ATTENDANCE ALLOWANCE

Attendance Allowance—Breach of natural justice—procedure for oral hearing before board—improper conduct—nature of "risk".

The claimant, who suffered from epilepsy, had been awarded attendance allowance at the lower rate on the ground that she satisfied only the daytime condition in relation to supervision. Her appeal against an earlier decision of the Attendance Allowance Board had succeeded before the Court of Appeal (*Moran v the Secretary of State for Social Services*—reported as appendix to R(A) 1/88) and she now appealed to the Commissioner against the Board's subsequent decision. A Tribunal of Commissioners was convened to hear the claimant's appeal.

Held by all 3 Commissioners, allowing the claimant's appeal that:

1. certain documents containing comments from the claimant's own general practitioner were not before the Board when they made their decision. The Board therefore reached their conclusion in ignorance of relevant evidence (paragraphs 7 and 8);

2. the interests of natural justice required an oral hearing, not least because the decision of the Board had cast doubt upon the factual evidence provided by the husband of the claimant (CA 1/82 considered) (paragraphs 9 to 14);

3. the claimant had requested an oral hearing of her application for review but it was rejected by the Board collectively, whereas the decision was, in accordance with regulation 2(1)(a) of the Social Security (Adjudication) Regulations 1986 meant to be that of the chairman alone (paragraphs 10 and 11);

4 the board can use their own accumulated medical knowledge and expertise to assess each case before them, taking account of any advances or other changes in medical knowledge so that the opinions they express reflect the most upto date established thinking. The Board had changed their view on the question of substantial danger since their earlier opinion. Where a long established approach was varied it was necessary to explain and support such a variation (paragraphs 15 to 18);

5. except, for example, where an obvious typographical error needs to be resolved, it is improper for a party to seek an explanation of or clarification from the Board of their decision and put it forward on appeal (paragraph 17);

6 the board had relied upon "recent medical evidence and opinion" to discount the possibility that a substantial danger may arise from a nocturnal fit. This was a departure from views which the Board had earlier expressed Some of the medical evidence and opinion was disclosed to the claimant's representatives. The Commissioners held that to give incomplete information was plainly misleading and a denial of natural justice. If some information is disclosed then all must be (paragraphs 18 and 19);

7. the possible seriousness of the consequences of even a very unlikely event if it did occur needed also to be considered. The proposition that avoidable death is an unlikely consequence of a nocturnal fit does not justify a conclusion that the risk is so remote that it can reasonably be ignored (*Moran v Secretary of State for Social Services*, reported as appendix to R(A) 1/88 and *R v Secretary of State for Social Services, Ex parte Connolly* [1986] 1WLR 421 considered) (paragraphs 20 to 26)

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1. Our decision is that the decision of the Attendance Allowance Board ("the Board") given on 12 January 1988 is erroneous in point of law. Accordingly the Board will review their determination pursuant to regulation 39(6) of the Social Security (Adjudication) Regulations 1986 [S.I. 1986 No. 2218].

2. The claimant appeals with leave of the Commissioner against the decision of the Board confirming the certificate issued by their delegated medical practitioner ("DMP") on 7 March 1985. That certificate awarded attendance allowance to the claimant at the lower rate for a period of two years, on the basis that she was so severely disabled physically that she required from another person continual supervision throughout the day in order to avoid substantial danger to herself. The necessary implication of that was that she did not satisfy either of the prescribed night conditions and consequently was not entitled to the allowance at the higher rate.

3. We held an oral hearing of this appeal. This took place on 8 and 9 February 1989, when the claimant was represented by Mr. Richard Drabble of Counsel, instructed by Mr. Nicholas Warren, Solicitor, of the Birkenhead Resource Unit. The Secretary of State was represented by Mr. Robert Jay of Counsel, instructed by the Solicitor to the Departments of Health and of Social Security. We are greatly indebted to both Mr. Drabble and Mr. Jay for the thorough and careful presentation of their cases.

4. The law is too well known to need elaboration here. It suffices to say that entitlement to attendance allowance and the rate at which it is paid depends upon the extent, if any, to which the claimant fulfils the requirements of section 35(1) and (2) of the Social Security Act 1975 which provides that—

"35.—(1) A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and either—

(a) he is so severely disabled physically or mentally that, by day, he requires from another person either—

(i) frequent attention throughout the day in connection with his bodily functions, or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(b) he is so severely disabled physically or mentally that, at night, he requires from another person either—

(i) prolonged or repeated attention during the night in connection with his bodily functions, or

(ii) continual supervision throughout the night in order to avoid substantial danger to himself or others".

Attendance allowance at the higher rate is payable if the claimant satisfies one (or both) of the day requirements and also one (or both) of the night requirements, and at the lower rate if only one (or both) of the day requirements or one (or both) of the night requirements is satisfied.

5. In the instant case the claimant, who is a married woman, now aged nearly 59, has suffered from epilepsy since she was 17. On 4 April 1983 she claimed attendance allowance and, on 28 April 1983, was examined by a doctor who was of the opinion that the claimant could not be safely left unsupervised either by day or by night. However, on 17 May 1983 a medical practitioner on behalf of the Board certified that she satisfied only the daytime supervision requirement and accordingly that she was entitled to attendance allowance at the lower rate for a period of two years from the date of her claim. The claimant made a further claim on 26 May 1984 which was, in our view correctly, treated as an application for review of the decision of 12 May 1983 and, after another medical examination and enquiries from her own general practitioner, the matter was referred to the Board's DMP who, by decision dated 5 December 1984, confirmed the decision of 17 May 1983.

6. The claimant appealed and, by decision dated 30 April 1986, the Commissioner, who felt himself bound by earlier authority, dismissed her appeal. The claimant then appealed to the Court of Appeal who, on 1 March 1987, allowed her appeal and remitted the matter to the Board for review in the light of the judgments of the Court. The Board, represented by the Chairman and eight members, gave their decision on 12 January 1988, and it is against that decision that the claimant now appeals. We acknowledge the assistance which we have derived from the "Chronology" prepared by Mr. Warren in setting out, in this and the preceding paragraph, in very brief outline the background to this matter.

7. We turn now to the arguments advanced on the merits of this appeal, and it will be convenient to deal firstly with a matter which was initially conceded as constituting an error of law, albeit an inadvertent one, on the part of the Board by the Secretary of State's representative in the submission dated 19 August 1988—a concession which Mr. Jay sought to withdraw before us. In paragraph 5 we mention the inquiries which were made of the claimant's general practitioner, Dr. R., who on 17 October 1984, in answer to certain questions said, under the heading "Prognosis", that—

> "Present control on 2 drugs not perfect—age and duration of symptoms may suggest little improvement may be achieved further, though specialist advice may be sought".

In answer to a further questionnaire on the claimants renewal application Dr. R. replied on 28 February 1985 that the prognosis was—

"Uncertain—very poor control in past 12 months—now improving though only slightly"; and in his report of the same date that—

> "This lady has the most severe and least well controlled epilepsy of any patient on my list and I am quite sure that she requires the full time care and supervision provided by her husband".

Now, it is common ground that neither Dr. R.'s replies to the questionnaire nor his report of 28 February 1985 were among the documents before the Board, and the Secretary of State's representative submitted that their absence was—

> "... contrary to natural justice in that the Board did not have before them—and therefore could not take account of—relevant evidence".

Not surprisingly, Mr. Drabble supported that submission, but Mr. Jay contended before us that even though the omission of the questionnaire and report might be a "technical breach of natural justice" the Board's decision should stand if we were satisfied that those documents would have made no difference. He submitted that Dr. R.'s report had in effect been "superseded" by the, admittedly very much fuller, report from Dr. C., a consultant neurologist, some two and a half years later on 15 September 1987, which clearly was before the Board and taken into account by them.

8. With respect to Mr. Jay we find that a surprising contention. It seems plain to us that the evaluation of Dr. R.'s report is essentially a medical question and, as such, the exclusive province of the Board. We accept that in certain circumstances it might be possible to say without doubt that the Board would not have been assisted by certain information; for example where a report identical to one before them was accidentally omitted from the scheduled evidence, but such cases must of necessity be extremely rare. In the instant case it is clear that, in the space of some four months, Dr. R. had revised his prognosis and, moreover, had expressed a particular opinion regarding the severity of and possibility of controlling the claimant's epilepsy. In our judgment, it was essential for the Board to have the opportunity to consider the views of the claimant's own general practitioner and assess their importance in relation to the other evidence before them, including no doubt the views of the consultant, Dr. C. It follows that the omission of Dr. R.'s report—and his answers to the questionnaire—did indeed mean that the Board reached their decision in ignorance of some relevant evidence, and that consequently their decision is erroneous in point of law. A similar situation was dealt with in *R v Leyland Justices Ex parte Hawthorne* [1979] QB 283 (which is referred to by the Commissioner in paragraph 11 of R(SB) 18/83), where it was held that justices had acted contrary to the principles of natural justice, without in any way being at fault, when they proceeded in ignorance of the fact that the prosecuting authority had withheld the names of potential witnesses from the accused.

9. The second issue we consider is whether, as Mr. Drabble submitted, the Board erred in law in refusing the claimant's request for an oral hearing, in which it was contended that, in the light of the indication of the Board's preliminary view of their decision (adverse to the claimant), and the importance of the issues of fact and law involved, an oral hearing would be "the only satisfactory means of ensuring that the concerns of individual

members of the Board can be ventilated and the Applicant given the choice to respond to concerns arising out of the Board's own medical experience that may as yet have been imperfectly articulated" and that it would also "ensure that the factual picture is correctly drawn". We would mention at this stage that the Board's preliminary view, communicated by letter dated 19 May 1987, contained the statement that they had—

> "... noted, in particular, the growing body of recent medical evidence and opinion which holds that the risk of substantial danger from night-time attacks is a remote possibility".

We deal specifically with that matter under another head, but we mention it here as it deals with one of the factors referred to in the claimant's written submission seeking an oral hearing.

10. The Board dealt with that request at paragraph 3 of their decision, saying that in considering it they were—

> "... guided by the criteria set out in Commissioner's decision CA 1/82. These make clear that an oral hearing is necessary only where the honesty of the claimant or the accuracy of the representations of fact made on her behalf are at issue".

They went on to find that an "oral hearing is not therefore required".

Mr. Jay supported the Board's decision and relied on paragraph 16 of CA 1/82 where the Commissioner said—

> "I accept that in all categories of cases, except the present one, i.e. one where the honesty of a claimant or the accuracy of a claimant's representations of fact are directly in issue, the existing procedures of the Board and its delegates (as set out in the Secretary of State's submission) adequately meet the demands of natural justice".

11. Unlike social security appeal tribunals (see regulation 24(1) of the Adjudication Regulations) or medical appeal tribunals (regulation 31(1)), there is no specific provision, either in the Act or the regulations, for the Board or their delegates to hold oral hearings and we accept, as Mr. Jay submitted, that such hearings are exceptional—by their very nature they are bound to be. Section 105(2) of the 1975 Act provides that Schedule 11 thereto shall have "effect with respect to the Board and their affairs ... but regulations may make further provision as to the ... procedure of the Board". Paragraph 12 of Schedule 11 provides that—

> "12. Subject to any directions given to them by the Secretary of State, the Board may
>
> (a) .....
>
> (b) regulate their own procedure (including the quorum)".

Section 105(2) also empowers regulations to make further provision as to the procedure of the Board. However, regulation 1(2) of the Social Security (Adjudication) Regulations 1986 [S.I. 1986 No. 2218] defines "adjudicating authority" as including the Attendance Allowance Board, and regulation 2(1)(a) provides that—

> "(1) Subject to the provisions of the Acts and of these regulations—
>
> (a) the procedure in connection with the consideration and determination of any claim or question to which these regulations relate shall be such as the Secretary of State, the adjudicating authority or the person holding the inquiry, as the case may be, shall determine, so however that in the case of a tribunal or board, *the procedure shall be such as the chairman shall determine.*" (our emphasis)

The matter is, therefore, a question of discretion which, of course, must be exercised judicially. It will be convenient for us to deal here with a procedural point raised by Mr. Drabble, namely that the Board were in error of law in making a collective decision to refuse an oral hearing as, pursuant to regulation 2(1) of the Adjudication Regulations, that was a decision which should have been made by the Chairman alone. Mr. Drabble did not put that forward as his most important ground of appeal but, on consideration, we consider it is of greater substance than appeared at first sight. It may well be that the chairman is given the power to determine the Board's procedure for reasons of expediency; it is easy enough to see that it would be impracticable or, at any rate, unnecessarily burdensome to have to convene a full Board to deal with every interlocutory matter as and when it arose. But, however that may be, the regulation is mandatory; procedure *shall* be determined by the chairman, and plainly different legal consequences flow from a decision made by the chairman alone and from one made by the Board. In the former case the only avenue of appeal open to a dissatisfied party is to seek judicial review by the Divisional Court, whereas in the latter case an appeal on a point of law lies to the Commissioner. A procedural decision, such as that regarding an application for an oral hearing, may be given prior to or the same time as the substantive decision and it follows, in our view, that it would be possible for a chairman's ruling to be included in a decision of the Board provided that it was made clear that that part of the decision was by him alone and his sole responsibility. There can be no question of that being the situation here; the ruling relating to the request for an oral hearing is set firmly in the body of the decision and is couched in the first person plural. We have no doubt that it was, and was intended to be, a collective decision of the Board; accordingly it did not comply with the statutory requirements and is erroneous in point of law. We would add that we are fortified in this view by the recent decision of a Tribunal of Commissioners, concerning a different but related jurisdictional point, in paragraph 35 of CI 141/87.

12. Returning to the main stream of the argument concerning the requested oral hearing, Mr. Drabble submitted that even on the basis of CA 1/82, the Board should have granted the claimant's request as examination of their decision shows that "the accuracy of a claimant's representations of fact" was directly in issue. He relies on the passage in paragraph 7.7 of their decision, where they deal with the claimant's husband's assertion in a written proof of evidence that, when the claimant has a fit at night—

> "I have to try to restrain her when she tries to get out of bed. She is very strong when in a fit. I can't push her. I just have to try to calm her until I can lay her down. I then make sure that her head is on one side."

The Board commented that the claimant's husband had only raised this "possibility ... very recently" and went on—

> "This is at variance with the normal pattern of behaviour during epileptic fits and indeed with earlier statements about [the claimant's] behaviour during a fit, which shows that she sometimes falls out of bed or wets the bed but makes no reference to a need to restrain her from leaving the bed. We are therefore in some doubt as to the probability of [the claimant] getting out of bed at the onset of an attack..."

Mr. Jay submitted that even if that passage raised questions as to the claimant's husband's accuracy, or even veracity, that was irrelevant because the Board continued—

> "... but consider that any risk which would arise if that were a possibility could be reduced by ensuring that there were no dangerous

or sharp-cornered objects within the bedroom and using safety gates to prevent ready exit from the bedroom".

13. In our view that conclusion did not eliminate the difficulty arising over the husband's statement. The claimant's behaviour during a night-time fit was obviously a material consideration. Equally obviously the claimant was in no position to describe her own conduct and her husband's description was the most direct evidence available. The Board were of course entitled to entertain the doubts they express about that evidence. If the Board were satisfied that with reasonable precautions the conduct described would not in any event present any relevant risk of substantial danger the difficulty could no doubt be overcome without the need to allow the evidence to be tested at a hearing. It would however need to be made clear 1) that for the purposes of considering the matter the evidence was fully accepted and 2) that any relevant risk would be avoided by the precautions prescribed. We very much bear in mind that the Board's decisions are not legal documents drafted by lawyers, but on a fair reading of the passage quoted above we are forced to conclude that the Board's treatment of the matter does not meet these requirements, firstly because the conduct described as actually happening is reduced to "a possibility" and secondly because it is then considered that any risk would only be "reduced" by the precautions to be taken. Our conclusion accordingly is that the need in the interests of natural justice to allow an oral hearing was not overcome upon the Board's approach and even on the restricted test in CA 1/82, which the Board sought to follow, the refusal of an oral hearing constituted an error of law.

14. So far as CA 1/82 is concerned, we entirely agree, with respect, with the examples the Commissioner gives of the circumstances in which an oral hearing will be necessary, but we do not consider those necessarily to be exhaustive of the type of "proper" case referred to by Lord Denning MR in *Breen v Amalgamated Engineering Union* [1971] 1 All ER 1148, quoted by the Commissioner, in which, in pursuance of the duty to act fairly, a statutory body entrusted with a discretion ought to grant an oral hearing. With regard to Mr. Drabble's further submission that the Board had only considered, albeit incorrectly, whether an oral hearing was *necessary*, and were in error in failing also to consider whether it was *desirable*, in the circumstances it is unnecessary and also perhaps undesirable for us to say anything other than that the whole question of whether or not to grant an oral hearing is within the discretion, properly exercised, of the Chairman as indicated above.

15. We move now to the next point in this appeal. The Secretary to the Board wrote to the claimant in the letter dated 19 May 1987 that, in reaching their preliminary opinion that she satisfied neither of the night conditions—

> "... the Board have looked very closely at the risk of substantial danger to yourself or others from epileptic attacks at night. They have noted, in particular, the growing body of recent medical evidence and opinion which holds that the risk of substantial danger from night-time attacks is a remote possibility ..."

On 3 June 1987 Mr. Warren, on the claimant's behalf, wrote asking for "a copy of the documents showing the 'growing body of recent medical evidence and opinion'", and on 23 June 1987 the Secretary wrote—

> "The Board's present view of the risks associated with epileptic attacks is not unique. It simply reflects the general trend of medical evidence from a number of well documented studies which is generally accepted throughout the medical profession",

and enclosed a—

> "... list of illustrative studies which indicate the basis of the Board's current approach to the risk associated with epilepsy ..."

This list gave the titles and provenance of five papers published between 1954 and 1975. Dr. C., in his report of 15 September 1987, commented that these were "somewhat old" and that "more recent, more satisfactory epidemiological data" had not been cited. Accordingly, in the claimant's written submission to the Board, it was stated that it was "still unclear to [the claimant's] advisers in what the *recent* medical evidence and opinion consists". That, then, was the position when the matter was considered by the Board.

16. The Board, at paragraph 7.3 of their decision, refer to the evidence submitted on the claimant's behalf and go on—

> "We accept that there is increased mortality in patients with epilepsy but this includes deaths both by day and by night. Recent medical studies and research indicate that death in bed at night is normally due to the unexplained development of pulmonary oedema and not, despite continuing widespread belief to the contrary, to asphyxia or other preventable events. Deaths from pulmonary oedema cannot be avoided by the presence of another person".

17. The essence of paragraph (iii)(c) of the claimant's grounds of appeal was that it had become apparent that the Board had had regard to "recent medical studies and research" which had not been disclosed to the claimant's advisers and that what had been disclosed did not support a finding that "death in bed at night is normally due to unexplained development of pulmonary oedema". There the matter rested until the receipt of a further, undated, submission on behalf of the Secretary of State, enclosed in the letter dated 2 November 1988 from the Department, which in answer to that paragraph said—

> "The Secretary of State agrees that the illustrative studies [see the preceding paragraph] do not support the conclusion that 'death in bed at night is normally due to pulmonary oedema'. These particular illustrative studies were not intended to support that proposition, but they were sent to illustrate the development of medical understanding of epilepsy in general terms. In any event, the Board were under no obligation to furnish such details".

Pausing there, apart from the last sentence, which we deal with later, up to that point the paragraph is unexceptional; the concession is properly made and the second sentence could possibly be a correct inference, although one would normally expect such a statement to be qualified by, for example, such words as "it would appear that ..." However, the paragraph continues—

> "In fact, Professor Marshall [the Chairman of the Attendance Allowance Board] relied upon Terrence, Rao and Perper's study 'Neurogenic Pulmonary Edema in Unexpected, Unexplained Death of Epileptic Patients' (copy attached) published in the Annals of Neurology (Volume No. 5). This study supported his view that death in bed can be caused by pulmonary oedema".

From this it became clear that the Secretary of State's representative had not been drawing inferences but had been in touch with and obtained information from the Board (or at any rate the Chairman) after their decision had been given and, indeed, after the claimant's appeal had been made. We have no hesitation in saying that we find that the Secretary of State's representative's action in this respect was improper. We do not wish

to labour the point: suffice it to say that, when an appeal is pending, clarification of a tribunal's decision should be sought only where, for example, an obvious typographical error needs to be resolved, and a party and in particular a party seeking to uphold a tribunal's decision should never, as here, attempt to obtain what is, in effect, an explanation of or a material addition to the decision. In our judgment the Board's decision should contain all necessary facts, findings and reasons and must be interpreted as it stands.

18. However, while we feel bound to record our disapproval of the course which was adopted in this case, it does not go to the essence of the appeal which, under this head, is that the Board have not disclosed all the sources of "recent medical evidence and opinion" upon which they were apparently relying, and consequently the claimant has been denied the opportunity to obtain the appropriate advice from her own experts. Mr. Jay submitted, inter alia, that the Board, which is largely composed of consultants in various fields, rely upon their wide experience and knowledge and that it would be impracticable to expect them to disclose the sources of all their learning. As a general proposition we accept that, and it may also well be that they "were under no obligation to furnish ... details". But, it seems to us those general propositions are inapplicable in this case. As the Board themselves very properly made clear in paragraph 8 of their decision, this was a case in which, on further consideration, they had decided to depart from views they had previously expressed. The Board's reliance, albeit not exclusively, upon recent medical research was made clear at an early stage and, moreover, following a request for disclosure, some information was given. In our judgment, to refuse to give any information would have been unhelpful but not misleading (and, in any event, could have been challenged), whereas to give incomplete information is plainly misleading and, again, a denial of natural justice. We are encouraged in that view by one of the passages in de Smith's Judicial Review and Administrative Action (Fourth Edition 1980) to which we were helpfully referred in which, at page 206, in discussing the obligation of statutory tribunals to act in accordance with natural justice, it is said that—

> "... this means, in the absence of contrary intendment, they must not place a party at a disadvantage by depriving him of an adequate opportunity of commenting on material relevant to their decision if it is gleaned from an outside source or in the course of their own investigations ..."

And in *R v Deputy Industrial Injuries Commissioner Ex parte Moore* [1965] QBD 456, Willmer LJ at page 476 E held that—

> "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 allow both sides to comment on or contradict any information he has obtained. This would ... apply equally 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".

Those observations were of course made at a time when such appeals before the Commissioner took the form of a full rehearing or reconsideration of the case, conducted substantially at the Commissioner's discretion. We appreciate also that care is required in applying those observations to the Board who are an expert body who may act on the basis of their own

expertise. Nevertheless we consider that the observations have relevance to the procedure of the Board in a case where the Board are explicitly proceeding in reliance on recent medical research.

19. It is not for us to comment on the importance of the paper by Terrence *et al.*: that must be a matter for expert medical assessment. However, we note that the sample examined comprises "8 occurrences of unexpected, unexplained death of epileptics ... recorded by the Allegheny County Coroner's Office, Pittsburgh, PA" during the years 1978 and 1979, and that of that sample two were recorded as "found dead in bed". We are not qualified to say—although we venture to doubt—whether the Terrence paper contains information of sufficient statistical significance to justify the Board's finding that "death in bed at night is *normally* due to the unexplained development of pulmonary oedema" (our emphasis). If, as we suspect may be the case, the Terrence paper does not justify the Board's finding, then it would seem to follow that the relevant sources of information on which they were relying have still not been disclosed. As we think we have already made sufficiently clear, if some information is disclosed then all must be.

20. This case was remitted to the Board for reconsideration in the light of the judgment delivered by the Court of Appeal on 13 March 1987 in *Moran v The Secretary of State for Social Services* (to be reported as an appendix to R(A) 1/88). In that case, delivering the judgment of the Court, Nicholls LJ, quoted the DMP as follows—

> "... I accept that a risk of substantial danger attends any and every fit which is accompanied by a loss of consciousness and that during her fits Mrs. Moran requires supervision in order to avoid such a possibility. Both medical reports indicate that because of the possibility of an epileptic attack Mrs. Moran is not left unsupervised at all by night *but I do not accept that a person who might have to intervene in the event of an attack should be regarded as exercising continual supervision between attacks* even though it might be unwise for her to be left alone". (the Court's emphasis).

Nicholls LJ continued—

> "It is evident that, in thus deciding the claim, the doctor had in mind, and followed, observations made in decision R(A) 1/83 given on 20th September 1982 by a tribunal of Commissioners",

and he then set out the whole of "crucial paragraph 9" of that decision, ending—

> *"We do not consider that a person who might have to intervene in the event of an attack should regarded as exercising supervision between attacks by reasons only that he might have to intervene in the event of an attack."* (the Court's emphasis).

and went on—

> "In my judgment, with great respect to the highly experienced Commissioners, the view expressed in the underlined words in paragraph 9 in decision R(A) 1/83 cannot be sustained as a general proposition. Given that supervision may be precautionary and anticipatory, or 'presence on guard', as expressed in one of the submissions made to us, there is no justification for drawing such a hard and fast distinction between, on the one hand, the position between attacks and, on the other hand, the position during attacks. In each case the function of the other person is the same: standing by to intervene in case the epileptic needs attention. If presence for that purpose during an attack, when intervention may or may not be

required, constitutes supervision, why may not presence for the same purpose between attacks also be supervision?"

The learned Lord Justice went on to say that "if the sufferer has adequate warning of an impending attack" the position might be different, but that was not the situation in the case under consideration, and that a person constantly present and ready to intervene—

> "... may be exercising continual supervision even between the attacks: it all depends upon the facts. Thus if there is a requirement for such a person there may, depending on all the facts, be a requirement for continual supervision between attacks as well as during attacks".

Nicholls LJ then dealt with the position of an epileptic who was capable of looking after himself between attacks and the contention that, unless the attacks were very frequent, it could not be said that *continual* supervision was required, and he continued—

> "But if standing by between attacks so as to be in position to intervene in the event of an attack *may* be supervision, then the relative frequency or infrequency of the attacks is immaterial so long as *the risk of 'substantial' danger is not so remote a possibility that it ought reasonably to be disregarded.*" (this latter being our emphasis).

21. The Board's decision mentions the Court of Appeal's judgment in *Moran* in paragraph 1, but they do not refer to the rationale of the judgment and, indeed, it may well be that they felt they did not need to do so. The Board's position is clearly summarised in paragraph 8, when they say—

> "While we accept that a fit is not entirely without danger the danger is either unavoidable or can be minimised by suitable precaution. The presence of someone ready to intervene during an attack is not therefore required ... We appreciate that our delegate accepted that a risk of substantial danger attends any and every fit which is accompanied by loss of consciousness and that we ourselves have expressed similar views in the past. However this case has caused us to take a closer look at the arguments we have used in the past and to find that they have taken an indiscriminate view of the dangers arising in individual cases".

It is plain that the Board is there referring to their finding that, subject to reasonable precautions, there is no appreciable danger from a fit at night and that any danger there is (for example, death from pulmonary oedema) could not be prevented by the presence of another person or, as they put it in paragraph 7.4—

> "...we remain of the opinion that the risk of death from avoidable cause during or as a result of a nocturnal seizure is so remote a possibility that it ought reasonably to be disregarded",

and in paragraph 7.5—

> "In the light of our medical expertise we consider that the risk of serious injury occurring during a tonic clonic seizure whilst in bed is so remote a possibility that it ought reasonably to be disregarded".

22. Now had the factual situation as found by the Board remained as it was at the time of the Commissioner's decision of 30 April 1986 then, in the light of the guidance of the Court of Appeal's judgment, the claimant might reasonably have expected her claim to succeed. In those circumstances it would be entirely understandable for the claimant to feel that the Board have, to use a colloquialism "moved the goalposts". But of course that would be an entirely wrong way to look at it. It is the function

of the Board to use their accumulated medical knowledge and expertise objectively to assess each case before them, and it is their right and, indeed, their duty to take account of any advances and other changes in such knowledge so that the opinions they express reflect the most up-to-date established thinking. It is, we think, implicit in what we have already said that that principle must be subject to the Board's obligation when, as in the instant case, they revise or modify a long established approach, to explain and, where appropriate, support such a variation.

23. The question which arises in this appeal is, as Mr. Drabble put it, whether the Board have adequately explained the criteria which they were applying. He submitted that paragraph 7.4 of their decision, referred to above, does not specify what criteria—one could say, new criteria—the Board adopted when deciding the question of remoteness and he referred us to paragraph 5.12.4 of the Boards "Handbook for Delegated Medical Practitioners" (HMSO 1988) which reads as follows—

> "5.12.4 **Substantial danger** Whether the risk of substantial danger is so remote a possibility that it ought reasonably to be disregarded depends upon the individual circumstances of each disabled person. The nature of the hazard in relation to these circumstances must be taken into account. *If it is unlikely that the disabled person or others will come to serious harm, the risk of substantial danger can reasonably be disregarded and the need for supervision does not arise.* Where there is a risk of substantial danger which cannot reasonably be disregarded, the frequency or infrequency of the danger is immaterial in considering whether continual supervision is needed by day or at night." (our emphasis)

Mr. Drabble submitted that the Board were not asking themselves the right question and that the correct approach is that set out in paragraphs 10–15 of CSA 8/81 (approved in *R v Secretary of State for Social Services, Ex parte Connolly* [1986] 1 WLR 421 at p 424), where the particular example of children being killed when left alone in a house which catches fire is quoted in paragraph 13, from the decision in CA 26/1979, as an apposite example of a situation with an apparently small risk which nevertheless may have castastrophic consequences—an example which was again cited as showing the correct approach in the decision of a Tribunal of Commissioners in R(A) 1/83 at paragraph 5.

24. There may be force in Mr. Drabble's criticism of the sentence underlined in the quotation from paragraph 5.12.4 of the Board's Guide but what we have to consider is whether the approach of the Board to the question of the remoteness of the risk of substantial danger as demonstrated in the decision under appeal is correct. We have come to the conclusion that the Board have erred in law in dealing with the question of the remoteness of the risk of death or serious injury to the claimant as a result of a nocturnal fit. Having read repeatedly their decision and in particular paragraphs 7.3, 7.4 and 7.5 we find their assessment of whatever degree of risk *is* accepted as arising to be unclear. More particularly, the findings on the risk of death from a fit and especially the statement that "Recent medical studies and research indicate that death in bed at night is normally due to the unexplained development of pulmonary oedema" would seem, at best, to justify a conclusion that death arising otherwise is unlikely. In our judgment, however, it is not sufficient to treat a risk as too remote merely because the event in question is unlikely to occur. The possible seriousness of the consequences of even a very unlikely event if it should occur—as in the example of the children in the burning house—must also

be considered. Death is obviously the most serious consequence that might attend a nocturnal fit. The proposition that avoidable death is an unlikely consequence of a nocturnal fit is in our view insufficient to justify a conclusion that the risk is so remote that it can reasonably be disregarded. To sum up, we consider that the Board's findings on the risk of death or of serious injury occurring in bed are inadequate to support their conclusion that the risk of avoidable death or serious injury so occurring to the claimant as a result of a nocturnal fit is so remote that it does not need to be taken into account at all. Whether that is a conclusion which the Board might properly have reached we do not know and is not for us to say: however, they will have the opportunity to consider this matter yet again. On this topic we would only add two matters for the Board's future consideration; firstly, where the Board have held that measures could be taken to reduce the risk, they should consider the degree of residual risk which would necessarily remain; and secondly, and this may be a related point, in our view the questions of death and serious injury cannot wholly be disposed of in watertight compartments, as the Board appear to have done in their decision.

25. The Board's treatment in paragraph 7.11 of the possibility of danger to the claimant arising during a period of confusion following a nocturnal fit, which as they note in paragraph 7.5 was a matter stressed by the consultant Dr C., has caused us some concern. We consider that to the extent that the Board have relied upon the absence of evidence of past injury to the claimant in these circumstances at night their reasoning is open to the criticism that the claimant has not been left alone in the house and has been under the supervision of her husband. We were referred to, and we approve, the observation of the former Chief Commissioner, at paragraph 15 of R(A) 1/73 when he said—

> "I think ... there is a danger of not starting the enquiry [as to the need for continual supervision] at an early enough point. If one starts with the fact that the disabled person is living with relatives who are looking after him, and then asks oneself to what extent he requires supervision, that is beginning at the wrong point. It might indeed be helpful to ask also whether without substantial danger the disabled person could be by himself in a house at any rate for periods long enough to make any supervision that there was not continual."

26. The final point taken by Mr. Drabble concerned paragraph 7.8 of the Board's decision in which they considered the possibility of the risk of a fit occurring by night when the claimant was out of bed for a purpose such as going to the toilet, or answering the phone or the front door. The Board suggested the use of a suitably arranged commode and considered that any risk could otherwise be avoided or reduced by the claimant not getting out of bed for the other reasons they mentioned. Mr. Drabble maintained that if the only way in which a person can avoid risk of injury is to remain permanently in bed, then that must mean that the test which has been used ignores the realities of everyday life and renders the decision perverse. We are not satisfied that would be an inevitable implication of the Board's approach in this case, but we nevertheless feel that the paragraph in question merits reconsideration.

27. As the Board point out in paragraph 8 of their decision, this claim has been considered by the full Board on three occasions. We regret that it will be necessary for them to consider it yet again, but we see no alternative. We trust, however, that the matter can now be finally resolved, particularly as the claim was made nearly six years ago.

28. The claimant's appeal is allowed.

Commissioner's File No: CA 139/88

(Signed) J. G. Mitchell
Commissioner

(Signed) R. F. M. Heggs
Commissioner

(Signed) M. H. Johnson
Commissioner