IN THE UPPER TRIBUNAL **Case No.** JR/99/2018
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Applicant, the Criminal Injuries Compensation Authority, was represented by Mr Robert Moretto of counsel, instructed by Mr David Paton, the Authority's Head of Legal and Policy.

The Respondent, the First-tier Tribunal, neither appeared nor was represented.

The Interested Party, the claimant, was represented by Mr Benjamin Tankel of counsel, instructed by Irwin Mitchell, Leeds.

Decision: Time for applying for permission to apply for judicial review is extended and the application is admitted.

Permission to apply for judicial review is granted.

The decision of the First-tier Tribunal dated 14 August 2017 is quashed and the case is remitted to be reconsidered by a differently-constituted panel of the First-tier Tribunal.

REASONS FOR DECISION

The facts

1. The underlying facts of this case are largely, but not entirely, uncontroversial.

2. The Interested Party, the claimant, was assaulted on 10 June 2012, as a result of which her jaw was dislocated. She was seen at hospital in the Accident and Emergency Department that day and required manipulation of the dislocation. She was also seen at the Maxillofacial Trauma Clinic four days letter.

2. Her medical records show that she had attended her general practitioner on 12 May 2008 complaining of persistent upper jaw pain following an assault and had been referred for an x-ray but there is no further reference to that injury in the medical records and that evidence does not appear anyway to have been before the First-tier Tribunal. On 29 August 2011, she had attended the Accident and Emergency Department complaining of an injury to the right side of her face following an assault. It was recorded that she had contusions to her face and dislocation to the "mouth/jaw/teeth" but she was discharged without treatment following investigation with x-rays. She again attended the Accident and Emergency Department on 10 September 2011 with a complaint of dislocation of her jaw and for a follow up on 12 September 2011, following which she was referred for physiotherapy.

3. On 21 February 2013, she attended the Accident and Emergency Department for a third time, complaining of an assault causing injuries to her face and hand. She was diagnosed as having a dislocation of her jaw and required manipulation under

general anaesthetic. She had continuing problems with dislocations, which required significant interventions, and on 12 September 2013 was admitted for a reduction of a dislocated mandible and fixation. Very unfortunately, she appears to have suffered a severe anaphylactic reaction to an anaesthetic agent as a result of which she suffered a hypoxic brain injury and has since been very severely disabled to the extent that she requires constant care and also lacks capacity so that her mother has at all times been acting on her behalf in connection with this case.

4. On 1 May 2014, the Applicant, the Criminal Injuries Compensation Authority, received from solicitors acting for the claimant a claim for compensation on the basis that the assault on 10 June 2012 had caused a fractured jaw and the brain injury. That claim was rejected on 10 March 2015 and again, on review, on 5 January 2017 on the ground that the jaw had been dislocated rather than fractured and the dislocation had not caused "continuing significant disability", as required by the relevant entry in Annex E to the Scheme, and that the brain injury could not be attributed to the assault of 10 June 2017 because it arose out of treatment following the 2013 injury which was, in the Authority's view, not connected to the earlier injury. In both decisions, reference was made to paragraph 32 of the Criminal Injuries Compensation Scheme 2012 which provides –

> "32. A person is eligible for an injury payment under this Scheme if:
> (a) their criminal injury is described in the tariff at Annex E; or
> (b) in any case falling within paragraph 36 (acceleration of [sic] exacerbation of an existing condition), their injury is described in that tariff and the value of the acceleration or exacerbation is at least £1,000."

Sub-paragraph (a) might be regarded as somewhat tautologous, since "criminal injury" is defined in Annex A as "an injury which appears in Part A or B of the tariff in Annex E".

5. The claimant appealed and her solicitors obtained a report from Mr J L Russell FDS FRCS, a consultant in oral and maxillofacial surgery. He reviewed the claimant's medical records. He does not mention the 2008 attendance at her general practitioner's surgery. His reading of the hospital records was that it was not clear whether her jaw was truly dislocated on 29 August 2011 and that the injury was not then felt to be significant but that in September 2011 there was an injury to the left side of the jaw. However, the lack of further entries suggested to him that the jaw joint symptoms then settled.

6. Turning to the injury on 10 June 2012, he said that there was no doubt that the claimant had suffered a true dislocation of her left jaw joint. He explained that such a dislocation causes damage to the retrodiscal tissue and possibly the joint capsule and, even if the tissue or capsule has had an opportunity to heal, subsequent dislocations may be more likely because the damaged tissue heals by scarring and scar tissue will never be as strong as the original attachment. Given that there was no recurrence of dislocation until the incident of 21 February 2013, he considered it likely that the injury on 10 June 2012 was less significant than that on 21 February 2013

> "7.4 … I would estimate that 75% of the damage occurred at the time of the second incident. This is because although the tissues may have been weakened by

> the incidents in 2011 and 2012, it was not until after the incident in 2013 that [the claimant] began to have recurrent dislocations."

He considered that the injury of 10 June 2012 had largely resolved by the time of the injury of 21 February 2013. Nonetheless, the former injury made it more likely than not that the application of similar force on the latter occasion would have resulted in a greater amount of injury.

7. On that basis, he concluded –

> "8.4 The assault of June 2012 materially contributed to the need for a further procedure in September 2013 and to the claimant's subsequent dislocation in February 2013.
>
> 8.5 On the balance of probabilities if a similar force were applied but for the incident of 12th (sic) June 2012, dislocation would not have occurred during the third incident in February 2013.
>
> 8.6 It was not until the incident on the 12th (sic) June 2012 occurred that [the claimant] began to have problems with repeated dislocations. Based on these findings I would apportion 25% of the damage to injury arising from the incident on the 10th June 2012, with 75% of the damage occurring in relation to the incident that is recorded in the notes as having occurred on the 21st February 2013. Nevertheless as set out in paragraph 8.5 above, on the balance of probabilities, if a similar degree of force was applied to [the claimant's] jaw on 21st February 2013, had she not been assaulted and suffered a dislocation on the 10th Jun 2012, she would not have endured a subsequent dislocation on the 21st February 2013."

8. The claimant's mother made a witness statement, explaining the background to the incident on 10 June 2012 and also saying that the claimant had not told her of any dislocation before then but that she had had continual problems with pain in her jaw after it. She had not known anything about any assault in February 2013. She said –

> "13. … [The claimant] did not mention anything about this to me, which I think is strange as she mentioned the previous assault to me. I would have expected that she would have mentioned this one to me as well.
>
> 14. As far as I am aware, [the claimant] reported the incident in June 2012 to the police and I think she called them quite quickly. I don't think the police found the person who has assaulted her. If she had been assaulted again, I think she would have reported it to the police again, I can't see why she wouldn't have done."

9. The claimant's claim form had identified both "Fractured Jaw Bone(s)" and "Brain Damage" as the injuries that she had suffered. The Authority's "Hearing Summary" identified only "Brain-injury" as the injury in issue and it identified as the "Issues to be decided by the panel" –

> "Under Paragraph 32 of the Scheme 'A person is eligible for an injury payment under this Scheme if their criminal injury is described in the tariff at Annex E'. The appellant believes medical treatment, which was received due to the injury received during the assault, resulted in the brain injury."

10. The First-tier Tribunal allowed the appeal, by a majority, the medically-qualified member of the panel dissenting. On its decision notice, it recorded the following decision –

> "A. The appeal against the Respondent's review decision is allowed under the following paragraphs of the Scheme: 32.
>
> B. Pursuant to the decision of the Upper Tribunal in *R(SB) v First-tier Tribunal and CICA* [2014] UKUT 497 (AAC) the issues arising in this appeal have been dealt with and the appeal is at an end. The file is returned to the Criminal Injuries Compensation Authority for implementation and further decision."

In its summary reasons on the decision notice, it said –

> "2. The tribunal consider that the appellant is entitled to an award of compensation as they have suffered an injury described at Annex E to the 2012 Scheme."

In its full statement of reasons, it said that the majority "feel compelled" to adopt Mr Russell's assessment that the incident in June 2012 amounted to a 25% contributor to the injuries that the appellant suffered with in respect of her jaw and it then said that, in the light of *R. v Criminal Injuries Compensation Board, ex parte Ince* [1973] 3 All ER 808 and *R.(BD) v First-tier Tribunal (CIC)* [2016] UKUT 352 (AAC), the question arose as to whether or not it was a 'significant or substantial' cause. It decided that it was –

> "36. The Tribunal's view, upon balance, is that 25% represents a substantial (or at the very least significant) element of contribution to the injuries which the appellant suffered. It is something which is "more than negligible' upon this assessment. …"

Its statement of reasons was issued to the parties by email on 28 November 2017.

11. The Authority submitted a claim for judicial review on 3 January 2018, arguing that the First-tier Tribunal had (a) misinterpreted the Criminal Injuries Compensation Scheme 2012, had (b) either erred in its approach to Mr Russell's report or had failed to give adequate reasons for relying on it and had (c) failed to give reasons for the dissent. The application was late, as the time limit was one month from the date that the statement of reasons was issued, but the Authority explained that the error arose because the statement of reasons was forwarded to its legal department, by the part of the Authority to whom it had been sent, only on 4 December and the legal department had initially thought that that was when the statement of reason had been issued by the First-tier Tribunal.

12. I directed a "rolled-up" hearing at which all issues could be considered. I am grateful to both counsel for their helpful submissions.

Extending time and giving permission

13. The Authority argues that the delay was minimal – only two working days in Scotland, where the authority is based, or three in England and Wales, it has caused no detriment to the other parties or to the Upper Tribunal's ability to consider the

application, it was due to an honest error and the error was rectified on the day that it was appreciated. It is further submitted that the grounds raise important issues and have merit and that there is a substantial amount of money at stake. (I accept the claimant's submission that there has never been any doubt that the scope of the claim for compensation included the brain injury and its consequences.) The claimant resists the application for an extension of time on the ground that a claim must be made promptly and that one month is "a long-stop period", that there are no special rules for public authorities and that the importance of the points of law raised is relevant but not determinative and that there was no good reason for the delay.

14. Although it is true to that the basic time limit for applying for judicial review refers to promptness, criminal injuries compensation cases are not usually so urgent that the Upper Tribunal would regard an application as late if it were made within the three months mentioned in rule 28(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) or, in a case where there was no delay in applying for a statement of reasons (which was not the position in *R.(Criminal Injuries Compensation Authority) v First-tier Tribunal (CIC)* [2015] UKUT 299 (AAC)), within the further period of one month allowed by rule 28(3). I therefore accept, on one hand, that the delay was minimal in this case and that it has not caused prejudice but, on the other hand, that there was no good cause for it even though it was due to an honest error. I also accept that there is no special rule for public authorities, but it seems to me that the issue here is one of proportionality and I would decide this case the same way whichever party was at fault. Since the delay was short and due to an honest error and there is a lot of money at stake, it would be disproportionate not to extend time if the grounds for applying for judicial review are arguable.

15. In my view, at least the first ground for applying for judicial review is arguable, for reasons that will appear below. Moreover, the other grounds merit consideration if permission is being given on the first ground.

16. Accordingly, I extend time for making this application for permission to apply for judicial review and I admit the application and give permission without limiting the grounds.

Causation

17. Paragraph 4 of the Criminal Injuries Compensation Scheme 2012 provides –

> "4. A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place."

It is not in issue that the claimant was a "direct" victim of a crime of violence on 10 June 2012. What has been put in issue on this application for judicial review is whether the further injury to her jaw that she suffered on 21 February 2013 and the brain injury that she suffered on 12 September 2013 were "directly" attributable to her having been such a victim. It is submitted by the Authority that the First-tier Tribunal erred in finding that those injuries were directly attributable to the claimant having been the direct victim of a crime committed on 10 June 2012 merely because that incident was a more than negligible cause of those injuries. The claimant, on

the other hand, submits that, in the light of the authorities to which it referred, the First-tier Tribunal reached a conclusion that it was entitled to reach on the evidence before it and for which it has given adequate reasons.

18. In *ex parte Ince*, the claimant was the widow of a policemen killed when the police car he was driving to the scene of an alleged burglary collided with another police car doing the same thing. The deceased had driven through a red traffic light when it was not safe to do so. In fact, there was no burglary or attempted burglary. The issue was whether his death was "directly attributable … to an arrest or attempted arrest of an offender or suspected offender or to the prevention or attempted prevention of an offence …" for the purposes of a predecessor of what is now paragraph 5 of the 2012 Scheme. The Criminal Injuries Compensation Board argued that there had to be an actual arrest or actual attempted arrest or the actual prevention or actual attempted prevention of an offence that was actually imminent and in fact about to take place. The Court of Appeal rejected that argument and, more importantly for present purposes, gave some general guidance on a number of matters including the meaning of "directly attributable". Lord Denning MR said –

> "In my opinion 'directly attributable' does not mean 'solely attributable'. It means directly attributable, in whole or in part, to the state of affairs as PC Ince assumed them to be. If the death of P C Ince was directly attributable to his answering the call for help, it does not cease to be so attributable because he was negligent or foolish in crossing the lights. In such case there were two causes: (i) the call for help; (ii) his negligence, or foolishness. His widow can rely on the first, even though the second exists."

Megaw LJ said –

> "In my judgment, personal injury is directly attributable to any of the matters (crime of violence, arrest of an offender, attempted prevention of an offence, or any of the other matters set out in para 5 of the scheme), if such matter is, on the basis of all the relevant facts, a substantial cause of personal injury. It does not need to be the sole cause. By the word 'substantial' I mean that the relationship between the particular cause and the personal injury is such that a reasonable person, applying his common sense, would fairly and seriously regard it as being a cause."

Scarman LJ agreed with both judgments.

19. In *BD*, the claimant suffered from a psychiatric illness that had several causes but which he claimed was directly attributable to a crime of violence for the purposes of the Criminal Injuries Compensation Scheme 2008. The First-tier Tribunal rejected the claim because the claimant had been awarded £1,500 in respect of a physical injury attributable to the crime and it considered that, at most, only 10% of the mental illness was attributable to that incident. It considered that the tariff award for the mental illness as a whole would have been £13,500 and 10% of that would have been less than the £1,500 already awarded. Note 5 to the tariff of that Scheme provided that, where a person suffered both a physical injury and a mental injury and the tariff amount for the physical injury was higher than the tariff amount for the mental injury, the claimant would be entitled only to the tariff amount for the physical injury. Upper Tribunal Judge Turnbull held that there was no provision in the Scheme for apportioning tariff amounts in the way that the First-tier Tribunal had

done but he also rejected the Authority's argument that the First-tier Tribunal had in substance found that the crime was not a substantial or significant cause of the mental illness so that the illness was not directly attributable to the crime. He concluded that the First-tier Tribunal had not addressed that issue because it had not thought it necessary to do so.

20. In my judgment, those cases throw only limited light on the meaning of "directly" because, while they are authority for the point that there may be more than one direct cause of an injury, they do not explain how one decides whether a cause is direct or indirect. Nor does *R. v Criminal Injuries Compensation Board, ex parte Parsons* (19 November 1982, unreported), where Cumming-Bruce LJ pointed out that "that adverb must have been selected and used by the draftsman in order that there should be some restrictive limitation on the causation contemplated by the word 'attributable'" but, in the light of *ex parte Ince*, said "I do not think I can analyse matters further than by asking on these facts: was the crime such a substantial cause, fairly considered, of the injuries as to come within the meaning of the words 'directly attributable'?"

21. The issue was addressed more directly by Dyson J in *R. v Criminal Injuries Compensation Board, ex parte K* [1998] 1 W.L.R. 1458, where the applicants claimed compensation in respect of reactive depression cause by the revelation that their daughter had been the victim of serious sexual assaults by the father of one of them. Under the scheme then in force, the issue was, as in this case, whether they had suffered injuries directly attributable to a crime of violence. Having considered whether they would have had a cause of action at common law against the grandfather and decided that they would not, he also decided that their illness was not directly attributable to the crimes against their daughter.

> "I do not think that it is possible or wise to seek to provide a detailed definition of direct attributability. Generations of judges have avoided defining causation, seeking refuge in common sense and the concept of fact and degree. …
>
> I accept Mr Knowles' submission that proximity is relevant to the question whether the injury is directly, as opposed to indirectly, attributable to the crime. The closer in time and place the secondary victim is to the commission of the crime of violence, the more likely it is that any personal injury suffered by him or her as a result of being told about the crime will be directly attributable to it. I cannot agree with Mr Dineen's submission that a finding of direct attributability must be made, no matter how many links there are in the chain of causation, unless one of those links is an unusual event. If an event is unusual, it is likely that it will break the chain altogether. In my view, that approach does not take proper account of the direct/indirect divide."

It may be noted that paragraph 6 of the 2012 Scheme makes specific provision for secondary victims and requires that an injury to a secondary victim be "directly attributable to being present at and witnessing an incident, or the immediate aftermath of an incident, as a result of which a loved one sustained a criminal injury" and so the issue that arose in *ex parte K* would not arise now in the same way. However, that case follows *ex parte Parsons* in holding that a distinction must be drawn between direct causes and those that are only indirect and it is itself authority for the proposition that proximity is a relevant consideration when drawing that distinction.

22. I am inclined to accept the claimant's argument that the First-tier Tribunal did not err in quite the way suggested by the Authority and that it was entitled to find that the crime committed on 10 June 2012 was a substantial or significant cause of both the injury to her jaw and the brain injury. In its context, where the evidence that it accepted suggested that the crime had caused 25% of the damage to the claimant's jaw that then necessitated surgery, the First-tier Tribunal's reference to "substantial or significant" meaning "more than negligible" was not a misdirection.

23. However, it did not separately address the question whether that crime was a direct cause of either or both of those injuries. Nowhere in its statement of reasons did it refer to paragraph 4 of the Scheme – although I accept that, as a specialist tribunal, it may have had that familiar provision in the back of its mind – and nowhere, except in paragraph 18 where it was considering *BD*, did it use the word "directly". That may be because the Authority referred only to paragraph 32 of the Scheme in its decisions and in its Hearing Summary and it did not address the question whether the crime could have been a direct cause of either injury because it did not accept that it was a cause at all. Paragraph 32 is not concerned with causation. Insofar as its decisions were based on a lack of causation, the Authority should have referred to paragraph 4 and then the significance of the word "directly" might perhaps have been less likely to have been overlooked. Paragraphs 4 to 9 are concerned with the basic condition for eligibility for any award under the Scheme. Paragraphs 32 to 41 are concerned more specifically with injury payments, as opposed to the other types of payment listed in paragraph 30, and so one does not get to paragraph 32 unless the conditions of one of paragraphs 4 to 6 are satisfied. The cases to which the First-tier Tribunal referred, *ex parte Ince* and *BD*, were concerned only with the question whether there could be more than one direct cause of an injury. *Ex parte Parsons* and *ex parte K* show that that is not necessarily the end of the inquiry. In both *ex parte Ince* and *BD*, the relevant incident was not more remote than the other causes. Here, arguably, it was and the question whether the relevant crime *directly* caused either of the claimed injuries had to be addressed.

24. It might be argued that, since the issue had not previously been addressed by the Authority, the First-tier Tribunal could have left it undecided. However, I consider that the better approach is that, given the terms of paragraphs 4 to 6 of the Scheme, the issue of causation in this Scheme necessarily raises the question whether the relevant incident was a *direct* cause of the incident, rather than an indirect cause, so that, notwithstanding the case of *SB* to which the First-tier Tribunal referred, the First-tier Tribunal was not only entitled to address that question but was bound to do so. In any event, in holding that the claimant was entitled to an award, it implicitly decided the issue in favour of the claimant without giving any reasons save insofar as it may have thought, wrongly, that the fact that the crime was a substantial or significant cause was sufficient by itself to show that it was a direct cause. I am therefore satisfied that it erred in law.

Expert evidence

25. The Authority argued that the First-tier Tribunal misdirected itself when it said that it was "compelled" to accept the expert evidence of Mr Russell. I do not understand the claimant to dispute the Authority's argument that there is no legal

presumption that an expert's report must be accepted merely because there is no opposing expert's report and that a judge or tribunal must consider the report in the light of such other evidence as there may be and the quality of the reasoning in the report. See the decisions of the Court of Appeal in *Re B (Care: Expert Witness)* [1996] 1 FLR 667 and *Dover District Council v Sherred and Tarling* (1997) 29 HLR 864. Moreover, a tribunal that includes a member with relevant expertise may be less inhibited in disagreeing with an expert witness although, if minded to rely on its own expertise, the First-tier Tribunal must ensure that the parties have an opportunity to deal with any new point (see *Evans v Secretary of State for Social Security* (reported as R(I) 5/94) and *Butterfield v Secretary of State for Defence* [2002] EWHC 2247 (Admin)). However, the claimant argues that the First-tier Tribunal did not err in the manner suggested.

26. I am not convinced that the First-tier Tribunal misdirected itself in the sense of considering that it was bound, as a matter of law, to accept Mr Russell's report rather than merely considering the report to be the compelling evidence in the absence of any other medical evidence. However, that raises the question whether the First-tier Tribunal gave any reason, or any adequate reason, for accepting the opinion expressed in the report and for considering it to be determinative of the case.

27. To the extent that a tribunal's reasons must address the contentions of the losing party, it is obviously necessary to know what those contentions were if the adequacy of the reasons is challenged. It is therefore unfortunate that the Authority did not make any written submission to the First-tier Tribunal following receipt of the report – or indeed at any time, since it appears that it considered provision of its earlier decisions as sufficient compliance with rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) – and it is also unfortunate that I do not have before me any note of the submissions made at the oral hearing before the First-tier Tribunal. However, it is obvious that the Authority did not accept that Mr Russell's opinion was determinative and it is now asserted by the Authority that it was argued before the First-tier Tribunal that Mr Russell's report proceeded on the basis that the force used in the February 2013 incident was equivalent to the force used in the June 2012 incident when there was no evidence to justify that assumption. It is also submitted that there are inconsistencies in Mr Russell's reasoning and an error in paragraph 8.6, where he said that the claimant suffered recurrent dislocations following the June 2012 incident, rather than the February 2013 incident.

28. Since I am satisfied that the First-tier Tribunal erred in not addressing the question whether the 2012 incident was a direct cause of either of the claimant's injuries and since Mr Russell understandably did not directly address that question either, it is not really necessary for me to reach a firm conclusion on this ground of appeal and therefore I need not analyse the parties' submissions in great detail. However, I incline to the view that whether or not there was an error in the first sentence of paragraph 8.6 is unimportant because it is obvious that Mr Russell was well aware of the fact that there had been no recurrence of dislocations between June 2012 and February 2013 and so it does not matter whether he deliberately referred to the June incident because it caused the first dislocation, even though the next dislocation was in February 2013, or whether he meant to refer to the February 2013 incident. As to inconsistencies, I think there may be more than one way of

reading some parts of Mr Russell's report but the general thrust of it seems to me to be that the June 2012 incident probably produced a weakness, even though he understood (possibly contrary to the claimant's mother's evidence) that the symptoms had largely resolved, so that the February 2013 injury would not have been as serious had the June 2012 incident not occurred. On that basis, whether the force used in February 2013 was greater or less or the same as that used in June 2012 seems immaterial to the question whether the June 2012 injury was a cause of the February 2013 injury and that may be the answer to the submission that the Authority says was advanced on its behalf before the First-tier Tribunal. The proportion of the damage attributed to each of the two relevant incidents appears to have been based on the relative seriousness of the dislocations of the jaw following each incident. Acceptance of an expert's report generally implies acceptance of the reasoning within it and that may sometimes be sufficient to explain the rejection of challenges to the report. However, it would undoubtedly have been better had the First-tier Tribunal recorded clearly the Authority's argument and answered it expressly, especially as there is some room for debate about what exactly Mr Russell was saying in his report.

29. Moreover, on the question whether the June 2012 incident was a direct cause of the injuries following the February 2013 incident, it might have been relevant, given the period of time that elapsed between the two incidents, to consider whether there would have been a dislocation following the latter incident if the former incident had not occurred. Mr Russell clearly stated that there would not. That is not, I think, necessarily inconsistent with the rest of his report – "similar force" in paragraph 8.5 may mean similar to the force used in February 2013 rather than in June 2012 and it is not impossible that force less than would have caused a dislocation had the earlier incident not occurred would, in consequence of the earlier injury, have caused more damage than the earlier incident – but the finding is not fully explained although it might perhaps be presumed to have been based on the nature of the injuries caused by the two incidents. In any event, the First-tier Tribunal did not address the issue of the directness of the cause, which is the basic reason why I accept that it erred in law.

Reasons for dissent

30. The Authority relies on *Secretary of State for Work and Pensions v SS (DLA)* [2010] UKUT 384 (AAC); [2011] AACR 24 for the proposition that the First-tier Tribunal erred in law in not recording the reasons for the medically-qualified panel member's dissent. However, in *JD v Secretary of State for Defence (WP)* [2014] UKUT 379 (AAC), I expressed some doubt about that decision. The point may be relatively academic. If the reasoning of the majority is otherwise impeccable, it is difficult to see why failing to provide reasons for a dissent should make the decision materially wrong in law. On the other hand, where the adequacy of reasoning is debatable, which implies that disagreement might not have been unreasonable, a failure to indicate the grounds of dissent may amount to a failure to explain why the majority disagreed with the dissentient and therefore a failure to address a material issue in the case and that may tip the balance in favour of quashing the decision. This is particularly likely to be so where, as here, there is an argument before the First-tier Tribunal as to the significance of a medical report and it is the medically-qualified panel member who dissents.

31. In the end, therefore, I do not consider that this ground adds anything to the general challenge to the adequacy of the First-tier Tribunal's reasoning on the question whether the injuries incurred by the claimant in 2013 were directly attributable to a crime of violence.

Relief

32. Having found there to have been an error of law because the First-tier Tribunal failed to consider whether the crime of 10 June 2012 was a direct cause, as opposed to an indirect cause, of the injuries suffered by the claimant in 2013, it is appropriate to quash the First-tier Tribunal's decision unless the error was immaterial. If I quash the decision, I must remit the case to the First-tier Tribunal unless, "without the error, there would have been only one decision that the … tribunal could have reached" (see section 17(2)(c) of the Tribunals, Courts and Enforcement Act 2007), in which case I may substitute a decision to that effect.

33. The Authority has not argued that there is only one decision that the First-tier Tribunal could have given in this case. The claimant, on the other hand, has argued that any error is immaterial. Both parties seem to me to have focused more on the arguments about Mr Russell's expert report rather than on the important question whether the claimant's injuries incurred in 2013 incident were directly attributable to a crime of violence. I do not accept that failing to consider the question of direct attributability was immaterial because I am not persuaded that, even if the First-tier Tribunal was right to find that the injuries were attributable to the crime of violence committed on 10 June 2012, the evidence leads inexorably to a finding that they were directly attributable to that crime Given that this issue was at the forefront of the Authority's case, I have found it slightly surprising that it has not advanced any argument as to how the issue is to be approached in the circumstances of this case and either argued that there is only one answer that could be given or at least indicated what findings need to be made by the First-tier Tribunal on the issue of direct attributability rather than indirect attributability. The claimant could not reasonably be expected to respond to an argument that had not been put. I do not consider it appropriate to try to give any detailed guidance on this issue in the absence of argument from either party.

34. In these circumstances, I quash the First-tier Tribunal's decision and remit the case to the First-tier Tribunal.

35. It will be for the First-tier Tribunal to interpret Mr Russell's report and any other evidence and to decide to what extent it accepts his opinions. Nothing that I have said as to my understanding of the report should be regarded as binding.

36. There are a number of issues that must be considered. There is, it seems to me, first the question whether the claimant was a victim of a crime of violence on 21 February 2013 as well as on 10 June 2012. The claimant (through her mother) may deliberately not have made a claim on that basis because she had not been told about an assault on 21 February 2013, but it appears that the clamant herself complained of an assault when she attended the hospital on that date and Mr Russell proceeded on the basis that she had suffered a blow consistent with an

assault then. That issue is obviously quite important when it comes to considering whether the injuries incurred in 2013 were directly attributable to a crime of violence. If she did not suffer a crime of violence on 21 February 2013, the relationship (if any) between the injury incurred on 10 June 2012 and that incurred on 21 February 2013 needs to be considered and it needs to be decided whether the later injury was not only attributable, but also directly attributable, to the earlier one. In that regard, the First-tier Tribunal will have to consider the evidence of the claimant's mother as to the symptoms that the claimant suffered between the incidents as well as Mr Russell's evidence. (It appears to be accepted by the claimant that the symptoms did not demonstrate a "continuing significant disability" so as to justify an award in respect of the first dislocation that was solely attributable to the assault on 10 June 2012.) Whether or not the claimant suffered a crime of violence on 21 February 2013, there may also be a question as to whether the brain injury incurred on 12 September 2013 is directly attributable to a crime of violence, although the Authority did argue before me that it would not be if the jaw injury incurred on 21 February 2013 was itself directly attributable to a crime of violence.

37. I leave to the First-tier Tribunal the question whether the claimant and the Authority should be directed to make their positions clear in written submissions before the hearing of the remitted case.

Mark Rowland
15 January 2019