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Editor's notes

In this issue, Bruce Topperwien contributes an analysis of recent case law on psychiatric cases and the meaning of 'stressor'. Following that is a discussion on the issue of psychiatric versus psychological opinion in diagnosis. The question of which carries more evidential weight is perhaps best answered with the word 'neither' - the key, as in the presentation of all evidence, is to ensure it is credible and, in the case of expert evidence, that it is backed by appropriate qualifications, experience and training.

The case of *Guy*, discussed in the lead article, is also reported in this issue, as is *Hardman* where the Full Court held the Tribunal to have misapplied the *Deledio* steps. The next issue of *VeRBosity* will contain an examination of recent case law in that area.

James McKay
Editor

This edition of *VeRBosity* contains reports of 5 Federal Court judgments in veterans' matters received in April to June 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.

The meaning of 'stressor' - commentary on recent cases

Bruce Topperwien

'Experiencing a severe stressor' - the cases of Schmidt; Brennan; Guy; Constable

These cases considered the nature of the requirement in certain SoPs concerning psychiatric conditions that the person had experienced 'a severe stressor'. These cases referred to previous Full Federal Court cases of *Stoddart* and *Woodward*.

Stoddart [2003] FCA 334

At first instance in *Stoddart*[1], Mansfield J took the view that the test for 'experiencing a severe stressor' is in two parts:

> 1. would a reasonable person in the position and with the knowledge of the veteran objectively perceive the event relied upon as a threat of death or serious injury or to physical integrity of self or other?
>
> 2. if so, did the threat convey that perception to the veteran in the sense that the veteran subjectively experienced that threat?

Woodward [2003] FCAFC 160

In *Woodward*[2], the Full Federal Court endorsed Mansfield J's analysis of the 'experiencing a severe stressor' factor, saying, 'the reasoning of Mansfield J in *Stoddart* is persuasive and that it should be followed.' The Court restated the test by saying that the factor would be met if the evidence points to:

> a person experiencing or being confronted with an event involving threat of death or serious injury (etc), if the event said to constitute the threat, judged objectively from the point of view of a reasonable person in the position of the applicant experiencing it, was capable of conveying, and did convey, the risk of death or serious injury. In other words, 'experiencing' should be construed as having at least this partially subjective connotation.

Stoddart [2003] FCAFC 300

On appeal in the Full Court in *Stoddart*[3], the Repatriation Commission did not challenge the interpretation given by the Court in *Woodward*, but argued that Mansfield J's use of the word 'risk' watered down the type of threat required by the SoP especially in light of the examples the SoP mentions. The Full Court rejected that interpretation of Mansfield J's use of the word 'risk', and said:

> Given the context in which the word 'risk' was used – i.e. in a protracted discussion of what constitutes a 'severe stressor' – it is apparent that his Honour intended no dilution of what the term 'threat' conveyed in the definition of each SoP and the gravity of the perceived risk was to be understood accordingly. To suggest that he did

[1] *Stoddart v Repatriation Commission* [2003] FCA 334, (2003) 74 ALD 366, 19 *VeRBosity* 48.

[2] *Woodward v Repatriation Commission* [2003] FCAFC 160, (2003) 200 ALR 332, 37 AAR 424, 19 *VeRBosity* 83

[3] *Repatriation Commission v Stoddart* [2003] FCAFC 300, (2003) 19 *VeRBosity* 125

> otherwise is to divorce the language used from its context.

Thus the Full Court rejected the view that the type of risk involved merely exposing a person to 'detriment'. It requires exposing the person to what that person perceived as a threat of death or serious injury.

Schmidt [2004] FCA 1158

Mr Schmidt claimed that he experienced three stressors during his service with the RAAF at Ubon, Thailand that led to post traumatic stress disorder and alcohol dependence: being confronted at gun point by a Thai guard; being held in a Thai police cell for a number of hours; and experiencing a 'red alert' while on patrol at the airbase. The Administrative Appeals Tribunal affirmed the rejection of his claim.

On appeal it was argued that the Tribunal had taken an incorrect approach to whether he had experienced a severe stressor by failing to consider the events as judged by an objective observer in the position of, and with the knowledge of, the veteran. However, the Court found that the Tribunal had not made an error because it had found as a fact, beyond reasonable doubt, that Mr Schmidt did not fear for his life or safety[4]. The Court said:

> [37] A subjective fear of one's life or safety is a necessary integer of the requirement of 'experiencing a severe stressor'. The AAT found that no such integer existed in this case. That finding was a finding of fact, and open to the AAT on the evidence.

Brennan [2004] FCA 1431

Mr Brennan claimed that the receipt of news concerning his brother's death was the stressor that contributed to the cause of his generalised anxiety disorder. The Court noted that there was very little evidence on which the Tribunal could have found that this event was a relevant stressor[5]. The Court set out the type of evidence that would be required before a reasonable hypothesis could be raised:

> [22] … If, for example, there was evidence that the news of his brother's death was received during the applicant's war service, that this caused him stress and anxiety, that that stress or anxiety resulted in a generalised anxiety disorder and that he suffered from that generalised anxiety disorder within two years of that stress or anxiety then this might well be the basis for identifying a relevant hypothesis which was consistent with the SoP. None of that evidence was before the AAT. …

Guy [2005] FCA 562

Mr Guy's claim for pension in respect of incapacity from alcohol dependence was based on an incident in a boiler room when he was nearly electrocuted. The Tribunal had said:

> [53] As to whether the applicant experienced a severe stressor we are satisfied that the only event experienced by the applicant during operational service that might evoke intense fear, helplessness or horror in a person, was the incident in Hong Kong where there was a perceived threat that he might be electrocuted. Such a perception was certainly open on the facts as related to us and it is apparent, on the evidence, that the applicant and others perceived at the time that there was a risk of serious injury or death. Whether the event in the boiler was such that it could be said that it might evoke intense fear, helplessness or horror is however not

[4] *Schmidt v Repatriation Commission* [2004] FCA 1158, 29 *VeRBosity* 103

[5] *Brennan v Repatriation* Commission [2004] FCA 1431, 29 *VeRBosity* 141

> apparent to us. Clearly there was what might be described as an anxious moment while the applicant removed himself from the boiler and the electricity was disconnected, but there was no incident which, in our view, could be described as an event that might evoke intense fear, helplessness or horror. The applicant reacted as any reasonable person would react, by removing himself from the danger.
>
> [54] We are not satisfied that the applicant experienced a severe stressor, as defined, during his operational service. …
>
> [56] … [It was] an anxious moment and we do not accept that it could result in physiological stress.

The Court said that this statement contained a contradiction. Tamberlin J said[6]:

> [19] … Once it is accepted that the veteran had perceived that there was a risk of serious injury or death and was confronted with an event which might evoke the relevant feelings, the definition in the SoP was satisfied. The Tribunal, in my view, in reaching its conclusion that the veteran had not experienced a severe stressor because there was only 'an anxious moment' was applying the wrong test. Rather than asking whether the incident was of a type which might, as the Tribunal found, evoke the relevant emotions, the Tribunal asked whether the incident did evoke these emotions. Hence the reference to the incident being only 'an anxious moment'. …
>
> [23] The Tribunal found … that:
>
> (i) The veteran experienced the boiler room incident;
>
> (ii) That this was an event that might evoke the degree of emotion required; and;
>
> (iii) The veteran perceived that there was a risk of serious injury or death.
>
> [24] On these findings, the veteran has established all the requirements required by the definition of 'experiencing a severe stressor' and therefore should succeed.

It is important to recognise that while the Court said that the requirement of meeting the definition had been met, it remitted the matter to the Tribunal to be reheard. This was because the Tribunal had made contradictory findings of fact. Additionally, as the Tribunal did not find that the stressor met the definition, the Tribunal did not make a finding concerning whether there was sufficient evidence that the incident had the relevant effect on the veteran (namely causing him to take to alcohol) nor did it make a finding on the timing of the clinical onset of his alcohol dependence.

Constable [2005] FCA 928

In *Constable's* case[7], the Court again considered the definition of 'experiencing a severe stressor' for the purposes of the alcohol abuse or alcohol dependence Statement of Principles. Mr Constable's claim was based on observing bandaged casualties being driven past him in a Landrover. The Tribunal had not regarded this experience as meeting the definition.

The Court held that the Tribunal had misinterpreted the definition. Dowsett J said:

> [21] … [The Tribunal] concluded that the applicant's observation of the men was at a time and place too far removed from the infliction of the

[6] *Guy v Repatriation Commission* [2005] FCA 562, 21 *VeRBosity* 60

[7] This case will be reported in the next issue of *VeRBosity*

relevant injuries. That approach ignored the fact that the Statement of Principles clearly included observation of casualty clearance as a possible severe stressor, and that such an event must often involve threat of death or serious injury.

…

[23] It was also necessary that the landrover incident '... might evoke intense fear, helplessness or horror.' The subject of the compound verb 'might evoke' is the 'event or events'. This invites an examination of the event itself rather than its effect upon the applicant. … [T]he AAT concluded that this requirement had not been satisfied, apparently because the evidence did not point to the applicant's having experienced such feelings. …

[24] … The requirement that a stressor evoke 'feelings of substantial distress in an individual' strongly suggests that the relevant event must have had that effect upon somebody. However use of the word 'might' in the presently relevant definition conveys the sense of a possibility rather than actuality.

[25] … [Neither *Stoddart* nor *Woodward* support] the proposition that an applicant must claim to have felt fear, helplessness or horror at the time of the relevant event in order that it qualify as a severe stressor. Any such claim would often be little more than an ex post facto reconstruction of complex emotions, probably experienced in unfamiliar circumstances. Further, one person may describe as a feeling of fear or horror, a sensation which another might describe as 'shock' or 'feeling sick in the stomach', expressions used by the present applicant. The applicant also told Dr Likely that he felt concern for the welfare of the injured soldiers. Such a feeling might be described as a feeling of helplessness. Dr Likely considered that the applicant had identified a feeling of horror. He said in evidence that he had been shocked and felt sick in the stomach 'due to nerves'. Even if, for the purposes of step 3, it was necessary that the evidence point to the applicant's having experienced feelings of intense fear, helplessness or horror, his claim had that effect.

[26] … [T]he AAT referred to the applicant's rank and experience and of a 'reasonable person' having such 'experience and seniority'. At step 3, the AAT was obliged only to assess whether or not the applicant's claim pointed to his having experienced a severe stressor. The Statement of Principles says nothing about the rank or experience of the relevant applicant, nor does it speak of any notional 'reasonable' person. The question was not whether a reasonable person of the same rank and experience as the applicant would have experienced intense fear, helplessness or horror. The question was simply whether or not the applicant had identified an event which might have evoked such a reaction. Those other matters may have been relevant at step 4 but not at step 3.

Discussion

It is common experience that not everyone who witnesses or experiences a severely traumatic event is affected psychiatrically by it. Nevertheless, while *Constable* suggests that merely experiencing the relevant stressor is sufficient for a hypothesis to be fit the Statement of Principles, the other cases indicate that more is required for a hypothesis to be 'reasonable'. The material should at least point to the fact that the stressor had such an effect on the veteran that it caused or aggravated

the claimed condition, for that must be the basis for any connection between the veteran's particular service and the claimed injury or disease. Subsection 120(3) requires 'a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.'

Guy, *Brennan* and *Schmidt* each demonstrate that it is not sufficient merely to identify incidents that occurred during a veteran's service that might be characterised as severely stressful or traumatic. It is necessary for there to be evidence at least pointing to the fact that those incidents actually had the relevant effect on the veteran both at the time of the event and on a long term basis:

- In *Guy's* case, while the Court found that the stressor definition was met by the relevant incident, the Court was not able to say that the applicant was bound to succeed. There still needed to be evidence of a relevant connection between the stressful event and the veteran's claimed condition.
- In *Brennan's* case, there was no relevant evidence of such a connection.
- In *Schmidt's* case, the Tribunal was able to find beyond reasonable doubt that while the event was potentially stressful, Mr Schmidt did not have the relevant reaction to it.

Even in *Constable's* case, the Court indicated, at para [25] that there was such evidence.

Post traumatic stress disorder has, as part of the diagnostic criteria, the re-experiencing of the traumatic event. Therefore, unless there is psychiatric evidence that the veteran continues to re-experience the particular event that is alleged to have caused the disorder, a diagnosis of PTSD cannot be made, and some other psychiatric diagnosis will have to be considered to account for the particular emotional or behavioural symptoms of the veteran.

Case preparation

This means that the evidence in a case should address:

- the details of the stressful event (especially from independent sources if possible);
- the person's actions and reactions at the time;
- their background and understanding of the event and the situation;
- the connection between the event and the particular psychiatric disorder that the person suffers;
- the diagnosis of the claimed disorder (including whether the person re-experiences the event, and if so, how it is being re-experienced);
- the time of clinical onset;
- the history and course of the disease, including treatment and current incapacity and impairment.

Psychiatry, psychology and the capacity to diagnose

The question of whether psychologists are capable of giving opinion evidence concerning a proper diagnosis of a psychiatric disorder is one that is 'unresolved' and 'awaits final

determination by an authoritative decision of the High Court or a Court of Appeal[8].

Consideration of the weight given to the evidence of either psychologists or psychiatrists by decision-makers should be strongly based on an understanding and appreciation of the expert's background, expertise and experience in diagnosis of psychiatric disorders.

Freckleton and Selby's *Expert Evidence*[9] contains a useful summary of the case law on the question.

The early view - a question of qualifications

As the authors observe from cases in the early 1990s, the judiciary demonstrated a great reluctance to recognise the value of psychologists' opinions.

> I consider it necessary to observe once again that it is important that clinical psychologists do not cross the barrier of their expertise. It is appropriate for persons trained in the field of clinical psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter the field of psychiatry.[10]

Similarly, Freckelton and Selby referred to two 1994 Victorian Administrative Appeals Tribunal decisions[11] made by Strong J where he 'was highly critical of experts who, in his judgment, went beyond the scope of their expertise in offering views in relation to crimes compensation appellants suffering from PTSD'[12]'

The later view - practical, pragmatic and having regard to experience

However, a year later, in the Victorian Court of Criminal Appeal, Hampel J provided some thoughts on a more pragmatic approach to the question.[13] Freckleton and Selby note with some caution that 'the views are not authoritative as they are those of a single judge and did not form an integral part of his decision, [h]owever, they are the most significant judicial analysis thus far of the comparative roles of psychiatrists and psychologists in relation to diagnosis. Further:

> [Hempel J] held that nothing in the definitions or the literature about the functions of psychiatrists and psychologists 'differentiates them on the basis that one has more or less understanding and knowledge of the nature and functioning of the mind in its normal or abnormal state'. … He commented that, '[i]t is, I think, common knowledge and experience that some psychologists have a greater knowledge and qualifications in the science which is concerned with the mental states and processes of the mind than some psychiatrists'. He held that, once the question of medical treatment of mental illness was put to one side, 'there is no reason why a psychologist may not be just as qualified or better qualified than a psychiatrist to express opinions about mental states and processes.[14]

In the Northern Territory Supreme Court, Martin CJ allowed an appeal after holding that the trial judge in a crimes compensation matter had wrongly determined a psychologist's evidence

[8] Freckelton and Selby, *Expert Evidence*, 13A.300, Lawbook Company.
[9] Above
[10] Wood J, *Peisley v The Queen* (1990) 54 A Crim R 42 at 52 (NSW Court of Criminal Appeal.
[11] *Hood v Crimes Compensation Tribunal* (unreported, Victorian AAT, 24 March 1994; *Williams v Crimes Compensation Tribunal* (unreported, Victorian AAT, 29 March 1994)
[12] Freckleton and Selby, above.
[13] *R v Whitbread* (1995) 78 Crim R 452
[14] Freckleton and Selby, above.

about PTSD to be inadmissible.[15] Again, having observed the psychologist to have given extensive evidence of his clinical experience in diagnosing PTSD, Martin CJ did note with caution that there was no contradictory evidence presented to counter the psychologist's assertions on his competence to provide diagnoses of PTSD.

Australian Psychological Society view

The question is unresolved, however, but as Freckleton and Selby do, it is perhaps useful to look the minimum standards expressed by the Australian Psychological Society (APS) for guidance on what to expect from psychological evidence (in this case specifically relating to PTSD). APS Clinical Psychologists[16] are 'qualified through their postgraduate training to assess, diagnose and provide expert opinions on PTSD in clinical, compensation and other medico-legal settings.' A broader guideline for psychologists generally is also provided:

> Other psychologists may or may not have undertaken postgraduate training in clinical psychology. Some may have developed particular expertise in assessing and diagnosing PTSD through specific professional training and their professional experience. Hence, the competence of these psychologists to assess, diagnose, treat and comment upon PTSD needs to be established individually, according to their qualifications, experience and professional training.

Putting the evidence in context - a practical checklist

The following checklist comes at the end of a chapter on psychiatric and psychological evidence from *A Judge's Deskbook on the Basic Philosophies and Methods of Science*.[17] Interestingly in this guide prepared for the benefit of US State Court judges, no real distinction exists between psychological and psychiatric opinion. The argument over whether one opinion is more valid than another on the basis of an expert's professional label is irrelevant - the real value of the expert opinion is, like all evidence, best viewed in context. Asking the following questions of the expert opinion can provide that context:

CRITICAL QUESTIONS REVIEWED

- Was the appropriate test used for a specific individual?
- Is the test being used appropriately for the specific legal issue at hand and can the data obtained be applied properly to the specific subject of that particular legal inquiry?
- Is the expert appropriately certified or licensed within the profession?
- What professional associations does the expert belong to and why?
- To what extent are these professional memberships relevant to the expert's training and expertise?

[15] *Nepi v Northern Territory of Australia* (unreported, Northern Territory Supreme Court, Martic CJ, 2 May 1997)

[16] The Difference between clinical and counselling psychology is described as follows: 'Clinical psychologists have traditionally studied disturbances in mental health, while counselling psychologists' earliest role was to provide vocational guidance and advice. Today, though, the differences between psychologists from each specialty are more nuanced, and there are perhaps more similarities than differences among individual psychologists from each field.' Source: Division 17 - American Psychological Association http://www.div17.org/Students/difference.htm

[17] 1999, State Justice Institute, USA. The State Justice Institute was founded in 1984 to award grants to improve the quality of justice in US State courts, facilitate better coordination between State and Federal courts, and foster innovative, efficient solutions to common problems faced by all courts.

- To what extent are these professional memberships relevant to the issue at hand?
- What is the expert's particular area of expertise?
- Is this area of expertise relevant to the issue at hand?
- Has the expert received any advanced specialised training or education (beyond the degree and licensure requirements) in his field of expertise (e.g., continuing education)?
- What relevant professional experience does the expert have since completing minimum degree, training, and licensure requirements (e.g., clinical experience, research experience)?
- What professional positions has the expert held (e.g., employment history)?
- Has the expert published within the subject about which he intends to testify?
- If the expert has published, what was the nature of those publications (e.g,. subject matter, which journals)?
- To what extent is the expert a recognised authority in his particular speciality?
- Has the expert served as a witness before?
- If yes: On what topic? In what type of cases? In how many cases? For what side?
- Has the expert ever testified to a contrary position in another proceeding?
- Is the clinical information that is being presented based upon an assessment (i.e., identification of risk factors associated with violence) or a prediction?
- What method or approach was used to gather information to make the assessment or prediction?
- What is the reliability and validity of the testimony or opinion?

Administrative Appeals Tribunal

Re Jebb and Repatriation Commission

Jarvis DP

[2005] AATA 470
24 May 2005

Ischaemic heart disease was war-caused - factor that veteran suffering from diabetes mellitus before clinical onset - Commission had earlier accepted that diabetes mellitus was war-caused - whether gives rise to equitable estoppel

Mr Jebb had engaged in operational service in Vietnam from July 1968 to July 1969. In 1999, the Commission accepted his claim for diabetes mellitus, but rejected his claim for ischaemic heart disease (IHD). Mr Jebb lodged a further claim for IHD in 2002, and his claim was rejected by the Commission and on review by the VRB.

Issue before the Tribunal

Mr Jebb's claim for IHD was based on a contention that he was suffering from diabetes mellitus before the clinical onset of IHD, which is one of the factors in the IHD Statement of Principles. The Commission argued that Mr Jebb did not satisfy any of the factors for diabetes mellitus and therefore neither his diabetes mellitus nor his IHD were war-caused. Mr Jebb argued that the Commission was prevented from adopting this argument because they had previously accepted in 1999 that his diabetes mellitus was war-caused.

The Tribunal determined that the claim on foot was separate to the 1999 diabetes mellitus claim, and as such, the Tribunal had the power to determine whether the IHD was or was not war-caused.

Argument before the Tribunal

Mr Jebb's original claim for diabetes mellitus was accepted on the basis that he had handled herbicides in Vietnam for a period greater than six months, thus satisfying one of the factors in the then applicable SoP.

However, the Commission argued that it wished to reconsider the applicability of the relevant factor based on the evidence of an historian's report of September 2004 and information provided by Mr Jebb himself.

Mr Jebb's counsel confined argument to the contention that the Commission ought to be prevented from re-evaluating the acceptance of diabetes mellitus in consideration of the claim relating to IHD. The legal term for the basis of Mr Jebb's argument is 'equitable estoppel'[18].

However the Tribunal held that the claim relating to Mr Jebb's IHD ought to be properly determined anew, with the Commission not being bound by the previous acceptance of his war-caused diabetes mellitus:

> [29] The present matter involves determining Mr Jebb's right to a pension in respect of IHD. It involves

[18] Equitable estoppel is 'an equitable claim that prevents a party from denying the existence of an assumption as to a state of affairs (which assumption the other party has acted upon), in circumstances where the denial would be unconscionable.' Source: 'Introduction to Equity and Trusts', R Mulheron, Lexis Nexis website: http://www.lexisnexis.com.au/aus/academic/text_updater/Equity/equitable_estoppel/default.asp

> determining his right and the Commission's obligation, and it is not a case involving the exercise of a statutory discretion. Accordingly, estoppel cannot operate to permit the decision-maker to determine the matter other than in accordance with the applicable statutory regime. …
>
> [34]. The proposition that estoppel should not apply in the circumstances of the present matter is reinforced by the provision in the VE Act for the RMA to review and update SoPs (see s 196B(7)). An earlier acceptance of a particular condition might be inappropriate if new medical-scientific evidence has become available and has resulted in the making of a new SoP. Such a SoP might have the effect that an hypothesis linking a particular claimed condition with war service would not be consistent with any of the factors in the later SoP, and the veteran might not be able to rely on the earlier SoP under *Gorton*[19], if the earlier SoP has been repealed before the relevant Commission decision.

The SoP for diabetes mellitus had changed since the 1999 decision, but not in a manner that provided any source of distinction between the 1999 claim and the later claim for IHD.

> [35]. There may, of course, be cases where the relevant factor in the SoP extant at the time of the earlier decision is not materially different from the corresponding factor in a later SoP. The present matter appears to be such a case. In these circumstances, no doubt the decision-maker would generally accept the earlier determination that the claimed condition was war-caused. However, in my view the decision-maker would still be obliged to consider this issue, and to do otherwise would be inconsistent with his or her obligations under the Act. If the decision-maker has become aware of relevant new information he or she should not be estopped from considering it, and in appropriate circumstances, making a different determination from the earlier determination.

Further:

> [38]. The fact that the assertion that Mr Jebb's diabetes mellitus is said to be war-caused is a sub-hypothesis of his claim for a different condition, namely IHD, is also relevant in my view. The Commission's previous acceptance that diabetes mellitus was war-caused should not preclude the Commission from examining again the facts relevant to that earlier acceptance of the condition if further claims are brought based upon an hypothesis that diabetes mellitus was war-caused. It is one thing for the Commission to accept the initial claim for that condition, but that acceptance should not of itself prevent the Commission from examining the matter afresh where further claims are made based on that condition which would increase the Commonwealth's liability for pension.

The Tribunal cited *Langley*[20] which noted that 'there is a fundamental difference between the consideration of a fresh claim for a pension in respect of incapacity from an injury or disease that is different from an injury or disease the subject of a prior determination of the Commission.' Further:

> [40] Subject to specific statutory provisions enabling it to do so (see s 31 of the Act) the commission cannot review the earlier determination; but it may consider afresh the facts which underpinned the earlier determination where it is necessary to do so, so that it may discharge its statutory function of determining the later claim. The later determination does not affect any

[19] *Repatriation Commission v Gorton* [2001] FCA 1194, (2001) 33 AAR 370, 65 ALD 609, 110 FCR 321, 17 *VeRBosity* 85

[20] *Langley v Repatriation Commission* (1993) 43 FCR 194, 115 ALR 51, 30 ALD 8, 9 *VeRBosity* 40

entitlement of the veteran arising from the earlier determination.

The Tribunal discussed arguments in favour of granting estoppel, but held against Mr Jebb. In so doing, however, the Tribunal foreshadowed the likelihood of an appeal to the Federal Court on the matter and directed the parties '[59] to adduce such evidence as they may be advised in relation to Mr Jebb's argument that the Commission is estopped from disputing that his diabetes mellitus is war-caused.' Having produced such evidence, the 'Tribunal will then be in a position to make findings of fact in the light of such evidence, and this should enable the Federal Court on any appeal from the Tribunal's decision to decide whether or not estoppel applies.'

Editor: The applicant in this case sought to rely on an accepted condition in a fresh claim for a separate condition which required the accepted condition to be war-caused. Although the applicant foreshadowed an appeal to the Federal Court to review the law in this area, it is currently well settled that the Commission is obliged to look at each claim anew, and if fresh evidence is presented that brings in to doubt the earlier acceptance of a condition, then it must take in to account that new evidence in determining the claim.

Re Dunn and Repatriation Commission

Christie

[2005] AATA 510
2 June 2005

Widows' pension – malignant neoplasm of the prostate – war-caused death – facts associated with the hypothesis necessary to support the hypothesis or which are inconsistent with the hypothesis and proof beyond reasonable doubt – expert evidence: evidentiary weight to attach to mathematical (predictive) models – expert evidence inferences on dietary intake

Mr Dunn had served in the Navy during World War 2 and in Korea. After being diagnosed with prostate cancer in 1994 and despite treatment he died in June 2003. The issue to be decided was whether his death arising from malignant neoplasm of the prostate arose out of or was attributable to or was contributed to in a material degree or aggravated by the particular circumstances of his operational service.

The hypothesis

The hypothesis advanced by the veteran's widow was that Mr Dunn's operational service increased his fat intake which was maintained subsequent to his operational service which led to malignant neoplasm of the prostate eventually causing death.

The relevant SoP was No 84 of 1999 as amended by No 69 of 2002, and both parties agreed the hypothesis advanced by Mrs Dunn was a reasonable one.

The evidence

The Tribunal was provided with witness statements from the late veteran's family and the Commission relied on the evidence of Dr Ruth English who is a nutrition consultant. Dr English reported her expert opinion on the dietary issues of Mr Dunn pre-operational service, during operational service and post-operational service. Her conclusions may be summarised as follows:

Pre-operational service

Dr English concluded that '[15] it was physiologically impossible and beyond any reasonable doubt that Mr Dunn was losing the excessive amount of some 70kg of his body weight every year on his pre-war diet … [and] the only scientific explanation for the large variation between the veteran's pre-service energy intake and his energy requirement was that the pre-service diet return for Mr Dunn was clearly invalid and unacceptable as a record of the veteran's diet before enlistment, as it significantly under-reports his true food intake.' Dr English further observed that Mr Dunn's alleged food intake was at odds with community food patterns as documented in contemporary national household dietary surveys and that it was 'not commensurate' with his height and weight and medical classification of being 'fit for service'.

During operational service

Dr English concluded that the level of animal fat in Mr Dunn's diet during service was actually lower than the average for an adult male civilian during World War 2. In support of this conclusion Dr English noted '[16] the failure of the veteran to gain weight during his service despite the sedentary nature of his occupation in service as an electrician compared to his pre-service occupation as a labourer'.

Post-operational service

Dr English concluded that '[19] Mr Dunn's weight gain after service was not in keeping with the kind of diet that his wife reported that she provided for him'. She opined that the claimed energy level in his diet would have led to an equivalent weight gain of 45 kg per year.

Supplementary evidence

In response to additional information about the eating habits of Mr Dunn, Dr English noted that even if the new information accurately reflected differences from the original contentions on eating habits '[24] these re-estimates did still convincingly show a major under-reporting of the veteran's pre-service diet and an over-reporting of his post-service diet'.

Applicant's submissions

Counsel for Mrs Dunn contended that general survey evidence relied on in Dr English's reports should not be relied upon when specific information provided by Mr Dunn and the evidence of his family was available to the Tribunal. It was further put that reliance on general surveys concerning general levels of consumption '[29] was totally at odds with the other evidence provided by the veteran in respect of his lifestyle, his economic and social circumstances and his own recollection.' It was noted for instance, that Mr Dunn 'came from an underprivileged background in which his diet was severely restricted due to his personal circumstances.'

Respondent's submissions

The Commission urged that Dr English's were based on a sound scientific analysis of the claimed eating habits of Mr Dunn and their projected results.

Further submissions

The Tribunal called for further written submissions concerning the basis and

methodologies employed by Dr English in reaching her conclusions.

The Commission submitted the methodologies employed by Dr English were sound and of academic weight.

Counsel for Mrs Dunn argued that the equation used by Dr English '[61] introduced a high margin for error … [they] should only be used at a group or institutional level - rather than an individual level … [and that] the equation should not be used to analyse a specific individual's energy expenditure.' and further:

> '[63] personal knowledge of an individual should be obtained before applying the … equation to that individual … [and that as] Dr English had no personal knowledge of the late Mr Dunn … it was inappropriate to apply the equation to his individual circumstances.'

Tribunal's consideration

The Tribunal made the following observations before considering the issues before it:

> [68] Dr English has relied on the scientific method of "inference" to provide the basis for her conclusions. The common law of evidence that is relevant in any consideration of the weight to be placed on an inference is contained in the decision of LJ Wright in *Caswell v Powell Duffryn Associated Collieries* 3 (1939) All ER 722 at 733:
>
> > There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But if there are no positive proved facts, from which any inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> [69] Furthermore, Dr English has relied on the Schofield equations [used in mathematical models] for predicting weight change and related dietary aspects for arriving at her conclusions on the dietary fat intake of the late Mr Dunn at different periods of time related to operational service. The common law principle in the decision of Young J in *Lawrence v Kempsey Shire Council* (1995) 87 LGERA 49, is relevant in any consideration of the evidentiary weight to be placed on the predictions used in the mathematical model relied on by Dr English – specifically the predictions arising from the use of the Schofield equations:
>
> > As to the scientist's computer model of how Christmas Creek would behave under certain conditions; unless there is some factual evidence or satisfactory expert opinion evidence to support the assumptions fed into the computer, the result obtained from the computer has no evidentiary value.

After consideration of the material put to the Tribunal by both parties and analysis of the scientific articles concerning employment of the methodologies used, the Tribunal concluded the following:

> [87] [In considering] these conclusion in these scientific articles against the legal principles contained in *Lawrence's case* [the Tribunal] finds that there are limitations associated with the underlying assumptions relied upon by Dr English affecting the accuracy of the predictions as applied to the late Mr Dunn's individual case.

The Tribunal stated as a result that 'little evidentiary weight is to be given to the conclusions of Dr English'. Further:

> [89] The Tribunal findings should not be interpreted as some challenge of the Schofield Equations per se. Rather, the Tribunal's findings reflect the need for scientific conclusions to be consistent with the legal standard. That is, in directly applying a mathematical model derived from the study of large groups to the situation of an individual, the need to ensure that all underlying assumptions for factors that influence the accuracy of the predicted output, for an individual, had been considered

> and incorporated into the structure of the model – where appropriate. The Tribunal concludes that in this application for review this is not the case. The legal principles in *Lawrence's case* cannot be satisfied and, in turn, the 'reasonable hypothesis standard of proof' cannot be satisfied.

The Tribunal then asked whether it was possible to substitute the general community survey data contained in the national household dietary surveys. It accepted the evidence of Mrs Dunn that his pre-service circumstances '[92] were straitened and in all likelihood, … his diet could not be considered to be average.' Further, and applying the principle in *Caswell*:

> [93] In order for the respondent to rely on the 1934 – 1938 survey and so substitute the survey's 'mean' or 'average' value for the late Mr Dunn's own diet survey (and the applicant's family evidence in this regard), some positive proved facts from which an inference can be supported must be made: *Caswell's case*. However, no such positive proved facts can be established by the respondent … The … predictions indicated Mr Dunn would have lost some 70 kg in a year on the dietary intake contained in his completed survey – a weight loss greater than the late Mr Dunn's weight on enlistment. The Tribunal has made a finding that these … predictions have little evidentiary weight and so the respondent's conclusions, in this regard, do not represent an objective or positive, proved fact.

The Tribunal did acknowledge the expert opinion of Dr English that '[95] problems exist with the validity of recall of past food consumption' due to the age, ability to recall, likelihood of errors or omissions and distortion of memory, however it held ultimately that:

> [96]. The consequence of section 119 of the *Veteran's Entitlement Act*, in these factual circumstances, is that evidence cannot be invented – nor is the decision-maker authorised or required to ignore the evidence before it and to decide the case on the basis of quite different evidence: *Mason v Repatriation Commission* [2000] FCA 1409 per Weinberg J. Accordingly, the Tribunal concludes the evidence of pre-service diet cannot be extrapolated from general community survey by the method of inference or by relying on the output of a mathematical model where limitations in the accuracy of the output exist.

Having accepted that the '[98] late Mr Dunn's dietary survey is the best evidence the Tribunal has before it on daily calorific and fat intake during the pre-service period' combined with the unchallenged acceptance of Mr Dunn's operational and post-operational fat consumption, the Tribunal concluded that this '[101] meets the SoP requirement for the 40% increase in fat consumption to be maintained for at least 20 years before the clinical onset of malignant neoplasm of the prostate.'

Decision

The Tribunal set aside the decision under review and substitutes a decision that Mr Dunn's 'malignant neoplasm of the prostate' was war-caused.

Federal Court of Australia

Guy v Repatriation Commission

TamberlinJ
[2005] FCA 562
6 May 2005

Alcohol dependence and/or abuse – whether Tribunal erred in finding that appellant had not experienced a 'severe stressor' – whether Tribunal applied the wrong test in asking whether the appellant had actually suffered intense fear, helplessness or horror

Mr Guy appealed a decision of the Tribunal refusing a disability pension claim in respect of alcohol dependence or alcohol abuse. Mr Guy served in the Navy from November 1950 to May 1957 which included periods of operational service in HMAS *Shoalhaven* in Korean waters from 17 July 1954 to 17 March 1955 and from 21 September 1956 to 12 October 1956 in the Far East Strategic Reserve in HMAS *Melbourne*.

Mr Guy relied on a number of incidents occurring on his operational service to give rise to his alcohol dependence, including one where he was at risk of being electrocuted inside a ship's boiler. He was able to escape from inside the boiler before the power supply was cut off and suffered no physical injury.

The Tribunal had accepted that a hypothesis was raised connecting Mr Guy's operational service with his consumption of alcohol, however it concluded that it was not satisfied that he had experienced a severe stressor as required by the relevant SoP.

On appeal to the Federal Court, counsel for Mr Guy argued that the Tribunal erred in not treating the perception of a threat in the boiler room as being sufficient and instead requiring that there must be an objective actual threat to the appellant's safety or physical integrity. Mr Guy's argument relied on the cases of *Stoddart* (2003) [19 *VeRBosity* 125] and *Woodward* (2003) [19 *VeRBosity* 83], both of which held in summary that the definition of 'severe stressor' '[17] did not require there to be an actual threat judged objectively and with full knowledge of all the circumstances.'

The Court noted that the Tribunal had accepted that the boiler room incident occurred and that such an incident '[18] might evoke intense fear, helplessness or horror.' The Court also observed that the Tribunal had accepted the evidence that Mr Guy 'had perceived that there was a risk of serious injury or death'. Ultimately, however, the Tribunal held that he 'had acted as a reasonable person would react and removed himself from the danger [and …] concluded that the veteran had actually suffered only "an anxious moment" and that, in fact, there was no incident which might evoke the relevant emotions.'

The Court found this reasoning to be '[19] self-contradictory and indicative of an error of law.' Further:

> Once it is accepted that the veteran had perceived that there was a risk of serious injury or death and was confronted with an event which might evoke the relevant feelings, the definition in the SoP was satisfied. The Tribunal, in my view, in reaching its conclusion that the veteran had not experienced a severe stressor because there was only 'an anxious moment' was applying the wrong test. Rather than asking whether the incident was of a type which might, as the Tribunal

found, evoke the relevant emotions, the Tribunal asked whether the incident did evoke these emotions. Hence the reference to the incident being only 'an anxious moment'.

[20] The correct approach to take is to ask whether the event might, or could possibly, evoke the relevant emotions. Despite its initial finding on this question, the Tribunal made a contradictory finding, without any explanation, that there was no severe stressor within the definition in the SoP. This contradictory finding indicates to me that, in applying the definition, the Tribunal must have misdirected itself or misunderstood the definition. In my view, it is not conclusive whether the veteran left the boiler room, thereby removing himself from the danger. The focus is rather on the type and nature of the danger, namely, whether it can be characterised as being capable of evoking the relevant emotions.

In conclusion, the Court found that although the Tribunal had properly considered that an actual objective threat was required (per *Stoddart* and *Woodward*), it erred '[22] … in approaching the question on the basis that the veteran was able to remove himself from the danger and therefore the incident did not evoke the relevant emotions.' The Tribunal found that '[23] (i) the veteran experienced the boiler room incident; (ii) that this was an event that might evoke the degree of emotion required; and (iii) the veteran perceived that there was a risk of serious injury or death. As a result, the Court found that '[24] the veteran has established all the requirements required by the definition of "experiencing a severe stressor".'

Formal decision

The appeal was allowed and in view of the contradictory conclusions, remitted to the Tribunal for re-hearing.

Hardman v Repatriation Commission

Black CJ, French and Gyles JJ
[2005] FCAFC 83
13 May 2005

Claim by veteran that he sustained depressive disorder during operational service in the Navy – where Tribunal rejected hypothesis as not reasonable by impermissible fact finding – error identified at step 3 of Deledio

Mr Hardman had enlisted in the Navy in 1963, and served in HMAS *Parramatta*, along the Malayan and Borneo coasts during the time of the Confrontation between Indonesia and Malaya. He had operational service from 17 August 1964 to 11 August 1966 and claimed to have experienced or seen certain stressful incidents during that period.

As a result of these incidents, Mr Hardman claimed he suffered post-traumatic stress disorder (PTSD) and that this led him to drink excessively and later develop ischaemic heart disease and diabetes mellitus. His claim had been rejected by the Commission, which was affirmed by decisions of the Board and the Tribunal; and a single judge of Federal Court dismissed an appeal. Mr Hardman appealed to the Full Court alleging the primary judge had failed to properly identify an error of law in the Tribunal's decision.

The alleged error was expressed as follows:

[11] Did the Tribunal err in making its findings on the hypothesised clinical onset of depression within 2 years of [Mr Hardman] having his appendectomy at the Cottage hospital

> [one of the claimed stressful incidents occurring on operational service]?'

The ground of appeal alleged that 'the Tribunal erroneously engaged in fact finding and failed to determine whether there were facts raised by the material that pointed to clinical onset within the 2 years required by the SoP.'

The Full Court allowed the appeal, holding that the Tribunal 'impermissibly entered upon fact finding, contrary to established authority.' In other words, the Tribunal had misdirected itself on the proper application of step three of the process laid out in *Deledio*.

Step 3 of the process set out in *Deledio* requires the decision-maker to 'form the opinion whether the hypothesis raised is a reasonable one'. Further:

> It will do so if the hypothesis fits, that is to say, is consistent with the 'template' to be found in the SoP. The hypothesis raised before it must thus contain one or more of the factors which the Authority has determined to be the minimum which must exist, and be related to the person's service (as required by ss 196B(2)(d) and (e)). If the hypothesis does contain these factors, it could neither be said to be contrary to proved or known scientific facts, nor otherwise fanciful. If the hypothesis fails to fit within the template, it will be deemed not to be 'reasonable' and the claim will fail.

The Full Court noted that the Tribunal 'found that the material before it "overwhelmingly" suggested a clinical onset of depression no earlier than 1969 and so more than two years after any relevant stressor'. The Court held that it was not open to the Tribunal at this stage to make any such findings – its job was to determine whether the 'raised facts' of the hypothesis put forward fitted within the template of the SoP. Further:

> [4] In making that finding [the Tribunal] negated the possibility of a reasonable hypothesis upon its view of the weight of the evidence. In so doing the Tribunal erred in law and the primary judge should have so held'.

The Full Court did acknowledge that the Tribunal's application of step 3 of the *Deledio* process put the primary judge in an awkward position. Ultimately, the Full Court held that in finding 'overwhelmingly' that a clinical onset did not occur within the relevant period, the Tribunal erred by not applying those 'raised facts' which did allow the factor in the SoP to be met.

> [26] The critical portions of the Tribunal's reasons are not crystal clear. In particular, the statement that the Tribunal found it difficult to see the raised facts as supporting depression as a disease assailing [Mr Hardman] soon after the alleged stressor is capable of more than one construction. It may have been an indirect way of finding that the raised facts did not, in truth, support the hypothesis at all. If so, that would be an end to the matter. That judgment was a judgment of fact for the Tribunal to make. Disagreement by a court with that finding does not establish error of law. … The Tribunal, on the other hand, may have been saying that the facts referred to were consistent with the hypothesis when considered in isolation but were overwhelmed by countervailing facts and matters and so not reasonable. The primary judge appears to have understood the Tribunal's decision in the latter sense. It should be so read. That accords with the most natural reading of the Tribunal's decision. If the Tribunal had intended to say that the facts relied upon by [Mr Hardman] did not support the hypothesis at all, then it would have been expected to have said so. The Tribunal's finding that the material to which it had referred 'overwhelmingly suggests a clinical onset of depression no earlier than 1969' also indicates that, in its opinion, the material pointed in two directions, although that pointing in one direction overwhelmed the other.

The Full Court summarised how s120(3) operates to raise a hypothesis on the basis of all the material before the decision-maker:

> [32] …It is clear enough that s 120A was enacted to deal with the difficulty inherent in applying s 120(3) following the decisions in *Bushell* and *Byrnes*. ... It correspondingly defined and restricted the area for judgment arising under that provision and so limited the practical operation of it. In most cases the hypothesis will be obvious as will the relation of it to the applicable SoP. There is a risk that the Tribunal's primary role of fact finding can be diverted into convoluted hypothetical reasoning by too mechanical an application of the *Deledio* steps in any given case. Those steps, as such, are not found in the Act. There are many cases in which the Tribunal can proceed to fact finding with little more than a glance at s 120(3). Indeed, in many cases there would be no error of law involved in disposing of a case under s 120(1) without adverting to s 120(3) (Hill at [80] and [85]).

The Full Court noted that there was a '[33] certain air of unreality' about the technical nature of the appeal, particularly given 'the findings which have been made by the Tribunal that are unaffected by error'.

Formal decision

The appeal was allowed and the matter remitted to the Tribunal for re-hearing.

Ryde v Repatriation Commission

Nicholson, Conti & Edmonds JJ
[2005] FCAFC 108
8 June 2005

Veterans' entitlements – appeal – successive claims for war widow's pension – Repatriation Commission, on accepting last claim, cannot backdate payments to date of a previous unsuccessful claim – role of Statements of Principles – successive claims not able to be dealt with as one continuous claim

The point of this appeal from the judgment of Sackville J (*Ryde v Repatriation Commission*[21]) concerned whether a war widow's pension is to be granted on a date no earlier than three months before the date on which the last claim was made; or whether the Commission can grant the pension with effect from a date three months before the claimant made her original (unsuccessful) claim for pension.

Effectively, Mrs Ryde sought to backdate the payment of her pension to the date of her husband's death (in 1991), rather than the date the Commission determined to be 7 February 2001.

The relevant section of the VE Act reads as follows:

> 20(1) Where a claim in accordance with section 14 for a pension is granted, the Commission may, subject to this Act, specify as a date that a determination under subsection 19(3) takes effect in respect of the claim, a date not earlier than 3 months before the date on which the claim for a pension, in accordance

[21] [2004] FCA 1281; 20 *VeRBosity* 134

with a form approved for the purposes of paragraph 14(3)(a) was received at an office of the Department in Australia.

...

(3) Nothing in this section empowers the Commission to specify as a date that a determination of a claim under subsection 19(3) takes effect in respect of a person who has made a claim for a pension under section 14, a date before the date that the person became eligible to be granted the pension.'

Mrs Ryde represented herself before the Full Court and the grounds of her appeal read as follows:

> ... I appeal to be heard by the Federal Court on the grounds that the Statements of Principles (as to the causes of death) had not been given due emphasis during the previous hearings at the Federal Court of NSW (sic).
>
> I request for medical authorities of Australia to be given more emphasis to explain the Statement of Principles, as to the cause of death of the late Raymond George Ryde, RAAF, as service or war related illnesses to give favour for my appeal. This is the main reason why I'm appealing since 1991, 1999 and 2001.

Mrs Ryde argued that had had her claims been handled correctly from the time she lodged her first claim, she should now be entitled to have her pension backdated to three months before the lodgment of the first claim and further that all three of her claims should be treated as one continuous claim, thereby entitling her to backdate the pension.

Mrs Ryde is the widow of Raymond George Ryde ('the veteran') who served in the Royal Australian Air Force from 10 June 1941 to 9 June 1954 as a service policeman. He had commenced a de facto relationship in February 1987. The veteran had previously made a successful claim in respect of an anxiety state.

In August 1987, the veteran claimed a pension for other disabilities, one of which (peripheral vascular disease) was accepted as being war-caused. He died on 7 September 1991, aged 79 years. Mrs Ryde lodged several claims for pension in respect of the veteran's death in 1991, 1999 and 2001.

The 2001 claim succeeded and the VRB and the Tribunal confirmed that the provisions of s 20 of the VEA clearly supported the commencement date of the pension being 7 February 2001.

On appeal to the Federal Court, the Full Court noted that Mrs Ryde had also sought in the alternative to have her pension backdated to 29 August 1995, which was the date when the Repatriation Medical Authority first issued a Statement of Principles concerning cerebrovascular accident (the primary cause of death of the veteran. The Full Court further outlined Sackville J's reasoning, which noted that it was not until the revocation of the 1995 SoP by Instrument No 53 of 1999 that a relevant factor entitling the veteran's death to be characterised as being war-caused was available.

> [21] As his Honour stated, s 196B(3) provides that if the Repatriation Medical Authority is of the view, inter alia, that there is sound medical-scientific evidence indicating that a particular kind of death can be related to eligible war service, it must determine a Statement of Principles in respect of that kind of death.
>
> …
>
> [23] Clause 3 of the Determination stated that on the sound medical-scientific evidence available, the Repatriation Medical Authority was of the view that it is more probable than not that death from cerebrovascular accident can be related to relevant service rendered by veterans. Clause 4 provided that at least one of the factors set out in cl 5 had to be related to the

veteran's war service. Clause 5 relevantly provided as follows:

> 'The factors that must exist before it can be said that, on the balance of probabilities, cerebrovascular accident or death from cerebrovascular accident is connected with the circumstances of a person's relevant service are:
>
> ...
>
> (d) an inability to undertake more than a mildly strenuous level of physical activity for at least the seven years immediately before the clinical onset of cerebrovascular accident; or
>
> ...'

This factor was set out in his Honour's reasons. That was the reason why the delegate accepted that the appellant was eligible for the widow's pension. It was not because of the evidence relied on by the appellant in her second claim. It is clear that in dealing with the Statement of Principles, his Honour fully took into account its effect. Furthermore, and with reference to the grounds of 'appeal', he was bound to take into account the Determination as it was made and not to receive medical evidence to explain the Statement of Principles.

In relation to the Mrs Ryde's contention that all three of her claims be regarded as a single claim, the Full Court noted s 14 of the Act and observed '[24] the principle that each claim is entirely separate at law from claims made before or after it', and that 'a claim cannot be made until a predecessor claim has been 'finally determined'.

> [25] These provisions answer the appellant's oral submissions. Her success of the third claim can only be treated under the VE Act as a separate claim. It cannot be treated as part of a continuity of claims. As Sackville J stated in his reasons at [46], the structure of the VE Act is very difficult (we would say impossible) to reconcile with the proposition, inherent in the appellant's submissions, that a claim made after the final determination of an earlier claim somehow revives or constitutes part of the first claim.

The Full Court therefore found no error in the reasoning of Sackville J and dismissed the appeal.

Costs

The Commission sought costs against Mrs Ryde, despite no such order being sought against the primary judge. The Commission drew attention to the AAT decision of *Ryde v Secretary, Department of Family and Community Services* [2005] AATA 130, where it was revealed in evidence that Mrs Ryde was the owner of a home in the Philippines valued in 1992 at approximately $680,000.

> [30] The usual rule is that costs follow the event. Given that the appellant holds assets, even though a pension recipient, we cannot in the circumstances see any proper discretionary ground to vary the usual rule. The appellant chose to not abide by the judgment of the primary judge but rather to put herself at risk as to costs by bringing the appeal. Although she is unrepresented, that alone is not a proper basis to vary the usual rule. Accordingly we consider costs should follow the event and the appellant be ordered to pay the costs of her unsuccessful appeal.

Giesen v Repatriation Commission

Gray J
[2005] FCA 846
24 June 2005

Whether special rate appropriate – test to be applied – whether 'alone' test or 'substantial cause' test – whether veteran who has engaged in remunerative work, but has ceased, can rely on latter test – whether ameliorating provision – whether tribunal took into account irrelevant considerations, asked itself correct question, dealt with correct issues, correctly applied statutory provisions and gave adequate reasons

Mr Giesen had rendered operational service with the Army in Vietnam from 24 October 1967 until 24 November 1967. He has been in receipt of a pension for some time as a result of the following disabilities: generalised anxiety disorder, psychoactive substance abuse or dependence, chronic solar skin damage, colorectal adenomatous polyp, gastro-oesophageal reflux disease, hypertension, irritable bowel syndrome, impotence, neurodermatitis and cerebral ischaemia. The following other conditions have not been accepted by the Commission as being war-caused: mitral stenosis, lumbar-sacral spondylosis, rheumatic heart disease, atrial fibrillation, benign prostatic hypertrophy, left ventricular dysfunction, chronic airflow limitation, obesity and post-traumatic stress disorder ('PTSD').

Mr Giesen had applied for an increase in pension along with a claim for pension entitlement for PTSD. The claim was successively rejected by the Commission, the VRB and the Tribunal

The Tribunal heard that after leaving the army, Mr Giesen returned to his trade as a boilermaker/welder. He had stopped working in 1980 due to a heart condition, but returned to part-time work with a metal recycling business in 1996. He left that employment initially in 1999 after continuing problems with binge drinking. He then worked five hours per week with an ex-serviceman's employment group, but ceased because his gastro-oesophageal reflux problems kept him awake at night and he could not cope with the work. He returned to the metal recycling business from 2000 to 2001, working 10 hours per week, but has not worked since April or May 2001.

Mr Giesen claimed that his gastro-oesophageal reflux disease, alcohol dependency, generalised anxiety disorder and irritable bowel syndrome prevented him from working more than eight hours per week. He claimed that he could cope with neck, heart, back, knee and shoulder pain for a few hours at a time, but the remaining conditions prevented him from working.

The Tribunal's reasoning included the following paragraph:

> [14] The Tribunal accepts that the applicant's physical problems, including non-accepted disabilities, may have aggravated his psychiatric problems. However, the clear weight of medical evidence is that the applicant's non-accepted conditions, together with the accepted conditions, have played a major role in preventing the applicant from working more than eight hours per week.

Case on appeal

Mr Giesen argued on appeal that the Tribunal had failed to apply the provisions of s 24 correctly. In particular, it was submitted that the Tribunal had not addressed s 24(1)(c) before proceeding

to deal with the ameliorating provision of s 24(2)(b).

Concerns over whether the correct test was applied

Gray J expressed some concerns he had with the Tribunal's failure to deal with the question posed in s 24(1)(c). Neither of the parties appeared too concerned with the failure, however Gray J digressed for some length on his view of what the proper test in the case should have been.

> [19] In the course of the hearing of the appeal, I expressed doubt as to whether the Tribunal ought to have had regard to s 24(2)(b) of the VE Act at all. It seemed to me that this was a case in which the applicant had been undertaking remunerative work. It therefore appeared to me that the correct question was whether, for the purposes of s 24(1)(c), it was his accepted war-caused conditions alone that prevented him from continuing to undertake that work. It seemed to me that s 24(2)(b) was designed to deal with a different case, namely the case of a veteran who had not attained the age of 65 and had not been engaged in remunerative work at all. In such a case, the veteran could take the benefit of a more lenient test, by showing that, but for the war-caused incapacity, he or she would be continuing to seek to engage in remunerative work, and that the incapacity was the substantial cause of the inability to obtain remunerative work.

As the Commission had conceded that the veteran was able to argue the case on the ameliorating 'substantial cause' test of s 24(2)(b) rather than the stricter 'alone' test in s 24(1)(c), Gray J was not in a position to hold the Tribunal had erred in applying the wrong test.

> [26] If I were to adopt my view, it would follow that the Tribunal in the present case had not considered the application of the correct test. In the course of its reasons, the Tribunal made no attempt to determine whether the applicant was prevented by his war-caused incapacity from continuing to undertake remunerative work that he was undertaking. The question would arise whether I should set aside the decision of the Tribunal and return the matter to the Tribunal to be determined on the proper test. The answer to that question might depend upon whether I should take the view that, having failed the more lenient test, the applicant would necessarily have failed the stricter one. The difficulty is that the tests are to be applied, in effect, at two different dates. The fact that the veteran might have failed the 'substantial cause' test at a later date does not necessarily mean that he must have failed the 'alone' test, when applied to his earlier cessation of remunerative work.
>
> [27] I am prepared not to apply my own view, however, because of the unanimity of the parties that it is not the correct view. In the light of the submissions that have been made, for the purposes of this proceeding, I should accept the concession of the Commission that it was open to the applicant to take the benefit of the more lenient test in s 24(2)(b) if the Tribunal had determined that his circumstances met that test. Purely because of this concession, I propose to confine my examination of the grounds of appeal to those put forward on behalf of the applicant, on the assumption that it was open to the Tribunal to apply the test in s 24(2)(b) of the VE Act.

The Tribunal's approach

Notwithstanding Gray J's theoretical excursion, he nevertheless found no fault with the Tribunal's reasoning.

> [29] The Tribunal understood perfectly well what its task was in applying s 24(2)(b). It asked itself the correct question, and answered it, when it found that the clear weight of medical evidence was that the applicant's non-accepted conditions, together with the accepted conditions, played a major

> role in preventing him from working more than eight hours per week. The Tribunal specifically rejected the submission that it was the applicant's mental state that prevented him from being able to obtain remunerative work. It specifically found that the war-caused disabilities were not the substantial cause of the applicant's inability to obtain remunerative work. The Tribunal did differentiate between the effect of non-accepted conditions and accepted conditions.

Gray J further held the Tribunal had dealt with the diverse medical evidence in a manner that enabled it to reconcile the differing views, nor did the Tribunal ignore s 119 of the Act. The reasons of the Tribunal, while brief, were also held to be '[33] not so brief as to cause the Tribunal to have failed to comply with its statutory obligation to set out its reasons.' Although Gray J did note that the Tribunal made no specific finding as to whether Mr Giesen was genuinely seeking to engage in remunerative work, and may well have erred in that regard, 'the error operated in favour of the applicant, and would not be a reason for setting aside the Tribunal's decision.'

Conclusion

The appeal was dismissed, and Mr Giesen was ordered to pay the Commission's costs.

Editorial comment: The judgment in this case is difficult to reconcile with other established case law. Gray J suggests that s 24(2)(b) applies only if the person had never worked after leaving the Australian Defence Force (ADF). A practical difficulty with His Honour's interpretation is that if service in the ADF is not to be regarded as 'remunerative work' for the purposes of s 24(1)(c) and if the purpose of s 24(2)(b) is to provide a means by which someone who had sought work but never actually worked after leaving the ADF might succeed, then that would mean that a person who was so severely injured in the ADF that they never sought work because to do so would be futile could never succeed. That cannot have been intended. The better interpretation, and apparently the one favoured by the Commission and presumably the applicant, is that the phrase 'has not been engaged' in s 24(2)(b) is concerned with the period within the assessment period since the person last worked.

Further, at paragraph [23] Gray J stated that the 'alone' test in s 24(1)(c) 'focuses on the last remunerative work that a veteran was undertaking'. That appears contrary to the Full Court judgment in *Starcevich*[22]. Then at paragraph [26] His Honour stated that the tests in s 24(1)(c) and s 24(2)(b) are to be applied at two different dates. That does not accord with the Full Court judgments in *Banovich*[23] and *Smith*[24] in which it was held that all the tests must be met at the same point in time on or after the application day.

It is respectfully proposed that this judgment should be read with some caution. Thus when the Court said that the Tribunal correctly applied the law when it stated, 'that the applicant's non-accepted conditions, together with the accepted conditions, played a major role in preventing him from working more than eight hours per week', it should not be read as indicating that the 8 hour test in s 24(1)(b) is part of the test in s 24(2)(b). Instead, it should be read merely as indicating that it was open to the

[22] *Starcevich v Repatriation Commission* (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296, 3 *VeRBosity* 163
[23] *Banovich v Repatriation Commission* (1986) 69 ALR 395, 6 AAR 122, 2 *VeRBosity* 112
[24] *Repatriation Commission v Smith* (1987) 15 FCR 327, 74 ALR 537, 3 *VeRBosity* 129

Tribunal to make the finding of fact that the applicant's non war-caused disabilities played a major role in preventing him from obtaining any substantial remunerative work, and so the 'substantial cause' test could not be met. To read any more into the judgment than that, might tend to lead one astray.

Repatriation Commission v Codd

Ryan J

[2005] FCA 888
30 June 2005

Widow's pension claim – veteran killed at level crossing in 1968 - whether death war-caused - various hypotheses claimed

The veteran had served in the Army during World War 2 between 1942 and 1946. Part of his service involved stretcher-bearing duties in New Guinea. In December 1968 the veteran was killed when a train at a level crossing in country Victoria struck a timber truck which he was driving. The coroner's inquest suggested the veteran's view of the approaching train had been impaired or blocked by the rising sun, and the veteran's blood alcohol level was the equivalent of having consumed one seven-ounce glass of beer.

Mrs Codd, the veteran's widow, lodged a claim that advanced several hypotheses before the Tribunal connecting the veteran's death with his service. These are outlined as follows:

> [4]• Anxiety – the service of the deceased had caused the veteran to develop an anxiety condition which contributed to impairment of concentration, lack of sleep, nightmares and restlessness all of which contributed to the collision.
>
> • Alcohol consumption – as a consequence of his service, the veteran consumed alcohol excessively which in turn led to an impairment of concentration contributing to the collision.
>
> • Aggravation of nystagmus – the deceased suffered from nystagmus and jerky movements of his head which were aggravated by anxiety, and the nystagmus and head jerking contributed to the fatal collision.
>
> • The combination of anxiety, alcohol and nystagmus – as a result of service, the veteran had commenced to consume alcohol excessively by way of self medicating; the nystagmus and jerking of his head had been aggravated by anxiety; and the combined effects of alcohol consumption, aggravation of nystagmus and head jerking had resulted in impaired concentration which contributed to the fatal collision.
>
> • Hypertension – hypertension (accepted as war-caused) caused the deceased to suffer from light-headedness, and these features, together with impairment of concentration (said to arise out of being light headed) contributed to the fatal collision.

The Tribunal received evidence concerning the veteran's mental health at the time of the accident that caused his death and found on the balance of probabilities that the veteran had suffered Generalised Anxiety Disorder (GAD) within the meaning of Statement of Principles No 1 of 2000. Although the Commission did not concede the veteran to have in fact experienced a severe psychological stressor it did admit that he might have given the nature of his duties as a stretcher-bearer.

The Tribunal then laid out the process for determining whether the hypothesis raised connecting the veteran's service with his death was reasonable (the Deledio steps). At step three of the

process, the Tribunal held that '[25] it could not be said that the hypothesis is "fanciful, impossible, incredible or not tenable or too remote or too tenuous (refer *East v Repatriation Commission*[25])" and that it was 'a hypothesis which is reasonable because it advances something more than mere possibility.'

Commission's argument

The Commission submitted that the Tribunal erred in determining that the material before it was capable of supporting a finding that the veteran was suffering from GAD at the time of his death. None of the medical evidence had made such a diagnosis, and the closest any such reports came to determining a diagnosis was an opinion that the symptoms as described by the veteran's wife were 'suggestive of PTSD or GAD'.

The Commission also argued that the Tribunal had erred by accepting medical evidence of GAD without having regard to the description of that disorder as set out in the SoP (or in DSM-IV). It also contended there was no evidence to enable the Tribunal to find on the balance of probabilities that the minimum number of the diagnostic features or symptoms required by the SoP were present in the veteran.

Arguing the point of whether a diagnosis of GAD was properly made, the Commission noted that the medical evidence was equally capable of supporting a diagnosis of PTSD, thus agitating an element of doubt over whether in fact a correct diagnosis was made. It was also submitted that the Tribunal had erred by relying on the Commission's acceptance that there was material that pointed to the veteran having experienced a severe psychosocial stressor to base its finding that the veteran was suffering from GAD at the time of his death. In relation to GAD, the experiencing of a stressor is not relevant to diagnosis, as it is not a feature or a symptom, unlike PTSD that requires such an exposure as a primary feature of the condition.

Respondent's argument

Counsel for Mrs Codd submitted that the Tribunal was able to make a finding that the veteran suffered GAD on the evidence it had before it. It was further argued, and in reliance on *Gosewinkel*[26] that '[43] it was implicit in the evidence before the Tribunal that the veteran met each of the requisite criteria for GAD.'

The respondent also argued that the Tribunal had determined that as a factor of the GAD SoP had been satisfied that was sufficient to ground the widow's claim. It was further argued in the alternative that 'as long as there is in the material some basis of support for the Tribunal's findings, no error of law can be imputed to the Tribunal'[27] and nor could an error of law lie by the Tribunal simply making a wrong finding of fact[28].

Reasoning

The Court accepted the Commission's submission that the Tribunal had erred in concluding to its reasonable satisfaction on the basis of the medical evidence '[46] that a hypothesis had been pointed to in relation to the veteran that he had a collection of symptoms corresponding to GAD.' Ryan J held that he did not consider 'that an inference to that effect was reasonably open to the Tribunal on the material before it … [n]or was it implicit in the evidence, as it was held to be in *Gosewinckel*, that the veteran had manifested at least the minimum

[25] *East v Repatriation Commission* (1987) 165 CLR 663, 3 *VeRBosity* 167

[26] *Repatriation Commission v Gosewinkel* (1999) 59 ALD 690, 15 *VeRBosity* 73

[27] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356

[28] *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J

collection of symptoms constituting GAD'. Further:

> [47] Without attempting to exhaust the collection of symptoms of GAD of which there was no evidence, it is sufficient to indicate that the material did not afford a basis for concluding that, at the time of his death, the veteran was experiencing excessive anxiety and worry in the sense of apprehensive expectation as required by par A of cl 8 of the SoP. Mrs Codd's evidence tended rather to suggest anxiety about past events which led the veteran to drink to excess because 'he wanted to forget things' or because he was 'ashamed'. The evidence was sufficient to indicate at least symptoms (1), (4) and (6) of those enumerated in par C of cl 8 of the SoP but it did not suggest, as required by that paragraph that those symptoms were associated with the anxiety and worry (about a future event) mandated by par A of that clause. Nor did the evidence indicate that at least some of the three symptoms which I have just identified were present for more days than not during the six months preceding the veteran's death. As well as failure to indicate that the veteran suffered from anxiety or worry of the requisite kind, the evidence was not capable of excluding his symptoms from having occurred solely during PTSD as required by par D of cl 8 of the SoP.

Ryan J noted that the Tribunal may have been led into error by the authority from *Benjamin*[29] that the 'the issue of diagnosis is not to be determined pursuant to the SoP'. However, as Ryan J continued, the principle from *Benjamin* makes it clear that:

> [48] …the Tribunal was required to decide to its reasonable satisfaction that a veteran was suffering from a particular injury or disease. In this case, GAD was one of several injuries or diseases postulated on behalf of the veteran's widow. Once a postulation of that kind occurs, it is necessary for the decision-maker to have regard to the definition of the injury or disease in the applicable SoP. That is not to say that the evidence, whether of medical experts or lay observers, has to use the nomenclature which is to be found in the SoP, or, even, that it has to advert to a particular SoP among several conceivably available.

A further error identified by Ryan J concerned the Tribunal's failure to properly consider whether the hypothesis raised by Mrs Codd was reasonable, particularly concerning the clinical onset requirement.

> [49] In particular, it is impossible to discern from the evidence relied on by the Tribunal how one of the factors set out in cl 5 of the SoP must have been related to any relevant service rendered by the veteran. Because of the concession on behalf of the applicant that the veteran may have suffered a severe psychological stressor between January and August 1945, the Tribunal appears to have assumed that factor (a)(ii) of cl 5 of the SoP existed. However, that factor required the clinical onset of anxiety disorder not later than two years after the veteran experienced the severe psychological stressor. In this case that must have been not later than August 1947. The absence of any evidence at all of relevant symptoms before 1950 signifies a separate and additional error of law by the Tribunal.

The appeal was allowed and the matter remitted to the Tribunal to determine in accordance with the law.

Editorial comment: The judgment in this case serves to clearly distinguish the reasonable satisfaction standard of proof in the determination of a proper diagnosis from the beyond

[29] *Benjamin v Repatriation Commission* [2001] FCA 1879, (2001) 34 AAR 270, 70 ALD 622, 17 *VeRBosity* 119

reasonable doubt standard employed in determining whether a hypothesis is reasonable.

Viewed objectively, and employing the term 'reasonable hypothesis', it does not seem too fanciful that the veteran's anxiety disorder contributed to the veteran's lack of concentration which precipitated the collision with the train. Prior to the determination of the reasonableness or otherwise of such a hypothesis, however, is the requirement that the decision-maker determine to its reasonable satisfaction that the veteran is or was suffering from a particular disability that was said to have contributed to his death (the 'kind of death'). In this case Ryan J makes clear that the Tribunal tended to incorporate the making of a diagnosis into the hypothesis.

Mere hypothesis that a veteran may or may not have or have had a particular condition at any time is clearly not to be determined by reference to the conjecture and language of possibility etched in medical reports. It must be determined on the basis of sound and conclusive medical evidence.

Statements of Principles issued by the Repatriation Medical Authority

April – June 2005

Number of Instrument	Description of Instrument
11 of 2005	Revocation of Statement of Principles (Instrument No 52 of 2002) and determination of Statement of Principles concerning **gastro-oesophageal reflux disease** and death from gastro-oesophageal reflux disease.
12 of 2005	Revocation of Statement of Principles (Instrument No 53 of 2002) and determination of Statement of Principles concerning **gastro-oesophageal reflux disease** and death from gastro-oesophageal reflux disease.
13 of 2005	Revocation of Statement of Principles (Instrument No 39 of 1997) and determination of Statement of Principles concerning **sleep apnoea** and death from sleep apnoea.
14 of 2005	Revocation of Statement of Principles (Instrument No 40 of 1997) and determination of Statement of Principles concerning **sleep apnoea** and death from sleep apnoea.
15 of 2005	Determination of Statement of Principles concerning **dermatomyositis** and death from dermatomyositis.
16 of 2005	Determination of Statement of Principles concerning **dermatomyositis** and death from dermatomyositis.
17 of 2005	Revocation of Statement of Principles (Instrument Nos. 97 of 1996 and 16 of 2002) concerning **impotence** and determination of Statement of Principles concerning **erectile dysfunction** and death from erectile dysfunction.
18 of 2005	Revocation of Statement of Principles (Instrument Nos. 98 of 1996 and 17 of 2002) concerning **impotence** and determination of Statement of Principles concerning **erectile dysfunction** and death from erectile dysfunction.
19 of 2005	Revocation of Statement of Principles (Instrument No. 113 of 1996) concerning **malignant neoplasm of the oral cavity or hypopharynx**; and determination of Statement of Principles concerning **malignant neoplasm of the oral cavity, oropharynx and hypopharynx** and death from malignant neoplasm of the oral cavity, oropharynx and hypopharynx.
20 of 2005	Revocation of Statement of Principles (Instrument No. 114 of 1996) concerning **malignant neoplasm of the oral cavity or hypopharynx**; and determination of Statement of Principles concerning **malignant neoplasm of the oral cavity, oropharynx and hypopharynx** and death from malignant neoplasm of the oral cavity, oropharynx and hypopharynx.

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 30 June 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
Albinism	[*Instrument Nos. 49/95 & 50/95*]	15-06-05
Alkaptonuria	[*Instrument Nos. 13/95 & 14/95 as amended by 188/95 & 189/95*]	15-06-05
Alpha-1 antitrypsin deficiency	[*Instrument Nos. 19/95 and 20/95*]	15-06-05
Ankylosing Spondylitis	[*Instrument Nos. 261/95 and 262/95*]	04-05-05
Anxiety disorder	[*Instrument Nos. 1/00 & 2/00*]	1-09-04
Asbestosis	[*Instrument Nos 138/96 & 139/96*]	16-04-03
Binge eating disorder	—	15-06-05
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
Cataract, congenital	[*Instrument Nos 237/95 & 238/95 as amended by 12/03 & 13/03*]	15-06-05
Cerebrovascular accident	[*Instrument Nos 30/02 & 31/02 as amended by 57/03 & 58/03*]	15-06-05
Cervical spondylosis	[*Instrument Nos 50/02 & 51/02 as amended by 64/02, 81/02 & 82/02*]	25-02-04
Charcot-Marie-Tooth disease	[*Instrument Nos 51/95 & 52/95*]	15-06-05
Chicken pox	[*Instrument Nos 58/94 and 59/94 of 1994, as amended by Instrument Nos. 186/95 and 187/95)*	15-06-05
Depressive disorder	[*Instrument Nos. 58/98 & 59/98*]	1-09-04
Dental caries	[*Instrument Nos. 366/95 & 367/95*]	1-09-04
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
Gaucher's disease	[*Instrument Nos. 21/95 & 22/95*]	15-06-05
Haemophilia	[*Instrument Nos. 53/95 & 54/95 as amended by 215/95 & 216/95*]	15-06-05
Hallux valgus, acquired	[*Instrument Nos. 47/98 & 48/98*]	15-06-05

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Hallux valgus, congenital	[*Instrument Nos. 300/95 & 301/95*]	15-06-05
Heart block (complete)	—	15-06-05
Hepatitis A	[*Instrument Nos 41/94 & 42/94*]	15-06-05
Hepatitis E	[*Instrument Nos 46/94 & 47/94*]	15-06-05
Hereditary spherocytosis	[*Instrument Nos 57/95 & 58/95*]	15-06-05
Herpes zoster	[*Instrument Nos 60/94 & 61/94*]	15-06-05
Horseshoe kidney	[*Instrument Nos 17/95 & 18/95*]	15-06-05
Huntington's chorea	[*Instrument Nos 107/95 & 108/95*]	15-06-05
Idiopathic fibrosing alveolitis	[*Instrument Nos 15/98 & 16/98*]	15-06-05
Intervertebral disc prolapse	[*Instrument Nos 130/96 & 131/96 as amended by 92/97 & 93/97*]	23-06-04
Ischaemic heart disease	[*Instrument Nos 53/03 & 54/03 as amended by 9/04 & 10/04*]]	15-06-05
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
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
Marfan syndrome	[*Instrument Nos 9/95 & 10/95*]	15-06-05
Meniere’s disease	[*Instrument Nos 77/01 & 78/01*]	5-05-04
Motor neuron disease	[*Instrument Nos 65/01 & 66/01*]	5-05-04
Multiple osteochondromatosis	[*Instrument Nos 1/99 & 2/99*]	15-06-05
Myasthenia gravis	[*Instrument Nos 263/95 & 264/95*]	15-06-05
Myelodysplastic disorder	[*Instrument Nos 15/00 & 16/00*]	20-08-03
Myopia, hypermetropia and astigmatism	[*Instrument Nos 23/99 & 24/99*]	15-06-05
Narcolepsy	—	28-01-04
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Osteogenesis imperfecta	[*Instrument Nos. 11/95 & 12/95*]	15-06-05
Osteoporosis	[*Instrument Nos. 67/02 & 68/02 as amended by 25/04*]	1-09-04
Paget's disease of bone	[*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
Polycystic kidney disease	[*Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99*]	1-09-04
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
Soft tissue sarcoma	[*Instrument Nos 23/01 & 24/01*]	20-08-03
Spina bifida	[*Instrument Nos 59/95 & 60/95*]	15-06-05
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
Vascular dementia	—	13-04-05
Von Willebrand's disease	[*Instrument Nos. 61/95 & 62/95*]	15-06-05
Wilson's disease	[*Instrument Nos. 15/95 & 16/95*]	15-06-05

AAT and Court decisions – April to June 2005

AATA = Administrative Appeals Tribunal
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court

Carcinoma

multiple myeloma
- inability to obtain appropriate clinical management
  Monk, R P (Army)
  [2005] AATA 335 15 Apr 2005

malignant neoplasm of the colon
- alcohol
  Sparks, A (Navy)
  [2005] AATA 319 11 Apr 2005

Circulatory disorder

atrial fibrillation
- alcohol
  Sparks, A (Navy)
  [2005] AATA 319 11 Apr 2005

hypertension
- alcohol
  Ewings, C (Navy)
  [2005] AATA 315 8 Apr 2005
  Sparks, A (Navy)
  [2005] AATA 319 11 Apr 2005
  Jensen, I B (Navy)
  [2005] AATA 474 26 May 2005
- anxiety disorder
  Sparks, A (Navy)
  [2005] AATA 319 11 Apr 2005
- smoking
  Ewings, C (Navy)
  [2005] AATA 315 8 Apr 2005
  Jensen, I B (Navy)
  [2005] AATA 474 26 May 2005

ischaemic heart disease
- hypertension
  Ewings, C (Navy)
  [2005] AATA 315 8 Apr 2005
- smoking
  Lyons, H L (RAAF)
  [2005] AATA 471 25 May 2005
  Jensen, I B (Navy)
  [2005] AATA 474 26 May 2005
  Cunningham, G R D (CMF)
  [2005] AATA 483 27 May 2005

Date of effect

widow's pension
- further claim successful
  -unable to backdate to earlier date
  Ryde, E P (Nicholson, Conti & Edmonds JJ)
  [2005] FCAFC 108 8 June 2005

Death

car accident
- anxiety related lack of concentration
  Codd (Army) (Ryan J)
  [2005] FCA 888 30 June 2005

carcinoma
- prostate cancer
  -high fat diet
  Dunn, D E (Navy)
  [2005] AATA 510 2 June 2005

ischaemic heart disease
- hypertension
  - anxiety disorder
  Porter, P (RAAF)
  [2005] AATA 537 8 June 2005
  - high salt intake
  Porter, P (RAAF)
  [2005] AATA 537 8 June 2005
- smoking
  Cornish, M A (CMF)
  [2005] AATA 472 24 May 2005

malignant neoplasm of the colorectum
-altered diet
  Martin, J (Navy)
  [2005] AATA 556 10 June 2005
-obesity
  Martin, J (Navy)
  [2005] AATA 556 10 June 2005
-pigeon fancier's lung diease
  Martin, J (Navy)
  [2005] AATA 556 10 June 2005

malignant neoplasm of the prostate
-high fat diet
  Dunn, D E (Navy)
  [2005] AATA 510 2 June 2005

Dental disorder

bruxism (teeth grinding)
- psychiatric condition
  Donnelly, G J (Navy)
  [2005] AATA 621 29 June 2005

Endocrine and metabolic disorders

diabetes mellitus
- alcohol
  Jensen, I B (Navy)
  [2005] AATA 474 26 May 2005
- smoking
  Jensen, I B (Navy)
  [2005] AATA 474 26 May 2005

Entitlement and liability

Statements of Principles
- whether accrued rights
  Jebb, J W (Army)
  [2005] AATA 470 24 May 2005
- whether estoppel applies
  Jebb, J W (Army)
  [2005] AATA 470 24 May 2005

Evidence and Proof

application of the *Deledio* steps
- no fact finding at step three
  Hardman (Navy)
  Black CJ, French and Gyles JJ
  [2005] FCAFC 83 13 May 2005

credibility
- inconsistent account of events
  Shields, B W (Navy)
  [2005] AATA 591 21 June 2005

insufficient
  Humphreys, J B (Army)
  [2005] AATA 610 29 June 2005

Extreme disablement adjustment

Impairment rating
  Walsh, D J (Army)
  [2005] AATA 288 5 Apr 2005

Lifestyle rating
  Walsh, D J (Army)
  [2005] AATA 288 5 Apr 2005

Gastrointestinal disorder

haemorrhoids
- diarrhoea
  Cormack, N J
  [2005] AATA 351 20 Apr 2005

gastro-oesophageal reflux disease
- cigarette smoking
  Lyons, H L (RAAF)
  [2005] AATA 471 25 May 2005
  Hourigan, M
  [2005] AATA 547 9 June 2005

peptic ulcer
- ulcerative oesophagitis
  Finger, L L J (Army)
  [2005] AATA 400 4May 2005

Genitourinary disorder

impotence
- anxiety disorder
  Willson, J (Navy)
  [2005] AATA 431 13 May 2005

Historical Material

Navy
HMAS Quickmatch
- riots in Penang January 1957
  Gibbs, R O (Navy)
  [2005] AATA 516 3 June 2005

HMAS *Vampire* May 1969
- assault on Vietnamese man in Vung Tau harbour
  Donnelly, G J (Navy)
  [2005] AATA 621 29 June 2005

HMAS *Vendetta* 1965 - 1966
- interception of sampan
  Farmer, K J (Navy)
  [2005] AATA 605 27 June 2005

HMAS *Yarra* February 1971
- action stations
  Donnelly, G J (Navy)
  [2005] AATA 621 29 June 2005

Musculoskeletal disorder

chondromalacia patellae
- injury to knee
  Edwards, V S (RAAF)
  [2005] AATA 624 29 June 2005

osteoarthritis
- trauma to wrists
  Humphreys, J B (Army)
  [2005] AATA 610 29 June 2005

Practice and Procedure

Administrative Appeals Tribunal
- extension of time
  Beh
  [2005] AATA 284 4 Apr 2005

Estoppel
- whether estoppel applies
Jebb, J W (Army)
[2005] AATA 470 24 May 2005

Extension of time
- prospects of success
Beh
[2005] AATA 284 4 Apr 2005

Psychiatric disorder

alcohol abuse
- aggravation
Newlands, A (Navy)
[2005] AATA 413 9 May 2005
- clinical onset
Collier, T (Navy)
[2005] AATA 295 6 Apr 2005
- diagnosis
Finney, R J (Army)
[2005] AATA 619 29 June 2005
- psychiatric disorder
Jensen, R (Army)
[2005] AATA 392 4 May 2005
McKlaren, RJ (RAAF)
[2005] AATA 448 19 May 2005
Delaforce, K (Navy)
[2005] AATA 455 19 May 2005
Allan, M (Army)
[2005] AATA 526 6 June 2005
Starcevich, G E (Navy)
[2005] AATA 629 30 June 2005
- stressor
- dropping cordite shell on deck
Cannon, R J (Navy)
[2005] AATA 428 12 May 2005
- hospitalised beside dead motorcyclist
Hourigan, M
[2005] AATA 547 9 June 2005
- incident on the gun line HMAS *Brisbane*
Collier, T (Navy)
[2005] AATA 295 6 Apr 2005
- involved in civilian riots
Gibbs, R O (Navy)
[2005] AATA 516 3 June 2005
- maintenance of inadequate artillery
Finney, R J (Army)
[2005] AATA 619 29 June 2005
- perimeter patrol
Jensen, R (Army)
[2005] AATA 392 4 May 2005
- scare charge
Cannon, R J (Navy)
[2005] AATA 428 12 May 2005
- shot at
Gibbs, R O (Navy)
[2005] AATA 516 3 June 2005
- witnessing injury of fellow sailor
Newlands, A (Navy)
[2005] AATA 413 9 May 2005

anxiety disorder
- clinical onset
- evidence of
Codd (Army) (Ryan J)
[2005] FCA 888 30 June 2005
- within two years
Collier, T (Navy)
[2005] AATA 295 6 Apr 2005
Willson, J (Navy)
[2005] AATA 431 13 May 2005
Morgan, J (Navy)
[2005] AATA 458 20 May 2005
Allan, M (Army)
[2005] AATA 526 6 June 2005
Wakefield, W E (Navy)
[2005] AATA 593 17 June 2005
- diagnosis
Collier, T (Navy)
[2005] AATA 295 6 Apr 2005
Sparks, A (Navy)
[2005] AATA 319 11 Apr 2005
Jensen, R (Navy)
[2005] AATA 392 4 May 2005
Allan, M (Army)
[2005] AATA 526 6 June 2005
Wakefield, W E (Navy)
[2005] AATA 593 17 June 2005
- diagnostic criteria not met
Cliff, G, A (Navy)
[2005] AATA 387 2 May 2005
Codd (Army) (Ryan J)
[2005] FCA 888 30 June 2005
- stressor
- action stations in confined space
Delaforce, K (Navy)
[2005] AATA 455 19 May 2005
Morgan, J (Navy)
[2005] AATA 458 20 May 2005
- convoy patrols
Allan, M (Army)
[2005] AATA 526 6 June 2005
- friendly fire
Allan, M (Army)
[2005] AATA 526 6 June 2005
- firing from perimeter wire
Allan, M (Army)
[2005] AATA 526 6 June 2005

- guard duty in Vung Tau harbour
  Wakefield, W E (Navy)
  [2005] AATA 593 17 June 2005
- incident on the gun line HMAS *Brisbane*
  Collier, T (Navy)
  [2005] AATA 295 6 Apr 2005
- threat from South Vietnamese police officer
  Allan, M (Army)
  [2005] AATA 526 6 June 2005
- witnessing body in water
  Wakefield, W E (Navy)
  [2005] AATA 593 17 June 2005
- witnessing bubbles in the water
  Wakefield, W E (Navy)
  [2005] AATA 593 17 June 2005

depressive disorder
- clinical onset
  Wakefield, W E (Navy)
  [2005] AATA 593 17 June 2005
  Finney, R J (Army)
  [2005] AATA 619 29 June 2005
- not within 2 years
  Finger, L L J (Army)
  [2005] AATA 400 4May 2005
- diagnosis
  Finney, R J (Army)
  [2005] AATA 619 29 June 2005
  Jones, B (Army)
  [2005] AATA 587 21 June 2005
- no recollection of events
  Finger, L L J (Army)
  [2005] AATA 400 4May 2005
- stressor
  - anxiety of driving alone without protection
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - bombardment in support of land operations
    Willson, J (Navy)
    [2005] AATA 431 13 May 2005
  - changing a tyre alone
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - death of a friend
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - experience of Signals Platoon
    Finger, L L J (Army)
    [2005] AATA 400 4May 2005
  - explosion in bar
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - fire in the boiler room
    Farmer, K J (Navy)
    [2005] AATA 605 27 June 2005
  - guard duty in Vung Tau harbour
    Wakefield, W E (Navy)
    [2005] AATA 593 17 June 2005
  - interception of sampan
    Farmer, K J (Navy)
    [2005] AATA 605 27 June 2005
  - maintenance of inadequate artillery
    Finney, R J (Army)
    [2005] AATA 619 29 June 2005
  - stationed in boiler room after submarine threat
    Farmer, K J (Navy)
    [2005] AATA 605 27 June 2005
  - witnessing body in water
    Wakefield, W E (Navy)
    [2005] AATA 593 17 June 2005
  - witnessing bubbles in the water
    Wakefield, W E (Navy)
    [2005] AATA 593 17 June 2005
  - scare charges
    Wakefield, W E (Navy)
    [2005] AATA 593 17 June 2005
    Willson, J (Navy)
    [2005] AATA 431 13 May 2005
  - transferred ships
    Willson, J (Navy)
    [2005] AATA 431 13 May 2005
  - trapped in a boiler room
    Willson, J (Navy)
    [2005] AATA 431 13 May 2005

personality disorder
- catastrophic event
  Hourigan, M
  [2005] AATA 547 9 June 2005
  Shields, B W (Navy)
  [2005] AATA 591 21 June 2005

post traumatic stress disorder
- diagnosis
  Collier, T (Navy)
  [2005] AATA 295 6 Apr 2005
  Jensen, R (Army)
  [2005] AATA 392 4 May 2005
  Gibbs, R O (Navy)
  [2005] AATA 516 3 June 2005
  Lees, A (Navy)
  [2005] AATA 549 9 June 2005

Jones, B (Army)
[2005] AATA 587 21 June 2005
Shields, B W (Navy)
[2005] AATA 591 21 June 2005
Starcevich, G E (Navy)
[2005] AATA 629 30 June 2005

- stressor
  - action stations
    Donnelly, G J (Navy)
    [2005] AATA 621 29 June 2005
  - anxiety of driving alone without protection
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - assault on Vietnamese man in Vung Tau harbour
    Donnelly, G J (Navy)
    [2005] AATA 621 29 June 2005
  - boiler room incident
    Galpin, G M (Navy)
    [2005] AATA 397 4 May 2005
  - changing a tyre alone
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 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
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - explosion in bar
    McKlaren, RJ (RAAF)
    [2005] AATA 448 19 May 2005
  - knife attack on Americans in Vung Tau bar
    Jones, B (Army)
    [2005] AATA 587 21 June 2005
  - involved in civilian riots
    Gibbs, R O (Navy)
    [2005] AATA 516 3 June 2005
  - locked in a freezer room
    Lees, A (Navy)
    [2005] AATA 549 9 June 2005
  - observed gunfire on mainland
    Galpin, G M (Navy)
    [2005] AATA 397 4 May 2005
  - perimeter patrol
    Jensen, R (Army)
    [2005] AATA 392 4 May 2005
  - scare charges
    Galpin, G M (Navy)
    [2005] AATA 397 4 May 2005
  - shot at
    Gibbs, R O (Navy)
    [2005] AATA 516 3 June 2005
  - threatened with pistol during boarding party
    Shields, B W (Navy)
    [2005] AATA 591 21 June 2005
  - threatened with rifle
    Beurskens, J (Army)
    [2005] AATA 601 24 June 2005
  - various incidents in Vung Tau harbour
    Starcevich, G E (Navy)
    [2005] AATA 629 30 June 2005
  - witnessing sampan blown up in Vung Tau harbour
    Godwin, J R (Navy)
    [2005] AATA 309 8 Apr 2005
  - wounded Gurkha patrols
    Godwin, J R (Navy)
    [2005] AATA 309 8 Apr 2005

Remunerative work and Special Rate

ceased to engage in remunerative work
- reason for ceasing
  - access to superannuation benefits
    Bunney, D E (Army)
    [2005] AATA 447 19 May 2005
  - care for ill mother
    Child, J (Army)
    [2005] AATA 411 9 May 2005
  - contract ended
    Ganley, B (Army)
    [2005] AATA 427 12 May 2005
  - financial pressures
    Bunney, D E (Army)
    [2005] AATA 447 19 May 2005
  - selling business for capital gain
    Hockey, L C (Army)
    [2005] AATA 316 8 Apr 2005
  - unwilling to learn new skills
    Clayton, A G
    [2005] AATA 512 2 June 2005
  - voluntary redundancy
    Alchin, R
    [2005] AATA 287 5 Apr 2005
    Wass, A D (Army)
    [2005] AATA 440 17 May 2005
    Clayton, A G
    [2005] AATA 512 2 June 2005

- workers compensation payout
Ristic, B (Army)
[2005] AATA 396 4 May 2005

employment
- air conditioning trade
Child, J (Army)
[2005] AATA 411 9 May 2005
- boilermaker
Ristic, B (Army)
[2005] AATA 396 4 May 2005
- bulldozer driver
Wass, A D (Army)
[2005] AATA 440 17 May 2005
- cane farmer
Pollock, A (Army)
[2005] AATA 367 27 Apr 2005
- caravan park operator
Hockey, L C (Army)
[2005] AATA 316 8 Apr 2005
- caterer / catering manager
Ganley, B (Army)
[2005] AATA 427 12 May 2005
- communications operator
Bunney, D E (Army)
[2005] AATA 447 19 May 2005
- fitter and turner
Clayton, A G
[2005] AATA 512 2 June 2005
- greyhound kennels
Alchin, R
[2005] AATA 287 5 Apr 2005
- security guard
Van Der Hoek, H (Navy)
[2005] AATA 383 29 Apr 2005
- train driver
Alchin, R
[2005] AATA 287 5 Apr 2005

last paid work (over 65)
- not yet ceased
Pollock, A (Army)
[2005] AATA 367 27 Apr 2005

remunerative work
- former farmer providing consulting advice
Pollock, A (Army)
[2005] AATA 367 27 Apr 2005

temporarily incapacitated
Ganley, B (Army)
[2005] AATA 427 12 May 2005

whether genuinely seeking to engage in
- attempts at voluntary work
Hockey, L C (Army)
[2005] AATA 316 8 Apr 2005
- doctor's advice not to seek work
Child, J (Army)
[2005] AATA 411 9 May 2005
- attempts at share trading
Hockey, L C (Army)
[2005] AATA 316 8 Apr 2005

whether prevented by war-caused disabilities alone
- absence from the workforce
- 30 year absence
Van Der Hoek, H (Navy)
[2005] AATA 383 29 Apr 2005
- effect of non accepted conditions
Giesen (Gray J)
[2005] FCA 846 24 June 2005
Alchin, R
[2005] AATA 287 5 Apr 2005
Ristic, B (Army)
[2005] AATA 396 4 May 2005
Child, J (Army)
[2005] AATA 411 9 May 2005
- knee problems
Clayton, A G
[2005] AATA 512 2 June 2005
- non-accepted alcohol condition
Van Der Hoek, H (Navy)
[2005] AATA 383 29 Apr 2005
- non-accepted back conditions
Dwyer, S
[2005] AATA 544 8 June 2005
- work restructuring
Clayton, A G
[2005] AATA 512 2 June 2005

Respiratory disorder

chronic bronchitis
- smoking
Ewings, C (Navy)
[2005] AATA 315 8 Apr 2005
Hourigan, M
[2005] AATA 547 9 June 2005
Lane, B (Navy)
[2005] AATA 566 15 June 2005

emphysema
- smoking
Roberts, B (Navy)
[2005] AATA 356 21 Apr 2005

Service Pension

assets test
- property valuation
Pantis, I
[2005] AATA 614 29 June 2005

partner service pension
- marriage like relationship
  Shertock, M
  [2005] AATA 473 6 May 2005

Spinal disorder

cervical spondylosis
- trauma
  Morris, R J
  [2005] AATA 539 7 June 2005

lumbar spondylosis
- trauma
  Carney, D L (RAAF)
  [2005] AATA 280 1 April 2005

Visual disorder

blinded
- burns to the eyes from chemicals
  Conway, G D (Army)
  [2005] AATA 467 24 May 2005
- PTSD caused
  Conway, G D (Army)
  [2005] AATA 467 24 May 2005

Words and phrases

experiencing a stressor
- wrong tests
  Guy (Tamberlin J)
  [2005] FCA 562 6 May 2005