VeRBosity Volume 16 No. 2

Contents

Editor's notes

This edition of *VeRBosity* contains reports on six Federal Court decisions relating to veterans' matters handed down in the period from April to June 2000.

The decision of the Full Court in *Keeley* has important implications for the review of decisions. The Court upheld an earlier decision that the applicant had an accrued right to have the claim reviewed in terms of an earlier and more favourable Statement of Principles.

Flynn & Connolly and *Connors* involved the question of whether the AAT had correctly applied the "reasonable hypothesis" standard of proof. *Wedekind* concerned a failure to diagnose a medical condition and *Gibson* involved an issue of natural justice.

This edition includes reports on selected AAT decisions handed down in the period from April to June 2000 as well as information about Statements of Principles issued by the Repatriation Medical Authority and matters under formal investigation.

Robert Kennedy
Editor

Administrative Appeals Tribunal

Re J R McClure and Repatriation Commission

Forgie

Q1999/329
14 April 2000

Serious default or wilful act - drink driving

This case concerned a claim that Mr McClure's cervical spondylosis was war-caused. He rendered operational service in Vietnam in 1969-70. As a result of his service, he developed psychoactive substance abuse and post traumatic stress disorder, both of which were accepted as war-caused.

In June 1972, he was involved in a motor vehicle accident at the Gold Coast. The accident occurred at about 3.30am when he was driving home from a party at Broadbeach. His car was on the wrong side of a divided road and when he swerved back to the left side, his vehicle crashed into a building. He fractured the base of his odontoid process and subsequently developed cervical spondylosis which was the subject of this claim.

There was evidence before the Tribunal that on the afternoon before the accident, the veteran had been drinking at a Surfers Paradise beer garden from about 4 to 6pm. He went to the party at about 8 or 9pm taking with him a 26 fl oz bottle of bourbon which was "mostly full". He believed that he was the only person who drank the bourbon. The police told him that there was about half a bottle of bourbon in the car after the accident. He was subsequently convicted of driving without due care and attention. There was no information available to the Tribunal about his blood alcohol concentration after the accident. A police report relating to the accident had been destroyed.

Mr McClure gave evidence at the Tribunal that he had become involved in a discussion with two women at the party about Australia's involvement in Vietnam and had become very angry. He also smoked some cannabis. He had become confused as a result of the argument and this had caused him to drive on the wrong side of the road.

Issue

The issue before the Tribunal was whether Mr McClure's cervical spondylosis "*resulted from ...* [his] *serious default*" in terms of s 9(4) of the *VE Act*. It was accepted that the accident would not have occurred but for his suffering from psychoactive substance abuse and post traumatic stress disorder. Consequently, his cervical spondylosis was war-caused in terms of s 9(2). However, sub-section 9(2) did not apply to his cervical spondylosis if:

> "... the incapacity of the veteran from that injury or disease resulted from the serious default or wilful act of the veteran that happened after the veteran ceased, or last ceased, to render eligible war service." (s 9(4))

Serious default

The Tribunal referred to previous authorities as to the meaning of "serious default" in the context of compensation provisions. The Tribunal said that a "*serious default*" might be thought to be a failure to act that it is not trifling. In view of the purpose of the Act to provide for

the payment of pensions, benefits and medical and other treatment for veterans, it must be a failure that warrants severe condemnation for the effect of finding that there has been a "*serious default*" in the context of s 9(4) is to penalise a veteran severely. In determining what is and is not a serious default in the context of the Act requires a consideration of the whole of the circumstances surrounding the veteran's actions, or lack of action.

The Tribunal found that the accident had occurred as a result of Mr McClure's default but the question remained as to whether the default was serious. The Commission submitted that it was serious because he drove while his ability to do so was impaired and the accident resulted from his impaired driving. His ability was impaired because of one of the following:

- the alcohol he had consumed prior to driving;
- a combination of alcohol and cannabis; or
- a combination of alcohol, cannabis and the effects of his PTSD and/or psychoactive substance abuse.

Tribunal's conclusions

The Tribunal was satisfied that the veteran's blood alcohol concentration at the time of the accident would have exceeded 0.05. However, it was required to assess what amounted to a "*serious default*" by reference to the state of knowledge in 1972. The Tribunal said:

> "Taking into account the lack of relevant evidence, I am not satisfied that Mr McClure would have been driving his motor vehicle under the influence of alcohol. Similarly, apart from the fact that he smoked some cannabis, there is no evidence upon which I am satisfied that he was driving under the influence of a drug. If alcohol and drugs were the only issues to consider, I would not be satisfied that Mr McClure's driving home in the circumstances represented a failure to fulfil his obligation to maintain control of his motor vehicle. It would not represent a serious default. They are not, however, the only issues to consider. I must also consider the whole of the circumstances and that means that I must consider his actions in choosing to drive after he had consumed alcohol and while he was upset after the argument. Those circumstances do not include his knowing that he suffered from PTSD or psychoactive substance abuse for there is no evidence that he was aware in 1972 that he suffered from those conditions or that he had received treatment for them. They do include his being aware that he could get confused about the correct side of the road on which to drive.
>
> Having regard to those circumstances, Mr McClure might be thought to be unwise to drive when he was upset after an accident. That is somewhat short of saying that he was in serious default. There is no evidence that his driving had been anything other than appropriate before the accident. There is no evidence to suggest that he should have known that his driving was likely to be impaired on that particular occasion. There is no evidence that his being confused at times about the correct side of the road had ever resulted in his being unable to steer a safe course on the road in the past. I am not satisfied that he was in serious default in choosing to drive home a short distance when he was angry and there is no evidence to suggest that Mr McClure was under the influence of alcohol or drugs.

In any event, the accident did not result from any incapacity to drive on the night per se but from the disorientation and confusion caused by his PTSD. Accepting as I do that Mr McClure thought that he was in Vietnam, it was the effect of his becoming disoriented and thinking that he was in Vietnam, and so required to drive on the right hand side of the road, that was the ultimate cause of his having the accident. I am satisfied that his disorientation, and subsequent despair, were symptoms of his PTSD. That he suffered from that condition was not a matter over which he had any control. In view of the lack of evidence to suggest that he knew that he was suffering from PTSD at the time or that he had any reason to consider that his driving was likely to be impaired, I am not satisfied that his choosing to drive in those circumstances and driving as he did amounts to a serious default.

It follows that I do not consider Mr McClure's cervical spondylosis '*resulted from ...* [his] *serious default*' as that expression is used in s 9(4) of the Act."

Formal decision

The Tribunal set aside the decision under review and substituted its decision that the veteran's cervical spondylosis was war-caused.

[Ed: In the case of *Re Williams* (7 April 2000) a differently constituted Tribunal reached a similar conclusion. In that case, the applicant had organic brain damage as a result of a motor vehicle accident. He was convicted of driving with a blood alcohol level above the prescribed minimum. The Tribunal found that his driving in those circumstances was not a "serious default or wilful act" in terms of s 9(4).]

Re R F Spargo and Repatriation Commission

Allen & Horton

N1999/365
10 April 2000

Whether allotted for duty during Korean War

Mr Spargo applied for review of a decision that he was not a "member of the Defence Force" for the purposes of the *VE Act.* This meant that he was not entitled to claim disability pension under the Act. The background was that he was serving on *HMAS Sydney* when she left Australia bound for Korea on 31 August 1951. *HMAS Sydney* was allotted for duty in the operational area of Korea from 31 August 1951 to 22 February 1952. He was seriously injured en route to Japan and on arrival at Kure was transferred to *HMAS Glory* on 30 September 1951 for return to Australia. He arrived back in Australia on 17 October 1951.

Legislation

Section 5B(2) of the *VE Act* provides:

"*Allotted for duty*

(2) A reference in this Act to a person, or a unit of the Defence Force, that was ***allotted for duty*** in an operational area is a reference:

(a) in the case of duty that was carried out in an operational area described in item 1, 2, 3, 4, 5, 6, 7 or 8 of Schedule 2 (in column 1)—to a person, or unit of the Defence Force, that is allotted for duty in the area (whether retrospectively or otherwise) by written instrument issued by the Defence Force for use by the Commission in determining a person's eligibility for entitlements under this Act;"

Section 6C of the *VE Act* provides as relevant:

> "(1) Subject to this section, a member of the Defence Force who has rendered continuous full-time service in an operational area as:
>
> (a) a member who was allotted for duty in that area; or
>
> (b) a member of a unit of the Defence Force that was allotted for duty in that area;
>
> is taken to have been rendering operational service in the operational area while the member was so rendering continuous full-time service.
>
> (2) …
>
> (3) For the purposes of subsection (1), a member of the Defence Force is, subject to subsection (4), taken to have rendered continuous full-time service in an operational area during the period commencing on:
>
> (a) if the member was in Australia on the day (***relevant day***) from which the member, or the unit of the member, was allotted for duty in that area—on the day on which the member left the last port of call in Australia for that service;"

Tribunal's conclusion

In oral reasons for decision, the Tribunal referred to the Full Federal Court's decision in *Repatriation Commission v Hawkins* (1993) (9 *VeRBosity 70*). The Tribunal noted that in that case, the Full Court had considered earlier provisions which equated to the present subsection 6C(3). The Full Court said that the provisions fixed the period of a veteran's operational service by reference to the day on which he departed from the last port of call in Australia for that service and to the day on which he arrived at the first port of call in Australia on returning from that service. It was clear that the effect of the Full Court's decision would have been known to the Parliament when the Act was amended in 1997.

The Tribunal said that the effect of subsection 6C(3) is quite clear - that for the purposes of subsection (1), a member of the Defence Forces is rendering continuous full-time service in an operational area on the day in which he left the last port of call in Australia. The Tribunal concluded:

> "In this case, the applicant's last port of call in Australia was Fremantle from whence he departed as a member of the crew of *HMAS Sydney* on 31 August 1951. It is quite clear therefore that for the purposes of his voyage on that ship until he arrived back in Australia, being a casualty on board *HMAS Glory*, for the whole of that period he was on operational service. Therefore, the decision under review is set aside and this matter remitted to the [Commission] with the directions that the applicant is a 'veteran' as that term is defined in the *Veterans' Entitlements Act 1986*."

Formal decision

The Tribunal set aside the decision and substituted its decision that Mr Spargo was a veteran who had operational service for the purposes of the *VE Act*.

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

Re K D Johnson and Veterans' Review Board (1st Respondent); Repatriation Commission (2nd Respondent)

Kiosoglous & Dahl

S1999/234
12 April 2000

Dismissal of VRB application - failure to respond to notice

Mr Johnson applied to the Tribunal for review of the dismissal of his application by the Veterans' Review Board. The background to this matter was that in 1996, Mr Johnson lodged an application for review with the VRB concerning his claim for vertigo and epilepsy. On 4 February 1999, the Registrar of the VRB wrote to him in terms of s 155AB(4) requesting that he provide within 28 days a written statement that he was ready to proceed at a hearing or reasons why he was not ready. In response, Mr Johnson sent back a form indicating that he had nominated a representative from the VVAA (SA) to respond to the VRB in relation to the notice. When no response was received from the veteran or representative within the required 28 days, the Registrar, as delegate of the Principal Member, dismissed the application pursuant to s 155AB(5) of the *VE Act.*

Legislation

Section 155AB of the *VE Act* provides as relevant as follows:

> "**155AB.** (4) If this section applies to an application for review at the end of the extended review period, the Principal Member must give a written notice to the applicant requesting the applicant to provide to the Principal Member, within 28 days after receiving the notice:
>
> (a) a written statement indicating that the applicant is ready to proceed at a hearing; or
>
> (b) a written statement explaining why the applicant is not ready to proceed at a hearing.
>
> (5) If the applicant does not provide a written statement under paragraph (4)(a) or (b) within the 28 days, the Principal Member must dismiss the application and must notify the applicant and the Commission of the dismissal."

Submissions

The issues before the Tribunal were:

- whether or not the document prepared by the Registrar dated 4 February 1999 was a "notice" pursuant to s 155AB, and if so;
- whether the applicant had provided a written response to that letter.

Mr Johnson's counsel submitted that the Registrar's letter was unclear and did not set out the consequences of failing to respond. The Repatriation Commission submitted that in considering whether a notice is adequate, the Tribunal must make an objective assessment taking into account the purpose of the document and the class of persons to whom it is addressed.

The Tribunal accepted that the test is objective and does not depend upon whether a particular applicant understood the meaning of the notice. It considered that the VRB document was "convoluted, confusing and not clearly worded" and was not as clear as it should be.

The Tribunal continued:

> "Although the Tribunal has concerns as to the form and content of the document, it concludes that the document does satisfy the procedural requirements of section 155AB and can be said to be a 'notice' pursuant

to that section. At the very least, it alerts the veteran to the need to take some action to respond to the Board. It sets out the need to provide a response as to readiness to proceed to hearing (or reasons why not) as required by sub-section 155AB(4) of the Act. It also explicitly sets out the consequences of failing to respond to the notice within the prescribed time. It is sufficiently clear in these regards, that despite some reservations, the Tribunal considers that viewed objectively, taking into account the class of persons to whom it is directed, it satisfies the procedural requirements of section 155AB of the Act and can be said to be a notice pursuant to that section."

The second issue before the Tribunal was whether Mr Johnson had responded to the notice. His counsel submitted that the return of the attached form on or about 8 February 1999 had alerted the VRB to the applicant's readiness to proceed to a hearing, or gave a reason as to why he was not ready.

The Tribunal rejected this submission. The form that Mr Johnson sent back did not provide a reason as to why he was not ready to proceed to a hearing and did not indicate a readiness to proceed. He had failed to respond to the Registrar's notice and accordingly, the decision to dismiss his application was affirmed.

Formal decision

The Tribunal affirmed the decision to dismiss Mr Johnson's application.

[Ed: In a similar case, *Re Gregory and Veterans' Review Board and Repatriation Commission* (7 June 2000), the Tribunal held that an application had been properly dismissed even though the applicant had instructed his representative to advise the Board concerning his readiness for a hearing. The failure of the representative to act on those instructions meant that no response was received by the Board and the application had to be dismissed.]

Re F F Cotterell and Repatriation Commission

Blow

N1999/738
7 June 2000

Assessment review - whether determination that disease is war-caused is examinable

Mr Cotterell applied for review of the refusal of his application for increase in pension in respect of war-caused disabilities of post-traumatic stress disorder with alcohol abuse and bilateral sensorineural hearing loss with tinnitus. He was previously assessed at 100% of the General rate and was applying for Special rate pension.

At the hearing before the Tribunal, the Repatriation Commission contended that Mr Cotterell was not suffering from post-traumatic stress disorder. It conceded that he might be suffering from some sort of psychiatric disorder, but asserted that it was not post-traumatic stress disorder and was not war-caused. If the Tribunal ruled against this submission, it conceded that the veteran was eligible for Special rate pension.

The Commission's statement of facts and contentions stated in part as follows:

"5. The respondent contends that the applicant does not satisfy the relevant diagnostic criteria for [post traumatic stress disorder] laid down in DSM-IV [a psychiatric manual].

6. In particular the respondent contends that the applicant did not experience a stressful event, one of the essential ingredients necessary

for a diagnosis of PTSD, as that term is defined in DSM-IV.

7. The respondent submits that the Tribunal has no warrant to review the Commission's decision to accept PTSD as being war-caused and that the Tribunal's sole task in this matter is to assess the appropriate level of service related incapacity.

8. The respondent contends that the task of assessing incapacity arising out of service necessarily involves a consideration of the service from which symptoms of the relevant condition are said to derive. The validity of this approach was approved by the Federal Court in *VVA v Gallagher* 34 ALD 205.

9. The respondent contends that there is no evidence the applicant suffers symptoms such as re-experiencing a stressful event by way of recurrent and intrusive, distressing recollections of the event.

10. The respondent contends, in the absence of a necessary stressful event, that the applicant's incapacity arising out of PTSD is nil."

Mr Cotterell's counsel contended that it was not open to the Tribunal to reconsider the earlier determination that the veteran was suffering from a war-caused post-traumatic stress disorder.

The Tribunal observed that it could find no support in *Gallagher's* case for the Commission's submission quoted at paragraph 8 above. The Tribunal rejected the reasoning in the Commission's statement of facts and contentions as "illogical".

Legislation

The Tribunal noted that the manner in which claims for pension and applications for increase are to be dealt with is set out in s 19 of the *VE Act*, the relevant parts of which are as follows:

"**19.** (3) The Commission shall determine a claim for a pension as follows:

(a) first, the Commission shall determine whether the claimant is entitled to be granted a pension in respect of:

(i) the incapacity of a veteran from war-caused injury or war-caused disease, or both; or

(ii) the death of a veteran that was war-caused;

(b) then, if the Commission determines that the claimant is so entitled, the Commission shall proceed as set out in subsection (5).

(4) The Commission shall determine an application for a pension at an increased rate in accordance with subsection (5).

(5) Where paragraph (3)(b) applies in respect of a claim or subsection (4) applies in respect of an application, the Commission shall assess, in accordance with whichever of sections 22, 23, 24, 25, 27 and 30 are applicable:

(a) the rate or rates at which the pension would have been payable from time to time during the assessment period; and

(b) subject to subsection (6), the rate at which the pension is payable from the date of the determination;

and shall make a determination approving the payment of pension in accordance with that assessment."

The Tribunal said that there is nothing in section 19 or elsewhere in the Act to suggest that the Commission, in making a determination pursuant to s 19(4), or even pursuant to s 19(3)(b), has the power to reconsider, ignore or reverse an earlier determination under s 19(3)(a)(i) that a veteran is entitled to a pension in

respect of an incapacity from a war-caused injury or disease.

Under s 31 of the Act, the Commission has the power to review its earlier decisions. Under s 31(6), it can cancel or suspend pensions, or decrease the rates of pensions, on the basis of relevant material that was not before the decision-making body that decided to grant them. The Tribunal said that those provisions suggest that s 19(3), (4) and (5) should not be interpreted as conferring any implied power to reconsider, ignore or reverse an earlier determination to the effect that a veteran is entitled to a pension in respect of an incapacity from a war-caused injury or disease. No such power need be implied since an express power has been conferred.

Tribunal's conclusions

The Tribunal referred to a line of Court decisions as to the jurisdiction of the Tribunal when conducting reviews of decisions under the *VE Act.*

The Tribunal said that for the purposes of reviewing a decision on an application for an increase in pension, the Tribunal cannot exercise the Commission's power under s 31 of the Act to reconsider the decision granting the claim for pension. The statutory framework, particularly the structure of s 19 of the Act, required the Commission to determine an application for increase in pension without reconsidering the applicant's entitlement to that pension. The same restriction must apply to the VRB and the Tribunal, since their powers on the review of such a decision are limited so that they stand in the shoes of the Commission.

The Tribunal concluded that it could not exercise the Commission's power under s 31 to reconsider the earlier decision granting the claim for pension in respect of post-traumatic stress disorder. In view of the Commission's concession, it followed that Mr Cotterell was eligible for Special rate pension.

Formal decision

The Tribunal set aside the decision under review and substituted its decision increasing the veteran's pension to the Special rate.

Re J L McLean and Repatriation Commission

Forgie

Q1998/427
22 June 2000

Whether death war-caused - struck by rock on hillside

This matter was remitted to the Tribunal for re-hearing following a successful appeal to the Federal Court by the Repatriation Commission. A differently constituted Tribunal had found that the late Mr McLean's death was war-caused. The case was remitted for re-hearing due to a failure by the Tribunal to accord procedural fairness to the Commission. Davies J allowed the appeal on the basis that the first Tribunal had not advised the parties that it was considering the matter on the basis of a factor in the Statement of Principles relating to lumbar spondylosis not raised during the hearing. (See 14 *VeRBosity* 42).

Mr McLean was accidentally killed in 1953 after being struck by a large rock which became dislodged by a falling tree and rolled down a steep hillside to where he was standing. He was in charge of a group of men felling trees near Mullumbimby in northern NSW.

The hypothesis put forward at the Tribunal was that Mr McLean suffered from a congenital condition of sacralisation of the fifth lumbar segment on the right side; he had reported incidents involving a bad back whilst on service; before his service, he had not suffered any restriction of movement because of back pain but, after service,

he did; his restriction of movement meant that he was unable to move away from the path of the falling rock and died as a result of being struck by the rock.

Issues

The first issue was whether the second Tribunal was estopped from considering whether the hypothesis was reasonable. In the Federal Court, Davies J had said that the Tribunal's decision that there was a reasonable hypothesis was reasonably open to it on the evidence. He said that whether or not a hypothesis is reasonable is a matter of judgment for the decision-maker of fact. Davies J had set aside the decision on another ground and remitted the matter to the Tribunal "to be heard and decided again with or without the hearing of further evidence."

The Tribunal decided that it was not estopped from considering whether the hypothesis was reasonable. The Tribunal said on this point:

> "It is apparent … that [Davies J] considered that the Tribunal had not erred in certain conclusions that it had reached. He did not, however, remit for re-hearing only those matters upon which he considered it had erred. Rather, he set aside the Tribunal's decision, in its entirety, and remitted it to be heard and decided again. On its face, his Honour's order left the whole of the decision to be reviewed and decided again. That he did so is confirmed by the fact that he expressly declined to make a direction as to which SoP applied. Instead, he advised the Tribunal re-hearing the matter to make findings under the SoP which was operative when the Commission made its decision and any SoP which might be in force when the Tribunal gave its decision. As it could well be the case that the findings to be made in relation to the two SoPs might be different, it would be inconsistent with this recommendation if the Tribunal were also to be considered to be bound by the earlier Tribunal's findings."

The second issue was whether Mr McLean's death was war-caused within the meaning of the Act. He had rendered operational service during World War 2 and the claim was required to be considered in terms of the "reasonable hypothesis" standard of proof in ss 120(1) and (3) of the *VE Act.*

The Tribunal noted that there was material pointing to Mr McLean having been hit and killed by a rock and that the rock was dislodged by a tree which had just been felled. There was also material pointing to Mr McLean not having moved out of the way of the rock sufficiently to avoid being hit. A more difficult question was whether there is material pointing to Mr McLean having not moved out of the way of the rock because of his limited mobility.

The Tribunal said that there was no material pointing to Mr McLean having seen the rock let alone having been unable to get out of its way because of his limited mobility. Accordingly. the material did not point to a vital part of the hypothesis. The hypothesis had not been established. Even if there was a hypothesis, it was not reasonable as it was too tenuous.

The Tribunal concluded that the evidence pointed to no-one having been aware of the rock until it started its descent and no-one having seen it until it was falling into the lantana at the bottom of the gully. There was no material pointing to Mr McLean having seen it at all and, if he did, there was no evidence pointing to his mobility or otherwise being a relevant factor in avoiding being hit by the rock.

Formal decision

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

[Ed: Mrs McLean has lodged a further appeal to the Federal Court against this decision.]

Federal Court of Australia

Gartrell v Repatriation Commission

Madgwick J

FCA 542
18 April 2000

No Statement of Principles when claim lodged - Ogston issue to be revisited

In 1994, Mr Gartrell lodged a claim for disability pension in respect of prostate cancer which he sought to relate to a smoking habit which commenced during his war service in the Middle East. At the time of lodging his claim, there was no Statement of Principles in relation to prostate cancer. However, by the time the decision under review was made, there was a SoP in force which did not include smoking as a factor for prostate cancer. The Tribunal affirmed the decision that his prostate cancer was not war-caused.

The Federal Court dismissed Mr Gartrell's appeal from the decision of the Tribunal on the basis that the facts were not relevantly different from those in the judgment of the Full Federal Court in *Ogston v Repatriation Commission* (1999) (15 *VeRBosity* 36). Madgwick J held that, as a single Judge, he was bound to follow the decision of the Full Court and said:

> "It is the intention of the applicant to appeal against the inevitably adverse decision that he will receive before me in the hope that *Ogston* will be reconsidered either by a Full Court of this Court or in the High Court of Australia."

The question arising in both *Gartrell* and *Ogston* was whether a SoP made under s 196B of the *VE Act* after the date of lodgment of a claim for disability pension is binding on the decision-maker when determining the claim. In *Ogston* the Full Court held that the SoP is binding on the decision-maker, even though the effect might be to deny a claim which might have been successful at the time the claim was lodged.

Formal decision

The Court dismissed Mr Gartrell's application.

[Ed: The Full Court dismissed Mr Gartrell's appeal from this decision. The Full Court's decision will be noted in the next edition.]

Repatriation Commission v Keeley

Lee, Cooper & Kiefel JJ

FCA 532
28 April 2000

Statements of Principles - effect of revocation - accrued rights

The Repatriation Commission appealed to the Full Court against the decision of Heerey J which allowed Mrs Keeley's earlier appeal and remitted the matter to the AAT for rehearing. (See 15 *VeRBosity* 70)

Mrs Keeley lodged a claim for a war widow's pension in December 1994. Her late husband died in 1986 as a result of multiple myeloma. The first Statement of Principles in respect of multiple myeloma (No 1 of 1995) was made by the RMA on 18 January 1995. This included as a factor related to war service:

> "(b) being occupationally exposed to paints and/or lacquers before the clinical onset of multiple myeloma;"

Before the AAT heard the matter, the RMA revoked the first SoP and determined a second SoP (No 134 of 1996) which included as a factor:

> "(b) being occupationally required to work as a painter for an average of three or more days per week over any two year period, (or working as a painter for a period or periods of time totalling at least 312 days) before the clinical onset of multiple myeloma, and where that occupational exposure has ceased, the clinical onset of multiple myeloma has occurred within 20 years of cessation;"

Based on the factor in the first SoP, the late veteran's death could possibly be related to service on the basis of exposure to paints and lacquers while working on aircraft during World War 2. Mrs Keeley conceded that she would be unable to establish the factual matters required to be established by the second SoP. The AAT applied the second SoP and affirmed the decision refusing the claim.

Accrued rights

Heerey J set aside the AAT's decision on the basis that section 50 of the *Acts Interpretation Act 1901* conferred on Mrs Keeley an "accrued right" to have her claim determined under the more favourable provisions of the first SoP.

Section 50 of the *Acts Interpretation Act* provides:

> "50. Where an Act confers power to make regulations, the repeal of any regulations which have been made under the Act shall not, unless the contrary intention appears in the Act or regulations effecting the repeal:
>
> (a) affect any right, privilege, obligation or liability acquired, accrued or incurred under any regulations so repealed; or
>
> (b) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any regulations so repealed; or
>
> (c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or regulations had not been passed or made."

Submissions

The Repatriation Commission submitted on appeal to the Full Court that SoPs made by the RMA under s 196B of the *VE Act* are procedural in character and not substantive. They affect how rights recognised by the Act are to be determined but do not create new rights. Mrs Keeley retained the right to have the decision reviewed by the AAT and only the conduct of the review was affected by s 196B and the SoPs. Therefore, s 50 of the *Acts Interpretation Act* had no operation.

Lee and Cooper JJ rejected the Commission's submission, saying:

> "An analysis of the provisions of ss 120A and 196B … shows that those provisions involve more than alterations of a procedural character in that they purport to define the scope of liability of the Commonwealth under the Act by, in effect, confining the claim a claimant may present."

Lee and Cooper JJ continued that s 120A(3), in combination with s 196B, purports to limit the right to have a claim determined under the *VE Act* by restricting the material relevant to such a determination to material that is relevant to the contents of a Statement determined under s 196B. The provisions do more than clarify the meaning of terms used in s 120(3) and how they are to be applied. They purport to restrict the operation of s 120(3) to the terms of the Statement determined under s 196B and in doing so substantively reform the nature of the right that is to be determined under the Act by application of the provisions of s 120. The right that accrued to Mrs Keeley upon lodgment of a claim, to have the claim determined under the Act by the Commission, was "affected" accordingly.

Lee and Cooper JJ concluded:

> "Unless a contrary intention is clearly disclosed, it is to be presumed that accrued rights are determined under the law as it stood when the right accrued. With regard to beneficial legislation such as the Act, it may be assumed that a construction of substantive provisions least likely to work or cause unfairness in result is to be preferred. It may be concluded that Parliament intended that the review of a decision on a claim made pursuant to a Statement more beneficial to a claimant than the terms of a Statement that replaced the former Statement after the decision had been made, is to be conducted as if the former Statement had not been revoked. Unless the Act provided otherwise, a proceeding initiated under the Act to review a decision made by the Commission was to be carried out by determining if the respondent's claim to a pension had been wrongly refused, the decision of the Commission to be replaced by the decision that should have been made by the Commission had it properly applied the law as it stood."

Lee and Cooper JJ observed that s 8(1)(a) of the *VE Act*, referring to "an occurrence that happened while the veteran was rendering operational service", requires no more than a temporal link between death and war service. In some circumstances, a reasonable hypothesis that the death of the veteran "resulted" from an occurrence that happened while the veteran rendered operational service may arise from the known facts without reliance upon "medical-scientific" opinion. Their Honours suggested that in those circumstances, the Commission would be required to determine the claim under ss 120(1) and (3), and s 120A relating to the SoPs would not be relevant.

[Ed: This observation concerning s 8(1)(a) is clearly *obiter* and appears to overlook the effect of s 196B(14)]

Kiefel J agreed that the Commission's appeal should be dismissed. Her Honour also held that the repeal of the first SoP affected the content of Mrs Keeley's right. Her Honour said:

> "From the time the first SoP came into effect, Mrs Keeley's right to a pension was defined specifically by the requirement that the circumstances of her husband's service involved his exposure in the course of his work to paints and/or lacquers before the clinical onset of multiple myeloma, and then more generally by the requirement that the condition be attributed to his service. Whilst she was required to prove or vindicate that right, it was one which was then held by her. The second SoP required more - that work as a painter had been undertaken for a minimum period or periods and that the condition onset within a certain time from cessation of exposure

through that work. Any increase in the bar to the remedy could not in my view be regarded as procedural. It affected a substantive right."

Formal decision

The Full Court dismissed the Repatriation Commission's appeal.

[Ed: The Repatriation Commission has applied for Special leave to appeal to the High Court.]

Repatriation Commission v Flynn & Connolly

Cooper J

FCA 643
17 May 2000

War widow's pension - exposure to low doses of radiation in Japan

The Repatriation Commission appealed to the Federal Court against decisions of the Tribunal that the deaths of two veterans were war-caused. (See 14 *VeRBosity* 17). Mr Connolly died from cancer of the pancreas and Mr Flynn died from non-Hodgkin's lymphoma. The Tribunal was not required to apply Statements of Principles as both claims were lodged before 1 June 1994.

Mr Connolly and Mr Flynn served in the British Commonwealth Occupation Forces (BCOF) in Japan. Mr Flynn was based at Kure from April 1946 to January 1947. Mr Connolly was based at Kure from March 1948 to November 1949 and at Iwakuni for periods during the Korean War. There was evidence that both veterans had visited Hiroshima and it was postulated that they were exposed to low doses of radiation and this had played a part in their deaths from cancer.

Linear no-threshold hypothesis

The Tribunal concluded that both deaths were war-caused on the basis of the so-called "linear no-threshold hypothesis". Under this hypothesis, a person exposed to even extremely low doses of radiation is at risk of developing cancer and the risk increases with any additional exposure. It is suggested that at the level of DNA damage, there is no basis for assuming that there is a dose threshold below which the risk of tumour induction will be zero.

The Tribunal concluded that:

1. the applicants' claims were based on an hypothesis which was not fanciful, because it was derived from the linear no-threshold hypothesis which is accepted by all members of the scientific community working in this field;
2. the hypothesis was not contrary to known scientific fact, as agreed by all medical witnesses; and
3. there was an apparent "pointing toward" the hypothesis by the findings to date of the long-term Radiation Effects Research Foundation (RERF) Study of Japanese atomic bomb survivors, which has found that there have been excess deaths apparently caused by radiation of the more common cancers, such as lung, liver and stomach.

Appeal grounds

The Commission submitted first that the Tribunal had limited its evaluation of the medical evidence to the linear no-threshold hypothesis, ignoring and excluding the contrary opinion of Professor Ilbery and the results of the RERF study.

Cooper J rejected this submission, noting that the Tribunal had examined the evidence in detail. The Tribunal had rejected Professor Ilbery's evidence on the basis that in considering the reasonableness of the hypothesis, he had applied a more onerous standard of proof than that required to be applied by

the Tribunal. In relation to the RERF study, the Tribunal concluded that the results to date were inconclusive in relation to exposure to low doses of radiation.

Cooper J said:

> "There is no substance in the submission that the AAT failed to consider the whole of the medical and scientific material or that it excluded or ignored the evidence of Professor Ilbery and the RERF study.
>
> The AAT had regard to the conflicting medical and scientific material before it. It evaluated all medical and scientific opinion, including the evidence of Professor Ilbery, and the contents of the RERF study against the whole body of other material before it, as it was obliged to do. It gave reasons for preferring other material, rather than the opinion of Professor Ilbery and explained its use of the RERF study. In the way that it dealt with the medical and scientific material, there is no demonstrable error of law as contended for by the applicant."

The Commission also submitted that, contrary to the requirements of s 120(3) of the *VE Act*:

(a) the AAT relied upon the RERF report and the linear no-threshold hypothesis as material pointing to the hypothesis that the death of each veteran from cancer resulted from exposure to radiation from the atomic bomb at Hiroshima when that material was incapable of supporting such an hypothesis; and

(b) the AAT treated as a reasonable hypothesis what the material left open as a mere possibility and thereby committed an error of law of the type identified in *Repatriation Commission v Bey*.

Cooper J found that the Tribunal did not use the results of the RERF study as pointing to the hypothesis that the particular cancers from which the veterans died resulted from their exposure to low level radiation in the Hiroshima region. The AAT had expressly disavowed its use for that purpose. What the AAT did was to regard the study as pointing toward the validity of the linear no-threshold hypothesis in respect of the more common cancers. The Tribunal had made its decision on the basis of the medical and scientific evidence which dealt with the linear no-threshold hypothesis.

Cooper J concluded that there was no error of law in the Tribunal's decision. His Honour said:

> "The body of medical and scientific opinion which subscribed to the linear no-threshold hypothesis and its application to the inducement of cancer by exposure to radiation, even at low levels of exposure, was a fact and one of the facts that the AAT was entitled to rely upon in coming to a conclusion that the hypothesis that the cancers from which the veterans died were induced from exposure to low level radiation in the Hiroshima area during operational service with the BCOF, was a reasonable hypothesis."

Formal decision

The Court dismissed the Repatriation Commission's appeal.

Repatriation Commission v Wedekind

Kenny J

FCA 649
17 May 2000

Pterygium - inability to obtain appropriate clinical management

The Repatriation Commission appealed to the Federal Court against a decision of the Tribunal that Mr Wedekind's pterygium was war-caused. (A pterygium is a fleshy growth of the conjunctiva into the cornea at the front of the eye.)

Mr Wedekind served in the Australian Army from January 1942 to March 1944. During his war service as a truck driver in Northern Australia, his eyes became inflamed due to glare and dusty road conditions. He was hospitalised eight times with chronic eye inflammation and was treated with antibiotics. He continued to have problems with his eyes after his discharge and in 1950, he was told that he had "fatty pterygium". In 1991, he was operated on for pterygium of the left eye.

Dr Gillies, ophthalmologist, expressed the opinion at the Tribunal that Mr Wedekind's pterygium arose in association with his repeated bouts of ocular inflammation during his war service. He stated that the diagnosis of fatty pterygium in 1950 made it even more likely that pterygium was present while Mr Wedekind was on service. Dr Gillies attributed the failure to diagnose the pterygium during Mr Wedekind's war service to the limited diagnostic technology then available.

Appeal grounds

The Commission's appeal raised three errors of law on the part of the AAT. They were:

(1) the AAT failed to test the connection between the pterygium and Mr Wedekind's war service by reference to the Statement of Principles concerning pterygium, as required by s 120B(3) of the *VE Act*;

(2) the material before the AAT was incapable of supporting the conclusion, required to support the AAT's decision, that the requirements of the SoP were made out; and

(3) the AAT failed to make findings of fact and provide reasons for several critical aspects of the matter before it.

As Mr Wedekind did not render operational service, the AAT was required to decide whether his pterygium was war-caused "to its reasonable satisfaction", applying the civil standard of proof in s 120(4). Because his claim was lodged after 1 June 1994, the Tribunal was required to determine the claim in accordance with the relevant SoP (No 254 of 1995). The only factor in the SoP was:

> "(a) inability to obtain appropriate clinical management for the pterygium."

Kenny J observed that before the AAT could be reasonably satisfied that Mr Wedekind's pterygium was war-caused, it had to be satisfied that:

(a) Mr Wedekind was unable to obtain appropriate clinical management for his pterygium during his war service, after having contracted the pterygium;

(b) subject to (c), his inability to obtain appropriate clinical management was related to his war service; and

(c) the pterygium was contracted while he was rendering war service and was contributed to in a material degree by, or was aggravated by, his war service.

In the course of determining whether it was satisfied of these matters, the Tribunal needed to identify the approximate date upon which Mr Wedekind contracted his pterygium; the appropriate form of clinical management; whether Mr Wedekind was unable to obtain that form of clinical management; whether that inability related to his service; whether the pterygium was contracted during his service; and whether it was contributed to in a material degree by, or was aggravated by, Mr Wedekind's particular service.

Errors of law

The Commission's primary submission was that the material before the Tribunal was incapable of supporting the findings that the Tribunal was required to make to reach a decision in favour of Mr Wedekind. There was evidence before the Tribunal that at the time of Mr Wedekind's war service, the appropriate form of clinical management for pterygium was "local decongestion drops" and wearing sunglasses when exposed to strong light and glare.

Kenny J observed that there was nothing in the evidence that would support the proposition that Mr Wedekind would have been unable to obtain eye drops and protective eye wear had his condition been diagnosed during his war service. The only reason for the failure to diagnose the condition in this case was the limitations of the technology available at the time of war service. Kenny J accepted that the standard of clinical management at the time of service was the relevant standard. (See *Brew v Repatriation Commission*, per Sundberg J (1999) (15 *VeRBosity* 41))

Kenny J accepted the Commission's submission that the evidence before the Tribunal was incapable of supporting findings that the Tribunal was obliged to make in reaching its decision, by virtue of s 120B(3) and the SoP. This constituted an error of law by the Tribunal. Her Honour also accepted that the Tribunal had failed to make findings of fact and provide reasons for its decision.

Formal decision

The Court set aside the Tribunal's decision and affirmed the primary decision that Mr Wedekind's pterygium was not war-caused.

Gibson v Repatriation Commission

Burchett, Lee & Hely JJ

FCA 739
6 June 2000

Natural justice - indication from AAT that no submission was required

Mr Gibson appealed to the Full Court against the decision of French J, dismissing his appeal against findings of the Tribunal concerning his knees. (See 15 *VeRBosity* 64). Mr Gibson has multiple osteochondromatosis, a congenital condition causing bony growths and contended that the condition was aggravated by training during his defence service. He alleged that there was an "inability to obtain appropriate clinical management" in terms of the Statement of Principles due to a failure to arrange x-rays of his hip and knees.

Appeal to Full Court

On appeal, Mr Gibson submitted that the Tribunal had failed to observe the rules of natural justice by not giving him an opportunity to make closing submissions concerning his knees.

The Full Court observed that the condition of the appellant's knees appeared to have been overlooked by the Tribunal. As a result, he was effectively prevented from making

submissions concerning his knees and was therefore denied natural justice.

French J at first instance found that Mr Gibson was not unfairly denied the opportunity to present his case to the Tribunal. The Full Court said that this approach reversed the normal rule for situations where an error of law has been shown in an administrative proceeding, or at least to impose a burden an applicant does not have to bear. The true rule is that the decision will be set aside if an error of law is shown that could have affected the outcome of the case.

The Full Court continued:

> "The present matter involved very complex medical evidence, much of it given by a range of Australian and Spanish specialists. We do not think it is possible to be satisfied that a reasonable opportunity to present the appellant's full case could have made no possible difference, and we think the Tribunal, when it hears a matter such as this, comes under the same rule as a court. Furthermore, the denial of natural justice was an error of law that, at the least, could have affected the outcome of the case."

Formal decision

The Full Court allowed Mr Gibson's appeal and remitted the matter to the Tribunal for rehearing in respect of his knee conditions.

Connors v Repatriation Commission

Kenny J

FCA 783
13 June 2000

Lumbar spondylosis - whether Statement of Principles upholds hypothesis - material not raising or pointing to an essential factor

Mr Connors lodged an appeal to the Federal Court against a decision of the Tribunal that his lumbar spondylosis was not war-caused. He served in the Australian Army during World War 2 from 1941 to 1946 and had operational service. He had been affected by pain and restricted mobility resulting from lumbar spondylosis since 1994.

In 1993, Mr Connors was diagnosed with crush fractures of the thoracic vertebrae. His radiologist was of the opinion that the fractures were old and could have been caused by a fall. The only serious fall that he could recall was at Ravenshoe in North Queensland in 1945 when he fell into a trench, striking his chest against the far wall. He did not seek medical treatment as a result of the fall and did not recall any back pain after the incident.

The Statement of Principles concerning lumbar spondylosis (No 165 of 1996) which was applied by the Tribunal included as a factor related to service:

> "(g) suffering a trauma to the lumbar spine before the clinical onset of lumbar spondylosis;"

The term "trauma to the lumbar spine" was defined in clause 7 of the SoP as follows:

> " '**trauma to the lumbar spine**' means an injury to the lumbar spine caused by the force of an extraneous physical or mechanical agent that

> causes the development, within 24 hours of the injury being sustained, of acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of that part of the spine, and where such acute symptoms and signs last for a period of at least one week immediately after the injury occurs, unless medical intervention has occurred. Where medical intervention for the injury has occurred (for example splinting, corticosteroid injection, surgery), and there is evidence relating to the extent of injury and treatment, such evidence may be considered;"

The Tribunal decided that the material before it did not permit a finding that Mr Connors had experienced any "acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of [the lumbar] spine" as the definition of "trauma to the lumbar spine" in clause 7 of the SoP required. The Tribunal found that the hypothesis advanced was not upheld by the SoP as required by s 120A(3) of the *VE Act*, since there was no evidence pointing to the existence of relevant pain following the fall at Ravenshoe. This meant that the material before the Tribunal could not raise a reasonable hypothesis connecting Mr Connors' lumbar spondylosis with his war service.

Appeal grounds

The essential issue in dispute in this case was whether a reasonable hypothesis can only be raised for the purposes of ss 120(3) and 120A(3) where there is material before the decision-maker pointing to the existence of a factor specified by an applicable SoP. Mr Connors submitted that "no individual part or parts of the hypothesis need be supported by facts raised in or by evidence" in order for that hypothesis to be upheld by the SoP.

The Repatriation Commission submitted that a claim cannot succeed unless the material before the decision-maker pointed to a hypothesis of the kind required to fit the template. If the material did not point to the existence of a specified factor and to the required relationship between that factor and service, a hypothesis of the kind required by the SoP could not be raised by the material before the decision-maker and could not be said to be "reasonable" for the purposes of s 120(3) of the *VE Act*. It was not sufficient that the material left the hypothesis open as a possibility or the material was not inconsistent with the hypothesis.

Court's conclusions

Kenny J rejected Mr Connors' submission that the Tribunal had erred in law in deciding that his lumbar spondylosis was not war-caused. Her Honour observed that if an essential element in a hypothesis is not raised (or pointed to) by the material before the decision-maker, then that hypothesis is not raised by that material. If the material does raise the hypothesis, then the decision-maker must determine whether it is reasonable. By virtue of s 120A(3), it will be reasonable if the hypothesis fits the SoP (or the SoP upholds the hypothesis).

In this case, the Tribunal was required to consider whether the material before it raised (or pointed to) Mr Connors' suffering a physical injury to the lumbar spine that caused the development, within 24 hours, of "acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of that part of the spine" which lasted for at least a week immediately after the fall at Ravenshoe in 1945.

Mr Connors sought to rely on earlier Court decisions concerning the application of the "reasonable hypothesis" provisions (namely *Bushell,*

Byrnes and *Bey*). Kenny J said that following the 1994 amendments to the *VE Act*, where there is a SoP determined under s 196B(2), then, pursuant to s 120A(3), a hypothesis is reasonable only if it is upheld by the SoP. The effect of s 120A(3) is that a hypothesis must be supported by evidence pointing to each individual element of the SoP for the hypothesis to be reasonable.

Formal decision

The Court dismissed Mr Connors' appeal.

High Court of Australia

Winch v Repatriation Commission

Gleeson CJ & Callinan J

26 May 2000

Mr Winch applied to the High Court for special leave to appeal against a decision of the Full Court of the Federal Court. The Full Court had dismissed his appeal against a decision of the Tribunal that his calcific aortic stenosis was not war-caused. (See 15 *VeRBosity* 37)

Mr Winch's counsel submitted that in its consideration of the medical evidence, including a specialist's opinion that the veteran's aortic stenosis was accelerated by smoking, the Tribunal had failed to adopt the correct approach in terms of ss 120(1) and (3) of the *VE Act.* It was submitted that the Tribunal was required to reject factors supporting the hypothesis in terms of s 120(1) but had failed to do so.

The High Court said that the Tribunal was required to consider whether the hypothesis was reasonable after consideration of the whole of the evidence. The ultimate question that the Tribunal had to address was whether the hypothesis was reasonable and they said it was not. The Court concluded that there were insufficient prospects of success to warrant the grant of special leave in this matter.

Formal decision

The High Court refused Mr Winch's application for special leave to appeal.

CAPTAIN NEVILLE HOWSE VC

by Dr Jim Harwood

Captain Neville Howse was the first Australian to win a Victoria Cross.

This year marks the 100th anniversary of the act which won him that honour.

With the Olympics being held in Australia this year, many of us will be thinking of our heroes. Australia almost seems to have had more than its fair share of great performers in the field of sport, but we have had many other heroes too.

The 25th of April 1915 is widely regarded as the baptism of fire for Australia's armed forces. On the beach on that first Anzac Day, there were many that became heroes. General Sir Brudenell White, when later reflecting on those heroes, said, "Could they now be asked to name the greatest, the palm would go to Neville Howse."

Many of those who proved themselves on that day were young untried men - ordinary young men from the towns and the bush of Australia. But Neville Howse was different. He was in his fifties and he had already distinguished himself in the Boer War. Indeed, he was already one of that gallant few who has been awarded the Victoria Cross.

His citation for his Victoria Cross reads:

> *"During the action at Vredefort, on the 24th July, 1900, Captain Howse went out under heavy cross-fire and picked up a wounded man and carried him to a place of shelter."*

Pedants may argue whether or not Howse should really be regarded as the first Australian to win a Victoria Cross. They could point out, for example, that he had not been born in Australia but that he had emigrated from England in 1889; or even that there was no such country as Australia in 1900. The Colonies were not to become Federated as one nation until January 1901. They could even argue that the honour should go to Mark Sever Bell. Bell was born in Sydney and won a Victoria Cross during the Battle of Ordashu in the Ashantee Wars. However, Bell had left these shores in early childhood and embarked on his military career in the United Kingdom, West Africa and Burma.

Howse on the other hand sailed to the Boer War as part of the contingent from New South Wales and the award was formally made on the 4th of June 1901 some five months after Federation had occurred.

However you view his claim to be the first Australian winner of the Victoria Cross, Neville Howse's claim to a place in our history cannot be denied.

Neville Howse was born on the 26th of October, 1863 in the village of Stogursey in Somerset. This village is only a few miles from Bridgewater Bay on the Bristol Channel and but a couple of miles from the house in which Samuel Taylor Coleridge wrote *"The Rime of the Ancient Mariner".* Perhaps, as a boy, Neville played in the nearby castle which had been in ruins since the Wars of the Roses or watched the shipping that sailed from Bristol to the far corners of the world.

Neville's father was a doctor who had served in the Crimean War. It seems likely that young Neville would have heard his father speak of the Charge of the Light Brigade and of the pioneering work of Florence Nightingale.

Knowledge of her work in the Crimean War may well have influenced Neville later in his life.

Neville Howse was educated at Freelands School in Taunton, Somerset, and then, like his father, went on to study medicine. After graduation from

the London Hospital, Neville demonstrated Anatomy at the University of Durham. Within a year he was told that he had a “weak lung”.

As a result he decided to migrate to Australia presumably to take advantage of the better climate. He made the move in 1889.

At first, he practised in Newcastle, but later moved north to Taree. At this stage he decided to become a surgeon and, in 1895, returned to England to undertake the necessary post-graduate study.

In 1899, he returned to New South Wales as a Fellow of the Royal College of Surgeons and set up practice in Orange.

At the end of that year Great Britain became involved in a war with the two Boer Republics of South Africa. The underlying cause of this conflict was the gold that was being mined in the Transvaal. The crisis was finally brought to a head when the South African Republic, under Paul Kruger, refused to grant political rights to the foreigners in the mining areas of Witwatersrand. The foreigners were mainly English and their Government responded aggressively.

Neville Howse decided to volunteer for service.

By the middle of 1900, the major Boer armies in South Africa had been defeated but the war was by no means at an end. Boer commandoes continued to harass the British army bases and their communications. One of the Boer’s most brilliant commando leaders was General Christiaan Rudolf de Wet; a cunning soldier who became known as the “Old Fox”.

On the 22nd of July 1900 news was received that de Wet had captured, looted, and burned a train at Rhenoster Poort. This was followed by a report that the “Old Fox” was at Vredefort. A group of mounted infantry, who were only eight miles away, set off after de Wet. Medical Corps members including Howse accompanied them. De Wet had left Vredefort after commandeering men, food and horses; but the British caught up with him at a Boer farm named Stinkhoutboom.

De Wet’s forces opened fire on the mounted infantry. The encounter was fierce. In the middle of the conflict, Howse saw a trumpeter fall. Fire was extremely heavy but Howse galloped off to rescue this man. His horse was soon shot from under him, but Howse continued on foot. He reached the wounded man who had been shot through the bladder, dressed his wounds and carried him out of the action. It was for this that Howse was awarded his Victoria Cross.

Unfortunately for the conduct of the war as a whole, on this occasion, the “Old Fox” got away.

After the war, Howse resumed his practice in Orange. It might seem that he would now settle down and leave adventure behind him. He married Miss Evelyn Northcote and they began to raise a family. They had five children: Eril, Guarda, Alison, John and Charles.

Now, Neville showed himself to be a leader in peace as well as a brave man in war. By the time Archduke Ferdinand was assassinated at Sarajevo, in 1914, Howse had twice been Mayor of Orange. The Archduke's death was followed by a general mobilisation in Europe. The Great War, which we now know as World War 1, had begun.

Howse once again joined the Army. This time it was an Australian Army.

After spending a brief period in New Guinea, Howse sailed with the Australian Imperial Force to Palestine.

While Churchill, who had been a war correspondent in the Boer War, planned the invasion of Gallipoli, Howse, a hero from the same war, planned the medical support for those hapless ANZACs who were to be involved. Whereas Churchill was to gain nothing but criticism for his planning of the invasion, Howse was to gain the greatest praise for the part he played.

The British staff in Cairo did most of the detailed planning for the invasion of the Gallipoli Peninsula. This included the planning of the necessary medical services.

The medical authorities in Cairo imagined that the Allied forces at Gallipoli would quickly secure the beaches and push inland. Here, they supposed, a sheltered site for a field hospital would soon be found. The beaches could thus be kept free for the landing of stores and reinforcements. But what if everything did not go according to plan?

When Howse saw the plans, he realised that they were totally inadequate. Despite opposition, he courageously criticised them and made constructive proposals. As a result of his insistence some improvements were made and many lives were to be saved.

On the day of the landing, the troops did not push inland quickly. The Turks offered stronger resistance than had been expected. Everything did not go according to the plan of those in Cairo. The beach at Anzac Cove looked like a holocaust.

Where were the wounded to be sent now? What was to be done and who was to do it? In the words of Sir Brudenell White: "Then it was that Howse became a giant. He took the whole matter into his own hands, giving and disregarding orders in a manner quite shocking but strangely and rapidly productive of results. Shells and bullets he completely disregarded. To the wounded he was gentleness itself; his capable hands eased many a patient, while his cheery voice and bearing brought comfort and consolation."

Howse had no responsibility or authority for the evacuation of casualties, but on his own initiative, he rapidly made such arrangements as he could and supervised the evacuation. He had a special pier built so that all arriving craft could be used for back-loading of casualties after they had discharged their troops, animals and stores on the beach.

During the ensuing months Howse continued to work in the same way. He shared the dangers, diseases, discomforts and privations of everyone at Gallipoli. He was also harassed by impractical instructions from the army headquarters in Cairo.

Worse still, the medical services in Egypt remained inadequate for the number of casualties evacuated from Gallipoli. Their numbers had been grossly underestimated. At this stage, Major-General Fetherston arrived in the Middle East. He realised at once that the Australian medical arrangements in Egypt needed to be under Australian control. He recommended that Howse

be promoted to Surgeon General and be made Director of Medical Services to the Australian Imperial Force.

Before this recommendation could be implemented, it was decided to evacuate the Gallipoli Peninsula. Howse returned to the Peninsula where his skill and experience were needed. The evacuation was successful and casualties were less than expected.

Once back in Cairo, Howse found himself in an anomalous position. The Australian Government had not yet confirmed his promotion. With his usual charm and tact, he did what he could using the principle of "go ahead and do what you believe should be done until someone stops you". They did not stop him and in early 1916, his promotion was confirmed.

This was a change for Howse. From now on he would be the administrator, not the hero helping the wounded soldier on the battlefield. And so, almost a year after the Gallipoli landing, Howse arrived in London and established his staff in the Westminster Methodist Training College, Horseferry Road, which had been taken over as the Australian Imperial Force Headquarters Abroad.

Howse reorganised the A.I.E medical services. One of his reforms was to have surgical teams stationed as far forward as it was possible to operate. In all, he laid down the principles for an army medical service that could operate effectively under all conditions from the desert to the jungle. The efficiency of the service that he organised was to benefit not only the soldiers of that first Great War but also their successors in World War 2 and our subsequent conflicts.

Howse returned to Australia at the end of 1918, but his job was not over. Early the next year he returned to London to supervise aspects of the Repatriation Program.

When he finally returned to Australia, Howse was the obvious choice for the appointment as Director-General of the Australian Army Medical Services.

In 1925 Howse resigned from the Army - not to retire but to stand for Parliament. He was elected as Federal Member for Calare. Later in the year, he was appointed Minister for Defence and Health. This was a very demanding position, and when his own health began to fail, he asked to be relieved and was appointed Minister for Home and Territories.

In 1928 he held the Ministries of Health and Repatriation. Interestingly, at that time the Minister responsible for Repatriation made decisions on individual appeal cases. Minister Howse would pore over the papers associated over each case, and he apparently found the process debilitating and exhausting. He set in train processes that would eventually mean that external review bodies would determine the appeals in such cases, as they still are today.

At the general elections a year later, he lost his seat in the landslide defeat of the Bruce government. The Prime Minister himself lost his seat of Flinders.

Howse was now well into his 60's and his health was failing. In 1930, he went to England and consulted Lord Moynihan who operated on him for gallstones. Unfortunately, the underlying trouble was more sinister. He was found to have malignant disease of the pancreas.

Howse died in London on 19 September 1930. His wife, two sons and three daughters survived him.

It will probably come as no surprise to learn that Howse was knighted for his services. However, it may be surprising to discover that he held three knighthoods. He was a Knight

Commander of the Most Honourable Order of the Bath, a Knight Commander of the Most Distinguished Order of St. Michael and St. George, and a Knight of the Most Venerable Order of St. John of Jerusalem.

Footnote:

Until recently, Neville Howse may have been largely forgotten, but a new biography of him, by Michael Tyquin, will help restore him to memory.

Further reading

"Neville Howse : Australia's first Victoria Cross winner" by Michael B Tyquin (Oxford University Press, 1999)

"ANZAC doctor : the life of Sir Neville Howse, Australia's first VC" by Stuart Braga (Hale & Iremonger, 2000)

Statements of Principles issued by the Repatriation Medical Authority

June - August 2000

Number of Instrument	Description of Instrument
13 of 2000	Revocation of Statement of Principles (Instrument No.73 of 1994 concerning haemorrhoids and death from haemorrhoids) and Determination of Statement of Principles under subsection 196B(2) concerning haemorrhoids and death from haemorrhoids
14 of 2000	Revocation of Statement of Principles (Instrument No.74 of 1994 concerning haemorrhoids and death from haemorrhoids) and Determination of Statement of Principles under subsection 196B(3) concerning haemorrhoids and death from haemorrhoids
15 of 2000	Determination of Statement of Principles under subsection 196B(2) concerning myelodysplastic disorder and death from myelodysplastic disorder
16 of 2000	Determination of Statement of Principles under subsection 196B(3) concerning myelodysplastic disorder and death from myelodysplastic disorder
17 of 2000	Revocation of Statement of Principles (Instrument No.34 of 1999 concerning malignant neoplasm of the bile duct and death from malignant neoplasm of the bile duct) and Determination of Statement of Principles under subsection 196B(2) concerning malignant neoplasm of the bile duct and death from malignant neoplasm of the bile duct
18 of 2000	Revocation of Statement of Principles (Instrument No.35 of 1999 concerning malignant neoplasm of the bile duct and death from malignant neoplasm of the bile duct) and Determination of Statement of Principles under subsection 196B(3) concerning malignant neoplasm of the bile duct and death from malignant neoplasm of the bile duct
19 of 2000	Revocation of Statements of Principles (Instrument No.69 of 1994 concerning chloracne and death from chloracne, and Instrument No.279 of 1995 concerning chloracne and death from chloracne) and Determination of Statement of Principles under subsection 196B(2) concerning chloracne and death from chloracne
20 of 2000	Revocation of Statements of Principles (Instrument No.70 of 1994 concerning chloracne and death from chloracne, and Instrument No.280 of 1995 concerning chloracne and death from chloracne) and Determination of Statement of Principles under subsection 196B(3) concerning chloracne and death from chloracne

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **Repatriation Medical Authority, 127 Creek Street, Brisbane Qld 4000**
- **Department of Veterans' Affairs, PO Box 21, Woden ACT 2606**
- **Department of Veterans' Affairs, 13 Keltie Street, Phillip, ACT 2606**
- **RMA Website: *http://www.rma.gov.au/***

Repatriation Medical Authority

CONDITIONS UNDER INVESTIGATION AS AT 16 AUGUST 2000

Description of disease or injury	Factors under investigation	Date gazetted
Acquired cataract [Instrument Nos 146/96 & 147/96] **Chronic solar skin damage** [Instrument Nos 33/96 & 34/96] **Malignant neoplasm of the lip epithelium** [Instrument Nos 105/96 & 106/96] **Non-melanotic malignant neoplasm of the skin** [Instrument Nos 45/98 & 46/98] **Pterygium** [Instrument Nos 60/98 & 61/98]	Required level of exposure to solar radiation	23-06-99
Acute lymphoid leukaemia [Instrument Nos 77/95 & 78/95]	- - -	16-08-00
Alzheimer's disease [Instrument Nos 378/95 & 379/95]	- - -	03-11-99
Aplastic anaemia **[NOTE**: As there is no SoP concerning aplastic anaemia, **no decision can be made in relation to a claim for this condition** until the RMA makes a SoP or a determination not to make a SoP: see subsections 120A(2) and 120B(2) *VE Act*.**]**	- - -	03-11-99
Asthma [Instrument Nos 59/96 & 60/96 as amended by Nos 75/97 & 76/97]	- - -	03-11-99
Bronchiectasis [Instrument Nos 35/97 & 36/97]	- - -	17-11-99
Carpal tunnel syndrome [Instrument Nos 71/97 & 72/97]	- - -	03-11-99

Chondromalacia patellae [Instrument Nos 320/95 & 321/95]	- - -	21-06-00
Chronic lymphoid leukaemia [Instrument Nos 79/95 & 80/95]	- - -	19-07-00
Chronic pancreatitis [Instrument Nos 47/97 & 48/97]	- - -	01-03-00
Chronic ulcerative colitis [Instrument Nos 144/96 & 145/96 as amended by Nos 179/96 & 180/96]	Stress	04-08-99
Deep vein thrombosis [Instrument Nos 43/98 & 44/98]	- - -	10-05-00
Dengue fever [Instrument Nos 139/95 & 140/95]	- - -	01-03-00
Giant cell arteritis [Instrument Nos 85/96 & 86/96]	- - -	22-03-00
Goitre [Instrument Nos 29/98 & 30/98]	Exposure to radiation in Hiroshima	05-05-99
Gulf War syndrome **[NOTE**: As there is no SoP concerning Gulf War syndrome, **no decision can be made in relation to a claim for this condition** until the RMA makes a SoP or a determination not to make a SoP: see subsections 120A(2) and 120B(2) *VE Act*.**]**	- - -	17-11-99
Hodgkin's disease [Instrument Nos 77/94 & 78/94] **Malignant neoplasm of the lung** [Instrument Nos 29/96 & 30/96 as amended by Nos 149/96 & 150/96] **Porphyria cutanea tarda** [Instrument Nos 71/94 & 72/94] **Soft tissue sarcoma** [Instrument Nos 49/98 & 50/98]	Exposure to herbicides used in Vietnam, namely 2,4-D, 2,4,5-T, cacodylic acid or picloram	23-06-99
Hypertension [Instrument Nos 25/99 & 26/99]	Sleep apnoea	18-08-99

Hypertension [Instrument Nos 25/99 & 26/99]	- - -	10-05-00
Malignant melanoma of the skin [Instrument Nos 97/95 & 98/95 as amended by Nos 189/96 & 190/96]	- - -	18-08-99
Malignant neoplasm of the bladder [Instrument Nos 231/95 & 232/95 as amended by Nos 362/95 & 363/95 and Nos 94/97 and 95/97]	Occupational exposure to aromatic amines	23-06-99
Meniere's disease [Instrument Nos 27/97 & 28/97]	- - -	10-05-00
Mesangial IGA glomerulonephritis **[NOTE**: As there is no SoP concerning Mesangial IGA glomerulonephritis, **no decision can be made in relation to a claim for this condition** until the RMA makes a SoP or a determination not to make a SoP: see subsections 120A(2) and 120B(2) *VE Act.***]**	- - -	17-11-99
Motor neurone disease [Instrument Nos 245/95 & 246/95]	- - -	18-08-99
Multiple chemical sensitivity **[NOTE**: As there is no SoP concerning multiple chemical sensitivity, **no decision can be made in relation to a claim for this condition** until the RMA makes a SoP or a determination not to make a SoP: see subsections 120A(2) and 120B(2) *VE Act.***]**	- - -	21-06-00
Neuropathy **[NOTE**: As there is no SoP concerning neuropathy, **no decision can be made in relation to a claim for this condition** until the RMA makes a SoP or a determination not to make a SoP: see subsections 120A(2) and 120B(2) *VE Act.***]**	- - -	03-11-99
Osteoarthrosis [Instrument Nos 41/98 & 42/98 as amended by Nos 19/99 & 20/99]	- - -	18-08-99

Psoriasis [Instrument Nos 21/98 & 22/98]	- - -	22-03-00
Tinnitus [Instrument Nos 43/96 & 44/96]	- - -	10-05-00

Administrative Appeals Tribunal decisions – April to June 2000

Application

dismissal by Veterans' Review Board
- whether adequate notice
  - **Johnson, K D** 12 Apr 2000
  - **Gregory, K J** 07 Jun 2000

Carcinoma

carcinoid tumour of appendix
- whether failure to diagnose
  - **Flett, J A** 09 Jun 2000

colon
- alcohol
  - **Severn, E** 17 May 2000
- prior smoking habit
  - **DeGans, M J** 27 Apr 2000

myelodysplastic syndrome
- exposure to radiation in Hiroshima
  - **Davis, P J** 10 May 2000

Cardiovascular disease

atherosclerotic peripheral vascular disease
- hypertension
  - **Everist, E L** 28 Jun 2000

hypertension
- alcohol
  - **Mansfield, R C** 02 Jun 2000
- obesity
  - **Rowe, W W** 13 Jun 2000
- psychoactive substance abuse
  - **Hughes, B J** 26 Jun 2000

ischaemic heart disease
- alcohol
  - **Severn, E** 17 May 2000
- smoking alleged - credibility of witness
  - **Scott, A (Estate)** 28 Apr 2000
- smoking - spider in tent
  - **Perkins, T H** 09 Jun 2000
- whether disease present
  - **Pringle, R M** 09 Jun 2000

Circulatory disease

varicocele
- increased intra abdominal pressure
  - **Perks, B L** 03 May 2000

Death

accidental death by falling rock
- whether mobility affected by lumbar spondylosis
  - **McLean, J L** 22 Jun 2000

cerebral arteriosclerosis
- hypertension & inability to undertake physical activity
  - **Brush, N M** 12 May 2000

cerebrovascular accident
- smoking cessation
  - **Lind, J A** 27 Jun 2000

ischaemic heart disease
- inability to undertake physical exercise
  - **Furber, M** 08 May 2000

left temporal glioblastoma
- whether course of therapeutic radiation
- dental x-rays
  - **Lee, A J** 19 Apr 2000

malignant neoplasm of rectum
- alcohol
  - **Borrett, M** 16 Jun 2000

multiple myeloma
- ischaemic heart disease as additional cause
  - **Keding, I** 11 May 2000

severe head injury
- tractor accident
  - **Plattfuss, B M** 28 Apr 2000

Dependant

divorced from veteran
- whether marriage-like relationship
  - **Reid, T** 16 May 2000

- experiencing a stressor
- Vietnam gun line tour

Jehn, A G 19 Jun 2000

- experiencing a stressor
- crashed helicopter in Vietnam

Carne, D L 27 Jun 2000

- false claims of traumatic incidents

Hardman, G J 26 Apr 2000

post traumatic stress disorder & psychoactive substance abuse

- aggravation by Vietnam service

Hughes, B J 26 Jun 2000

Qualifying service

whether allotted for duty

- FESR service

Graham, E W 01 May 2000

Remunerative work

ceased work for rural company beyond age 65

- whether employee or independent consultant

Keady, B 18 Apr 2000

Intermediate rate

- bank courier

De Pasquale, R 23 May 2000

whether prevented by war-caused disabilities alone

- calendar salesman

Coulson, H K 26 Jun 2000

- clerical/administrative
- voluntary retirement

Challenger, T J 27 Apr 2000

- contract cleaner

Schulz, G R 23 May 2000

- council driver

Potiuch, R O 26 Apr 2000

- crane operator

Smith, T J 07 Apr 2000

- farmer aged 76

Barnet, E H 20 Apr 2000

- fitter/process worker

Bagust, V L 22 Jun 2000

- fitter/welder aged 61

Rowe, F 28 Apr 2000

- plant nursery

Coleman, J E 04 Apr 2000

- restaurant worker
- non war-caused asthma & ankle conditions

King, K J 18 Apr 2000

- service mechanic age 59

Mills, L L 23 Jun 2000

- slaughterman - closure of meatworks

O'Brien, P W 08 Jun 2000

- technician/manager

Robinson, F C 13 Jun 2000

- truck driver

Small, N M 17 Apr 2000

- warehouse worker aged 70

Pringle, R M 09 Jun 2000

whether prevented from working 8 hours per week

- bricklayer

Prowse, P 10 May 2000

- insurance agent aged 72

Grant, S M 19 May 2000

- investment income not relevant

Morison, M 30 Jun 2000

- railway worker aged 55

Francis, R J 30 Jun 2000

Respiratory disorder

asthma

- navy diver

Millen, P T 23 Jun 2000

Spinal disorder

cervical spondylosis

- fall from helicopter

Small, N M 17 Apr 2000

- unloading cargo

Hayward, G 01 May 2000

cervical spondylosis, lumbar spondylosis & intervertebral disc prolapse

- jump from helicopter

Berry, J 20 Apr 2000

Words and phrases