THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2023-001276-CIC
[2024] UKUT 208 (AAC)

R (LXR) v the First-tier Tribunal (respondent) and the Criminal Injuries Compensation Authority (interested party)

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter relating to the person referred to in this decision as LXR shall during his lifetime be included in any publication if it is likely to lead members of the public to identify him as the person who alleged that an offence had been committed. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Decided following an oral hearing on 26 February 2024

Representatives	
LXR	Chris Buttler KC and Katy Sheridan of counsel, instructed by Bindmans LLP
First-tier Tribunal	Took no part
CICA	Robert Moretto, instructed by CICA Legal Department

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On application for judicial review of a decision of the First-tier Tribunal (Social Entitlement Chamber)

Reference:	CI013/22/00022
Decision date:	9 May 2023
Hearing:	Online

The decision of the First-tier Tribunal is quashed under section 15(1)(c) of the Tribunals, Courts and Enforcement Act 2007 and the matter is remitted to the tribunal under section 17(1)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A. What this case is, and is not, about

1. This case deals with CICA's power to re-open an application for a material change in medical condition under paragraphs 114-116 of the Criminal Injuries Compensation Scheme 2012. In particular, it concerns the correct interpretation and application of *condition* in paragraph 115(b).

2. I also comment on the decision of the Court of Appeal in *R v Criminal Injuries Compensation Board, ex parte Williams* [2000] PIQR Q339.

3. The tribunal considered and rejected an argument based on discrimination. This was a ground of appeal before the Upper Tribunal. In view of my decision on paragraph 115(b), it is not necessary to refer to that alternative argument. To avoid any doubt, the whole of the First-tier Tribunal's decision has been quashed. If the discrimination argument, or a different one, arises before the First-tier Tribunal at the rehearing, it has jurisdiction to decide it.

4. I have not admitted or relied on any evidence that was not before the First-tier Tribunal.

B. A summary

5. It has taken longer to write this decision than I predicted at the end of the hearing. In part, that was because the more I tried to get to the bottom of the flaws in the First-tier Tribunal's reasoning, the more I encountered issues that had not been discussed at the hearing. I have tried to explain my decision in a way that is helpful to CICA and the First-tier Tribunal in future cases without deciding a case that was never argued.

6. Materiality has presented another problem. Mr Moretto argued that the case turned on the tribunal's findings of fact. I see his point. However, the tribunal's understanding of paragraph 115(b) may have affected its analysis of the evidence and even attribution. If this has been an appeal, I could have given directions and re-made the decision. That is not available to me on judicial review.

C. History and background

7. On 28 February 2019, LXR made two applications for compensation. I refer to them, for convenience, as the child abuse application and the RAF application.

The child abuse application

8. I begin with the child abuse application. This application concerned sexual abuse between 1982 and 1988 when LXR was a child. CICA made an award at level B9 (£11,000) with a reduction of £50 for a medical report paid for by CICA. No award was made for mental injury. The claims officer explained why:

> As stated in Paragraph 34 of the 2012 Scheme, when someone has sustained a mental injury as a result of sexual abuse, 'they will be entitled to an injury payment for whichever of the sexual assault or the mental injury would give rise to the

> highest payment under the tariff.' To yield a higher award than the sexual abuse element offered, a prognosis or diagnosis would be required from a clinical psychologist or psychiatrist which stated any mental injury directly attributable to the abuse would be moderate and disabling for a period lasting 5 years or more.
>
> Your medical records as well as the reports from Dr Boris Iankov in March 2017 and Joanne Rubbi in August 2019 detail the diagnoses of your mental injuries and their treatment. Both Dr Iankov and Ms Rubbi make it very clear that your mental injuries are extensive, but attribute them almost wholly to a separate incident. On balance, I am satisfied the period of sexual abuse between 1982 and 1988 is not the primary cause of these injuries. Therefore, though I recognise the impact it has had on your life, I am unable to make a separate award on this claim in relation to psychological trauma suffered, and have offered the highest award applicable.

9. LXR accepted the award on 19 August 2019, but applied for the application to be re-opened on 21 June 2021. Before I come to that, I will mention the other application, as it provides background for the case before me.

The RAF application

10. This application concerned abuse in 1998 by a padre during LXR's time in the RAF. CICA refused the claim and the First-tier Tribunal dismissed LXR's appeal. In short, the padre had gained pleasure from listening to LXR describe his childhood experience of abuse. As listening to LXR did not involve contact, it had not amounted to a crime of violence under paragraph 4 of, and Annex B to, the Scheme. LXR could only show a crime of violence under paragraph 2(1)(c) of the Annex if there had been:

> (1) … a crime which involves:
>
> …
>
> (c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear; …

The tribunal found that a person of reasonable firmness would have walked away much sooner than LXR did.

The application to re-open

11. CICA refused to re-open the child abuse application on the ground that the evidence submitted did not show a material change in LXR's condition since he accepted the award. LXR applied for a review, relying on a report by Dr Caroline Law, a Counselling Psychologist. This report contains the essence of LXR's case. She wrote:

> When LXR first began his work with me, it was a fundamental feature of his presentation that he ascribed his mental health issues to a single incident of sexual abuse suffered as an adult and while serving with the RAF. … However,

> in my professional opinion, that interpretation of his condition was inaccurate and was affecting LXR's presentation and ability to address and treat his condition. For the reasons I give below, I am of the view that LXR's current presentation amounts to a material change in his condition.

She concluded:

> In summary, it is my opinion that there are two aspects of the material change in LXR's condition. One of these is LXR's own understanding as to the cause of his mental health condition, which has changed. He now understands that the historic sexual abuse has had a profound impact on his life, personality development and ability to function within relationships. The other aspect is the change in symptomatology i.e., the increase in dissociative episodes, the decrease in rage and anger, and the increase in feelings of loss, grief, sadness, powerlessness and helplessness.

12. A different claims officer refused the review, which led to the appeal to the First-tier Tribunal and its decision that is now before me. Before I come to that, I will set out the relevant provisions of the Scheme.

D. Re-opening under the 2012 Scheme

13. The outcome of this case depends on the interpretation and application of these provisions of the 2012 Scheme:

> **Eligibility: injuries for which an award may be made**
>
> 4. A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place. The meaning of crime of violence is explained in Annex B.

Annex A defines a criminal injury as 'an injury which appears in Part A or Part B of the Tariff in Annex E'.

> **Further payment on re-opening of an application**
>
> 114. A claims officer may re-open an application after a final award has been made, including when the award followed a direction by the Tribunal, in order to make an additional payment where a condition in paragraph 115 is satisfied.
>
> 115. The conditions referred to in paragraph 114 are:
>
> (a) a person who has accepted an award subsequently dies as a result of the criminal injury giving rise to the award; or
>
> (b) there has been so material a change in the medical condition of the applicant that allowing the original determination to stand would give rise to an injustice to the applicant.
>
> 116. An application may only be re-opened under paragraph 114:

(a) within two years after the date on which the Authority received the notice of acceptance of the determination, or the date of the Tribunal's direction to make an award; or

(b) if later, with supporting evidence which means that the application can be determined without further extensive enquiries by a claims officer.

E. The decision of the First-tier Tribunal

14. The tribunal dismissed the appeal. It provided a detailed 'Decision Notice' on 9 May 2023 and 'Written Reasons' on 4 July 2023. They are slightly different. I have used the latter.

15. After a short introduction, the tribunal identified the issues as medical reopening under paragraphs 114 and 115, and discrimination. It then set out its findings of fact:

> *Findings of fact*
>
> 9. The facts in this case are not in issue. It is accepted that LXR has suffered for many years from serious mental health conditions including PTSD and a personality disorder. His symptoms include anger, hopelessness, grief, dissociative episodes, suicidal ideation, flashbacks, and hypervigilance.
>
> 10. It is accept that he was subject to childhood sexual abuse and awarded £11,000 for sexual assault as a child – B9. Although not found to amount to a crime of violence, the behaviour of the vicar towards him was in gross breach of his role and duty.
>
> 11. We find that it was the treatment itself which led to a change in LXR's understanding of his condition and the origins of it rather than a serious change in his medical condition.

16. The tribunal then turned to its analysis.

> *Medical reopening*
>
> 12. The test for medical reopening is a strict one. It is for LXR to show us, on a balance of probabilities, the following:
>
> a. A change in his medical condition; this is a matter of direct comparison between the date the award was accepted and the date of application to reopen;
>
> b. Whether that change is serious;
>
> c. Whether the serious change in directly attributable to the original assault; and
>
> d. In light of the above whether it would be unfair for the original decision to stand.
>
> 13. In coming to our decision, we take into account that if LXR was not happy with the award, he could have challenged the amount of compensation awarded.

> Applying to medically reopen his case is not a method by which he can seek to challenge a decision he is unhappy with.
>
> 14. In summary LXR's case is that there has been a serious/material change in his medical condition since he accepted the original award. This is because there has been a change in LXR's understanding of the cause of his mental health difficulties and this in turn has led to an increase in his symptomatology and a significant deterioration in his mental health.

I can skip paragraph 15, which summarised arguments put by Ms Sheridan on LXR's behalf. The tribunal went on:

> *Has there been a change in LXR's condition between 19 August 2019 and 21 June 2021*
>
> 16. We consider the meaning of 'medical condition'. This term is not defined in the legislation. We therefore look at the ordinary everyday meaning of medical condition.
>
> 17. The Cambridge English dictionary defines 'medical' as related to the treatment of illness and 'condition' as the particular state that something or someone. [There must be something missing here. The text of the equivalent paragraph in the decision notice is the same.]
>
> 18. The Collins English dictionary defines these terms in a similar vein with 'condition' being defined as if you talk about the condition of a person or thing, you are talking about the state they are in, especially how good or bad their physical state is and 'medical' as meaning relating to illness and injuries and to their treatment of prevention.
>
> 19. The trouble with Ms Sheridan's [LXR's counsel] definition is that if we were purely looking at the word 'condition' she might be right in stating that there is nothing in the rules to suggest a new diagnosis, an increase/decrease of someone's understanding of their condition and an ability to engage or a significant change in their symptomatology does not amount to a material change given that the word 'condition' is used rather than 'injury'. However, we are looking at the term 'medical condition'. It is clear from the ordinary dictionary definition that medical condition relates to a person's illness and treatment and it is clear therefore that a person's change in understanding of their condition and ability to engage with treatment as opposed to treatment is not a 'medical condition'.

Attributable

17. The tribunal considered attribution in the alternative:

> 45. If we are wrong about there being no material change in LXR's medical condition, we go on to consider whether any material change is directly attributable to the childhood sexual abuse.
>
> …

> 49. In LXR's application to review the following is stated: "It is *because* of that report [the report of Dr Pereira-Scott of November 2019] and other developments including subsequent work undertaken by LXR with his treating team – that his condition has changed materially both in terms of his own understanding of the cause of his psychological problems, and also in terms of his psychological presentation and symptoms, which have changed significantly."
>
> 50. In our view, it is clear from this evidence that the material change is not directly attributable to the crime of violence i.e. the childhood sexual assault but rather to a change in his own understanding of the cause of his psychological problems and because of the report of Dr Pereira-Scott which cannot be said to be a "direct cause". Additionally, given that proximity is a relevant consideration when distinguishing between "direct" and "indirect" cause, it was done some 40 years after the childhood sexual assault that it is claimed LXR's understanding of the cause of his psychological problems and his psychological presentation and symptoms have changed. This also leads us to conclude that any changes are not directly attributable to the childhood sexual assault.

F. The arguments for the parties

18. Mr Buttler argued that the tribunal had failed to take the correct approach to the interpretation of paragraph 115(b). He criticised the way that the tribunal had used dictionaries and failed to apply principles of interpretation. He argued by reference to the purposes of the Scheme, in particular (in summary):

- To provide payment to the victims of serious crimes, including sexual offences;
- To compensate victims of sexual abuse;
- To allow for injuries and causes that are not immediately evident;
- To allow CICA to extend time;
- To allow a flexible approach to cases of childhood sexual abuse; and
- To prevent injustice.

From those purposes, he reasoned that *medical condition* meant *reasonably ascertainable medical condition*.

19. Mr Moretto, in short, argued that the tribunal's decision depended on matters of fact, either on causation or in the alternative attribution.

G. The use of dictionaries and of context

Statutory interpretation

20. The Supreme Court summarised the correct approach to interpretation in *R (O) v Secretary of State for the Home Department* [2023] AC 255:

> 29. … Words and phrases derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which

> Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. …

There was nothing new in that. It has surely been the case for as long as language as we know it has existed. The Court went on to deal with external aids:

> 30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty … But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …

The result is that a provision has to be interpreted in a layer of contexts.

Dictionaries

21. The tribunal consulted dictionaries and quoted what it found in them. There was nothing wrong in doing that. Paragraph 19 of the tribunal's reasons shows that it derived a meaning from the definitions, which it adopted as its conclusion and applied to the evidence. It thereby went wrong by treating the definitions as the meaning of *medical condition* rather than using them as an aid to identifying that meaning. Just to emphasise why that is wrong, I have checked *condition* in two other dictionaries. Chambers 21st Century Dictionary contains among its definitions of *condition*: (a) a state of health (as in 'out of condition'); and (b) a medical condition or ailment (as in 'a heart condition'). The Shorter Oxford English Dictionary includes: (a) a particular mode of being of a person and (b) a state resulting from physical or mental illness; and (c) nature, character, quality, characteristic or attribute. That now makes four dictionaries: Cambridge, Collins, Chambers and Oxford. There are similarities and differences between their definitions. None is definitive. There is no reason to prefer one over any other. Nor is meaning to be found by piecing together the different definitions, if that is possible.

22. What dictionaries show is the range of meanings that exist. This allows a tribunal to sift out meanings that are unlikely to be relevant, given the context. As examples, definitions of *condition* as a particular type of term in a contract or a technical expression in mathematics do not help in understanding paragraph 115(b). This makes it easier to home in on the meaning or meanings that are closest to the statute. I say clos*est* because words can have endless nuances of meaning, depending on their context. That is the second time in this paragraph that I have mentioned context. There is no avoiding it. That is especially so when a word has a broad, general meaning, as *condition* does.

Context

23. The tribunal might have avoided its mistaken reliance on dictionary definitions if it had, at least, considered *medical condition* in the context of paragraph 115(b) as a whole. Courts regularly say that legislation must be interpreted as a whole. What that means depends on the nature of the provision that has to be interpreted.

24. Paragraph 115(b) contains a number of concepts and components: materiality, medical change, condition, and injustice. The decision of the House of Lords in *Woodling v Secretary of State for Social Services* [1984] 1 WLR 448 at 352 is not well-known, but it illustrates the correct approach to the interpretation of provisions that are constructed like paragraph 115(b). The issue concerned section 35(1)(a)(i) of the Social Security Act 1975, which contained a condition of entitlement to attendance allowance:

> A person … is so severely disabled physically or mentally that, by day, he requires from another person … frequent attention throughout the day in connection with his bodily functions …

Lord Bridge spoke for the House:

> The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word or phrase separately.

He then set out the legislation and went on:

> At first blush, this language does not to my mind fit the person whose physical disablement only prevents him from preparing his own meals. If I have to break down and attempt to analyse the language, I would emphasise three points. First, the disablement must be severe. Secondly, the phrase 'bodily functions' is a restricted and precise one, narrower than, for example, 'bodily needs.' Thirdly, the phrase 'attention … in connection with bodily functions,' which must, I think, be read as a whole, connotes a high degree of physical intimacy between the person giving and the person receiving the attention.

25. Lord Bridge did not talk about layers of context, but that is what he was using. He started with section 35(1) as a whole, from which he extracted the relevant parts of the subsection and then focused on some words and phrases within the extract, one of which itself had to be considered as a whole. He used the individual words and phrases to help give meaning to the whole, although their meaning in turn derived from the whole. That is the kind of analysis needed to interpret and apply paragraph 115(b).

26. An application can be reopened if it would be an *injustice* to maintain the original determination. Whether it would be an injustice depends on whether there has been *so material* a *change* in the applicant's *medical condition*. The paragraph must be given a meaning as a whole. That meaning will derive from the meaning of the concepts employed when considered in the context of each other and of the whole, as the House of Lords did in *Woodling*.

27. Injustice is a value judgment that has to be made by reference to the materiality of the change. Materiality, in a legal context, suggests 'relevance', 'significance' or 'impact'. The power to re-open only applies after a final award has been made. In that context, materiality means that the applicant would now qualify for a more favourable award than was made before. That leads naturally to the application of Annex E. Under that Annex, condition must be connected to the classification of an injury in the tariff that carries a higher payment. And, as the tribunal correctly pointed out, condition means medical condition.

28. Some words, perhaps most words, have a core meaning surrounded by what I call a penumbra of meaning. Imagine a car as it comes off the production line. There is nothing missing and it is working perfectly. Now fast forward twenty or thirty years. All that is left is a rusting body shell with the rest lost to scavenging and decay. By that stage, it can no longer properly be described as a car. Over the years, it will become less and less like the original vehicle. Eventually, there will come a point when it is no longer a *car*. That moment is not capable of precise definition, not least because meaning depends on the context. A rusting hulk in a barn may no longer be a car for the purposes of liability for road tax, but may be one within the meaning of the owner's will.

29. *Condition* is different. The definitions that the tribunal relied on and the ones that I have identified are general. Most of them lack any clear core meaning. 'Medical condition or ailment' is an isolated exception. *Condition as used* in social security legislation illustrates the potential range of meaning that it can bear. Depending on the circumstances, it can refer to all or any of: aetiology, diagnosis, symptoms, disablement, and treatment or medication. Its value lies in its vagueness, which allows flexibility. No doubt, that was why it was chosen. Given the range of injuries covered by the Scheme, it was necessary to find a word that was sufficiently general to apply to the micro-contexts of the various injuries in Annex E. To take some examples, the following could be material changes:

- a disabling mental injury may be more prolonged;
- the control provided by epilepsy medication may reduce;
- a ruptured intervertebral disc may become more disabling.

The word *condition* is apt to cover all of those and many more besides.

30. I am not going to attempt a definition. That would undermine the value of the deliberate breadth of meaning that *condition* carries. Not only that, it would be contrary to what I have said about interpreting and applying language in its context.

31. My approach to *condition* is, I think, wider that that identified by the First-tier Tribunal. It is important to remember, though, that it is but one part of paragraph 115(b). There are other components that can limit its scope – materiality, change and injustice. Each of those, individually and together, have their role to play in identifying the correct scope of paragraph 115(b).

H. Mr Buttler's proposed interpretation of medical condition

32. Mr Buttler argued from the purposes of the Scheme. That is permissible: *R (Colefax) v First-tier Tribunal (Social Entitlement Chamber)* [2015] 1 WLR 35 at [18]. The purposes of the Scheme form part of its context. Language is not used without a reason and interpretation should render the language effective. I accept that all the purposes Mr Buttler listed are part of the context of paragraph 115(b). I do not, though, accept that they justify interpreting *medical condition* to mean *reasonably ascertainable medical condition*.

33. The purposes Mr Buttler identified are consistent with his proposed interpretation. That is not surprising, given that they are stated so generally. That is often the case with purposes. They lack the precision from which to identify specific provisions. Rather, once the purposes have been identified, there is a series of choices to be made - some of them as matters of principle, others for financial or practical considerations – that lead to the terms of the legislation. It is not sufficient to propose an interpretation and show that it is consistent with one or more of the purposes of the Scheme. That is especially so as the argument assumes a narrower meaning of *medical condition* than I have identified. If I have understood Dr Law's evidence correctly, it is that LXR's understanding of his systems and their causes was fundamental to the nature and treatment of his condition. I see no reason why that should not be a change in his condition, provided that the tribunal accepts that evidence.

34. I accept that the specific references to child abuse may seem more suited to support Mr Buttler's interpretation. It would be wrong to ignore them as features of the Scheme. It would, though, be just as wrong to overlook all the other forms of crime and injury to which the Scheme, and paragraph 115(b), has to apply. They would be particularly relevant if I were interpreting provisions of the Scheme that deal specifically with child abuse. But paragraph 115(b) is a general provision that applies to the Scheme as a whole.

I. R v Criminal Injuries Compensation Board, ex parte Williams

35. This case is reported at [2000] PIQR Q339. The judgments were given before neutral citation numbers were introduced and, for some reason, the report did not adopt the paragraph numbering of the original transcript. I will quote from the transcript and use the paragraph numbers.

36. I am going to spend some time on this case. In part, because it was discussed at the hearing. But also because it is regularly, if not routinely, cited by the First-tier Tribunal in cases under paragraph 115(b) of the 2012 Scheme. Some judges appear to use it as a template or checklist for the issues that can arise on appeals. In this case, the tribunal listed the issues in paragraph 12. It did not mention *Williams*, but the list is similar to ones that I see regularly. It is possible – I am speculating now – that the structure of this approach distracts from the overall structure of paragraph 115(b).

37. First, a reminder of what paragraph 115(b) says. It requires that:

> there has been so material a change in the medical condition of the applicant that allowing the original determination to stand would give rise to an injustice to the applicant.

That language has been essentially the same since paragraph 56 of the Criminal Injuries Compensation Scheme 1996. The Court in *Williams* did not deal with that provision; it dealt with paragraph 13 of the Criminal Injuries Compensation Scheme 1990:

> Although the Board's decisions in a case will normally be final, they will have discretion to reconsider a case after a final award of compensation has been accepted where there has been such a serious change in the applicant's medical condition that injustice would occur if the original assessment of compensation were allowed to stand.

The main difference from the later Schemes is that paragraph 13 used *serious* rather than *material*.

38. Mr Williams was a police officer who sustained an injury to his back while attempting to arrest a large and violent man. He applied for criminal injuries compensation and accepted an award of £2500. Both the transcript and the report say that the award was made in 1998. This is probably a mistake. It is much more likely that it was made in 1988. Mr Williams sustained an exacerbation of his injury during self-defence training in 1994. He also felt a click in his back while unloading a police van in 1995, after which he was unable to return to work. This led to an application for his case to be reopened, which was dealt with under the 1990 Scheme.

39. Ward LJ gave the lead judgment. He began with the need to show a *change*:

> 26. As to whether or not there is a change, that in my judgment is a matter for pure comparison between the condition of the applicant at the date of the original award, and his condition at the date when he is seeking reconsideration of his case. The medical evidence is so overwhelming that the only conclusion that the Board could reach is that there had been a change. The man was living an ordinary life, subject only to mild discomfort, now his life is pretty well utterly ruined.

40. Next, the judge dealt with *seriousness*:

> 27. The second question of evaluating the seriousness of the change, is a matter for a judgment on the facts of the particular case. But where one has the transformation from an active life to a life of being so disabled as not to be able to follow one's chosen occupation (as is stated in the short summary of the present condition, already quoted, as being a 'major syndrome of lower back failure with high level of symptoms significant signs and a high level of disability'), the only conclusion which any reasonable Board could reach is that the change was very serious.

As I have already said, *serious* has been changed to *material*.

41. The judge went on to deal at [28] with the question whether the 'change is directly attributable to the original injury.' This requirement arises from what is now paragraph 4 of the 2012 Scheme. He accepted the argument by Mr Williams' counsel:

> 29. … But 'directly attributable' is the antithesis of indirectly attributable. It seems to me that Mr Kent is correct in saying that, properly construed, what is required is an unbroken line of causation, unbroken that by some new and intervening or supervening event which of itself is so powerful or dominant as to render the initial operating cause to be wholly nugatory. It must be a matter of fact and degree in every case.

42. Ward LJ analysed the evidence and concluded that there had been an unbroken chain of causation before dealing finally with *injustice*:

> 35. Thus, in my judgment, the chairman of the Board erred. Mr Crow [counsel for the Board] is anxious to attack the judge's approach in this case, which may be lead to it being available for suggestion that the emphasis should be on whether or not there was an original mis-diagnosis of the exact nature of the injury. Mr Crow submits that mis-diagnosis is not the test in paragraph 13, the test is a change attributable to injury. Mr Crow is correct in that. Mis-diagnosis, or even mis-prognosis, in the original report is not of itself a justification for coming back for reconsideration. The test is of a serious change directly attributable to the original injury. Once that serious change is established, then the second question for the tribunal for the Board will be whether or not 'injustice would occur if the original assessment of compensation were allowed to stand'.
>
> 36. That requires the tribunal to consider whether the change is so serious that injustice would occur. In considering where the injustice of the case lies, it would be appropriate, and Mr Crow does not submit otherwise, for the court to have regard to whether or not there was an original error in the diagnosis and whether that counts for the failure correctly to forecast the consequences of the injury. To that extent it may be that Latham J erred but it does not in my judgment undermine his conclusion that, upon the evidence available to the Board, the only reasonable conclusion was that the case fell within paragraph 13. Subject to the matter of justice being reconsidered, I would remit the matter to the Board for them to consider whether the justice of the case now entitles Mr Williams to seek a reconsideration of his award.

43. Laws LJ gave a short judgment. He began with this paragraph:

> 38. I agree this appeal should be dismissed for the reasons given by my Lord. I make it clear that I agree expressly with what my Lord has said concerning any part played by a misdiagnosis upon the facts of any case when considering the operation of paragraph 13 of the scheme.

Using Williams as a template or checklist

44. *Williams* was a decision of the Court of Appeal and, as such, it is binding on the First-tier Tribunal and the Upper Tribunal for what it decides. It is important, though, not to use it inappropriately.

45. First, the language has changed. Paragraph 115(b) uses *material*, not *serious*. The tribunal used *serious* in paragraph 12, *serious/material* in paragraph 14, and *material* in paragraph 45. It seems to have treated the words as interchangeable. They are not. It is essential to use the correct language.

46. Second, the tribunal used *unfair* in paragraph 12. That has never been part of any of the Schemes that have existed since 1964. The only word used has been *injustice*, which the tribunal did use in paragraph 45. It is not possible to blame reliance on *Williams* for this – the Court did not use unfairness in its reasoning. Again, it is essential to use the right language.

47. Third, no simple list can capture the complex interplay of fact and judgment involved in deciding whether a change is so material that it would give rise to an injustice to allow the original determination to stand. That is only possible by considering paragraph 115(b) as a whole.

48. Fourth, the Court in *Williams* was deciding the particular case following the structure of counsel's arguments. That is why it referred to change, seriousness and direct attribution. It was not setting out a comprehensive flowchart or checklist for future cases, any more than the House of Lords in *Woodling* was using the three points identified by Lord Bridge as a guide for all future cases. It is, of course, permissible and helpful for a tribunal to identify the issues that arise on the evidence and arguments in a particular case, but that is a different matter.

49. Finally, the tribunal listed four factors in paragraph 12 and said that it was for LXR to show them on the balance of probabilities. The balance of probabilities is used for findings of fact. It does not apply to assessments about the quality of past events, such as whether injustice would occur in paragraph 115(b). See *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at 477. The tribunal's mistake on this is not attributable to *Williams*, which did not mention the balance of probabilities.

Mis-diagnosis

50. The tribunal relied on what Upper Tribunal Judge Mesher said in *R (SS) v First-tier Tribunal* [2010] UKUT 410 (AAC), [2011] AACR 21 at [27]:

> 27. The principles accepted in *Williams* pose serious problems for the case sought to be made for the applicant in the present case. They confirm that what is required for paragraph 56 of the 1996 Scheme and succeeding schemes is a change in the applicant's medical condition that has happened after the date of whatever decision authorises the award of compensation accepted by the applicant. That is what must be meant by 'the original award', so that in the present case the crucial date for comparison is 7 August 2007. Then there must be a 'pure comparison' between the applicant's medical condition at that date and at the date when re-opening is being considered. It might from the outside appear odd (and supportive of a flexible interpretation of a fairly loosely drafted provision) that what might be regarded as more fundamental errors of legal approach or of mistakes of material fact at the time of the original decision cannot support a re-opening of a case, but that is the state of the Schemes as approved by

> Parliament. And CICA would no doubt say that the remedy for an applicant is and was first to get the evidence in support of his case in order by the time that a review decision is made and, if he does not accept an award directed in a review decision, to appeal against it (with an extension of the normal time limit being available). In such an appeal the overall merits of the case on the circumstances down to the date of the appeal decision would be assessed free of the restrictive conditions in paragraph 56 for a re-opening of a case where the award has been accepted. By a 'pure comparison' must be meant a comparison of the applicant's actual medical condition as it is now known to have been at the date of the original decision with the current condition. That is how a mis-diagnosis is excluded. *Williams* is an example of a case where a mis-diagnosis at the time of the original award was later revealed, but nevertheless there was a later change in medical condition, in the effects of the two exacerbating incidents, to support a re-opening.

51. Judge Mesher treated what the Court said about mis-diagnosis in *Williams* as binding. The Court of Appeal in *R (Colefax) v First-tier Tribunal (Social Entitlement Chamber)* [2015] 1 WLR 35 has since said that the issue is still open, saying that *Williams* was only obiter on the point. The *Colefax* case actually concerned a late application for compensation under the 2008 Scheme. It decided that the application included later manifestations of a new type of injury. It then considered how this would work under what is now paragraph 115(b):

> 22. The power to re-open cases in paragraphs 56 and 57 will (subject to its limited availability after two years) readily accommodate the late manifestation of a new type of injury. But it is not clear that it would accommodate the late diagnosis of the requisite causal link between the crime and a medical condition which had not first appeared, or deteriorated, since the making of the claims officer's decision: see *R v CICB ex parte Williams* [2000] PIQR Q339, per Ward LJ (obiter) at para 35. That question does not arise directly for decision in this case (any more than it did in the *Williams* case). In my view paragraph 56 would not accommodate late diagnosis but, in view of Lady Justice Arden's view, expressed tentatively during the hearing that it might do in some circumstances, I am content to leave the point open.

52. One interpretation of LXR's medical evidence is that what has happened is the late manifestation of a new type of injury from the sexual abuse he experienced as a child. That will be a matter for the First-tier Tribunal at the rehearing. It is not for me.

Authorised for issue
on 16 July 2024

Edward Jacobs
Upper Tribunal Judge