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Editor's notes

This edition of *VeRBosity* contains reports on all Federal Court decisions relating to veterans' matters handed down in the four month period from 1 September 1994 to 31 December 1994. During that period, the Court handed down five decisions on matters which were previously heard by the Board. The cases of *Cruise, Gleeson, Owens* and *Nation* each involved consideration by the Court of whether the Tribunal had correctly applied the "reasonable hypothesis" standard of proof provisions in section 120 of the *Veterans' Entitlements Act 1986*. *Nation's* case also dealt with the extent of the Tribunal's powers when it is hearing and determining a matter remitted to it by the Court for further hearing. *Jackson's* case was concerned with the extent of backdating of pension which is permissible under transitional provisions, following the repeal of the *Repatriation Act 1920*.

This edition also includes reports on selected Board and Tribunal decisions handed down in the same period.

Robert Kennedy
Editor

Selected Decisions of the Veterans' Review Board

Entitlement - hypertension - stress - diabetes mellitus - protein malnourishment - cassava

W94/0018

Kiernan, Peters & Hudson

27 September 1994

The veteran appealed to the Board for review of a decision which determined that hypertension and diabetes mellitus were not war-caused.

The veteran served in the Australian Army from 29 April 1941 to 18 October 1944. During this period he served in the South West Pacific Area and that service constitutes eligible war service including operational service as defined in the *VE Act*.

Diabetes

The advocate put forward the contention that the veteran's diabetes mellitus was attributable to his war service due to protein malnourishment and consumption of cassava while operating with 2/2 Independent Company in Timor in 1942.

The Board had before it a report from Professor Zimmet, Executive Director, International Diabetes Institute, in response to a letter from Dr Horsley, Medical Services Adviser to the Department of Veterans' Affairs. Dr Horsley's questions and the answers provided by Professor Zimmet were as follows:

"(Q) What evidence is there that cassava consumption results in an increased risk of diabetes mellitus?

(A) There is some circumstantial evidence that cassava consumption results in an increased risk of diabetes. It is possible to produce diabetes in animal models with cassava.

(Q) What evidence is there that malnourishment results in an increased incidence of diabetes mellitus?

(A) Malnutrition related diabetes is considered as one of the three major categories of diabetes. It occurs predominantly in tropical countries and protein calorie malnutrition, particularly in childhood, is suggested as a possible cause. However, even in tropical countries it probably accounts for only a very small proportion of cases.

(Q) What form of diabetes is postulated to be related?

(A) Malnutrition related diabetes."

The Board noted the report and was satisfied that there was sufficient material to allow it to make an appropriate decision in respect of diabetes mellitus.

Hypertension

In regard to the veteran's hypertension, it was contended that this had developed as a result of stressful situations experienced during war service. The veteran had an elevated blood pressure reading of 150/90 in 1948. The Board had before it a report from Dr McKechnie, Consultant Physician, which stated in part:

"The hypertension has apparently been present since 1948 and clinical signs are consistent with this history. While there are many causes of

hypertension, it was recognised by Selye (1945 on) that stress factors could result in what he called the Adaptation Syndrome of which hypertension was a feature. It is not known if hypertension was present during war service or on the veteran's discharge. In my opinion it is possible that his particularly stressful time in East Timor could have contributed to the genesis of the condition."

The veteran stated that his hypertension was first noted in 1948, but that he was not given medication. However, he continued to have his blood pressure checked by his local doctor approximately once per month thereafter. His blood pressure was continuously above normal levels.

Board's conclusions

The Board considered that the expert medical reports before it were sufficient to raise reasonable hypotheses in terms of the interpretation of that requirement of the Act by the High Court in cases of *Bushell* and *Byrnes*. It remained for the Board to consider whether the facts supported those hypotheses as required by section 120(1) of the Act.

The Board found the factual basis for the hypotheses by noting the well documented history of the 2/2 Independent Company during the period of its operations behind enemy lines on Timor during 1942. During that period, it is well documented that the unit was required to live off the land. These circumstances resulted in inadequate diet, continual physical and psychological stress, and recurrent illnesses. Part of the means by which the unit maintained itself was by eating native foods including cassava, a staple diet on the island.

The Board noted that the circumstances were exceedingly stressful for all members of the unit and the results of that stress continued to be experienced by the veteran in the context of an accepted disability of post traumatic stress disorder. As noted by Dr McKechnie, stress has been recognised by many authorities as a factor in the development of hypertension.

Given this factual basis, the Board was not satisfied beyond reasonable doubt that there was no sufficient ground for determining that the veteran's hypertension and diabetes mellitus were war-caused.

Formal decision

The Board set aside the decision under review and substituted its decision that the veteran's hypertension and diabetes mellitus were war-caused.

Entitlement - atherosclerosis - smoking increase - psoriasis

V93/0998

Parker, Logan, Heazlewood

18 November 1994

The veteran appealed to the Board for review of a decision which determined that aortic atherosclerosis and psoriasis were not war-caused.

The veteran served in the Australian Army from 12 September 1966 to 11 September 1972. His periods of operational service were from 13 June 1967 to 26 April 1968 and from 1 May 1971 to 18 November 1971 in South Vietnam.

Atherosclerosis

It was submitted that there was a causal relationship between heavy smoking

and Vietnam service and the subsequent development of aortic atherosclerosis. The advocate put to the Board that the veteran's smoking habit increased during his service by some two-thirds and therefore his smoking habit should be accepted as war-caused.

The Board noted that the veteran was a smoker many years prior to his enlistment at the age of 31 years. During his service in Vietnam as an infantryman, his cigarette consumption rose to up to two packs a day. The veteran gave evidence of stress he suffered as a rifleman, particularly at the Battle of Suoi Chau Pha with 7RAR. The veteran later returned to Vietnam with 4RAR where he served as a barman. The veteran recalled that his company canteen was located within the company lines and he in fact slept inside the canteen and had much access to cigarettes and beer.

The Board summarised a report by Dr Morgan in regard to the veteran's smoking habit as follows:

> "2. As you point out it is common ground that smoking is a risk factor for atherosclerosis. There is a dose relationship between cigarette smoking and the development of atherosclerosis.
>
> 3. On the assumption that the pre-enlistment level of smoking would have continued to 1992 in the absence of operational service, a simple linear relationship can be used to estimate the relative contributions of the pre-enlistment habit and the increase associated with operational service.
>
> Pre-enlistment smoking habit = 10 per day for 35 years = 17.5 pack years
>
> Increase in smoking = (40-10) per day 25 years = 37.5 pack years
>
> Total smoking habit = 17.5 plus 37.5 pack years = 55 pack years
>
> Pre-enlistment contribution = (17.5/55)/100 = 32%
>
> Increased habit contribution = (37.5/55)/100 = 68%
>
> 4. On the basis of this calculation, in my opinion the pre-enlistment smoking habit made a contribution of approximately one third and the increase in smoking habit a contribution of two thirds to the total smoking-related risk."

The Board said:

> "The Board is of the opinion that this material raises a reasonable hypothesis of connection between a smoking habit and the veteran's condition of atherosclerosis within the meaning of subsection 120(3). Accordingly, the Board turned to the application of subsection 120(1) to determine whether it could accept sufficient of the facts as are necessary to support the raised hypothesis.
>
> Dr Morgan, in his report, has chosen to divide the contribution made by the non-war-caused smoking and the war-caused increase in smoking in a linear manner. However, the Board is of the opinion that such a calculation does not assist it in making its determination.
>
> The issue before the Board is whether the veteran had a war-caused smoking habit and the Board finds that the veteran had a pre-enlistment smoking habit which was not war-caused. The increased smoking on

> service and subsequent to service cannot be differentiated from the veteran's pre-enlistment smoking habit. The Board is of the view that the veteran's smoking habit was well entrenched prior to service and that therefore the habit was not war-caused."

On this basis, the Board decided that the veteran's aortic atherosclerosis was not war-caused.

Psoriasis

It was contended that the veteran's psoriasis was brought on by the stress partly precipitated by his war service in Vietnam. The veteran stated that he never had psoriasis before about the 1980s. He was being treated by Dr Brenan, a dermatologist.

The Board said:

> "The evidence now before the Board is that the veteran's psoriasis first arose in 1989. The Board has carefully studied Dr Brenan's report but can find no information to show that the veteran's psoriasis was linked to his service. At best, Dr Brenan states that in his opinion, psoriasis was aggravated by stress and in turn this stress may well have been caused by his war service in Vietnam. However, the doctor can offer no further information to assist the Board in its determinations. The only evidence the Board has before it indicated that the veteran's first onset of psoriasis was in 1989. The Board is of the view that the psoriasis occurring at that time is too far, in terms of time, from the veteran's service to be able to be reasonably linked to service."

Formal decision

The Board affirmed the decision under review that the two conditions were not war-caused.

Selected Decisions of the Administrative Appeals Tribunal

Entitlement - whether dependant of deceased veteran - remarried then divorced

Re J M Ross and Repatriation Commission
Handley

S94/43 09 Sep 1994

Mrs Ross applied for review of a decision that she was not the "dependant of a deceased veteran" within the meaning of section 13(8A) of the *VE Act*. Her first husband, a veteran, died in 1977 and she married Mr Ross later the same year. She was separated from Mr Ross and they were divorced in 1983. In 1992, she applied for a war widow's pension in relation to her first husband's death. Her claim was refused by the Repatriation Commission on the basis that she was not qualified to receive a widow's pension and that decision was affirmed on review by the Veterans' Review Board.

Legislation

Section 11 of the *VE Act* defines "*dependant*" as:

> "**11. 'dependant'**, in relation to a veteran (including a veteran who has died), means:
>
> (a) the partner; or
>
> (b) a non-illness separated spouse; or
>
> (c) a widow or widower (other than a widow or a widower who marries or re-marries); or
>
> (d) a child;
>
> of the veteran."

Section 13(8A) of the *VE Act* provides that:

> "**13.**(8A) Where a dependant of a deceased veteran (not being a child of the veteran) has re-married or married after the death of the veteran but on or before 28 May 1984:
>
> (a) the Commonwealth is not liable to pay a pension to the dependant under this section unless the decision by the Commission, the Board or the Administrative Appeals Tribunal, as the case may be, to grant the pension was made before the commencement of section 7 of the *Veterans' Affairs Legislation Amendment Act 1988*; and
>
> (b) a decision granting a pension to the dependant under this section made after the commencement referred to in paragraph (a) by the Commission, the Board or the Administrative Appeals Tribunal (including a decision granting such a pension as from a date before that commencement) is void and of no effect."

Submissions

Mrs Ross told the Tribunal that her second husband was a homosexual and that there was a marriage in law only and not in fact. She said that she was not aware of his status at the time of the marriage. She had approached a solicitor to apply for an annulment of the marriage but, in the meantime, Mr Ross sought and was granted a divorce by the Family Court.

She argued that as she did not regard her marriage to Mr Ross as a proper "marriage", the Tribunal should deem

that she had not "remarried or married after the death of the veteran" for the purposes of section 13(8A).

Tribunal's findings

The Tribunal found that the relationship of the applicant and Mr Ross was within the meaning of a "marriage". The Tribunal noted that the Family Court, being a specialist jurisdiction, had regarded the relationship as one of marriage because it had granted a divorce of that marriage. The marriage was never annulled and it resulted in a divorce.

The Tribunal rejected the submission on behalf of Mrs Ross, saying:

> "The applicant would have the Tribunal decide that the marriage was a nullity so as to restore her right to recover widow's pension. It is not the jurisdiction of this Tribunal to decide whether the marriage was a nullity.
>
> For all relevant purposes, the applicant did remarry and the person she married was Mr Ross. It was a marriage within the terms of the *Family Law Act* and the *Marriage Act* and was a marriage clearly within the circumstances contemplated by section 13(8A) of the *Veterans' Entitlements Act*.
>
> In the circumstances the applicant cannot therefore qualify as a 'widow' within the meaning of *Veterans' Entitlements Act*."

Formal decision

The Tribunal affirmed the decision that Mrs Ross was not the dependant of a deceased veteran.

Jurisdiction of AAT - application for review out of time

Re A E Bennett and Repatriation Commission

Forgie

V92/503 06 Oct 1994

The issue in this case was whether the Tribunal had jurisdiction to consider Mrs Bennett's application for review.

Mrs Bennett had lodged an application for review of a decision of a delegate of the Repatriation Commission dated 9 February 1987 which refused her claim for a widow's pension on the basis that her husband's death was not war-caused. The decision was affirmed by the Veterans' Review Board on 11 February 1988. On 24 April 1988, Mrs Bennett wrote to the Department of Veterans' Affairs indicating that she wished to apply to the Tribunal for review of the decision. Her letter of 24 April 1988 was received by the Tribunal on 9 June 1992. On 24 June 1992, an order granting Mrs Bennett an extension of time within which she was required to lodge her application was granted by the Tribunal, with the consent of the Repatriation Commission.

Legislation

Under section 29 of the *Administrative Appeals Tribunal Act*, (as modified by section 176 of the *VE Act*), an application for review of a decision made under the *VE Act* must be lodged with the Tribunal within three months from the day on which the person is given a decision setting out the findings on material questions of fact and reasons for the decision. The AAT has the power to extend the time for making an application for review, up to a

maximum of twelve months after the person is notified of the decision.

Jurisdictional issue

The Tribunal first considered whether it could determine if it had jurisdiction to continue hearing the matter considering that the Tribunal had earlier extended the time for lodging an application for review. The Tribunal said:

> "It is, of course, for the Court to determine finally the extent of the Tribunal's statutory authority, powers and discretions. The AAT, however, may consider the limits of its authority, powers and discretions for it must stay within them. This was the view expressed by Mr Justice Brennan when he said in *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239:
>
> > 'An administrative body cannot therefore lawfully exercise authority merely because it is of the opinion that it has the authority. Its opinion is not the charter of its powers and discretions. It derives its powers and discretions from and in accordance with the law. It is the Court's judgment and not the administrative body's opinion which defines the extent of (as well as the constitutional support for) its statutory authority.
> >
> > ...
> >
> > An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect. In *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, Dixon J, whilst denying the power of a Local Coal Reference Board to determine judicially the meaning of a statutory phrase upon which its jurisdiction depended, distinguished the Board's function of forming an opinion upon the question. He said, at p 618: "I do not mean to say that the Board may not, for the purpose of determining its own action, 'decide' in the sense of forming an opinion upon the meaning and application of the words 'coal mining industry'. It must make up its mind whether this or that particular function on the borders of the coal mining industry does or does not fall within the conception."
> >
> > Blackburn J, sitting in an administrative jurisdiction in *Re Cilli's Objection* (1970) 15 FLR 426 at 428; [1970] ALR 813 at 815, noted that an administrative body 'must satisfy itself that all its proceedings are in accordance with the law. It must therefore receive and consider, whenever the point is taken, an argument that it has no jurisdiction. To say that is, in truth, to say no more than that it must at all times act lawfully.'
> >
> > When an administrative body declines to exercise a power in consequence of its opinion as to the limits of the authority conferred upon it by statute, the administrative body thereby seeks to conform with the expressed will of the legislature.'"

Tribunal's decision

The Tribunal decided that Mrs Bennett should have lodged her application for review within three months from the date on which she was furnished with the Board's decision. Her application was not lodged with the Tribunal until 9 June 1992 when it was actually received by the Tribunal. The Tribunal found that the Department of Veterans' Affairs was not the Tribunal's agent for the purpose of lodging applications for review. Further, the Tribunal did not have authority to extend the time in which Mrs Bennett could lodge her application beyond the twelve month time limit.

Formal decision

The Tribunal decided that it did not have jurisdiction to consider Mrs Bennett's application for review lodged on 9 June 1992.

Meningioma - head injury as air gunner

Re R N Jenkins and Repatriation Commission
Gibbs, Argent & Shanahan

V93/1274 07 Dec 1994

Mr Jenkins served in the Australian Army from 1942 to 1943 and in the RAAF from 1943 to 1946. He served with Bomber Command in the United Kingdom as a rear-end gunner. He rendered operational service and his claim in respect of meningioma was required to be considered in terms of the "reasonable hypothesis" standard of proof in sub-sections 120(1) and (3) of the *VE Act*. During 1945, Mr Jenkins was involved in two incidents in which he hit his head while in the rear gun turret of bomber aircraft. The first incident occurred while he was participating in a training flight in the UK. The pilot of the aircraft experienced difficulty landing the aircraft and during one attempt, the rear wheel hit the ground before the front wheels, causing Mr Jenkins to be thrown forward from the waist up, hitting his forehead on the metal framework of the turret. The second incident occurred while Mr Jenkins was returning from a bombing mission over Germany. The aircraft in which he was flying suddenly lost height, causing him to hit his forehead against the machine gun. He was unconscious for some 4-5 hours, and, after arrival back in the UK, he was admitted to hospital where he remained for about three weeks before he resumed normal flying duties.

The Tribunal noted that there was no record of Mr Jenkins having experienced a blow to the forehead during service, nor was there any record of his admission to hospital or treatment for an injury arising out of such an incident. The Tribunal found, however, that Mr Jenkins did suffer trauma to the left side of his forehead while returning from a bombing mission in 1945 and that the injury may have been serious.

Mr Jenkins told the Tribunal that after his discharge from hospital following the incident, while returning from a bombing mission, he had felt drowsy and experienced headaches but was able to cope with his duties. He could not recall having sustained a significant head injury since his discharge from the RAAF.

Submission

In 1988, Mr Jenkins was diagnosed with a left spheroid ridge meningioma, a

form of brain tumour which was located at the base of the skull, on the left side. The meningioma was surgically removed in December 1988. It was claimed that the veteran's meningioma was due to head injury during his war service.

Medical evidence

During the hearing at the Tribunal, an article entitled "Head Trauma and Subsequent Brain Tumours" ("The Annegers Study") was received in evidence. The Annegers Study investigated the possibility that head trauma predisposes to intracranial neoplasia and involved 2,953 patients who were followed for a total of 29,859 person years. In the study, the observed number of cases of all subsequent brain tumours (4) did not differ from the number expected (4.13). The observed tumours comprised one astrocytoma and three meningiomas. The article made the point that because brain tumours are relatively rare, the results of the study cannot absolutely refute the possibility that head trauma predisposes to brain tumours. However, the individual risk is very small, and the weight of evidence does not support an aetiological association. In the study, the occurrence of subsequent brain tumours was not associated with the severity or location of the head injury. Nevertheless, the point was made that head trauma does not seem to be a significant aetiological factor in meningioma.

Dr Hjorth, neurologist, told the Tribunal that there is a long history of individual case reports linking trauma to meningioma, although it was fair to say that the evidence has always been disputed. He did not think that there could be any reasonable doubt, however, about the relationship between severe and local trauma and the subsequent development of meningioma at the site of the trauma. In the case of Mr Jenkins he accepted, however, that this was not an instance involving local trauma. The Tribunal noted that the tumour was at the base of the skull on the left side, whereas the injury, if there was one, was high on the left side of the forehead.

Dr Hjorth stated his belief that the possibility of a head injury contributing to the subsequent development of the meningioma in this case was at least a reasonable hypothesis.

Professor Fox, a medical oncologist, told the Tribunal that antecedent head injury, infection, metabolic and other systemic disease and exposure to toxins and radiation had all been suggested as causative factors of brain tumour. However, with the exception of radiation and possibly viral infection, there was no conclusive evidence that any of these factors play a part in the causation of cerebral neoplasms in humans. Professor Fox did not agree that there was a reasonable hypothesis that generalised trauma may cause the subsequent development of meningioma. He said that there was no suggestion from prospective studies that there was a link between the development of meningioma and trauma and that there was no link between the trauma experienced by Mr Jenkins and the actual site of development of his meningioma.

Dr Fabinyi, the neurosurgeon who removed Mr Jenkins' tumour, was of the opinion that there is insufficient evidence to say whether or not trauma is a long term risk factor in the development of meningioma.

Tribunal's conclusions

The Tribunal concluded as follows:

> "That Mr Jenkins experienced trauma to his forehead, which may have been a serious trauma, and that he later in life developed a meningioma, are facts which, in our opinion, raise a hypothesis connecting the meningioma with the circumstances of the particular service rendered by him. The question, however, is whether the hypothesis is a reasonable hypothesis. We are of the opinion that it is not. As we have indicated, the Annegers Study failed to show an association between general head trauma (as opposed to local trauma) and the subsequent development of meningioma. While Dr Hjorth accepts this to be so and therefore concludes that the relationship is unproven, he nevertheless asserts that one negative epidemiological or general survey cannot exclude the possibility of a small association.
>
> While we accept this to be so, the point, however, it that the Annegers Study was not such a survey. ... It is our opinion therefore, that on the whole of the material before us, which includes the views expressed by Dr Fabinyi, the hypothesis is contrary to known scientific facts and is therefore not reasonable. Pursuant to section 120(3) of the *VE Act*, Mr Jenkins' claim for pension must therefore fail."

Formal decision

The Tribunal affirmed the decision that the veteran's meningioma was not war-caused.

(Ed: Mr Jenkins has appealed to the Federal Court against the Tribunal's decision.)

Leiomyosarcoma - carbontetrachloride

Re H J Oliver and Repatriation Commission

Barnett, Joske & Lloyd

W93/224 13 Dec 1994

Mrs Oliver applied for review of decisions that her late husband's leiomyosarcoma and his death were not war-caused. The veteran served in the Army from 1941 to 1945 and had operational service. He served as a driver and heavy plant operator and the Tribunal found that he regularly used carbontetrachloride ("CTC") to clean electrical fittings and his uniform. He developed leiomyosarcoma of the spermatic cord in 1986 and died in 1990.

Mrs Oliver sought to establish a reasonable hypothesis connecting her husband's exposure to CTC during war service with the onset of leiomyosarcoma. Dr Watson, general practitioner, and Dr Berry, a specialist in cardiovascular medicine, gave evidence in support of the claim. They relied on the accepted fact that CTC is a known carcinogen and that the veteran suffered from a very rare cancer. They referred to published research which established a link between high dose exposure in rats and the development of carcinoma of the liver. They also relied on three studies of humans exposed to CTC who developed hepatocellular carcinoma of the liver. On the basis of these facts, the two doctors felt that it is a

reasonable hypothesis that there is some causal link between the veteran's exposure to CTC in the war and the development of sarcoma of the spermatic cord some thirty to forty years later.

The Repatriation Commission submitted that there is no medical or scientific evidence that exposure to CTC is linked to the development of the type of tumour from which the veteran suffered (leiomyosarcoma) in the place where it occurred, that is the smooth muscle of the spermatic cord. The Repatriation Commission submitted that the hypothesis was not reasonable. Dr Buck, specialist in oncology, gave supporting evidence that there was virtually no experimental, epidemiological or clinical evidence to link Mr Oliver's sarcoma with exposure to CTC. He stated in particular that:

- there is no epidemiological evidence linking leiomyosarcoma in man to CTC exposure;
- the clinical evidence referred to in the literature linking CTC and carcinoma in man is extremely weak and non-conclusive; and
- evidence from animal experiments was strongly against the proposed hypothesis.

Tribunal's findings

The Tribunal found that the medical opinions supporting a link between CTC exposure and the veteran's sarcoma of the spermatic cord were "shallow and unconvincing". The Tribunal said that Dr Buck was eminently qualified in the relevant speciality of oncology, that is, the study of malignant disease.

The Tribunal said:

> "This is not a situation where there is a conflict between suitably qualified medical specialists who are eminent in the relevant field of knowledge such as the situation considered by the High Court in *Bushell v Repatriation Commission* (1992) 29 ALD 1 and by the Federal Court in cases such as the *Repatriation Commission v Byrne and Others* (1981) 40 ALR 296, where reasonable hypotheses were found to have been established despite the contrary opinion of other expert medical witnesses. In this case there is really no contest between eminent specialists as the evidence of the eminent and appropriately qualified Dr Buck is overwhelmingly against the hypothesis proposed by the applicant saying that the materials referred to in support of the hypothesis simply do not link exposure to CTC to the type of disease which caused the veteran's death. Against this there are only witnesses without adequate specialist knowledge giving opinion evidence which is not based on appropriate epidemiological, experimental or clinical evidence which could link exposure to CTC to the development of sarcoma (as opposed to carcinoma) in fact any form of damage to connective tissues (as opposed to epithelial tissues)."

The Tribunal concluded that there was no material which raised the relevant causal hypothesis linking CTC to the development of the type of sarcoma which developed in the veteran's connective tissues (that is, the spermatic cord). It therefore found that the hypothesis proposed by the applicant, linking the veteran's sarcoma to war-time exposure to CTC, was not reasonable and for this reason, applying section 120(3) of the *VE Act*, the Tribunal was satisfied beyond reasonable doubt that there was no sufficient ground for determining that

the death of the veteran was war-caused.

Formal decision

The Tribunal affirmed the decisions under review.

Ischaemic heart disease - passive smoking

Re E M Booth and Repatriation Commission

Barnett, Joske & Lloyd

W93/159 22 Dec 1994

Mr Booth served in the Australian Army from 1940 to 1946. He did not serve outside Australia. He was employed as a driver and during the period from August 1942 to June 1944, he served with 125 AGT Company and was engaged in driving trucks in Western Australia. He was a non-smoker but was sometimes accompanied on long trips by a relief driver who was usually a smoker. He died of ischaemic heart disease in 1990 and it was claimed that his death was war-caused.

It was submitted that in the allegedly closed conditions within the cabin, the veteran was subjected to heavy exposure to passive smoking and that this created the conditions which led to the development of the veteran's ischaemic heart disease which was first diagnosed in 1980. It was also claimed that he was exposed to passive smoking while sleeping in tents at various camps during service.

Operational service

The issue of whether the veteran performed operational service was crucial to the Tribunal's decision. Mrs Booth submitted that her late husband's service between August 1942 and June 1944, while he was driving in convoys in the north west of Western Australia, should be treated as "operational service" within the meaning of section 6(1)(n) of the *VE Act* which provides:

> "**6.** (1)(n) a person who has rendered continuous full-time service as a member of the Defence Force within Australia during World War 2 in such circumstances that that service should, in the opinion of the Commission, be treated as service in actual combat against the enemy shall be taken to have been rendering operational service while the person was so rendering that continuous full-time service."

The Tribunal found that the veteran was on operational service only on 17 August 1943, when he was in the vicinity of Broome on the day when the town was bombed by Japanese war planes. The remaining period of his Army service was "eligible war service".

Medical evidence

Dr Jamrosik, a specialist in public health, gave evidence that passive smoking could be a causal factor in the development of ischaemic heart disease as active smoking is accepted as a predisposing factor and various scientific research projects have established a link between passive smoking and the development of coronary disease.

Dr Somers, specialist cardiologist, conceded the possibility of a link between passive smoking and ischaemic heart disease but thought it was not likely in this case. Having

reviewed the scientific literature on the subject, he pointed out that it was "fragmentary and fragile" and that the only substantial study concerned the effect of passive smoking by non-smoking spouses of a smoking partner in a domestic situation over a number of years, which was not readily transferable to episodic and limited exposures sometimes suffered by the veteran in truck convoys. He also pointed out that there were several other more likely risk factors for ischaemic heart disease with regard to the veteran - he was overweight and suffered from Type 2 diabetes mellitus and hypertension. He was also in his late 50's when he was diagnosed with the condition and 72 years of age when he died. Dr Somers also pointed to the fact that the veteran worked as a taxi driver for 35 years after the war and that for most of that period, he would have been exposed to significant passive smoking.

Tribunal's conclusions

The Tribunal said that although Dr Jamrosik's opinion, in general terms, was that passive smoking can create an increased risk factor for cardiovascular disease in persons with previously healthy hearts, a large part of his evidence involved drawing conclusions from studies of active smokers. The Tribunal said:

> "The veteran's exposure to passive smoking during his service was limited to relatively short periods and it was intermittent. He was certainly not driving smoker passengers for long periods in his truck every day over the two years specified. Furthermore, the truck cabin was not always fully closed up. Also, had his passive smoking exposure been confined to the period of World War 2 service he would have been smoke free for over thirty years before developing heart symptoms and even for a long term active smoker, on the figures Dr Jamrosik quoted, the excess risk after 30 years without smoking would be below five per cent. In this case the 35 year post-war period during which he drove taxis with smoker passengers makes it most difficult to attribute responsibility to war time exposure."

The Tribunal was satisfied beyond reasonable doubt that there was no reasonable hypothesis linking passive smoking during the veteran's one day of operational service and the ischaemic heart disease which was the cause of his death.

In relation to the remaining period of eligible war service, the Tribunal said:

> "The level of passive smoking to which the veteran was exposed throughout his eligible war service is quite unmeasurable, especially in the absence of testimony from the veteran himself. In addition to that, the veteran drove taxis for 35 years after discharge and in that job the Tribunal finds that it is likely that the veteran was subjected to many years of passive smoking. As there were also other more likely potential causes of the veteran's ischaemic heart disease as listed above, the Tribunal cannot be satisfied that the ischaemic heart disease in 1980 arose out of or was caused by exposure to unknown levels of passive smoking in the years 1940 to 1946."

The Tribunal was not reasonably satisfied that the disease of ischaemic heart disease suffered by the veteran arose out of or was attributable to his eligible war service.

Formal decision

The Tribunal affirmed the decision that the veteran's death was not war-caused.

Prostate cancer - high fat diet

Re J Drummond and Repatriation Commission
McDonald, Argent & Campbell

V93/1098 23 Dec 1994

This case was concerned with whether Mr Drummond's prostate cancer was war-caused. Mr Drummond served in the Australian Army from 1942 to 1946 and he rendered operational service. The claim was required to be decided in terms of the "reasonable hypothesis" standard of proof in sub-sections 120(1) and (3) of the *VE Act*.

Several hypotheses were put forward in support of the claim that the veteran's prostate cancer was war-caused:

- that there was a connection with the veteran's war-caused prostatitis (inflammation of the prostate gland);
- that there was a relationship with trauma to the veteran's prostate during service;
- that there was a connection with a high fat diet during war service; and
- that a combination of the first three factors had caused or contributed to the development of the veteran's carcinoma of the prostate.

The Tribunal considered that the first two hypotheses were untenable in the light of current medical knowledge and were therefore unreasonable in terms of section 120(3) of the *VE Act*.

High fat diet

It was accepted by both medical experts who gave evidence before the Tribunal that a high fat diet probably causes prostate cancer. Professor Fox, a medical oncologist, prepared a report in which he said that on the basis of information provided to him by the Repatriation Commission, it had been estimated that fat consumption of the Australian Defence Forces in World War 2 was in the order of 162 grams per day as against that for the Australian civilian population of 144 grams per day. However, Professor Fox said that Australians had a comparatively high fat diet by world standards, in particular, during the 1930's, 1940's and 1950's. Thus, he regarded any higher than normal intake by Australian service personnel in World War 2 compared to a generally high fat intake by the Australian population as insignificant. Professor Fox stated that he found it difficult to accept that a brief period of high fat diet would result in prostate cancer 40 or 50 years later. He also said that carcinoma of the prostate is quite common in elderly men and that Mr Drummond fell into the usual age group for men contracting the disease. There was nothing in Professor Fox's view which distinguished the applicant's circumstances from any other men of a similar age so that the small change for such a short period of time, resulting from the higher than average fat diet during the applicant's operational service, could have affected the applicant.

Dr Sullivan, an oncologist, put forward the theory that the intake of excess fat during the veteran's Army service was causally related to the development of carcinoma of the prostate in this case. Dr Sullivan advanced his theory on the

basis that not only would there have been a higher fat intake during the period in which Mr Drummond was serving in the Armed Forces but that, having become used to a higher fat diet in the services, Mr Drummond would have tended to stay with a high fat diet after his discharge. The type of food eaten may have changed, but the desire for a high fat intake would have continued. On this basis, it was not only the high intake of fat during his service in World War 2 but the consequent effect arising from the habit formed during service which had contributed to his condition.

Tribunal's conclusions

The Tribunal regarded Dr Sullivan's assertion about the veteran's post-war diet as too tenuous to support a reasonable hypothesis in this case. However, the Tribunal accepted the hypothesis based on a high fat diet during war service, saying:

> "It appears to the Tribunal that Professor Fox is basing his rejection of Dr Sullivan's evidence on a lack of empirical data on which to base the hypothesis compared to the empirical data used to support the theory that high fat diet leads to prostate cancer. Because a hypothesis is based on speculation (i.e. in this case speculation as to medical opinion as opposed to a set of facts), it does not necessarily mean it is 'unreasonable'. If, as Professor Fox concedes, there is a general acceptance of a theory connecting high fat diet to prostate cancer, then it is reasonable to hypothesise that the higher the fat content the more likely for the cancer to develop.
>
> Professor Fox's view is there was nothing to suggest that 'such a small change for such a small period of time' in the applicant's diet would make any difference in circumstances where the applicant, both pre and post-World War 2, had in common with other Australians a high fat diet. However, the Tribunal is not convinced that Professor Fox's view that there was nothing to suggest that 'such a small change for such a small period of time' in the applicant's diet would make any difference in circumstances where the applicant, both pre and-post-World War 2, had in common with other Australians, a high fat diet should displace the hypothesis. Indeed, it may well be that a higher than normal dietary intake of fat for a specific period of a person's life may be determinative in the subsequent development of the cancer. It is clear that the hypothesis on this point is 'unproved' and may be 'opposed to the weight of informed opinion' if the Tribunal was to accept Professor Fox's view. That, however, does not necessarily make it unreasonable and, in the view of the Tribunal in relation to this particular aspect of the case, the Tribunal does not find it obviously 'fanciful, impossible, incredible or not tenable or too remote or too tenuous'. In those circumstances, the applicant must succeed on this point."

Formal decision

The Tribunal set aside the decision under review and decided that Mr Drummond's cancer of the prostate was war-caused.

(Ed: The Repatriation Commission has appealed to the Federal Court against the Tribunal's decision.)

Decisions of the Federal Court of Australia

Disease contributed to in a material degree - *VE Act* s 8(1)(e)

Repatriation Commission v Cruise

Jenkinson J

12 September 1994

This was an appeal from a decision of the Tribunal. Mr Cruise died in 1984 due to myeloblastic leukaemia caused by polycythaemia rubra vera ("PRV"). PRV is characterised by excessive proliferation of red blood cells in the bone marrow and is a disease of unknown aetiology. The late veteran served in the RAAF from 1943 to 1945 and was posted to New Guinea from December 1943 to June 1945. Because he rendered operational service, the relevant standard of proof to be applied was that provided for in ss 120(1) and (3) of the *VE Act*.

There was uncontradicted evidence before the Tribunal by an eminent haematologist, Professor Penington, that the disease had probably been contracted by Mr Cruise at least ten years before June 1955. That finding he inferred from a number of signs and symptoms which the evidence disclosed as having been manifested at various times between 1942 and Mr Cruise's death. Dr Parkin, haematologist put forward a "reasonable speculation" that the early onset of PRV in this case suggested that military service in the tropics could have been implicated in some way.

The Tribunal determined that the death of Mr Cruise was war-caused. Although some evidence before the Tribunal suggested a possibility that the PRV from which Mr Cruise died was contracted while he was rendering operational service in New Guinea, the Tribunal did not unequivocally express a finding either that the contraction of the disease occurred <u>during</u> that period or that a reasonable hypothesis connecting his death with the circumstances of his service in New Guinea included the hypothesis that the contraction of the disease occurred during that period. The Tribunal concluded:

> "We are satisfied that the evidence raises a reasonable hypothesis that the disease of PRV was suffered while Mr Cruise was rendering war service but did not arise out of that service but that the progress of the disease was contributed to in a material degree by Mr Cruise's service after contracting the disease, even though it was not diagnosed until much later."

Commission's appeal

On appeal to the Federal Court, counsel for the Commission submitted that there was an indication in the Tribunal's reasons for its decision that the Tribunal did find reasonable a hypothesis that the contraction of the disease occurred during that period.

Section 8(1)(e) of the *VE Act* provides:

> "8. (1) Subject to this section, for the purposes of this Act, the death of a veteran shall be taken to have been war-caused if:
>
> ....
>
> (e) the injury or disease from which the veteran died:
>
> (i) was suffered or contracted while the veteran was rendering eligible war service, but did not arise out of that service; or
>
> (ii) was suffered or contracted before the commencement of the

period, or last period, of eligible war service rendered by the veteran, but not while the veteran was rendering eligible war service;

and, in the opinion of the Commission, the injury or disease was contributed to in a material degree by, or was aggravated by, any eligible war service rendered by the veteran, being service rendered after the veteran suffered that injury or contracted that disease;

but not otherwise."

The Court said that the Tribunal's finding that it was 'after contracting the disease' that 'the progress of the disease was contributed to in a material degree by Mr Cruise's war service' suggested that the Tribunal had in mind both the contraction and the progress as events occurring during the period of operational service.

Counsel for the Commission submitted that the medical hypotheses of Dr Parkin and Professor Penington were contradictory. This submission was rejected by the Court on the basis that one had nothing to say about contraction and the other had nothing to say about the effect of war service rendered after contraction. The Court said that it could be inferred from the Tribunal's reasons for decision that if there was a conflict, the Tribunal made its finding in favour of Professor Penington's evidence.

The Court said that the disease PRV "was contributed to in a material degree by ... eligible war service" within the meaning of s 8(1)(e) of the *VE Act* if events or circumstances involved in the rendering of that service were among the causes of those changes in the disease process (whether by way of symptoms or "complications", in the sense of that word indicated by Dr Parkin, or by way of increase in the degree of red cell proliferation) which would mark the normal progression of PRV and if that causal contribution was "in a material degree".

Finally, it was submitted that the evidentiary material before the Tribunal did not provide any basis for either of the hypotheses accepted by the Tribunal. The Court said:

> "That submission cannot be accepted in relation to Professor Penington's opinion. His inferred opinion that the PRV had been contracted at least ten years before June 1955 had the support of a substantial body of medical evidence concerning Mr Cruise's clinical states on a number of occasions during the period from 1942 until his death and also his wife's description of his apparent state of health (before service in New Guinea) and of ill-health (after service in New Guinea) until 1955. His opinion concerning the contribution of diet to the progress of the disease had the support of Mrs Cruise's evidence of Mr Cruise's statements to her."

Formal decision

The Court dismissed the appeal with costs.

Alcohol related death - *VE Act* s 120(1) & (3)

Gleeson v Repatriation Commission

Beaumont, Einfeld & Hill JJ

28 September 1994

This was an appeal from a single Judge (Moore J) who had dismissed an appeal from a decision of the Tribunal that the death of Mr Bede Gleeson was not

war-caused. The essential issue before the Tribunal was the relationship between the deceased's drinking and his war service.

Mr Gleeson rendered operational service in the Army during World War 2. He died in 1989 from carcinoma of the large bowel. The Repatriation Commission conceded that the late veteran's alcohol consumption contributed to the bowel cancer but decided that there was insufficient evidence as to the cause of his drinking to raise a reasonable hypothesis in terms of sub-section 120(3) of the *VE Act*.

Evidence before Tribunal

Several persons who were associated with the late veteran during his war service gave evidence concerning his drinking habits. His brother, Mr Kevin Gleeson, made two statutory declarations which were both before the Tribunal. In the first, he said that the veteran abstained from alcohol prior to 1937. He said that he was transferred to the country in 1937 and joined the AIF in 1940 and did not see much of the family until after the war when he noticed that the veteran was drinking. In a second statutory declaration, he said that he saw the late veteran for part of the time between 1937 and 1941 when they were both living at home. He could not recall seeing him drinking during that period.

The Tribunal concluded that it could not put any weight on the brother's evidence concerning the late veteran's drinking habits. The Tribunal found that there was no evidence before it to support an hypothesis that the veteran did not drink alcohol prior to service and commenced to drink alcohol as a result of the exigencies of his service.

Full Court's conclusion

The Full Court held that in rejecting the brother's evidence, the Tribunal had failed to properly address the legal questions posed by s 120(3). The Court said that the Tribunal had in effect proceeded on the assumption that the brother's evidence did not exist.

The Full Court said:

> "In our opinion, the Tribunal failed to address correctly the questions posed to it by s 120, that is to say (a) did the whole of the material before it raise some facts which give rise to the hypothesis suggested; and (b) if so, is the hypothesis reasonable?
>
> As Einfeld J pointed out in argument, where, as here, part of the material before the Tribunal consisted of two pieces of documentary material from a single source, and the maker of the statements in that material is not given an opportunity to explain a possible discrepancy, it is not appropriate for the Tribunal, in effect, to speculate about possible contradictions in those documents and then to conclude (as the Tribunal did in para 22 of its reasons) that, in this respect, there is simply 'no evidence' on the topic the subject of the documentary material. On the contrary, some of that material, even if it be assumed to be difficult to reconcile with other material (a questionable assumption here) did, in our opinion, constitute part of the material before the Tribunal which, when taken as a whole, could be said (in the sense of being capable of doing so) to 'raise facts' which 'give rise to the hypothesis suggested' in the sense provided in s 120(3). That

is the first of the two stages of the inquiry directed by s 120 to be undertaken.

In the present case, in our view, the Tribunal did not, in embarking upon this first stage of its statutory inquiry, have regard, as s 120(3) required, to a consideration of the whole of the material before it in determining whether that material did or did not raise the hypothesis suggested. On the contrary, in substance, and in form, the Tribunal, for this purpose, entirely eliminated from its consideration a part of that material in the form of the information contained in the two statutory declarations. The Tribunal purported to do this on the footing that it was difficult to reconcile certain of the statements in the declaration. Whilst this may be a basis for evaluating the credibility of the information in the declarations, it could not provide a foundation for a conclusion that there was 'no evidence' on the topic for the purpose of determining whether the whole of the material before it raised the requisite facts. The Tribunal has, in effect, proceeded on the assumption that the material from Mr Kevin Gleeson did not exist. With all respect to the primary Judge, we cannot accept that this can be characterised as no more than an imperfect expression of a process of reasoning which, in its essentials, was correct. It follows, we think, that the Tribunal did not address the correct legal question."

Formal decision

The Full Court set aside the Tribunal's decision and remitted the matter to the Tribunal to be reheard in accordance with law.

Adenocarcinoma of colon - amoebic dysentery and irritable bowel syndrome

Owens v Repatriation Commission

Lockhart J

3 November 1994

Mr Owens lodged an appeal against a decision of the AAT that his adenocarcinoma of the colon was not war-caused. The veteran served in the Australian Army during World War 2 with operational service in New Guinea. In early 1945, he was admitted to hospital several times with amoebic dysentery. He continued to suffer from neurogenic diarrhoea, which caused a constantly loose bowel. This condition was noted at the time of his discharge from the Army in November 1945. The veteran's amoebic dysentery and irritable bowel syndrome were subsequently accepted as war-caused diseases.

The veteran's colon cancer was diagnosed in 1986 and he immediately underwent surgery to remove the cancer. The operating surgeon reported in 1991 that the carcinoma had arisen in a villous adenoma, a factor which was significant in the outcome of the case. The Tribunal heard evidence that this factor indicated that the cancer was of genetic origin.

Tribunal's decision

It was submitted for the veteran that his bowel cancer may be causally related to the amoebic dysentery or irritable bowel syndrome.

Professor Kune, an expert in the field of the cancer research, gave evidence at the Tribunal on behalf of Mr Owens.

Professor Kune considered it "biologically plausible" that irritable colon syndrome/diverticular disease was one of the predisposing factors in the development of large bowel cancer. He conceded that there had been no systematic examination of the postulated connection between irritable bowel syndrome and colon cancer. Professor Kune referred to several studies which had raised the possibility of an association between amoebic dysentery and carcinoma of colon but acknowledged that the possibility had not been followed up by further research.

The Tribunal concluded that the studies to date did not assert a positive connection between amoebic dysentery and colon cancer but merely suggested a possibility of a connection which might be worth exploring further.

Dr Levi, another expert in cancer research, gave evidence at the Tribunal on behalf of the Repatriation Commission. Dr Levi confirmed that there was no experimental, epidemiological, or clinical evidence to support a past history of amoebic dysentery predisposing to the development of carcinoma of the colon. He said that a similar conclusion could be drawn in relation to the irritable colon, although this condition could be associated with the development of diverticulosis and diverticulitis which might have occurred in Mr Owens' case. Dr Levi considered that the evidence of the operating surgeon identifying a villous adenoma suggested that the cancer was of genetic origin in this case. In Dr Levi's view, the particular cause of the applicant's cancer had been identified, and to suggest any other possible cause would be to expose a theory contrary to known facts. In his opinion, the villous adenoma was the most normal and accepted way of explaining the cause of the applicant's cancer.

The Tribunal had concluded that both of the alternative hypotheses put before it were too tenuous and did not raise a reasonable hypothesis in terms of subsection 120(3) of the *VE Act*. The Tribunal affirmed the decision that the adenocarcinoma of the colon was not war-caused.

Reasonable hypothesis

It was argued for Mr Owens that the Tribunal had applied subsection 120(3) of the *VE Act* without considering subsection 120(1). The Court rejected this argument, saying:

> "The Tribunal decided that the material before it did not raise a reasonable hypothesis connecting the operational service of the applicant with his incapacity, so that there was nothing upon which it could find that the incapacity was war-caused within the meaning of section 120(1). If the material had raised such a hypothesis, the operation of subsection (3) would have been spent and the matter would have fallen for determination in accordance with subsection (1). The Tribunal did not reach that point because of its finding that the material did not raise a reasonable hypothesis connecting the operational service with the incapacity. Hence, the claim had to fail before the Tribunal."

The Court continued:

> "This is not a case, in my opinion, of two different hypotheses expressed by two different medical practitioners, each of which is supportable. The Tribunal did not consider two different professional opinions, each of which had a rational foundation, and prefer

one to the other. If it had done that it would have erred in law (see *Bushell* and *Repatriation Commission v Webb* [1987] 76 ALR 131 per Beaumont J at 135). The Tribunal recognised correctly that a hypothesis does not necessarily require proof; but I agree with the Tribunal that what is in essence merely a suggestion for research cannot be itself a hypothesis on the material before the Tribunal in this case. Professor Kune's hypothesis as to causative link between either amoebic dysentery or irritable bowel syndrome and the applicant's cancer of the colon is a 'hypothesis' to him in the sense that it is a possibility and it cannot be described as fanciful or absurd; but the Professor adds there has been no systematic study to his knowledge carried out, so there is no evidence to suggest the requisite link."

The Court concluded that the Tribunal had correctly dealt with the medical evidence before it and had not erred in law.

Formal decision

The Court dismissed the application.

[Ed: Mr Owens has lodged an appeal to the Full Federal Court.]

Extent of AAT's powers - surgery for war-caused sinusitis - obsessive compulsive neurosis - *VE Act* s 120(1) & (3)

Nation v Repatriation Commission

Northrop J

7 December 1994

Mr Nation lodged an appeal to the Federal Court against a decision of the AAT, following the rehearing of his application for review of a decision that the disease of obsessive compulsive neurosis was not war-caused. In an earlier decision on appeal, the Court (Northrop J) held that the Tribunal had not adopted the correct approach to applying ss 120(1) and (3) of the *VE Act*, as outlined by the High Court in *Bushell*. Northrop J had set aside the first Tribunal's decision and remitted the matter to the Tribunal to be heard again. (See *9 VeRBosity 74*)

Mr Nation served in the Australian Army from 1945 to 1952 and had operational service outside Australia during World War 2 and in Korea. He underwent a nasal operation in 1982 in an attempt to cure bilateral maxillary sinusitis, a condition which was accepted in 1983 as a war-caused disease. He claimed that the disease of obsessive compulsive neurosis resulted from the operation in 1982. The Tribunal determined for the second time that his obsessive compulsive neurosis was not war-caused.

Issues

Two issues were raised by the second appeal to the Court:

1. the nature of the powers of the AAT when hearing and determining a matter remitted to it by the Court; and
2. the methodology for applying ss 120(1) and (3) of the *VE Act*.

What issue was remitted?

The second Tribunal took the view that for the purpose of deciding whether the veteran's neurosis was war-caused, it was open to it to determine whether his bilateral maxillary sinusitis was, in fact, war-caused. The veteran's counsel argued before the Court that the "matter" remitted to the Tribunal by the

Court was limited to the matter then in issue - that is, whether obsessive compulsive neurosis resulted from the operation in 1982. It was argued that the question of whether the disease which necessitated that operation, namely bilateral maxillary sinusitis, was a war-caused disease, was not a matter remitted to the Tribunal by the Court.

In relation to this first issue concerning the "matter" remitted to the Tribunal, Northrop J held that it was limited to the issue of causation from the nasal operation to the existing disease of obsessive compulsive neurosis. His Honour said that the Tribunal on the remittal could not consider other matters, in particular, whether the bilateral maxillary sinusitis was war-caused. Northrop J said that his views on this issue were consistent with those of Lockhart and Beazley JJ in the majority in the case of *Langley v Repatriation Commission* (1993) (*9 VeRBosity 40)*. Northrop J decided that the appeal should be allowed on the basis of the first issue raised.

Application of s 120

Northrop J next considered whether the AAT had adopted the correct approach to applying ss 120(1) and (3) as outlined by the High Court in *Bushell* and *Byrnes*. The AAT had first examined the medical evidence and concluded that the material raised a reasonable hypothesis connecting the veteran's obsessive compulsive disorder or neurosis with his nasal operation. The AAT had then considered whether the veteran's bilateral maxillary sinusitis was war-caused and concluded as follows:

> "Accordingly, after the consideration of the whole of the material before the Tribunal, I am of the opinion that that material does not raise a reasonable hypothesis connecting the applicant's bilateral maxillary sinusitis, nor any 'disease' referred to in his claim in respect of 'anxiety neurosis', with the circumstances of the particular service rendered by him."

Having reached that conclusion, the AAT did not consider the application of s 120(1). Northrop J held that the correct methodology was also not followed by the second Tribunal. The Court said:

> "What is clear is that in applying subsection 120(3), proof of facts is not in issue. The methodology adopted by the Tribunal led to error in applying subsection 120(3). As I said earlier, there was ample material of a credible nature to give rise to the requisite reasonable hypothesis. The Tribunal, because of this error, did not consider the application of subsection 120(1)."

Northrop J also allowed the appeal on the second issue raised.

Formal decision

The Court set aside the Tribunal's decision and declared that the veteran's obsessive compulsive neurosis was a war-caused disease.

[Ed: The Repatriation Commission has lodged an appeal to the Full Federal Court.]

Retrospective operation of grant of pension - *Repatriation Act 1920* - transitional provisions

Jackson v Repatriation Commission

Gummow, Lindgren & Sackville JJ

23 December 1994

This was an appeal from a single Judge (Whitlam J) who had dismissed an appeal against a decision of the

Administrative Appeals Tribunal setting the date of effect for the grant of pension. On 15 April 1983, Mr Jackson had lodged a claim for pension in respect of diabetes mellitus and right retinal vein thrombosis under the former *Repatriation Act 1920*. This was refused by a Repatriation Board on 9 August 1984 and on 1 November 1984, he appealed to the Repatriation Commission for review of the decision. Following the enactment of the *Repatriation Legislation Amendment Act 1984*, which abolished the Commission's appeal function, his appeal was deemed to have been made to the VRB under s 107VC of the *Repatriation Act 1920*. With the repeal of the *Repatriation Act* in 1986, the appeal was then required to be treated as an application for review by the VRB under section 135 of the *VE Act*.

The VRB affirmed the Repatriation Board's decision on 17 September 1987 and Mr Jackson then appealed to the AAT under section 175 of the *VE Act*. On 11 February 1992, the AAT decided to grant pension to Mr Jackson with effect from 1 August 1984. This was the date three months prior to the date on which he appealed to the Repatriation Commission and was set in accordance with section 21(1A) of the *Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986 ("VE (TP&CA) Act")*.

Section 21(1A) of the *VE (TP&CA) Act* governed the specification of a date of effect where -

> "the determining body would not have had power to make (a decision to grant a pension) but for the operation of a provision of this Act whether that provision conferred power on the determining body directly or indirectly".

Issue

Mr Jackson contended that the correct date of effect was 15 January 1983, which was three months before he lodged his original claim. The dispute was as to Mr Jackson's entitlement to pension in respect of the period from 15 January 1983 to 1 August 1984. The Full Court said that the correct date of effect in this case turned on the proper construction and effect of amendments to section 21 of the *VE (TP&CA) Act*.

Court's decision

The Full Court said:

> "The question which arises under sub-s 21(1A) of the Transitional Act is whether the AAT's decision on 11 February 1992 is governed by sub-s 21(1) or 21(1A) of the Transitional Act. If the AAT's decision is within sub-s (1A), a date before 22 May 1986 may, subject to sub-s 21(3), be fixed as the date from which payment of a pension is approved. If the AAT's decision is not a decision referred to in sub-s 21(1A) a date before 22 May 1986 may be fixed 'in accordance with the relevant provisions of the *VE Act* as such date.
>
> Sub-section 21(1A) is widely expressed. It embraces a situation in which the AAT would not have had power to make a decision but for a provision of the Transitional Act, even if that provision only indirectly confers power on the AAT."

The Full Court said that section 19(4) of the *VE (TP&CA) Act* indirectly conferred power on the AAT to make its decision to grant pension to Mr Jackson.

The Court held that the date of effect in this case was governed by

section 21(1A) of the *VE (TP&CA) Act*. The veteran's appeal lodged on 1 November 1984 was the "initiating action" in terms of paragraph 21(3)(b) of that Act. Therefore, the earliest date which could be fixed by the AAT was three months prior to the date of the appeal. The Court said that if the provisions of the *VE (TP&CA) Act* were not applicable in this case, then when the AAT made its determination on 11 February 1992, it would not have had power to do so. The Court concluded:

> "The appeal instituted by Mr Jackson on 1 November 1984 was one to which s 52 of the 1984 Act applied, within the meaning of sub-s 21(5) of the Transitional Act. This was the date of the 'initiating action' within the meaning of para 21(3)(b) of the Transitional Act. Paragraph 21(3)(a) is inapplicable on the facts. Therefore, 1 August 1984 was the earliest date the AAT might have fixed as the first date for payment. It did so. The appeal to the primary Judge from the AAT rightly failed. There was no error of law by the AAT."

Formal decision

The Full Court dismissed the appeal.

Tribunal Decisions received - September to December 1994

Carcinoma

leiomyosarcoma
- smoking, alcohol and amoebiasis

Sayer, E B 15 Dec 1994

leiomyosarcoma of spermatic cord
- carbontetrachloride

Oliver, H J 13 Dec 1994

melanoma
- exposure to sunlight

Harper, J G 23 Dec 1994

meningioma
- head injury as air gunner

Jenkins, R N 07 Dec 1994

prostate cancer
- cessation of smoking

Livery, I 19 Sep 1994

prostate cancer
- psychiatric condition

White, L V 25 Oct 1994

prostate cancer
- high fat diet

Drummond, J 23 Dec 1994

Cardiovascular disease

coronary atherosclerosis
- whether smoking habit war-caused

Corling, A 02 Dec 1994

hypertropic obstructive cardiomyopathy

Reeve, W F 28 Sep 1994

ischaemic heart disease
- alcohol consumption
- malaria

McFarlane, C D 14 Sep 1994

ischaemic heart disease
- passive smoking

Booth, E M 22 Dec 1994

Cerebrovascular disease

cerebrovascular accident hemiparesis
- smoking ceased more than 30 years

Percy, G R 16 Dec 1994

Death

smoking habit
- established habit on enlistment

Jones, H C 06 Sep 1994

Dependant

remarried after veteran's death
- divorced from second husband

Ross, J M 09 Sep 1994

Diabetes

mumps infection
- non-operational service

Miller, E 28 Nov 1994

Disability pension

osteoarthritis hips, patello-femoral osteoarthritis & left greater trochanteric bursitis
- war-caused

lumbar spondylosis, anxiety disorder & chronic bronchitis
- not war-caused

Cooke, C M 14 Oct 1994

Extreme disablement adjustment

whether lifestyle rating sufficient

Hoffman, G S 14 Oct 1994

lifestyle assessment
- whether contribution by non war-caused disabilities

McMaster, W 07 Nov 1994

Gastrointestinal disorder

non-ulcer dyspepsia

Parker, A C 08 Nov 1994

gastro-oesophageal reflux

Buckingham, A G 08 Sep 1994

reflux oesophagitis
- aggravation from operational service

Coulson, G J 09 Nov 1994

General rate pension

Guide to Assessment (1994 Guide)(GARP)
- intermittent attacks of vertigo

McKenna, B D 16 Dec 1994

Jurisdiction

Administrative Appeals Tribunal
- power to review
- application lodged with Commission 4 years previously

Bennett, A E 06 Oct 1994

whether application for review by VRB lodged
- no record of receipt by Department

McGowan, B J 07 Oct 1994

Osteoarthritis

knee, wrist & elbow
- age-related

Percy, G R 16 Dec 1994

Psychiatric disorder

chronic adjustment disorder with anxious and depressed mood

Parker, A C 08 Nov 1994

chronic anxiety state

Clark, J H 23 Dec 1994

Pulmonary disorder

asthma
- aggravated by defence service

Slape, W J 16 Dec 1994

Remunerative work

whether prevented by war-caused disabilities alone
- printing industry
- subsequent work of a different kind

McGowan, B J 07 Oct 1994

whether prevented by war-caused disabilities alone
- effects of non war-caused disabilities

Geaghan, W J 17 Nov 1994

whether prevented by war-caused disabilities alone
- effects of non war-caused disabilities and age

Bourke, P D 25 Oct 1994
Shortis, C 26 Oct 1994
Cox, R P 23 Dec 1994

whether prevented by war-caused disabilities alone
- long term retirement plans and age

Smith, B M 10 Nov 1994

whether prevented by war-caused disabilities alone
- retired age 60 and obtained service pension

Dexter, S F 22 Dec 1994

whether prevented by war-caused disabilities alone
- family company in financial difficulties

Moore, F H 19 Dec 1994

whether prevented by war-caused disabilities alone
- security work less than 5 hours a week

Owen, J M 22 Dec 1994

whether totally and permanently incapacitated

Forster, A F 26 Oct 1994

whether loss of earnings
- capital gain on sale of farming property

Williams, H G 04 Nov 1994

whether unable to work more than 8 hours per week

Thomas, B R 21 Nov 1994

Intermediate rate

Clark, J H 23 Dec 1994

Special rate
- reduction below 70% criterion

Turner, A J 01 Dec 1994

Rheumatoid arthritis

auto-immune rheumatoid arthritis and Felty's syndrome
- influenza and pneumonia

Bourke, E J 09 Nov 1994

Spinal disorder

cervical spondylosis

Buckingham, A G 08 Sep 1994

lumbar disc degeneration and cervical spondylosis
- Malayan service

Owen, J M 22 Dec 1994

"1995 CHANGI DIARY" by NEIL PIGOT

(published by The Crimson Flower Project)

A review by Bron Sibree*

More than 22,000 Australians were imprisoned by the Japanese in South-East Asia during World War II, and only 14,000 returned home. For three years and seven months they toiled in mines under the sea in Japan, built railways with bare hands and bare feet, and endured forced marches while suffering from malnutrition and multiple diseases.

Alongside British, American and Dutch internees, Australians endured unbearable deprivation and barbarity - yet they survived, in some cases, in numbers four times greater than any other nationality.

Why? This is the question actor, author and publisher Neil Pigot attempts to unravel in *1995 Changi Diary*, part of a series of projects undertaken through his company, The Crimson Flower Project, in an urgent endeavour to provoke and re-kindle the national memory.

In 50 years, says Pigot, no one has seriously attempted to answer why the Australian survival rate was so high, or how it was these men managed to survive. What they achieved should be the cornerstone of the Australian ethos, yet it is barely understood by the older generation and, in the case of the younger, almost unknown. As a nation we've dwelt on the death, barbarity and deprivation and so "shut it out of our national memory".

When 32-year-old Neil Pigot speaks, he speaks not only for a younger generation but also for the men themselves. He became personally entrusted by the POWs to tell their story "from a positive point of view" as a result of meeting Sir Edward 'Weary' Dunlop, Slim De Grey and other ex-POWs when he performed in Richard Davey's play *A Bright and Crimson Flower*, which chronicled the Australian POW experience.

Deeply affected by the profound sense of humanity these men emanated, he was confronted for the first time with "the extraordinary difference between what I'd been brought up believing and what these people were telling me". Realising that a younger generation "has to forget remembrance", he became charged with redressing the situation. He was encouraged by Weary Dunlop to approach the task in its current format in order to reach a wider public, which Dunlop and other ex-POWs felt "had always defeated them". He chose to first record *The Changi Songbook* with surviving members of the original Changi concert party because "they wanted to record these songs when they came back, and nobody was interested". Pigot committed himself to the task for three and a half years. "I wanted to pursue it because I felt we had not given these men and women any justice."

After interviewing more than 1,000 ex-POWs, he was alarmed to discover that in 50 years nobody had even bothered to ask them what had gone on over there. "They feel it hasn't been understood, and they have been afraid to talk to people about the experience."

He discovered that these men were never paid their subsistence allowance because the Australian Army took the view that they'd been fed by the Japanese. As a consequence of being officially discouraged from speaking about their experiences, many of these men have never had an opportunity to resolve the experience in their own minds, he says. "Many of these men will say 'I tried to explain, but nobody wanted to listen' ".

1995 Changi Diary is a careful distillation of those interviews and of two and half years research. It provides a rare snapshot of the entire 43-month ordeal of these 7th and 8th Division men held in captivity, from the fall of Singapore in February 1942 to their return home and readjustment in 1945-46. It deals with a variety of men's perspectives, from those who stayed in Changi to those who went on work parties in the camps - ranging from those as far north as Japan to Rabaul in the east and Timor and Java in the west.

What is genuinely surprising to many is the extent to which these men travelled. Most people have heard of some of the 40 or so camps that existed on the Thai-Burma railway, but it is not widely known that there were 12 prison camps in Taiwan and five on the island of Hainan, between Vietnam and China.

Pigot does not glamorise their experiences, nor does he ignore incidents such as the Sandakan death marches, or the Long Carry Of Ambon. Rather, they are encompassed in a broader structure of event, statistics and perspectives. While not pretending to have the last word, he urges us to "shift our line of vision", to look beyond the notion that all that came out of their experience was brutality and deprivation.

Using many previously unpublished illustrations and artworks done by the POWs themselves, the diary project reveals aspects of a culture and range of technological achievements given scant attention in the last 50 years.

Little is appreciated, especially by a younger generation, "of the cultural and technological achievements of the Australian POWs", Pigot says. The ingenuity with which Australians combated death, disease and malnutrition is something to be celebrated. With a totality of purpose and organisation, they threw themselves into what he calls "the technology of survival".

Bamboo was used to manufacture everything from huts to intravenous needles. Twine was manufactured by stripping the outer skin off bamboo. This was then used to build huts, or hold together pumps and aqueducts. Aluminium scavenged from crashed aircraft was turned into artificial limbs.

In Changi they created a boot factory, a soap factory and a rubber factory which developed a latex mixture that was used for everything from patching clothes to

shaping false teeth. They established university courses and organised concert parties. Faced with starvation, and melancholia - which ranked alongside cholera as a killer - they wrote songs, poetry and plays parodying their situation.

Although there is some public appreciation of the medical improvisation that occurred as a result of the publication of Dunlop's diaries, the full extent of the range of equipment and apparatus developed by these men is not fully realised even today, Pigot says.

In some camps, catgut for surgical sutures was made from pigs' intestines and stored in Burmese brandy. Alcohol, to sterilise surgical instruments, was distilled from rice wine with the addition of suitable strains of fungus. They manufactured litmus paper in the middle of the jungle, and through trial and error sourced colour indicators for pH tests from local flowers. Stills were devised to distil water for the intravenous treatment of cholera victims.

"A lot of the techniques that they practised through the need to improvise remained accepted medical practice until the 1960s," says Pigot. This is especially true of appendectomies, the most common operations apart from an amputation (for leg ulcers) in the camps. "Some of the smallest appendix scars until the 1960s were found on a POW."

The diary project attempts to shed light on the 36 doctors who worked the Thai-Burma railway. With the exception of Weary Dunlop, Pigot says, their names and achievements remain unknown by the Australian public. "All of them uniformly were loved and worshipped by their men and in some cases revered by the Japanese."

What is often underestimated is the role and size of the trading networks Australians set up with the Chinese in Singapore, and with the Thais on the Thai-Burma railway. Similarly, in Ambon, Timor - virtually everywhere there were POWs - a trading structure evolved.

The ingenuity these men demonstrated is a reflection of the eclectic nature of Australian society at that time, he says. The roving populations of the Great Depression had ensured a variety of skills that could be harnessed in the camps, which other nationalities seemed to lack.

The egalitarian nature of Australians, too, is highlighted in the instance of POW camps in Japan. By 1945, some 3,000 Australians were being held in Japan, often sharing quarters with the Americans, who had established competitive free-market trading systems in the camps. Many POWs, having traded all their rations to other prisoners, were facing starvation. Australians refused to operate on this system, explains Pigot. It wasn't the Australian way. As one Australian prisoner said at the time: "From now on this is an Australian camp and we share."

Death was also approached by the Australians in a different manner. POWs recall that it was common to see British or a Dutch inmate dying alone. Australians never died alone. In the words of one POW: "It's difficult to understand the depth of bond -

you died with somebody with a hand on your forehead saying a little prayer, and people actually sorry to see you die."

Pigot believes they survived because their response to that situation was uniquely Australian. "They created a working civilisation that had everything in it, in varying degrees, that they had had at home. They had this incredible ability to think on their feet. Every man knew what their job was." This was not born of discipline. "They did it for the love of each other."

He says they achieved what they did because of "the incredible price that they placed on their mates. Mateship in that circumstance meant washing, clothing and feeding your mate when he was sick, even if he had dysentery and cholera, and risking your own life. That's not mateship as we think of it now. It's a deeper humanity than I think we associate with the word these days."

The sheer inventiveness and extraordinary, transformative compassion with which these men built their civilisation should be "an enduring imprint on the national psyche".

Yet the POW experience has never taken its rightful place in the national ethos because it has been shrouded in misconception for decades. This dates back as far as the fall of Singapore, he argues. For too long it has been viewed simplistically, and for so long was looked at as a shameful defeat. "This has contributed to our unwillingness to look at the experience." Compounding this has been the silence of the POWs themselves. "No one wanted to hear their story, so they just shut up."

For Neil Pigot, *The Changi Songbook* and *1995 Changi Diary* don't go nearly far enough toward redressing the situation. He plans to tour the play *A Bright and Crimson Flower* nationally, together with an exhibition of POW art and memorabilia - never before seen publicly - and has developed a comprehensive educational kit for schools across Australia.

"We've now got generations of school teachers who haven't been taught it during their school education, and have no understanding of it whatsoever," he says with a sense of urgency. "If we don't carry this history with us, then in 20 years time it will be gone."

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