VeRBosity Volume 21 No. 1

Contents
January – March 2005

Editor's notes

The 20th anniversary of the Veterans' Review Board coincides with the 150th anniversary of the Victoria Cross. Recently an award of the Victoria Cross was made to Private Beharry of the 1st Battalion the Princess of Wales's Royal Regiment, the first recipient of the Victoria Cross for over 20 years (and the first since *VeRBosity* began). Anthony Staunton, a former editor of *VeRBosity*, has put together a piece on the history of the medal. Anthony is nearing completion of a book on the Victoria Cross due to be published later this year by the Australian War Memorial.

Following up from the recent issue on the special rate of pension [2003 *VeRBosity* Special Issue], Bruce Topperwien has composed a useful short guide to the special rate tests.

In the Federal Court, the meaning of 'remunerative work' in the special rate test is examined in *Wright.* In *Fenner,* the Court makes plain that where doubt surrounds the applicant's evidence, it cannot be rejected beyond reasonable doubt merely because other evidence is contradictory – that doubtful evidence must be tested to satisfy that standard of proof.

James McKay
Editor

This edition of *VeRBosity* contains reports of 4 Federal Court and 2 Federal Magistrates Court judgments in veterans' matters received in January to March 2005 as well as selected AAT decisions handed down in the same period. There is an index of all AAT and Court cases received in this period and information on recent Statements of Principles determined by, and current investigations of, the Repatriation Medical Authority.

Victoria Cross Sesquicentenary

Anthony Staunton

The Victoria Cross was instituted by Queen Victoria in 1856. However the first awards were backdated to cover the outbreak of the Crimean War. 2004-2005 is the sesquicentenary of the Crimean War and the first Victoria Cross awards.

The first award was in the Baltic. On 21 June 1854, Mate Charles Lucas RN was serving aboard HMS *Hecla* which was one of three ships bombarding the Russian fort of Bomarsund in the Aland Islands in what is now Finland. The Russians returned fire and a live shell with a burning fuse landed on *Hecla's* upper deck. When all hands were ordered to fling themselves flat on the deck, Lucas, with great presence of mind, ran forward and hurled the shell into the sea. The shell exploded before it hit the water but action by Lucas prevented anyone being killed or seriously wounded.

While Lucas has the singular honour of being the first naval recipient, the first Army awards were for the Battle of Alma of 20 September 1854 when eight officers and men of the British Army were honoured. Four awards went to the Scots Fusilier Guards (now Scots Guards), Major Robert Lindsay, Lieutenant John Knox, Sergeant James McKechnie and Private William Reynolds. Two awards were to 23rd Regiment (Royal Welsh Fusiliers) Lieutenant Colonel Edward Bell and Lieutenant Luke O'Connor. The remaining two awards were to Troop Sergeant Major John Berryman of the 17th Lancers and to Sergeant John Park of the 77th Regiment (Middlesex).

The names of Lucas and the eight Alma recipients all appeared in the first list of Victoria Cross recipients published in the London Gazette on 24 February 1857. Lucas and six of the Alma recipients received their medals from Queen Victoria and the first presentation held in Hyde Park on 26 June 1857. Colonel Bell of the 23rd received his award from the Queen at a later presentation. The only one of this small group not to be personally decorated by Queen Victoria was Sergeant Park of the 77th who was with his regiment which had left England for garrison duties in the colony of New South Wales.

First presentation in Australia

The 77th Regiment arrived in Sydney in mid 1857 to replace the 11th Regiment that had been in the colony for 11 years. As well as Sergeant Park, Private Alexander Wright who had been awarded the Victoria Cross for gallantry during the siege operations outside Sebastopol had also arrived in Sydney. In November 1857 the War Office forwarded to the General Office Commanding New South Wales Victoria Crosses for both Park and Wright. However by the time the medals arrived in Sydney, the regiment had already received orders to reinforce India where the Indian Mutiny was in progress. As a result the medals were presented to Park and Wright in a private ceremony before the regiment sailed for India.

The first public presentation in Australia was made to Private Frederick Whirlpool of the Hawthorn and East Kew Rifles for gallantry with the 3rd Bombay European Fusiliers at Jhansi, India on 2 May 1858. The medal was presented by Lady Barkly, the wife of Sir Henry Barkly, KCB, the Governor of Victoria, at Albert Park, Melbourne, on 20 June 1861. Whirlpool lived in Australia until his death at Windsor, NSW, on 24 June 1898, where he was buried in an unmarked grave. His Victoria Cross is on display in the

Colonial Gallery at the Australian War Memorial.

The First Army Victoria Cross

The medals awarded to Park and Wright are in public collections in England. The VC awarded to Whirlpool is on display at the Australian War Memorial. However the Art Gallery of South Australia has the first Army Victoria Cross in its collection. In the first list of awards in 1857 the Army awards appeared in regimental order of precedence with the senior regiment to appear being the 2nd Dragoons (the Royal Scots Greys). The only member of the Royal Scots Greys to appear in the first gazette was Sergeant Major John Grieve who has the distinction of being the first Army recipient to be gazetted with the Victoria Cross. When Queen Victoria made the first presentation at Hyde Park the Army recipients were again in regimental order and the first Army recipient to receive his medal was Sergeant Major Grieve.

The Victoria Cross of Sergeant Major Grieve was donated to the Art Gallery of South Australia in 1936 by his nephew Mr John Oliver but the medal had been with the Art Gallery from at least 1918. Several recent books on the Victoria Cross have claimed that Sergeant Major Grieve was the great uncle of Captain Robert Grieve, 37th Battalion AIF decorated for his actions at Messines in Belgium in 1917. However research by members of both families have yet to reveal a connection.

Number of Victoria Cross awards

Since the first awards for the Crimean War there have been 1255 awards of the Victoria Cross including three bars and the award to the American Unknown Warrior in 1921. Australians have received 96 awards, 91 to members of the Australian Defence Force and five to Australians serving in British or South African forces.

Table: Number of Victoria Crosses awarded

Period	Total (including bars)	Australian awards
1854–1904	522	6
1914–1919	634* (2)	66
1920–1935	5	-
1939–1945	182 (1)	20
1950–2005	12	4
Total	**1255 (3)**	**4**

*including one to the Unknown American Warrior

Longest time between Victoria Cross action and gazettal

Since 1856, just five Victoria Cross awards have been gazetted more than five years after the action being commended. The longest time between the Victoria Cross action and gazettal was the posthumous award to the Hon. Christopher Furness, 1st Battalion, Welsh Guards, who was killed in action in France on 24 May 1940. This award was gazetted 5 years and 259 days later on 7 February 1946. It was only after captured members of his unit were released when the war ended that details of his gallantry became officially known. Of the 91 Victoria Crosses to the Australian Defence Force, just five of the awards were gazetted more than six months after the action being commended. The longest wait for an Australian Victoria Cross was 13 months, for the Vietnam award to Warrant Officer Class 2 Kevin Wheatley.

Posthumous awards

Six awards were presented to next of kin in 1907 and are sometimes cited as examples of belated awards. Prior to 1907 an officer or soldier killed in action could not be awarded the Victoria Cross but a memorandum could be published in the London Gazette stating that had they survived they would have received the Victoria Cross. There were just six of

these memorandum cases; two for the Indian Mutiny, two for the Zulu War in 1879 and one each for Matabeleland and the North West Frontier in 1897. In 1907 the widow of one of the six men made a personal representation to King who directed that the decoration of the Victoria Cross should be handed to the nearest representative of the six recipients in question on the strict understanding that no other cases were involved in this decision. The 1907 decision was a precedent for posthumous awards not belated awards.

The most recent Victoria Cross

On 18 March 2005, the first Victoria Cross to be awarded in over 20 years went to Private Johnson Gideon Beharry, 1st Battalion the Princess of Wales's Royal Regiment. This was the first Victoria Cross award since two posthumous awards to the British Army in the Falklands in 1982 and the first living recipient since 1969 when Warrant Officer Keith Payne of the Australian Army Training Team was awarded the Victoria Cross in Vietnam.

Private Beharry, aged 25, saved the lives of 30 of his comrades from 1st Battalion the Princess of Wales's Royal Regiment at al-Amarah, north of Basra, in the early hours of 1 May 2004. He drove his Warrior armoured vehicle through an ambush while his turret was on fire and 2nd Lieutenant Richard Deane, his platoon commander, lay wounded. Had he come to a halt, the four Warriors behind him would have been trapped and many would have been killed. Once the vehicles were clear of the ambush, Private Beharry dragged his severely injured platoon commander to safety and rescued other soldiers from their Warriors, all under intense enemy fire.

Private Beharry suffered head wounds in the second of two rocket-propelled grenade ambushes and is still recovering from his injuries. He is the 57th holder of the VC in his regiment and attending the media conference that announced the award was the only other living VC from his regiment, Lieutenant-Colonel Eric Wilson, aged 92. Colonel Wilson is the oldest living recipient and was posthumously awarded the Victoria Cross in Somaliland in 1940. However he had survived the VC action and was captured by the Italians. He was released when the Italians were defeated in East Africa in 1941.

Although Private Beharry is the first VC recipient since 1982, another soldier, Trooper Christopher Finney, of the Blues and Royals, was awarded the George Cross in 2003. He would have been awarded the VC had it not been that he saved the lives of his comrades under 'friendly fire' from two US Air Force aircraft. The VC is awarded only for acts of extraordinary courage under enemy fire.

Living recipients

Private Beharry is one of just 14 living recipients of the Victoria Cross. Ten of the recipients are Second World War veterans including Ted Kenna from Victoria who was awarded the Victoria Cross at Wewak in New Guinea in 1945. The four post war recipients are Bill Speakman of the Black Watch in Korea, Rambahadur Limbu of the 10th Gurkhas in Sarawak in 1965, Keith Payne in Vietnam and now Private Beharry.

The special rate tests – a short guide

Bruce Topperwien

Advocates and practitioners may find it useful to refer to the following short guides to the special rate tests. More in depth commentary on the special rate provisions and case law can be found in the *VeRBosity* 2003 Special Issue.

Aged under 65

The decision-maker must be positively persuaded[1] that the applicant satisfies the following three tests:

Test 1 – degree of incapacity

The applicant's degree of incapacity from war-caused disabilities must be at least 70%.[2]

Test 2 – incapacity for remunerative work from war-caused disabilities

The applicant's incapacity from war-caused disabilities must be of such a nature as, of itself alone, to render the applicant incapable of undertaking remunerative work for more than eight hours a week.[3] This criterion can be understood correctly only by applying the criteria in s 28, which requires that three sets of matters only be taken into account. These are:

> 1. What are the applicant's trade and professional skills, qualifications and experience?[4]
>
> 2. What kinds of remunerative work might a person with the Applicant's skills, qualifications and experience reasonably undertake?

In answering this question the decision-maker must disregard temporary effects on availability of work, such as the state of the labour market[5], but the kind of work must be of a kind that is reasonably available[6].

> 3. To what degree does the applicant's physical or mental incapacity from war-caused injury or disease, or both, reduce the applicant's capacity (in hours per week) to undertake the kinds of remunerative work referred to in the second of these questions?

In considering this third question the decision-maker must disregard all of the applicant's non-accepted disabilities or any other factors that might have an impact on the applicant's capacity to undertake those kinds of remunerative work and ask:

> Do the applicant's accepted conditions of themselves alone render the applicant incapable of undertaking those kinds of remunerative work for more than eight hours a week?

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[1] *Repatriation Commission v Smith* (1987) 3 *VeRBosity* 129

[2] s 24(1)(a)

[3] s 24(1)(b)

[4] In *Chambers v Repatriation Commission* (1995) 11 *VeRBosity* 24, the Court said:

'A person's skills are not confined to those acquired in formal training or by virtue of experience in particular employment. They include innate aptitude for tasks and abilities acquired or developed independently of employment or training. For example, a person may never have used computers at work and have no formal computer training. If that person has self-taught word processing skills, he or she nonetheless has skills that may well enhance opportunities for remunerative work. Similarly "qualifications" means (*Oxford Shorter Dictionary* and *Macquarie Dictionary*) "a quality or accomplishment which qualifies or fits a person for some office or function". The word is not confined to qualifications obtained as the result of formal training or work experience. Again, a person's experience is not necessarily restricted to that acquired in employment or formal training.'

[5] *Chambers v Repatriation Commission* (1995) 11 *VeRBosity* 24

[6] *Repatriation Commission v Buckingham*, (1996) 12 *VeRBosity* 19

Test 3 – prevented from continuing the kind of work the applicant had been undertaking, causing loss of salary, wages, or earnings

The applicant's incapacity from war-caused injury or disease, alone, must prevent the applicant from continuing to undertake the kind of remunerative work the applicant had been undertaking. It must be substantial remunerative work that the applicant otherwise would have still been undertaking at the application day had the applicant not had his or her incapacity from war-caused injury or disease.[7] By reason of being prevented from continuing to undertake that kind of work, the applicant must be suffering a loss of income that he or she would not otherwise be suffering.[8]

In considering this third test, the Full Court in *Flentjar* said the following questions should be asked:[9]

> **1.** What was the relevant 'remunerative work that the applicant was undertaking' within the meaning of s 24(1)(c) of the Act?
>
> **2.** Is the applicant, by reason of war-caused disabilities, prevented from continuing to undertake that work?
>
> **3.** If the answer to question 2 is 'yes', is the incapacity from war-caused disabilities the only factor or factors preventing the applicant from continuing to undertake that work?
>
> **4.** If the answers to questions 2 and 3 are, in each case, 'yes', is the applicant by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that the applicant would not be suffering if he or she were free of that incapacity?

If the answers to any of questions 2, 3 or 4 is 'no', the special rate of pension is not payable. The decision-maker must:

> '… assess what the veteran probably would have done, if he had none of his service disabilities during the assessment period. The requirement to consider "remunerative work that the veteran was undertaking" does not mean a particular job with a particular employer but the substantive remunerative work that the veteran had undertaken in the past. … The Tribunal was not bound to limit its consideration to the last employment that the veteran actually undertook.'[10]

To have been prevented from continuing to undertake the relevant kind of work means that the applicant must have ceased undertaking that kind of work entirely.[11]

In order to answer the 4th *Flentjar* question, the decision-maker must refer to s 24(2)(a), which qualifies the 'loss' test by deeming a person to fail the 'loss' test if:

> 1. The applicant has ceased to engage in remunerative work for reasons other than incapacity from war-caused injury or disease; or
>
> 2. The applicant is incapacitated or prevented from engaging in remunerative work for some other reason.

If the applicant is aged under 65 years, is unemployed, and has been genuinely seeking to engage in remunerative work that the applicant would, but for incapacity from war-caused injury or disease, be continuing to seek to engage in, and that incapacity is 'the substantial cause' of the applicant's inability to obtain remunerative work, the applicant is deemed to meet the first limb of s 24(1)(c), that is, the 3rd *Flentjar* question.[12]

[7] *Starcevich v Repatriation Commission* (1987) 3 *VeRBosity* 163
[8] s 24(1)(c)
[9] *Flentjar v Repatriation Commission* (1997) 13 *VeRBosity* 111
[10] *Repatriation Commission v Hendy* (2002) 18 *VeRBosity* 115
[11] *Wright v Repatriation Commission* (2005) 20 *VeRBosity* 18
[12] s 24(2)(b)

To be 'the substantial cause', incapacity from war-caused disabilities must at least be the operative factor that, more than any other, explains why the applicant could not obtain remunerative work.[13]

The applicant must have been genuinely seeking to engage in remunerative work at some time during the assessment period in order to take advantage of this provision.[14]

The ameliorative effect of s 24(2)(b) does not apply to the 'loss' test or the operation of s 24(2)(a).[15]

Aged over 65

The first two tests are identical to those for persons aged under 65 (see above).

Test 3 – prevented from continuing the last paid work the applicant had been undertaking, causing loss of salary, wages, or earnings

This test differs from the third test that applies for persons aged under 65 in that it concentrates on the 'last paid work' that the applicant was undertaking before making the claim or application.

In considering this third test, the following questions should be asked:

1. What was the last remunerative work that the applicant was undertaking?

2. Was the applicant undertaking that work since before turning 65 as well as after turning 65?

3. Was the applicant undertaking that work continuously for 10 years?

4. In that last paid work was the applicant an employee or self-employed?

5. If an employee, did the applicant work for the same employer for the continuous period of at least 10 years that began before turning 65?

6. If self-employed, did the applicant work in the same profession, trade, employment, vocation or calling for the continuous period of at least 10 years that began before turning 65?

7. Is the applicant, by reason of war-caused disabilities, prevented from continuing to undertake that work?

8. If the answer to question 7 is 'yes', is the incapacity from war-caused disabilities the only factor or factors preventing the applicant from continuing to undertake that work?

9. If the answers to questions 7 and 8 are, in each case, 'yes', is the applicant by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that the applicant would not be suffering if he or she were free of that incapacity?

If the answers to any of questions 2, 3, 5, 6, 7, or 8 is 'no', the special rate of pension is not payable.

In order to answer question 9, the decision-maker must refer to s 24(2B), which qualifies the 'loss' test by deeming a person to fail the 'loss' test if:

1. The applicant has ceased to engage in remunerative work for reasons other than incapacity from war-caused injury or disease; or

2. The applicant is incapacitated or prevented from engaging in remunerative work for some other reason.

[13] *Fox v Repatriation Commission* (1997) 13 *VeRBosity* 25

[14] *Leane v Repatriation Commission* (2004) 20 *VeRBosity* 24

[15] *Fry v Repatriation Commission* (1997) 13 *VeRBosity* 82. In *Magill v Repatriation Commission* (2002) 18 *VeRBosity* 50 Drummond J said:
'[11] Unlike s 24(2)(b), which ameliorates the operation of the first limb of s 24(1)(c), s 24(2)(a) only explicates the second limb of s 24(1)(c) by emphasising that a veteran will not be able to satisfy that limb if, though suffering a loss of earnings that may be causally related to a war-related injury or disease, there are other reasons that are also causally related to the veteran's having ceased to engage in work or related to the veteran's being prevented from engaging in work.'

Administrative Appeals Tribunal

Re Landells and Repatriation Commission

Dwyer

[2005] AATA 85
27 January 2005

Post-traumatic stress disorder (PTSD) – incident while repairing steam valve on HMAS *Voyager* – fear of severe injury – guilt and anxiety over *Voyager* collision – diagnosis – development of PTSD – finding that applicant suffers war caused PTSD

Mr Landells served with the Navy in HMAS *Voyager* between 10 March and 8 May 1963 on FESR service. On 16 April 1963 he was required to fix a faulty steam valve. This involved him holding a brass rod while another seaman struck it with a sledgehammer to force the valve closed. He applied for a transfer from HMAS *Voyager* to HMAS *Vampire* in September 1963, prior the collision of the *Voyager* with HMAS *Melbourne*.

Diagnosis

First the Tribunal was required to determine the correct diagnosis. Evidence from six psychiatrists presented a range of diagnoses. After examining all of the medical evidence, the Tribunal found to its reasonable satisfaction that the correct diagnosis was post-traumatic stress disorder (PTSD). It could not find the veteran suffered alcohol abuse or dependence. Despite still attending Alcoholics Anonymous meetings, the Tribunal accepted evidence that he had not had a drink since 1986, and therefore he did not suffer from alcohol abuse and or dependence at the time his claim was lodged in 2002.

The Tribunal then turned to examine whether Mr Landells' PTSD was war-caused by considering whether it was attributable to the experience with the steam valve, or to him being confronted with the tragedy of the *Voyager* collision, or to a combination of those matters.

The steam valve incident

Step 1

Mr Landells gave the following evidence on the incident:

> [64] I was holding a brass strip, rod, onto the top of the valve and the chief engine room artificer was going to strike it, which he did. He struck it with a sledgehammer. I was praying, because I was fearful for my life, because I was in a situation where a steam valve was stuck open, wouldn't respond to the throttle wheel from the control plates, which was connected by linkages and with my thoughts of super heated steam escaping, I felt that if the valve broke or if the hammer hit the part that would have shattered, that I would have been shot with a shot of super heated steam in the crutch probably and would have made a mess of me, so we closed the valve and continued on.

The Tribunal further noted that Mr Landells said he was '[65] … fearful for his life and fearful of sustaining serious injury, because of what he had learnt during his training at Flinders about the danger of super heated high pressure steam.' After the incident, Mr Landells gave evidence that he 'was more on edge'. Further:

> [69] … after the incident of the steam valve, I was trying to steady my emotions, my feelings of the incident and it was some months after [the incident] the collision between the *Melbourne* and *Voyager* occurred and that was bad news.

The Tribunal held the incident did raise a hypothesis pointing to Mr Landells' PTSD being caused by the steam valve incident.

Step 2

The relevant SoP for PTSD was No. 3 of 1999, as amended by No. 54 of 1999.

Step 3

The Tribunal was then required to determine whether the hypothesis raised fitted the template of the SoP. It heard evidence from Commander Ferrier who was an Engineer officer on HMAS *Voyager*, and Mr Cameron, who was the Chief Engine Room Artificer at the time Mr Landells served on that ship.

Although Mr Cameron described Mr Landells' version of events 'verging on fantasy', and Commander Ferrier tendered evidence that the incident was not as dangerous as perceived by Mr Landells, the Tribunal found the hypothesis raised did fit the template.

> [99] Mr Landells did not know as much as Commander Ferrier did about the method of construction of the steam turbine. From his perspective, it was quite reasonable to assume that the procedure carried with it a risk of physical injury to him or a threat to his physical integrity. This was the first time Mr Landells witnessed the procedure and he was the one who had to straddle the valve while the rod he was holding was hit with a hammer by the Chief Engine Room Artificer. Mr Landells' subjective perception that there was a threat of severe injury to him as a result of the procedure was not unreasonable, bearing in mind his position on the ship.

Further:

> [101] It is apparent that Mr Landells' account of the incident was not confirmed by Mr Cameron. However, at step 3, it is not appropriate to make any findings of fact. We find the evidence of Mr Landells and Commander Ferrier raises or points to Mr Landells 'experiencing a severe stressor', by experiencing an event that he perceived on reasonable grounds to involve a threat to him of serious injury, or a threat to his physical integrity. On Commander Ferrier's evidence, there was a real risk of severe injury if that steam escaped, although the risk of it doing so was small.

Step 4

The Tribunal was not satisfied beyond reasonable doubt that Mr Landells did not experience a stressor, despite acknowledging some inconsistencies in Mr Landells' evidence:

> [105] It may well be that over the 40 years since the incident Mr Landells has either consciously or unconsciously exaggerated the dangerous elements of the experience. That does not allow us to be satisfied beyond reasonable doubt that he did not 'experience a severe stressor', or that it did not contribute to his incapacity from PTSD. Nor is there any way we could be satisfied beyond reasonable doubt that the event did not occur on or about 16 April 1963, as Mr Landells said, which was during his operational service.

Finding the incident to have occurred, the Tribunal then turned to the question of whether the steam valve incident qualified as a 'severe stressor' in the development of Mr Landells' PTSD:

> [117] Although the evidence does raise a doubt as to whether Mr Landells' had a perception that the steam valve incident involved a threat of serious injury to himself at the time of the incident, or only developed it later, as he told the VRB, we have concluded that we cannot be satisfied beyond

> reasonable doubt that Mr Landells was not confronted with what he perceived to be a threat of serious personal injury to himself in the steam valve incident.

The Tribunal concluded:

> [125] However, we are satisfied beyond reasonable doubt that we cannot accept the raised facts which suggest that Mr Landells' PTSD results from or is attributable solely to his fear that he would suffer personal injury in the steam valve incident, which occurred during his operational service. There is no evidence that Mr Landells developed any psychiatric illness after the steam valve incident.

Alternative hypothesis

Having found the hypothesis raised by Mr Landells unreasonable, the Tribunal considered whether an alternative hypothesis might be reasonable. The Tribunal expressed the alternative hypothesis as follows:

> [126]… whether the material before us pointed to or raised the hypothesis that Mr Landells developed PTSD after the *Voyager* collision, even though he was not serving on *Voyager* at that time, partly because of his stressful experience in the steam valve incident, and because of his guilt about whether the defective steam valve, of which he was only too well aware, had contributed to the collision.

Testing the alternative hypothesis against the evidence, the Tribunal found that the steam valve incident had been a causal factor in Mr Landells' later onset of PTSD as a result of the HMAS *Voyager* collision. Therefore, the steam valve incident, which occurred while on operational service, satisfied the requirement that the PTSD be at least partially 'attributable' to such service.

> [152] In this matter we have concluded that the steam valve incident was a severe stressor which occurred during operational service, as required by clause 5(a) of SoP No. 3 of 1999. It occurred prior to the clinical onset of PTSD. We are satisfied beyond reasonable doubt that it did not, on its own, lead to or result in the development of PTSD by Mr Landells.
>
> [153] However, we are not satisfied beyond reasonable doubt that Mr Landells' experiencing a severe stressor, as constituted by the steam valve incident, during operational service, was not one of the contributory causes of him developing PTSD. He developed that condition when confronted with the knowledge that HMAS *Voyager* had sunk with the loss of 82 lives. There is a considerable amount of medical evidence pointing to him developing PTSD because of his guilt and anxiety about not reporting the defective steam valve, which he believed may have contributed to the collision, as well as guilt and anxiety about his transfer from HMAS *Voyager*. On the medical evidence, at that stage, the severe stressor which had caused Mr Landells to suffer intense fear for his own safety at the time it occurred, and anxiety for the safety of those serving on HMAS *Voyager*, played a part in the development of PTSD.

Formal decision

The decision of the Repatriation Commission was set aside with the Tribunal deciding Mr Landells' PTSD was war-caused under s 9 of the Act.

Editor: On the findings of the Tribunal regarding the steam valve incident, it would appear that the Tribunal could have found that PTSD was war-caused without having to consider the alternative hypothesis concerning the collision involving HMAS *Voyager*. But the Tribunal appears to have thought that it could not do so because the PTSD was not 'solely' attributable to the steam valve incident. With respect the legislation does not require sole attributability, merely a contribution to the cause: *Repatriation Commission v Law* (1981) 147 CLR 635.

Re Herd and Repatriation Commission

Kenny

[2004] AATA 155
21 February 2005

Special rate – veteran prevented from undertaking remunerative work for more than 8 hours per week – veteran not prevented by reason of incapacity from war-caused conditions, alone or substantially, from continuing to undertake remunerative work that he was undertaking

Mr Herd served in the Navy from 1965 until 1971. From then, until 1976, he worked in spare parts, as a repossession agent, a mechanic. From 1976 he worked as a trades assistant in the maintenance section of the Reserve Bank. After some conflict with management in February 1993 he took a voluntary redundancy package.

After becoming redundant, he commenced full-time study at Griffith University where he completed an Arts degree with honours. Throughout his undergraduate degree, Mr Herd supported himself on Austudy payments. He commenced a Doctor of Philosophy program in 1997, however he eventually withdrew in 2002. His supervisor in the program said that his work for the doctorate was initially of a high standard, but deteriorated substantially.

Consideration

The Tribunal was satisfied that Mr Herd met the tests in s 24(1)(a) and s 24(1)(b). He had a pension rate above 70 per cent and the Tribunal found on the medical evidence that he was incapable of undertaking remunerative work for more than eight hours a week, primarily due to Mr Herd's accepted anxiety disorder.

In deciding whether Mr herd satisfied s 24(1)(c), the Tribunal had regard to the four questions laid out in *Flentjar* (13 *VeRBosity* 52). On the first question, the Tribunal held the 'relevant remunerative work' the veteran was undertaking' was building maintenance, as well as the work of an academic nature, involving research assistance, taking tutorials and marking of examination papers.

Evidence from Mr Herd's employer at the Reserve Bank noted that '[28] … if he had not taken the redundancy, there was no other reason that his employment would have been terminated in the foreseeable future.'

The Tribunal also found that the academic work Mr Herd had undertaken, though minor and not earning much income, still qualified as remunerative work. However, the Tribunal did distinguish Mr Herd's study programs for the completion of the degree and honours and that relating to the doctorate study as not being remunerative work:

> [31] At most, [the study programs] were means to obtaining the remunerated academic work that Mr Herd did.

In relation to the second and third questions in *Flentjar* the Tribunal found the following:

> [32] In relation to the second of the *Flentjar* questions, it is more probable than not that Mr Herd's anxiety disorder would prevent him from undertaking each of the forms of remunerative work noted above. However, I am satisfied that the third *Flentjar* question is answered in the negative because it is not only the effects of his accepted disabilities which would have prevented him from continuing in the remunerative work identified above.

The Tribunal gave the following reasons for answering the third question in the negative:

> [33] I am satisfied that Mr Herd would not be undertaking the type of

> maintenance work that he did at the Reserve Bank if he did not have his accepted disabilities. There may have been some tension in the work-place but this was not the reason for his departure from the Reserve Bank. Neither was the tension related to his anxiety. … He took a voluntary redundancy and the employer said that there was no other reason that his employment would have been terminated in the foreseeable future. More significantly, he regarded that work as being a "dead-end" job which would lead to nowhere and he had made a conscious decision to change his career direction. … Also, by the commencement of the assessment period, he had not been involved in maintenance work for almost 10 years. He was, by then, aged 57, and it was Mr Herd's own understanding that his age was a factor in not being able to get work when he applied for it in 1997 and 1998.
>
> [35] If Mr Herd had wanted to continue with academic work of the kind that he was doing, I am satisfied that this could have been achieved only if he remained enrolled in or completed his doctoral studies. …[W]ithdrawal would have precluded him from continuing to undertake academic work. … Rather than take a break as suggested … Mr Herd withdrew from the program. From the end of 1998 when he began to receive the service pension until mid 2002, he treated the doctoral studies as a hobby or an interest without the same commitment he demonstrated previously.

Finding age to have been a factor in relation to Mr Herd being prevented from continuing to undertake remunerative work relating to building maintenance, the Tribunal then turned to the factors preventing him from engaging in academic work.

Noting that Mr Herd was not enrolled in the PhD program at the commencement of the assessment period, the Tribunal was '[36] … satisfied that this was a factor which would have prevented him from continuing to be engaged in remunerative work of an academic nature.' Further:

> [36] As the effect of his accepted disabilities was not the only factor preventing him from continuing to undertake maintenance work or academic work, this means that the third *Flentjar* question is answered in the negative.

Not needing to contemplate the fourth and final question in *Flentjar*, the Tribunal affirmed the decision under review.

Re Lamont and Repatriation Commission

McCabe

[2005] AATA 149
17 February 2005

Post-traumatic stress disorder – generalised anxiety disorder – whether suffered severe stressor which triggered PTSD – alcohol dependence – whether dependent prior to relevant service

This was an appeal against a decision of the Commission rejecting Mr Lamont's claim for the disabilities of post traumatic stress disorder and alcohol abuse and or dependence.

Mr Lamont joined the Army in 1958 when he was 18, undertaking operational service on two occasions, with the FESR in Singapore and Malaysia, where he was accompanied by his wife and young family, and Vietnam from 5 May 1967 to 30 April 1968, based in Nui Dat.

Mr Lamont was a radio operator serving with a signals unit in Vietnam. He said this work was very stressful and that he worried that if his work was not done accurately, people might die.

He also said in evidence that he grew increasingly bored at Nui Dat in early 1968. Hearing of a vehicle making the trip to Vung Tau, he volunteered to provide security for the vehicle. On the trip the vehicle slowed down to pass a small group of dead bodies near the village of Hoa Long. Mr Lamont's evidence was the bodies were of young men who he guessed to be 12 years old, or perhaps older.

The vehicle did not stop though Mr Lamont recollected the occupants talking about what they had just seen. He also '[11] wondered whether his work had anything to do with the death of these individuals' and that 'he felt numb'.

The Tribunal heard that Mr Lamont then started to drink more heavily following the incident and that he started to have nightmares about the scene and experienced flashbacks, sweats and felt anxiety.

Alcohol abuse – clinical onset

All medical witnesses agreed that Mr Lamont suffered from alcohol dependence, though the Tribunal held the clinical onset pre-dated his service in Vietnam:

> [18] While the applicant may have increased his level of alcohol consumption during his time in Vietnam (and continued to increase his consumption after he returned home), it seems to me there is ample evidence he was already dependent on alcohol by 1967. In other words, I am satisfied the onset of the condition pre-dated the applicant's service in Vietnam.

PTSD — Diagnosis

The Tribunal weighed up the differing opinions on the diagnosis of Mr Lamont's psychiatric illness, finding to its reasonable satisfaction that he suffered from PTSD.

> [21] I am satisfied the bulk of the medical evidence supports a finding that the applicant suffers from an anxiety disorder, albeit one that is almost certainly complicated and accentuated by alcohol abuse. Dr McIntyre says it is PTSD; Dr Carter agrees it could be. Her preference for GAD is based on her concern that the applicant's response may not satisfy the diagnostic criteria. That is certainly an issue, but I am ultimately prepared to accept his reaction exhibits a sense of helplessness and horror as required by the criteria [for PTSD].

Causation

Having determined a diagnosis of PTSD, the Tribunal then turned to apply the steps laid down in *Deledio* to determine whether the condition was war-caused. Under the first step the Tribunal found the material raised the hypothesis that the sight of the bodies was sufficiently distressing that it caused him to develop a psychiatric condition.

Applying the second step, the Tribunal identified the relevant Statement of Principles for PTSD (No 3 of 1999, amended by No 54 of 1999).

The third step required consideration of whether Mr Lamont's hypothesis fitted the template of the SoP. The Tribunal said:

> [25] I am satisfied that coming across the bodies in the way described by the applicant qualifies as 'experiencing a severe stressor' within the meaning of the SoP. I think the youth of the victims sets this case apart from others where bodies might be seen on the side of the road in wartime. I am also satisfied the applicant's response was characterised by 'intense fear, helplessness or horror'. While he was not necessarily fearful, he said he quickly felt numb and wondered if his work had anything to do with the deaths. He said he felt a sense of horror when he reflected on the event later in the day, once the vehicle had made its way to Vung Tau and the tension of the journey wore off. I do not think his failure to report the

> incident or to discuss it with others tells us very much: he explained that in those days, soldiers did not let on they were distressed by what they saw. They feared their promotion prospects would be affected.

Having accepted Mr Lamont as a credible witness and as there was nothing to question the substance of his account, the Tribunal was satisfied at the fourth step that the hypothesis had not been disproved beyond reasonable doubt and so found that his PTSD was attributable to his operational service.

Re Hocking and Repatriation Commission

Bell

[2005] AATA 245
18 March 2005

Peripheral vascular disease – ischaemic heart disease – chronic airflow limitation – whether conditions arose out of or attributable to service – question of when applicant ceased smoking – date of clinical onset

Mr Hocking enlisted in the 6th Light Horse between 1933 and 1936 and then enlisted in the regular Australian Army in 1941 and was discharged in 1946. His claim for peripheral vascular disease, ischaemic heart disease and chronic airflow limitation was rejected by the Commission on the basis that the conditions were not due to his service. The Tribunal first considered whether the applicant's smoking was attributable to service.

Whether smoking attributable

Evidence on behalf of Mr Hocking noted that he was brought up in a strict Methodist family which prohibited smoking, among other things. Mr Hocking's claim form and smoking questionnaire lodged in 2001 stated that he had commenced smoking at the age of 29 in 1941 when he enlisted in the regular Army. Evidence pointing to the attribution of service to the development of his smoking habit was described as follows:

> [9] Mr Hocking's evidence to the Veterans' Review Board was also that, once enlisted in the regular Australian army, he received a free ration pack of cigarettes every week. He said he was under peer pressure to smoke, because everybody else smoked. He also smoked to relax. Mr Hocking also said it was a stressful time for him as he expected to be shipped overseas and was on alert every day. This evidence conformed with the information in the Claim form.

The Tribunal characterised the competing evidence below:

> [10] In competition with this evidence is the fact of Mr Hocking's involvement in the Light Horse over some 8 years, making him more accustomed than most to military life. Added to this is the fact he was 29 years old when he joined the regular Army and less likely to be subject to peer pressure to smoke. I also note that Mr Hocking's service did not take place in a theatre of war and there is no evidence, other than his own, that he and his fellows were subject to significant or any stress.

After consideration of the Court decisions of *Repatriation Commission v Tuite* [9 *VeRBosity* 30], *Critch v Repatriation Commission* [12 *VeRBosity* 81] and *Repatriation Commission v Edwards* [9 *VeRBosity* 66], the Tribunal concluded that there was insufficient evidence to disprove the causal link between Mr Hocking's smoking habit and the conditions of his service:

> [13] These decisions support the conclusion that peer pressure, anxiety and boredom in the Army during wartime may contribute to a veteran taking up smoking. In particular, I note that in *Edwards* the Federal Court

considered that even though the evidence in support of the Tribunal's decision that the veteran's smoking was due to his eligible service was 'meagre', that decision, supported by 'some' evidence, should not be disturbed.

When did the smoking cease?

Evidence of when Mr Hocking ceased smoking was contradictory. His first (unsigned) questionnaire submitted in February 2001 stated that he had ceased smoking in 1970. A subsequent questionnaire in August 2001 stated 1990 as the date he ceased smoking. A doctor's report from May 2001 stated he ceased in 1965.

Despite the inconsistencies, the Tribunal was satisfied that an overseas trip in 1990 coincided with his giving up of smoking.

Does the smoking history satisfy the SoPs?

Having determined Mr Hocking's service as being attributable to the development of his smoking habit, and the date his smoking ceased as 1990, the Tribunal then turned to assessing his smoking history against the relevant SoPs for peripheral vascular disease (No.66 of 2002); chronic airways limitation (No 31 of 2004) and ischaemic heart disease (No 39 of 1999).

Factor 5(a) of No.66 of 2002 required the smoking at least five cigarettes per day for at least three years prior to the clinical onset of atherosclerotic peripheral vascular disease and where smoking has ceased, the clinical onset occurred within 10 years of cessation. As the Tribunal found that Mr Hocking gave up in 1990, and the medical evidence gave a clinical onset in 1994, the factor relating peripheral vascular disease with service was satisfied.

For chronic airways limitation, factor 5(a) of No 31 of 2004 was relied on and easily satisfied. The Tribunal accepted that Mr Hocking had smoked at least the minimum 10 pack years of cigarettes before the clinical onset of chronic bronchitis and/or emphysema

Similarly, Mr Hocking's smoking history and evidence surrounding the clinical onset of his ischaemic heart disease enabled the satisfaction of factors 5(e) and (f) of No. 39 of 1999.

Decision

Having determined Mr Hocking's service as being attributable to the development of his smoking habit, the Tribunal had little difficulty in then finding that that his peripheral vascular disease, chronic airways limitation and his ischaemic heart disease were due to eligible service.

Re Jones and Repatriation Commission

Levy

[2005] AATA 169
25 February 2005

Special rate – time out of the workforce prior to date of claim – satisfaction of the 'alone' test under s 24(1)(c) – labour market forces – seasonal work successfully and effectively undertaken

Mr Jones was in the Army between 1962 and 1968 and served in Vietnam between September 1966 and March 1967. The following injuries had been accepted as war-caused: gunshot wound to left buttock and left shoulder; lumbar cervical spondylosis; chronic right ankle sprain and osteoarthrosis; sensorineural hearing loss; post traumatic stress disorder; diabetes; and alcohol abuse. Mr Jones sought pension at the special rate.

The Commission conceded that Mr Jones satisfied paragraphs 24(1)(a) and (b) of the Act, however it argued that the period of time he had been out of the

work force before the date of claim prohibited satisfaction of s24(1)(c).

After resigning from the Army, Mr Jones' work history included a number of years with the Victorian Police, a couple of years with Ready Mix, as a partner in an aquarium business that dissolved after 12 months, various jobs in sales, and for a period as a taxi driver.

From the early 1980s, Mr Jones found it difficult to obtain work of any kind, until he managed to secure periodic seasonal cannery and fruit picking work until the early 1990s. Essentially, Mr Jones was in a cycle of employment during the fruit picking season followed by a period on unemployment benefits.

The 'alone' test in s 24(1)(c)

The Commission argued that Mr Jones did not satisfy the alone test in s 24(1)(c) due to his age and time out of the workforce. He had been out of the workforce since 1992, and at the time of his application (in 2003) he was 59 years of age.

However, the Tribunal accepted Mr Jones' argument that at the end of the 1992 fruit season he was effectively totally incapacitated for all employment by reason of his war-caused injuries alone. It also accepted that but for those injuries, in 2003, he would have continued in his former seasonal employment despite his age.

> [61] Mr Jones had a history of seasonal employment in the Goulburn Valley with a number of canneries and with Heinz. There was evidence that seasonal work is available at major canneries every year and it is not uncommon for the same persons to be re-engaged in each season. That was the evidence of Mr Jones, and as a fact I accept that that was his work routine in the years prior to 1992. … Mr Jones was – although with difficulty – capable of performing the seasonal cannery work and did perform it. From approximately 1992 when the season at Heinz concluded, Mr Jones did leave to travel to Bundaberg to see his children. He has not worked thereafter. He did not then cease his remunerative work for reasons other than incapacity by war-caused injury or disease. He ceased that employment because the season concluded and upon its conclusion he then travelled to Bundaberg.

The Tribunal further found that Mr Jones' seasonal employment '[62] had been work that he had "performed" and which he had "successfully" and "effectively undertaken".'

The question of whether age or time out of the workforce may have contributed to his inability to continue with the remunerative work that he was undertaking was found to be irrelevant

> [64] In my view those considerations are not relevant in the present case. The nature of seasonal process work, is effectively the same work undertaken each year and persons, irrespective of age, are generally re-engaged. Two predominant reasons for re-engagement is the need for labour and the experience of the person from previous seasons.
>
> [65] There is nothing heard in my view in the present proceedings which would cause me to find as a fact that but for the injuries suffered by Mr Jones which have been accepted as war-caused he would not have continued to be re-engaged each season with Goulburn Valley canneries. It would have been work – but for his war-caused injuries – that he would have been capable of undertaking 'successfully' and 'effectively'. I am also of the view that the applicant's age at the commencement of the assessment period would not have offended the 'alone' test.

Decision

The Tribunal set aside the decision and assessed pension at the special rate.

Re White and Repatriation Commission

McCabe

[2005] AATA 75
21 January 2005

Practice and procedure – withdrawal of Tribunal application – whether withdrawn in error

Mr White had withdrawn his application for review by the Tribunal in late 2003, but contended the application was withdrawn in error. Mr White sought to argue that the Tribunal should exercise its discretion under s 42A(10) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) to reinstate the application.

Background

At the time Mr White withdrew the application, his daughter had recently been diagnosed with cancer which '[3] caused him significant stress that militated against good decision-making.' Mr White also suffers from a psychiatric condition, and evidence from his treating psychiatrist confirmed that his medication changed around the time he withdrew the application. The Tribunal found that it was '[3] clear there was some sort of disruption to Mr White's treatment which appeared to impact on his ability to think clearly'.

Evidence also suggested that he had received '[4] … some form of demand' that distressed him at that time.' and this coincided with a suggestion that the Legal Aid office would not continue to fund his appeal to the Tribunal.

Subsection 42A(10) AAT Act

Subsection 42A(10) of the AAT Act says:

> If it appears to the Tribunal that an application has been dismissed in error, the Tribunal may, on the application of a party to the proceeding or on its own initiative, reinstate the application and give such directions as appear to it to be appropriate in the circumstances.

The relevant question in Mr White's case was whether the 'error' could be made by the applicant, or whether it only applied to errors made by the Tribunal. The Tribunal cited Goldie *v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCFCA 367, as authority '[7] … that the power to reinstate in s 42A(10) was not limited to cases in which the Tribunal made an error'.

Although the Tribunal suggested that an unwise decision to withdraw is not necessarily an error, it nevertheless held that the circumstances of Mr White's withdrawal did amount to an error:

> [10] … I am satisfied the applicant's mental state was such as to preclude him making a rational and considered decision when he instructed his solicitors to withdraw the proceedings. Other events caused him to be in a state of distress which was compounded by problems in his medication. While the evidence does not suggest he was incapable of rational thought at the relevant time, the applicant's judgement was apparently so flawed that it could be said the instructions to the solicitor were given in error within the meaning of s 42A(10).

Although the Commission argued the merits of the case ought to be examined before deciding to reinstate, the Tribunal was satisfied that Mr White had an arguable case and there was no evidence to suggest that reinstatement would be unfair to the Commission.

The Tribunal ordered the matter be reinstated.

Editor: It is important to note the distinction between withdrawal of an application before the Tribunal and the Veterans' Review Board. Unlike the AAT Act, there is no equivalent provision in the VEA for a withdrawn

VRB application to be reinstated due to mistake or error. The Board has no power to reinstate an application for review once it has been withdrawn unless there is clear evidence that the applicant did not know that he or she was withdrawing the application.

Federal Court of Australia

Wright v Repatriation Commission

Tamberlin J

[2005] FCA 7
14 January 2005

Special rate – inability to undertake remunerative work – not caused solely by war-caused disease or injury – meaning of 'remunerative work' – accepted conditions alone must lead to the prevention – remunerative artistic work had continued during the assessment period

Mr Wright appealed a decision of the Tribunal that he did not qualify for payment of the special rate of pension.

After leaving the Navy in 1973 he worked in the merchant marine as well as a range of other occupations. Notwithstanding several periods of incarceration for drug offences, he became a talented and fairly successful artist. After completing a fine arts course he held exhibitions of his art and worked as a TAFE art teacher.

The Tribunal had refused to assess Mr Wright's pension at the special rate and affirmed the delegate's decision to continue pension at 100% of the general rate.

Tribunal's Reasoning

The Tribunal had characterised the kinds of remunerative work under s 24(1)(b) that a person with Mr Wright's skills and experience might reasonably be able to undertake as work associated with maintenance of particular kinds of machinery, general labouring, art teacher and artist.

The Tribunal held that Mr Wright satisfied the test in s 24(1)(b) because his war-caused conditions rendered him unable to undertake these types of remunerative work for more than 8 hours a week.

The Tribunal then went on to examine the nature of the work that Mr Wright had been undertaking. The Tribunal was aware that he had held exhibitions of his paintings and ceramics during the assessment period and earned money from the sale of works at these exhibitions, but said:

> [11] … [W]hile aware that the Applicant intermittently seeks to pursue his natural artistic talents … the artistic work performed by the Applicant since his application … is no more than an expression of his talent and certainly not performed with the intention of gaining a livelihood. … [T]he Tribunal concludes that such a financial return is consistent with an individual carrying on a pursuit of individual preference, namely a hobby with the financial return assisting in meeting the financial outlay for the material associated with the hobby activity. … Accordingly the Tribunal concludes that the Applicant did not undertake any remunerative work from his date of application.

Because Mr Wright's artistic endeavours since the date of application were held to be a hobby and not 'remunerative work that the veteran was undertaking' for the purposes of s 24(1)(c), the Tribunal concluded that he had not been

genuinely seeking to engage in remunerative work during the assessment period and so the ameliorative effect of s 24(2)(b) could not be applied in his case.

Further, the Tribunal found that Mr Wright had been prevented from continuing to undertake remunerative work because of both his war-caused conditions and his non accepted conditions, which prevented him satisfying the alone test in s 24(1)(c).

Case on appeal

Mr Wright contended that the Tribunal's finding that his non-accepted disabilities also contributed to preventing him undertaking remunerative work contradicted its conclusion that he had satisfied 24(1)(b) that his war-caused conditions of themselves alone rendered him unable to undertake remunerative work for more than 8 hours per week. Tamberlin J rejected this argument, stating:

> [15] …[O]n a proper analysis the two findings are not inconsistent. This is because a finding that an applicant satisfies subsection s 24(1)(b) of the Act goes to the nature and level of incapacity by which ability to undertake remunerative work is to be assessed. If the character and effect of the incapacity is such as to render the veteran incapable of undertaking remunerative work for a period aggregating more than eight hours per week then condition 24(1)(b) is satisfied. The next and distinct step is to proceed to consider the requirements of ss 24(1)(c) which is concerned with the causation of the veteran's inability to continue with the remunerative work that he or she was previously undertaking. The two findings are separate and complementary. They pose different hurdles which the veteran must surmount. The finding that the prevention from continuing to undertake remunerative work is not caused solely by war-caused injury or war-caused disease is a different and separate finding from a requirement that the nature of the incapacity is such that a person cannot work for more than eight hours.

Secondly, Mr Wright contended that the Tribunal erred in adopting a definition of 'work' as '[11] action involving effort or exertion directed to a definite end especially as a means as gaining one's livelihood.' It was argued, and Tamberlin J agreed that such a definition of 'work' is contrary to the definition of 'remunerative work' in s 5Q. Tamberlin J said:

> [16] …[T]he definition is not restricted to an action that is carried out with the intention of gaining one's livelihood. This erroneous gloss on the statutory definition is imported into the AAT's reasons … when the conclusion is reached that although Mr Wright may have received some financial returns from the sale of art in 2002, such financial return was consistent with an individual carrying on a 'hobby' with the financial return assisting in meeting the financial outlay for the materials. In my view, in so far as this definition was applied it was an error.

However, as the error had no significant impact on the outcome, the Court found it insufficient a reason to set aside the decision.

The Tribunal found, in relation to s 24(1)(c) that Mr Wright was prevented from continuing the remunerative work he had been undertaking because of *both* his war-caused conditions and the non-accepted conditions. In other words, the non-accepted conditions were a contributing cause. The Court found the finding was supportable on the evidence and followed the authority in *Hendy* (2002) 18 *VeRBosity* 115, that the accepted conditions must be the only cause.

Mr Wright had also submitted that the Tribunal had erred in not considering whether he was prevented by his war-caused conditions from engaging in remunerative activity as a teacher. Given that he had ceased teaching 5 years before the assessment date, Tamberlin J held that '[23] it is artificial in these circumstances to suggest that consideration should have been given to the question whether he could have continued remunerative work as a teacher.' Further:

> [24] … In the present case, the evidence indicates there was no suggestion of Mr Wright taking up teaching again. It further appears that Mr Wright had voluntarily abandoned any prospect of working as a teacher and there was no indication that this decision had been attributable to war-caused injury or disease alone.

In conclusion, the Court observed that since Mr Wright was engaged in remunerative artistic work during the assessment period (albeit to a lesser extent than before) the requirement that he had been 'prevented from continuing' the relevant remunerative work had not been satisfied if that kind of work were to be relied upon for the purposes of s 24(1)(c).

Formal decision

The Court dismissed the appeal.

Editor: Three points arise from this case. First, in relation to 'remunerative work' the Court characterises the kind of artistic activity performed by Mr Wright as potentially being 'remunerative work' rather than an activity better described as a hobby.

Secondly, the case makes plain that the test in s 24(1)(b) is a very different test to that in s 24(1)(c).

Thirdly, if a person seeks to rely on a particular kind of work for the purposes of the 'alone' test in s 24(1)(c), the veteran must not be able to continue to do any of that kind of work at all.

Repatriation Commission v Hill

Wilcox, French, Weinberg JJ

[2005] FCAFC 7
16 February 2005

Invalidity service pension – Tribunal found veteran suffered from several permanent psychiatric illnesses – 'very little wrong' with veteran – Tribunal not satisfied veteran permanently unable to do work for periods adding up to more than eight hours per week – whether veteran 'permanently incapacitated for work' – judge erred by construing veterans' provisions by reference to principles underlying workers' compensation legislation

Mr Hill served in the Australian Army for three years, from June 1965 to June 1968 and was posted to Vietnam from June 1967 to April 1968. That period of service was 'qualifying service' under the Act. His application for an invalidity service pension was based upon a claim that he was 'permanently incapacitated for work' (s 37(1)).

Mr Hill suffered from several permanent psychiatric illnesses, including, alcohol dependency, a pathological gambling addiction, major depression, a dysthymic disorder, and mild post-traumatic stress disorder.

After leaving the army in 1968, Mr Hill worked for the State Electricity Commission of Victoria for around 21 years. Through this period, he showed signs and symptoms of alcohol dependency and gambling addiction.

In 1994, Mr Hill moved to Darwin, where he worked as a gardener, and then with the Salvation Army as a counsellor. His wife was employed full-time at the Darwin Hospital. He returned to Victoria in 1995 and found work as the CEO of a retirement village. He resigned in early 2000.

In mid-2000, Mr Hill returned to Darwin where along with his wife he found work as carers for Aboriginal school children

Tribunal's findings

Under clause 5 of the *Permanent Incapacity for Work Determination 1999*, a person is 'permanently incapacitated for work'' if, among other things:

> '(2)(a) the person has an impairment that, if it were an injury or disease for the *Guide to the Assessment of Rates of Veterans' Pensions*, would result in a combined impairment rating of 40 or more under Table 18.1 in that Guide; and
>
> (b) solely because of the impairment, the person is ***permanently unable to do work*** for periods adding up to more than 8 hours per week; and
>
> (c) the Commission is satisfied that the impairment is permanent. (emphasis added)

The Tribunal found that Mr Hill's medication for a range of psychiatric disabilities made him 'listless', and that his wife 'did most of the work at the house caring for the children, including cooking, washing, cleaning, and shopping'. Further:

> It found that the respondent drove the children to and from school, and to sporting events. He also mopped the floor 'now and again', and mowed the lawn. He sometimes assisted in serving the food, and sometimes accompanied the children to the shopping centre. … He had lost interest in life, self-esteem and confidence and was acutely embarrassed about his situation.

The Tribunal held, however, that despite suffering depression, lacking in self-esteem, and finding that he was 'unlikely to be able to work at full capacity again', he nevertheless had capacity for work:

> [14] The fact that the [Mr Hill] drives the school bus, does the mowing, mops the floor now and again, takes the children to the shops, and helps with serving meals, indicates that he can at least work for a few hours per day. The Tribunal finds that [Mr Hill] is capable of working more than eight hours per week. He does not qualify for the service pension.

Appeal to single judge

The primary judgment (20 *VeRBosity* 98) had held the Tribunal erred by misunderstanding '[17] the meaning of the word 'work', in context, by failing to adopt a construction which involved working in 'meaningful employment' as distinct from some 'activity undertaken intermittently and at [Mr Hill's] own pace and at [his] own whim.'

The Full Court quoted the following at [22] from Mansfield J's judgment:

> The evidence (none of which it appears to have rejected) indicates that the applicant *does certain tasks intermittently* and *at his own election* and *in his own time*, which (when performed) *may assist his wife* in providing services to the children who she looks after. But *he does not do so in any organised or structured or reliable way*. He is *not remunerated* for what he does; he receives weekly pocket money *irrespective of how much or how little he does*. His contribution *is not one upon which his wife relies*, but rather (it seems from her evidence) is *one which she accommodates*. *The medical evidence categorises the applicant as unable to work notwithstanding what he does*. (emphasis added)

Mansfield J held that the Tribunal had fallen into error in its interpretation of the

cl 5(2)(b) because '[23] it had failed to appreciate that the expression "permanently unable to do work" did not mean unable to perform menial tasks, but rather unable to "work in employment".' Further:

> [23] [Mansfield J] reasoned that the relevant provisions of the VE Act should be understood to operate in the same way as the compensatory provisions of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and the workers' compensation enactments of the various states and territories.

Appeal to Full Court

The Commission argued that Mansfield J had erred by equating veterans' incapacity provisions with workers' compensation legislation, by operating on the false basis that Mr Hill's disability was required to be war-caused, and by construing that the incapacity of Mr Hill related to his capacity to earn wages as opposed to incapacity to work.

The Full Court noted that '[50] … the facts of the present case illustrate the difficulty that can arise in determining limits that are to be imposed on the term "work" in the context of the VE Act.'

Findings

The Court held that the Commission's submission that '[52] any ability to perform a remunerative task amounts to capacity for 'work' causes problems:

> On that definition, a quadriplegic who could make a voice activated response to a telephone request would be capable of doing work. The fact that someone might be willing to pay for such a service would mean that such a person was able to 'do work', and probably for more than eight hours per week. Any definition of 'work' that treated so severely disabled a person as able to 'do work' might all but eviscerate entitlement to an invalidity service pension. It is hardly likely that this is what the legislature intended.

Further:

> [56] What is tolerably clear is that the term 'work' in cl 5(2)(b) must essentially mean the same as the term 'work' in ss 37(1) and 37AA. Clause 5(2)(b), being delegated legislation, cannot constrain the concept of 'work' as it appears in the statute. And given that the statute uses the expression 'remunerative work', it is arguable that the term 'work' carries a wider meaning. It is of some significance to note that the expression in the Determination is to 'do work', and not to 'find work'. Nonetheless, the term 'work' cannot carry a meaning that is so wide as to render the entitlement to an invalidity service pension impossible to attain.
>
> [57] In our view, the expression to 'do work' in cl 5(2)(b), when read in context, requires the decision-maker to focus upon the applicant, and not some hypothetical person. Consideration must be given to whether a person of the applicant's background, suffering from his or her condition, is, solely by reason of the impairment, permanently unable to do remunerative work of the type that he or she would otherwise be fitted to undertake. In answering that question, it must be determined whether the applicant can undertake such work for more than eight hours per week. In other words, the test looks at the individual applicant, treats 'work' as remunerative activity, and assesses the applicant's ability to carry out that activity by reference to that person's qualifications, background and skills.

The Full Court then prescribed limits on the test of capacity for work as follows:

> [58] The test that we consider appropriate does not go as far as that seemingly applied by the primary judge. His Honour's analysis would treat an applicant as relevantly incapacitated in circumstances where that person could not readily find alternative employment. That goes too far. It imposes an unwarranted gloss

> upon the language used by the legislature. The correct test, in our view, does not focus upon employability, but rather the capacity to perform remunerative work of a kind for which the person is otherwise suited.

The Full Court did find Mansfield J to have erred '[60] … in equating the expressions 'permanently incapacitated for work' and 'permanently unable to do work' in the VE Act and the determination with the meaning given to analogous expressions in workers' compensation statutes.'

> [61] In adopting what was in substance a test of 'employability', we consider that his Honour fell into error. A test of that nature may be appropriate in the context of whether an employee who has been injured in the course of his or her employment is relevantly incapacitated, and entitled by reason of that fact to compensation. An invalidity service pension is genealogically different. It is analogous to a social security entitlement. There is no need for any link to be shown between the incapacity that the veteran now suffers, and any service that has been rendered. There is nothing to suggest that s 37(1) of the VE Act contains an implication that, in considering whether a person is 'permanently incapacitated for work' regard must be had to the availability of the type of work for which that person is suited.

Orders

The Full Court remitted the matter to the Tribunal to be heard afresh by a differently constituted Tribunal as it identified errors at both the Tribunal and primary judge level.

Editor: The test for invalidity service pension is similar to the s 24(1)(b) and s 28 special rate test. While the special rate test does introduce a hypothetical person test insofar as the identification of the relevant kinds of remunerative work is concerned, the test in s 28(c) is applied in much the same way as the court set out in paragraphs [57] and [58]. An important distinction however, is that s 24(1)(b) does not require the relevant impairment to be the sole cause of the incapacity for remunerative work.

The test of 'permanently incapacitated for work' in cl 5 of the 1999 Determination may also serve as a useful pointer to the concept of 'incapacity for work' under the new MRC Act. Although the new Act does not provide entitlement to service pensions (these are still covered under the VEA), it does make available compensation for 'incapacity for work'. Like the Full Court in this case, the statutory definitions of 'incapacity for work' and 'incapacity for service' are tied to the '[58] capacity to perform remunerative work of a kind for which the person is otherwise suited'. The definition (in s 5 of the new Act) of incapacity for service or work under the new Act is as follows:

> 'Section 5 …
>
> **Incapacity for service**, in relation to a person who has sustained an injury or contracted a disease, means an incapacity of the person to engage in the defence service that he or she was engaged in before the onset of the incapacity, at the same level at which he or she was previously engaged.
>
> …
>
> **incapacity for work**, in relation to a person who has sustained an injury or contracted a disease, means:
>
> (a) an incapacity of the person to engage in the work that he or she was engaged in before the onset of the incapacity, at the same level at which he or she was previously engaged; or
>
> (b) if the person was not previously engaged in work, an incapacity of the person to engage in any work that it is reasonably likely that he or she would otherwise be engaged in.'

Fenner v Repatriation Commission

Mansfield J

[2005] FCA 27
2 February 2005

Reasonable hypothesis – whether the Tribunal erred in identifying the hypotheses put forward by the appellant – whether the Tribunal erred in determining only on the balance of probabilities – use of evidence to test hypotheses – consideration of beneficial nature of the Act

Mr Fenner appealed a decision of the Tribunal that affirmed a decision of the Commission, as affirmed by the VRB, not to accept alcohol abuse and post traumatic stress disorder (PTSD) as being war-caused.

Background facts

Mr Fenner had served in HMAS *Sydney* on seven separate periods of operational service during April 1967 to June 1968, and had sought to rely on three incidents to satisfy the relevant SoP factors for alcohol abuse and PTSD. The Tribunal described these incidents as follows:

> [14] (a) While working in the engine room, the crew received a telex which read 'full steam ahead'. They remained at full steam ahead for a very lengthy period. They were told that an escort ship had detected a 'ping' which indicated a submarine [the submarine incident],
>
> (b) The ship that he was serving on, entered Vung Tau Harbour during the Tet offensive. He observed extensive war activity on the shore and in the air and he feared for his life; [the direct threat incident] and
>
> (c) On his first trip to Vietnam, and upon anchoring in Vung Tau Harbour he was frightened by the unexpected explosions of 'scare' charges. On his third trip to Vung Tau Harbour he was exceptionally startled by a particularly loud scare charge [the scare charge issue].

Apart from evidence presented by Mr Fenner and his treating psychiatrist, the Tribunal also heard evidence of Commodore Mulcare who had researched the alleged incidents. The nature of this evidence threw considerable doubt on the veracity of Mr Fenner's contentions. The Tribunal then concluded that it was satisfied beyond reasonable doubt that there was no sufficient ground for making the determination that Mr Fenner's conditions were war-caused.

Grounds of Appeal

The Court examined the Tribunal's application of sections 120(1) and (3) and 120A(3) in light of *Deledio's* case.[16]

Despite noting in its reasons that the Tribunal had made no explicit reference to the *Deledio* steps, Mansfield J was satisfied that the first three steps were properly evaluated:

> [34] In my view, the Tribunal's reasoning … reflects, to a point, the first three steps which the Full Court in *Deledio* identified as appropriate. It identified hypotheses connecting the appellant's AA and PTSD with his operational service. It identified the relevant SoPs. It determined, but in a qualified way, that the hypotheses raised were reasonable. Its qualified conclusion on that topic is … that the hypotheses were reasonable provided the events occurred in the manner claimed by [Mr Fenner].

However, Mansfield J went on to express two reservations as to whether the

[16] 14 *VeRBosity* 45

Tribunal adopted the correct decision-making approach:

> [37] … The reservations concern first, the way in which the Tribunal identified the hypotheses put forward by [Mr Fenner], and secondly, whether it properly then applied s 120(1) of the Act or whether it embarked upon a determination of findings of fact on the balance of probabilities rather than to determine whether it was satisfied beyond reasonable doubt that [Mr Fenner]'s AA and PTSD are not war-caused.

Further:

> [38] In my judgment, the Tribunal overstated the nature of certain of the hypotheses in such a way as to lead it to reject particular features of the facts asserted by [Mr Fenner] and therefore to reject the hypotheses put forward when it was inappropriate to do so. I have also reached the view that, because of the way in which the Tribunal approached the analysis of the evidence, it has not in fact made a determination that certain facts upon which the hypotheses it identified were based did not occur beyond reasonable doubt, but has looked to determine on the balance of probabilities whether those facts occurred or did not occur, and being satisfied on the probabilities that they did not occur, it then applied the formulaic conclusion at the end of its reasons in terms of s 120(1).

Before examining in depth the Tribunal's approach to each of the three incidents relied upon to raise a hypothesis connecting the conditions with Mr Fenner's operational service, Mansfield J placed considerable emphasis on the fact that much of the evidence tendered by and on behalf of Mr Fenner was unchallenged.

The submarine incident

Mansfield J noted that in addition to the Mr Fenner's evidence concerning the 'full ahead' order in response to the possible presence of an enemy submarine, six other witness statements confirmed his evidence. He further noted that the Commission did not seek to cross-examine these statements, instead relying on investigative evidence tendered by Commodore Mulcare. As such, Mansfield J found that '[44] the evidence of the [Commission] could not enable a finding to be made beyond reasonable doubt that the HMAS *Sydney* did not go into full steam ahead for a period on its way to Vung Tau at the time [Mr Fenner] asserted.' In supporting this finding, Mansfield J relied upon the suggestion in Cmdre Mulcare's evidence of the possibility that a 'full ahead' order may have been adduced from other evidence available from HMAS *Stuart* which 'revealed two possible submarine contacts' in February 1968.

Mansfield J's conclusion in relation to the submarine incident were as follows:

> [48] In my judgment, the hypothesis was that [Mr Fenner] experienced a severe stressor when the HMAS *Sydney* went 'full ahead' because of what [Mr Fenner] reasonably perceived to be a submarine threat on the way to Vietnam in about 2 February 1966. The Tribunal was required to determine whether that hypothesis was reasonable. I do not consider it did so. It failed to do so because it incorporated into the hypothesis certain detail of the appellant's evidence about the submarine incident to determine its reasonableness.

Mansfield J further criticised the Tribunal for importing a time element into the submarine incident (the duration of steaming at 'full ahead'). Having accepted that 'being in fear for half an hour if being torpedoed could be a severe stressor' Mansfield J wondered 'why such a fear for a shorter period of time might not also qualify as experiencing a severe stressor'

> [52] In addition, I consider the way the Tribunal has approached its task has

> led it to misdirect itself as a matter of law. It accepted the hypothesis about the submarine incident (and the other two hypotheses) only if the events occurred in the manner described by [Mr Fenner], relevantly that the 'full ahead' was at least for 20 minutes. It did not then say it was required to be satisfied beyond reasonable doubt that the 'full ahead' was not for at least 20 minutes. When it made its finding of fact, it said it was not satisfied that the 'full ahead' was for 20 minutes, but again did not express that finding as being beyond reasonable doubt. For the same reasons as I conclude below, in respect of the direct threat incident and the scare charges issue, I conclude that the Tribunal did not in fact make that finding beyond reasonable doubt.

The scare charges incident

Mansfield J noted that the Tribunal characterised Mr Fenner's evidence in relation to the scare charges as 'grossly exaggerated', which was contrasted with '[57] the unchallenged evidence of the other six witnesses confirm[ing] the evidence of [Mr Fenner] about the general effect of scare charges.' The reluctance of the Commission to cross-examine Mr Fenner's evidence and that tendered in support of his contentions was further criticised by Mansfield J in making reference to an established common law rule of evidence:

> [59] In a court, the rule in *Browne v Dunn* (1893) 6 R 67 (HL) would apply. The respondent sought from the Tribunal findings of fact inconsistent, in material respects, with that unchallenged evidence. In a court each of those witnesses, in fairness, would have been given the opportunity to respond to the assertions the respondent proposed to make (based upon Commodore Mulcare's inquiries) that the location of the boiler room, and the other sources of noise on the vessel, rendered the noise of scare charges of relevantly insignificant intensity. Moreover, the adjudicating court would have been given the benefit of having seen and heard those witnesses and their responses to, or explanations of, the views of Commodore Mulcare before being called upon to determine whether the facts truly lay.

Despite acknowledging the Tribunal not to be bound by the rules of evidence, Mansfield J nevertheless characterised '[60] the application of the rule *in Browne v Dunn* [as] an aspect of procedural fairness so that, subject to taking account of the particular statutory context and functions, its contravention may invalidate a decision of the Tribunal.'

The conclusion drawn by Mansfield J's assessment of the Commission's failure to directly challenge Mr Fenner's and other evidence in his support is that the Tribunal arrived at its conclusion erroneously. Instead of properly being satisfied beyond reasonable doubt, the Court held the decision was arrived at on the balance of probabilities:

> [64] … I think its process of reasoning and its conclusions (other than the final conclusion) indicate that it did not apply the test prescribed by s 120(3), namely whether it was satisfied beyond reasonable doubt that there is no sufficient ground for making the determination concerning the scare charges issue. The conclusion on the facts on that issue is not expressed in the terms of satisfaction beyond reasonable doubt. Its reasoning is based only upon inference drawn from the evidence about the location of the boiler room, and about the other activity on the vessel. It does not directly criticise [Mr Fenner's] evidence for any other reason, but those inferences lead it to conclude he grossly exaggerated the effect of the scare charges. Had it been expressing its satisfaction beyond reasonable doubt it could readily have done so. Moreover, had it been expressing its satisfaction beyond reasonable doubt, it would almost

> inevitably have had to address the corroborative evidence of the six witnesses whose statements were unchallenged, the context of [Mr Fenner's] sensitivity as explained to the Tribunal …, the evidence that scare charges were dropped at varying distances from the vessel and on occasions right next to it, and the evidence of Commodore Mulcare which did not positively assert that certain depth charges could not have made a significant noise in the boiler room of the vessel. My strong overall impression of the Tribunal's reasons is that it was satisfied only on the balance of probabilities, and not beyond reasonable doubt, that the hypothesis on the depth charges issue did not exist.

The direct threat incident

The evidence surrounding the events in Vung Tau harbour on February 3 1968 was contradictory in establishing the level of threat. Again, Mansfield J was critical of the Commission for not cross-examining Mr Fenner and the corroborating evidence, and then the Tribunal for giving greater weight to the evidence of Cmdre Mulcare that the incident could not have been of substantial threat to those in the ship's company. Mansfield J pointed to contentions raised in Cmdre Mulcare's evidence that suggested that there was in fact danger, as the HMAS *Sydney* took action to minimise the apparent danger.

In conclusion, Mansfield J gave some suggestion that on rehearing, the Tribunal might still be capable of finding facts necessary to disprove the hypotheses beyond reasonable doubt. However, it was made clear that the Commission has to do much more in addressing Mr Fenner's evidence if it is to convince the Tribunal to be satisfied beyond reasonable doubt that the hypotheses raised are disproved.

Editor: Mansfield J's decision makes no less than 10 references to Mr Fenner's 'unchallenged evidence' which, despite the Tribunal not being bound by the rules of evidence, suggests that in the context of administrative decision-making not only should the other party take steps to ensure that contested evidence is challenged directly with the witnesses giving that evidence, but the decision-maker ought to be more careful in its questioning of evidence about which it has serious concerns.

In light of this judgment decision-makers are obliged to question those aspects of an applicant's evidence that it may view as lacking credibility. Clearly, the Tribunal in this case apparently had simply chosen to prefer the evidence tendered on behalf of the Commission to that of the applicant. However Mansfield J suggests that making a finding on this basis alone aligns the standard of proof more closely to the balance of probabilities rather than beyond reasonable doubt.

Hill v Repatriation Commission

Wilcox, French, Weinberg JJ
[2005] FCAFC 23
28 February 2005

Entitlement – post-traumatic stress disorder and alcohol abuse – whether veteran witnessed crewmember drowning – whether Tribunal required to consider hypothesis not raised by veteran – whether material before Tribunal points to or raises an hypothesis if it involves mere speculation or conjecture

This was an appeal from a judgment of Mansfield J *(Hill v Repatriation*

Commission [20 *VeRBosity* 101] dismissing an appeal from the AAT which rejected Mr Hill's claim for a disability pension in respect of post-traumatic stress disorder (PTSD), and psychoactive substance abuse or dependence (alcohol abuse).

Background

Mr Hill joined the Royal Australian Navy in 1965 and served until 1978. He had two periods of operational service, both aboard HMAS *Melbourne*, from 25 April 1966 to 6 May 1966 and from 30 May 1966 to 9 June 1966. He began drinking in 1966, with his consumption increasing progressively.

Of the incidents that Mr Hill relied upon, only one was before the Court. That issue concerned the alleged witnessing of an incident in which a crew member drowned when attempting to escape from the cockpit of a Sea Venom aircraft that failed to land properly on board the HMAS *Melbourne* (the Sea Venom incident).

Tribunal's reasoning

The Tribunal heard an account from Mr Hill describing the circumstances surrounding the Sea Venom incident. He described seeing 'a person in there trying to punch his way out through the canopy (of the aircraft)', as it sank in the South China Sea. In cross-examination he confirmed that 'it was easy to see inside the canopy'. Mr Hill believed the pilot had died in the incident. He gave further evidence that following the incident, HMAS *Melbourne* went on to dock in Hong Kong where he became very drunk for the first time in his life '[19] to drown memories … of seeing a bloke trapped inside a canopy and no way of helping him'.

The Tribunal described the only issues to be determined as being:

> [21]... whether Mr Hill experienced a stressor by witnessing the Sea Venom incident and whether that experience led to his current conditions of PTSD and alcohol abuse.'

The Tribunal then noted that Mr Hill had not mentioned the Sea Venom incident in his first claim in 1997. Nor did he mention it when examined by a psychiatrist in November 1997. It was not until September 1998 in giving evidence before the Veterans' Review Board that the incident was first raised.

The Tribunal found the following facts in relation to the Sea Venom incident:

> [23] [O]n 28 April 1966, a Sea Venom aircraft had appeared to land normally on HMAS *Melbourne*, but … the arrestor wire had malfunctioned. Instead of slowing down, and stopping, the aircraft had continued to move forward down the deck at some speed. The pilot … had applied full power in an effort to resume flight, but the problem had arisen too late for that to be done. In the space of a few seconds, the aircraft was propelled forward along the deck, and fell into the sea. As it was falling from the deck, [the pilot] activated the 'eject' function. The canopy was jettisoned and he ejected at about the point when the aircraft hit the water. He was subsequently rescued. The observer officer … also attempted, belatedly, to eject. In his case, the ejection process was only partially completed when the aircraft hit the water. Tragically, he drowned.

The Tribunal further found that:

> [24] … if the appellant had been surveying an area of 2-deck that required re-painting, as he claimed, he could not have had a line of vision to the flight deck. Accordingly, he could not have seen the aircraft go over the end of the ship, and plummet into the sea. Moreover, he could not have seen the aircraft suspended from the arrestor hook, or the crewmember trying to punch his way out of the canopy, as neither of these things had occurred.

The Tribunal then held that it was satisfied beyond reasonable doubt that Mr Hill did not see the Sea Venom incident. In light of this finding the Tribunal concluded that the hypothesis linking his PTSD and alcohol abuse with the incident was 'not reasonable'. The Tribunal further noted that Mr Hill '[29] did not have a response involving intense fear, helplessness or horror, nor subjective symptoms of increased stress'.

Primary Judge's Decision

Mansfield J held that the Tribunal had truncated the four step process laid out in *Deledio* by moving immediately to the fourth stage. Having found, beyond reasonable doubt, that the Mr Hill had not seen the Sea Venom incident, the Tribunal concluded that the hypothesis that he put forward, connecting his PTSD and alcohol abuse with the circumstances of his operational service, was 'not reasonable'.

Mansfield J then examined whether the Tribunal's failure to follow the *Deledio* steps meant that the appeal should succeed. He concluded that the finding beyond reasonable doubt that Mr Hill had not seen the Sea Venom incident meant that his claim had to fail. If Mr Hill had not witnessed the incident it could not constitute a stressor. He found that as the facts rendered the first three steps irrelevant, there lay no error.

Appeal to the Full Court

Mr Hill advanced a number of grounds on appeal to the Full Court. Primarily, it was argued that the Tribunal's failure to comply with the *Deledio* steps '[51] based upon a finding of fact prematurely made, was so blatant a disregard of what the Full Court had said in *Deledio* that it should not be condoned.'

A further submission argued that both the Tribunal and the primary judge '[52] had significantly understated the breadth of the hypothesis upon which [Mr Hill] had relied.' It was submitted that the Tribunal itself had raised a 'broader hypothesis' when it concluded that the Mr Hill's 'memory was "probably a compilation of his traumatic dreams and reality".' It was argued that the failure to explore this so-called 'broader hypothesis' also constituted an error.

The Full Court also received a submission that as there was no evidence to support the Tribunal's finding that Mr Hill had not seen the Sea Venom incident, the Tribunal could not have been satisfied beyond reasonable doubt.

However, the Full Court examined at length the evidence doubting Mr Hill's contentions, including reports from the Board of Inquiry into the Sea Venom incident, oral evidence from the surviving pilot, and evidence from a witness on the HMAS *Yarra* (which was trailing the HMAS *Melbourne* at the time of the incident). The Court concluded that 'in the light of this evidence which was extensive and far-reaching,' it was open for the Tribunal to conclude 'beyond reasonable doubt' that Mr Hill did not see the incident.

Mr Hill's counsel conceded there was a '[69] stark difference between [his client's] version of the incident, and that of all the independent eyewitnesses.' However, counsel for Mr Hill pressed that '[70] even if his client's account of the Sea Venom incident were totally rejected, the AAT still had an obligation, in accordance with *Deledio,* to consider whether there was an alternative hypothesis available whereby that incident might have operated as a 'stressor'.'

Conclusions

The Full Court held that none of the grounds of appeal were made out.

***Deledio* steps**

In relation to the alleged failure to follow the *Deledio* steps the Court said the following:

> [80] In general, it is a salutary practice for the AAT to follow the *Deledio* steps because by doing so it is less likely to overlook an hypothesis that is fairly raised by the material and must therefore be considered. On occasion, a failure to follow those steps may give rise to an error of law. Indeed, the primary judge held that the AAT's failure to follow those steps had been an error of law in the present case. However, in our view, a failure to follow the *Deledio* steps will not of itself give rise to an error of law, and certainly will not do so in all cases. Of course, and in any event, even if an error of law is demonstrated it does not necessarily follow that the decision must be set aside.
>
> …
>
> [83] It is well established that, in the context of appeals from the AAT, the Court may decline to set aside a decision even where an error of law has been demonstrated provided that it considers that the AAT arrived at a decision that was clearly correct on the material before it.

The Full Court also made plain that the Tribunal's finding that it was 'satisfied beyond reasonable doubt' that Mr Hill had not seen the Sea Venom incident adequately addressed s 120(1), 'which equates with the fourth stage of *Deledio*.'

Further:

> [85] There is ample authority, as cited by the primary judge, for the proposition that the AAT is not obliged to proceed step by step, in a mechanical manner. In addition, as [Mansfield J] noted, in *Repatriation Commission v Crane* [20 *VeRBosity* 47], a Full Court made the point that the *Deledio* steps were not meant to operate in substitution for the requirements of the VE Act.

In relation to the proposition that an alternative hypothesis ought to have been contemplated by the Tribunal, the Court held that '[87] the only hypothesis advanced … was that correctly identified by the primary judge [which] involved, as its central feature, [Mr Hill] having witnessed a crewmember struggling vainly to escape from the cockpit of the Sea Venom seconds before that crewmember drowned.' Noting that 'at no stage did [Mr Hill] ever claim that the event that triggered his PTSD and alcohol abuse was seeing debris from the aircraft as it floated past the ship,' the Court was satisfied 'there was no "broader hypothesis" raised'.

Finally, the complaint concerning the failure by the Tribunal to be properly satisfied 'beyond reasonable doubt' was also dismissed.

> [92]. The appeal must raise a question of law. An appellant who attacks a decision of the AAT upon the basis that there was an absence of evidence to support its decision must, in order to succeed, show that there was no material before the AAT upon which its conclusion could properly be based. To assert that the AAT attached undue weight to a particular matter, or gave some other matter excessive weight, does not, of itself, give rise to an error of law.
>
> [93] A court should not disturb a finding of fact by a tribunal based upon its assessment of the credit or credibility of a witness unless it is satisfied that the tribunal did not take advantage of its opportunity to see and hear the witness, or that the conclusions that it reached were inconsistent with an overwhelming body of evidence, or were glaringly improbable

The Full Court then turned to an argument put forward by counsel for Mr Hill during oral argument of the appeal. Essentially, it was submitted that had the Tribunal '[95] moved sequentially through the four steps set out in *Deledio*,

instead of leaping directly to the fourth step, it would have realised that there was an alternative hypothesis raised by the material before it that it was obliged to consider.'

> [96] The Full Court in *Deledio* no doubt chose its language carefully when it formulated the four-stage process that the AAT should normally follow. An obligation, expressed in the terms of the first stage, implies a duty to consider not merely the particular hypothesis put forward, but also any other hypothesis fairly raised by the evidence.
>
> [97] However, the AAT is not required to trawl through voluminous documentation, with a view to seeing whether somewhere within that body of material there might be the semblance of an hypothesis connecting the applicant's condition with the circumstances of his or her service. There is a substantial difference between an hypothesis fairly raised by the material, and one which can only be postulated on the basis of speculation and conjecture.

Directly to point, the Full Court said:

> [98] if it is necessary to couple a fertile imagination with a selective rendition of the evidence in order to create the hypothesis, it is not an hypothesis of the kind which the Full Court in *Deledio* had in mind.
>
> …
>
> [103] It is one thing to say that a tribunal must consider any inferences that are reasonably open on the material before it. It is altogether another to say that a tribunal must consider every conceivable permutation of the facts, and engage in speculation and conjecture as to possible hypotheses. The former is a course that *Deledio* not only permits but requires. The latter has no place under the VE Act.

The Court then engaged in some discussion as to whether the Tribunal was '[104] required to consider an hypothesis that was said to be available on the material before it even though it had not been expressly raised, and actually required findings which ran counter to [Mr Hill's] case.' It held that:

> [107] an unarticulated claim that does not 'clearly arise' from the material before the Tribunal does not, in our view fall within the *Deledio* steps.
>
> …
>
> [112] [T]he principle underlying the allocation of evidential burdens in relation to defences in criminal cases is similar, in certain respects, to the principle that lies behind the first of the *Deledio* steps. It is not the task of the AAT to search for hypotheses that might establish the relevant connection. If the material points to such an hypothesis, it must be considered. If it is not advanced, and exists only as a speculative possibility, it can be ignored. The AAT's failure to consider as a possibility that [Mr Hill] may have experienced a stressor by witnessing something quite different to what he claimed to have seen cannot, in our view, give rise to appealable error on its part.

Formal Decision

The appeal was dismissed and an order made that Mr Hill must pay the Commission's costs.

Editor: This case emphasises the duty of the Board and Tribunal duty to consider all the hypotheses raised by the material, whether put by or on behalf of an applicant or not. However, the Full Court also stressed that the contemplation of alternative hypotheses by the decision-maker does not extend to fanciful or speculative matters.

Federal Magistrates Court

Hayes v Repatriation Commission

McInnis FM

[2005] FMCA 125
16 February 2005

Widow's entitlement – appeal from Administrative Appeals Tribunal – whether error of law

The veteran, Charles Henry Hayes, had served in Army in the south-west Pacific and was discharged in 1946. The veteran had suffered from an anxiety disorder that had been accepted as being war-caused. He died in 2001 and the cause of death was certified as 'acute renal failure – two weeks; multiple myeloma – 20 months'.

The applicant applied for a war widow's pension on 27 August 2001, which was rejected by the Commission's delegate, the VRB, and the Tribunal.

The relevant Statement of Principles for the conditions that were the subject of evidence included the SoP for hypertension, No 35 of 2003, and SoP No 55 of 2003 relating to multiple myeloma. The Tribunal had found that the evidence concerning the veteran did not satisfy the definition of hypertension in the relevant SoP and therefore did not find that hypertension was a cause of death of the veteran, nor did it satisfy any of the factors in the multiple myeloma SoP.

Tribunal decision

McInnis FM noted the Tribunal made such a finding despite evidence of some elevated blood pressure readings. The relevant SoP, specifically excluded 'temporary elevations in blood pressure from conditions such as acute renal failure, neurogenic hypertension, eclampsia, pre-eclampsia or medications.'

The treating doctor's evidence included some elevated blood pressure readings of a kind which exceed the upper limit of 140 mmHg systolic readings. However the Tribunal found these incidents to be temporary elevations only. The doctor himself stated that he did not believe that the veteran suffered from hypertension.

Although the Tribunal accepted that the veteran 'took prescribed medication for hypertension from about 1983', it determined to its reasonable satisfaction that '[14] … on the basis of the death certificate and the relevant medical evidence, … the kind of death suffered by the veteran was multiple myeloma'.

The Tribunal then turned to the application of the *Deledio* steps, and at the third step (deciding whether the hypothesis was reasonable) concluded the following:

> [14] … Overall, there is no material or evidence pointing to the veteran meeting any of the relevant factors in the SoP concerning myeloma, and therefore the hypothesis is not consistent with the template and is deemed not to be a reasonable hypothesis.

The Tribunal then turned to the subhypothesis concerning hypertension-related ischaemic heart disease, finding:

> [14]…[t]here was no persuasive medical evidence that would lead the Tribunal to conclude that hypertension-related ischaemic heart disease was a medical cause of death (or kind of death)

Appeal

The widow's appeal claimed that there was an error of law in the assessment and determination of what constituted hypertension, and that the Tribunal introduced its own definition, rather than assessing on a reasonable hypothesis whether the definition in the SoPs had been met.

McInnis FM understood the argument as follows:

> [18] if ischaemic heart disease was a factor in the cause of death, then whether or not it was referred to in the death certificate did not disentitle the applicant to a widows pension

McInnis FM agreed that proper analysis of the Tribunal's process was consistent with the Commission's submission:

> [22] …
>
> - in the present case the claim was the veteran had a hypertension-related death;
> - the AAT found that the veteran's blood pressure was not permanently elevated;
> - it found the veteran did not satisfy the definition of hypertension in the relevant SoP;
> - it found that the hypertension was not a cause of death or kind of death;
> - it found that the SoP concerning hypertension was not applicable;
> - the AAT was reasonably satisfied the kind of death suffered by the veteran was multiple myeloma;
> - the AAT was not persuaded that hypertension-related ischaemic heart disease or hypertension-related renal impairment was a medical cause of his death.

McInnis FM concluded:

> [23] In my view a proper analysis of the AAT's reasoning process is consistent with the sequence of findings referred to by the respondent in the preceding paragraph. I can see no error of law in the manner which the AAT approached its task. Its fact-finding mission resulted in a finding of the kind of death suffered by the veteran as being multiple myeloma. That was a finding, in my view, open to it on the medical evidence before it at the time of the hearing.

Conclusion

As McInnis FM found no error of law in the Tribunal's decision, the appeal was dismissed with the applicant ordered to pay costs.

Steicke v Repatriation Commission

McInnis FM

[2005] FMCA 126
16 February 2005

Lumbar spondylolisthesis and lumbar spondylosis – trauma – clinical onset

Mr Steicke appealed a decision of the AAT refusing his claim for lumbar spondylolisthesis and lumbar spondylosis.

Mr Steicke had rendered eligible war service in the Army from 7 January 1942 to 30 October 1943. He relied on the following evidence in support of his hypothesis:

> [5] …
>
> - Engaging in heavy manual labour for a period of seven months building a camp at Alice Springs.
> - Some time after performing the duties at Alice Springs the Applicant undertook further training at Kapooka. He allegedly suffered two falls while parachuting in an obstacle course during the training and those falls caused trauma to his lumbar spine.

Issues

McInnis FM characterised the issues before the Tribunal and the Court as follows:

> [13] …
>
> - The date of clinical onset of lumbar spondylosis given that the Applicant had been discharged on 14 October 1943 the Applicant would need to establish the date of clinical onset of lumbar spondylosis before 14 October 1968.
> - Whether the Applicant suffered *'trauma to the lumbar spine'* as defined in cl 8 of SoP No 47 of 2002.
> - Whether the Applicant suffered degenerative lumbar spondylolisthesis.
> - The date of clinical onset of degenerative lumbar spondylolisthesis.

Findings

Factor 5(g) of the relevant SoP for lumbar spondylosis (No 47 of 2002) required 'suffering a trauma to the lumbar spine within 25 years immediately before the clinical onset of lumbar spondylosis'. McInnis FM held that the Tribunal's finding that the '[19] clinical onset of lumbar spondylosis did not occur before 1968 … was made on the basis of the material before the tribunal'. Therefore, there was no error. Further:

> [20] The factual matrix presented to the AAT permitted it to make findings in circumstances where there was no evidence that [Mr Steicke] was at Kapooka undergoing training where he claimed he had suffered two falls and no evidence of other symptomology which may lead to a different conclusion at the relevant time. Further, there was a lack of corroboration from contemporary records to support the assertions of [Mr Steicke]. These were all factual matters to be explored by the AAT.

McInnis FM considered Mr Steicke's argument that the Tribunal had confused 'the requirement of a causal connection pursuant to s.9 of the VE Act and the SoP for lumbar spondylosis and spondylolisthesis and spondylosis'. He found no error.

> [22] [T]he AAT had correctly considered the requirement of a causal connection between the claimed conditions and the circumstances of the Applicant's service. A causal link is required pursuant to s.9 of the VE Act and the relevant SoP provides those factors which must exist and which must be related to service before it can be claimed on the balance of probabilities that the conditions are connected with the circumstances of the person's relevant service.

In relation to the alleged failure to provide adequate and sufficient reasons, McInnis FM held that 'it is clear that it has made findings on material questions of fact and further it is clear to me that it has quite properly included detailed reference to the material upon which the findings were based.'

Mcinnis FM also held that Tribunal was not in error for the methodology used to apply the facts of the case to the relevant Statement of Principles**.**

> [24] [The AAT's] application of the facts to the case of a relevant SoP is the finding which I regard as open to the AAT. … [I]t was not satisfied that clinical onset of the applicant's spondylosis occurred before 1968. Having made that finding which was reasonably open to it on the balance of probabilities as distinct from a mere possibility, the AAT has correctly approached its task and I do not accept that it has erred in law in its methodology.

Formal decision

The appeal was dismissed with Mr Steicke ordered to pay costs.

Statements of Principles issued by the Repatriation Medical Authority

January – March 2005

Number of Instrument	Description of Instrument
1 of 2005	Revocation of Statement of Principles concerning **seizures** (Instrument No 81 of 1996) and determination of Statement of Principles concerning **epileptic seizure** and death from epileptic seizure.
2 of 2005	Revocation of Statement of Principles concerning **seizures** (Instrument No 82 of 1996) and determination of Statement of Principles concerning **epileptic seizure** and death from epileptic seizure.
3 of 2005	Revocation of Statement of Principles (Instrument No 79 of 1996) and determination of Statement of Principles concerning **epliepsy** and death from epliepsy.
4 of 2005	Revocation of Statement of Principles (Instrument No 80 of 1996) and determination of Statement of Principles concerning **epliepsy** and death from epliepsy.
5 of 2005	Revocation of Statement of Principles (Instrument No. 72 of 1998) and determination of Statement of Principles concerning **ingunial hernia** and death from ingunial hernia.
6 of 2005	Revocation of Statement of Principles (Instrument No. 73 of 1998) and determination of Statement of Principles concerning **ingunial hernia** and death from ingunial hernia.
7 of 2005	Revocation of Statement of Principles (Instrument Nos. 47 of 2001 and 55 of 2001) and determination of Statement of Principles concerning **solar keratosis** and death from solar keratosis.
8 of 2005	Revocation of Statement of Principles (Instrument Nos. 48 of 2001 and 56 of 2001) and determination of Statement of Principles concerning **solar keratosis** and death from solar keratosis.
9 of 2005	Revocation of Statement of Principles (Instrument Nos. 67 of 2001and. 59 of 2003;) and determination of Statement of Principles concerning **chronic lymphoid leukaemia** and death from chronic lymphoid leukaemia.
10 of 2005	Revocation of Statement of Principles (Instrument Nos. 68 of 2001and. 60 of 2003;) and determination of Statement of Principles 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/***

Conditions under Investigation by the Repatriation Medical Authority

as at 31 March 2005

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
Anxiety disorder	[*Instrument Nos. 1/00 & 2/00*]	1-09-04
Asbestosis	[*Instrument Nos 138/96 & 139/96*]	16-04-03
Bipolar disorder	[*Instrument Nos 128/96 & 129/96*]	24-03-04
Caisson disease	[*Instrument Nos 147/95 & 148/95*]	31-03-04
Cardiomyopathy	[*Instrument Nos 19/98 & 20/98 as amended by 22/02 & 23/02*]	2-03-05
Cervical spondylosis	[*Instrument Nos 50/02 & 51/02 as amended by 64/02, 81/02 & 82/02*]	25-02-04
Depressive disorder	[*Instrument Nos. 58/98 & 59/98*]	1-09-04
Dental caries	[*Instrument Nos. 366/95 & 367/95*]	1-09-04
Dermatomyositis	—	16-07-03
External burns	[*Instrument Nos 37/94 & 38/94 as amended by 195/95 & 196/95*]	25-02-04
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
Impotence	[*Instrument Nos 97/96 & 98/96 as amended by: 16/02 & 17/02*]	22-12-04
Intervertebral disc prolapse	[*Instrument Nos 130/96 & 131/96 as amended by 92/97 & 93/97*]	23-06-04
Loss of teeth	[*Instrument Nos 5/03 & 6/03*]	2-03-05
Lumbar spondylosis	[*Instrument Nos 46/02 & 47/02 as amended by 77/02 & 78/02*]	25-02-04
Macular branch vein occlusion	—	2-03-05
Malignant neoplasm of the bile duct	[*Instrument Nos 17/00 & 18/00*]	22-12-04
Malignant neoplasm of the breast	[*Instrument Nos 53/97 & 54/97*]	16-07-03
Malignant neoplasm of the larynx	[*Instrument Nos 27/95 & 28/95 as amended by Nos 155/95 & 156/95, 151/96 & 152/96, 193/96 & 194/96*]	16-07-03
Malignant neoplasm of the lung	[*Instrument Nos 35/01 & 36/01*]	20-08-03
Malignant neoplasm of the oesophagus	[*Instrument Nos. 115/96 & 116/96 as amended by 11/98 & 12/98*]	1-09-04

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Malignant neoplasm of the oral cavity or hypopharynx	[*Instrument Nos 113/96 & 114/96*]	6-03-02
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 thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Meniere's disease	[*Instrument Nos 77/01 & 78/01*]	5-05-04
Motor neuron disease	[*Instrument Nos 65/01 & 66/01*]	5-05-04
Myelodysplastic disorder	[*Instrument Nos 15/00 & 16/00*]	20-08-03
Narcolepsy	—	28-01-04
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03
Osteoporosis	[*Instrument Nos. 67/02 & 68/02 as amended by 25/04*]	1-09-04
Paget's disease	[*Instrument Nos.15/96 & 16/96*]	28-01-04
Parkinson's disease	[*Instrument Nos. 36/02 & 37/02*]	2-03-05
Peptic ulcer disease	[*Instrument Nos 21/99 & 22/99*]	23-06-04
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
Post traumatic stress disorder	[*Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99*]	1-09-04
Pulmonary barotrauma	—	24-03-04
Rotator cuff syndrome	[*Instrument Nos. 83/97 & 84/97*]	19-11-03
Seborrhoeic dermatitis	[*Instrument Nos 50/99 & 51/99*]	16-07-03
Secondary Parkinsonism	[*Instrument Nos 38/02 & 39/02*]	2-03-05
Seizures	[*Instrument Nos 81/96 & 82/96*]	5-03-03
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*]	5-03-03
Steatohepatitis	—	25-02-04
Sudden unexplained death	[*Instrument Nos 99/96 & 100/96 as amended by 185/96, 186/96, 18/02, 19/02, 49/03 & 50/03*]	25-02-04
Thoracic spondylosis	[*Instrument Nos 48/02 & 49/02 as amended by 79/02 & 80/02*]	25-02-04
Toxic encephalopathy	—	25-02-04
Tuberculosis	[*Instrument Nos. 81/97 & 82/97*]	1-09-04

AAT and Court decisions – January to March 2005

AATA = Administrative Appeals Tribunal
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court
HCATrans = High Court special leave hearing
SRCA = decided under the *Safety, Rehabilitation and Compensation Act 1988* and in which the MRCC was a party

Carcinoma

malignant neoplasm of the colorectum
- alcohol
  Simpson, R (Army)
  [2005] AATA 171 28 Feb 2005
- smoking
  Simpson, R (Army)
  [2005] AATA 171 28 Feb 2005

malignant neoplasm of the prostate
- high fat diet
  King, G M (Navy)
  [2005] AATA 83 25 Jan 2005

multiple myeloma
- no factors met
  Hayes (Army) (McInnis FM)
  [2005] FMCA 125 16 Feb 2005

Circulatory disorder

hypertension
- alcohol
  Nicklin, G D (Army)
  [2005] AATA 160 22 Feb 2005
- diagnosis
  Hayes (Army) (McInnis FM)
  [2005] FMCA 125 16 Feb 2005

cardiomyopathy
- alcohol
  McKay, R (Navy)
  [2005] AATA 254 10 Mar 2005

ischaemic heart disease
- alcohol
  Pascoe, I (Army)
  [2005] AATA 163 23 Feb 2005
- hypertension
  Hayes (Army) (McInnis FM)
  [2005] FMCA 125 16 Feb 2005
- psychiatric disorder
  Mortensen, I R & W H J (Army)
  [2005] AATA 230 17 Mar 2005
- smoking
  Stien, A (Army)
  [2004] AATA 1411 24 Dec 2004

Death

carcinoma
- malignant neoplasm of the prostate
  -increase in animal fat intake
  Thom, A M J
  [2005] AATA 265 24 Mar 2005

circulatory disorder
- ischaemic heart disease
  -whether suffered
  Williamson, M
  [2005] AATA 152 17 Feb 2005

Eligible service

qualifying service
- service in Japan after WW2
  McDonald,G J (Army)
  [2004] AATA 1400 24 Dec 2004
- unauthorised passenger on Liberator
  Janke-Walker, C G (RAAF)
  [2005] AATA 1 4 Jan 2005
- whether incurred danger from hostile forces of the enemy
  Janke-Walker, C G (RAAF)
  [2005] AATA 1 4 Jan 2005
  Coombes, L J (Army)
  [2005] AATA 197 10 Feb 2005

Entitlement and liability

- statements of principles
  - accrued rights
  Ireland, T (Navy)
  [2005] AATA 20 5 Jan 2005

Evidence and proof

- application of *Deledio* steps
  - unchallenged evidence supports hypothesis
  Fenner (Mansfield J)
  [2005] FCA 27 5 Jan 2005
- proofing of witnesses
  - need for
  Fenner (Mansfield J)
  [2005] FCA 27 5 Jan 2005

- mechanical step-by-step approach not required
  Hill (Navy)(Wilcox, French, Weinberg JJ)
  [2005] FCAFC 23 28 Feb 2005
- rejection of evidence beyond reasonable doubt at step 4
  Hill (Navy) (Wilcox, French, Weinberg JJ)
  [2005] FCAFC 23 28 Feb 2005

Gastrointestinal disorder

irritable bowel syndrome
- anxiety disorder
  Greenough, J (Army)
  [2005] AATA 191 8 Mar 2005
- psychiatric disorder
  Munday, R (Army)
  [2004] AATA 1350 17 Dec 2004

Haematological disorder

polycythaemia vera
- inability to obtain clinical treatment
  Joyce, R (Navy)
  [2005] AATA 4 6 Jan 2005

Historical Material

Navy

HMAS Derwent
- June 1966
  - threat from Indonesian patrol boats
    Haughey, J (Navy)
    [2005] AATA 189 8 Mar 2005

HMAS Duchess
- collision with junk 1966
  Benyk, M (Navy)
  [2005] AATA 260 29 Mar 2005

HMAS Melbourne
- April 1966
  - Sea Venom crash
    Hill (Navy) (Wilcox, French, Weinberg JJ)
    [2005] FCAFC 23 28 Feb 2005

HMAS Perth
- Feb 1971
  - Vietnamese prisoners brought on board
    Wiseman, R L (Navy)
    [2005] AATA 156 18 Feb 2005
- Sep 1970 – April 1971
  - various incidents
    Nitz,A (Navy)
    [2005] AATA 255 24 Mar 2005

HMAS Tobruk
- Nov 1951
  - Shelling of goods train
    McKay, R (Navy)
    [2005] AATA 254 10 Mar 2005

HMAS Yarra
- March – September 1965
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005
- August 1973
  Chattington, M (Navy)
  [2005] AATA 249 24 Mar 2005

Neurological disorder

motor neurone disease
Alexander, E (RAAF)
[2005] AATA 166 23 Feb 2005

restless leg syndrome
- iron deficient diet
  Ireland, T (Navy)
  [2005] AATA 20 5 Jan 2005

Practice and Procedure

withdrawal of application
- mistaken withdrawal
  - whether in error
    King, K & M
    [2005] AATA 294 15 Mar 2005
  - discretion to reinstate
    White, R
    [2005] AATA 75 21 Jan 2005

Administrative Appeals Tribunal
- no power to review gold card determination
  Bellamy, E
  [2005] AATA 134 21 Jan 2005

Psychiatric disorder

adjustment disorder
- clinical onset
  Armstrong, R J (Army)
  [2005] AATA 180 4 Mar 2005
- diagnosis
  Colman, R (Navy)
  [2005] AATA 74 14 Jan 2005
- stressors
  - handling caskets of dead soldiers
    Rossiter, G (Army)
    [2005] AATA 178 3 Mar 2005
  - witnessing fire in slum area
    Rossiter, G (Army)
    [2005] AATA 178 3 Mar 2005

- night flying
  Nicklin, G D (Army)
  [2005] AATA 160 22 Feb 2005
- motor vehicle accident
  Thomas, J (Army)
  [2005] AATA 184 7 Mar 2005
- observing artillery fire
  Greenough, J (Army)
  [2005] AATA 191 8 Mar 2005
- observing helicopter gunship firing
  Greenough, J (Army)
  [2005] AATA 191 8 Mar 2005
- observing wounded soldier while hospitalised
  Greenough, J (Army)
  [2005] AATA 191 8 Mar 2005
- sailing up the Saigon River
  McCormack, B D (Army)
  [2005] AATA 60 21 Jan 2005
- searching pirate ships
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005
- shore leave
  Lamb, W P (Navy)
  [2005] AATA 40 18 Jan 2005
- witnessing diver beside ship
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005

- major illness or injury
  - back injury
    Palmer, R J (Navy)
    [2005] AATA 2 4 Jan 2005
  - chronic airways obstructive disease
    Brady, P G (Navy)
    [2005] AATA 124 9 Feb 2005
  - smoking related illness
    Brady, P G (Navy)
    [2005] AATA 124 9 Feb 2005

depressive disorder
- adjustment disorder
  Rossiter, G (Army)
  [2005] AATA 178 3 Mar 2005
- clinical onset
  De Smid, R (Navy)
  [2005] AATA 133 14 Feb 2005
  Wiseman, R L (Navy)
  [2005] AATA 156 18 Feb 2005
- diagnosis
  Colman, R (Navy)
  [2005] AATA 74 14 Jan 2005
  Chattington, M (Navy)
  [2005] AATA 249 24 Mar 2005
- due to non-service related experience
  Chattington, M (Navy)
  [2005] AATA 249 24 Mar 2005
- stressor
  - Collision with typhoon buoy on *HMASYarra*
    Chattington, M (Navy)
    [2005] AATA 249 24 Mar 2005
  - Cyclone Tracy cleanup
    De Smid, R (Navy)
    [2005] AATA 133 14 Feb 2005
  - burnt in firefighting course
    De Smid, R (Navy)
    [2005] AATA 133 14 Feb 2005
  - hearing incoming rounds
    Wiseman, R L (Navy)
    [2005] AATA 156 18 Feb 2005
  - witnessing prisoners on HMAS Perth
    Wiseman, R L (Navy)
    [2005] AATA 156 18 Feb 2005
  - witnessing Sea Venom crash
    De Smid, R (Navy)
    [2005] AATA 133 14 Feb 2005

post traumatic stress disorder
- aggravation
  Haughey, J (Navy)
  [2005] AATA 189 8 Mar 2005
  Benyk, M (Navy)
  [2005] AATA 260 29 Mar 2005
- clinical onset
  Munday, R (Army)
  [2004] AATA 1350 17 Dec 2004
- clinical worsening
  Haughey, J (Navy)
  [2005] AATA 189 8 Mar 2005
- diagnosis
  Munday, R (Army)
  [2004] AATA 1350 17 Dec 2004
  Lamont, R W (Army)
  [2005] AATA 149 17 Feb 2005
  Haughey, J (Navy)
  [2005] AATA 189 8 Mar 2005
  Chattington, M (Navy)
  [2005] AATA 249 24 Mar 2005
- stressor
  - action stations
    Haughey, J (Navy)
    [2005] AATA 189 8 Mar 2005
  - chasing submarine at full ahead
    Fenner (Mansfield J)
    [2005] FCA 27 5 Jan 2005
  - cleaning tanks and APCs
    Armstrong, R J (Army)
    [2005] AATA 180 4 Mar 2005

- collision with junk
  Benyk, M (Navy)
  [2005] AATA 260 29 Mar 2005
- contact with unidentifiable ship
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005
- chasing a submarine
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005
- Cowra breakout
  Mortensen, I R & W H J (Army)
  [2005] AATA 230 17 Mar 2005
- death of a friend
  Mortensen, I R & W H J (Army)
  [2005] AATA 230 17 Mar 2005
- direct threat during Tet offensive
  Fenner (Mansfield J)
  [2005] FCA 27 5 Jan 2005
- experiencing violent storm
  Haughey, J (Navy)
  [2005] AATA 189 8 Mar 2005
- fear of booby-trapped VC prisoners
  Nitz,A (Navy)
  [2005] AATA 255 24 Mar 2005
- fear of enemy divers
  Nitz,A (Navy)
  [2005] AATA 255 24 Mar 2005
- fixing steam inlet valve
  Landells, T D (Navy)
  [2005] AATA 85 27 Jan 2005
- inadvertent machine gun fire
  Haughey, J (Navy)
  [2005] AATA 189 8 Mar 2005
- liquid oxygen fire
  Haughey, J (Navy)
  [2005] AATA 189 8 Mar 2005
- observation of napalm bombing
  Nitz,A (Navy)
  [2005] AATA 255 24 Mar 2005
- scare charges
  Fenner (Mansfield J)
  [2005] FCA 27 5 Jan 2005
  Benyk, M (Navy)
  [2005] AATA 260 29 Mar 2005
- searching pirate ships
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005
- shelling of Hospital (perception of)
  Nitz,A (Navy)
  [2005] AATA 255 24 Mar 2005
- shelling of goods train
  McKay, R (Navy)
  [2005] AATA 254 10 Mar 2005
- witnessing diver beside ship
  Pye, G (Navy)
  [2005] AATA 145 17 Feb 2005
- witnessing bodies on stretchers
  Benyk, M (Navy)
  [2005] AATA 260 29 Mar 2005
- witnessing dead bodies
  Lamont, R W (Army)
  [2005] AATA 149 17 Feb 2005
- witnessing pilot drown
  Hill (Navy) (Wilcox, French, Weinberg JJ)
  [2005] FCAFC 23 28 Feb 2005

Remunerative work and Special Rate

capacity to undertake remunerative work
- capacity for retraining
  Bullock, P J (Navy)
  [2005] AATA 78 24 Jan 2005

ceased to engage in remunerative work
- reason for ceasing
  - acceptance of unsatisfactory job
    Durbridge, T (Army)
    [2005] AATA 261 29 Mar 2005
  - voluntary redundancy
    Herd, B (Army)
    [2005] AATA 155 21 Feb 2005
    Durbridge, T (Army)
    [2005] AATA 261 29 Mar 2005
  - end of season
    Jones, P R (Army)
    [2005] AATA 169 25 Feb 2005
  - labour market conditions
    Jones, P R (Army)
    [2005] AATA 169 25 Feb 2005
  - failed medical examination
    Beasley, s L (Navy)
    [2005] AATA 252 24 Mar 2005
  - withdrawal from study program
    Herd, B (Army)
    [2005] AATA 155 21 Feb 2005
  - redundancy
    Morris, J P (Navy)
    [2005] AATA 253 24 Mar 2005
  - non defence related disability
    Creaney, R Navy)
    [2005] AATA 177 3 Mar 2005

employment
- academic
  Herd, B (Army)
  [2005] AATA 155 21 Feb 2005

- administrative and clerical
  Rigby, R (Navy)
  [2005] AATA 198 4 Mar 2005
- artist
  Wright (Navy) (Tamberlin J)
  [2005] FCA 7 14 Jan 2005
- boiler room operator
  Morris, J P (Navy)
  [2005] AATA 253 24 Mar 2005
- building maintenance
  Herd, B (Army)
  [2005] AATA 155 21 Feb 2005
- computer services provider
  Farrugia, A (Navy)
  [2005] AATA 234 18 Mar 2005
- defence force trainer
  Rigby, R (Navy)
  [2005] AATA 198 4 Mar 2005
- electrical fitter
  Creaney, R Navy)
  [2005] AATA 177 3 Mar 2005
- labourer
  Bullock, P J (Navy)
  [2005] AATA 78 24 Jan 2005
- logging contractor
  Williams, B H
  [2004] AATA 127 1 Feb 2005
- miner
  Beasley, s L (Army)
  [2005] AATA 252 24 Mar 2005
- sales and supply
  Oxford, B H (Navy)
  [2005] AATA 137 11 Feb 2005
- seasonal labourer
  Jones, P R (Army)
  [2005] AATA 169 25 Feb 2005
- spare parts manager
  Durbridge, T (Army)
  [2005] AATA 261 29 Mar 2005
- teacher
  Wright (Navy) (Tamberlin J)
  [2005] FCA 7 14 Jan 2005
- unskilled labourer
  Lee, I (Army)
  [2004] AATA 1409 24 Dec 2004

remunerative work
- study for doctorate not remunerative work
  Herd, B (Army)
  [2005] AATA 155 21 Feb 2005

whether genuinely seeking to engage in
- reliance on pension benefits
  Lee, I (Army)
  [2004] AATA 1409 24 Dec 2004
- no attempt
  Beasley, s L (Navy)
  [2005] AATA 252 24 Mar 2005
- whether genuine attempt
  Farrugia, A (Navy)
  [2005] AATA 234 18 Mar 2005

whether prevented by war-caused disabilities alone
- civilian work injury
  Lee, I (Army)
  [2004] AATA 1409 24 Dec 2004
- failed medical examination
  Beasley, s L (Navy)
  [2005] AATA 252 24 Mar 2005
- failure to renew contract
  Williams, B H
  [2004] AATA 127 1 Feb 2005
- lack of financial incentive
  Oxford, B H (Navy)
  [2005] AATA 137 11 Feb 2005
- morbid obesity
  Rigby, R (Navy)
  [2005] AATA 198 4 Mar 2005
- effect of non war-caused disabilities
  Oxford, B H (Navy)
  [2005] AATA 137 11 Feb 2005
  Wright (Navy) (Tamberlin J)
  [2005] FCA 7 14 Jan 2005
- minor effect
  Farrugia, A (Navy)
  [2005] AATA 234 18 Mar 2005
- whether evidence of effect of war caused condition overcomes voluntary redundancy
  Morris, J P (Navy)
  [2005] AATA 253 24 Mar 2005

Respiratory disorder

asthma
- clinical onset
  King, G M (Navy)
  [2005] AATA 83 25 Jan 2005
- exposure to smoke and fumes
  King, G M (Navy)
  [2005] AATA 83 25 Jan 2005

chronic bronchitis
- smoking
  Colman, R (Navy)
  [2005] AATA 74 14 Jan 2005

chronic airways obstructive disease
- smoking
  Brady, P G (Navy)
  [2005] AATA 124 9 Feb 2005

emphysema
- smoking
Creaney, R Navy)
[2005] AATA 177 3 Mar 2005

Service Pension

post traumatic stress disorder
- permanent incapacity for work
Wong, V
[2005] AATA 216 14 Mar 2005

Spinal disorder

cervical spondylosis
- lifting
Hawkins, K (Navy)
[2005] AATA 132 14 Feb 2005
- carrying loads on head while upright
Hawkins, K (Navy)
[2005] AATA 132 14 Feb 2005
- trauma
- motorcycle accident
Creaney, R (Navy)
[2005] AATA 177 3 Mar 2005

- lumbar spondylolsis
- clinical onset
Turner, P D (Navy)
[2004] AATA 1374 21 Dec 2004
Steicke (McInnis FM)
[2005] FMCA 126 16 Feb 2004
- diagnosis
Palmer, R J (Navy)
[2005] AATA 2 4 Jan 2005
- trauma
-fall from diving board
Turner, P D (Navy)
[2004] AATA 1374 21 Dec 2004

- spondylolisthesis
-lumbar spondylosis
Steicke (McInnis FM)
[2005] FMCA 126 16 Feb 2004
- trauma
Palmer, R J (Navy)
[2005] AATA 2 4 Jan 2005