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Contents

October - December 2003

Editor's notes

Following a request for some practical advice on record-keeping for advocates and pension officers, an article on that topic has been included in this issue (see page 104). A copy of the article is also available as a separate document on the 'Publications' page of the VRB's web site, http://www.vrb.gov.au

This edition of *VeRBosity* contains reports on veterans' matters in eleven Federal Court judgments and one Federal Magistrates Court judgment handed down in the period from October to December 2003. Also reported are selected AAT decisions handed down in the same period. An index is included of all AAT cases received in this period as well as all relevant court cases handed down in the year 2003.

Information is also included about Statements of Principles issued recently by the Repatriation Medical Authority and matters currently under investigation.

Bruce Topperwien
Editor

Questions & Answers

The VRB encourages applicants and their representatives to contact their local VRB Registrar to discuss any issues relating to their cases. If you have any questions particularly concerning the *Veterans' Entitlements Act 1986* (the VEA) you can telephone the NSW Registrar, Peter Godwin, on **1300 135 574** from anywhere in Australia at the cost of a local call.

Periods of CFTS after 6 April 1994

Question: A person served with the RAN from 1972 until 2003. He left the permanent forces in 1995 and transferred to the Naval Reserve in which he rendered periods of continuous full-time service on a number of occasions. Is his service with the RANR 'defence service' for the purposes of the VEA?

Answer: No. The definition of 'defence service' in s.68(1) of the VEA is divided into three categories of service:

Para (a) – continuous full-time service (CFTS) rendered between (and including) 7 December 1972 and 6 April 1994 (the day before the 'terminating date');

Para (b) – for a person who (i) rendered CFTS immediately before 22 May 1986 (the 'commencement date' of the VEA) and (ii) continued to render CFTS until 6 April 1994 and (iii) was on 6 April 1994 bound to render CFTS for a term expiring on or after 7 April 1994, it includes the CFTS of that member on and after 7 April 1994 and before (iv) the expiration of that term that on 6 April he or she was bound to render, or (v) the termination of their service, whichever came first.

Para (c) – hazardous service.

The relevant provision in this case is para (b). The person can meet sub-para (i) as he was rendering CFTS immediately before 22 May 1986. He can meet sub-para (ii) as he continued to render CFTS until 6 April 1994. He can meet sub-para (iii) as he was bound to render CFTS for a term expiring after 7 April 1994 (namely some time in 1995). However, he cannot meet (iv) in respect of any service after 1995 because it is not 'before' the expiration of the term that he was bound to serve as at 6 April 1994, namely a term that ended in 1995. While he was at all times a member of the Defence Force and so he could fit within sub-para (v) until 2003, the proviso at the end of para (b) is that the end date of defence service is the earlier of the two dates in sub-para (iv) and (v). In this case, the earlier date in the date in 1995 when his term of CFTS that he was bound to render as at 6 April 1994 expired.

Therefore, if a person has a period of CFTS after 6 April 1994 that is not part of the period of CFTS that he or she was bound to render as at that date, then that later CFTS is not 'defence service' for the purposes of the VEA. Instead the person has eligibility under the *Safety, Rehabilitation and Compensation Act 1988* for injuries relating to that service.

Parachuting while off duty

Question: A veteran rendered operational service served in Malaysia in 1966 with the RAAF. He was injured in a parachuting accident. He, along with a number of service mates engaged in this activity while off duty, in their own time. Are there any AAT or court cases that would assist in deciding whether an injury in these circumstances would come within the VEA as a war-caused injury?

Answer: Injury or disease caused by events that have no connection to performance of duty are usually not compensable (see *Holthouse* (1982) 1 RPD 287). The applicant in *Re Buckfield and Repatriation Commission* (1993)

9 *VeRBosity* 17 was a naval officer who, with the express permission of her commanding officer, engaged in horse riding to maintain fitness and because it was a pursuit that she had enjoyed pre-service. She was required to keep fit and time was set aside for sporting activities in her duty hours. She was injured while in a horse riding accident while off duty. The AAT noted the difference between workers compensation legislation which has an 'in the course of employment' test as an alternative to the 'arose out of' employment test, and noted that all the sporting injury cases that could be found had been accepted under the 'in the course of employment' test, which does not require a causal connection with employment. The AAT noted that the VEA does not have such a test in relation to defence service. Instead it has the 'arose out of' service test. The AAT said that mere permission to undertake a particular sporting activity does not give rise to the necessary causal link with service.

But, unlike Buckfield, the parachuting veteran had rendered *operational* service. For operational service there is a similar test to the 'in the course of employment' test, namely the 'resulted from an occurrence' test. The occurrence must have occurred while the person was rendering operational service. The notion of 'rendering ... service' still requires some connection to the performance of duty (see *Roncevich's* case (2003) 19 *VeRBosity* 56 and *Truchlik's* case (1989) 87 ALR 263), but the VEA deems some periods to be times when a person is rendering service even when they are not (for example, subsections 6C(3) and (4)).

In considering the parachuting case it could be important to find out whether parachuting when off duty was approved or encouraged by his commanding officer, and whether the activity was supported in a material way by the RAAF. For example, who supplied the parachutes and the aircraft? Did the parachuting give the veteran a formal qualification that would be of benefit for his service with the RAAF? Was it a skill he needed for advancement of his career? While none of these factors on their own would be likely to be sufficient to provide the relevant connection to service, in combination, they might be sufficient.

It should be noted that if such an injury occurred instead during a period of service covered by the *Safety, Rehabilitation and Compensation Act 1988*, it might not be compensable under that legislation. Subs. 6(3) of that Act provides that compensation is not payable if the person sustains an injury 'because he or she voluntarily and unreasonably submitted to an abnormal risk of injury'. In *Re Martin and Comcare* (1993), the AAT held that whether the employer encouraged the activity would be relevant to the question of reasonableness.

3 January 1949 cut off date

Question: Why is 3 January 1949 the cut off date for persons who were not enlisted for service for World War 2 or who were not serving with BCOF in Japan (see s.6A(4) VEA)?

Answer: 3 January 1949 was the commencement date of amending legislation (Act No. 61 of 1948) providing coverage under the *Commonwealth Employees' Compensation Act 1930* for members of the Forces who were neither enlisted for the purposes of WW2 nor a member of the Interim Forces. Until then, this legislation only covered public servants and other Commonwealth employees. Members of the Defence Force (not being 'employees') were covered either by the *Defence Act 1903* or the Repatriation Acts. Those enlisted for WW2 or as members of the Interim Forces continued to be covered under Repatriation legislation until their service under those terms of enlistment ceased. The VEA sets a cut off date of 1 July 1951 for anyone still enlisted at that date under those terms (though it is most unlikely that there were any).

Record-keeping for advocates and pension officers

Bruce Topperwien

Good record-keeping is essential for every advocate or pension officer. This article seeks to describe best practice in record-keeping, as well as indicate the responsibilities the law currently imposes on advocates and others who advise or assist veterans and their dependants (called 'claimants' in this article for ease of reference).

It is important to maintain good records of relevant events, conversations, correspondence and other communications with the claimant and anyone else with whom you communicate about their case. You should keep a record of all information related to your efforts on behalf of the people whom you represent. Such documentation should include letters, faxes, memos, e-mail messages, any notes taken during or after phone calls, and any other related information you have acquired.

Proper documentation helps advocates and pension officers keep track of their activities and to demonstrate that they have followed proper procedures and have acted on the claimants' instructions.

Create and keep a 'paper trail'

Numerous documents are created in the process of assisting veterans and their dependants with their claims and appeals. These may include printed, faxed and electronic letters (e-mail messages and attachments), and may serve several purposes. For example, they may be used to:

- contact people who are not available in person or by phone;
- record and confirm important information received orally, in meetings or through phone calls;
- record and confirm important understandings and undertakings;
- record and confirm time-lines and deadlines.

Take notes

It is important to get into the habit of recording all relevant phone calls, meetings or other oral conversations. After any phone call, make a short note. If it is likely that a phone call will be lengthy, ensure that you have adequate writing paper (or your computer) near the phone. If possible, you should jot down key details, at least in point form, during the call. In your more detailed notes written afterwards, be sure to include the time and date of the conversation, the names of participating persons, and a short outline of the discussion.

Follow-up letters

When appropriate, use the written information as the basis for follow-up letters to confirm meetings, calls, decisions, key facts, undertaking given, and so on. By following up a meeting or conversation with a claimant with a letter confirming what was discussed and agreed, you ensure that any misunderstandings get cleared up early. It also ensures that the claimant has a written reminder of what he or she agreed to do, and what you agreed to do.

Always ask for and note the name and contact data of anyone you may need to communicate with later on. This applies especially to anyone who promises, or refuses, to take a step on your behalf or on behalf of the claimant.

Make and keep copies

Always make and keep copies of letters, other documents and electronic messages that you send, receive or share with others and put them on the file.

It is important to recognise that it is your (or your organisation's file) not the claimant's file. However, because the file contains personal information about the claimant, the claimant has a right to access it if he or she chooses to do so.

If the claimant chooses to end your relationship, while you should keep copies of all relevant documents (see below), you should provide the claimant with all original documents that the claimant has provided to you as well as copies of other relevant documents related to his or her case.

How should records be kept

The Department of Veterans' Affairs, in consultation with a number of experienced veterans' advocates have developed a computerised case management system for the use of advocates and pension officers. This system is called VPAD. Recently, it was made available to selected advocates and veterans' centres across Australia. VPAD facilitates best practice record-keeping and enables efficient tracking and maintenance of cases by advocates and their organisations.

If you do not have access to VPAD, you should maintain a system of some sort that records all your cases, both past and present. For current cases, your system should enable you to quickly find out what is currently happening, such as what the case is about, what the issues are, when the next appointment will be, what evidence is being sought and from whom, and any important dates. That way, if either the claimant or the Board contacts you, you can quickly give them an update on the progress of the case.

Privacy

It is essential that you maintain the privacy of everyone whose personal information you have obtained in the course of your activities. This involves ensuring that:

- at the time personal information is obtained, or when permission is being given to obtain personal information, the person to whom it relates is made aware of who else is likely to see or hear about their personal information;
- personal information is always appropriately secured;
- personal information is not released or made available to anyone without the permission of the person to whom it relates (unless a law requires its release).

How long to keep documents

For your own protection, you should keep documents for at least 7 years after the last action that was taken or last advice given in the case.

Under State and Territory statutes of limitation, the limitation periods for commencing civil litigation can vary from periods as short as 6 months to periods of up to 15 years. But the main causes of action likely to give rise to litigation against advocates and pensions officers is generally 6 years. Such actions include negligence (for example, negligent advice, or negligently failing to take a certain course of action) and breach of contract. Keeping the documents for an extra year provides a margin of safety as the time begins to run from when the relevant damage occurred, which might be some time after the action occurred or the advice was given.

It should be noted that limitation periods are usually not absolute bars to commencing litigation. It is up to the defendant to invoke the limitation as a defence to the action.

Professional indemnity insurance

If you do not have professional indemnity insurance you run a substantial risk in the event of litigation being commenced against you by a unhappy former claimant.

The Veterans' Indemnity and Training Association Inc (VITA) was established in 1995 as a result of concerns of ex-service organisations that they might be subject to litigation if the advice they gave in good faith was incorrect. Currently there are 25 organisations that are members of VITA, which provides professional indemnity insurance for its members' practitioners (advocates and pension & welfare officers).

In order to be covered by the VITA insurance policy, practitioners must abide by the TIP (Training & Information Program) Code of Ethics, and have an auditable trail of case work. This means that each case must be kept in a separate case file from each other case and must be initiated with a cover sheet stating, among other things

- the name and address of the claimant;
- the name of the practitioner;
- the name of the ex-service organisation for whom the practitioner is acting.

VITA requires that all notes of action or other annotation relating to the case must be added to this case file, and that if, at any time, the claimant wishes to go to another organisation, copies of the documents provided by the claimant must be retained on the file (and originals given back to the claimant).

In addition, to be eligible for VITA coverage, the practitioner must be an authorised practitioner of an ex-service organisation that is a financial member of VITA. Such authorisation must be in writing from the organisation. The practitioner must be TIP trained to the level at which he or she is authorised to operate by their organisation. Being trained to a particular level carries with it an implied requirement to keep up to date and undertake regular refresher training at the relevant level. VITA also requires that fees, including donations and gratuities, must not be charged nor solicited for services to claimants (other than an administrative fee that must not exceed $50)

If these requirements are not met, the insurance cover may be void.

Documents that must be kept

While you are working on a current case, you need to keep a copy on file of all documents created in the course of the case. However, once the matter has been concluded you do not need to keep everything. What you do need to keep are those records that indicate any advice that you have given, any instructions given to you, and records of any meetings and conversations in connection with the case. That is, evidence of the claimant's instructions, your actions, the actions of others relating to the case, and any advice given.

If such information is kept on computers you need to ensure that you have an adequate back-up system so that it is not lost, and you need to ensure that if you upgrade your computer that the data is transferred over to a compatible system on the new computer.

Do not leave copies on claimants' data on the old computer if you are disposing of it.

Data on floppy discs will probably not last 7 years in that form of storage and should be transferred to a hard disc of a computer or to CDs or Zip drives. But even CD storage might not last 7 years. CDs should be checked and copied every year to ensure that the data is still accessible. Old CDs and floppy discs should be physically broken up.

Documents that can be destroyed

You do not need to keep copies of documents that will be in the possession of the Department of Veterans' Affairs or the Veterans' Review Board because if litigation is commenced, you will be able to obtain copies of those documents.

Documents that can and should be destroyed include the section 137 report and copies of claim forms and medical reports that have been presented as evidence in the case.

The s.137 report is kept by the Board for 7 years from the date the matter was finalised and can be retrieved from archives in the event it is needed in litigation. While the VRB keeps the tape of its hearings for only 2 years, it is most unlikely that the tape would be required in civil litigation involving an advocate. This is because anything said or done in the course of a hearing by an advocate, provided it does not amount to contempt of the Board, is protected by section 167(2) of the VEA, which provides that a person representing a party at a hearing of a review before the Board has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court. A barrister cannot be sued for negligence for the way in which he or she conducts a case in a Court hearing.

One reason why it is good practice to destroy the s137 report and other similar documents after the case is over and all appeal processes have been finalised is that it reduces the risk of personal information being inadvertently released, and thus reduces your risk of liability under privacy legislation. Of course, it also saves storage space!

How should documents be destroyed

Documents relating to a claimant should never be placed in the ordinary garbage without first being shredded or otherwise made unreadable. There is a real risk that unless documents are properly destroyed they may be discovered at the local rubbish tip, and might turn out to be very embarrassing not only for the claimant, but your own reputation if their source is traced back to you. The claimant might also be able to obtain damages against you for breach of privacy.

Responsibility of an advocate or pension officer

Taking on the role of advocate or pension officer, whether as a volunteer or as an employee of an ex-service organisation, carries with it substantial and on-going responsibilities. They are even greater if you are not supported by the resources and assistance of a major ex-service organisation.

While it can be very rewarding work, the task is not an easy one. You need to keep your skills and knowledge up to date, be fully aware of your responsibilities in record keeping and maintaining privacy, and ensure that you have adequate insurance cover, such as that available through the VITA scheme.

While this article has been prepared in consultation with leading ex-service organisation practitioners and the Legal Services Group of the Department of Veterans' Affairs, any opinions expressed are those of the author.

Administrative Appeals Tribunal

Re F Y Brown and Repatriation Commission

Allen & Thorpe

[2003] AATA 1010
8 October 2003

Entitlement – 'kind of death' – broncho-pneumonia as terminal event – real or operative cause Alzheimer's disease

The certified causes of Mr Brown's death in 1992 were:

1. (a) Respiratory arrest – minutes;
   (b) Bronchopneumonia – four days
2. Senile dementia – two years

The Tribunal noted that, in accordance with the Federal Court decision in *Hancock* (2003) 19 *VeRBosity* 82, the first step was to determine the 'kind of death' suffered by the veteran. In that regard, the Tribunal said:

> In determining the 'kind of death' the Tribunal is concerned to find the real or operative cause of death as opposed to the final stage of the process of dying. To adopt the words of the High Court in *Fitzgerald v Penn* (1954) 91 CLR 268 at 276, the Tribunal must ascertain whether a particular illness or disease can fairly and properly be considered the cause of death. See also *Chappel v Hart* (1998) 195 CLR 232 at 243 per Gaudron J and compare *R v Malcherek*, *R v Steel* [1981] 1 WLR 690 especially at pp 695, 696.

Chronic bronchitis hypothesis

The applicant had suggested that the veteran died from bronchopneumonia caused by chronic bronchitis, which in turn was caused by a service-related smoking habit.

The medical evidence accepted by the Tribunal was that the veteran was in palliative care for his Alzheimer's disease and that bronchopneumonia is the usual terminal event in that disease. Prior investigations indicated that there was no evidence that the veteran had chronic bronchitis or chronic airflow limitation. For example, when the veteran's chest was examined in 1965, 1969, 1978, 1987 and 1991, it was found to be normal.

The Tribunal found:

> [O]n the balance of probability the cause of the veteran's death was dementia in which broncho-pneumonia was but the end of the dying process and not an operative cause.

Type of dementia

Having rejected bronchopneumonia as the kind of death, and having found that the veteran died from dementia, the Tribunal then considered the type of dementia from which he died.

Medical evidence raised the hypothesis that the veteran might have died as a result of a dementia that was a combination of Alzheimer's disease and vascular dementia. There was some evidence that the veteran could have suffered two strokes (cerebrovascular accidents), which could have given rise to vascular dementia.

The Tribunal noted that there was no Statement of Principles for vascular dementia and so, based on *Spencer's* case (2002) 18 *VeRBosity* 21, it was not required to apply the SoP for

cerebrovascular accident. Nevertheless, the Tribunal noted that the Statement of Principles for cerebrovascular accident supported medical evidence given to the Tribunal that ingestion of alcohol above the prescribed limit is a risk factor in cerebrovascular accident.

Alcohol hypothesis

The Tribunal found that the veteran had consumed the relevant amount of alcohol, and so it then went on to consider whether that alcohol consumption was service-related. The tribunal concluded:

> [32] The Applicant's latest statement evidences that the deceased did drink alcohol before enlistment in the army. At the time of his enlistment he was in his mid twenties, married and socially active and therefore could not be said to be an impressionable young man straight from school or the bosom of his family. Nor is there any suggestion of any religious or other conviction, which might have suggested that it would have needed some significant external impetus to cause the deceased to begin to take alcohol. There is nothing to suggest that during his period of war service the drinking of alcohol, whether or not in moderation became habitual with the deceased.
>
> [33] In this regard we note that the Applicant's evidence was that alcohol was supplied to the deceased. We know from numerous other cases in the Veterans' Division of this Tribunal that at times, particularly towards the end of the war, there were issues of beer to troops but at all times this was irregular and limited.
>
> [34] After discharge, and particularly while working as a journalist, the deceased drank. Just how much he drank is uncertain but it is entirely logical to accept the Applicant's statement that:
>
> > 'As the income from civilian life improved there was more money for beer and the drinking habit increased.'
>
> [35] There is nothing in the sparse material before us regarding the deceased's war service that would cause us to accept that any aspect of that service caused him to develop a habit of indulgence in alcohol. There is no suggestion the deceased was addicted to alcohol or alcohol dependent as opposed to someone who drank at the end of a day's work. No doubt as a journalist he not only found the bar of a public house convivial but also a source of information.
>
> [36] Whereas a hypothesis linking the deceased's ingestion of alcohol with war service can be said to have been raised by the material before us, we are satisfied beyond reasonable doubt that his continuing to drink alcohol post service was in no way caused or contributed to by the incidence of his war service.

Smoking hypothesis

A hypothesis related to smoking was also suggested, but the Tribunal rejected that on the following basis:

> [42] We regard the best evidence as to the deceased's smoking habits to be what he himself said. Thus on 18 March 1969 a medical practitioner employed by the then Repatriation Department recorded the deceased as not smoking. (the entry being "tobacco NIL").
>
> [43] On 11 September 1978 the deceased was examined by Dr Sibree cardiologist regarding possible ischaemic heart disease. That specialist medical practitioner records the deceased as being a non-smoker.
>
> [44] Whereas the Applicant has stated that the deceased would not

tell the truth to an examining medical practitioner about his smoking, the deceased was an intelligent man who according to the Applicant was well aware of the dangers of smoking. We do not accept that when being examined for possible ischaemic heart disease he would fail to mention to the examining cardiologist a smoking habit. He certainly revealed his alcohol ingestion.

[45] A further pointer against the deceased continuing to smoke is the absence of any functional abnormality in the deceased's lungs when examine in 1965, 1969, 1978, 1990 and 1991 ...

[46] We are satisfied beyond reasonable doubt that the deceased had ceased smoking at least by 1969 and that therefore any smoking habit did not cause or contribute to any cerebrovascular accident.

Formal decision

The Tribunal affirmed the decision under review.

[Ed: In its reasons, the Tribunal referred to, but did not go into any detail about an English court case of *R. v Malcherek*. This case illustrates a circumstance in which a terminal event will not be regarded as an 'operative cause' in a person's death. In that case, Mr Malcherek appealed his conviction for murder on the ground that he had not killed his wife by stabbing her, but that it was the treating doctor who had killed her by turning off her life support. The court did not regard the doctor's action (the terminal event) as the cause of death and held that the real and operative cause of her death was the fact that she was stabbed by her husband.]

Re D J Hopkins and Repatriation Commission

Beddoe

[2003] AATA 1104
4 November 2003

Special rate – non-war-caused disabilities contributed to leaving last job but since resolved – by application day war-caused disabilities alone prevented veteran continuing to undertake the kind of work he had been undertaking

Mr Hopkins had worked as a sales representative. His accepted disabilities were anxiety depression, post traumatic stress disorder and hearing loss with tinnitus. He also suffered from advanced osteoarthritis of the knee and double vision, neither of which had not been accepted as war-caused. His knee caused him problems getting in and out of the company vehicle, and he was unable to return to work until he had obtained a medical certificate to the effect that his double vision had resolved. Mr Hopkins resigned from his work in August 2000 because of his 'medical problems'.

After leaving work Mr Hopkins applied for a service pension on the ground of permanent incapacity due to his war-caused conditions as well as his double vision.

In January 2001 a medical report indicated that his double vision had resolved. In May 2001 he had a total knee replacement operation. In a medical report dated November 2002, the orthopaedic surgeon stated that the functionality of Mr Hopkins' knee was now such that he was capable of working as a sales representative.

Evidence from a psychiatrist was to the effect that over the period between October 1999 and November 2000, Mr Hopkins continued to complain of intermittently depressed moods, anxiety, insomnia, difficulties coping at work, intermittent nightmares about Vietnam events, difficulty with concentration, forgetfulness, energy problems, anger episodes, and difficulty tolerating other people, especially in the work situation. In a report dated November 2002, the psychiatrist indicated that Mr Hopkins had undergone additional stress after ceasing work due to his father's protracted hospitalisation and his mother was living with them.

In his oral evidence, the psychiatrist said that Mr Hopkins has been a little better since he stopped working, but that he had a lot of chronic symptoms.

The Tribunal's analysis

The Tribunal accepted the psychiatric evidence that his war-caused conditions, on their own, prevent Mr Hopkins from working more than 8 hours a week.

The Tribunal found that Mr Hopkins resigned his employment because of his war-caused disabilities as well as his double vision and osteoarthritis of his knee. However, since then, his non war-caused disabilities have been treated successfully and no longer prevent him from undertaking remunerative work, and his incapacity from his war-caused disabilities is the only reason for preventing him from undertaking his work as a sales representative.

The Tribunal said that as at the application day (31 August 2000), the applicant could not satisfy the criteria in s24(1)(c) because at that date it was not incapacity from war-caused disabilities alone that prevented him from continuing to undertake work as a sales representative. But that by November 2002, it was the only thing preventing from undertaking it.

Formal decision

The Tribunal set aside the decision under review and assessed pension at the special rate with effect from November 2002.

[Ed: It is worth noting that the Board's decision was made in May 2002. Thus the AAT held that, at the time the VRB heard his case, Mr Hopkins was not entitled to the special rate of pension.

An aspect of this case worth noting, but not expressly mentioned by the AAT, is the 'has ceased to engage' and 'is prevented from engaging' tests in s24(2)(a). A veteran is deemed not to have had a loss if these tests cannot be met. The AAT implicitly recognised that these tests are *continuing* ones, and they must not be applied just at the date the person ceased work. They are concerned with the reasons why, throughout the assessment period, the veteran is out of the workforce rather than just why he left his last job.]

Re G R Wheat and Repatriation Commission

Lloyd

[2003] AATA 1050
17 October 2003

Entitlement – osteoarthrosis of knee – thoraco-lumbar spondylosis – heavy lifting – application of* Kattenberg *– cervical spondylosis – trauma insufficient to satisfy SoP

In an editorial comment at (2003) 19 *VeRBosity* 42, it was suggested that the reasoning behind the Federal Court decision of *Kattenberg* (which concerned smoking) might also apply to Statements of Principles with a cumulative lifting factor. This case has borne that out.

Mr Wheat served in the Army from May 1968 until April 1970, and rendered operational service in Vietnam from November 1969 until February 1970. He claimed that his thoraco-lumbar spondylosis and osteoarthrosis right knee were attributable to lifting heavy loads during his operational service. It was estimated that during his operational service he lifted a total of 73,548 kg in loads of greater than 25 kg.

The relevant Statement of Principles requires:

> manually lifting or carrying loads of at least 25 kg while weight bearing to a cumulative total of 120,000 kg within any 10 year period, before the clinical onset ...

It was also estimated that he had lifted 63,000 kg in 25 kg loads in the 18 weeks ***before*** he rendered any operational service. Added together, these amounts exceed the requirement of the Statements of Principles, but on their own, neither does.

The Tribunal referred to *Kattenberg's* case and found that the 73,500 kg of lifting during operational service had made a 'material contribution' to the overall amount of lifting performed by the veteran in a 10 year period, and thus the lifting factors in the Statements of Principles were satisfied.

Formal decision

The Tribunal set aside the decision under review and determined that Mr Wheat's thoraco-lumbar spondylosis and osteoarthrosis right knee were war-caused.

Re K N Hill and Repatriation Commission

Muller

[2003] AATA 1151
17 November 2003

Post traumatic stress disorder – alcohol abuse – aircraft crash off HMAS Melbourne

This is a follow-up on the case note of the original AAT matter in (2000) 16 *VeRBosity* 101 and the subsequent Federal Court appeals in (2001) 17 *VeRBosity* 116 and (2002) 18 *VeRBosity* 53. The Court remitted the matter to be redetermined by the AAT.

Mr Hill had claimed that during a period of eligible service he had witnessed a Sea Venom aircraft crash off the deck of HMAS *Melbourne* as it came in to land. He said he saw it hanging by its arrestor hook and saw the hook snap. He said that the Melbourne was put into reverse and the aircraft went alongside the ship and that he could see a man in the aircraft trying to punch his way out of the cockpit.

Mr Hill had eligible service aboard *Melbourne* in April, May and June 1966. He also served in *Melbourne* in February 1966 (a non-eligible period) when a Gannet aircraft was lost off Jervis Bay.

At the rehearing, the Commission presented detailed evidence concerning the alleged incident of 29 April 1966 involving the Sea Venom from a historian who was serving in the vessel astern of the *Melbourne* when the incident occurred; from the pilot of the Sea Venom involved in the incident; and photographic stills from a movie taken of the incident.

The evidence given by the pilot was as follows:

A normal approach was made for an arrested landing, the Observer Lieutenant Kennel, calling the I.A.S. in the normal Sea Venom deck landing manner. The last Airspeed call I heard from Lt. Kennell immediately before arrestor wire engagement was 117 knots. The touchdown felt normal and the aircraft appeared to be lined up parallel to the centreline but slightly offset to Starboard.

A wire was engaged and initial retardation experienced but after what appeared to be approximately half wire pullout, retardation abruptly ceased and the aircraft rolled down the deck.

I immediately applied full power. I had no time to check the I.A.S. but as the aircraft left the Flight Deck and dropped the Port Wing, I realised that I did not have flying speed so called 'Eject, Eject'. As I attempted to level the wings, the Observer jettisoned the canopy and I had the impression that he ejected immediately afterwards. By this time I had succeeded in levelling the wings and ejected myself. I felt that the aircraft was just about to or had just struck the water as I ejected.

As I ejected I felt a sharp pain in the back and blow to my left foot. Entry into the water took place feet first and very shortly after ejection and was quite violent, my face mask tearing off as I entered the water.

I inflated my Life Saving Waistcoat as I submerged and immediately came to the surface. I released my parachute harness and thought I was completely disentangled until the SAR helicopter appeared and the slipstream began to blow the parachute canopy away. I found myself being dragged by the parachute until I managed to untangle a single shroud line hooked about my neck and shoulder.

On first appearance of the SAR helicopter which was very soon after entry into the water, I disconnected my dinghy without inflating it and was picked up very shortly after clearing myself from the parachute.

At no time after ejection did I sight Lieutenant Kennell.

He went on to say that the time between applying full power and going over the end of the flight deck was only 2 or 3 seconds; the aircraft did not remain hooked to the ship; the Sea Venom broke up immediately upon striking the water; and the ship did not stop as there were two other aircraft in the air that had to land.

Sea Venom

Gannet No. 858
(courtesy RAN)

The historian gave evidence that on 12 February 1966 a Gannet (No. 858) crashed over the side of the ship and was suspended precariously by wire and sponson. Both crew were recovered unhurt, but the aircraft was lost.

Formal decision

The Tribunal, being satisfied beyond reasonable doubt that Mr Hill did not see the Sea Venom incident, affirmed the decision under review.

Federal Court of Australia

J M Brown v Repatriation Commission

Cooper J

[2003] FCA 1130
17 October 2003

Entitlement – sarcoidosis – whether an 'inability to obtain appropriate clinical management' – service at HMAS Harman

Mrs Brown rendered non-operational eligible war service as a member of the Women's Royal Australian Navy Service from 22 February 1943 to 23 June 1945. She was posted to HMAS Harman (a naval station near Canberra) to work in the code room of the naval radio facilities dealing with the interception of radio transmissions by Japanese military forces.

The work Mrs Brown performed was of a sensitive nature and she was required to work extensive long shifts. Generally, she was confined to the naval facility.

Until the time of her enlistment Mrs Brown was in good health. However, she developed a persistent bad cough and experienced tiredness during her time at Harman. Her coughing became such that her Petty Officer advised her to go to the sick bay to seek medical attention. There was a sick bay at Harman for those service personnel at the base requiring medical attention.

The AAT found that Mrs Brown did not then, nor later, attend the sick bay to receive attention for her cough and tiredness because she believed that too many people were attending the medical facility at Harman, because she did not want to go, and, because she did not realise that she was ill. She did not attend any private medical practitioner during her time at Harman. As a consequence of not attending the sick bay, Mrs Brown did not receive any medical attention for her cough or tiredness.

Mrs Brown was diagnosed by a specialist as suffering from sarcoidosis in 1958 and was treated with steroids thereafter. The AAT had found that it was likely that her sarcoidosis began during the time of her service at Harman. The AAT also found that at the time of Mrs Brown's war service there was no effective treatment available for sarcoidosis, although there was at that time appropriate clinical management for the condition.

The AAT found that Mrs Brown did not receive appropriate clinical management of the undiagnosed sarcoidosis because she chose, against the suggestion of her superior, not to seek medical treatment, and thus there was no inability on her part to obtain appropriate clinical management of the undiagnosed sarcoidosis during the period of her service at Harman.

Ground 1: No medical practitioner available

In the Federal Court, counsel for Mrs Brown argued that she was objectively unable to obtain appropriate clinical management of her condition because there was no medical practitioner at the sick bay at Harman to make the diagnosis and implement appropriate clinical management. Thus the absence of a medical practitioner at the sick bay objectively operated as a barrier to her obtaining appropriate clinical management of her condition during her period of service at Harman.

The Court rejected this argument, saying:

> 'At its highest, the evidence was that the sick bay was generally operated by attendants as opposed to doctors. However, there was no evidence to support a finding of fact that access to appropriate clinical management by a doctor was unavailable as a matter of course to service personnel attending the sick bay. Importantly, the evidence did not support a finding that if the applicant had attended sick bay, with the symptoms which she had, she would not have had access to a doctor either at the time of attending or at some reasonable time thereafter. Rather, the medical evidence suggests that because the symptoms of sarcoidosis easily mimicked tuberculosis, which was a common contagious disease at the time, further appropriate medical examination may have occurred had she presented at sick bay with the symptoms which she had. However, because the applicant did not attend seeking attention for her persistent cough and tiredness, it is now not possible to say what access to a doctor, if any, was available to her at Harman during her period of service.'

Ground 2: Nature of the work

The second basis of her application to the Court was that she was prevented from obtaining treatment because of the nature of her work. The section where she worked was 'secret and treated like a war zone', she was required to work extensive long shifts, and was generally confined to base. However, the Court noted that she had access to the sick bay and was told to attend by the Petty Officer.

Ground 3: Subjective inability to get treatment

The third basis was that subjectively, as a matter of practical reality, she believed that she could not access a doctor during her service because of the nature of her work and the fact that there was no doctor at the sick bay and that the AAT had not considered this but had focussed on her decision not to follow the advice of the Petty Officer. The Court rejected this ground and said:

> 'The findings of the AAT that she chose not to seek treatment at the sick bay, that she did not want to go to the sick bay and that she did not go because she did not realise that she was ill throughout her time at Harman, were all available on the evidence. The finding that she did not seek out a doctor to obtain treatment during that time because she did not think to do so, was also available on the evidence. These findings were of her subjective reasons for acting in a particular way. None of these findings involves the applicant having a subjective belief that she could not access medical treatment because of the secretive nature of her work, the long shifts she was required to work, being confined to base or because of a culture against her seeking such medical treatment. The objective reasons the applicant gave for not wanting to go to sick bay were that there were too many people there, it was overcrowded, she did not want to be lying around, and there was no point in going because there was no doctor in attendance. She did not, in her oral evidence, seek to make out the case of external circumstances operating upon her such as to give rise to a belief reasonably held that she, as a matter of practical reality, could not access appropriate clinical management for the condition causing her persistent coughing and tiredness: *Brew v Repatriation Commission* at [28] - [30].'

Formal decision

The Court dismissed the application and awarded costs against the applicant.

Tate v Repatriation Commission

Cooper J

[2003] FCA 1169
24 October 2003

Entitlement – death from malignant neoplasm of the prostate – diet

The veteran had rendered operational service in the Australian Army from 2 December 1941 to 8 January 1946. He died from prostate cancer in 1979. His widow had submitted in the AAT that, consistent with the relevant Statement of Principles, Mr Tate increased his pre-service intake of animal fat by more than forty per cent to at least seventy grams per day as a result of his Army service, maintaining that level of consumption for a period of twenty years prior to the onset of prostate cancer.

The AAT found that a reasonable hypothesis had been raised on the basis of the widow's evidence, and that of her daughter, concerning the veteran's changed diet, which they said resulted from his war service.

However, evidence given by Dr Ruth English AO, a specialist nutritionist, was that a dietary questionnaire submitted by Mrs Tate was invalid because, if it were correct, the veteran would, theoretically, have gained 39 Kilograms *per year* in weight over the period 1945 to 1962, whereas, in fact he lost 5 kilograms over that period. Accepting Dr English's evidence, the AAT was satisfied beyond reasonable doubt that a fact necessary for the hypothesis to be true had been disproved.

Handling of the evidence

The Court rejected the applicant's attack on the Tribunal's handling of the evidence and its reasoning, saying:

> 'The AAT did not treat the dietary questionnaire or Ms Tate's evidence in relation to it as raised facts necessary to the hypothesis. Rather, it properly treated the questionnaire and her evidence as evidentiary material forming the factual foundation to support the raised facts upon which the applicant relied to support the hypothesis. The AAT rejected that material for that purpose. In doing so, it committed no legal error.
>
> ... Once the dietary questionnaire and Ms Tate's evidence in support of it was rejected, there were no materials which would support, as a raised fact, that Mr Tate was ingesting animal fat at some unspecified levels sufficient to satisfy factor 5(c) of SoP No 84 of 1999 for the minimum twenty year period.'

Formal decision

The Court dismissed the application and awarded costs against the applicant.

Repatriation Commission v Nugent

Cooper J

[2003] FCA 1184
27 October 2003

Application for extension of time to appeal – time to appeal runs from date of AAT decision not receipt of written reasons – special rate – deafness

On 12 March 2003, the AAT handed down its decision to assess pension Mr Nugent's at the special rate and, in so doing, gave its reasons orally. The Commission received written notification of the AAT's decision on 14 March 2003. On 17 March 2003, the Commission sought written reasons from the AAT, which the AAT provided to the parties on 8 May 2003.

On 2 June 2003, the Commission applied for an extension of time in which to file and serve a notice of appeal from the decision of the AAT. An extension of time was required because an appeal must be instituted not later than the 28th day after the day on which a document setting out the terms of the decision of the AAT is furnished to the person appealing, or within such further time as the Court allows (s.44(2A) AAT Act 1975).

[Ed; In *Repatriation Commission v Tuite* (1992) 37 FCR 571, 16 AAR 328, 27 ALD 609, 8 *VeRBosity* 71 (a case not referred to in the judgment), the Federal Court held that the time in which to institute an appeal begins to run from the date of receipt of the written decision, not the date of receipt of the written reasons.]

Evidence was given in the Court that the departmental advocate mistakenly thought that the time began to run from the receipt of the written reasons, and that other departmental officers had a similar misunderstanding until advised correctly by counsel on 30 May 2003.

Prejudice to veteran and potential influence of the AAT decision

In considering the application for extension of time, the Court noted that the applicant would be prejudiced by not being paid the rate of pension determined by the AAT until the matter is finalised; and that there was no substance in the argument that by letting the AAT decision stand it would have an adverse influence in the determining system in respect of the interpretation of section 24. On this latter point, the Court said:

> 'There is no uncertainty as to the requirements of s 24 of the VE Act. As counsel for the applicant demonstrated beyond argument in her submission on the merits of the proposed appeal, the requirements have been clearly and authoritatively laid down by Full Courts and single justices of this Court: see for example *Chambers v Repatriation Commission* (1995) ...; *Repatriation Commission v Buckingham* [1996] ...; *Forbes v Repatriation Commission* (2000) ...; *Flentjar v Repatriation Commission* (1997) ...; *Repatriation Commission v Hendy* [2002] ...; *Repatriation Commission v Alexander* [2003] ...'.

Unfairness to other veterans

The Commission also argued that if the decision were allowed to stand other veterans in a similar position who had missed out on the special rate might feel aggrieved. The Court noted that this argument was premised on the assumption that the decision is wrong and that Mr Nugent has unfairly received a benefit to which he was not entitled, and that it is premised on a disagreement with the findings of fact made by the AAT as to the nature and extent of the disabilities from which he suffers. The court said:

> 'This is not a case of a public service appeal where, for example, to extend time to appeal will impact on the rights of other applicants in the same position as the applicant in relation to the appointment made. Rather, it concerns the rights *inter se* of the applicant and the respondent, and the AAT decision does not impact upon the right of any veteran to obtain a ... pension under s.24 of the VE Act if the factual circumstances of that veteran entitle him or her to a benefit under that section. The situations where veterans do suffer a real sense of grievance is where two veterans have both served in the same location, performing the same duties and, because of a change in the policy of the applicant as to the nature of that service, they are treated differently. This occurs when earlier AAT determinations which treated the service as rendering

operational service were allowed to stand, and later claims for the same service are rejected by the applicant as non-operational service, and the rejection upheld by later AAT and Court decisions. That is not this case.'

The special rate issue

The Commission was concerned that the AAT had failed to give proper consideration to evidence relating to a number of non-service-related factors that it contended contributed to Mr Nugent failing to meet the tests in s.24. However, the Court noted that there was expert medical evidence on which the AAT could rely to support its findings of fact, and that accordingly, the Court held that the prospects of success in the appeal by the Commission would be poor. The Court said:

> '[T]he reasons contain sufficient detail to show the findings of fact the AAT made in respect of the issues and the manner in which it applied the statutory requirements of s.24 to those facts. The complaints as to the inadequacy of the reasons fall away when it is realised that the AAT found that the incapacity of [Mr Nugent] to undertake remunerative work was solely due to his profound war-caused deafness; and the reasons why the AAT came to that conclusion, namely that the profound deafness which forced the respondent out of a clerical position with the Army was the same condition which rendered him incapable of undertaking remunerative work of a similar nature in the civilian workplace.'

After considering all these matters, the Court held that the Commission had not made out a case for an extension of time to be granted.

Formal decision

The Commission's application for an extension of time to appeal was refused, with costs awarded against the Commission.

Demczuk v Repatriation Commission

Mansfield J

[2003] FCA 1188
29 October 2003

Entitlement – application of* Deledio *steps – whether AAT engaged in fact-finding at step 3

The AAT had decided (1) that the applicant's generalised anxiety disorder and alcohol dependence were not war-caused, but (2) that his alcohol abuse was war-caused. Mr Demczuk appealed to the Federal Court in relation to the first aspect and the Commission cross-appealed in relation to the second.

Both parties agreed that the AAT's decision relating to generalised anxiety state should be set aside and remitted for rehearing, but could not agree on the basis for setting it aside. Neither party was concerned about the alcohol dependence matter, but Mr Demczuk opposed the cross-appeal in relation to alcohol abuse.

The Commission's main contention was that the AAT had failed to understand and apply the four step process set out in *Deledio*, which requires that the decision-maker ***not*** engage in fact finding when considering if the circumstances of service point to a hypothesis connecting the injury or disease with service. Instead, the AAT made findings of fact about those claimed circumstances on the balance of probabilities before addressing the relevant SoPs. The Court said:

'[45] It is at the third stage of the *Deledio* test that, in my judgment, the Tribunal has fallen into error. Its consideration of the evidence of the applicant, of the respondent and of the medical evidence indicates that the Tribunal embarked upon a fact-finding process to determine whether there was a reasonable hypothesis in accordance with the Alcohol SoP raised by the material connecting in the necessary way the applicant's operational service with his condition of alcohol abuse. It made positive findings about the occasions when the applicant claimed to have experienced a stressful event, their character as falling within the definition of `experiencing a severe stressor', and the onset of clinical signs of alcohol abuse within the two year period of the applicant having experienced the three severe stressors which it found to have occurred.

[46] It was not required by the second and third stages explained in *Deledio* that the Tribunal should have embarked upon that fact-finding exercise. The Full Court in *Deledio* at 96 agreed with the observations of Heerey J at first instance: *Deledio v Repatriation Commission* (1997) 47 ALD 261 at 275 that:

> "... it is necessary to repeat that the SoP has no function in relation to the proof or disproof (under s 120(1)) of the particular facts of a veteran's case. The SoP's function is limited to prescribing a medical-scientific standard with which a hypothesis must be consistent - so that the SoP can 'uphold' the hypothesis ..."

and

> "If the hypothesis is reasonable the claim will succeed unless:
>
> (i) one or more facts necessary to support it are disproved beyond reasonable doubt; or
>
> (ii) the truth of a fact inconsistent with the hypothesis is proved beyond reasonable doubt.
>
> At no stage is there an onus of proof on the claimant. If one of the disputed facts happens also to be a component of an SoP then the commission must disprove that fact beyond reasonable doubt, just like any other relevant fact.'

[47] If the applicant's claim for pension entitlement in respect of alcohol abuse had been unsuccessful, he may therefore have had grounds to have the Tribunal's decision set aside. Its erroneous approach also permeates its consideration of the claim based upon generalised anxiety disorder. As I understand it, that is the reason why the respondent consents to the appeal being allowed and the remittal to the Tribunal of the applicant's claim for pension entitlement in respect of generalised anxiety disorder. Although the Tribunal appears to have recited the correct approach under s 120(3), its subsequent analysis of the claims and the way in which it has made findings of fact leading to its conclusions indicate that it has not in fact applied the correct approach under s 120(3).'

Formal decision

The Court allowed both the appeal and the cross-appeal, set aside the decision and remitted the matter for rehearing by the AAT. As agreed by the parties, the Court made no order for costs.

Roncevich v Repatriation Commission (No. 2)

Mansfield J

[2003] FCA 1241
28 October 2003

Costs – delay in costs order – subsequent appeal to Full Federal Court and application for special leave to appeal to High Court

At the time when the substantive judgment was given in this case (see (2002) 18 *VeRBosity* 106), there was no appearance by the Commission because of a misunderstanding concerning the time at which judgment was to be delivered. Judgment was handed down in Adelaide and via video to Darwin, there being an hour time difference due to daylight saving in South Australia, but no daylight saving in the Northern Territory. Consequently, no submissions were put to the Court concerning costs.

Subsequently, Mr Roncevich appealed to the Full Court (see (2003) 19 *VeRBosity* 56), which dismissed the appeal. He then applied for special leave to appeal to the High Court (this application is yet to be heard).

In the meantime, the Commission applied to the Court for a costs order in its favour. The Court accepted the Commission's explanation for its non-appearance at the judgment hearing, and noted that the Commission had foreshadowed in its original submissions to the Court that if it were successful, it would seek a costs order.

Counsel for Mr Roncevich sought to oppose the making of a costs order on a number of bases: first, that the appeal to the court was not frivolous. The Court agreed with that fact, but said that this was not a reason not to award costs to the successful party.

Secondly, it was argued that the application raised issues of significant public interest, namely as to the point at which 'defence service' begins and ends. The Court indicated that while it might have been of interest to the veteran community, it was never identified to the Court as being a test case. The Court also noted that the extent of a person's 'defence service' will depend on the facts of each case.

The Court then considered the matter of the delay in seeking costs. Counsel for Mr Roncevich asserted that he was under the belief at material times in deciding whether to appeal to the Full Court, and whether to seek special leave to appeal to the High Court, that he would not be liable for costs of this application. He claimed that he was entitled to expect that he would not be exposed to the risks of a costs order on this application because the Commission did not seek costs. The Court said:

> '[8] The applicant does not take the additional step of saying that he would, in fact, not have pursued an appeal to the Full Court had an order for costs been made against him in the first instance on this application. Nor does he say that he would not have sought special leave to appeal from the decision of the Full Court, which decision itself made a costs order against him, if he had an order for costs against him of this application.
>
> [9] Accordingly, whilst I accept that he was under the belief – and the understandable belief, given the elapse of time – that the respondent would not seek costs against him of this application, I do not think that the prejudice which he asserts goes so far as to demonstrate that by reason of his belief he has acted in a way different from that which he would have acted had the order for costs

> been made when judgment was delivered, or soon thereafter.
>
> [10] In considering the question of prejudice and balancing the applicant's position against that of the respondent, in the interests of justice, I have also had regard to the fact that the applicant has not deposed to his financial circumstance. I do not assume that he is a man of unlimited assets but, on the other hand, I do not assume that his assets are such that had an order for costs been made against him on 2 December 2002, he would not have proceeded with his appeal or with his application for special leave to appeal to the High Court.'

The Court accepted the Commission's reasons for its delay in seeking costs.

Formal decision

The Court ordered Mr Roncevich to pay the Commission's costs.

Repatriation Commission v Towns

Tamberlin J

[2003] FCA 1262
7 November 2003

Entitlement – 'kind of death' – cause of death unknown

In determining how Mr Towns, died, the coroner said that:

> ... Towns died on or about 12 August 1998 in bushland ... and that he died of natural causes, the aetiology is unknown. That is we do not know why he died, but on the balance of probabilities he has died of natural causes. It may well have been that the fight that he has had over the years took its toll ...

His war-caused disabilities included post-traumatic stress disorder depressive disorder and alcohol abuse. He had suffered a major financial loss of about $1.5 million in 1996, for which he was very depressed and blamed himself.

In essence, the applicant's hypothesis was that because of his depression the veteran had gone bush without taking necessary precautions to protect himself, and that this had contributed to his death.

The AAT found:

> The exact circumstances of the veteran's death remain unknown but there is material before the Tribunal that points to the veteran having placed himself in a dangerous situation (rugged bushland) with no precautions taken as to his safety (no water, provisions, clothing or notice to others of his whereabouts). The lack of material before the Tribunal as to the exact circumstances of the veteran's death and its direct cause does not, in the Tribunal's view, stand in the way of the reasonableness of the hypothesis put by the Applicant and does not render it fanciful, impossible or incredible although it is theoretical. In the Tribunal's view, the material before it gives rise to the hypothesis

Kind of death

On appeal, the Commission, relying on *Repatriation Commission v Hancock* (2003) 19 *VeRBosity* 82, argued that the AAT had erred by not determining the 'kind of death' suffered by the veteran.

Tamberlin J rejected that argument, saying:

> [26] The judgment of Selway J in *Hancock* is distinguishable from the present circumstances because in that case there were two SoPs which could have applied. .... In the present case, because of the unknown peculiar circumstances in which the

veteran died, it is not possible to say that any SoP could be applicable to the circumstances. The principal SoP [relating to sudden unexplained death] was excluded by its terms. The other SoP relating to suicide was, in the view of the AAT, precluded as a consequence of the findings of the Coronial Inquest. Accordingly, this is not a case where the AAT was required to, or failed to make, a finding as to the kind of death. In the view of the AAT, it was simply not possible to do so on the balance of probabilities, having regard to the surrounding circumstances. ...

[28] ... Accordingly, in my view, the appropriate course for the AAT was to proceed directly to consider whether a claim could be made out on the law as it stood prior to the introduction of the SoP regime on 30 June 1994. It was not necessary to make any specific determination at the preliminary stage in relation to the kind of death met by the veteran.

[29] Secondly, ... the AAT accepted the finding of the Coroner that the death was not suicide, but was due to natural causes. In my view, this acceptance supports the view that the finding was that the veteran died of natural causes, the aetiology or medical cause of which is unknown. Therefore it could be said that there had been a determination of the kind of death, leaving the question of aetiology or medical causation undetermined. On this basis, there was in fact a determination of the kind of death.

[30] Thirdly, the expression 'kind of death' is wide reaching. It does not, in terms, require identification of the prime cause of death in a medical sense, but is sufficiently broad to include death which occurs in a particular temporal or circumstantial context, such as death occurring 'suddenly' or in a particular location or set of circumstances. The expression 'kind' does not mandate a determination of the precise medical causation of the death. A death, for example, might be characterised as a death at sea, or a death in circumstances in which there has been an exposure to the elements. This could properly be described as a kind of death using that expression in a broad sense.

Formal decision

The Court dismissed the appeal, awarding costs against the Commission.

[Ed: The circumstances in which the 'kind of death' will be as broad as that suggested by the Court are likely to be unusual. The Court distinguished *Hancock's* case on the basis that in *Hancock* there was a choice of SoPs, whereas in *Towns*, the cause of death was unknown other than that the veteran had died of natural causes while in the bush. It found there was no relevant SoP that could be pointed to by the evidence. Therefore, it seems unlikely that *Towns'* case would apply, for example, if death were from metastatic carcinoma of unknown primary. In such a case, there are SoPs for most primary tumours and it would be a question of fact as to which type of malignant neoplasm was likely to have given rise to the metastasis in a particular veteran's case. The RMA recently announced an investigation into metastatic carcinoma of unknown primary. This investigation may give rise to some interesting issues when the RMA eventually considers whether a SoP can be made. For example, is it a different kind of disease from metastatic carcinoma of a known primary, or is it just a question of the nature of the evidence in each individual's case?]

Cameron v Repatriation Commission

Allsop J

[2003] FCA 1323
21 November 2003

Entitlement – rejection of medical opinion – whether engaged in fact-finding or merely assessed the material to determine whether reasonable hypothesis was raised

This case concerns the nature of the consideration that can take place in deciding whether or not the material before the decision-maker raises a reasonable hypothesis of a connection between a veteran's death and service. The applicant argued that the Tribunal had engaged in impermissible fact-finding, whereas the Commission argued that all the Tribunal had done was to assess and weigh the material to decide whether it raised a reasonable hypothesis.

The hypothesis suggested by Mrs Cameron (but which the Tribunal had found was not a reasonable hypothesis raised by the material) was that her late husband increased his smoking due to the conditions of his service, his smoking contributed to chronic bronchitis, which contributed to pneumonia, which caused a fever and delirium, which contributed to him being struck by a car when crossing a road. This hypothesis was supported by a medical opinion written 22 years after the veteran's death, which stated:

> The pneumonia found at autopsy is more likely than not ... to have been accompanied by fever. Fever itself is sometimes associated with mental confusion called delirium. It is quite likely that he had some confusion as the result of his pneumonia and that confusion was instrumental in his failing to see the car ...

The Tribunal noted evidence given at the Coroner's inquest that the veteran had run across the road; he had left his home three times that day; he had been to the hotel twice and had a blood alcohol reading of 0.2%. The Tribunal said:

> Commonsense informs that a man with a fever sufficient to cause confusion or delirium would not undertake these activities and nor would he be inclined, as a normal and moderate drinker, to consume alcohol sufficient to give him a reading of 0.2 per cent.

The Tribunal found that there was 'no material' pointing to the veteran suffering from delirium.

The Court noted:

> [42] The dividing line between impermissible fact finding and permissible (indeed mandated) assessment of all the material, weighing it and concluding whether or not, as a whole, it points to the posited reasonable hypothesis, is not necessarily easy. The characterisation of Dr Burns' views as assertions may be seen to be part of this weighing process of all the material. On the other hand, there is force in the applicant's submissions that if the medical opinion is, in terms, in accordance with the hypothesis, to conclude that the hypothesis is unreasonable involves a finding that the medical opinion is without basis. I have not found this distinction easy to resolve.

The Court held that it is not fact-finding to conclude that there is no reasonable hypothesis in the face of medical opinion that proposes a hypothesis that is unsupported by any other material.

Formal decision

The Court dismissed the appeal and awarded costs against Mrs Cameron.

Meehan v Repatriation Commission

Jacobson J

[2003] FCA 1371
28 November 2003

Entitlement – rejection of expert evidence beyond reasonable doubt at* Deledio *step 4 – unreliability of applicant's evidence upon which expert's evidence was based

Mr Meehan claimed that his generalised anxiety disorder was war-caused. His evidence at the AAT had been that he had served in HMAS *Sydney* in Vietnam in 1969, he claimed to have been affected by stressors including being on sentry duty in the dark, seeing men killed and injured, and seeing corpses transported on his ship in body bags.

His psychiatrist gave evidence that Mr Meehan showed signs of generalised anxiety disorder, which would have been present within two years of the stressors if he had not self-medicated with alcohol.

The Tribunal found that a reasonable hypothesis had been raised and then proceeded to step 4 of the *Deledio* steps to determine whether a fact necessary for the hypothesis was disproved beyond reasonable doubt or wether a fact inconsistent with the hypothesis being true was disproved beyond reasonable doubt. The Tribunal listed 10 instances of unreliable evidence given by Mr Meehan. The Court noted that:

> The list included an exaggeration of the number of times the Applicant had been to Vietnam. It also included an exaggeration of the amount of time he spent there. He told one of the psychiatrists who had given evidence for him that he had spent five months in Vietnam whereas in fact he had been there for only 5½ hours on each of two occasions. He told one of his psychiatrists that he had seen people being killed but he later conceded that this was not so. He told Dr Dinnen and another psychiatrist that he had seen corpses returning from Vietnam in body bags but there was independent evidence that HMAS *Sydney* did not transport bodies from Vietnam. He told Dr Dinnen that he had been a sentry officer on landing craft in Vung Tau Harbour at night. However, the Tribunal found that HMAS *Sydney* was in Vung Tau Harbour only in daylight hours and that the accurate picture was very different from and much less threatening than the version presented by the Applicant.

In light of this, the Tribunal said it could not accept any of the applicant's evidence without corroboration, and that the cogency of much of Dr Dinnen's evidence was doubtful as he had uncritically relied on what the veteran had told him.

Applicant's argument

In the Court, it was argued on behalf of Mr Meehan that the Tribunal's finding that the applicant's evidence was unreliable and its doubting of the cogency of the supporting medical evidence did not satisfy the 'beyond reasonable doubt' standard of proof.

Court's findings

The Court referred to the High Court case of *Bushell*, in which it was said that a decision-maker can be satisfied beyond reasonable doubt that it cannot accept the raised facts, 'because of the unreliability of the material which is claimed to support them or because of the superior reliability of other parts of the material'. The Court said that while the Tribunal did not make a specific finding that particular facts had been disproved, on a fair reading of the reasons, that is what it had found as there was no other explanation for the long list of unreliable material. The Court said:

> Although it used the words 'unreliable' and 'of little use', the effect of what it found was that it was satisfied beyond reasonable doubt that the facts upon which the diagnosis of [generalised anxiety disorder] was based did not exist. Without the factual underpinnings the medical opinions were of no use and there was nothing else to support the hypothesis.

Formal decision

The Court dismissed the appeal and awarded costs against Mr Meehan.

Repatriation Commission v Stoddart

Carr, Finn, & Sundberg JJ

[2003] FCAFC 300
19 December 2003

Entitlement – PTSD – alcohol abuse or dependence – experiencing a severe stressor – whether objective or subjective

The Tribunal had found that Mr Stoddart's post-traumatic stress disorder and his alcoholic liver damage were not war-caused on the basis that the only relevant factor in the applicable Statements of Principles, namely, experiencing a severe stressor, could not be met. The Tribunal found that this factor, which required that the person witnessed or was confronted with an event that involved actual or threatened death or serious injury, was an objective test.

On appeal at first instance (see (2003) 19 *VeRBosity* 48), Mansfield J held that the test contained both subjective and objective elements, and so the Tribunal had made an error of law.

The Commission appealed that judgment to the Full Court, arguing that the Tribunal really had applied a subjective element to the test; that Mansfield J had improperly watered down the 'threat' requirement of the Statements of Principles; and that routine events, as found by the Tribunal to have been all that Mr Stoddart had experienced, could not amount to severe stressors.

Subjective element

The Full Court held that the definitions of the factors in the Statements of Principles 'did not require there to be an actual threat judged objectively and with full knowledge of all the circumstances' (para [30]). The Court held that the Tribunal had applied a purely objective test and did not address whether the 'threat' perceived by Mr Stoddart was, in the circumstances, capable of satisfying the factor, notwithstanding that there was no actual threat as such (para [31]).

Threat

In addressing the Commission's argument that Mansfield J had watered down the 'threat' requirement by merely speaking of a 'risk' of death or serious injury, the Court said:

> [34] ... The description, 'a risk of death', can be used appropriately to describe a clear and present danger of death and a mere possibility of death. Ordinarily, it is the context in which such a description is used (with or without an accompanying adjective: cf 'risk' vs 'mere risk' in *Repatriation Commission v Thompson* (1998) 44 FCR 20 at 24) that will indicate the gravity of the risk that is being incurred. In our view, such is the case with the primary judge's usage.
>
> [35] Given the context in which the word 'risk' was used – ie in a protracted discussion of what constitutes a 'severe stressor' – it is apparent that his Honour intended no

dilution of what the term 'threat' conveyed in the definition of each SOP and the gravity of the perceived risk was to be understood accordingly. To suggest that he did otherwise is to divorce the language used from its context. It is notable that the Full Court in *Woodward* (at para [139]) appeared to have no difficulty with his Honour's use of the term 'risk'.

[36] Similarly, we do not consider that the primary judge impermissibly refocussed the definition of threat. The dictionary definition he adopted – ie 'an indication of probable evil to come: something that gives indication of causing evil or harm' – is the proper and appropriate one in the setting of the SOPs for the reasons given by his Honour: Reasons at para [52]

Routine events

The Commission contended that the routine events that the Tribunal had found Mr Stoddart had experienced could not constitute a 'severe stressor'. The Court said that this argument:

> [38] ... fails to take account of the possibility that events that are objectively 'neutral in character' may, nonetheless, reasonably give rise to a perceived threat because of what they convey to pa particular person who experiences them given his or her position at the time.

The Court also rejected an argument that on the evidence, the Tribunal could not possibly have found in favour of Mr Stoddart in any event.

Formal decision

The Full Court dismissed the appeal and awarded costs against the Commission.

Sleep v Repatriation Commission

Carr, Finn, & Sundberg JJ

[2003] FCAFC 304
19 December 2003

Attendant allowance – whether similar in effect or severity to disease of cerebro-spinal system

Mr Sleep appealed a decision of a Federal Magistrate ((2002) 18 *VeRBosity* 119) that dismissed an appeal from the Tribunal which had affirmed the refusal of an application for an attendant allowance under s98 of the VEA. He has a number of war-caused diseases that the Magistrate said have the following effect:

> The lymphopaenia with CD4 suppression has reduced his immune system to such an extent that he is a target for opportunistic infection. This leads to marked symptoms of fatigue malaise and severely restricts his ability to socialise. His skin disorders are uncomfortable, unsightly and require frequent attention and medication. Overlayed upon these difficulties is an anxiety state.

The Tribunal did not consider these to be 'similar in effect or severity to a disease affecting the cerebro-spinal system' as required by s98(2) of the VEA.

The Full Court held that it was a matter for the Tribunal to determine the facts and that the Tribunal's decision was not so unreasonable that no reasonable Tribunal could have made it. The Court also held that the Tribunal was bound to apply current legislation and that Mr Sleep had no accrued right to have the Tribunal apply earlier criteria that had been changed before he made his claim.

Formal decision

The Full Court dismissed the appeal and awarded costs against Mr Sleep.

Whitworth v Repatriation Commission

Ryan J

[2003] FCA 1530
19 December 2003

Entitlement – material required to raise a reasonable hypothesis

At the Tribunal, it was contended on behalf Mrs Whitworth that her late husband died through a causal chain from exposure to benzene on service, leading to pancytopenia (some 50 years later), and then to pneumonia, which was a cause of his death. The Tribunal found there was no support for this hypothesis in the material before it.

On appeal, it was argued that the Tribunal had made an error of law by scrutinising the evidence of Dr Collins (who advanced the hypothesis) against the evidence of Dr Fox (who opposed it); and by failing to treat Dr Collins' evidence as material raising a reasonable hypothesis.

The Court rejected these arguments, referring to *Bushell's* case (1992) and saying:

> [8] While an hypothesis may yet be reasonable though scientifically unproven, the High Court's discussion clearly proceeds on the basis that the hypothesis is founded on facts pointed to by the material. That requirement is inescapable. Even in a case where a scientifically unproven hypothesis is put forward by a relevantly qualified witness, the Commission and the Tribunal must, in such a case, still scrutinise that theory in light of the other available medical evidence and consider 'the validity of the reasoning' supporting it. True it is that there need not be, necessarily, material pointing to every step in the process of reasoning by which the hypothesis connects war-service with the development of a disease. ...
>
> [11] It may well be that, in the course of a hearing, an hypothesis is put forward by a witness which is not impossible or fanciful and yet the hypothesis itself will not be a reasonable one. It will remain a mere, and not a reasonable, hypothesis if there is no material pointing to it beyond the hypothesis itself; see *Bull* at 761. ... There is a crucial difference between material that raises an hypothesis, and an abstract hypothesis raised by a witness which cannot be ruled in or excluded on the basis of what the High Court in *Bushell* called the raised facts. In the former case, material may both raise an hypothesis and point to it with the result that a reasonable hypothesis could be made out; in the latter case the hypothesis will merely have been put before the Tribunal which, without more, will not be able to find it to be reasonable. ...
>
> [14] It is apparent from that evidence that Dr Collins could go no further than to express a belief in a 'real possibility that part of the condition of pancytopenia was caused by the exposure to benzene'; that one could only say there was a possible connection with benzene exposure during the veteran's war-service, which is an 'alternative explanation for some of the pancytopenia'; that it is possible that there could be a delay of 50 years in the manifestation of symptoms, but that this would be a 'long time'; and that, as there is no clinical evidence supporting or contradicting the theory, it 'can't be excluded'. That evidence clearly does not satisfy the test in *East* [1987] as refined in *Bull*. [2001] Merely because a theory cannot be excluded as impossible, fanciful or contrary to the known facts does not entail it is

reasonable. There must be some material pointing to it.

[15] Mr De Marchi for the applicant submitted that Dr Collins' hypothesis had been detailed and well-reasoned and there was material pointing to it being Dr Collins' own opinion. Had Dr Collins been an expert 'eminent in the relevant field of knowledge' in the *Bushell* sense, that might have been sufficient. However, Dr Collins, on his own admission is not a specialist in oncology or diseases of the blood. Dr Collins further admitted his hypothesis was not founded on any clinical evidence. It would be a different matter if there had been blood films or other clinical evidence from the period between the veteran's war service and his death which showed abnormalities consistent with the progress of the disease. Factual, rather than purely theoretical, material of that kind may point to an hypothesis so as to make it reasonable. However, a theory that is entirely unsupported by any substantiating fact, and merely provides an explanation connecting a known condition with a known event in the applicant's history, remains no more than a theory. On the authority of *Byrnes* [1993], an hypothesis is not to be rejected simply because it contains an element of supposition: one link, or even more, in a chain of reasoning may be supposed. However, the entire chain cannot be successfully founded on supposition or assumption. There must be *some* positive fact pointing to a link in the chain. ...

[16] ... The reference to Dr Fox's differing explanation of the origin of the pancytopenia was not, it seems to me, introduced as part of a mistaken process of evaluating the material 'on balance'. Rather, it was indicated as reinforcing the correctness of the conclusion that there is no material pointing to the hypothesis; such material as there was pointed away from it to another hypothesis. In a situation where the only clinical evidence points away from a hypothesis, it is self-evidently not a reasonable one. The Tribunal was correct, for the reasons given below, in having regard to Dr Fox's material in assessing the validity of the reasoning which supported the hypothesis propounded by the applicant.

[17] On the clear authority of *Bushell*, the Tribunal when confronted with an unproven medical theory must set about 'examining the validity of the reasoning which supports the claim that there is a connection between the incapacity or death and the service of a veteran' and in this exercise is entitled to take into account competing medical evidence adverse to the applicant's claim. That is clearly what the Tribunal did.

Formal decision

The Court dismissed the appeal and awarded costs against Mrs Whitworth.

Federal Magistrates Court of Australia

Gerzina v Repatriation Commission

McInnis FM

[2003] FMCA 490
7 November 2003

Entitlement – post-traumatic stress disorder – meaning of 'intense fear, helplessness or horror' – whether DSM-IV and SoP require 'intense horror' or just 'horror'

The AAT had found that the veteran was not suffering from post traumatic stress disorder because he did not have the required reaction to the alleged stressor: the Tribunal said

> [39] ... we find that Mr Gerzina was upset by his duties involving the inspection and preparation of battle damaged vehicles for return to Australia, and by the smell of putrefaction and the traces of blood or skin indicating that people had died or been severely wounded in those vehicles. But we are not satisfied that his reaction was such as to satisfy criterion A(ii) of the diagnostic criteria for PTSD. Mr Gerzina could not have felt any fear as a result of those duties. He gave the impression in his evidence, and we find, that he did feel 'horror'. But we are not satisfied that it was 'intense horror'.. If so, that seems to us to be inconsistent with his account to Dr Seabridge, that he went to Saigon to ask the Colonel to transfer him to an operational area because he was frustrated by the routine nature of his work, in the light of the reminders in the vehicles that other soldiers were killed.
>
> [40] The evidence does not establish to our satisfaction that Mr Gerzina's reaction to either of the two traumatic events he described involved 'intense fear, helplessness, or horror'.

On appeal to the Court, Mr Gerzina argued that the word, 'intense' in the diagnostic criteria qualifies only 'fear', and not 'helplessness' or 'horror' as well.

In reply, the Commission relied on the Federal Court decision of *Repatriation Commission v Hill* (2002) 17 *VeRBosity* 116, in which von Doussa J said:

> In my opinion the Tribunal was correct in holding that the veteran's emotion whether it be of fear, helplessness or horror had to be 'intense'

The Court rejected Mr Gerzina's argument that this was not a binding part of that judgment, and then said:

> [40] ... In my view, having regard to the dictionary definitions it is quite possible for the helplessness and horror to be described by the adjective "intense". Although it may be suggested that helplessness to some extent appears to be an absolute term, it must be viewed in the light of the context of the DSM-IV and the condition of post-traumatic stress disorder which is sought to be diagnostically defined.

Formal decision

The Court dismissed the application and awarded costs against Mr Gerzina.

Statements of Principles issued by the Repatriation Medical Authority

November – December 2003

Number of Instrument	Description of Instrument
51 of 2003	Determination of Statement of Principles concerning **pleural plaque** and death from pleural plaque.
52 of 2003	Determination of Statement of Principles concerning **pleural plaque** and death from pleural plaque.
53 of 2003	Revocation of Statement of Principles (Instrument No. 38 of 1999) and determination of Statement of Principles concerning **ischaemic heart disease** and death from ischaemic heart disease.
54 of 2003	Revocation of Statement of Principles (Instrument No. 39 of 1999) and determination of Statement of Principles concerning **ischaemic heart disease** and death from ischaemic heart disease.
55 of 2003	Revocation of Statement of Principles (Instrument No. 72 of 1999) and determination of Statement of Principles concerning **myeloma** and death from myeloma.
56 of 2003	Revocation of Statement of Principles (Instrument No. 73 of 1999) and determination of Statement of Principles concerning **myeloma** and death from myeloma.
57 of 2003	Amendment of Statement of Principles (Instrument No. 52 of 1999 as amended by 30 of 2002) concerning **cerebrovascular accident** and death from cerebrovascular accident.
58 of 2003	Amendment of Statement of Principles (Instrument No. 53 of 1999 as amended by 31 of 2002) concerning **cerebrovascular accident** and death from cerebrovascular accident.
59 of 2003	Amendment of Statement of Principles (Instrument No. 67 of 2001) concerning **chronic lymphoid leukaemia** and death from chronic lymphoid leukaemia.

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **RMA Website:** ***http://www.rma.gov.au/***

Repatriation Medical Authority

CONDITIONS UNDER INVESTIGATION AS AT 31 DECEMBER 2003

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Achilles tendonitis or bursitis	[*Instrument Nos. 53/96 & 54/96*]	19-11-03
Acute myeloid leukaemia	[*Instrument Nos 169/96 & 170/96*]	16-07-03
Acute sprains and acute strains	[*Instrument Nos. 50/94 & 51/94*]	19-11-03
Asbestosis	[*Instrument Nos 138/96 & 139/96*]	16-04-03
Brodie's abscess		05-03-03
Chronic bronchitis & emphysema	[*Instrument Nos 73/97 & 74/97*]	16-04-03
Chronic lymphoid leukaemia	[*Instrument Nos 67/01 & 68/01*]	16-07-03 17-12-03
Dermatomyositis		16-07-03
Diabetes mellitus	[*Instrument Nos 82/99 & 83/99 as amended by Nos 9/01, 10/01, 91/01 & 92/01*]	28-11-01
Endometriosis		16-10-02
Epilepsy	[*Instrument Nos 79/96 & 80/96*]	05-03-03
Fracture	[*Instrument Nos. 11/94 & 12/94 as amended by Nos. 219/95 & 220/95*]	19-11-03
Gastro-oesophageal reflux disease	[*Instrument Nos 52/02 & 53/02*]	18-12-02
Haemorrhoids	[*Instrument Nos 13/00 & 14/00*]	13-11-02
Hiatus hernia	[*Instrument Nos 42/99 & 43/99*]	14-08-02
Hodgkin's disease	[*Instrument Nos 25/00 & 26/00*]	20-08-03
Inguinal hernia	[*Instrument Nos 72/98 & 73/98*]	16-04-03
Jakob-Creutzfeldt disease	[*Instrument Nos 63/95 & 64/95 as amended by Nos 190/95, 49/97 & 50/97*]	18-12-02
Leptospirosis		05-03-03
Malignant neoplasm of the breast	[*Instrument Nos 53/97 & 54/97*]	16-07-03
Malignant neoplasm of the colorectum	[*Instrument Nos 58/02 & 59/02*]	02-07-03
Malignant neoplasm of the larynx	[*Instrument Nos 27/95 & 28/95 as amended by Nos 155/95 & 156/95, 151/96 & 152/96 and 193/96 & 194/96*]	16-07-03
Malignant neoplasm of the lung	[*Instrument Nos 35/01 & 36/01*]	20-08-03

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Malignant neoplasm of the oral cavity or hypopharynx	[*Instrument Nos 113/96 & 114/96*]	06-03-02
Malignant neoplasm of the pancreas	[*Instrument Nos 55/97 & 56/97 as amended by 20/02 & 21/02*]	20-08-03
Malignant neoplasm of the prostate	[*Instrument Nos 84/99 & 85/99 as amended by Nos 69/02 & 70/02*]	16-07-03
Malignant neoplasm of the salivary gland	[*Instrument Nos 25/97 & 26/97*]	06-03-02
Malignant neoplasm of the small intestine	[*Instrument Nos 153/96 & 154/96 as amended by Nos 7/98 & 8/98*]	16-04-03
Malignant neoplasm of the testis and paratesticular tissues	[*Instrument Nos 3/97 & 4/97*]	14-08-02
Malignant neoplasm of the thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Metastatic carcinoma of unknown primary		19-11-03
Myelodysplastic disorder	[*Instrument Nos 15/00 & 16/00*]	20-08-03
Neoplasm of the pituitary gland	[*Instrument Nos 37/97 & 38/97*]	13-11-02
Non melanotic malignant neoplasm of the skin	[*Instrument Nos 43/01 & 44/01 as amended by Nos 51/01 & 52/01*]	08-05-02
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03
Osteomyelitis		05-03-03
Peripheral neuropathy	[*Instrument Nos 79/01 & 80/01 as amended by 13/03 & 14/03*]	20-08-03
Plantar fasciitis	[*Instrument Nos. 3/00 & 4/00 as amended by Nos. 47/03 & 48/03*]	19-11-03
Rheumatoid arthritis	[*Instrument Nos 126/96 & 127/96*]	13-11-02
Rotator cuff syndrome	[*Instrument Nos. 83/97 & 84/97*]	19-11-03
Seborrhoeic dermatitis	[*Instrument Nos 50/99 & 51/99*]	16-07-03
Seizures	[*Instrument Nos 81/96 & 82/96*]	05-03-03
Sleep apnoea	[*Instrument Nos 39/97 & 40/97*]	11-06-03
Soft tissue sarcoma	[*Instrument Nos 23/01 & 24/01*]	20-08-03
Spondylolisthesis & spondylolysis	[*Instrument Nos 15/97 & 16/97*]	05-03-03
Tinea	[*Instrument Nos 27/94 & 28/94 as amended by Nos 184/95, 185/95, 7/02 & 8/02*]	29-05-02

Administrative Appeals Tribunal decisions – October to December 2003

Circulatory disorder

cardiomyopathy
- alcohol abuse or dependence
  - **Reynolds, K W** (Navy) 12 Dec 2003

cerebellar haemorrhage
- cerebral ischaemia
  - smoking
    - **Burge, L** (Army) 12 Nov 2003

cerebral ischaemia
- alcohol
  - **Musgrave, J** (Navy) 3 Dec 2003
- smoking
  - **Burge, L** (Army) 12 Nov 2003

hypertension
- alcohol abuse or dependence
  - **Prodger, I G** (Navy) 14 Oct 2003
  - **Freemantle, K R** (Navy) 28 Oct 2003
  - **Hayward, W C J** (Navy) 4 Nov 2003
  - **Smith, D R** (Army) 19 Dec 2003

ischaemic heart disease
- smoke haze
  - **Casas, K S** (Navy) 10 Nov 2003
  - material contribution from 53 days exposure
    - **Brecht, A H R** (Navy) 19 Nov 2003

Death

alcohol abuse or dependence
- culture of drinking in unit
  - **Starr, J** (Army) 11 Dec 2003
- experiencing a severe stressor
  - aircraft hit by flak
    - **Lilley, A M** (RAAF) 12 Dec 2003
  - death of a colleague
    - **Mychael, S** (RAAF) 19 Nov 2003

bronchopneumonia
- terminal event
  - **Brown, F Y** (Army) 8 Oct 2003

carcinoma of prostate
- animal fat consumption
  - **Duncan, R V** (Navy) 8 Oct 2003
  - **Rogalsky, K J** (Army) 11 Aug 2003

carcinoma of rectum
- processed meat
  - **Wren, D I** (RAAF) 14 Nov 2003

carcinoma of stomach
- Helicobacter pylori
  - **Bennett, F** (Army) 22 Dec 2003

cardiomyopathy
- alcohol
  - **Lilley, A M** (RAAF) 12 Dec 2003

dementia
- alcohol
  - **Brown, F Y** (Army) 8 Oct 2003
- smoking
  - **Brown, F Y** (Army) 8 Oct 2003

hypertensive heart disease
- alcohol dependence
  - **Mychael, S** (RAAF) 19 Nov 2003

ischaemic heart disease
- dyslipidaemia
  - alcohol
    - **Starr, J** (Army) 11 Dec 2003
- hypertension
  - salt
    - **Patterson, J** (Navy) 12 Dec 2003
- panic disorder
  - anxiety
    - **Lewis, H M** (Navy) 29 Oct 2003
  - assault
    - **Martin, T M** (RAAF) 10 Dec 2003
  - nightmares re Japanese
    - **Winn, J E** (YMCA) 28 Oct 2003

kind of death
- correct diagnosis
  - **Duncan, R V** (Navy) 8 Oct 2003
  - **May, V B** (RAAF) 4 Dec 2003

Musculoskeletal disorder

Achilles tendonitis or bursitis
- trauma
  Johnston, R K (Army) 12 Dec 2003

Neurological disorder

chronic inflammatory demyelinating polyneuropathy
- toxic chemicals
  Foster, R J (Army) 9 Oct 2003

sleep apnoea
- cause unknown
  Hewson, R J (Army) 10 Dec 2003

Osteoarthrosis

ankle
- trauma
  - jumping
    Jones, L A (RAAF) 21 Nov 2003

hip
- disordered joint mechanics
  - limp
    Sharpe, J (Army) 21 Nov 2003

knee
- heavy lifting
  Wheat, R W (Army) 17 Oct 2003

shoulder
- fall
  Corpus, P (Army) 15 Oct 2003
  Wheat, R W (Army) 17 Oct 2003

Practice and procedure

Administrative Appeals Tribunal
- constitution
  - remittal from Federal Court
    Allan, G 3 Oct 2003
- reinstatement of application
  - psychiatric condition affecting decision to withdraw
    White, R 22 Dec 2003

Psychiatric disorder

alcohol abuse or dependence
- diagnostic criteria not met
  Potts, B F (Navy) 10 Nov 2003
  Vock, E (Army) 18 Dec 2003
- experiencing a severe stressor
  - clearance diving
    Reynolds, K W (Navy) 12 Dec 2003
  - crashlanding on aircraft carrier
    Freemantle, K R (Navy) 28 Oct 2003
    Hayward, W C J (Navy) 4 Nov 2003
    Hill, K N (Navy) 17 Nov 2003
  - defusing depth charge
    Hayward, W C J (Navy) 4 Nov 2003
  - helicopter flights in Vietnam
    Hoogkamer, H (Army) 22 Dec 2003
  - helicopter rocket attack on enemy
    Ballantyne, R A (Army) 24 Nov 2003
  - hookman on aircraft carrier
    Wild, D H (Navy) 31 Oct 2003
  - scare charge
    Thorpe, P K R (Navy) 15 Jul 2003
  - separation from partner
    Allum, E M (Army) 17 Oct 2003
    Musgrave, J (Navy) 3 Dec 2003
  - sexual assault
    Martin, R L (RAAF) 5 Dec 2003
  - toxic fumes working in enclosed space
    Hayward, W C J (Navy) 4 Nov 2003
  - truck hijacked
    Ballantyne, R A (Army) 24 Nov 2003
  - unauthorised discharge of weapon
    Ballantyne, R A (Army) 24 Nov 2003
    Smith, D R (Army) 19 Dec 2003
  - uncontrolled dive in submarine
    Freemantle, K R (Navy) 28 Oct 2003
  - underwater explosions while in submarine
    Freemantle, K R (Navy) 28 Oct 2003
  - water entering open hatch in submarine
    Freemantle, K R (Navy) 28 Oct 2003
  - witnessed assault
    Ballantyne, R A (Army) 24 Nov 2003

anxiety disorder
- back pain
  - motorcycle accident
    Brennan, G A (Army) 16 Oct 2003

- cerebellar haemorrhage
  - smoking
    Burge, L (Army) 12 Nov 2003
- diagnosis
  Burge, L (Army) 12 Nov 2003
- experiencing a severe stressor
  - crashlanding on aircraft carrier
    Hayward, W C J (Navy) 4 Nov 2003
  - Cyclone Tracey
    Stewart, P J (RAAF) 21 Nov 2003
  - defusing depth charge
    Hayward, W C J (Navy) 4 Nov 2003
  - emergency surfacing in submarine
    Prodger, I G (Navy) 14 Oct 2003
  - helicopter flights in Vietnam
    Hoogkamer, H (Army) 22 Dec 2003
  - separation from seriously ill partner
    Allum, E M (Army) 17 Oct 2003
  - toxic fumes working in enclosed space
    Hayward, W C J (Navy) 4 Nov 2003
  - witnessed assault
    Ballantyne, R A (Army) 24 Nov 2003
- supervening non-service-related PTSD
  Casas, K S (Navy) 10 Nov 2003

depressive disorder
- diagnostic criteria not met
  Hewson, R J (Army) 10 Dec 2003
- experiencing a severe stressor
  - boarding party incident with HMAS Vendetta
    Potts, B F (Navy) 10 Nov 2003
  - crashlanding on aircraft carrier
    Freemantle, K R (Navy) 28 Oct 2003
  - Cyclone Tracey
    Stewart, P J (RAAF) 21 Nov 2003
  - 'Dear John' letter
    Pickering, D (Navy) 18 Dec 2003
- hypertension
  Prodger, I G (Navy) 14 Oct 2003

diagnosis
- no disease present
  Wood, W C (Army) 15 Oct 2003
  Vock, E (Army) 18 Dec 2003

personality disorder
- catastrophic experience
  - not experienced
    Compston, R J (Navy) 22 Sep 2003
- diagnosis
  Compston, R J (Navy) 22 Sep 2003

post traumatic stress disorder
- experiencing a severe stressor
  - atomic bomb test
    Rees, J F (Navy) 17 Oct 2003
  - boarding party incident with HMAS Vendetta
    Potts, B F (Navy) 10 Nov 2003
  - clearance diving
    Reynolds, K W (Navy) 12 Dec 2003
  - crashlanding on aircraft carrier
    Freemantle, K R (Navy) 28 Oct 2003
    Hill, K N (Navy) 17 Nov 2003
  - explosions near Vung Tau
    Rees, J F (Navy) 17 Oct 2003
  - fire in missile bay room
    Rees, J F (Navy) 17 Oct 2003
  - helicopter crash
    Rees, J F (Navy) 17 Oct 2003
  - helicopter rocket attack on enemy
    Ballantyne, R A (Army) 24 Nov 2003
  - hookman on aircraft carrier
    Wild, D H (Navy) 31 Oct 2003
  - locked in ships' fridge
    Lees, A R (Navy) 10 Oct 2003
  - motor vehicle accident
    Clarke, N A (RAAF) 21 Nov 2003
  - scare charge
    Rees, J F (Navy) 17 Oct 2003
    Thorpe, P K R (Navy) 15 Jul 2003
  - sexual assault
    Martin, R L (RAAF) 5 Dec 2003
  - truck hijacked
    Ballantyne, R A (Army) 24 Nov 2003
  - unauthorised discharge of weapon
    Ballantyne, R A (Army) 24 Nov 2003
  - uncontrolled dive in submarine
    Freemantle, K R (Navy) 28 Oct 2003

Remunerative work & special rate

Respiratory disorder

Service pension

Allied veteran
- whether permanently incapacitated since permanent residency
  Huck, R 14 Oct 2003

assets test
- loan
  - valuation method
    Sernack, N 30 Sep 2003

invalidity
- Allied veteran
  - whether permanently incapacitated since permanent residency
    Huck, R 14 Oct 2003
- capacity to undertake remunerative work
  - whether solely because of impairment
    Hill, C D 7 Nov 2003

Spinal disorder

cervical spondylosis
- trauma
  - injured stacking beer kegs
    Stewart, P J (RAAF) 21 Nov 2003
  - insufficient symptoms
    Stewart, P J (RAAF) 21 Nov 2003
    Wheat, R W (Army) 17 Oct 2003

intervertebral disc prolapse
- smoking
  Armstrong, B J (Navy) 3 Oct 2003

lumbar spondylosis
- fall
  Hawkett, J (Army) 17 Oct 2003
  Steicke, W M (Army) 12 Dec 2003
- lifting
  Armstrong, B J (Navy) 3 Oct 2003
  Wheat, R W (Army) 17 Oct 2003
  Walker, P J (Army) 31 Oct 2003

thoracic spondylosis
- lifting
  Wheat, R W (Army) 17 Oct 2003
  Walker, P J (Army) 31 Oct 2003

Court decisions – January to December 2003

Allowances and benefits

attendant allowance

- whether similar in effect or severity to disease affecting cerebro-spinal system

Sleep
(*Carr, Finn, Sundberg JJ*)
[2003] FCAFC 304 19 Dec 2003

Application for review

dismissal of VRB application

- preconditions for exercise of power to issue notice

Johnson
(*Weinberg, Stone, Jacobson JJ*)
[2003] FCAFC 89 9 May 2003

- whether compliance with procedures is mandatory

Johnson
(*Weinberg, Stone, Jacobson JJ*)
[2003] FCAFC 89 9 May 2003

- whether s155AB notice valid

Johnson
(*Weinberg, Stone, Jacobson JJ*)
[2003] FCAFC 89 9 May 2003

Death

kind of death

- cause unknown

Towns (*Tamberlin J*)
[2003] FCA 1262 7 Nov 2003

- meaning

Towns (*Tamberlin J*)
[2003] FCA 1262 7 Nov 2003

- standard of proof

Hancock (*Selway J*)
[2003] FCA 711 16 Jul 2003

Dependant

member of a couple

- same sex couple

Young (*UNHRC*)
941/2000 18 Sep 2003

Eligible service

defence service

- function at sergeant's mess

Roncevich
(*Heerey, Whitlam, Marshall JJ*)
[2003] FCAFC 146 30 Jun 2003

domicile

- whether intention to change

Parnell-Schoneveld (*Jacobson J*)
[2003] FCA 153 6 Mar 2003

internment by Japanese

- meaning of 'interned'

Price (*Conti J*)
[2003] FCA 339 16 Apr 2003

Entitlement & liability

occurrence

- temporal and causal elements

Woodward & Gundry
(*Black CJ, Weinberg, Selway JJ*)
[2003] FCAFC 160 30 Jul 2003

- whether SoP applies

Woodward & Gundry
(*Black CJ, Weinberg, Selway JJ*)
[2003] FCAFC 160 30 Jul 2003

Evidence and proof

application of *Deledio* steps

- assessing reasonableness of hypothesis

Cameron (*Allsop J*)
[2003] FCA 1323 21 Nov 2003

Whitworth (*Ryan J*)
[2003] FCA 1530 19 Dec 2003

- assessment of the material

Cameron (*Allsop J*)
[2003] FCA 1323 21 Nov 2003

Whitworth (*Ryan J*)
[2003] FCA 1530 19 Dec 2003

- fact-finding at step 3

Hill (*Heerey J*)
[2003] FCA 46 7 Feb 2003

Demczuk (*Mansfield J*)
[2003] FCA 1188 29 Oct 2003

- material must raise each essential element of SoP

Dunlop
(*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 201 27 Aug 2003

Cameron (*Allsop J*)
[2003] FCA 1323 21 Nov 2003

- mechanical step-by-step approach not required

Dunlop
(*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 201 27 Aug 2003

- rejection of evidence beyond reasonable doubt at step 4

Tate (*Cooper J*)
[2003] FCA 1169 24 Oct 2003

Meehan (*Jacobson J*)
[2003] FCA 1371 28 Nov 2003

- unreliable material

Meehan (*Jacobson J*)
[2003] FCA 1371 28 Nov 2003

expert

- evidence not based on reliable material

Meehan (*Jacobson J*)
[2003] FCA 1371 28 Nov 2003

- evidence not based on supporting material

Whitworth (*Ryan J*)
[2003] FCA 1530 19 Dec 2003

kind of death

- standard of proof

Hancock (*Selway J*)
[2003] FCA 711 16 Jul 2003

kind of injury or disease

- standard of proof

Fogarty
(*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 136 20 Jun 2003

Injury and disease

clinical onset

Parr (*Moore J*)
[2003] FCA 970 15 Sep 2003

diagnosis

- standard of proof

Fogarty
(*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 136 20 Jun 2003

whether suffering from an injury or disease

- preliminary issue must be determined

Fogarty
(*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 136 20 Jun 2003

Jurisdiction

accrued rights

- SoP in force at time of AAT review
  - must be applied

Stoddart (*Mansfield J*)
[2003] FCA 334 17 Apr 2003

Thomas
(*Heerey, Whitlam, Marshall JJ*)
[2003] FCAFC 122 30 May 2003

Fogarty
(*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 136 20 Jun 2003

- SoP in force at time of claim
  - no right to apply that SoP

Stoddart (*Mansfield J*)
[2003] FCA 334 17 Apr 2003

- SoP in force at time of VRB review
  - no right for AAT to apply that SoP

Thomas
(*Heerey, Whitlam, Marshall JJ*)
[2003] FCAFC 122 30 May 2003

- SoP revoked at time of review
  - wrongly applied

Thomas
(*Heerey, Whitlam, Marshall JJ*)
[2003] FCAFC 122 30 May 2003

Practice and procedure

costs

- delay in seeking costs order

Roncevich (No. 2) (*Mansfield J*)
[2003] FCA 1241 28 Oct 2003

dismissal of VRB application

- see **Application for review**

extension of time to appeal to Federal Court

- oral AAT reasons
  - 28 days run from receipt of written decision, not written reasons

Nugent (*Cooper J*)
[2003] FCA 1184 27 Oct 2003

- prospects of success

Nugent (*Cooper J*)
[2003] FCA 1184 27 Oct 2003

- whether respondent prejudiced

Nugent (*Cooper J*)
[2003] FCA 1184 27 Oct 2003

procedural fairness

- no opportunity to inspect documents

O'Sullivan (*Sackville J*)
[2003] FCA 387 1 May 2003

Psychiatric disorder

alcohol abuse or dependence

- experiencing a severe stressor
  - whether subjective or objective

Stoddart (*Mansfield J*)
[2003] FCA 334 17 Apr 2003

Stoddart (*Carr, Finn, Sundberg JJ*)
[2003] FCAFC 300 19 Dec 2003

post traumatic stress disorder

- experiencing a severe stressor
  - meaning of 'intense fear, helplessness or horror

Gerzina (*McInnis J*)
[2003] FMCA 490 7 Nov 2003

  - whether subjective or objective

Stoddart (*Mansfield J*)
[2003] FCA 334 17 Apr 2003

Woodward & Gundry (*Black CJ, Weinberg, Selway JJ*)
[2003] FCAFC 160 30 Jul 2003

Stoddart (*Carr, Finn, Sundberg JJ*)
[2003] FCAFC 300 19 Dec 2003

whether suffering from a psychiatric disease

- preliminary issue must be determined

Fogarty (*Spender, Tamberlin, Kenny JJ*)
[2003] FCAFC 136 20 Jun 2003

Remunerative work & special rate

loss of salary, wages, or earnings

- earnings
  - drawings on shareholders loan account

Brydon (*Baumann FM*)
[2003] FMCA 299 17 Jul 2003

- failure to ask what veteran would have done if not had war-caused disabilities

Case (*Baumann FM*)
[2003] FMCA 153 29 Apr 2003

whether genuinely seeking work

- realistic approach

Conway (*Dowsett J*)
[2003] FCA 704 19 Jun 2003

- objective signs required

Leane (*Finn J*)
[2003] FCA 889 27 Aug 2003

- when test to be applied

Conway (*Dowsett J*)
[2003] FCA 704 19 Jun 2003

whether prevented by war-caused disabilities alone

- meaning of 'alone'

Alexander (*Spender J*)
[2003] FCA 399 2 May 2003

Hendy (*Gleeson CJ, Gummow J*)
[2003] HCATrans 358 12 Sep 2003

Leane (*Finn J*)
[2003] FCA 889 27 Aug 2003

Van Heteren (*Finn J*)
[2003] FCA 888 27 Aug 2003

Words and phrases

alone (s24(1)(c))

Alexander (*Spender J*)
[2003] FCA 399 2 May 2003

Hendy (*Gleeson CJ, Gummow J*)
[2003] HCATrans 358 12 Sep 2003

Leane (*Finn J*)
[2003] FCA 889 27 Aug 2003

Van Heteren (*Finn J*)
[2003] FCA 888 27 Aug 2003

clinical onset

Parr (*Moore J*)
[2003] FCA 970 15 Sep 2003

domicile

Parnell-Schoneveld (*Jacobson J*)
[2003] FCA 153 6 Mar 2003

earnings

- drawings on shareholders loan account

Brydon (*Baumann FM*)
[2003] FMCA 299 17 Jul 2003

VeRBosity
Case Note References