CLAIM FOR INDUSTRIAL INJURY BENEFIT

Personal injury—prolapsed intervertebral disc—admissibility of medical opinions in previous cases

A crane driver felt a sudden pain at the bottom of her back as she was bending over the control box whilst operating the crane. On straightening, the sharp pain subsided into an ache and she was able to continue work. Three days later she became incapable of work and a diagnosis of prolapsed intervertebral disc was made. Conflicting opinions were given by two medical experts who were each asked to comment, and were cross-examined, on medical evidence set out in previous Commissioner's decisions.

Held :—

(1) that the statutory authorities are not precluded from considering medical opinions given in other cases ;

(2) that the weight of medical evidence was against the opinion that the single simple movement that the claimant had made would be likely to have caused a physiological change for the worse in her condition ; and

(3) that the employment did not contribute in any material degree to the claimant's condition.

1. My decision is that the claimant's incapacity from and including the 19th April 1962 was not the result of an industrial accident.

2. The claimant, a married woman aged 28, was employed as the operator of a ten ton gantry crane in a foundry. The crane was mounted on runners which enabled it to be moved from one position to another along the length of the building in which it was used and it was operated from a cabin some 20 to 25 feet above the floor. At the front of the cabin, which was reached by ascending a perpendicular ladder, there was a control box two feet wide and three feet in height on which were three levers, having a rotary movement not unlike those in an old fashioned tram, by means of which the operator lowered and raised the lifting mechanism of the crane and directed

the load into the required place. There was also a foot pedal which operated a brake to control—and, if necessary, to stop—the load in mid-air. When lowering or raising a load it was necessary for the operator to hold the appropriate levers and to be prepared to put her foot on the brake pedal. It was also necessary for the operator to lean over the control box in order to look directly underneath the crane to ensure the safety of workers on the ground and to direct the load into the proper position, or, as the case might be, to make certain that it was ready to be lifted and was properly attached for that to be done. The crane was in constant use and the person operating it had to lean over in the way described at intervals of approximately five minutes throughout the working day of eight hours.

3. The claimant was continuously employed as a crane operator for two years, during the whole of which she was, evidently, well able to do all that was required of her, but at 2.30 p.m. on the 16th April 1962 (having started work as usual at 7.30 a.m.), as she was bending over the control box with one foot on the brake pedal and each hand on a lever, she felt a sudden sharp pain at the bottom of her back. She was in a bent position for some ten to fifteen seconds and on feeling the pain she straightened up slowly which caused, what she described as, a " pulling sensation " in the lower part of her back. After straightening her back the pain subsided into an ache and the claimant was able to continue to operate her crane for the remainder of the day, i.e. until 4.30 p.m., but her back continued to ache and that evening she went to see her doctor. The doctor advised her that if she " took things steady " she could carry on working but, on the 19th April, that is to say, three days later, the pain began to radiate down her leg and she was certified to be incapable of work by reason of lumbar pain. Subsequently she was referred to a hospital where a diagnosis of prolapsed intervertebral disc was made.

4. The facts set out above are not in dispute. It is accepted that the claimant's incapacity (which continued from the 19th April 1962 until at least the end of the period during which injury benefit would have been payable) was throughout due to prolapsed intervertebral disc and the sole question that falls to be decided is whether, as the claimant claims, her incapacity was the result of an industrial accident on the 16th April 1962 ; that is to say, whether on that date the claimant suffered personal injury caused by accident arising out of and in the course of her employment. See section 7(1) of the National Insurance (Industrial Injuries) Act, 1946. The local appeal tribunal, by a majority, decided that the claimant had not had an industrial accident ; hence the present appeal to the Commissioner which was heard at an oral hearing on the 17th and 18th July 1963.

5. It is common ground that the question whether the claimant suffered personal injury caused by accident arising out of and in the course of her employment falls to be decided on the medical evidence and at the hearing of the claimant's appeal I heard evidence from Mr. Evan Price, a consultant orthopaedic surgeon at the hospital at which the claimant was a patient, and from Dr. Hayes, a Senior Medical Officer of the Ministry of Pensions and National Insurance. I have also seen a statement from another Senior Medical Officer of the Ministry, who considered the case papers while the present appeal was pending, and in addition I have been shown letters from three medical practitioners who were, apparently, invited to comment on an unreported decision, which is numbered C.I.80/60, to which the insurance officer now concerned with the case referred in his submission.

6. I have not seen copies of the requests addressed to the three medical practitioners when their comments were invited but in a letter dated the 13th June 1963 the claimant's solicitors expressly asked that their letters in reply should be included in the case papers before me. I have therefore read them but I say at once that I have found the comments and opinions of the writers of no assistance whatsoever in the decision of this case. One of the letters, which was written from Norwich to a trade union and is dated the 19th October 1960, is a mere criticism, for which no reasons are given, of the correctness of Decision C.I.80/60 and the letter is couched in language that is, to say the least of it, in my view unbecoming to a professional man of, I assume, some standing. The other letters, which are dated the 8th and 23rd May 1963, and which were written respectively from Wimpole Street and Harley Street in London, purport to give reasons why, in the opinion of the writers, Decision C.I.80/60 was wrongly decided but are equally unhelpful. It is by no means clear to me why it was considered desirable for any of the letters to be included in the case papers in the present case, and the solicitor who appeared for the present claimant, wisely in my opinion, did not allude to any of the views expressed by the writers. I will therefore say no more than that Decision C.I.80/60 was decided on the evidence relevant to the case to which the decision relates, which was given by medical experts at least as well qualified as the writers of the letters, who were in a far better position than the writers to express an expert opinion in the case with which they were dealing.

7. I have not found the present case an easy one to decide. As I have already said the decision of it turns primarily on the medical evidence but it is also important to bear clearly in mind the words of the statute which require it to be shown (if the claimant's claim to have suffered on industrial accident is to succeed) that the claimant suffered personal injury " by accident arising out of her employment ". It is not contended that the claimant met with an accident in the ordinary popular meaning of that word but it has long been accepted that " a physiological injury or change occurring in the course of a workman's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment ". See per Clauson L. J. in *Oates v. Earl Fitzwilliam's Collieries* [1939] 2 A.E.R.498.

8. That principle was followed in an early case under the present legislation, namely, C.I.27/49 (reported), upon which the claimant's solicitor strongly relied, and my attention was also drawn to the case of *Clover Clayton & Company v. Hughes* 3 B.W.C.C.275 in which a workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner which caused a rupture of the aneurism resulting in his death. The House of Lords upheld the decision of the Court of Appeal, affirming that of the County Court Judge, that the workman's death resulted from personal injury by accident and I quote the following passage from the speech of Lord Loreburn at page 281 of the report :—

> " An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he

can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly ?

Looking at it broadly, I say, and free from over nice conjectures : was it the disease that did it or did the work he was doing help in any material degree ? "

9. In the present case the medical evidence is conflicting. On the one hand Mr. Evan Price, who has had a wide practical experience of cases of prolapsed intervertebral disc, was of opinion that there was a direct causal connection between the prolapse of the claimant's disc and the work on which she was engaged, while on the other hand, Dr. Hayes expressed an opposite opinion. Both those expert witnesses gave evidence and were cross-examined at some length and they were also invited to comment on the medical evidence given in Decisions R(I)20/56, R(I)35/59 and R(I)33/60.

10. I have given full and anxious consideration to all that Mr. Evan Price and Dr. Hayes said and I do not propose to discuss their evidence in detail. It may, I think, fairly be summarized by saying that the view taken by Mr. Evan Price was that the traumatic effect of the claimant leaning over in the way described was sufficient to cause a slight tear in the ligament or anulus fibrosus (which may, he said, for all practical purposes be regarded as one and the same) in the fourth or fifth lumbar vertebrae of the claimant's back. In his opinion the tear in the ligament gave rise to a condition of instability or weakness which enabled the centre of the disc (the nucleus pulposus) to obtrude, i.e. to prolapse, which was a more gradual process and did not actually occur until three days later. There were, he said, no grounds for supposing that there was any partial extrusion of the nucleus pulposus before the claimant felt a pain in her back at half-past two on the 16th April 1962, nor was there any evidence, so far as he knew, of any degenerative condition of her back and in his opinion the trauma caused by her bending over in a somewhat awkward position was the " triggering " of the eventual prolapse and that there was therefore a direct causal connection between it and the tear of the ligament. He concluded accordingly that at half-past two on the 16th April 1962 there had been a change for the worse in the claimant's condition which, in his opinion, could be more aptly (and more accurately) characterized as a pathological, rather than a physiological, change.

11. If, as a matter of reasonable probability, Mr. Evan Price's view of what happened is the true one the claimant would no doubt succeed but Dr. Hayes took an entirely contrary view of the matter and it is therefore necessary to see where the balance of probabilities lies. Dr. Hayes agreed with the opinion of the other Senior Medical Officer, to whose statement I have referred above, that the probability is that the claimant's symptoms occured when they did because the degenerative condition of her back had reached the stage when the symptoms became manifest, and in his opinion it was most unlikely that a normal anulus fibrosus would be torn by such a mild trauma (which, he said, in the context connotes an abnormal force applied to the point of contact) as would result from simply bending over as the claimant had done. He agreed with the advice given to the Commissioner in the case which gave rise to Decision R(I) 35/59 and with the expert medical opinion expressed in paragraph 10 of Decision R(I) 33/60.

12. Each case must, of course, be decided on its own particular facts and I should not, as a general rule, be disposed to have any regard to the evidence given in another case but both Mr. Evan Price and Dr. Hayes were expressly asked whether they agreed with, and were cross-examined at some length on, the medical evidence which is set out in detail in the decisions referred to above. That evidence may accordingly be regarded as part of the evidence in this case and must therefore be considered in relation to the present claimant's claim that her incapacity resulted from an industrial accident.

13. In paragraph 11 of Decision R(I) 35/59 the Commissioner said this :—

> " In the present case I invoked the assistance of an eminent surgeon as medical assessor. He told me that before there can be extrusion of an intervertebral disc, there must be snapping of a ligament, and a powerful ligament at that. Where extrusion is caused by a single trauma, therefore, one would expect the trauma involved to be a fairly severe one. Where, on the other hand, extrusion is not due to some fairly severe trauma, it is generally considered to arise from a congenital condition which under the influence of a series of minor traumata or episodes results in the gradual extrusion of the disc up to a point where it becomes painful and incapacitating. In such case, a quite trivial movement (where associated with work or not) may, in a given individual, constitute the " last straw ", converting a partially extruded (but symptomless) disc into a completely extruded (and painful) one."

14. Reference may also be made to Decision R(I) 33/60 in paragraph 10 of which the Commissioner quoted the following extract from a statement made by a Senior Medical Officer :—

> " In many cases (some 40 per cent to 50 per cent) there is no clear history of trauma and in others the nature of the trauma may be very trivial (straightening up after tying a shoelace, rising from a bath, a sneeze, rising from bed after a short acute infective illness, such as influenza). It is unlikely that these painful incidents are anything more than episodes in the course of the process of degeneration, they call attention to what is happening in the intervertebral discs, they do not bring about the process of change or accelerate the rate of that process. A more serious trauma, such as an unexpected increase in the weight of a heavy lift, a heavy fall upon the buttocks, or a fall of ' roof ' upon the shoulders of a miner, results in much increased pressure across the intervertebral discs, more especially in the lumbar region such as could result in the protrusion of the nucleus through a degenerated part of the anulus fibrosus. The protrusion might then occur in such a position as to impinge immediately upon a nerve root and give rise to severe and incapacitating pain. In such cases there is no doubt as to the injury and its effects."

15. It is with no disrespect to Mr. Evan Price that I have not set out his evidence, which, if I may say so, was clear and to the point, with greater particularity. He is a consultant with great practical experience and high medical qualifications and I have considered everything he said with the care which it plainly merits. His opinion obviously carries weight but, having regard to the other medical evidence, I find it very hard to accept that postulating, as he did, a normal healthy spine, a single simple movement, such as the claimant had made approximately twelve times an hour for eight hours a day over a period of two years, would be likely suddenly to have caused a physiological (or pathological) change for the worse in her condition. The

weight of the medical evidence is, in my judgment, against that conclusion. I have fully considered whether, in substance, as far as I can judge on such a matter, the accident came from the disease alone, so that whatever the claimant had been doing it would probably have come all the same, or whether the employment contributed to it, and I am satisfied that the answer to the question posed by Lord Loreburn at the end of the passage cited above, namely " Was it the disease that did it or did the work he was doing help in any material degree ? " must be that the work that the claimant was doing did not help in any material degree. I therefore find that the claimant did not suffer personal injury caused by accident arising out of her employment at 2.30 p.m. on the 16th April 1962.

16. That would be enough to dispose of the case but I may add that, even though I were to accept the contention based on Mr. Evan Price's opinion which is relied upon on behalf of the claimant, namely, that the work on which the claimant was engaged at 2.30 p.m. on the 16th April 1962 caused a physiological (or pathological) change for the worse in her condition, I should still not feel able to allow the appeal because there is, in my opinion, no greater likelihood that the claimant's incapacity was caused in the way suggested by Mr. Evan Price than that suggested by Dr. Hayes ; that is to say, that the claimant had a partially extruded (but symptomless) disc which was converted into a completely extruded (and painful) one by a simple movement. On that view therefore the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a matter of conjecture. It could not therefore be said that the balance of probabilities points to the conclusion for which the claimant contends and the onus of proof, which is upon her, would not be discharged.

17. In the result (whichever way the case is put) I see no ground for disagreeing with the conclusion to which the majority of the local appeal tribunal came and I hold that on the 16th April 1962 the claimant did not suffer personal injury caused by accident arising out of and in the course of her employment. Her claim to have suffered an industrial accident was therefore rightly disallowed.

18. I dismiss the claimant's appeal.

(Signed) Desmond Neligan,
Deputy Commissioner.

NOTE

The claimant applied to a Divisional Court of the Queen's Bench Division for an order of certiorari to bring up and quash the decision of the Deputy Commissioner. The application was dismissed (see Solicitors' Journal (1964) 108 S.J. 380). The claimant appealed and on 26th November, 1964 the Court of Appeal (Willmer, Pearson and Diplock L.JJ) dismissed the appeal (R *v* Deputy Industrial Injuries Commissioner *Ex parte* Moore [1965] 1 Q.B.456 ; [1965] 1 All E.R.81). The judgments of the members of the Court of Appeal are printed in full in the Appendix hereto.

APPENDIX

R *v.* DEPUTY INDUSTRIAL INJURIES COMMISSIONER *Ex parte* MOORE

(from the transcript supplied by the Association of Official Shorthandwriters, Ltd., London)

LORD JUSTICE WILLMER : This is an appeal from a decision of the Divisional Court of the Queen's Bench Division given on the 30th April 1964 dismissing a motion on behalf of the applicant, Kathleen Cicely Moore, for an order of certiorari to bring up and quash a decision of the 16th August 1963 of Mr. Neligan, the Deputy Industrial Injuries Commissioner. The deputy commissioner had dismissed the applicant's appeal against a decision of the local appeal tribunal that an injury, in respect of which she had put forward a claim, was not caused by an accident arising out of and in the course of her employment within the meaning of section 7, subsection (1), of the National Insurance (Industrial Injuries) Act, 1946.

The applicant was employed as a crane driver, and claimed in respect of an accident alleged to have occurred on the 16th April 1962. It was alleged that she had occasion to lean forward in the cab of her crane for the purpose of seeing that the lift of the crane was correctly positioned for the load which was to be lifted. This was a movement which in the ordinary course of her duties she was required to perform every few minutes during the working day. But on this occasion the movement caused a sharp pain in her back, which, however, disappeared when she straightened her back. She accordingly went on working, but later the pain returned. Three days afterwards, on the 19th April 1962, she was admitted to hospital, where the trouble was diagnosed as a prolapsed intervertebral disc. The applicant made a claim under the Act of 1946, but her claim was rejected by the insurance officer, and on appeal by the local appeal tribunal.

On appeal to the deputy commissioner, an oral hearing took place, during which unsworn oral evidence was given on behalf of the applicant by Mr. Evan Price, a consultant orthopaedic surgeon, and on the other side by Dr. Hayes, a senior medical officer of the Ministry of Pensions and National Insurance. Dr. Hayes's evidence was also supported by a statement obtained from another senior medical officer of the Ministry. The view expressed by Mr. Evan Price was that the traumatic effect of the applicant leaning forward in the manner described was to cause a tear in the ligament, or anulus fibrosus, in the fourth or fifth lumbar vertebrae. This tear of the ligament, he thought, caused a condition of weakness, which enabled the centre of the disc (the nucleus pulposus) to obtrude, or prolapse, three days later. He expressed the view accordingly that the trauma resulting from the applicant bending forward was the direct cause of the subsequent prolapse. On the other hand, Dr. Hayes expressed the view that the prolapse was probably caused by a pre-existing degenerative condition of the applicant's back, and that a normal ligament would be most unlikely to be torn by such a mild trauma as could be caused by the mere act of bending forwards.

It will be seen that the question raised was a purely medical one, and in such circumstances it may well seem surprising that the case should have given rise to proceedings for certiorari. The question which has arisen,

however, came about in this way. On behalf of the insurance officer it was sought to rely on medical opinions expressed in two previous reported decisions of an industrial injuries commissioner, in one case by an eminent surgeon who had been called in as an assessor, and in the other case by a senior medical officer of the Ministry. Both Mr. Evan Price and Dr. Hayes, when they gave evidence, were questioned at length about these expressions of opinion, and Dr. Hayes expressed his agreement with the opinions expressed. The effect of the medical opinions given in these two previous cases is set out in paragraphs 13 and 14 of the decision of the deputy commissioner, and I do not think it is necessary for me to read them out. It is sufficient to observe that the opinions expressed were of a general nature, dealing generally with the causes that may lead to disc protrusion, and did not refer to the particular facts or symptoms observed in the particular cases. The learned deputy commissioner took the view that in the circumstances these medical opinions expressed in previous cases must be regarded as part of the evidence in the present case.

In paragraph 12 of his decision he said this : " Each case must, of course, be decided on its own particular facts, and I should not, as a general rule, be disposed to have any regard to the evidence given in another case, but both Mr. Evan Price and Dr. Hayes were expressly asked whether they agreed with, and were cross-examined at some length on, the medical evidence which is set out in detail in the decisions referred to above. That evidence may accordingly be regarded as part of the evidence in this case, and must, therefore, be considered in relation to the present claimant's claim that her incapacity resulted from an industrial accident ". Then, having set out in paragraphs 13 and 14 the effect of the two previous opinions, the learned deputy commissioner went on in paragraph 15 to say that he could not accept Mr. Evan Price's view " having regard to the other medical evidence ". Later in the same paragraph he said that " the weight of the medical evidence " was against the conclusion that such a simple movement as merely bending forward could cause a sufficient trauma to a healthy spine as would lead to the prolapse which occurred.

The learned deputy commissioner went on in paragraph 16 to say that, even if he were to accept Mr. Evan Price's view, that still would not prove the case for the applicant ; the case would, in his opinion, be left as one of equal probabilities, so that on any view the applicant's claim was bound to fail. Since paragraph 16 has been the subject of the applicant's attack in this court, I had best read it in full. " That would be enough to dispose of the case, but I may add that, even though I were to accept the contention based on Mr. Evan Price's opinion which is relied upon on behalf of the claimant, namely, that the work on which the claimant was engaged at 2.30 p.m. on the 16th April 1962 caused a physiological (or pathological) change for the worse in her condition, I should still not feel able to allow the appeal because there is, in my opinion, no greater likelihood that the claimant's incapacity was caused in the way suggested by Mr. Evan Price than that suggested by Dr. Hayes ; that is to say, that the claimant had a partially extruded (but symptomless) disc which was converted into a completely extruded (and painful) one by a simple movement. On that view, therefore, the facts which are proved give rise to conflicting inferences of equal degree of probability so that the choice between them is a matter of conjecture. It could not, therefore, be said that the balance of probabilities points to the conclusion for which the claimant contends, and the onus of proof, which is upon her, would not be discharged ".

The motion for certiorari was based on the submission that there was an error of law on the face of the record, in that paragraphs 12 to 15 of

the decision showed that the learned deputy commissioner had wrongly treated as evidence in this case the medical opinions given by other unnamed doctors in other cases. On this point the Divisional Court accepted the submission put forward on behalf of the applicant, and held that the learned deputy commissioner had erred in law in admitting these medical opinions as evidence in the present case. The learned Lord Chief Justice, who delivered the leading judgment, with which the other two members of the court agreed, pointed out that paragraph 12 of the deputy commissioner's decision was ambiguous. It might mean either that the opinions expressed by the doctors in the other cases became evidence in the present case because they were adopted by Dr. Hayes as part of his evidence, or alternatively that these two opinions constituted evidence from an independent source or two independent sources in the present case. Having regard to what was said in paragraph 15, the learned Lord Chief Justice thought that the deputy commissioner was admitting these medical opinions as evidence in the latter sense. This, he thought, constituted an error of law, for these two medical opinions were not, in his judgment, capable of being considered as two separate independent pieces of evidence. But, having expressed that view, the learned Lord Chief Justice went on to hold that the deputy commissioner was none the less entitled to dismiss the appeal on the ground stated in paragraph 16 of the decision.

In order to make good that point, however, the Lord Chief Justice proceeded to " edit " what the deputy commissioner had said. He quoted paragraph 16 of the decision in full, and went on as follows : " Having read that, may I say at once that clearly something is wrong in the first five lines of that paragraph, because if, as the paragraph is worded, the commissioner accepted Mr. Price's contention ' that the work on which the claimant was engaged . . . caused a physiological (or pathological) change for the worse in her condition ', if he was so satisfied there was an end of the case. It seems to me quite clear that what the commissioner was intending to say, or perhaps did say and there is a typing error, is that even if he were to accept the contention of Mr. Price that the work on which the claimant was engaged was capable of or might cause the change, then he is left with a complete balance of probabilities. I think that that is clearly what the commissioner intended to say, if he did not actually say it or write it ".

The applicant now appeals to this court, and it has been contended on her behalf that it was not open to the Divisional Court to place a meaning on paragraph 16 of the decision which the words used did not convey. It has been argued that the words used must be taken as they are, and on that basis (as the Lord Chief Justice himself observed) if the opinion of Mr. Evan Price were accepted, that would be the end of the case. The respondent countered with a cross notice, seeking to support the order of the Divisional Court on the ground that the deputy commissioner was not shown to have relied on the expressions of medical opinion in other cases except in so far as they had been adopted as part of the evidence of Dr. Hayes, or alternatively on the ground that, if the deputy commissioner did rely on these expressions of medical opinion as constituting of themselves evidence in the case, he was not in error in doing so.

It will be convenient to deal with the cross appeal first, not only because, if it succeeds, it is decisive of the case, but also because it raises a point of general importance on which it is desirable that we should express our opinion. For myself I am by no means satisfied that the Lord Chief Justice was right in concluding that the deputy commissioner was treating the medical opinions expressed in other cases as constituting independent pieces

of evidence in the present case. I do not think that that view is really consistent with the concluding sentence of paragraph 12 of the decision, having regard particularly to the use of the word " accordingly ". As I understand it, what the deputy commissioner was saying in that paragraph was that the medical opinions expressed in the other cases became part of the evidence in the present case because they had been put to both the doctors who were called as witnesses, and had been adopted by Dr. Hayes. Dr. Hayes must thus be regarded as fortifying his evidence by reference to these opinions, as well as by reference to the opinion of the other senior medical officer in the present case, just as he might do by reference to a textbook. In the same way an expert witness giving evidence on foreign law may fortify his evidence by reference to decisions of the foreign court, which thereupon become evidence in the case. On that view it does not seem to me to be at all inapt to refer to " the other medical evidence ", or to " the weight of the medical evidence ". Accordingly, even if this were a formal proceeding in a court of law governed by strict rules of evidence, I do not think that the applicant would have sufficiently shown that there was an error of law on the face of the record by reason of the admission of inadmissible evidence.

But let it be assumed that I am wrong, and that the deputy commissioner was, as the Lord Chief Justice thought, treating the opinions expressed by doctors in other cases as independent pieces of evidence in the present case. Can it be said that even so he was guilty of an error of law such as to justify an order of certiorari? In order to answer this question it is necessary to examine the nature of the inquiry which he was conducting, and that in turn involves an examination of the powers conferred by the statute under which the deputy commissioner was appointed, and of the regulations governing procedure which were made in pursuance of the statute. The industrial injuries commissioner and deputy commissioners are appointed under the powers conferred by section 42, subsection (1), of the Act of 1946. Jurisdiction to hear appeals from a local appeal tribunal is conferred by section 47. By section 51, subsection (1), it is enacted that regulations may provide for prescribing the procedure to be followed in connection with the consideration and determination of claims and questions by an " insurance tribunal ", which by subsection (5) includes the commissioner. Regulations have in fact been made in pursuance of this power, to which I must presently refer. Section 51, subsection (1), also provides by paragraph (e) that regulations may be made for prescribing the evidence to be required in connection with the determination of a claim or of any question arising in connection with a claim or an award. We have been informed that no such regulations have in fact been made, but at least the existence of the power to make them indicates that Parliament did not intend that the proceedings should be governed by the strict rules of evidence.

Subsection (2) of section 51 provides that witnesses may be examined on oath if the person holding the inquiry thinks fit, and confers power to administer oaths for this purpose. In the present case, however, we have been informed that the witnesses who gave evidence were not in fact sworn.

The relevant regulations are the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948. The procedure before the commissioner is prescribed by regulation 22, the following paragraphs of which appear to be of some possible materiality. " (1) If any person to or whom notice of appeal is given makes a request to the commissioner for a hearing of the appeal, the commissioner shall grant such a request unless, after considering the record of the case and the reasons

put forward in the request for the hearing, he is satisfied that the appeal can properly be determined without a hearing, in which event he shall inform the claimant or beneficiary in writing and may proceed to determine the case without a hearing. (2) If, in accordance with the provisions of the last foregoing paragraph, a request for a hearing has been granted, or if notwithstanding that no request has been made the commissioner is otherwise satisfied that a hearing is desirable, reasonable notice of the time and place of the hearing shall be given to every person to or by whom notice of appeal was given and, if he thinks fit, to any other person appearing to the commissioner to be an interested person! (3) Every such hearing shall be in public, except in so far as the commissioner for special reasons may otherwise direct. . . . (6) If it appears to the commissioner that any appeal which is made to him involves a question of fact of special difficulty, the commissioner may direct that in dealing with the appeal or any part thereof he shall have the assistance of an assessor or assessors specially qualified and selected from a panel appointed for that purpose ". Regulation 26 also makes some provision for the procedure to be followed, and by paragraph (1) thereof provides as follows : " (1) For the purpose of the determination of any question by the Minister, an insurance officer or an insurance tribunal—(a) the Minister, the insurance officer or the insurance tribunal, as the case may be, may refer to a medical practitioner for examination and report any question arising for his or their decision ; (b) subject to the provisions of the Act and these regulations, the procedure on the determination of any question by the Minister or the insurance tribunal shall be such as the Minister or such insurance tribunal, as the case may be, shall determine ". Regulation 27 provides that the claimant or any person duly authorised to represent him shall have the right to be heard, and by paragraph (3) it is provided that any person exercising the right to be heard may call witnesses, and shall be given an opportunity of putting questions directly to any witnesses called at the hearing.

It will be seen that the effect of the Act and the regulations is to provide for a considerable degree of latitude in procedure ; indeed, regulation 26(1)(b) confers an almost unfettered discretion on the commissioner as to how he shall proceed. He is not bound to hold any hearing at all, even where the applicant has asked for one. If the applicant does not ask for a hearing it must, I think, be obvious that the commissioner is free to obtain information from any source which is available to him. If there is a hearing, witnesses may or may not be called, and, if called, may or may not be sworn. It is to my mind abundantly clear that Parliament intended that there should be a minimum of formality. As was pointed out by Mr. Justice Diplock (as he then was) in *Regina* v. *Medical Appeal Tribunal* (*North Midland Region*), *ex parte Hubble*, (1958) 2 Queen's Bench Division, page 228, at page 240, the inquiry is more in the nature of an inquest than a *lis inter partes*. That case arose out of a reference to a medical board or an appeal therefrom to a medical appeal tribunal under section 39 of the Act, but the same considerations must apply to an appeal to the commissioner under section 47. Similarly in *Regina* v. *Deputy Industrial Injuries Commissioner*, *ex parte Jones*, (1962) 2 Queen's Bench Division, page 677, Lord Parker (Lord Chief Justice), at page 685, described a deputy commissioner exercising this jurisdiction as " a *quasi* judicial tribunal ". Where so much is left to the discretion of the commissioner, the only real limitation, as I see it, is that the procedure must be in accordance with natural justice. This involves that any information on which the commissioner acts, whatever its source, must be at least of some probative value. It also involves that the commissioner must be prepared to hear both sides, assuming that he

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has been requested to grant a hearing, and on such hearing must allow both sides to comment on or contradict any information that he has obtained. This would doubtless apply equally in the case where a hearing had been requested but refused, for in such a case it would not be in accordance with natural justice to act on information obtained behind the backs of the parties without affording them an opportunity of commenting on it.

This, I think, is in accordance with the statement of principle made by Lord Loreburn in *Board of Education* v. *Rice*, (1911) Appeal Cases, page 179, at page 182. That case related to the conduct of an inquiry by the Board of Education under section 7 of the Education Act 1902, but the principles stated must in my view apply with equal force to inquiries by other similar tribunals. What Lord Loreburn said was as follows : " Comparatively recent statute have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind ; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under section 7, subsection (3), of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari ".

Those being the principles to be followed, I can see no objection to the course taken by the deputy commissioner in the present case in admitting and giving effect to the opinions of the other doctors expressed in the other cases referred to. All the more must this be so, I think, when it is remembered that in the present case the parties had abundant opportunity (of which they availed themselves) to comment on the opinions which had been expressed. It is only fair to remark that it has not been argued on behalf of the applicant in the present case that the deputy commissioner was bound by the strict rules of evidence. Once that concession is made, it seems to me that, provided the parties had the opportunity to comment on the opinions which had been expressed in other cases, the only question remaining was as to the weight to be attributed to those opinions, that is, their probative value. This would not raise any question of law such as to justify an order of certiorari unless it could be said that the opinions expressed were so worthless as to have no weight at all, which could hardly be suggested in the present case.

I must not, however, omit to notice two other contentions put forward on behalf of the applicant. (1) It is said that the vice of what was done in the present case lay in the fact that the names of the doctors who had expressed opinions in the other cases were not divulged. Bearing in mind that one of them was described as an " eminent surgeon ", and had been called in to sit as an assessor, while the other was described as a " senior medical officer ", I do not think that there is much merit in this point. In any event, the comment goes only to the weight to be attached to the opinions expressed, and not to the question whether they were properly admitted as evidence. (2) It is said that these opinions were admitted notwithstanding an assurance given by the deputy commissioner to the applicant's solicitor, in the course of the opening of the case, to the effect that he would not decide the appeal on evidence given in other cases. But I cannot think that the deputy commissioner was bound not to depart from this assurance if he formed the view that the opinions expressed by the doctors in the other cases were of probative value. He was, of course, bound to afford the applicant every opportunity of commenting on the opinions expressed. This he did, and since both the witnesses who were in fact called were fully cross-examined with regard to these opinions that had been expressed in other cases, I cannot think that the applicant has any justifiable grievance.

In these circumstances, even assuming that the Lord Chief Justice was right in thinking that the deputy commissioner was treating the opinions expressed in other cases as independent pieces of evidence in the present case, I do not think that he was going beyond what he was entitled to do. In expressing the contrary view I think that the Lord Chief Justice was overlooking the informal nature of the procedure applicable to the hearing before the deputy commissioner, and was treating the case as though it were a formal hearing in a court of law.

Having regard to this conclusion I am of the opinion that the judgment of the Divisional Court should be supported on the grounds put forward in the respondent's notice. This renders it strictly unnecessary to deal with the question raised by the applicant's appeal, since even if the appeal were successful it could not affect the result of the case. But since we have heard full argument on the question raised by the appeal I think it right to express my view thereon as briefly as possible.

Like the Divisional Court, I am of the opinion that paragraph 16 of the decision does not disclose any error of law such as would justify an order of certiorari. But I confess that I do not agree with the reason given by the Lord Chief Justice for arriving at that conclusion. In my view both the argument put forward on behalf of the applicant and the reasoning of the Lord Chief Justice are based on a misunderstanding of what the deputy commissioner actually said in paragraph 16 of the decision. As I read that paragraph, the deputy commissioner was seeking to draw a distinction between that which could be the cause of the physiological change and that which might be the cause of the incapacity. The deputy commissioner did *not* say that, if he accepted the contention based on Mr. Evan Price's opinion that the work on which the applicant was engaged was the cause of the incapacity complained of, the case would be left as one of equal probabilities. What he said, as I understand it, was that if he accepted the contention that the work caused a physiological or pathological change for the worse, that would still not prove that the incapacity was caused by the work. He went on to explain that the incapacity could equally well have been caused (as Dr. Hayes contended) by the fact of

the applicant having already a partially extruded disc, which was converted into a completely extruded one by this simple movement. The question would still remain, whether the change that was brought about was a change to a normal healthy back or a change to a back which was already diseased. As to that, at the best for the applicant, the evidence in the view of the deputy commissioner was evenly balanced. It seems to me that this was a view of the medical evidence that it was open to the deputy commissioner to take ; and even if it could be said to be a wrong view, it would not be an error of law such as would justify an order for certiorari.

For these reasons I am of the opinion that the Divisional Court came to the right conclusion, although not for the reasons expressed by the Lord Chief Justice. It follows that in my judgment the appeal should be dismissed.

LORD JUSTICE PEARSON : I agree.

On the 16th April 1962, the applicant, while at work, felt a sudden pain in the lower part of her back, but she continued to work on that day and the next two days. Then on the 19th April 1962 she felt a pain running down her leg, and on examination in hospital she was found to have a prolapsed intervertebral disc. This condition prevented her from working from the 19th April 1962 onwards.

Section 7, subsection (1)(a) of the National Insurance (Industrial Injuries) Act, 1946, so far as it is material to this case, provides: " Where an insured person suffers personal injury caused . . . by accident arising out of and in the course of his employment . . . industrial injury benefit . . . shall be payable to the insured person if . . . he is as the result of the injury incapable of work ".

There were two questions to be decided on medical evidence : Was there an " industrial " accident on the 16th April 1962 ? If so, did it cause the incapacity for work from the 19th April 1962 onwards ?

At the hearing before the deputy commissioner the claimant's medical witness, Mr. Evan Price, said that probably the pain in her back on the 16th April 1962 was due to the tearing of a vertebral ligament caused by her leaning over in the usual course of her work to see underneath the crane, and that the prolapsed intervertebral disc, which was diagnosed on the 19th April 1962 and rendered her incapable of work, was due to the tearing of the ligament three days before. On the other hand, the insurance officer's medical witness, Dr. Hayes, a senior medical officer of the Ministry, said in effect that probably there was a pre-existing and progressive degenerate condition of the back involving a prolapsed intervertebral disc, and the pain in the back on the 16th April 1962 and the pain running down the leg on the 19th April 1962 were merely symptoms or incidents of the onset or progress of the condition. Dr. Hayes's evidence was supported by a written statement from another senior medical officer of the Ministry who had considered the case papers while the appeal to the deputy commissioner was pending. Dr. Hayes in his evidence agreed with the opinion of the other senior medical officer. It has not been suggested in the present appeal that it was wrong for the deputy commissioner to take into account the statement of the other senior medical officer.

At the hearing, however, reference was made to medical advice given by a medical assessor to the commissioner in a previous case which has been reported (No. 35 of 1959) and to medical evidence given by a medical

witness in another previous case which has been reported (No. 33 of 1960). Dr. Hayes in his evidence agreed with them.

The deputy commissioner in paragraph 12 of his decision said this: " Each case must, of course, be decided on its own particular facts, and I should not, as a general rule, be disposed to have any regard to the evidence given in another case, but both Mr. Evan Price and Dr. Hayes were expressly asked whether they agreed with, and were cross-examined at some length on, the medical evidence which is set out in detail in the decisions referred to above. That evidence may accordingly be regarded as part of the evidence in this case, and must therefore be considered in relation to the present claimant's claim that her incapacity resulted from an industrial accident ". In that paragraph of his decision the deputy commissioner was evidently using the phrase " medical evidence " as including the advice given in No. 33 of 1959 as well as the evidence given in No. 33 of 1960.

In paragraph 13 of his decision the deputy commissioner cited a passage from No. 35 of 1959 where the commissioner had said: " In the present case I invoked the assistance of an eminent surgeon as medical assessor. He told me that before there can be extrusion of an intervertebral disc, there must be snapping of a ligament, and a powerful ligament at that. Where extrusion is caused by a single trauma, therefore, one would expect the trauma involved to be a fairly severe one. Where, on the other hand, extrusion is not due to some fairly severe trauma, it is generally considered to arise from a congenital condition which, under the influence of a series of minor traumata or episodes, results in the gradual extrusion of the disc up to a point where it becomes painful and incapacitating. In such a case, a quite trivial movement (whether associated with work or not) may, in a given individual, constitute the ' last straw ', converting a partially extruded (but symptomless) disc into a completely extruded (and painful) one ".

In paragraph 14 the deputy commissioner cited a passage from No. 33 of 1960 where the commissioner had set out an extract from a statement made by a senior medical officer in that case. I will read the first two sentences: " In many cases (some 40 per cent to 50 per cent) there is no clear history of trauma and in others the nature of the trauma may be very trivial (straightening up after tying a shoelace, rising from a bath, a sneeze, rising from bed after a short acute infective illness, such as influenza). It is unlikely that these painful incidents are anything more than episodes in the course of the process of degeneration ; they call attention to what is happening in the intervetebral discs ; they do not bring about the process of change or accelerate the rate of that process ".

In paragraph 15 the deputy commissioner stated his conclusion on his primary ground. Having referred to Mr. Evan Price's great practical experience and high medical qualifications, he said: " His opinion obviously carries weight, but having regard to the other medical evidence I find it very hard to accept that, postulating, as he did, a normal healthy spine, a single simple movement, such as the claimant had made approximately twelve times an hour for eight hours a day over a period of two years, would be likely suddenly to have caused a physiological (or pathological) change for the worse in her condition. The weight of the medical evidence is, in my judgment, against that conclusion. I have fully considered whether in substance, as far as I can judge on such a matter, the accident came from the disease alone so that whatever the claimant had been doing it would probably have come all the same, or whether the employment contributed to it ; and I am satisfied that the answer to the question posed by Lord Loreburn at the end of the passage cited above, namely, ' Was it the disease

that did it or did the work he was doing help in any material degree ? ', must be that the work that the claimant was doing did not help in any material degree. I therefore find that the claimant did not suffer personal injury caused by accident arising out of her employment at 2.30 p.m. on the 16th April 1962 ". On the face of it, the deputy commissioner's conclusion seems reasonable and in accordance with common sense, and there was ample evidence on which he could reach that conclusion.

The claimant's criticism is that the deputy commissioner wrongly treated as evidence in the present case the advice and evidence quoted from the previous cases. This criticism seems to me to be too technical and not well-founded, even if the rules of evidence applicable to court proceedings had to be applied, strictly and in their entirety, in the hearing before the deputy commissioner. The advice and evidence given in the previous cases had been fully put to the medical witnesses in the present case, so that each of them had the opportunity of saying that they were incorrect or irrelevant to the present case, if that was his view. Dr. Hayes, by agreeing with the advice and evidence given in the previous cases, adopted them as part of his own evidence in the present case.

So incorporated they added to the weight of the rest of his evidence, both because they were cogently expressed, and because they showed that Dr. Hayes's opinion on the general medical question involved (which was as to the aetiology of a prolapsed intervertebral disc) was not an isolated opinion, but was shared by other members of the medical profession. An expert witness must be allowed, if his opinion is challenged, to say that it is not merely his own opinion but is in harmony with the opinions of other experts in the same field, and for this purpose to cite their opinions in support of his own. In this case Dr. Hayes's opinion was also supported by the statement of the other senior medical officer. The sentence in paragraph 15 of the decision saying that the weight of the medical evidence was against the claimant's contention can be sufficiently accounted for and justified without assuming that the deputy commissioner ascribed independent status to the advice and evidence quoted from previous cases. With respect, I am not able to agree with the Divisional Court's view on that point, although it depends on the interpretation of passages in the decision, and different views can be taken. Even if the advice and evidence quoted from the previous cases were given some independent status as evidence in the present case, that would not necessarily be wrong. The relevant provisions of the Act and regulations must be taken into account.

In the Industrial Injuries Act 1946, section 36, subsection (2), provides : " Subject to the foregoing provisions of this section, any claim for benefit and any question arising in connection with a claim for or award of benefit shall be determined by an insurance officer, a local appeal tribunal or the Commissioner appointed or constituted in accordance with the following provisions of this Act ". Then there is section 51, subsection (1), which provides : " Regulations may provide (a) for prescribing the procedure to be followed and the form of any document required in connection with the consideration and determination of claims and questions by the Minister, an insurance tribunal and insurance officers or in connection with the withdrawal of a claim ", and then passing to (e) : " for prescribing the evidence to be required in connection with the determination of a claim or of any question arising in connection with a claim or an award ". Then subsection (5) of section 51 provides : " In this section the expression ' insurance tribunal ' means the Commissioner, a local appeal tribunal, a medical appeal tribunal, a medical board or a single medical practitioner

acting in place of a medical board ". I think that section 51, subsection (1)(e) is not directed to rules of evidence, but to prescribing the information which a claimant may be required to give. Regulation 9 of the National Insurance (Industrial Injuries) (Claims and Payments) Regulations 1948 shows what is intended.

The National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations 1948 provide by Regulation 26(1) that: " For the purpose of the determination of any question by . . . an insurance tribunal . . . (b) subject to the provisions of the Act and these regulations, the procedure on the determination of any question by . . . the insurance tribunal shall be such as . . . such insurance tribunal . . . shall determine ". A commissioner or deputy commissioner is for this purpose an " insurance tribunal " by virtue of section 51, subsection (5), of the Act, and regulation 1(5) and the Interpretation Act 1889. Under that regulation 26(1)(b) it is not necessary even to have general rules of procedure except in so far as they are provided by other regulations or by the Act. The deputy commissioner could determine the procedure for this particular case. No doubt the procedure has to be reasonable and, when there is a hearing, it has to be a well-conducted hearing. But the deputy commissioner would not render his procedure unreasonable, nor his hearing ill-conducted, merely by admitting as evidence something which, according to the strict rules of evidence for court proceedings, would be inadmissible. The rules of evidence are in some respects artificial and unsatisfactory, and may require the exclusion of evidence which is highly reliable and credible, as in the recent case of *Myers* v. *Director of Public Prosecutions*, (1964) 3 Weekly Law Reports, page 145 In civil proceedings in court the requirements of the rules of evidence are frequently waived by express or tacit consent in the interests of justice and convenience. The deputy commissioner's discretion to determine the procedure under regulation 26(1)(b) must be wide enough to enable him, in a proper case, to admit good evidence notwithstanding that there might, according to the rules of evidence, be some technical objection to its admissibility. I am not in the least intending to say that it would be right (at any rate in a case when there is a hearing) for a tribunal without the consent of the parties to decide case A. on the evidence given in case B. That would be unreasonable procedure, and the hearing would be ill-conducted. Nothing at all resembling that happened in the present case, as clearly appears from paragraphs 11 and 12 of the decision.

Next I should say a few words about the obscure paragraph 16 of the decision, which in the view of the Divisional Court required amendment. My own not very confident view is that no amendment is required, and that paragraphs 15 and 16, though they overlap to some extent, deal for the most part with separate questions. Paragraph 15 decides that there was no industrial accident. Paragraph 16 says alternatively that, if it be assumed that there was an industrial accident, such accident is not shown to have caused the incapacity for work. It seems to me, however, that if (contrary to my conclusion expressed above) the decision in paragraph 15 had to be set aside by reason of misreception or misuse of evidence imported from other cases, the decision in paragraph 16 would be equally contaminated, and would have to suffer the same fate.

In my judgment, however, there was no misreception or misuse of evidence at the hearing of this case, and the application for an order of certiorari was rightly rejected (although I am not wholly in agreement with the reasoning of the Divisional Court) and I would dismiss the appeal.

LORD JUSTICE DIPLOCK The National Insurance (Industrial

Injuries) Act 1946, as subsequently amended, instituted a comprehensive scheme for the payment of various classes of monetary benefit to insured persons who suffer personal injury caused by accident arising out of and in the course of their insurable employment. These benefits are paid out of a fund raised from contributions by insured persons and their employers and from moneys provided by Parliament. A scheme of this kind requires machinery for determining whether a claimant is entitled to payment of any, and if so what, amount out of the fund. Such a determination may raise a variety of questions dependent upon the nature and circumstances of the particular claim, and the Act provides by section 36 for different methods of determining different categories of question. In the present appeal we are concerned only with questions which are not special questions as defined in that section. The issue in this appeal is as to the proper procedure to be adopted upon an appeal to an insurance tribunal from a decision of an insurance officer disallowing a claim in whole or in part.

Section 45 of the Act requires that all claims to benefit shall be submitted to an insurance officer, a civil servant appointed by the Minister. His duties are administrative only ; he exercises no quasi-judicial functions for there is, at this stage, no other person between whose contentions and those of the claimant he can adjudicate. He must form his own opinion as to the validity of the claim, and for this purpose he may make whatever inquiries he thinks fit. If he is satisfied that the claim ought to be allowed in whole, he may allow it, and his decision is final ; but if he disallows it in whole or in part, he must give his reasons in writing, and the claimant has a right of appeal to a local appeal tribunal. From a decision of a local appeal tribunal there is a further right of appeal at the instance of the claimant or his trade union, or at the instance of the insurance officer, to the commissioner or a deputy commissioner.

In dealing with appeals of these kinds, the insurance tribunal, namely, the local appeal tribunal or the commissioner or deputy commissioner as the case may be, is exercising quasi-judicial functions, for at this stage it has conflicting contentions before it, those of the claimant and those of the insurance officer who has disallowed the whole or part of the claim. But there is an important distinction between the functions of an insurance tribunal and those of an ordinary court of law, or even those of an arbitrator. As was pointed out by the Divisional Court in *Regina* v. *Medical Appeal Tribunal* (*North Midland Region*) *ex parte Hubble* (1958) 2 Queen's Bench Division, page 228, at page 240, a claim by an insured person to benefit is not strictly analogous to a *lis inter partes*. Insurance tribunals form part of the statutory machinery for investigating claims, that is, for ascertaining whether the claimant has satisfied the statutory requirements which entitle him to be paid benefit out of the fund. In such an investigation neither the insurance officer nor the Minister (both of whom are entitled to be represented before the insurance tribunal) is a party adverse to the claimant. If an analogy be sought in ordinary litigious procedure, their functions most closely resemble those of *amici curiae*. The insurance tribunal is not restricted to accepting or rejecting the respective contentions of the claimant on the one hand and of the insurance officer or Minister on the other. It is at liberty to form its own view even though this may not coincide with the contentions of either. (See *Regina* v. *Medical Appeal Tribunal uni sup.*)

The machinery laid down in the Act for the investigation and determination of claims is comprehensive and exclusive. Any decision reached by an insurance tribunal on an appeal in those provisions is final (see section 36, subsection 3) ; and the Arbitration Acts, 1889 to 1934, do not apply to

any proceedings under the Act except in so far as they may be applied by regulations made under the Act (see section 51, subsection 3). The High Court's jurisdiction in respect of determinations by a deputy commissioner acting as an insurance tribunal is not appellate but supervisory. It can set aside his determination only if satisfied that the deputy commissioner in making it has acted contrary to law ; that is to say, that he has acted either contrary to some express provision of statute law regulating his jurisdiction to determine claims, or contrary to some rule of common law. The rule of common law of which he may be in breach may be either one of substantive law (as where an error of law is apparent on the face of his written determination) or it may be one of those rules of procedure which the common law requires persons who exercise quasi-judicial functions to observe, and which are compendiously referred to as the rules of natural justice. It is with an alleged breach by the deputy commissioner of the rules of natural justice that the present appeal is concerned.

In view of the judgments which have already been delivered, I need not analyse the express provisions of the Act and regulations relating to the procedure to be adopted on an appeal to a deputy commissioner. It is sufficient to note that they contain no express provision as to the evidence that a deputy commissioner may take into consideration on an appeal, and that regulation 26(1)(b) gives to him in the absence of any express provision, discretion to determine his own procedure, subject always to his observing the rules of natural justice. The question of law raised before us is whether the deputy commissioner acted contrary to the rules of natural justice in attaching some weight to opinions as to the general aetiology of the prolapse of intervertebral discs reported to have been given by unnamed medical practitioners in two earlier appeals determined by other deputy commissioners, and upon which the medical experts who gave evidence orally for the claimant and the insurance officer at the actual hearing before the deputy commissioner were invited to comment.

Where, as in the present case, a personal bias or *mala fides* on the part of the deputy commissioner is not in question, the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing.

In the context of the first rule, " evidence " is not restricted to evidence which would be admissible in a court of law. For historial reasons, based perhaps on the fear that juries who might be illiterate were incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion ; c.f. *Myers* v. *Director of Public Prosecutions*, (1964) 3 Weekly Law Reports, page 145. But these technical rules of evidence form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer ; but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned

above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

In the present case the question to be determined by the deputy commissioner was whether the prolapse of an intervertebral disc from which the claimant was admittedly suffering on the 19th April 1962 was caused by accident arising out of and in the course of her insurable employment on the 16th April 1962. The decision depended upon the correct diagnostic inference to be drawn from the claimant's symptoms in the light of the known aetiology of injuries of this kind. The aetiology of any kind of injury is provable by expert medical opinion ; and the opinion of any qualified medical practitioner is evidence of this, although its probative value will depend upon his expertise in the particular kind of injury. The medical opinions to which it contended the deputy commissioner wrongly attached weight were hearsay ; they were reported in previous written determinations of other deputy commissioners as having been expressed to them. But this goes to the weight of this material only. Its weight as hearsay depends on the likelihood of the other deputy commissioners having correctly recorded in their written determinations the medical advice in one case, and the medical evidence in the other, that they had received, and on the likelihood that H.M. Stationery Office had correctly transcribed the written determinations in the official printed reports.

The medical practitioners whose opinions were so reported were unnamed. But this also goes to weight only, depending on the likelihood in the once case that the deputy commissioner concerned would have chosen as his medical assessor an expert in the type of injury to which his determination related and in the other case on the likelihood that the deputy commissioner concerned would not have described a witness as an eminent surgeon, and attached importance to his evidence, if he was not expert in the relevant surgical field. Neither medical practitioner whose opinion was referred to was available for cross-examination before the deputy commissioner whose determination is in question in the present appeal, but this goes to weight only. There is nothing on the face of his determination to show that he did not take all these factors affecting the weight of this evidence into consideration, and this was a matter for him, not for the High Court.

In fact the deputy commissioner heard comments on these medical opinions from the expert medical witnesses actually called before him on behalf of the claimant and the insurance officer respectively, but the need to do this arises not under the first but under the second rule of natural justice. If there had been no hearing, the deputy commissioner would have been entitled to take these two reported medical opinions into account in reaching his decisions because both were " evidence " within the meaning of the first rule.

The second rule simply requires that a deputy commissioner, in determining an appeal, must give fair consideration to the contentions of all persons who are entitled under the Act and the regulations to make representations to him. If no hearing is requested by a person entitled to be represented, the deputy commissioner is not bound to hold one. In such a case he *must* consider any written material submitted by the claimant and the insurance officer and the written decision of the local appeal tribunal from which the appeal is brought, and he *may* consider material from any other source which is evidence in the sense I have already described. In

refraining from requesting a hearing, the persons who would have been entitled to be heard waive their right to comment upon any material which the deputy commissioner may use in arriving at his determination. In effect they say : " The written documents contain all that we want to say in relation to the appeal ; we leave it to you to reach a just decision, and for that purpose to base it on whatever evidentiary material you think fit ".

Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such " evidence " relevant to the question to be decided as any person entitled to be represented wishes to put before him ; (b) to inform every person represented of any " evidence " which the deputy commissioner proposes to take into consideration, whether such " evidence " be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations ; (c) to allow each person represented to comment upon any such " evidence " and, where the " evidence " is given orally by witnesses, to put questions to those witnesses ; and (d) to allow each person represented to address argument to him on the whole of the case. This in the context of the Act and the regulations fulfils the requirement of the second rule of natural justice to listen fairly to all sides ; (see *Board of Education* v. *Rice*, (1911) Appeal Cases, page 179, per Lord Loreburn at page 182).

In the present case the deputy commissioner complied with all these requirements. The medical opinions given in other cases to which he referred in his written determination were put to the expert medical witnesses who were in fact called by the claimant and the insurance officer respectively. They were invited to comment on them and were cross-examined about them. The medical witness called by the insurance officer in fact accepted these opinions as correct and as coinciding with his own. Even in a court of law applying technical rules of evidence, these opinions would have been admissible as having been adopted as part of that medical witness's own evidence ; but I emphasise that the deputy commissioner was not bound to apply the technical rules of evidence, and was entitled to treat these opinions as " evidence " in their own right even if neither medical witness who was actually called had adopted them. If both these witnesses had disputed the medical opinions, this would have gone not to their admissibility, but to their weight, and would, no doubt, in the view of the deputy commissioner have reduced their probative value to practically nothing.

For these reasons, which differ from those of the Divisional Court, I would dismiss this appeal.

I should add that it was argued that even if the deputy commissioner would otherwise have been entitled to base his determination in part on the medical opinions given in other cases, he disentitled himself from doing so by stating at an early stage in the hearing that he would decide the appeal on the evidence given before him, and not on the evidence given in other cases. This was an ambiguous statement, but as I have already pointed out the reported medical opinions did, even under the technical rules of evidence, become evidence in the case before him upon being adopted as part of his own evidence by one of the medical witnesses actually called. So there is nothing in this point either.