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Contents
January - March 2002

Editor's notes

This edition of *VeRBosity* contains reports on six Federal Court decisions relating to veterans' matters handed down in the period from January to March 2002.

There are reports on selected AAT decisions handed down in the period from January to March 2002. Information is also included about Statements of Principles issued recently by the Repatriation Medical Authority and matters currently under formal investigation.

There is also an article by Bruce Topperwien on the effect of *Langley's* case and s 8(1)(f) of the *VE Act.* Bruce is the Executive Officer of the VRB and also lectures in veterans' law for Southern Cross University.

The views expressed in *VeRBosity* articles should not be seen as official VRB 'policy', but are intended to promote discussion about legal issues.

Robert Kennedy
Editor

General Information

Media release by the Hon Danna Vale, Minister for Veterans' Affairs

4 April 2002

VETERANS' REVIEW BOARD HEAD RE-APPOINTED

The Principal Member of the Veterans' Review Board, Brigadier Bill Rolfe (Retired), has been re-appointed for a further three years, the Minister for Veterans' Affairs, Danna Vale announced today.

The Governor-General has approved the re-appointment, effective from 8 April 2002.

Minister Vale said she welcomed Brigadier Rolfe's re-appointment.

> "The Veterans' Review Board is a key part of the repatriation appeals process and is highly regarded within the veteran community for its record of providing fair decisions.
>
> As the Principal Member of the VRB, Brigadier Rolfe is responsible for the management of the Board and the appeal cases brought by members of the veteran community.
>
> I am delighted that Brigadier Rolfe will continue to provide the Board with the benefit of his extensive military experience, as well as his legal and administrative skills," Minister Vale said.

Brigadier Rolfe has been the Board's Principal Member since 1997, following a distinguished career in both the Australian Army and the public service. A graduate of the Royal Military College Duntroon, he served in Vietnam before undertaking a law degree at the Australian National University.

Brigadier Rolfe is also a graduate of both the Australian Army Command and Staff College and the United States Army Judge Advocate General's School.

> "The Veterans' Review Board is different in many ways to other merit review tribunals, particularly in respect of the unique and specialised skills which the members bring to the Board," Minister Vale said.
>
> "Brigadier Rolfe's re-appointment will ensure the Board continues its tradition of independence, forthrightness and fairness in serving Australia's veteran community."

The Veterans' Review Board is an independent statutory body that reviews decisions of the Repatriation Commission affecting certain pensions and benefits for Australian veterans and their dependants.

Decisions reviewed by the VRB include claims for injury or disease as caused by war/defence, claims for war widows'/widowers' pensions, assessment of the rate of pension paid for war/defence-caused incapacity and claims for grant of attendance allowance. It may affirm, vary or set aside the decision under review and, where appropriate, substitute its own decision.

Media release by the Hon Danna Vale, Minister for Veterans' Affairs

21 March 2002

MORE VETERANS ELIGIBLE FOR GOLD CARD

Thousands of Australian veterans will become eligible for comprehensive free health care following the passage of the Federal Government's Gold Card legislation in Parliament today.

Veterans' Affairs Minister Danna Vale welcomed the passage of the Bill, which will provide all Australian Defence Force veterans with qualifying service over the age of 70 with the Gold Repatriation Health Card from 1 July 2002.

"This legislation delivers on a key commitment made by the Howard Government during last year's Federal election," Minister Vale said.

"The Federal Government recognises that as our veteran population ages their health care needs change.

From 1 July 2002, the Gold Card will be available to older veterans with qualifying service from conflicts including the Korean War, the Malayan Emergency, the Indonesian Confrontation and the Vietnam War.

Importantly, the Howard Government has taken a long term view with this initiative. Veterans of later conflicts such as the Gulf War, East Timor and Australia's current deployment in the coalition against terror, will also be eligible for the Gold Card upon reaching the age of 70.

Through this measure our older veterans will receive the care they need, the care they deserve," the Minister said.

Eligible veterans who receive benefits through the Department of Veterans' Affairs automatically qualify for the Gold Card and will receive a letter within the next two weeks advising them of their entitlement. The Gold Card will be sent to them before 1 July 2002.

Other veterans who believe they have qualifying service and who have turned 70 on or before 1 July are encouraged to contact DVA on **133 254** to receive an application form.

Veterans who turn 70 after 1 July can also lodge an application, with their entitlements to take effect from their birthday.

"This initiative further demonstrates the Howard Government's commitment to advancing the welfare and interests of the veteran community.

It recognises and delivers on our nation's duty to care for those who serve Australia in times of war and conflict," Minister Vale said.

Media release by the Attorney-General, the Hon Daryl Williams AM QC MP

27 March 2002

NEW APPOINTMENTS TO THE FEDERAL COURT OF AUSTRALIA AND THE ADMINISTRATIVE APPEALS TRIBUNAL

I am pleased to announce the appointment of Mr Garry Keith Downes AM QC as a Judge of the Federal Court of Australia and as acting President of the Administrative Appeals Tribunal.

I also welcome the appointment of Professor Stanley Hotop as a part-time Deputy President of the Tribunal for a period of three years.

Mr Downes has practised as a barrister at the New South Wales Bar since 1970 and was appointed a Queen's Counsel in 1983. His practice involves mainly appellate advocacy and commercial litigation and arbitration. Mr Downes was formerly Chairman of the Administrative Law Committee of the Law Council of Australia and, in 1994-95, was President of the Union Internationale des Avocats (International Association of Lawyers).

He is currently the Australian member of the International Court of Arbitration of the International Chamber of Commerce in Paris and the Chairman of the Australian Branch of the Chartered Institute of Arbitrators. In 1997, Mr Downes was made a Member of the Order of Australia for service to the law as a barrister, educator and executive officer of many legal organisations.

The resignation of the Hon Justice Deirdre O'Connor as a Judge of the Federal Court and as President of the Administrative Appeals Tribunal became effective earlier this month.

Pending resolution of proposed changes to tribunal arrangements, Mr Downes has been appointed to act as President of the Administrative Appeals Tribunal for a period of 12 months. Mr Downes will be based in Sydney and take up his appointments on 2 April 2002.

Professor Hotop has been a member of the Tribunal since 1991, part-time Senior Member since 1992, and has previously acted in the position of part-time Deputy President. He is currently Associate Professor of Law at the University of Western Australia. Professor Hotop was Associate Professor of Law at the University of Sydney from 1980 to 1989.

Professor Hotop will be based in Perth, which will ensure that the Tribunal has a Deputy President presence in Western Australia.

Death from a war-caused injury or disease

Bruce Topperwien

Summary: **(1)** A veteran's death will be war-caused if the veteran died from a previously accepted war-caused injury or disease.

(2) However, the accepted disability must be a direct cause of death. An indirect cause is not sufficient.

(3) The SoPs and the concept of 'reasonable hypothesis' do not apply to such a connection.

(4) The standard of proof is 'reasonable satisfaction'.

(5) The 'death from an accepted disability' connection does not replace other means of finding death to be war-caused, to which a 'reasonable hypothesis' might apply. But for those other means to apply, every link in the chain of causation between service and death must be upheld by a relevant SoP.

(6) Connection to a previously accepted disability without having to re-establish the service connection only applies to widows' claims.

(7) In disability pension claims, and widows' claims where an accepted disability is not the direct cause of death, every link in the chain of causation between service and the claimed disability or death must be upheld by a relevant SoP, even if a previously accepted disability is a link in that chain.

In *Langley v Repatriation Commission* (1993) 9 *VeRBosity* 40, 43 FCR 194, the Federal Court held that a decision-maker should determine each causal link in a chain of causation between the circumstances of the veteran's service and the disability or death even if a disability in that causal chain had previously been accepted as war-caused.

For example, If a veteran had previously had hypertension accepted as war-caused, a later claim that ischaemic heart disease was war-caused because it was related to his hypertension would not succeed unless the decision-maker were again satisfied about the connection between the hypertension and the veteran's service. That legal requirement was reaffirmed by the Full Federal Court in *McKenna* (1999) 15 *VeRBosity* 22, 29 AAR 70 and *Ogston* (1999) 15 *VeRBosity* 36, 56 ALD 789.

The introduction of the Statement of Principles (SoP) regime in 1994 brought this issue sharply into focus. The binding nature of SoPs meant that some causes that had been accepted under the pre-SoP system on the basis of questionable medical evidence were no longer legally valid (for example, smoking and prostate cancer). This led Legacy and veterans' organisations to lobby the government to amend the Act to provide that widows' claims should be granted if the veteran died from an accepted disability.

In 1996, after considering those representations, the government agreed to lessen the effect of *Langley's* case on widows' claims by amending the Act. Paragraph 8(1)(f) was added to provide:

> 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: …
>
> (f) the injury or disease from which the veteran died is an injury or disease that has been determined in accordance with

> section 9 to have been a war-caused injury or a war-caused disease, as the case may be;
>
> Note: The effect of paragraph (f) is that, if the veteran has died from an injury or disease that has already been determined by the Commission to be war-caused, the death is to be taken to have been war-caused. Accordingly, the Commission is not required to relate the death to eligible war-service rendered by the veteran and sections 120A and 120B do not apply.

A similar provision was inserted in s 70(5) for 'defence-caused' death.

The 'from which' causal connection

Paragraph 8(1)(f) provides an alternative method to those in paragraphs (a) to (e) of s 8(1) for determining whether a veteran's death was war-caused.

Instead of the veteran's death being connected to service, it must be connected to an accepted war-caused injury or disease. For this connection to apply, the decision-maker must be satisfied that it was a war-caused injury or disease '*from which*' the veteran died.

While no court has yet considered this provision, a similar phrase, 'incapacity from which he died', appeared in s 24(2)(a) of the *Repatriation Act 1920*, and was examined by the Federal Court in *Repatriation Commission v Hayes* (1982) 1 RPD 281, 64 FLR 423. In that case, the Court held that the Repatriation Review Tribunal had made an error of law when it decided that the 'from which' test was satisfied by finding that the incapacity 'played some material part' in the veteran's death.

Instead, the Court held that the test would be satisfied if 'the ordinary answer of an ordinary man … would be that the death has "resulted" from incapacity'. This indicates that the phrase, 'from which the veteran died', is a more direct causal test than 'arose out of, or was attributable to' (in s 8(1)(b)). The 'from which' test requires a reasonably close connection between the accepted disability and the veteran's death.

This test is similar to the causation test in negligence cases. In *March v Stramare* (1991) 171 CLR 506, Mason CJ said, 'the cause of a particular occurrence is a question of fact which must be determined by applying commonsense to the facts of each particular case'. So, the test under s 8(1)(f) could be said to be: 'as a matter of commonsense, did the veteran's death result from the war-caused injury or disease?'

The standard of proof

The Note to s 8(1)(f) says that 'the Commission is not required to relate the death to eligible war-service rendered by the veteran'.

The 'beyond reasonable doubt' standard of proof in s 120(1) applies only if the claim relates to the veteran's operational service. But when s 8(1)(f) is under consideration, service is irrelevant because there is no connection required to operational service. Thus s 120(1) and s 120(3) (the 'reasonable hypothesis' test) do not apply, but instead s 120(4) applies. That is, the required connection between the veteran's death and the war-caused injury or disease must be found to exist to the 'reasonable satisfaction' of the decision-maker.

In *Ferriday's* case (1996) 12 *VeRBosity* 75, 150 ALR 57 at 74, the Court said:

> "Facts which may be germane to establishing a right to a pension under the Act but not part of the question of causal connection between a morbid condition and a relevant circumstance of operational service addressed under s 120(1) are facts to be established to the reasonable satisfaction of the Commission."

SoPs do not apply

The Note to s 8(1)(f) also says that 'sections 120A and 120B do not apply'. Those sections concern SoPs.

In *McKenna's* case, the Court held that if a SoP is relevant to a sub-hypothesis within the overall hypothesis said to connect service and injury, disease or death, then the hypothesis will not be reasonable unless the sub-hypothesis fits the template of that SoP. Because the Note to s 8(1)(f) expressly excludes any link to service and also excludes the operation of ss 120A and 120B, that principle in *McKenna's* case does not apply if the veteran has died from a war-caused injury or disease. It does not matter that no SoP upholds the connection between service and the accepted disability that caused death because that connection is not required under s 8(1)(f).

However, the decision-maker must be reasonably satisfied that the veteran actually died from the accepted disability, and cannot merely accept that it is a reasonable hypothesis that the veteran died from the accepted disability. Such a finding would be a misuse of the notion of 'reasonable hypothesis'. *McKenna's* case indicates that the concept of 'reasonable hypothesis' applies only to the overall connection between the particular circumstances of the veteran's service and the veteran's death. It does not apply to sub-elements within the hypothesis. Thus, it is a concept that has no application to s 8(1)(f), which is not at all concerned with a connection to service.

The only AAT cases to have considered s 8(1)(f) to date appear to be *Re Bourke* (1998) 14 *Verbosity* 59 and *Re Bowles* (21 Oct 1998). However, the AAT did not have to apply it in either case because the evidence did not indicate that the veterans' war-caused diseases played any part in their deaths. While, in *Re Bourke* the AAT seemed to assume that in considering s 8(1)(f) the reasonable hypothesis test applied, the AAT did not discuss the issue or have the benefit of any argument on that point.

Other connections still available

Failure to meet s 8(1)(f) does not mean that a connection cannot still be made between service, the accepted disability and the veteran's death. For example, a veteran might have an accepted disability of hypertension and the evidence might show that while the veteran died from a heart attack caused by ischaemic heart disease, the hypertension was only one of a number of contributing factors in the cause of the ischaemic heart disease. In such circumstances, it could not be said that the veteran 'died from hypertension'. Yet, as long as the entire chain of causation from the circumstances of his service through to hypertension, ischaemic heart disease, heart attack and death is upheld by relevant SoPs, the claim can still succeed. In *Law's* case (1980) 1 RPD 42, 47 FLR 57, the Full Federal Court held that for the 'attributable to' test in s 8(1)(b), service merely had to make a material contribution to the cause of death, it did not need to be the direct cause.

A recent VRB case

Recently, the Board was asked to consider s 8(1)(f) in circumstances where many years earlier the veteran's tension headaches had been accepted as a war-caused disease. He later died of a brain haemorrhage. On behalf of the widow it was put that the aspirin the veteran had taken for his headaches had contributed to his brain haemorrhage. The relevant SoP for brain haemorrhage included the taking of aspirin as a factor.

The Board rejected this submission. The suggested connection between taking aspirin and the brain haemorrhage was not supported by any medical evidence. As the factors in SoPs relate to less direct causal connections than that

required by the 'from which' test, the SoP could not be used as evidence that taking aspirin results in brain haemorrhage. Specialist medical evidence would be required before any such connection could be found to exist for the purpose of s 8(1)(f), and such evidence would have to relate directly to the facts of the veteran's case. The evidence would have to deal with the quantity of aspirin that must be taken, and any time relationship necessary between ingestion and the haemorrhage for it to be regarded as a direct cause. That evidence would have to be consistent with the facts of the case by demonstrating a direct connection between an episode of tension headaches suffered by the veteran, his taking the requisite dose of aspirin needed to cause a haemorrhage, and the time between taking the aspirin and the haemorrhage. No such evidence was available to the Board.

As a result, there was no evidence on which the Board could find, as a matter of commonsense, that the veteran had died from his tension headaches. Even if this evidence had been obtained, it would still be debatable whether a direct connection between tension headaches and the veteran's death could be said to exist as it would have been taking aspirin that resulted in the death, not the tension headaches.

Conclusion

The purpose of enacting s 8(1)(f) was to provide some comfort for partners of those veterans who, during their lifetime, claimed pension for their illnesses, assuming that if they died from those disabilities, their surviving partner would receive a war widow's pension. To accommodate this common assumption, Parliament has provided a commonsense test of causation between the accepted disability and the veteran's death, without affecting the possibility of claims still being granted by more indirect causal connections. However, the more indirect connections must be upheld by SoPs. The fact that Parliament has not sought to apply a provision like s 8(1)(f) to disability pension claims is an indication that this was to be a limited exception to the general rule that issues of medical causation must be upheld by SoPs.

Administrative Appeals Tribunal

Re P Stone and Repatriation Commission

Way

Q1999/1034
16 January 2002

Death – ischaemic heart disease – obesity

Mrs Stone applied for review of a decision that the death of her late husband was not war-caused. The veteran had served as a flight rigger in the RAAF in Australia during World War 2. The Tribunal was required to decide the matter to its reasonable satisfaction in accordance with s 120(4) of the *VE Act.*

The cause of the veteran's death aged 79 was (a) cardiac arrest (b) recurrent ventricular tachycardia (2 days) and (c) ischaemic heart disease (two years).

Submissions

Mrs Stone contended that his death was a result of obesity and that his obesity was related to war service, in that changes in his environment, associated with his service induced a lasting change in his eating habits which led to a service-induced weight increase, hypertension and ischaemic heart disease.

The only issue before the Tribunal was whether the veteran's obesity was related to his service. The Statement of Principles applied by the AAT (No 84 of 1995) required:

> "(a) suffering from persistent obesity before and continuing at least until the accurate determination of hypertension;"

"*Being obese*" is defined in terms of having a Body Mass Index greater than 30.

Mrs Stone told the Tribunal that prior to service the veteran was very thin, short and had narrow shoulders. At the end of his service he was very fat, jowly and had thick shoulders and at this stage his eating habits had changed. His weight increased from 154lbs on entry to 181lbs on discharge from the RAAF. He was 210lbs when he was diagnosed with hypertension in 1980.

The Commission submitted that the late veteran's obesity was not causally related to his war service.

Tribunal's conclusions

The Tribunal noted that the veteran's weight increased considerably during his service. It said that in the absence of any other evidence, it would be speculation to infer that his weight increase resulted from an increase in fat in his war-time diet, or from the calorific value of rations provided during his service, or from the conditions or exigencies of his service.

The Tribunal concluded:

> "On the material before it, the Tribunal is satisfied that the veteran did not develop a preference for fatty food as a result of his service, that the veteran's service was not a contributing cause to his subsequent obesity and his service in the RAAF was merely the setting in which the increase in his weight occurred."

Formal decision

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

Re V R Smith and Repatriation Commission

Sassella

N1999/1325
17 January 2002

Death – exposure to gassing in France – later development of respiratory problems not connected with gassing attack

Mrs Smith applied for review of a decision that her late husband's death was not war-caused. The veteran had served in the Army during World War 1. He was gassed in France on 22 March 1918 and was discharged from hospital to rejoin his unit on 30 April 1918. He died in 1968 at the age of 82 years from ischaemic heart disease and pneumonia.

Mrs Smith contended that the gassing attacks during the war had left her husband susceptible to pneumonia which contributed to his death.

Medical opinions

Dr Rutland, respiratory physician, gave evidence in support of Mrs Smith's application. He assumed that the late veteran was exposed to chlorine gas during World War 1. He said that a minority of those exposed to chlorine gas developed long term respiratory problems as a result of an acute gassing event. It was possible that the gassing had led to long term damage in this case.

Professor Breslin, thoracic surgeon, agreed that it was possible that gassing could lead to long term problems. However, in this case there was no medical evidence of chronic respiratory problems or lung disease from 1918 onwards. He concluded that the veteran had pneumonia as a terminal event and was not related to gassing in World War 1. Rather, it was related to old age and debility and his ischaemic heart disease.

Submissions

Mrs Smith's counsel submitted that the veteran's gassing attack in World War 1 was sufficiently serious to require hospitalisation, that this led to respiratory disease throughout his life which contributed to heart disease resulting in pneumonia that caused his death. He rejected Professor Breslin's suggestion that the symptoms from the gassing must have subsided before the end of World War 1 because he was able to return to his battalion.

The Commission submitted that there was no objective evidence that the late veteran had any respiratory disabilities at the time of his death that could be attributed to war service.

Tribunal's conclusions

The Tribunal concluded that the late veteran had no more than a sinus condition of unknown aetiology commencing most probably in the 1950s which explained his breathing and coughing symptoms as described by his widow. There was no radiographic evidence of structural damage to the sinus. The Tribunal found that the veteran died from pneumonia which was not related to the gassing attack during war service.

Formal decision

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

[Ed: An appeal has been lodged to the Federal Court against this decision.]

Re P A Letherbarrow and Repatriation Commission and Comcare (Department of Defence)

Allen, Horton & Lynch

N1998/1803 & N2000/1744
29 January 2002

Death – post traumatic stress disorder – service on HMAS Melbourne

This case illustrates the different outcomes that can result from claims made under the various compensation schemes for veterans. Mrs Letherbarrow had applied for review of two decisions that the death of her late husband was not attributable to his RAN service. The first decision was made under the *Veterans' Entitlements Act 1986.* The second decision was made under the *Safety, Rehabilitation and Compensation Act 1988.*

As both claims encompassed the same medical investigations and had a common factual basis, it was agreed that they should be heard together notwithstanding different standards of proof.

The claim under the *VE Act* arose out of a short period of operational service on *HMAS Melbourne* in Vietnamese waters in June 1965. In addition, the veteran had eligible defence service as defined in section 69 of the *VE Act* from 7 December 1972 to 31 January 1983.

The standard of proof under the *SRC Act* and in relation to defence service under the *VE Act* is the civil standard, whereas the standard in relation to operational service is beyond reasonable doubt.

The late veteran was serving on board *HMAS Melbourne* in 1964 when that vessel collided with *HMAS Voyager* and also in 1969 when the collision occurred with *USS Frank E Evans*. Neither of those incidents occurred during periods of eligible service under the *VE Act.*

Mrs Letherbarrow's claim was that the veteran's death from suicide in 1992 occurred while he was affected by the following diseases:

- chronic post-traumatic stress disorder;
- alcohol and other substance abuse and dependence;
- a major depressive disorder

and that those diseases had been caused, materially contributed to or aggravated by his employment with the Department of Defence and operational service in the RAN.

There were several psychiatrist opinions before the Tribunal that the late veteran was suffering from psychiatric illness as well as drug and alcohol dependence at the time of his death.

Tribunal's conclusions

The Tribunal concluded that the late veteran's death was not related to his eligible service under the *VE Act.* It found in particular that there was no material suggesting that he had experienced a "stressful event" while on operational service in Vietnamese waters. The Tribunal noted in this regard that *HMAS Melbourne* was at alert but not at action stations. The report of proceedings for *HMAS Melbourne* referred to boredom experienced by the crew during the period of escort duties in Vietnamese waters. There was no evidence of any external stimuli resulting in psychological stress. The Tribunal therefore affirmed the decision made under the *VE Act.*

In relation to the claim under the *SRC Act,* the Tribunal found that the late veteran had committed suicide because of an increase in pressure due to an indiscretion at work involving alcohol. His death occurred shortly before he was due to see the Commonwealth Medical

Officer. He had committed suicide because he was suffering a series of psychiatric illnesses as a result of PTSD caused by his employment with the Navy.

The Tribunal found that at the time of his death the deceased was depressed as a result of alcohol and drug abuse, which was caused in turn by his PTSD. The PTSD existed from the time of the collision between the *HMAS Melbourne* and the *USS Frank E Evans*. At that time the deceased was particularly vulnerable to such an injury as he had a pre-conditioning as a result of the collision between *HMAS Melbourne* and *HMAS Voyager*. The Tribunal said that his vulnerability was increased by the fact that after neither collision was there any counselling or medical investigation undertaken by the Navy.

Formal decision

The Tribunal:

(a) affirmed the decision of the Repatriation Commission that Mr Letherbarrow's death was not attributable to service in terms of the *Veterans' Entitlements Act 1986;* and

(b) set aside the decision of Comcare and substituted its decision that his death was compensable under the *Safety, Rehabilitation and Compensation Act 1988.*

Re I Macinnis and Repatriation Commission

Mowbray

A2001/114
30 January 2002

Osteoarthrosis of the knee – trauma - struck by ammunition box

Mr Macinnis applied to the Tribunal for review of a decision that his osteo-arthrosis of the right knee was not war-caused or defence-caused. He served in the Australian Army and rendered operational service in Vietnam. He also had eligible defence service from 1972 to 1995.

The relevant Statement of Principles applied by the Tribunal (No 81 of 2001) concerning osteoarthrosis includes as a factor related to service:

> "(j) suffering a trauma to the affected joint before the clinical onset of osteoarthrosis in that joint;"

The expression "trauma to the affected joint" is defined as follows:

> **" 'trauma to the affected joint'** means a discrete joint injury that causes the development, within 24 hours of the injury being sustained, of symptoms and signs of pain, and tenderness, and either altered mobility or range of movement of the joint. These symptoms and signs must last for a period of at least seven days following their onset; save for where medical intervention for the trauma to that joint has occurred, where that medical intervention involves either:
>
> (a) immobilisation of the joint or limb by splinting, sling or similar external agents; or

(b) injection of corticosteroids or local anaesthetics into that joint; or

(c) aspiration of that joint; or

(d) surgery to that joint;"

Submissions

Mr Macinnis submitted that his right knee injury was related to his service in Vietnam. He recalled an incident where his right knee was struck by an ammunition box, which fell from a distance of approximately three feet. He also gave evidence that symptoms developed within 24 hours. He spoke of very sharp pain, swelling and bleeding of the knee. He also stated that after the incident his knee had given him great pain, if he moved, swivelled or put any weight on it. He also said that he had restriction of the knee and wore bandages for a period of two weeks after the incident occurred.

The Commission submitted that the Vietnam incident failed to meet the factors and definition in the SoP. It was contended that the definition of "trauma" requires a serious injury, but that Mr Macinnis's injury could only be classed as a nuisance injury causing discomfort. It was not serious enough to require medical attention. The Commission argued that the injury resulted in a trauma to the skin and soft tissues about the kneecap, rather than a trauma to the knee joint proper.

Tribunal's conclusions

The Tribunal concluded that the degree of severity is itself set out in the SoP, in the definition of "trauma to the affected joint". This requires certain symptoms and signs to be evident and for those to last for a specified period. The Tribunal rejected the Commission's interpretation of the definition relating to Mr Macinnis's case.

The Tribunal said that the main issue was whether the applicant's case fitted the SoP template. The Tribunal found that based on the evidence presented, the hypothesis raised was consistent with the template in the SoP. The Tribunal was also not satisfied beyond reasonable doubt the osteoarthrosis of the right knee was not war-caused.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that osteoarthrosis of the right knee was war-caused.

Re P P Middleton and Repatriation Commission

Sassella

N2000/1689
15 February 2002

Entitlement – intervertebral disc prolapse – clinical onset – reference to medical text

Mr Middleton applied for review of a decision that his lumbar intervertebral disc prolapse and lumbar spondylosis were not war-caused. He was a wireless operator and air gunner in the RAAF during World War 2.

The Statement of Principles for intervertebral disc prolapse (No 130 of 1996 as amended) includes as a factor related to service:

"(e) exposure to an environment of high positive G forces at the time of the clinical onset of intervertebral disc prolapse;"

Lumbar intervertebral disc prolapse is a factor on the SoP for lumbar spondylosis.

Mr Middleton's hypothesis was that his war service caused his intervertebral disc prolapse in that he was exposed to an

environment of high positive G forces at the time of the clinical onset of intervertebral disc prolapse and this led to his lumbar spondylosis.

Clinical onset

The main issue before the AAT was the date of clinical onset of Mr Middleton's intervertebral disc prolapse. He told the AAT that at the end of each flight the crew were stiff and had severe back pain. It was the normal aftermath of every flight. He would sleep for 12 to 14 hours and would be stiff and sore for about two days.

After discharge from the RAAF he had frequent back pain. It was annoying but not disabling. For a few years he regarded it as a condition he had to live with. He saw doctors about it in the 1950s and was given aspirin. Later, a general practitioner arranged physio-therapy for his back problem. That provided temporary relief. He saw an orthopaedic surgeon in 1984 with sciatic pain and had spinal injections.

There was medical opinion before the AAT that G forces in excess of 2 could be generated by common manoeuvres engaged in by Liberator aircraft of the type carrying the applicant. The AAT considered that the reference in the SoP definition to "modern high performance aircraft" was intended as an example only and not as a requirement.

Submissions

Mr Middleton submitted that his intervertebral disc prolapse was related to exposure to an environment of high positive G forces. His evidence was that he first experienced pain and stiffness in the back during operational service and the pain continued after discharge. The first acute episode was in 1983 after he lifted a bowls bag.

The Repatriation Commission submitted that the pain experienced by the veteran during service was not sufficiently acute to have caused an intervertebral disc prolapse.

Tribunal's conclusion

The Tribunal noted that the factor in the SoP could be satisfied where a person experienced local pain and stiffness. It was not necessary that the pain experienced be described as "acute".

In support of its conclusion that the veteran's intervertebral disc prolapse was related to service, the AAT referred to an online medical treatise *"Harrison's Online"* in which it is stated that "asymptomatic disk protrusions are common in adults". The AAT took this to mean that an intervertebral disc prolapse is not necessarily accompanied by pain. However, to be an intervertebral disc prolapse within the SoP definition, pain must be present. The AAT said that the SoP seemed to recognise as an intervertebral disc prolapse one that caused some, albeit not acute, pain.

The AAT concluded that the pain experienced by the veteran during operational service was sufficient for a finding of clinical onset of intervertebral disc prolapse at that time. It followed that the veteran's lumbar spondylosis was also war-caused.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that lumbar intervertebral disc prolapse and lumbar spondylosis were war-caused.

[Ed: The Repatriation Commission has lodged an appeal to the Federal Court against this decision. The issue of whether the AAT had denied procedural fairness by referring to medical texts was discussed in the case of *Winch v Repatriation Commission* (1998) 14 *VeRBosity* 73.]

Re M A Farrelly and Repatriation Commission

Cunningham

T2000/163
22 February 2002

Dislocation of shoulder – aggravation of previous injury – not related to defence service

Mr Farrelly applied to the Tribunal for review of a decision that his rotator cuff syndrome left shoulder was not defence-caused. He served as a member of the Defence Force on a continuous full-time basis from 30 May 1972 until 27 June 1975.

Mr Farrelly dislocated his left shoulder twice in August 1972. As these injuries occurred before 7 December 1972, they were not covered under the *VE Act.* He dislocated his left shoulder for a third time on 6 February 1973 while swimming at a weir and was taken to a camp hospital for treatment. He underwent a Putti-Platt procedure on the shoulder on 14 May 1973.

Subsection 70(5) of the *VE Act* provides that an injury shall be taken to be defence-caused if it "arose out of, or was attributable to" defence service. Subsection 70(5)(d)(ii) makes provision for where an injury that was suffered or contracted **before** the period of defence service was contributed to in a material degree or aggravated by any defence service rendered by the member, being service rendered after the member suffered that injury.

Submissions

The essential issue before the Tribunal was whether the third dislocation was defence-caused in that it occurred during the course of the applicant's defence service.

The applicant submitted that the aggravation of his injury was caused by the fall in 1973 which was during his eligible service. He contended that he was never formally dismissed prior to leaving the camp for a recreational swim but was granted permission to do so.

The Commission submitted that the injury did not arise out of his defence service but occurred while he was off duty, away from the army base enjoying a swim.

Tribunal's conclusion

The Tribunal noted the Federal Court matter of *Repatriation Commission v Tuite* (1993) 29 ALD 609 in which the Court stated that:

> "… if an injury or disease is claimed to have arisen out of or be attributable to a serviceman's period of camp life, the question will usually be whether life in camp was a contributing cause and not merely the setting in which the event occurred."

The Tribunal concluded that even if it accepted the applicant's evidence that he had not been formally discharged prior to leaving camp for the swim, there must be a greater connection between the injury sustained and his eligible service. In other words, the applicant's service should not be merely the setting in which the injury occurred. Whilst he may have been granted permission to leave camp for the swim, it was not a service-related recreational activity. There was not sufficient connection between this activity and his service such that the Tribunal could find that the injury "arose out of, or was attributable to" his defence service.

Formal decision

The Tribunal affirmed the decision that Mr Farrelly's rotator cuff syndrome left shoulder was not defence-caused.

Federal Court of Australia

Parker v Repatriation Commission

Madgwick J

FCA 1915
12 December 2001

Death – whether veteran's smoking habit was war-caused

Mrs Parker appealed to the Federal Court against a decision of the AAT that her late husband's death was not war-caused. The AAT found that he died from metastatic lung cancer from a primary cancer in the groin.

Mrs Parker contended that her husband's death was related to a war-caused smoking habit. She told the AAT that the veteran, whom she first met in 1957, said that he commenced smoking when he joined the army. This evidence was supported by the late veteran's younger brother who gave evidence that he was not aware of the veteran smoking prior to war service. However, hospital medical records indicated that he had smoked 10 cigarettes per day since the age of 15.

The AAT was reasonably satisfied that his smoking habit was established prior to war service in Australia during World War 2 and was not war-caused.

Submissions

Mrs Parker's counsel submitted that the AAT had erred in finding that there was no evidence that the late veteran's smoking habit increased during or after war service. It was submitted that the AAT had made findings that no reasonable decision-maker could have made (referred to as "*Wednesbury* unreasonableness").

Madgwick J observed:

> "The case of the applicant was really put in two ways. The first was that the weight of the material coming from honest and careful witnesses was simply such that it was bizarre and perverse to prefer the evidence in the hospital record. Certainly, the material from the applicant and [the brother] was worthy of very considerable attention by the Tribunal. It would be very unlikely, though by no means impossible, that if the veteran had smoked before his army days his young brother would not have known about it. Likewise, it cannot be countenanced that the Tribunal disbelieved the applicant when she said that the veteran told her that he had begun smoking while in the army.
>
> However, the Tribunal might very well have taken the view that the veteran was far more likely to tell his doctors as best he could, the exact truth about the commencement and degree of his smoking. It seems likely to me, and I should think it was at least open to the Tribunal to think, that his interlocutor at the hospital, … would have been very interested in the extent and degree of the insults to his lungs which the veteran's smoking had offered them. The Tribunal, despite the evidence of the applicant and [the brother] in my opinion, was legally entitled to form the view which it did, that '[the veteran] had a well established smoking habit prior to his service'. On this basis, I find that the substance of the first basis on which the case was put must fail."

It was put in the alternative that there was, contrary to the Tribunal's understanding, acceptable evidence that the veteran's smoking habit had increased following his army service.

Madgwick J decided that the Tribunal's conclusion that there was 'no [acceptable] evidence' that the veteran's smoking habit had materially increased following his service was open to it.

Formal decision

The Court dismissed Mrs Parker's appeal.

Repatriation Commission v Olsen

Stone J

FCA 12
22 January 2002

Entitlement – which SoP applies on review of decision

The Repatriation Commission appealed to the Federal Court against the decision of the Tribunal that Mr Olsen's plantar fasciitis with calcaneal spur was defence-caused. In the course of its decision, the AAT addressed the issue of which Statement of Principles applied upon review where the SoP in force at the time of the Commission's decision had been amended or revoked and replaced by a SoP more favourable to the claimant.

[Ed: This issue was also considered by a Full Court in *Gorton's* case. (See 17 *VeRBosity* 85).]

In determining Mr Olsen's application, the AAT considered two SoPs, Instrument No 38 of 1996 ("the 1996 Instrument") and Instrument No. 4 of 2000 ("the 2000 Instrument"). The 1996 Instrument was in force at the time of the decisions of the Commission and the VRB. The 2000 Instrument was determined in the period when the hearing before the AAT was adjourned for some months to enable the diagnosis of his condition to be clarified.

The AAT decided that Mr Olsen could not succeed in terms of the 1996 Instrument but was entitled to a pension by virtue of the 2000 Instrument. The AAT decided that in those circumstances, it was open to it to apply the more favourable 2000 Instrument. (See 16 *VeRBosity* 98).

Submissions

The Commission submitted that, where there are two SoPs, it is irrelevant which is more advantageous; either *Keeley's* case is correct and the SoP in force at the time of the Commission's decision should be applied, or *Keeley* was wrongly decided and the SoP in force at the time of the AAT's decision should be applied.

Stone J said that in those circumstances, **both** SoPs apply. An applicant before the AAT is entitled to receive a pension if he or she is entitled to do so by reference to either SoP. This is the case irrespective of which SoP is more advantageous, although, where one SoP is clearly more advantageous, the applicant may choose not to rely on the other. This is not a matter of election on the part of an applicant but a matter of entitlement.

The Commission submitted further that the current Instrument, being effectively new legislation, ought not to affect rights and liabilities defined by reference to "past events".

Stone J said that when a new SoP comes into force, all veterans gain the right to have their injuries and diseases assessed with reference to that new SoP, even though the injury or disease may have occurred in the past. What Mr Olsen (and every other veteran) gained when the current Instrument came into force was a **new** right to have his claim assessed by reference to that Instrument.

Finally, the Commission argued that its liability to pay pensions under the *VE Act* ought not to be affected by a new SoP.

Stone J said that if a new "more favourable" SoP replaces a previous SoP in relation to a particular condition, additional veterans may become entitled to a pension. Except to the extent that the new SoP repeals a prior SoP, this will not affect the Commission's existing liabilities; it rather creates **additional** liabilities.

Formal decision

The Court dismissed the Repatriation Commission's appeal.

[Ed: The case of *Repatriation Commission v Brown* raised the same issue and was heard together with this matter. The Court dismissed the Commission's appeal for the reasons outlined in this case.]

Elliott v Repatriation Commission

Stone J

FCA 26
23 January 2002

Entitlement – osteoarthrosis of knees – whether Tribunal erred in law

Mr Elliott appealed to the Federal Court against the Tribunal's decision that his osteoarthrosis in both knees was not war-caused. He served in the Army during World War 2 and rendered operational service in Papua New Guinea.

The Tribunal considered two possibilities connecting the applicant's osteoarthrosis with his war service. One was that it could be attributed to the extreme cold he experienced driving tanks and camping out during his service in Australia, compounded by being continually wet during the tropical wet season in PNG. The other was that his accepted condition of lumbar spondylosis had affected his joints and caused osteoarthrosis of his knees.

The Tribunal rejected the first suggestion but considered the second in terms of the relevant factor in Statement of Principles No 41 of 1998 which provides:

> "(e) having a malalignment of a joint before the clinical onset of osteoarthrosis in that joint;"

Mr Elliott relied on a medical opinion by Dr Sambrook who raised as a possibility that altered gait as a consequence of his back problems had led to malalignment in his knees. The Tribunal found that his condition did not fit the template in the SoP and that the material did not raise a reasonable hypothesis connecting the condition with his operational service. Applying s 120(1) of the *VE Act* the Tribunal was satisfied, beyond reasonable doubt, that his condition was not war-caused.

Submissions

The main ground of appeal was that the Tribunal had erred in its application of s 120 and s 120A of the *VE Act* by misapplying:

(a) the test of whether a reasonable hypothesis had been raised on the material before it; and

(b) the test of whether the hypothesis was disproved beyond reasonable doubt within the meaning of s 120(1) of the *VE Act*.

Mr Elliott submitted that the hypothesis was consistent with factor 5(e) and that the Tribunal had erred by indulging in fact finding at the "reasonable hypothesis" stage contrary to the proper approach outlined in *Deledio.*

Court's conclusions

The Court noted that Professor Sambrook's initial report postulated that lumbar spondylosis might have led to malalignment of the knees. For this to be a reasonable hypothesis however, the material would need to point to some asymmetry, whether by way of evidence of an altered gait or radiological evidence of differential deterioration in the knees. Although the material raised the possibility of asymmetry it related not to the accepted condition of lumbar spondylosis but to the congenital condition of genu varum.

The Court did not accept that the Tribunal had engaged in illicit fact finding at the "reasonable hypothesis" stage. The Court said:

> "In attempting to determine if the material before the Commission raises an hypothesis connecting the veteran's condition with the particular service, and if any such hypothesis is reasonable, the Tribunal was required to consider and analyse that material. This exercise is not concerned with the truth of the assertions in the material and should not be confused with an exercise in fact finding. … A hypothesis can be dismissed as not reasonable if the material before the Commission does not raise the essential elements of the hypothesis.
>
> In this case the elements of the 'cause of action', that is essential elements of the hypothesis, could not be made out because, in the Tribunal's opinion, the material did not give rise to an hypothesis connecting the applicant's lumbar spondylosis with the condition of his knees. The only material before the Tribunal that allegedly raised a link between the two conditions was Professor Sambrook's report and subsequent letter. The Tribunal did not accept this interpretation of the material but regarded the reference to such a link as purely speculative and, for reasons already described, not consistent with the relevant SoP. To the extent that malalignment of the knee joints was raised in the Professor's report it was connected not with the applicant's service but with a congenital condition that was independent of his operational service. The Tribunal was entitled to form this opinion on the material before it."

Formal decision

The Court dismissed Mr Elliott's appeal.

Knight v Repatriation Commission

Gray J

FCA 103
15 February 2002

Lumbar spondylosis – acute symptoms and signs of pain – no reasonable hypothesis

Mr Knight appealed to the Federal Court against a decision of the Tribunal that his lumbar spondylosis was not war-caused. He rendered operational service in Japan after World War 2 and contended that his spinal condition was due to trauma to the lumbar spine as defined in the relevant Statement of Principles (No 165 of 1996), 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".

Mr Knight traced his back problems to his work as a carpenter in Japan. He was involved in the making of large wooden boxes into which parts of Mustang fighters were packed to be shipped to Australia. He described himself and another carpenter manhandling aircraft into the appropriate position for dismantling. He also described manoeuvring propellers onto the bases of wooden boxes after the propellers had been removed from aircraft. He gave a number of different accounts as to how he came to suffer back problems in Japan.

There was no record of the veteran having sought medical treatment during service for injury to the lumbar spine. The Tribunal concluded that there was no material pointing to 'acute symptoms and signs of pain, tenderness and altered mobility or range of movement of [the lumbar] spine … where such acute symptoms and signs last for a period of at least one week immediately after the injury'. There was also no medical evidence relating to the extent of injury and treatment. His evidence was that he had ongoing pain which did not prevent him returning to his normal duties after some heat treatment.

The Tribunal concluded that the material did not point to a reasonable hypothesis connecting the veteran's lumbar spondylosis with the circumstances of his service.

Submissions

Mr Knight's counsel submitted that the Tribunal had erred in law by failing to identify which paragraph of s 9(1) of the *VE Act* was applicable to the claim.

The Court rejected this, saying:

> "It is true that s 9 represents the starting point in the process of reasoning that connects an injury with war service, if such a connection can be made. It is not the case, however, that a decision-maker is in every case bound to refer to s 9, or to identify a particular paragraph as providing the necessary connection."

Mr Knight's counsel submitted further that the Tribunal had failed to act in accordance with s 119 which requires decision-makers to take account of the effects of the passage of time and deficiencies in official records.

The Court noted that for reasons considered by the Full Court in *Repatriation Commission v Bey* (1997) 13 *VeRBosity* 117, the material either points to a connection between a disease and service or it does not. If it does not, the deficiency in the material cannot be remedied by resort to a procedural provision such as s 119(1)(g). There was no evidence in this case that the Tribunal had failed to apply s 119 in the correct manner.

The Court also rejected a submission that the Tribunal had failed to follow the four step approach outlined by the Full Court in *Deledio's* case. The Tribunal found that the material before it disclosed no reasonable hypothesis that could fit within the relevant template in the SoP. It did not engage in fact finding at the first stage and there was no error of law in its approach.

Mr Knight's counsel submitted that the Tribunal had misconstrued the definition of "trauma to the lumbar spine". The Court noted that the argument put by

counsel had been rejected by the Full Court in the cases of *Harris* and *Arnott* and was plainly wrong.

Finally, Mr Knight's counsel submitted that the Tribunal had failed to take account of the position adopted by the High Court in *Bushell* and *Byrnes* that a hypothesis may assume the existence of facts and that such an assumption does not make the hypothesis unreasonable.

The Court said on this point:

> "There is no doubt that a hypothesis may assume the existence of a fact or facts and be reasonable, for the purposes of s 120 and s 120A of the *VE Act*. To satisfy the provisions of those sections, however, it is still necessary that there be material before the decision-maker pointing to such a hypothesis. The assumption of facts does not extend to assuming the occurrence of events which, if they had occurred, and had been known to the decision-maker, would have caused the material to point to a reasonable hypothesis. In other words, deficiencies in the material cannot be made good by the assumption, in favour of a veteran, that there must have been a reasonable hypothesis. The material before the decision-maker must point to such a hypothesis. The Tribunal's finding in the present case must be taken to express the view that the material did not even point to a hypothesis that was based on one or more assumed facts."

Formal decision

The Court dismissed Mr Knight's appeal.

Spencer v Repatriation Commission

Emmett J

FCA 229
28 February 2002

Cerebrovascular accident – no Statement of Principles when claim determined – accrued rights

Mr Spencer appealed to the Federal Court against a decision of the Tribunal refusing his claim in respect of "stroke", diagnosed as cerebrovascular accident.

The Repatriation Commission made a determination on 13 April 1995 refusing his claim. On 29 August 1995, a Statement of Principles ("SoP 326/1995") was gazetted in respect of cerebrovascular accident. Having regard to the decision of the Full Court in *Keeley's* case, SoP 326/1995 was irrelevant for the purposes of the AAT's review of his claim.

Section 120A(3) of the *VE Act* provides that, for the purposes of s 120(3), a hypothesis connecting a disease with the circumstances of the particular service rendered by a person is reasonable only if there is in force a Statement of Principles, determined by the Repatriation Medical Authority pursuant to s 196B(2) of the Act, that upholds the hypothesis. Section 120A(4) provides that s 120A(3) does **not** apply in relation to a claim in respect of the incapacity from disease if the RMA has neither determined a Statement of Principles nor declared that it does not propose to make such a Statement of Principles in respect of the kind of disease contracted by the person.

Submissions

Mr Spencer put forward the hypothesis that the circumstances of his service contributed to or caused an anxiety state

with gastrointestinal symptoms, that the anxiety state contributed to or caused hypertension and that the hypertension contributed to or caused the cerebrovascular accident.

The Tribunal concluded that, because SoP 83/1995 dealing with hypertension did not uphold the applicant's hypothesis, his claim was correctly refused by the Commission. The Tribunal said that it was bound by s 120A(3) and, since there was no SoP in force at the relevant time that upheld the applicant's hypothesis, the hypothesis could not be found to be reasonable.

Counsel for the Commission submitted that this approach was correct and that the Tribunal had properly concluded that s 120A(3) governed the outcome because SoP 83/1995 did not uphold the hypothesis that his hypertension was contributed to or caused by an anxiety state that was caused or contributed to by service.

Error of law

Emmett J said that the Commission's approach involved a misapprehension of the way in which s 120A is meant to operate. Before s 120A(3) could be applied, s 120A(4) must first be considered. He continued:

> "Once one accepts … that the Authority had neither determined a Statement of Principles nor declared that it did not propose to make such a Statement of Principles in respect of cerebrovascular disease or cerebrovascular accident at the relevant time, and that the present applicant has made a claim in respect of his incapacity from a cerebrovascular accident or cerebrovascular disease, it follows, as a matter of simple English, that the requirements of section 120A(4) are satisfied. As a consequence, s 120A(3) does not apply in relation to the applicant's claim."

Formal decision

The Court set aside the Tribunal's decision and remitted the matter to the Tribunal for rehearing.

Stewart v Repatriation Commission

Whitlam J

FCA 316
21 March 2002

Jurisdiction – epilepsy – whether diagnosis of war-caused disease could be amended on review

Mrs Stewart appealed to the Federal Court against a decision of the Tribunal that varied the diagnosis of her late husband's war-caused post-meningitic epilepsy to read "epilepsy" and affirmed decisions that essential thrombocytosis and osteoarthrosis right knee were not war-caused. (See 16 *VeRBosity* 103).

Mr Stewart had applied to the Tribunal for review of the Repatriation Commission's decision. He died in 1997 before the hearing of his application was completed and his widow continued the application as his legal personal representative. An autopsy revealed that his epilepsy was not due to meningitis.

The Tribunal determined that the decision under review was the whole of the decision of the Commission, including the part that determined that the late veteran's post-meningitic epilepsy was war-caused.

Submissions

Mrs Stewart submitted that the Tribunal erred in law in holding that it had jurisdiction to review that part of the decision that the late veteran's post-meningitic epilepsy was war-caused. She submitted that the acceptance of that disability by the Commission was not

reviewed by the VRB and thus it was not part of its decision so as to be reviewable under s 175 of the *VE Act*.

Whitlam J rejected this submission saying that the expression "the decision of the Commission that was so affirmed" in s 175(1)(a) encompasses the **whole** of that decision. This view was supported by the majority of the Full Court in *Fitzmaurice v Repatriation Commission* (1989) 19 ALD 297.

Mrs Stewart also submitted that the Tribunal erred in law in applying GARP V to the assessment of the late veteran's disabilities, given that GARP IV was applicable at the date of death of the veteran.

Whitlam J held that for reasons given by Mathews P in *Re Anderson and Repatriation Commission* (1998) 53 ALD 467, the Tribunal was bound to apply GARP V. The fact that the veteran had died by the time of the Tribunal's decision was not relevant to this issue.

Formal decision

The Court dismissed Mrs Stewart's appeal.

Statements of Principles issued by the Repatriation Medical Authority

March - May 2002

Number of Instrument	Description of Instrument
34 of 2002	Determination of Statement of Principles under subsection 196B(2) concerning **malignant neoplasm of the anal canal** and death from malignant neoplasm of the anal canal
35 of 2002	Determination of Statement of Principles under subsection 196B(3) concerning **malignant neoplasm of the anal canal** and death from malignant neoplasm of the anal canal
36 of 2002	Revocation of Statement of Principles (Instrument No.68 of 1999 concerning **Parkinson's disease** and death from Parkinson's disease), and Determination of Statement of Principles under subsection 196B(2) concerning Parkinson's disease and death from Parkinson's disease
37 of 2002	Revocation of Statement of Principles (Instrument No.69 of 1999 concerning **Parkinson's disease** and death from Parkinson's disease), and Determination of Statement of Principles under subsection 196B(3) concerning Parkinson's disease and death from Parkinson's disease
38 of 2002	Revocation of Statement of Principles (Instrument No.70 of 1999 concerning **secondary parkinsonism** and death from secondary parkinsonism), and Determination of Statement of Principles under subsection 196B(2) concerning secondary parkinsonism and death from secondary parkinsonism
39 of 2002	Revocation of Statement of Principles (Instrument No.71 of 1999 concerning **secondary parkinsonism** and death from secondary parkinsonism), and Determination of Statement of Principles under subsection 196B(3) concerning secondary parkinsonism and death from secondary parkinsonism
40 of 2002	Revocation of Statement of Principles (Instrument No.235 of 1995 concerning **malignant neoplasm of the bone or articular cartilage** and death from malignant neoplasm of the bone or articular cartilage), and Determination of Statement of Principles under subsection 196B(2) concerning malignant neoplasm of the bone or articular cartilage and death from malignant neoplasm of the bone or articular cartilage

41 of 2002	Revocation of Statement of Principles (Instrument No.236 of 1995 concerning **malignant neoplasm of the bone or articular cartilage** and death from malignant neoplasm of the bone or articular cartilage), and Determination of Statement of Principles under subsection 196B(3) concerning malignant neoplasm of the bone or articular cartilage and death from malignant neoplasm of the bone or articular cartilage
42 of 2002	Amendment of Statement of Principles, Instrument No.73 of 2001, under subsection 196B(2) concerning **otitis externa** and death from otitis externa
43 of 2002	Amendment of Statement of Principles, Instrument No.74 of 2001, under subsection 196B(3) concerning **otitis externa** and death from otitis externa

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **Repatriation Medical Authority, 4th Floor 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 8 MAY 2002

Description of disease or injury	Date gazetted
Allergic rhinitis [Instrument Nos 65/95 & 66/95 as amended by Nos 160/95 & 161/95]	01-08-01
Aortic stenosis [Instrument Nos 5/00 & 6/00]	06-03-02
Atherosclerotic peripheral vascular disease [Instrument Nos 87/95 & 88/95]	25-10-00
Atrial fibrillation [Instrument Nos 9/96 & 10/96]	19-09-01
Carotid artery disease [Instrument Nos 346/97 & 347/97]	28-02-01
Cervical spondylosis [Instrument Nos 31/99 & 32/99]	24-04-02
Chronic fatigue syndrome [Instrument Nos 90/97 & 91/97]	19-09-01
Chronic myeloid leukaemia [Instrument Nos 7/97 & 8/97]	16-01-02
Chronic sinusitis [Instrument Nos 211/95 & 212/95]	01-08-01
Colorectal adenomatous polyp or familial adenomatous polyposis [Instrument Nos 91/96 & 92/96]	06-03-02
Dental pulp disease (including pulpal abscess) [Instrument Nos 370/95 & 371/95]	06-03-02
Diabetes mellitus [Instrument Nos 82/99 & 83/99 as amended by Nos 9, 10, 91 & 92/01]	28-11-01
Gastro-oesophageal reflux disease [Instrument Nos 62/99 & 63/99]	28-11-01

Gulf War syndrome	17-11-99
Hypertension [1] [Instrument Nos 31/01 & 32/01]	24-04-02
Ischaemic heart disease [Instrument Nos 38/99 & 39/99]	28-11-01
Loss of teeth [Instrument Nos 374/95 & 375/95]	06-03-02
Lumbar spondylosis [Instrument Nos 27/99 & 28/99]	04-10-00
Macular degeneration [Instrument Nos 29/97 & 30/97]	06-06-01
Malignant neoplasm of the brain [Instrument Nos 40/99 & 41/99]	10-01-01
Malignant neoplasm of the colon [Instrument Nos 23/96 & 24/96 as amended by Nos 5/98 & 6/98]	10-01-01
Malignant neoplasm of the oral cavity or hypopharynx [Instrument Nos 113/96 & 114/96]	06-03-02
Malignant neoplasm of the rectum [Instrument Nos 25/96 & 26/96 as amended by Nos 3/98 & 4/98]	06-03-02
Malignant neoplasm of the salivary gland [Instrument Nos 25/97 & 26/97]	06-03-02
Malignant neoplasm of the stomach [Instrument Nos 67/97 & 68/97 as amended by Nos 9/98 & 10/98]	24-04-02
Mitral valve prolapse	16-01-02
Multiple sclerosis [Instrument Nos 170/95 & 171/95]	22-11-00

[1] This investigation follows a declaration by the Specialist Medical Review Council under subsection 196W(4) that there is sound medical-scientific evidence to justify amendment of the SoPs for hypertension to include as a factor *"occupational or work related stress consequent upon working in a high demand, low decision latitude or control job".*

Myeloma [Instrument Nos 72/99 & 73/99]	19-09-01
Non melanotic malignant neoplasm of the skin [Instrument Nos 43/01 & 44/01 as amended by Nos 51/01 & 52/01]	08-05-02
Obesity	28-02-01
Osteoporosis [Instrument Nos 61/97 & 62/97]	25-10-00
Psoriasis [Instrument Nos 21/98 & 22/98]	22-03-00
Thoracic spondylosis [Instrument Nos 29/99 & 30/99]	24-04-02

Administrative Appeals Tribunal decisions – January to March 2002

Carcinoma

malignant melanoma of skin
- sunburn
  Warren, N J 01 Feb 2002

prostate
- animal fat consumption
  Karey, B 14 Mar 2002

Cardiovascular disease

hypertension
- alcohol abuse
  Stewart, R J 01 Feb 2002

ischaemic heart disease
- smoking
  Morton, J 28 Mar 2002

Death

carcinoma of kidney
- phenacetin consumption
  Clair, J F 14 Feb 2002

carcinoma of prostate
- animal fat consumption
  Darkin, A N 15 Feb 2002
  Harris, W 28 Mar 2002

carcinoma of rectum
- alcohol consumption
  Neal, A L A 16 Jan 2002

drowning
- ischaemic heart disease – smoking
  Hill, Y R 05 Mar 2002

ischaemic heart disease
- obesity & diabetes
  Chivers, A 11 Jan 2002
- obesity & hypertension
  Stone, P 16 Jan 2002
- pneumonia – mustard gas exposure
  Smith, V R 17 Jan 2002

rheumatic heart disease
- rheumatic fever as a child
  Hindmarsh, N 29 Jan 2002

suicide
- post traumatic stress disorder
  Murray, R E 14 Jan 2002
  Letherbarrow, P A 29 Jan 2002

Dermatological disorder

chronic solar skin damage
- Naval service
  Petrie, D J 08 Mar 2002

Diabetes

diabetes mellitus
- smoking cessation
  Hudson, F L 16 Jan 2002

Extreme disablement adjustment

impairment rating
  Parsons, S A (decd) 05 Mar 2002

lifestyle rating
  Griggs, G W 03 Jan 2002
  Singer, J 18 Mar 2002

Gastrointestinal disorder

gastro-oesophageal reflux disease
- alcohol dependence or abuse
  Lees, A J 15 Feb 2002
- smoking
  Berry, J 06 Feb 2002
  Belcher, A J 21 Mar 2002

gastro-oesophageal reflux disease & peptic ulcer disease
- smoking
  Nelson, L G M 27 Feb 2002

Injury and disease

obesity
- whether a disease
  Stafford, T O 20 Feb 2002

Jurisdiction

reduction in pension under ss 46Q & 46R

- whether decision or self-executing provision

Embleton, J A 13 Mar 2002

Musculoskeletal disorder

right epicondylitis

- trauma – fall on elbow

Brabham, C A 07 Feb 2002

rotator cuff syndrome

- aggravation – sporting injury while off duty

Farrelly, M A 22 Feb 2002

Neurological disorder

motor neuron disease

- inability to obtain appropriate clinical management

Graham, J 23 Jan 2002

Osteoarthrosis

ankles & shoulder

- inflammatory joint disease

Hale, B 16 Jan 2002

knee

- malalignment of joint

Hatherall, K J 11 Feb 2002

- trauma – struck by ammunition box

Macinnis, I 30 Jan 2002

knees, hand & hips

- trauma

Lees, F A N 04 Jan 2002

Psychiatric disorder

depressive disorder

- shoulder injury

Gilmour, N W 10 Jan 2002

generalised anxiety disorder

- no diagnosis

Lees, F A N 04 Jan 2002

generalised anxiety disorder & alcohol dependence or abuse

- experiencing a stressful event - Vietnam waters

Stewart, R J 01 Feb 2002

- severe psychosocial stressor – scare charges & firing from helicopters at Vung Tau

Lees, A J 15 Feb 2002

post traumatic stress disorder

- experiencing a stressor – Chinese mob incident

Pigdon, B 04 Feb 2002

- experiencing a stressor – radio operator in Vietnam

Harrison, R D 15 Feb 2002

- no diagnosis

Osland, K 26 Mar 2002

post traumatic stress disorder & alcohol abuse

- experiencing a stressor – gunner in Vietnam

Willis, T J 26 Feb 2002

post traumatic stress disorder & generalised anxiety disorder

- experiencing a stressor – Bofors gun practice action station

Berry, J 06 Feb 2002

post traumatic stress disorder & psychoactive substance abuse or dependence

- experiencing a severe stressor – Vietnam waters

Stevenson, A 01 Mar 2002

Remunerative work

Intermediate rate

- whether incapable of more than part-time work

Dwight, G E 17 Jan 2002

temporarily incapacitated

Hatherall, K J 11 Feb 2002

- before application day

Milne, D 27 Feb 2002

whether genuinely seeking to engage in

- resigned from regular army

Keech, A B 09 Jan 2002

whether prevented by war-caused disabilities alone

- cook & tow truck operator

Beresford-Maning 07 Mar 2002

- railway worker – voluntary redundancy

Walden, G F 25 Feb 2002

Respiratory disorder

bronchiectasis, chronic bronchitis & emphysema

- smoking

Smith, J S 20 Feb 2002

chronic bronchitis

- smoking

Berry, J 06 Feb 2002

Callaghan, T 19 Mar 2002

Crockett, D 28 Mar 2002

Spinal disorder

lumbar intervertebral disc prolapse & lumbar spondylosis

- exposure to high positive G forces

Middleton, P P 15 Feb 2002

lumbar spondylosis

- malalignment

Hatherall, K J 11 Feb 2002

- trauma – falls in Malaya

Glynn, W E 01 Feb 2002

- trauma – fall on barge

Stafford, T O 20 Feb 2002

lumbar spondylosis & cervical spondylosis

- trauma – falls on deck

Crockett, D 28 Mar 2002

thoracic spondylosis

- trauma

Lees, F A N 04 Jan 2002

Words and phrases

clinical onset

Graham, J 23 Jan 2002

Middleton, P P 15 Feb 2002

Belcher, A J 21 Mar 2002

inability to obtain appropriate clinical management

Petrie, D J 08 Mar 2002