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Editor's notes

This edition of *VeRBosity* reports the cases of *Milenz* and *Malady*, which are important in their explanation of the application of the *Deledio* process for decision-making.

The case of *Rodda* highlights the need for representatives to ensure that they fully understand the legislation and procedures involved in their applications before the Board. Failure to provide the correct advice can potentially lead to serious adverse consequences for an applicant.

A SRCA case, *Glendenning*, is included to provide a comparison with the MRCA and to illustrate how permanent impairment matters are considered.

This edition includes a short article on linking SoPs in a chain of causation between the claimed injury, disease or death and service. It also includes two retrospective articles, one looking at 20 years of special rate court cases, and the other outlining the major changes to the VEA in disability compensation in the 20 years since its introduction in 1986.

Trina McConnell
Editor

Special rate cases: 1986 to 2006

Background

¹⁹⁸⁶ By the end of 1986, the VEA had been in force for less than a year, the new special rate rules had been in place for less than 2 years, and had just been the subject of the first Federal Court judgments to consider them in three cases that were heard together: *Banovich*,¹ *Delkou*,² and *Lucas*.³ It was very much 'early days' in the application and interpretation of the legislation, and so, 20 years ago there was pretty much a clean slate on which judges could begin to explain how the VEA should be applied.

An important issue decided by these cases was the time at which the special rate criteria were to be applied. There had been a division within the AAT on this question: some deciding that the tests could be met at the date the veteran left work, and others deciding that they had to be met from the application day. *Banovich* decided that the tests had to be met on or after the application day.

The Court also held that the fact that a person might not have met the tests when they last stopped working did not

prevent the person meeting the tests at some later date.

Another important issue considered by *Banovich* was the meaning of 'remunerative work' in s 24(1)(c). The Court said that it referred to the *type* of work which the member previously undertook and not to any particular job.

The next group of Court cases dropped a bombshell. In *Smith*,⁴ *Wright*,⁵ and *McGuire*,⁶ the Full Court said that the special rate continued to be payable only so long as the veteran continued to meet *all* the criteria. As this was not how the pension had been administered, the Act was quickly amended to insert s 24A, which provides that once the special rate is granted it continues to be paid unless the person becomes capable of working more than 8 hours a week, or unless the pension was granted because of a false statement or misrepresentation.

The next case was *Starceвич*.⁷ This case built upon the statement in *Banovich* about remunerative work being about the *type* of work that the veteran previously undertook and not any particular job. There had been debate about whether it was the last kind of

This is an edited version of a paper presented by Bruce Topperwien to the RSL State Advocate / Pension Officer Forum.

¹ *Banovich v Repatriation Commission* (1986) 69 ALR 395, 6 AAR 122, 2 *VeRBosity* 112.

² *Delkou v Repatriation Commission* (1986) 69 ALR 406, 6 AAR 125, 2 *VeRBosity* 113.

³ *Lucas v Repatriation Commission* (1986) 69 ALR 415, 6 AAR 122, 2 *VeRBosity* 114.

⁴ *Repatriation Commission v Smith* (1987) 15 FCR 327, 74 ALR 537, 3 *VeRBosity* 129.

⁵ *Repatriation Commission v Wright* (1987) 7 AAR 28, 3 *VeRBosity* 130.

⁶ *McGuire v Repatriation Commission* (1987) 7 AAR 31, 12 ALD 797, 3 *VeRBosity* 130.

⁷ *Starceвич v Repatriation Commission* (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296, 3 *VeRBosity* 163.

work that had to be considered, or whether any previous work could be taken into account.

The Full Court in *Starceвич* decided, by majority, that any previous kind of work could be considered, provided that it was a kind of work that the veteran would still have been doing in the assessment period if his or her war-caused disabilities had not intervened to prevent the veteran from continuing to do that kind of work. Fox J's judgment, with which Jenkinson J substantially agreed, held that the work had to be 'substantial', and so did the relevant loss. He also indicated that the passage of time since last doing the relevant work might be a factor that could preclude entitlement to the special rate.

For the Commission, this case had both positives and negatives. It lost the argument about the last work being the relevant work,⁸ but on the other hand the court said that both the relevant work and the loss required by s 24(1)(c) had to be 'substantial'. There was also support for the argument that if the person had not done the relevant type of work for some time, the person's time out of the workforce might be a factor preventing the person doing that kind of work in the assessment period.

1988 The next case was *Jebb*,⁹ which decided that entitlement to the special rate had to be assessed not only as at the application day (the date the claim for pension or application for increase in pension was

lodged), but throughout the entire assessment period (from the application day to the date of decision).

*Cavell*¹⁰ soon followed, further clarifying the 'alone' test in s 24(1)(c). The AAT had said that 'alone' meant that the incapacity from accepted disabilities had to be the 'sole, unique and absolute cause' preventing the veteran from continuing in the kind of work he or she had been undertaking. The court rejected such a pedantic approach and said that it 'is a decision that should not be made upon nice philosophical distinctions, but with an eye to reality, and as a matter in respect of which common sense is the proper guide.' While the Court said that this assessment must be done 'with an eye to reality', it still emphasised that a factor other than accepted disabilities merely needed to 'play a part' in preventing the veteran from continuing in their former kind of work. It did not have to be a sufficient reason in its own right to prevent the veteran from continuing in that kind of work.

The next case was *Strickland*,¹¹ in which 1989 Davies and Ryan JJ said that age 65 is not an irrelevant matter, and that if nothing more were known of an applicant for a pension than that he was over the age of 65 years when the application was lodged, a tribunal would not be likely to be satisfied that the veteran was then suffering a loss of earnings by reason only of his war-caused incapacity.

⁸ This idea was revived by amendment of the legislation for those aged over-65 in 1994.

⁹ *Jebb v Repatriation Commission* (1988) 80 ALR 329, 8 AAR 285, 4 *VeRBosity* 48.

¹⁰ *Cavell v Repatriation Commission* (1988) 9 AAR 534, 5 *VeRBosity* 29.

¹¹ *Strickland v Repatriation Commission* (1989) 5 *VeRBosity* 135.

1990 The next major issue to come before the Court concerned what was meant by a 'loss of salary, wages or earnings on his or her own account'. In *Greenwood*,¹² the Court held that a person does not necessarily have to have had a loss of 'income' to have a loss of 'earnings'.

1991 *Sherman*¹³ was argued in an attempt to regain the ground that had been lost in *Strickland* about whether a veteran aged over 65 was in a more difficult position than one under age 65. The Court confirmed the relevance of age, but indicated that the particular circumstances of the veteran had to be taken into account. The Court also indicated that while the decision-maker can consider types of work undertaken before the person's last work, it will not be relevant if the person would never have returned to that kind of work even if he did not have the accepted disabilities.

In *Braund*,¹⁴ the Court reiterated the need for the special rate criteria to be assessed as at the application day and throughout the assessment period, and not at the time the person stopped working if that was before the assessment period. The Court noted that, provided the applicant met the criteria at some point in the assessment period, it did not matter that the veteran ceased to meet the criteria at later in the period because s 24A continued the veteran's entitlement to the pension.

¹² *Repatriation Commission v Greenwood* (1990) 22 ALD 289, 12 AAR 408, 6 *VeRBosity* 140.

¹³ *Sherman v Repatriation Commission* (1991) 7 *VeRBosity* 60.

¹⁴ *Repatriation Commission v Braund* (1991) 23 ALD 591, 7 *VeRBosity* 91.

*Birtles*¹⁵ concerning the nature of the type of work relevant to s 24(1)(c). The Commission argued that the relevant work was the 'main or chosen' work of the person, whether or not that was the person's last type of work. The Court rejected that as being 'too narrow an approach', and that 'a' type of work that the veteran had previously undertaken should be considered provided it was not performed for only a short period.

A significant issue that had arisen in special rate cases was whether that rate of pension could be dated any earlier than the date of grant of an entitlement if the review included an assessment period that started earlier than the date of acceptance of the newly accepted disability. This was answered in 1993 in *Maloney*.¹⁶ At first instance,¹⁷ Einfeld J said that the acceptance of an injury or disease as war-caused meant that it was always war-caused and so its effects could be taken into account when assessing pension from an earlier date than the date from which the newly accepted disability was granted. The Full Court overturned that decision, holding that if the newly accepted disability was necessary for the veteran's entitlement to the special rate, then the special rate of pension could date only from the date of acceptance of that disability.

1993

¹⁵ *Birtles v Repatriation Commission* (1991) 33 FCR 290, 105 ALR 359, 24 ALD 545, 14 AAR 497, 7 *VeRBosity* 125.

¹⁶ *Repatriation Commission v Maloney* (1993) 117 ALR 622, 18 AAR 216, 9 *VeRBosity* 77.

¹⁷ *Repatriation Commission v Maloney* (1992) 29 ALD 684, 9 *VeRBosity* 35.

1994 In 1994, the case of *Hall* emphasised the need to assess the person's entitlement to special rate in the assessment period, rather than merely looking to see why they left their last work. That case also briefly considered (in one paragraph) the 'genuinely seeking' test in s 24(2)(b). The Court's statement was misunderstood by some to indicate that no attempt to find work is needed if the person's accepted disabilities stop them looking for work.¹⁸ Mr Hall, in fact, had registered with an employment service and was willing to take a job if he could get one. The Court's statement about it all being 'a charade' was a remark that really had nothing to do with the case.

1995 It was now nine years since the special rate legislation had been enacted and no cases had yet considered the test in s 24(1)(b) – the 8 hour test – in any detail. The emphasis had been squarely on s 24(1)(c). That all changed with *Chambers'* case.¹⁹ The AAT had found that Mr Chambers could undertake manual labour in a low stress work environment, even though he had previously not done that kind of work. The Court upheld the AAT's decision and said that 'all the individual's skills and qualifications, regardless of the means by which they have been acquired or developed, are to be taken into account in determining the opportunities for remunerative work available to that

person. Indeed, it is appropriate to consider the individual's ability to acquire new skills, although an issue will arise in particular cases as to whether it is reasonable to expect the person to undergo retraining or certification.'

The case of *Sheehy*²⁰ involved the next significant consideration of the meaning and nature of 'remunerative work' in s 24(1)(c). Mr Sheehy was compulsorily retired as a fitter at a dockyard at age 65. Shortly afterwards, he obtained work with another employer as a storeman, once for a week in 1982, and again with yet a different employer for two weeks in 1992. His evidence was that 'the work was more than he could manage' due to his war-caused back condition. It was argued that he met s 24(1)(c) because his accepted disability prevented him from continuing to work as a storeman. The AAT and the Court rejected this argument on the ground that he had never actually performed the work as a storeman. The Court said that the 'remunerative work that the veteran was undertaking' must have been 'performed' or 'successfully undertaken' or 'effectively undertaken'. Mr Sheehy's one and two-week stints of employment were not *successfully* undertaken, and so it could not be said that he had ever worked, in reality, as a storeman. Therefore, 'storeman' could not be a type of work that he was prevented from '*continuing*' to undertake.

¹⁸ See *Conway v Repatriation Commission* [2003] FCA 704, (2003) 37 AAR 486, 19 *VeRBosity* 54, in which the Court sought to dispel this misunderstanding.

¹⁹ *Chambers v Repatriation Commission* (1994) 33 ALD 473, 10 *VeRBosity* 58; *Chambers v Repatriation Commission* (1995) 129 ALR 219, 36 ALD 207, 21 AAR 128, 11 *VeRBosity* 24.

²⁰ *Repatriation Commission v Sheehy* (1995) 133 ALR 654, 39 ALD 286, 11 *VeRBosity* 91; *Sheehy v Repatriation Commission* (1996) 66 FCR 569, 137 ALR 223, 41 ALD 205, 23 AAR 126, 12 *VeRBosity* 49.

In *Doig*,²¹ the Court considered a person who had worked in the admissions and discharges section of a local hospital. The Court accepted that this kind of work should be characterised as 'accounting, administrative and clerical work' for the purposes of s 24(1)(c). It was argued that the AAT had only looked at the likelihood of Mr Doig being employed in the local hospital rather than more generally in accounting, administrative and clerical work. The Court agreed that this was the test, but noted that the AAT had no evidence about the availability of such broader work for someone of his age (70 years). If the only evidence the AAT had was that the hospital was unlikely to have employed him at his age, then there was no evidence on which it could have found that some other employer might have employed him but for his accepted disabilities. The Court said that the onus was on Mr Doig to provide such evidence.

¹⁹⁹⁷ In *Jackman*,²² the Court held that even though a veteran might have stopped working due to accepted disabilities alone some 10 years earlier, that did not

²¹ *Doig v Repatriation Commission* (1996) 12 *VeRBosity* 94.

²² *Jackman v Repatriation Commission* (1997) 13 *VeRBosity* 73.

mean that this continued to be the reason for not working at the application day. The Court said that 'age and time out of the workforce can become important and relevant considerations', and noted that the applicants' retirement intentions, financial position and family circumstances also impacted on why he was not working at the application day.

In *Fox*,²³ the Court looked at the meaning of 'the substantial cause' in s 24(2)(b), and said that if the incapacity is not of itself productive of the inability to obtain work, it must nevertheless be 'the operative factor which, more than any other, explains it'.

The next major decision was *Flentjar*.²⁴ In this case, the Full Court set out a 4-step process by which the criteria in s 24(1)(c) are to be assessed. The decision was not particularly ground-breaking, but it gave a more structured approach to the decision-making process.

²³ *Fox v Repatriation Commission* (1997) 45 ALD 317, 24 AAR 527, 13 *VeRBosity* 25.

²⁴ *Repatriation Commission v Flentjar* (1997) 47 ALD 67, 13 *VeRBosity* 52; *Flentjar v Repatriation Commission* (1997) 26 AAR 93, 48 ALD 1, 13 *VeRBosity* 111.

The Flentjar steps – s24(1)(c):

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

In *Fry*,²⁵ the Court, for the first time, indicated that the ameliorating provision in s 24(2)(b) operates only in relation to the first limb of s 24(1)(c) and does not operate in relation to the loss test, as amplified by s 24(2)(a).²⁶ In other words, notwithstanding that a person might have been genuinely seeking to engage in remunerative work and their incapacity from accepted disabilities is the substantial cause of being unable to obtain such work, if the person has ceased to engage or is prevented from engaging in remunerative work for a reason other than their incapacity from accepted disabilities, the person is deemed not to meet the loss of earnings test in s 24(1)(c).

1999 In *Moorcroft*,²⁷ the Court, confirmed this interpretation.

In 1994, the government had amended s 24 to make it more difficult for persons aged over 65 to obtain the special rate. The tests concentrate on the person's 'last paid work'. These provisions were first considered by the Federal Court in 1999 in *Grant*.²⁸ The Court held that s 24(2A)(d) required the same consideration as the first limb of s 24(1)(c), except that the decision-maker was required to consider the last paid work of the veteran rather than any work the veteran had previously

undertaken. In so doing, the Court found the AAT had erred when it considered that an economic slump in the wool industry played a part in preventing the veteran from continuing to work as a sheep farmer. The slump in the wool industry might have been relevant to the questions involved in s 24(2B) – equivalent to s 24(2)(a) – in that it might have contributed to why he 'ceased' working as a sheep farmer, but it could not be said to have 'prevented' the applicant from doing that kind of work.

The *Forbes* case²⁹ revived the reasoning 2000 in *Cavell* in relation to how the 'alone' test in s 24(1)(c) operates. The Court rejected an argument that a non-service-related factor could be ignored unless it, alone, stopped the veteran from working. The Court said that even if the war-caused conditions are 'far and away the more dominant' of the causes of preventing the veteran from continuing to work, the existence of some other factor that *also* contributes will deny the veteran the special rate of pension.

The Full Federal Court in *Thomson*³⁰ considered the over-65 provisions, in particular, the 10-year rule in s 24(2A)(g), noting that the provision was concerned not only with the 10 year continuity of employment, but with whether the person had been an employee or not in their last paid work, and that a realistic rather than a 'mathematical' approach

²⁵ *Fry v Repatriation Commission* (1997) 47 ALD 776 (note only), 13 *VeRBosity* 82.

²⁶ This was later confirmed in *Magill v Repatriation Commission* [2002] FCA 744, 18 *VeRBosity* 50.

²⁷ *Moorcroft v Repatriation Commission* [1999] FCA 862, (1999) 29 AAR 482, 58 ALD 143, 15 *VeRBosity* 45.

²⁸ *Grant v Repatriation Commission* (1999) 15 *VeRBosity* 68; *Grant v Repatriation Commission* (1999) 57 ALD 1, 15 *VeRBosity* 99.

²⁹ *Forbes v Repatriation Commission* (2000) 101 FCR 50, 171 ALR 131, 58 ALD 394, 31 AAR 381.

³⁰ *Thomson v Repatriation Commission* [1999] FCA 1485, (1999) 15 *VeRBosity* 95; *Thomson v Repatriation Commission* [2000] FCA 204, (2000) 61 ALD 58, 16 *VeRBosity* 12.

must be taken to the continuity question based on the character of the relevant work. The Court noted that the AAT had looked at gaps in his employment in the last 18 months of his work rather than assessing continuity by reference to the work pattern over the whole 10 years.

2001 In *White*,³¹ the Court again considered the over-65 tests, and noted that a person cannot have had some periods of work as an employee and other periods working on one's own account to make up the 10 year period of continuous employment in their 'last paid work'. It must have been one or the other, not both. The Court also mentioned in passing that remuneration for work did not have to be in the form of money, but could take the form of goods or services.

In *Carter*,³² the Court held that the 8 hour test in s 24(1)(b) had nothing to do with the 'prevented from continuing to undertake remunerative work' test in s 24(2A)(d). It did not matter that the last work the veteran did was less than 8 hours a week, it was still 'remunerative work,' and so had to be taken as his 'last paid work'. There had been a break of about 12 months between his full-time work and that part-time work, which the Court held broke the 10 years continuity required by s 24(2A)(g). It is interesting to note that, in *Carter*, the Court thought that part-time work might be able to be characterised as different in nature to full-time work, but it chose not to decide

³¹ *White v Repatriation Commission* [2001] FCA 1585, (2001) 114 FCR 494, 34 AAR 151, 17 *VeRBosity* 112.

³² *Carter v Repatriation Commission* [2001] FCA 992, (2001) 33 AAR 343, 66 ALD 139, 113 FCR 314, 17 *VeRBosity* 80.

that point. This issue was considered again, but with the opposite conclusion, in *Haskard*³³ and in *Wright*.³⁴

In *Byrne*,³⁵ the Court noted that the AAT had found that the reason for the applicant moving to an area of low employment was because of his accepted disability, and so this could not be used as a reason for his claim not to succeed.

In *Hendy*,³⁶ the Full Court, in considering the first limb of s 24(1)(c), said that the requirement to consider 'remunerative work that the veteran was undertaking' does not mean a particular job with a particular employer but 'the substantive remunerative work that the veteran had undertaken in the past'. This idea of 'the substantive work' appeared to be bringing back some of the old rejected arguments from *Starcevich* and *Birtles*, that is, the only work relevant for s 24(1)(c) was the main type of work the veteran had done in the past. However, the Court went on to say that the Tribunal was 'not bound to limit its consideration to the last employment that the veteran actually undertook'.

The Court also reinforced the point made in *Cavell* and *Forbes* that in considering the 'alone' test, the 'decision-maker is required to take into account any factor that plays a part or contributes to a

³³ *Repatriation Commission v Haskard* [2002] FCA 1493, (2002) 126 FCR 1, 36 AAR 257, 71 ALD 29, 18 *VeRBosity* 104.

³⁴ *Wright v Repatriation Commission* [2005] FCA 7.

³⁵ *Byrne v Repatriation Commission* [2001] FCA 1134, (2001) 33 AAR 410, 17 *VeRBosity* 83.

³⁶ *Repatriation Commission v Hendy* [2002] FCAFC 424, (2002) 76 ALD 47, 18 *VeRBosity* 115.

veteran's being prevented from continuing to engage in remunerative work.'

2002 The next major case was *Counsel*.³⁷ This was the first time that the 'loss' test had been considered in any detail since *Greenwood* in 1990. Mr Counsel was a partner in a business that did not make a profit. It was argued by the Commission that as the business made no profit, he could not have had a loss of earnings when he stopped working. Gray J said that 'salary or wages' and 'earnings on his or her own account' are intended to encompass the full range of ways in which people can make money from their own efforts. The fact that a loss might be shown by various accounting methods does not detract from the fact that each of the partners was entitled to income from the business. The veteran's physical and mental labour produced or contributed to the generation of that income, and so it was appropriate to regard that income as 'earnings on his or her own account'.

*Haskard*³⁸ considered the over-65 provisions, and in particular, the meaning of 'last paid work' in s 24(2A)(d). The Court held that the requirement that the veteran have stopped undertaking his or her last paid work meant what it said. It accepted the Commission's argument that as Mr Haskard still carried on the work of a self-employed valuer, albeit making only six valuations a year, it could not be said that his incapacity had prevented him

from continuing to undertake the last paid work. He still undertook it, and so he was not entitled to the special or intermediate rates of pension.

In *Leane*³⁹ the Court considered the so-called 'ameliorating provision' in s 24(2)(b). The Full Court criticised the AAT for requiring 'objective signs of active pursuit of remunerative work', but held that in the circumstances, it had not made an error of law affecting the outcome of the case. While the Court said that the Act did not require objective evidence of seeking work, it accepted that this would commonly be the situation if the person were, in fact, genuinely seeking work.

The Court then said that to be eligible on the basis of relying on s 24(2)(b), the applicant had to have been genuinely seeking remunerative work *during the assessment period*. This interpretation had not been applied previously.

The next case to cause a stir was *Wright*.⁴⁰ In this case, the Court held that the same reasoning that applied in *Haskard's* case in relation to the over-65 tests applied to the under-65s. In other words, a veteran had to have ceased undertaking the particular kind of work on which he or she relied for the purposes of s 24(1)(c). As Mr Wright was continuing to do his work, but to a lesser extent than previously, he was not prevented from continuing that type of remunerative work.

³⁷ *Counsel v Repatriation Commission* [2002] FCAFC 201, (2002) 122 FCR 476, 18 *VeRBosity* 55.

³⁸ *Repatriation Commission v Haskard* [2002] FCA 1493, (2002) 126 FCR 1, 36 AAR 257, 71 ALD 29, 18 *VeRBosity* 104.

³⁹ *Leane v Repatriation Commission* [2004] FCAFC 83, (2004) 20 *VeRBosity* 24.

⁴⁰ *Wright v Repatriation Commission* [2005] FCA 7, (2005) 21 *VeRBosity* 18.

As the identical words are used in s 23, the same rule would appear to apply to the intermediate rate – the person must have stopped undertaking, because of accepted disabilities alone, the kind of work that he or she had been undertaking. If the person is still undertaking it, the intermediate or special rate cannot be payable. This does not mean that a person cannot still be working if aged under 65. But they cannot be working in the kind of work that their accepted disabilities have prevented them from undertaking.

The case of *Graham*,⁴¹ gave an example of how this might operate. The AAT had considered the veteran's work when he ran a restaurant and units. The Court noted that he did everything that he was capable of doing. Insofar as the restaurant was concerned this consisted primarily of managing the restaurant and working as a waiter; insofar as the units were concerned it consisted primarily of managing them and doing various unskilled tasks such as gardening and acting as a handyman. In its analysis the AAT has treated these various tasks as separate and distinct 'types' of work. The result, on the facts of this case, is that the AAT was able to treat the types of remunerative work involving physical strength as being separate from the types of work that have a lesser physical requirement. The Court then said that it was up to the AAT whether it could say that the veteran could be both a gardener and a motel manager at the same time.

The Court did not give decision-makers freedom to divide any job into its component parts and call each part a different type of remunerative work. But where the nature of the work is quite different and unrelated to the other work done by the person, it might be capable of being regarded as a separate kind of work for the purposes of s 24(1)(c). If the veteran were prevented from continuing to undertake one kind of work but is capable of continuing to do some other kind of work (but for less than 8 hours a week), the person might be entitled to the special rate.

The Court also said that if a veteran would not have been doing a particular kind of work during the assessment period in any event, or would be prevented from doing it for some reason other than their accepted disabilities, then that kind of work is not appropriate to consider for the purposes of determining whether he or she had a loss of salary, wages or earnings.

The next important case was *Leigh*.⁴² For the first time the Court considered the temporary special rate in s 25 and the meaning of 'temporary' and 'permanent'. The Court agreed with the proposition that the word 'permanent', when used in s 24, means 'for a period longer than just a few years hence', and that incapacity for 'a few years' at least in Mr Leigh's case could not be said to be permanent. The Court endorsed the approach adopted by Woodward J in *McDonald v Director-General of Social Security* (1984) 6 ALD 6.

⁴¹ *Repatriation Commission v Graham* [2004] FCA 1287, (2004) 20 *VeRBosity* 136.

⁴² *Leigh v Repatriation Commission* [2006] FCA 395, (2006) 22 *VeRBosity* 69.

2006

In *Butcher*,⁴³ the Court noted that 'it is not a matter of focusing on the last job the veteran had, or indeed, any particular job; rather, 'the type of work the veteran was undertaking or his field of activity'. The Court said that the decision-maker must identify the 'substantive remunerative work' that the veteran has undertaken in the past ..., or the 'substantial remunerative work that he has undertaken in the past', suggesting that usually a more general characterisation of work will be applicable because of the need to identify 'the' substantive remunerative work or 'the' substantial work that the person has undertaken in the past, rather than any substantive or substantial remunerative work the person undertook.

This appears inconsistent with *Birtles* and *Starcevich*, but *Butcher's* case might be reconciled with those cases by considering it with *Graham's* case. It is not a matter of characterising the whole of the work that a person was undertaking at a particular point in time, but it is necessary to characterise any distinct kinds of work undertaken that were substantive and substantial and which can be regarded as independent and separate types of work.

The breadth of characterisation may be very important in deciding whether the special rate criteria are satisfied. On a broad characterisation of Mr Graham's work as 'managing holiday units' (as was argued by the Commission in that case), he might not have been able to succeed,

whereas, a narrower characterisation may have enabled him to do so.

The question of whether the relevant kind of remunerative work that the person was undertaking was 'substantive' or 'substantial' may be an important factor. These words do not appear in the text of the section, but were used in *Hendy's* case and *Starcevich's* case, respectively, to describe the 'remunerative work' referred to in s 24(1)(c) that the veteran was prevented from continuing to undertake by incapacity from war-caused injury or disease alone.

The word, 'substantive', in *Hendy's* case appears to have been used in a similar sense to how the word, 'substantial', was used in *Starcevich's* case. *Butcher's* case may indicate that these words might have different shades of meaning. Perhaps, in the context of s 24(1)(c), it might be said that:

- 'substantive remunerative work' indicates that the type of work has a separate and independent existence from other remunerative work undertaken by the person;
- 'substantial remunerative work' indicates that the type of work is of real importance and value to the person as well as being undertaken over an extended period and for a number of hours per week.

It remains to be seen whether such a distinction develops in the case law on s 24(1)(c).

⁴³ *Repatriation Commission v Butcher* [2006] FCA 811, (2006) 22 *VeRBosity* 62.

Changes in the VEA: 1986 to 2006

Rewind to 1986

There have been substantial changes in the world since 1986 when the VEA started. If we wind the clock back to 1986, what would be find?

Internationally, the Soviet bloc faced off against the West, though the tension was easing through *perestroika* and the USSR had a new, young leader, Mikhail Gorbachev, who presented the 'human face of socialism'. The Challenger disaster in January 1986 put the space shuttle program on hold for nearly 3 years. The Chernobyl disaster occurred, heightening concern about the safety of nuclear power and focused the spotlight more closely on environmental issues. IBM introduced the first laptop computer in 1986 and the first Nintendo came on to the market. *Top Gun* was the top grossing film and the *Oprah Winfrey Show* premiered.

Domestically, Allan Border was Captain of the Australian cricket team, which lost the Ashes in 1986-87. Bob Hawke was the Prime Minister and Arthur Gietzelt was Minister for Veterans' Affairs (the last to have served in World War 2).

Australians were rendering peacekeeping service in Cyprus and the Middle East, and the ADF had an observer role in Korea (though not recognised at that time as operational service).

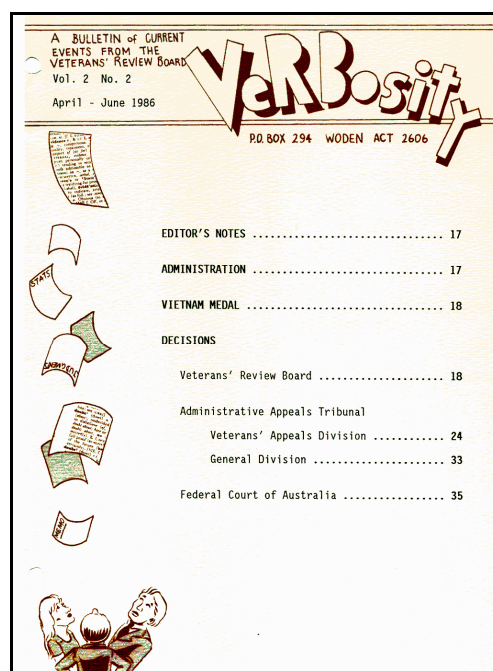
On Thursday, 22 May 1986, the VEA came into operation, replacing various Repatriation Acts, but largely continuing a pension and treatment system that had been in place since World War 1.

In 1986 there were about 19,400 applications for review outstanding at the VRB, an increase from the 11,781 applications that it had inherited on 1 January 1985 from the previous determining system. The VRB had 49 full-time and 46 part-time members, and 95 full-time staff.

In about 70% of VRB applications that proceeded to hearing, applicants were represented by ex-service organisation advocates.

The concept of a 'reasonable hypothesis' was only 12 months old in May 1986, and there had yet to be any court cases on the new standard of proof or special rate provisions.

VeRBosity also looked a little different then.



Fast forward to 2006

In 2006, Australians are rendering warlike service in Iraq, Afghanistan, the Persian Gulf and other adjacent countries. Non-warlike service is being rendered in the Solomon Islands, East Timor, the Balkans, and the Middle East. Peacekeeping service is being rendered by Australian Federal Police in Cyprus, the Solomon Islands, Bougainville, and East Timor.

At the end of 2006, the VRB had about 4,200 applications outstanding. The VRB has 1 full-time and 40 part-time members and the equivalent of 35 full-time staff.

About 87% of applications that proceed to hearing are represented by advocates.

Most of the law concerning ‘reasonable hypothesis’ and special rate is now fairly well settled, but a major issue facing representatives and the Board is the application of the *Military Rehabilitation and Compensation Act 2004* and related legislation. No cases have yet been decided by the AAT or Federal Court under that Act. A new era has begun.

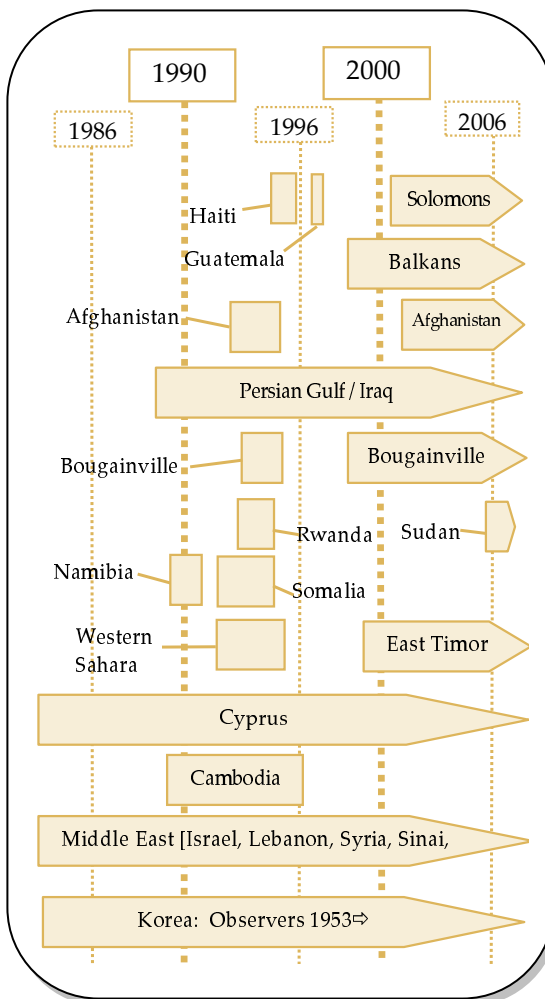
Overview of the court cases

The following is an overview of the significant court cases from 1986 to 2006 (leaving aside the special rate cases discussed in the previous article).

Reasonable hypothesis

In 1987, the Full Court in *East*¹ stated that a reasonable hypothesis had to be more than a possibility and consistent with known facts. The Court endorsed a

¹ *East v Repatriation Commission* (1987) 16 FCR 517, 74 ALR 518, 6 AAR 492, 3 *VeRBosity* 127.



decision of the VRB stating that it could not be ‘obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous’.

In 1988, the Full Court in *Webb*,² while endorsing *East*, cast some doubt on the effectiveness of the change in wording from the 1985 reasonable hypothesis provisions to the provisions in the VEA. While the concept of ‘dispelling’ a hypothesis beyond reasonable doubt had

² *Webb v Repatriation Commission* (1988) 19 FCR 139, 78 ALR 696, 8 AAR 274, 4 *VeRBosity* 47.

been taken out of the legislation by the VEA, it was effectively brought back in by the High Court in *Bushell*³ in 1992 and reinforced in *Byrnes*.⁴ In *Byrnes*, the High Court said a 2-step process applied:

1. Determine whether the material points to facts that, if true, would raise a reasonable hypothesis connecting the claimed injury, disease or death with the person's service.
2. If a reasonable hypothesis is raised, the claim will succeed unless the raised facts are disproved beyond reasonable doubt; or facts inconsistent with the hypothesis are proved beyond reasonable doubt.

Bushell also held that it would be rare for a hypothesis *not* to be reasonable if supported by a relevant medical expert. The Government was concerned that decision-makers were not equipped to assess the credibility of complex medical-scientific evidence put forward by experts, but was unsuccessful in its attempt to amend the Act to assist decision-makers to deal with such evidence.⁵ So, in 1994, the Government established the Repatriation Medical Authority (RMA) to determine Statements of Principles (SoPs) based on 'sound medical-scientific evidence' that specified the factors that might cause or

worsen particular kinds of injuries, diseases, or deaths.

It took some time for the SoP régime to be judicially considered, nevertheless the High Court dismissed an application for special leave to appeal in *Owens*⁶ on the ground that there was a new system in place and there was no need to reconsider the old law. Even so, the Court said that the Federal Court erred in interpreting the requirements for a reasonable hypothesis. The High Court said, 'It is not whether an hypothesis of connection would be reasonable if some facts are ignored; the question is answered by reference to the whole of the material'.

Divergent lines of judicial authority still remained on what a 'reasonable hypothesis' was, so a 5-member bench of the Federal Court considered the issues in *Bey*.⁷ In a joint judgment, four judges re-endorsed *East*, and rejected the idea that a 'mere possibility' could be the basis of a reasonable hypothesis.

Statements of Principles

The first case to consider how the Statement of Principles régime fitted into the *Byrnes* two-step process was *Deledio*.⁸ The Full Court came up with 4 steps that were subsequently modified by *Bull*.⁹

³ *Bushell v Repatriation Commission* (1992) 175 CLR 408, 109 ALR 30, 8 *VeRBosity* 2.

⁴ *Byrnes v Repatriation Commission* (1993) 177 CLR 564, 116 ALR 210, 30 ALD 1, 18 AAR 1, 9 *VeRBosity* 83.

⁵ The Veterans' Entitlements Legislation Amendment Bill 1992 lapsed upon the proroguing of Parliament for the 1993 Federal election.

⁶ *Repatriation Commission v Owens* (1996) 70 ALJR 904, 12 *VeRBosity* 55.

⁷ *Repatriation Commission v Bey* [1997] FCA 1347, (1997) 13 *VeRBosity* 117.

⁸ *Repatriation Commission v Deledio* (1998) 49 ALD 193, 27 AAR 144, 14 *VeRBosity* 45.

⁹ *Bull v Repatriation Commission* [2001] FCA 1832, (2001) 17 *VeRBosity* 118.

1. Determine whether the material points to facts that, if true, would raise a hypothesis connecting the claimed injury, disease or death with the person's service.
2. Identify any relevant SoPs.
3. The hypothesis will be reasonable if:
 - (a) the *East* tests are met; and
 - (b) it fits the template of the SoP (if a SoP applies).
4. The claim will succeed unless the reasonable hypothesis is disproved beyond reasonable doubt.

In *Beale*¹⁰ and *McMillan*¹¹ the Court held that the AAT should not wait for the RMA to complete an investigation, but should decide the cases on the existing SoPs.

In *Keeley*,¹² *Gorton*,¹³ and *Thompson*,¹⁴ the Court held that the VRB and AAT must apply the current SoPs, but if the case cannot succeed on that basis, an applicant has an accrued right to have applied whatever SoPs, if any, were in force at the date of the Commission's primary decision.

In *McKenna*,¹⁵ the Court held that if a hypothesis is based on a connection from service to a disease that was the subject of

a SoP through to the claimed disease, which is also the subject of a SoP, then each link in the hypothesised chain of causation has to meet the relevant SoP. *McKenna* built upon a principle in *Langley*¹⁶ in which the Full Court had held that if a previously accepted condition caused a newly claimed condition, the decision-maker could not rely on that previous acceptance, but had to re-determine the connection with service when considering whether the newly claimed condition was service-related.

In *Spencer*,¹⁷ the Court held that if the claimed condition was not the subject of a SoP, then notwithstanding that a disease hypothesised to cause the claimed condition was covered by a SoP, no SoPs had to be applied.

Application of SoP factors

In *Gosewinckel*¹⁸ and *Connors*¹⁹ the Court held that every essential element of a SoP factor had to be pointed to by the material before the decision-maker for a hypothesis to be upheld by the SoP.

*Kattenberg*²⁰ held that service merely needed to materially contribute to the person meeting a SoP factor for the factor to be related to the person's service. This

¹⁰ *Beale v AAT* (1998) 26 AAR 497, 50 ALD 895, 14 *VeRBosity* 22.

¹¹ *McMillan v Repatriation Commission (No. 2)* [1998] FCA 127, (1998) 14 *VeRBosity* 21.

¹² *Repatriation Commission v Keeley* [2000] FCA 532, (2000) 16 *VeRBosity* 4.

¹³ *Repatriation Commission v Gorton* [2001] FCA 1194, (2001) 17 *VeRBosity* 85.

¹⁴ *Repatriation Commission v Thompson* [2001] FCA 341, (2001) 17 *VeRBosity* 40.

¹⁵ *McKenna v Repatriation Commission* [1999] FCA 323, (1999) 29 AAR 70, 15 *VeRBosity* 22.

¹⁶ *Langley v Repatriation Commission* (1993) 43 FCR 194, 115 ALR 51, 30 ALD 8, 9 *VeRBosity* 40.

¹⁷ *Spencer v Repatriation Commission* [2002] FCA 229, (2002) 18 *VeRBosity* 21.

¹⁸ *Repatriation Commission v Gosewinckel* (1999) 59 ALD 690, 15 *VeRBosity* 73.

¹⁹ *Connors v Repatriation Commission* [2000] FCA 783, (2000) 16 *VeRBosity* 47.

²⁰ *Kattenberg v Repatriation Commission* [2002] FCA 412, (2002) 18 *VeRBosity* 41.

had particular impact on those factors that have a quantity that has to be satisfied. While the person still has to have met the relevant quantity in the factor, the contribution to that quantity from service merely has to have been 'material'.

The cases of *Stoddart*²¹ and *Woodward*²² considered the severe stressor factor in certain psychiatric disorder SoPs. The Court held that it involved both subjective and objective elements: that is whether the person had the relevant experience of the stressful event (subjective); and whether a reasonable person with the same background and experience of the veteran might also have experienced the event in the same way as the applicant (objective).

Brew,²³ *Wellington*,²⁴ *Wedekind*,²⁵ and *Brown*²⁶ considered the 'inability to obtain appropriate clinical management' factor, developing the following tests for its application:

1. The claimed injury or disease had to exist before or during the person's relevant service; and
2. The type of clinical management that applied to the general population

would have prevented the worsening or reduced the worsening of the person's claimed injury or disease had it been given; and

3. Due to service, the person was physically unable to obtain that clinical management or was so overborne by psychological factors that the person could not seek such clinical management; and
4. The claimed injury or disease was permanently worsened because the person was unable to obtain that clinical management at that time.

Kind of injury, disease or death

In *Preston*,²⁷ the Federal Court held that the question of diagnosis of the claimed injury or disease was part of the hypothesis and so was not to be decided on the balance of probabilities.

Five years later, the Full Court in *Cooke*²⁸ (also a pre-SoP case) came to the opposite conclusion, but queried whether it applied to death cases.

In 2001, Full Courts in *Benjamin*²⁹ and *Budworth*³⁰ (cases that concerned injury or disease under the SoP régime) said that it applied to 'the kind of injury, disease or death' claimed. Finally, *Hancock*³¹ in 2003

²¹ *Repatriation Commission v Stoddart* [2003] FCAFC 300, (2003) 77 ALD 67, 19 *VeRBosity* 125.

²² *Woodward v Repatriation Commission* [2003] FCAFC 160, (2003) 200 ALR 332, 19 *VeRBosity* 83.

²³ *Brew v Repatriation Commission* [1999] FCA 1246, (1999) 30 AAR 63, 15 *VeRBosity* 72.

²⁴ *Repatriation Commission v Wellington* [1999] FCA 1552, (1999) 57 ALD 507, 15 *VeRBosity* 98.

²⁵ *Repatriation Commission v Wedekind* [2000] FCA 649, (2000) 16 *VeRBosity* 45.

²⁶ *Brown v Repatriation Commission* [2003] FCA 1130, (2003) 19 *VeRBosity* 114.

²⁷ *Preston v Repatriation Commission* (1993) 45 FCR 214, 123 ALR 719, 30 ALD 79, 9 *VeRBosity* 67.

²⁸ *Repatriation Commission v Cooke* [1998] FCA 1717, (1998) 160 ALR 17, 14 *VeRBosity* 100.

²⁹ *Benjamin v Repatriation Commission* [2001] FCA 1879, (2001) 17 *VeRBosity* 119.

³⁰ *Repatriation Commission v Budworth* [2001] FCA 1421, (2001) 17 *VeRBosity* 109.

³¹ *Repatriation Commission v Hancock* [2003] FCA 711, (2003) 37 AAR 383, 19 *VeRBosity* 82.

confirmed, in a binding decision, that the 'kind of death' was also to be decided on the balance of probabilities.

Connections with service

In 1993 *Tuite*,³² the Full Court considered the 'arose out of, or was attributable to service' test. Davies J said that provided service was an operative cause contributing to the injury or disease, it did not matter that the cause could be found elsewhere than in camp life. Burchett and Einfeld JJ agreed, saying that not everything that happens in an Army camp is attributable to a person's service, but all that is needed is a 'causal influence'.

This was reinforced by the High Court in 2005 in *Roncevich*, in which the court held that an activity that is reasonably expected or authorised to be undertaken, or is incidental to the performance of duties will be attributable to service.

The meaning of 'aggravation' was considered in *Yates*.³³ The Court held that, unlike workers' compensation legislation which provides that an aggravation is an injury in its own right and can refer to a temporary aggravation, the pension system under the VEA required 'aggravation' to refer to a more permanent type of aggravation to the underlying injury or disease. It does not include temporary aggravation or worsening merely of signs or symptoms of the injury or disease.

³² *Repatriation Commission v Tuite* (1993) 39 FCR 540, 17 AAR 158, 29 ALD 609, 9 *VeRBosity* 30.

³³ *Repatriation Commission v Yates* (1995) 38 ALD 80, 21 AAR 331, 11 *VeRBosity* 45.

Exclusion of liability

In *McPherson*,³⁴ the Full Court held that a veteran was not excluded from pension for an aggravated ankle injury on the ground of 'serious default or wilful act' despite failing to disclose the ankle injury when he enlisted.

In *Levi*,³⁵ the Court found that a heroin addiction could be accepted as war-caused even though he took the illegal substance contrary to military regulations and allegedly due to an incident in which the applicant said he was ordered to murder a prisoner.

In *Ferriday*,³⁶ the Court upheld the exclusion of liability where the veteran's injury arose out of an incident due to which he was convicted and jailed for manslaughter. The Court held that the standard of proof that applies to an exclusion of liability is the balance of probabilities.

Operational service

In 1989 in *Kohn*,³⁷ the Court held that when deciding whether a veteran had rendered 'continuous full-time service outside Australia', the decision-maker had to consider the purpose of the voyage in order to see whether the veteran's service could properly be characterised as 'service outside Australia'. Being temporarily outside

³⁴ *McPherson v Repatriation Commission* (1989) 87 ALR 275, 10 AAR 142, 5 *VeRBosity* 58.

³⁵ *Repatriation Commission v Levi* (1994) 33 ALD 79, 10 *VeRBosity* 2.

³⁶ *Ferriday v Repatriation Commission* (1996) 150 ALR 67, 42 ALD 526, 24 AAR 29, 12 *VeRBosity* 75.

³⁷ *Repatriation Commission v Kohn* (1989) 87 ALR 511, 10 AAR 363, 18 ALD 414, 5 *VeRBosity* 108.

Australia on a voyage to transport him from one place in Australia to another did not meet this test.

Ten years later, the breadth of *Kohn's* case was narrowed by the Court in *Proctor*.³⁸ In that case, the Court said that potential proximity to the enemy and the possibility of taking some active part in defending the vessel if it were to be attacked enabled Mr Proctor's voyage from one place in Australia to another to be characterised as service outside Australia.

In 1990 in *Doessel*³⁹ and *Davis*,⁴⁰ the Federal Court held that 'allotment for duty in an operational area' meant no more than being posted to the operational area. This interpretation quickly led to an amendment of the Act to define the phrase by reference to instruments made by the Defence Force for the purposes of determining entitlements under the VEA.

In 1993, the case of *Hawkins*⁴¹ held that the operational service of a person who was deemed to have been allotted for duty, did not only include their time in the operational area but extended to the trip to and from the operational area in the same way as it did for those who were actually allotted for duty in the area.

In 2001 in *Spargo*,⁴² the Court held that a person who was injured on the trip to the operational area and was 'allotted for duty in an operational area' but who did not actually reach the area had not rendered any operational service. The extension for the trip to and from the area applied only if the person actually served in the area.

Attendant allowance

In *O'Donnell*, in 1993, the Court held that the exclusion that applied to a person who was being cared for at public expense applied only if the government paid the entire cost of the person's care.

In *Trengove*,⁴³ in 1994, the Court considered what was meant by a 'need' for an attendant. It held that 'need' had its ordinary dictionary meaning of a 'requirement'. The Court held that the need did not have to be continuous but could be intermittent. In *Hutton*,⁴⁴ in 1998, the Court held that the person's need had to be due to accepted disabilities.

Dependants

In 1990 in *Finn*,⁴⁵ the Court held that a person who had remarried after the death of their husband was no longer a widow and so was not entitled to claim a war widow's pension.

³⁸ *Proctor v Repatriation Commission* (1999) 54 ALD 343, 15 *VeRBosity* 13.

³⁹ *Repatriation Commission v Doessel* (1990) 95 ALR 704, 21 ALD 107, 12 AAR 291, 6 *VeRBosity* 106.

⁴⁰ *Repatriation Commission v Davis* (1990) 94 ALR 621, 11 AAR 416, 6 *VeRBosity* 22.

⁴¹ *Repatriation Commission v Hawkins* (1993) 45 FCR 205, 18 AAR 93, 117 ALR 225, 9 *VeRBosity* 70.

⁴² *Spargo v Repatriation Commission* [2001] FCA 1763, (2001) 34 AAR 185, 17 *VeRBosity* 115.

⁴³ *Trengove v Repatriation Commission* (1994) 122 ALR 271, 32 ALD 100, 19 AAR 508, 10 *VeRBosity* 51.

⁴⁴ *Hutton v Repatriation Commission* [1998] FCA 56, (1998) 49 ALD 8, 14 *VeRBosity* 20.

⁴⁵ *Finn v Repatriation Commission* (1990) 6 *VeRBosity* 101.

In *Jenkins*⁴⁶ in 1999, the Court entertained an argument that, though divorced from the veteran at the time of his death, the ex-wife could be living in a marriage-like relationship. However, on the facts as found by the AAT, this situation did not apply in Mrs Jenkin's case.

Extreme disablement adjustment

In *Raisbeck*,⁴⁷ the Court held that the impairment rating of 70 had to be due entirely to accepted disabilities for a veteran to be entitled to the extreme disablement adjustment.

Scope of review

In *Stafford*,⁴⁸ the Court considered the scope of the review conducted by the VRB, and held that if the Repatriation Commission decides a number of different matters in its decision on a claim for pension, the VRB reviews the entire decision unless parts of it are withdrawn clearly and unambiguously by the applicant.

In *Bramwell*,⁴⁹ the Court held if a decision is integrally related to other matters under review, an applicant cannot withdraw such a matter from the review.

In *Stewart*,⁵⁰ the Court held the AAT's review was not confined to the

assessment of pension but could include a review of the acceptance of a disability as war-caused if it was decided as part of the Commission's primary decision.

Amendments of the VEA

Enacting the VEA in 1986 involved combining and adjusting the policies from, together with a major rewrite of, a number of different Repatriation Acts and Regulations. It took nearly 4 years from the announcement of the legislative review project by the Minister in September 1982 until its completion with the enactment of the VEA in May 1986.

Major changes such as this always involve difficult issues, and a number of amending Acts are often required before the words of the legislation can be said to coincide with the intentions of the policy makers. As each year goes by, amendments need to be made as anomalies are identified and need to be resolved, and as new eligibility is recognised with Australia's changing involvement in overseas operations.

Added to these issues are new initiatives and pressures on the Government each year to make and implement new policy changes in legislation. Changes in related government schemes and initiatives, such as in tax, health, defence, compensation, and social welfare may also require amendment of the VEA.

These factors have meant that from the time the VEA was enacted in 1986 until the end of 2006, there were no fewer than 130 Acts passed that amended the VEA.

The major changes that have affected disability compensation are set out in the following chart.

⁴⁶ *Jenkins v Repatriation Commission* [1999] FCA 169, (1999) 56 ALD 379, 15 *VeRBosity* 19.

⁴⁷ *Raisbeck v Repatriation Commission* (1993) 31 ALD 704, 18 AAR 528, 9 *VeRBosity* 79.

⁴⁸ *Repatriation Commission v Stafford* (1995) 56 FCR 132, 38 ALD 193, 11 *VeRBosity* 51.

⁴⁹ *Bramwell v Repatriation Commission* [1998] FCA 1351, (1998) 158 ALR 623, 51 ALD 56, 14 *VeRBosity* 92.

⁵⁰ *Stewart v Repatriation Commission* [2002] FCA 316, (2002) 18 *VeRBosity* 22.

Major amendments of VEA affecting disability compensation

-
- 1987 • Special and intermediate rates of pension, once granted, would continue to be payable for the veteran's lifetime unless capacity for work improves or it was obtained by a false statement or misrepresentation.
-
- 1988 • Introduction of the Extreme Disablement Adjustment (EDA) rate of pension.
- Veterans need only to have 70% degree of incapacity (rather than the previous requirement of 100% degree of incapacity) before consideration could be given to the special or intermediate rate of pension.
-
- 1990 • Automatic grant of a war widow pension to widows of veterans who receive EDA (effective from 22 December 1988).
-
- 1991 • Plain English rewrite of Parts I and III of the VEA.
- Provision for the dismissal of VRB applications if not being actively pursued after 2 years.
 - Definition of 'allotment for duty in an operational area' introduced, requiring instruments in writing from the Defence Force, the Vice Chief of the Defence Force, or the Minister.
-
- 1993 • Automatic eligibility for war widow's pension extended to partners of former Australian prisoners of war.
-
- 1994 • Military Compensation Scheme commenced on 7 April 1994.
- Repatriation Medical Authority (RMA) established to determine Statements of Principles (SoPs).
 - Specialist Medical Review Council (SMRC) established to review the contents of a SoPs.
 - All new claims (from 1 June 2004) were subject to Statements of Principles issued by the RMA or determinations issued by the Commission.
 - More difficult criteria for intermediate rate and special rate for veterans over 65 years of age at the time they make a claim.
-

Changes in the VEA: 1986 to 2006

- 1994 (cont) • The SWPA Act and regulations were repealed and Australian mariners became eligible under the VEA as 'veterans'.
- Costs of medical reports obtained by an appellant to the Veterans' Review Board (VRB) and the SMRC (to a maximum of \$425 per report) reimbursed.
-
- 1995 • Applicants to the VRB and SMRC to be reimbursed for reasonable travelling expenses incurred in obtaining evidence.
-
- 1996 • Automatic grant of war widow/widower's extended to cases where the veteran died as a result of a disability already accepted as being war-caused or defence-caused.
-
- 1997 • Veterans' Vocational Rehabilitation Scheme established.
-
- 2000 • Extension of Repatriation Benefits in recognition of service in South-East Asia between 1955-75.
-
- 2002 • Reinstatement of war widow's pension to those pre-1984 widows who lost their pensions on marriage or re-marriage with effect from 1 January 2002.
-
- 2004 • Indexation of the above general rate component of the disability pension by reference to Male Total Average Weekly Earnings; and indexation of the component up to the general rate by reference to the Consumer Price Index.
- Extension of disability pension eligibility to veterans involved in the Berlin Airlift; to those involved in minesweeping; and to aircrew who served on the Malay-Thai border.
- *Military Rehabilitation and Compensation Act 2004* commenced with effect from 1 July 2004.
-

Applying a chain of SoPs

A suggested connection between an injury, disease or death and a person's service may involve a chain of causation linking the person's service to an injury or disease leading to the claimed injury or disease, or to the person's death. Consider the example in the chart below.

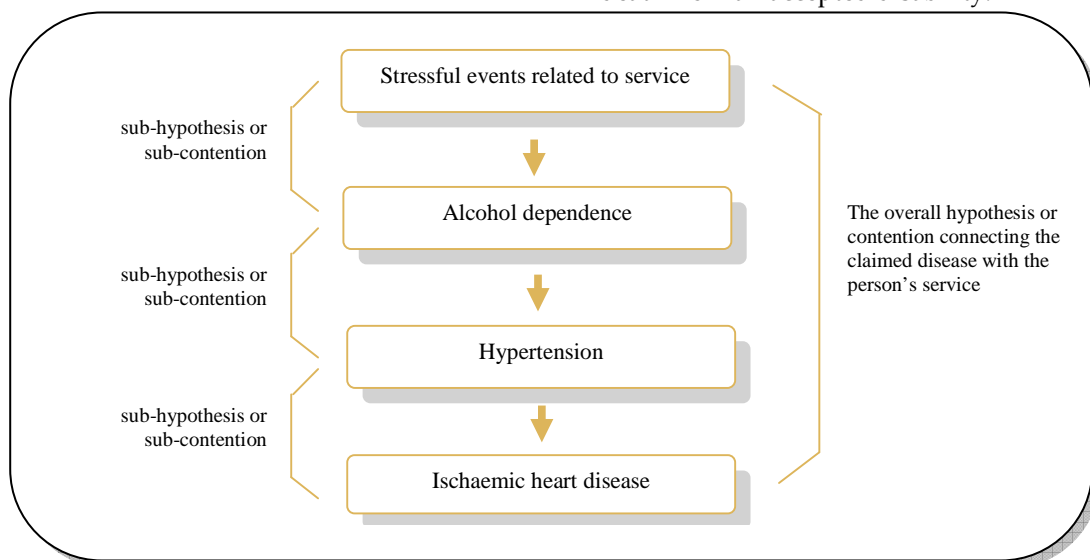
If there is a SoP in force concerning the injury, disease or death that is the subject of the claim (ischaemic heart disease) as well as a SoP for an injury or disease (hypertension and alcohol dependence) that is said to have led to that injury, disease or death, then all the relevant SoPs must be met for the hypothesis to succeed.

In *McKenna's* case,⁹⁴ each part of the causal chain was called a 'sub-hypothesis', and the Court held that each sub-hypothesis along a causal chain must satisfy the relevant SoPs.

The same principle applies in cases concerning the reasonable satisfaction standard of proof. A contention of a connection between the claimed injury, disease or death and the person's service may contain sub-contentions.

The fact that an injury or disease within a causal chain has been accepted previously as war-caused or defence-caused does not create a presumption that it is related to service for the purposes of a claim for a different injury or disease.⁹⁵ The decision-maker must consider the entire chain of causation afresh.

There is a limited exception to this rule in death claims. See below in relation to death from an accepted disability.



⁹⁴ *McKenna v Repatriation Commission* [1999] FCA 323.

⁹⁵ *Langley v Repatriation Commission* (1993) 43 FCR 194, 9 *VeRBosity* 40.

If the kind of injury, disease or death is not one covered by a SoP, and the hypothesis relies on a sub-hypothesis that has a relevant SoP, the decision maker need not have particular regard to that SoP.⁹⁶

Nevertheless, *Casey's case*⁹⁷ indicates that it is not an error of law to have regard to a SoP when assessing the reasonableness of the hypothesis even though the decision-maker is not bound to apply the SoP provided that it is raised with the applicant in the course of the hearing and the applicant is given an opportunity to make submissions in relation to it. It would certainly be an error to treat the SoP as if the Board were bound by it.

Death from an accepted disability

If a veteran or member died from a previously accepted disability the SoPs do not apply and his or her death is taken to be:

- war-caused under s 8(1)(f) of the VEA; or
- defence-caused under s 70(5)(e) or s 70(5A)(e) of the VEA; or
- a service death under s 28(1)(e) of the MRCA.

For those provisions to apply, the previously accepted disability must be a reasonably direct cause of death rather than merely an injury or disease that was part of a chain of causation.

The relationship of the veteran's death to the accepted disability must be such that

⁹⁶ *Spencer v Repatriation Commission* [2002] FCA 229, (2002) 18 *VeRBosity* 21.

⁹⁷ *Casey v Repatriation Commission* (1995) 60 FCR 510, 11 *VeRBosity* 86.

commonsense would suggest that the veteran died from the accepted disability.⁹⁸

These provisions provide a different and alternative method of determining whether a death was war-caused from those require a link with service. In his Second Reading Speech, the Minister said that this provision would simplify the process where the veteran had died from an accepted disability and negate the need for detailed investigation of a claim.

The standard of proof that applies in establishing whether death was from an accepted disability is the balance of probabilities (reasonable satisfaction). This is because the Notes to the provisions say that the Commission is not required to relate the death to service rendered by the person. The reasonable hypothesis provisions apply only if the claim relates to a person's operational, peacekeeping, hazardous, warlike or non-warlike service.

The Notes also indicate that the SoPs do not apply in establishing a connection between the death and the accepted disability. However, the balance of probabilities SoP might be used as a guide, following the reasoning in *Casey's case*.

⁹⁸ *Repatriation Commission v Hayes* (1982) 43 ALR 216, 64 FLR 423, 5 ALD 8, 1 RPD 281. In that case, Keely J held that the Tribunal had erred when it decided that the test was satisfied by finding that the incapacity 'played some material part' in the veteran's death. But Keely J held that it could be satisfied where 'the ordinary answer of an ordinary man ... would be that the death has "resulted" from incapacity'.

Administrative Appeals Tribunal

Re Barbie and Repatriation Commission

Pascoe, Senior Member

[2006] AATA 1018
29 November 2006

Special rate – meaning of ‘remunerative work’ – whether merely a hobby

Mr Barbie worked as an air traffic controller after he left the RAAF in 1979. He continued in that work until 2002, when he resigned at age 56 years.

In his evidence before the AAT he said that early retirement was available to him from age 50, but financially, it was best for him to retire after age 55. He said that he intended to keep working until age 60, but was finding it getting more difficult to cope with the shift work and long hours.

The Tribunal noted that his main health concerns at that time appeared to be headaches for which he took large quantities of aspirin, but that neither the headaches nor aspirin abuse had been accepted as war-caused.

While Mr Barbie suggested that his accepted disability of alcohol abuse was the cause of his retirement, the AAT

found that his headaches were the main reason, together with the fact that his superannuation scheme allowed him to retire at age 55.

Mr Barbie also sought to meet the requirements of s24(1)(c) by relying on a business that he started in 1997 making and repairing golf clubs.

He had purchased equipment at a cost of \$5,000 to enable him to assemble and tailor golf clubs to an individual’s needs. He said that it really just started as a hobby, but he had the hope and some expectation of generating an income from this activity. He said that he made clubs for family and friends, but he also believed he had made about 12 sets of clubs that he sold to other customers with an average profit of about \$500 per set. An invoice book that was produced in evidence indicated 10 sales over 7 years, with gross revenue of \$10,610.

Mr Barbie placed advertisements for his activity in his local newspaper and left business cards at local golf clubs.

He said that he spent a minimum of two hours a week in this activity.

Mr Barbie suffered a stroke in 2004, which stopped him continuing to undertake any further golf club making activity. The stroke was accepted as due to service.

The issue for the tribunal was whether the golf club making activity could be regarded as ‘remunerative work’ for the purposes of s 24(1)(c). the Tribunal said:

[14] In her evidence before the VRB, Mrs Barbie acknowledged that the involvement with golf clubs by Mr Barbie was *a hobby, but it was going*

to be a little bit of supplement when he did retire. Before this Tribunal, Mrs Barbie said that it was difficult to make money from golf club making and repair as it was competitive; her husband could not be seen as competing with the professional at his own club; and the work and income was intermittent. No evidence of expenses was provided and it is not clear whether or how much a profit was generated from his few sales.

[15] Given the evidence of Mr and Mrs Barbie relating to his involvement with golf club making and repair together with the record of actual sales ... it is difficult to see this involvement as *remunerative work*. It could not be regarded as *substantial, successfully undertaken or effectively undertaken*. At best it was a hobby of Mr Barbie from which he hoped some modest and intermittent income might be derived. He clearly spent very little time between his retirement from full time work and his stroke on this activity. In that 19 months he made two sales only. One of these was a full set of clubs and the other was the sale of one club only. It is relevant that he saw no reason to include any proceeds of sale or expenses in his income tax return.

[16] I cannot be satisfied that this involvement constituted *remunerative work* nor the suffering any loss of earnings as a result of the stroke. As such Mr Barbie does not satisfy the requirements of s 24(1)(c) of the Act. (AAT's emphasis)

Formal decision

The Tribunal affirmed the decision under review.

Re Glendenning and Military Rehabilitation and Compensation Commission

Breen, Member

[2006] AATA 1050
5 December 2006

Permanent impairment – signs and symptoms – aggravation

Mr Glendenning had served in the Army since 1979. Following the making of a claim under the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA), the AAT determined, in 2004, that Comcare⁹⁹ was liable to pay compensation in respect of the aggravation of gastro-oesophageal reflux disease (GOR) and irritable bowel syndrome (IBS) due to his service in the Army. He then sought permanent impairment compensation for those conditions. The Military Rehabilitation and Compensation Commission (the MRCC) decided that no compensation was payable for permanent impairment, a reconsideration delegate affirmed that decision, which was then appealed to the AAT.

The basic issues before the Tribunal were whether the impairment from these two diseases was permanent, and if so, what was the degree of permanent impairment.

⁹⁹ On 1 July 2004, with the enactment of the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*, the MRCC took over responsibility from Comcare for matters under the SRCA involving members and former of the Defence Force.

Basis for diagnosis

In order for the Tribunal to decide whether the impairment from these diseases was permanent, it first had to consider the bases for their diagnoses and the history of the progression of the diseases from the first mention in the Army medical records of symptoms in the late 1970s. The AAT said:

[13] ... relevant parts of Mr Glendenning's medical records ... contain mention of symptoms or medical problems which may have been precursors to, or the beginnings of, both of his medical conditions. However, the first mention of the diagnosis of mild gastro-oesophageal reflux is in 1992, followed by a firm diagnosis in 1995. The diagnosis of the irritable bowel syndrome appears first in 1996 and formal specialist confirmation of both the irritable bowel syndrome and gastro-oesophageal reflux is made in Dr Collins' report dated 14 February 2001.

Whether temporary or permanent

As liability for the two diseases were accepted on the basis of aggravation rather than cause, compensation could be paid only for the permanent impairment resulting from that aggravation.¹⁰⁰ The MRCC argued that the aggravation was temporary and so permanent impairment payments should not be made.

In the SRCA, 'permanent' is defined as 'likely to continue indefinitely'.¹⁰¹

¹⁰⁰ This same concept applies under sections 70 and 72 of the MRCA.

¹⁰¹ The same meaning is given in s 68(1)(b)(ii) of the MRCA.

The AAT found that the evidence from five different specialists led it to the conclusion both conditions were permanent, although they had 'a great tendency to wax and wane in relation to stress, physical activity and medical treatment'.

Onset of permanent impairment

Once permanency had been established, the question of the time of onset was next to be addressed. It was important to distinguish the onset of permanent impairment from the onset of the disease. The AAT said:

[24] ... Those witnesses who have appropriately focussed on the legal concept of impairment (and not fitness for employment) have in general agreed that the onset of permanent impairment occurred after 1988. Their evidence clearly supports the presence of impairment as defined as *malfunction of any bodily system*. (AAT's emphasis)

If permanence were found to be before 1 December 1988, permanent impairment compensation was not payable under the SRCA. The AAT considered permanence using the criteria in s 24(2) of the SRCA, namely:

- (a) the duration of the impairment;
- (b) the likelihood of improvement in the employee's condition;
- (c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and
- (d) any other relevant factors.¹⁰²

¹⁰² The same criteria apply under s 73 of the MRCA.

The AAT said:

[27] Dr Collins stated in 2003 that the degree of incapacity from his gastrointestinal conditions has waxed and waned significantly and is likely to continue to do so. Dr Eaves addressed the question of permanent impairment in May 2003 noting in both Dr Collin's consultation and his consultation Mr Glendenning complained of significant symptoms of gastro-oesophageal reflux and irritable bowel syndrome despite significant medication to combat these conditions. In his report dated 7 March 2006 Dr Macrae states that Mr Glendenning certainly continues with impairment relating to both disorders, with periodic dyspeptic and functional bowel disorder symptoms as described. All three specialist gastroenterologists were satisfied that both medical conditions had been adequately treated. Dr Macrae mentioned surgical fundoplication; but only in the context of Mr Glendenning being able to do away with his medications. In her report dated 24 June 2003, Dr Collins, at the end of a long list of treatment recommendations, mentioned that psychological therapy may be considered.

[28] Based on the foregoing evidence, I am satisfied that Mr Glendenning's impairment has been and will be of long duration, that the two conditions, gastro-oesophageal reflux and irritable bowel syndrome, are unlikely to improve. I am also satisfied that the conditions will wax and wane and that all reasonable treatment has been undertaken. No other relevant factors were raised in evidence before the Tribunal.

[29] I therefore conclude that Mr Glendenning's conditions are permanent and that the impairment caused by both conditions is also permanent. The evidence supports the onset of permanent impairment as being post-1988. Mr Glendenning gave evidence that his relocation to Sydney in 1994 into a difficult employment situation aggravated his conditions. I accept this evidence, noting that his description of the nature of his work and its associated responsibilities and long hours that he carried at that time was not challenged. His medical records, which indicate little need for medical assistance with either condition prior to this time, also support the conclusion that the exacerbations leading to permanent impairment took place after 1988. I am therefore satisfied that the Act does apply to Mr Glendenning's situation.

Degree of permanent impairment

The degree of permanent impairment is determined using the approved *Guide to the assessment of permanent impairment*.¹⁰³

The relevant table in the Guide requires consideration of 'objective signs' of the disease for higher levels of impairment and 'symptoms and/or signs' for other levels of impairment.

The AAT considered what was meant by 'signs' and 'symptoms' in this context. It said:

[33] Two of the medical witnesses tried to suggest that in the case of the irritable bowel syndrome (where, by definition, objective physical signs or

¹⁰³ Under the MRCA, GARP M is the approved Guide. It is based on the VEA's GARP.

anatomical alteration must be absent), typical symptoms can become the objective signs. I am not inclined to accept this evidence. Since the approved Guide uses both words – symptoms and signs – in the one sentence, the authors surely intended that the two words have distinct meanings. In addition, as the approved Guide is based on the similar guide of the American Medical Association, it must be assumed that the words symptoms and signs have their medical meaning. According to the *Blackiston's Gould Medical Dictionary* (4th ed), a sign is defined as:

objective evidence or physical manifestation of disease.

A symptom is defined as a:

phenomenon of physical or mental disorder or disturbance which leads to complaints on part of the patient; usually a subjective state, such as headache or pain, in contrast to an objective sign.

[34] This distinction is consistent with Senior Member Sassella's application of the terminology in *Re Florit and Comcare* (2004) 81 ALD 774 at paragraph 33:

The need for 'objective signs' means, in our view, the need for objective signs of a stomach disorder to be present on an ongoing basis such as, for example, by way of endoscopy. In a medical context the adjective 'objective' is used to refer to a sign or symptom that can be perceived by others in addition to the patient. A symptom only the patient can perceive is 'subjective'.

It therefore follows, with regard to Mr Glendenning's irritable bowel

syndrome, that it is not possible for him to demonstrate any signs or objective signs. Nor is it possible for him to demonstrate any damage to the bowel as such a demonstration would tend to undermine or negate the original diagnosis.

[35] As identified in some of the medical reports, it is possible to demonstrate damage to the oesophagus in gastro-oesophageal reflux disease. Thus, in Dr Macrae's report dated 7 March 2006, he writes:

Mr Glendenning certainly has symptomatic gastro-oesophageal reflux disease, although this has not been documented to be associated with inflammation or ulcerative disease in the oesophagus, as evident by several gastroscopies.

[36] In the second gastroscopy performed by Dr Collins, and reported in her letter dated 3 April 2001, she described a few millimetres of linear inflammation in the lower oesophagus. When this finding was drawn to the attention of Dr Macrae by Counsel for Mr Glendenning, Dr Macrae gave evidence that inflammation is a soft sign, there is no break in the lining and finally I think it is an interpretation which is not necessarily robust.

[37] Dr Schoeman performed a further gastroscopy on Mr Glendenning on 11 September 2003 and noted no oesophageal abnormalities.

[38] Therefore, taking into account the weight of the medical evidence, I find that there are no objective signs of gastro-oesophageal reflux.

The AAT found that as there were no objective signs of the diseases, the degree of permanent impairment had to be nil.

The AAT affirmed the decision under review.

Editor: What this case means for MRCA matters

Permanent impairment compensation under the MRCA is determined in a similar manner to that described and demonstrated in this case.

Impairment is defined in the MRCA as:

‘the loss, loss of the use, or the damage or malfunction, of any part of the person’s body, of any bodily system or function, or of any part of such a system or function’¹⁰⁴

Each different kind of impairment resulting from a service injury or disease must be assessed for its permanence. When considering permanency under the MRCA, it is the *nature* of the impairment that is of primary importance, not the *level* of impairment. For example, if a knee injury results in a loss of range of movement, the question is whether the person will continue to suffer some loss of range of movement indefinitely. Whether that loss of range of movement meets or will meet a *minimum impairment level* or whether the loss of range of movement has *stabilised* are separate matters to be decided before permanent impairment compensation can be paid.

To decide whether impairment is likely to continue indefinitely, the decision-maker must have regard to:

- duration of the impairment; and
- likelihood of improvement in the service injuries or diseases; and

- whether the person has undertaken all reasonable rehabilitative treatment for the impairment; and
- any other relevant matters.

The duration of the impairment concerns both to the length of time for which an impairment has already been in existence and to its likely future duration.

If an impairment is likely to improve or resolve through the natural healing process or medical or surgical treatment, it cannot be regarded as permanent.

Permanent impairment usually cannot be determined until reasonable rehabilitative treatment has been completed. What is ‘reasonable’ is a matter of fact in each individual case. In *Dragojlovic v Director-General of Social Security*, the Federal Court held that a ‘disability which can be relieved by treatment which is reasonably available is not permanent’. However, Smithers J said that ‘where the claimant is a person who actually cannot, for fear, or religious beliefs, for example, or for some other reason of a genuinely compulsive nature, accept that treatment, the question is whether his disability is one which can, in fact, be relieved’.

The AAT’s discussion of the meaning of ‘signs’ and ‘symptoms’ has no direct parallel in the MRCA’s GARP M. Nevertheless, the concept of aggravation of signs and symptoms appears in s 30 of the MRCA, and it may be necessary to consider the meaning of those terms when determining whether or not a sign or a symptom has been aggravated by service rendered by the person.

¹⁰⁴ Section 5, MRCA.

Federal Court of Australia

Byrne v Repatriation Commission

Collier J
[2006] FCA 1326
11 October 2006

Post traumatic stress disorder – dysthymic disorder – stressor – satisfaction beyond reasonable doubt

Mr Byrne had served in the RAAF in Vietnam. In November 1969 he and two colleagues undertook an excursion by Land Rover to a field where mine-clearing operations were taking place. Shortly before they arrived at the minefield, one of the servicemen involved in mine-clearing activated a booby trap resulting in injuries to several men. By the time Mr Byrne and his companions arrived the injured men had been given first-aid treatment with the application of field dressings. Mr Byrne remained with the Land Rover approximately 15-20 metres from the injured men. He was unsure how long he and his companions remained at the scene but recalled waiting until a helicopter arrived to take the injured men away. This incident was claimed to have caused Mr Byrne's post traumatic stress disorder and dysthymic disorder.

The AAT had found that a reasonable hypothesis of a connection between the

incident and these diseases was raised by the evidence. However, at step 4 of the *Deledio* process, the Tribunal found that:

- Mr Byrne's recollections of the event were vague;
- He remained some distance from the injured men, and did not speak with them or provide assistance;
- He had no recall of any aspect of the event until he spoke with Mr Ellis at a reunion of personnel from his RAAF squadron 30 years later.
- It was unable to accept the correctness of Mr Byrne's recall of the nature of his reaction to the sight of the wounded soldiers;
- After they left the minefield they undertook an uneventful tour of Vietnamese villages;
- Five days after the event, the applicant wrote a letter to his parents referring to the day he spent with Mr Ellis and Mr Smith but not referring to the minefield incident;
- The evidence of Dr Barry was that the minefield incident was in itself not sufficient to result in post traumatic stress disorder;
- The event did not constitute a severe stressor which was sufficient to trigger post traumatic stress disorder;
- The evidence of Dr Mulholland was coloured by the version of the events given by Mr Byrne to

Dr Mulholland, namely that Mr Byrne had been 'dragooned' into an 'operation' in which he was 'acting as an escort for the evacuation of wounded soldiers' which 'lasted a few hours' and which left him 'pretty much exposed'. The Tribunal was satisfied beyond reasonable doubt that what actually occurred was not consistent with the version relied upon by Dr Mulholland.

As a consequence, the Tribunal was satisfied beyond reasonable doubt that the incident did not have a significant effect on the applicant, and so affirmed the rejection of his claim.

On appeal, Mr Byrne argued that the Tribunal did not use the *Stoddart* test of 'risk of death or serious injury' when assessing whether Mr Byrne subjectively satisfied the SoPs.

The Court disagreed, saying:

[48] ... The Tribunal in its reasoning did recognise that an objective and subjective component of experiencing a severe stressor must be evident. In relation to post traumatic stress disorder, the Tribunal referred to *Stoddart*; in relation to dysthymic disorder the Tribunal referred to *White v Repatriation Commission* [2004] FCA 633, a decision of Spender J which in turn referred to the test in *Stoddart*. Applying the test in relation to both disorders, the Tribunal was of the view, within the context of the third *Deledio* step, that the material concerning the applicant's observation of and reactions to the minefield incident did point to

the existence of both objective and subjective components.

[48] However, in order for the post traumatic stress disorder and dysthymic disorder of the applicant to be related to the applicant's service within the meaning of the Act, clearly the Tribunal needed to consider the evidence within the fourth *Deledio* step as to the events that occurred and whether the applicant experienced a severe stressor (in relation to post traumatic stress disorder) or a severe psychosocial stressor (in relation to dysthymic disorder). At par 38 and par 39 the Tribunal found:

'The extent of [the applicant's] involvement was in seeing some injured soldiers and I am satisfied beyond reasonable doubt that this was not an event that meets the requirements of experiencing a severe stressor as provided for in the Statements of Principles for post traumatic stress disorder ... In relation to dysthymic disorder, the analysis above is equally applicable to whether the minefield incident was a severe psycho-social stressor.'

[49] Accordingly, the Tribunal formed the view on the basis of the evidence before it that the applicant's disorders were not war-caused. It was not necessary for the Tribunal to consider whether the incident 'might' evoke feelings of intense fear, helplessness or horror.

Mr Byrne also argued that the Tribunal had misapplied the evidence of Dr Barry, who had said, 'During his time with the RAAF, Mr Byrne was involved in a number of incidents which he found traumatic during which he experienced a

threat to his own life. He was also exposed to the general threatening environment which was life as an armed service personnel during the Vietnam War where he was exposed to the injury and loss of colleagues’.

The AAT had said that Dr Barry’s diagnosis of post traumatic stress disorder:

[38] ... was based upon the impact of a range of experiences, but that is not the manner in which the Statement of Principles operates for the purposes of determining a relationship to service. There needs to be an experience of a severe stressor, as that term is defined.

The Court found that this statement did not contain an error of law.

Mr Byrne made three further allegations of error of law based on section 119 of the Act:

[66] First, the applicant submits that the Tribunal did not take into account the passage of time when making determinations on the applicant’s memory loss, and in fact ignored s 119(1)(h)(i) of the Act.

[67] Secondly, in the grounds of appeal in the notice of appeal the applicant by reference to s 119(1)(h)(ii) claims that the Tribunal used the fact that the applicant did not write to his parents about this incident against him in making their decision.

[68] Thirdly, the applicant in the grounds of appeal relies generally on s 119(1)(g) which provides that the Tribunal shall act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities.

The Court rejected all three arguments, saying:

[70] In my view it cannot be said that the Tribunal did not take into account the passage of time when making determinations on the applicant’s memory loss. My reading of the Tribunal’s decision is that the passage of time was a relevant issue before the Tribunal, in the sense that the Tribunal took into account the fact that, despite the applicant’s claims concerning the incident of 9 November 1969, over time the applicant had (in the Tribunal’s view) simply forgotten about the incident, and was only reminded of it at a subsequent RAAF reunion. In this respect, the issue of time passing and the applicant’s lack of memory of the event (and later, despite being reminded of the incident, apparent lack of accurate memory of details of the event) appeared to reinforce the Tribunal’s views that the incident ... had had minimal impact on the applicant at the time it occurred.

[71] In relation to the submission of the applicant concerning his letter to his parents:

- In my view this type of communication does not fall within the terms of an ‘absence of, or a deficiency in, relevant official records’. Further, the applicant’s parents were not ‘appropriate authorities’ to whom the incident of 9 November 1969 should be reported. Accordingly, this submission is misconceived in that respect.
- In any event, the reference in the decision of the Tribunal to

the failure of the applicant to communicate the incident in a letter to his parents was but one aspect of evidence upon which the respondent relied to show the minimal impact the incident had on the applicant.

[72] Finally, in relation to both s 119(1)(g) and s 119(1)(h) I note comments by Mansfield J in *Fenner v Repatriation Commission* [2005] FCA 27 where his Honour said (at par 29):

‘...whilst the directions of s 119(1)(f), (g) and (h) are of relevance to the way in which the Tribunal proceeded, they cannot remove from it the responsibility of applying ss 120 and 120A and other relevant provisions of the Act according to the proper terms. I do not think the argument therefore really advances the appellant’s case on this appeal.’

[73] Those comments apply equally here. In the absence of further submissions explaining how s 119(1)(g) and (h) are of relevance, in my view they add little to the applicant’s case.

Formal decision

The Court dismissed the appeal, awarding costs to the Repatriation Commission.

Repatriation Commission v Milenz

Finn J
[2006] FCA 1436
8 November 2006

Entitlement – Deledio steps – ‘clinical worsening’

The AAT had found that alcohol abuse, depressive disorder and irritable bowel syndrome were war-caused. Alcohol abuse and depressive disorder were accepted on the basis of aggravation of a pre-existing alcohol problem by being ‘locked down’ at ‘action stations’ while in Vietnam. Irritable bowel syndrome was said to have arisen out of that event by being caused by ‘a specified psychiatric condition’.

The Repatriation Commission appealed that decision to the Federal Court on the grounds, among others, that the AAT had failed to find that the material before it pointed to the clinical worsening of the features and symptoms of Mr Milenz’s alcohol abuse or depressive disorder as prescribed by the SoP within the time prescribed, and that as a consequence no hypothesis was raised by the material that could be upheld by the SoP.

Standard of proof for diagnosis

The Court commenced its consideration by noting that ‘the ... reasonable satisfaction standard is to be applied where the matter in issue is whether or not a veteran actually suffers the injury or disease said to be war-caused’.

Clinical onset and clinical worsening

The Court then noted that the function of the SoPs 'is to prescribe a medical-scientific standard with which a hypothesis must be consistent', and that the factors 'are all related in some way (usually by time) to the "clinical onset" or the "clinical worsening" of the disease', and '[d]iagnostic criteria, or else prescribed symptoms, are in turn specified for each of the diseases'.

Alcohol abuse and alcohol dependence are separate diseases

In considering the SoP for alcohol abuse and alcohol dependence the Court noted at para [14] that it was necessary to determine which of those two diseases (as defined by the SoP) applied to the applicant as they are mutually exclusive and have different clinical features or symptoms.

Diagnostic criteria relevant to clinical worsening

The Court noted that the AAT had not addressed the diagnostic criteria at all in its reasons when it formed the view that the hypothesis of aggravation was upheld by the SoP. This was a telling omission because the Court said, at para [33], that the SoP's definition of the disease is important because 'the clinical worsening must be of the disease having the features, symptoms and manifestations prescribed in the relevant SoP's definition'.

In relation to alcohol abuse this means that 'the worsening is in the "clinically significant impairment or distress" which resulted from the maladaptive pattern of alcohol abuse and which ... was "manifested" in one or more of the

prescribed ways within' a 12 month period. The Court held that this was a medical-scientific standard, not a lay standard, and so the AAT had made an error when it made the inference that Mr Milenz's alcohol abuse had worsened because 'the quantity, type and frequency of alcohol consumed was far greater' after he experienced the severe stressor. There needed to be evidence relating to the worsening of the features or manifest symptoms of the disease as defined in the SoP. The altered consumption of alcohol was not such a feature or symptom.

The hypothesis raised by the material at step 1 did not involve 'clinical worsening'

The Court said that the hypothesis that the AAT said was pointed to by the material, was not a hypothesis that was upheld by the SoP. The hypothesis raised by the material before the AAT involved a service-related stressor causing an increase in 'the quantity, type and frequency of alcohol consumed' by the veteran. The AAT inferred that this was a clinical worsening of the alcohol abuse. But the Court said that 'clinical' worsening meant a worsening of the features or clinical symptoms of the disease as specified in the diagnostic criteria in the SoP. As the hypothesis considered by the AAT did not include those elements, it could not be said to be upheld by the SoP.

A similar error was found to have occurred in relation to depressive disorder. The relevant SoP defines 'depressive disorder' as the presence of one of three separately defined conditions. The AAT did not identify

which of those three conditions was present in Mr Milenz's case by reference to the diagnostic criteria. This error meant that when the AAT had to consider whether there had been a clinical worsening of the symptoms or features of Mr Milenz's particular depressive condition, it failed to do so because it had not identified what those symptoms or features were. The Court said that this was a diagnostic question that required a clinical judgment to be made, and as the AAT had not addressed this at all, it had made an error of law.

In relation to irritable bowel syndrome, the Court noted that the decision in relation to this disease was related to the findings in relation to depressive disorder, and so it was affected the same legal error.

The Court set aside the decision of the AAT and remitted the matter to be reheard.

Editor: What this case means

There must be material pointing to 'clinical' worsening by reference to clinical judgment and the diagnostic standards in the SoP for there to be material pointing to 'clinical worsening'.

While questions concerning clinical onset or clinical worsening are 'diagnostic' questions, they are not part of the question of what is the diagnosis of the claimed injury or disease from which the veteran currently suffers, and so are not to be decided the balance of probabilities standard of proof. Questions concerning the time of clinical onset or clinical worsening (and whether there has been any clinical worsening) are to be

addressed at step 1 of *Deledio* when determining what hypotheses, if any, are raised by the whole of the material, and again at step 3 of *Deledio* when considering whether any raised hypotheses are upheld by the SoP.

The hypotheses raised by the material at step 1 in Mr Milenz's AAT case did not include anything to do with the worsening of features and symptoms of the disease because the AAT failed to obtain such information from the medical experts in the course of the hearing. The Court refused an application on the part of the Commission to make an order affirming the rejection of the claim because Mr Milenz was 'entitled to have his case put again' to the AAT. The implication is that the Court was of the view that the applicant should not be disadvantaged because the AAT had failed to seek the relevant evidence from the experts when it had the opportunity. This means that the VRB should ensure that relevant medical evidence is available in relation to questions of clinical onset and clinical worsening of the disease as defined in the SoP.

Implications for decision-making

Step 1 of *Deledio* involves the raising of hypotheses from a consideration of the evidentiary material before the decision-maker. This involves more than merely identifying what the applicant *suggests* the link is between the claimed injury, disease or death and the person's service. Without *material* raising the connections between service and the claimed disability or death, it is not a 'hypothesis' for the purposes of step 1, but merely speculation.

The *evidentiary material* before the decision-maker must *point to facts* that, if they were true, would raise a hypothesis of a connection between the claimed injury, disease or death, and the person's eligible service. If the evidentiary material does not raise such a hypothesis (either directly or by inference), then that is the end of the matter. No SoPs need be considered, and the claim fails.

While the SoPs are not applied at step 1, the decision-maker will be aware of the existence and the contents of the relevant SoPs. As a matter of practicality and fairness (note the fact that the Court remitted the matter to the AAT for rehearing in *Milenz's case*), the decision-maker may have regard to the information in SoPs, not as evidence, but as a guide to its *consideration* of the evidence to see:

- whether the evidentiary material raises facts or hypotheses that may assist the applicant; and
- whether the Board should seek further material that may assist the applicant.

For example, a veteran might have claimed that his diabetes mellitus is war-caused. There might be evidence that he had an alcohol problem and had suffered from haemochromatosis. While the relevant SoPs include haemochromatosis as a factor for diabetes, and alcohol as a factor for haemochromatosis, unless there is medical evidence that suggests that those matters were connected in a relevant way in this particular veteran's case, a hypothesis connecting those elements will not be raised by the material.

Decision-makers usually have no special medical expertise and the SoPs do not allow them to assume, in the circumstances of the particular case, that *this* veteran's alcohol consumption led to *his* haemochromatosis, which led to *his* diabetes. These are medical questions requiring medical evidence relating to the particular veteran's circumstances and medical history. The SoPs are not evidence and so cannot raise hypotheses of connection. SoPs are templates by which hypotheses that have been raised by the evidence are to be tested (at step 3 of *Deledio*).

Nevertheless, knowing that the SoPs include particular factors enables the decision-maker to make the relevant inquiries to see whether medical evidence can be obtained that might raise a hypothesis in the particular case. In seeking such evidence, the decision-maker would ask questions of a specialist to obtain information concerning:

- whether the speculated chain of causation might have applied in the circumstances of the particular veteran's case;
- the timing of clinical onset and clinical worsening of each disability by reference to the relevant diagnostic criteria; and
- the history of the onset or worsening of any features or symptoms of the relevant conditions.

If relevant medical evidence is obtained that indicates that the veteran's alcohol habit may have been caused by the circumstances of his service, and that his consumption of alcohol may have contributed to the cause of his

haemochromatosis, which may have then contributed to the cause of his diabetes mellitus, a hypothesis of a connection will have been raised. At step 3 this hypothesis is tested against the particular requirements of the relevant SoPs.

No fact-finding is involved at step 1. The evidentiary material is examined to see whether it raises facts and inferences that, if they were true, would raise a hypothesis connecting the claimed injury, disease or death with the circumstances of service.

The hypothesis that is raised at step 1 is what is tested at step 3, and the facts raising it are assessed at step 4. Therefore, it is important that the reasons for decision should:

- set out the terms of that hypothesis precisely; and
- refer to the particular material that raises each of the relevant facts and that suggests each of the connections leading from service to the claimed injury, disease or death.

A hypothesis raised by the material at step 1 might not be consistent with the terms of the SoP. If that is so, the case still proceeds to steps 2 and 3, but obviously will not pass step 3.

In *Milenz's* case, the hypothesis raised by the material before the AAT was that:

Mr Milenz's experience of a service-related stressor caused an increase in the quantity, type and frequency of alcohol he consumed and that this was an aggravation of his pre-existing alcohol abuse.

As the Court pointed out, this was not a hypothesis upheld by the SoP because the SoP required there to be a 'clinical worsening' of the disease rather than a change in his alcohol consumption. It was nevertheless a valid hypothesis for the purpose of step 1: it was just not upheld by the SoP at step 3.

If, however, there had been medical evidence suggesting that a new feature of Mr Milenz's alcohol abuse had arisen (for example, 'failure to fulfil major role obligations') or a pre-existing feature of his alcohol abuse had worsened (for example, 'persistent or recurrent social or interpersonal problems') within, say, a couple of months of experiencing the service-related stressor and that this worsening could be due to that stressor, the hypothesis might have been expressed as:

Mr Milenz's experience of the service-related stressor led, within a couple of months, to an ongoing failure to fulfil his major role obligations and to a worsening of his recurrent interpersonal problems caused by alcohol intoxication, and that this was an aggravation of his pre-existing alcohol abuse.

When that hypothesis is then tested at step 3, it would fit the template of the SoP because:

- the period in which the symptoms are exhibited would be less than the maximum required by the SoP (both the 12 month period over which the features and symptoms are to be expressed and the 2 year period from when the stressor was experienced); and

- the ongoing failure to fulfil major role obligations and recurrent interpersonal problems are indications of 'clinical' worsening of the disease.

The clinical worsening of the disease would need to be ongoing if it is to meet the permanent kind of aggravation required by the VEA or sections 27 and 28 of the MRCA (*Yates'* case).

Step 2 of *Deledio* involves identifying the relevant SoPs. First it is necessary to determine whether the RMA has determined a SoP for the kind of injury, disease, or death that is the subject of the claim. If there is a relevant SoP, then it is necessary to identify any other SoPs in the chain of causation within each hypothesis raised in step 1 (*McKenna's* case).

This step also involves identifying whether any relevant SoPs have changed since the date of the decision under review. If so the applicant has an accrued right to have the SoPs apply that were in force at that time if the claim cannot succeed under the current SoPs (*Keeley's*, *Gorton's* and *Thompson's* cases).

If there is no relevant SoP for the claimed kind of injury, disease or death, no SoPs apply to any element of the hypothesis (*Spencer's* case).

Step 3 of *Deledio* involves determining whether the hypothesis raised in step 1 is reasonable. To be reasonable, the hypothesis:

- must be more than a mere possibility;
- must be consistent with known facts (facts that are not in dispute);

- cannot be unreal, too tenuous, fanciful, too remote or impossible; and
- must be upheld by the relevant SoPs (if SoPs apply). (*Bey's* and *Bull's* cases.)

The material before the decision-maker must point to:

- every essential element of the relevant SoPs, including any elements in defined terms within factors (*Connors'* and *Dunlop's* cases); and
- the timing of clinical onset or clinical worsening, as the case requires (*Cornelius'*, *Lees'* and *Milenz's* cases).

No fact-finding is involved at this step. That is, the decision-maker must not determine whether or not a particular event or circumstance happened. Instead, the decision-maker must decide whether the hypothesis that has been raised at step 1 is reasonable and, if a SoP applies, whether the material *points to* all the essential elements of the relevant SoP factors.

Step 4 of *Deledio* involves assessing credibility of the evidence and determining, on the beyond reasonable doubt standard of proof, whether:

- a fact exists that is inconsistent with the hypothesis being true; or
- a fact that is essential to the hypothesis is not true.

This is the only step in the *Deledio* process at which the credibility of the material can be assessed and facts relating to the hypothesis can be found to exist or not (*Rickaby's* case).

Repatriation Commission v Cotton

Rares J
[2006] FCA 1523
16 November 2006

Hypertension – alcohol – meaning of ‘which cannot be decreased’

Mr Cotton served in the RAAF from 1943 to 1946. He did not render operational service. He claimed that his ischaemic heart disease was caused by hypertension, which it was said to be caused by his alcohol consumption, which he related to his eligible war service. The AAT accepted this claim.

The Repatriation Commission appealed to the Federal Court arguing that the AAT had failed to properly apply the relevant factor in the hypertension SoP:

(b) Consuming an average of at least 300 grams per week of alcohol for a continuous period of at least six months immediately before the clinical onset of hypertension, which cannot be decreased to less than an average of 300 grams per week of alcohol.

The Tribunal had found:

[38] Taking account of the above concerns, we are of the opinion that the drinking habits of Mr Cotton, both during service and thereafter were such as to meet the conditions prescribed in the Statement of Principles for hypertension. It is clear from his evidence that during his employment ... until 1980, he drank on most days. When in Sydney, he drank beer in a hotel after work, and again on reaching

Manly, and on arriving home, he had a further drink. That occurred each week day, with less at the weekends. Extrapolating from his evidence, a reasonable consumption in a week might well equate to 30 glasses of beer or 300 grams. When travelling, the frequency of drinking might be more erratic, but on his evidence, the outcome is similar. Suffice that we find that the conditions of factor 5(b) of instrument number 4 of 2004 are met.

The Commission argued that this finding failed to deal with the final clause of factor 5(b), namely:

... which cannot be decreased to less than an average of 300 grams per week of alcohol.

The Court then considered the way in which this phrase had been considered by the AAT in other cases. Rares J said:

[9] The Commission drew attention to a number of earlier decisions of the Tribunal which sought to grapple with the nebulous way in which factor 5(b) is expressed. As is obvious from a reading of it, the factor requires the consumption of a minimum average amount of alcohol for a continuous period of at least six months immediately before the clinical onset of hypertension. There is no issue that the Tribunal was entitled to find, as it did, that Mr Cotton had satisfied that part of factor 5(b). But the question then arises as to what do the words which follow in the Delphic clause at the end of factor 5(b) mean?

[10] A member of the Tribunal (Mr E Fice) said in *Re Jensen and Repatriation Commission* [2005] AATA 474 at [24] that it was impossible to make any sense of the final clause in an

analogous form (which referred to 200 rather than 300 grams per week and did not include the criterion of a period of six months). He continued that the factor:

‘... seems to require a consumption of an average of at least 200 grams of alcohol per week at the time of the clinical onset of hypertension, and an inability to decrease that consumption to less than an average of 200 grams per week, also at the time of the clinical onset of hypertension.’

[11] Mr Fice referred ([2005] AATA 474 at [24]) to an earlier decision of the Tribunal in *Re Collier and Repatriation Commission* [2004] AATA 111 at [12] which had said that factor 5(b) was confusing and ‘just does not make sense’. And, in *Re Campbell and Repatriation Commission* [2006] AATA 455 at [71] a Senior Member said that the language was unclear and devoid of meaning. He disagreed with the decision in *Re Schubinski and Repatriation Commission* [2005] AATA 1273 at [100], where a differently constituted Tribunal had said of the current factor 5(b) that the relevant words were capable of a sensible construction and that they:

‘... connote an element of an inability on the part of the person concerned to decrease his or her average consumption below the average stated. In other words, we hold subclause (b) to mean that an applicant must establish that for a continuous period of at least six months immediately before the clinical onset of hypertension the applicant was not only consuming an average of 300 grams per week

of alcohol but was unable to consume less than that average during that period. In other words ... the relevant words in effect refer to a compulsion to drink, not merely to the fact of drinking.’

[12] Before me the Commission asserted that it did not need to propound a final view as to the proper construction of factor 5(b) because, whatever it means, each part of it was not considered or applied by the Tribunal in the present decision. I was informed from the Bar table that the words of factor 5(b) had not been the subject of any clarification despite the difficulty of construction identified two years ago in *Re Collier and Repatriation Commission* [2004] AATA 111.

[13] In light of the substantive impact which statements of principles have in the assessment of claims made by service and former service personnel, it is unfortunate that this provision, which has been rightly criticised as badly worded, has been left unamended. It is obviously a very difficult piece of wording to construe.

The Commission argued that the phrase had the meaning given to it by the AAT in *Re Schubinski and Repatriation Commission* [2005] AATA 1273. The Court rejected that interpretation and said:

[33] In *Repatriation Commission v Gosewinckel* (1999) 59 ALD 690 at 704-705 [67] Weinberg J noted that the provisions in Pt XIA of the Act ‘... were introduced in order to take the determination of “purely medical ... issues” out of the hands of bodies such as the tribunal: Explanatory Memorandum to Veterans’ Affairs (1994-95 Budget Measures) Legislation

Amendment Bill 1994 at p 3'. The construction posited by the Commission in this case of factor 5(b) does not raise a 'purely medical issue'. Factor 5(b) works as a 'purely medical issue' if one reads it as setting out the objective fact that 300 or more grams of alcohol, and nothing less, on average per week are consumed for a continuous period for at least six months before the clinical onset of hypertension. That is an objective fact that can be ascertained. The concluding clause in the factor emphasizes that it will not be satisfied if less than 300 grams per week are used in the calculation. That construction makes sense of the provision where a Tribunal might be inclined to think that near enough to 300 grams per week as average amount over the continuous period was good enough.

In commenting on the need for meaning to be given to the phrase and for every aspect of the factor to be met, the Court said:

[28] I am of opinion that the proper construction of factor 5(b) recognises that the present tense is used in the verb 'cannot' to emphasize to the decision-maker that the consumption of an average of at least 300 grams per week of alcohol for the continuous period of at least six months immediately preceding the clinical onset of hypertension is not to be ignored under any circumstances. Thus, even where the medical evidence might demonstrate that the veteran consumed less than 300 grams per week of alcohol immediately before the clinical onset of the hypertension and that that consumption was, as matter of fact, clinically causative of the condition, the concluding clause excludes the exercise

of that clinical conclusion from consideration by the decision-maker.

The Court then considered whether the appeal raised a question of law, and said:

[40] Here, the question of law asks the Court to review what the Tribunal did and then to determine whether it erred in failing to apply one or more elements which it was required to apply in factor 5(b). That is not a question of law within the meaning of the authorities on an appeal under s 44(1) of the AAT Act. The Commission argued that because the Tribunal did not make a finding about the last clause of factor 5(b), the way in which the question of law was framed complied with s 44(1). In my opinion it does not. Before one reaches that step, one would need to know what, properly construed, factor 5(b) involved and a subsequent question of law would be whether it was properly applied to the facts as found by the Tribunal.

[41] I am of opinion that the question as raised in the notice of appeal does not raise a question of law within the meaning of the authorities. In any event, if I am wrong in my conclusion as to the question of law, I am of opinion that the Tribunal made no error of law in applying factor 5(b).

The appeal was dismissed with costs awarded to Mr Cotton.

Editor: What this case means

While the Court's discussion of the interpretation of this 'Delphic' factor is *obiter dicta* and so is not strictly binding, it is still very persuasive authority given that the meaning of the factor was an important part of the Repatriation Commission's argument before the Court.

The effect of the Court's analysis is that the phrase, 'which cannot be decreased to less than an average of 300 grams per week of alcohol' adds nothing more than emphasis to the preceding words of the factor. The phrase does not mean that the veteran or member had a compelling service-related need to keep on drinking heavily, or for there to be dependence or addiction to alcohol for the factor to be met.

Nevertheless, it is still necessary that the person's consumption of alcohol, at the level and for the period stated in the factor, had a causal relationship to the person's service.

The Court noted at para [16] of its reasons that there was no relevant explanatory material that might throw light on the obscurity of the language of the SoP factor. The Explanatory Note prepared by the RMA on each occasion that this factor was changed does not assist in the interpretation of this factor.

In Instrument No 32 of 2001, the relevant factor provided:

- (b) suffering from alcohol dependence or alcohol abuse, involving consumption of an average of at least 300 grams per week of alcohol (contained within alcoholic drinks) at the time of the clinical onset of hypertension

This was replaced in Instrument No 36 of 2003 with:

- (b) consuming an average of at least 300 grams per week of alcohol which cannot be decreased to less than an average of 300 grams per week, at the time of the clinical onset of hypertension

This was amended by Instrument No 4 of 2004 to read:

- (b) consuming an average of at least 300 grams per week of alcohol for a continuous period of at least 6 months immediately before the clinical onset of hypertension, which cannot be decreased to less than an average of 300 grams per week of alcohol

The only Explanatory Note that indicates why a change was made to the wording is that associated with the last amendment. The explanation given was, 'to clarify the time period in which the consumption of a minimum average amount of alcohol must occur'.

This legislative history possibly suggests some support for the Court's approach. The removal of 'dependence' or 'abuse' from the factor and replacing it with an amount of alcohol tends to suggest that the RMA considered that it was the amount and frequency of consumption of alcohol over a period that caused hypertension rather than a need or compulsion to drink alcohol that caused hypertension. As the Court noted, this makes sense given that the role of the RMA is to consider, objectively, what can cause the relevant injury or disease. The RMA is not concerned with the more subjective element of why or how someone may have been exposed to the causal factor.

**Repatriation Commission v
Patterson**

Kiefel, Sundberg & Edmonds JJ
[2006] FCAFC 165
24 November 2006

**Entitlement – hypertension –
Notice of Contention**

Mr Patterson had claimed that his hypertension was related to his service in Vietnam on three bases: obesity, salt intake, and alcohol consumption. The Tribunal rejected all three of these. He appealed to the Federal Court.¹⁰⁵ The Court (Heerey J) held that the AAT had erred in the way it approached the case relating to salt intake and alcohol consumption because it appeared to have engaged in fact-finding at step 3 of the *Deledio* process.

The Commission appealed to the Full Federal Court on the ground that the material before the Tribunal was incapable of raising a hypothesis connecting Mr Patterson's hypertension with his operational service. The Commission had raised a Notice of Contention asking the Court to dismiss Mr Paterson's appeal on that basis. The Commission argued in the Full Court that Heerey J had not considered the its Notice of Contention.

The Commission argued that it had asked the primary judge to assume all the facts raised by the applicant's evidence in his favour and to rule that

even on that evidence no reasonable hypothesis was raised to connect his hypertension with his service.

When the Full Court considered the terms of the Commission's Notice of Contention it did not agree that the Commission had asked the Court to assume facts in favour of the applicant. The Court said:

[51] A Notice of Contention will in some cases be an appropriate vehicle by which the Commission seeks to terminate a proceeding that it considers is bound to fail. Had the primary judge been entertaining a submission that invited him to assume in favour of Mr Patterson all the facts he propounded and rule that on those facts, taken at their highest, his case had to fail, his Honour may well have accepted the invitation. Since that is not what was put to his Honour, we need not express a more definite view. It would remain a matter to be decided in the exercise of his discretion. But where the invitation was, as the primary judge correctly saw it, to reconsider the whole of the material before the Tribunal, it was in our view eminently open to him to take the course described at [29], and to remit the matter to the Tribunal for further consideration according to law. We agree with his Honour that, properly understood, the Commission's Notice of Contention sought in effect a 'rehearing of the case before the Tribunal'. As the primary judge said in another context, the Act, as expounded in *Deledio* and the various cases leading up to that decision, 'mandates a unique decision-making process'. The facts are for the Tribunal to decide. In a case such as the present, where, in our view, it cannot be said that there is only

¹⁰⁵ *Paterson v Repatriation Commission* [2006] FCA 538 (2006) 22 *VeRBosity* 67

one possible answer to the question whether Mr Patterson's hypertension is related to his operational service, it is not appropriate for a trial judge, and a fortiori an appellate court, to venture upon a fact finding exercise that the Tribunal has not itself carried out. It was common ground that it had failed to follow the Act's unique decision-making process. A striking illustration of the inappropriateness of the task the Commission's Notice of Contention sought to impose on the primary judge was the ruling for which Mr Patterson contended, that Dr English's evidence should be rejected because she was evasive in her responses to cross-examination. The Tribunal, having heard and seen the witnesses, was in a position to decide that type of issue, which may well have turned on the demeanour of the witness. The primary judge had no such advantage.

The Court dismissed the appeal, varied Heerey J's order to include the dismissal of the Notice of Contention, and awarded costs to Mr Paterson.

Byrne v Repatriation Commission

Bennett J
[2006] FCA 1667
5 December 2006

***Death – 'kind of death' – drowning
– coronary artery disease***

Mr Byrne died in 1962 when his boat overturned during a fishing trip on Tantangara Dam in the Snowy Mountains. Mrs Byrne contended that her late husband's death was contributed

to by coronary artery disease (CAD), which she said was related to his service in World War 2. She alleged that her husband's ability to survive in the waters when his boat overturned was impaired by his CAD.

The AAT had found that the kind of death was death by drowning, and that it was satisfied beyond a reasonable doubt that CAD had played no part in the veteran's death.

The main ground of appeal to the Court was that the AAT failed to refer to the evidence or other material that was the basis for its finding that CAD did not contribute to Mr Byrne's death. Mrs Byrne submitted that the Tribunal gave no reasons or no sufficient reasons for that conclusion.

The Court said:

[10] Under the heading '[c]onsideration of 'kind of death'' the Tribunal found that the 'kind of death' was, on the balance of probabilities, drowning. The Tribunal stated at [57] that it did not consider IHD or CAD was a 'kind of death'. It then proceeded to discuss the conflicting medical opinions about the kind of death and whether a cardiac event arising from CAD caused the death. In particular, it engaged in a detailed analysis of the evidence concerning the effect of IHD or a cardiac event arising from CAD. At [64] – [68] the Tribunal weighed the evidence on a cardiac cause of death. Accepting that Mr Byrne had CAD (at [66]), the Tribunal was not satisfied on the balance of probabilities that it was a cause of death or a 'kind of death' (at [68]) for reasons that it gave by reference to the evidence and its assessment of it.

In summary, it referred to the two premises on which the opinions that there was a cardiac cause of death were based. Those premises were that the autopsy revealed that Mr Byrne had no water in his lungs and that he had made no effort to save himself. The Tribunal did not accept that either premise was correct, so that the opinions based on those premises were without foundation.

[11] The next heading in the decision reads '[i]s there a reasonable hypothesis connecting Mr Byrne's death with his service?' The Tribunal noted that, initially, two hypotheses had been advanced relating to malaria and IHD and that a third hypothesis was advanced during the hearing. That hypothesis was, as I have noted, that CAD impaired Mr Byrne's ability to survive once he was in the water. No complaint is made about the Tribunal's treatment of the first two hypotheses in this appeal.

[12] The Tribunal proceeded to consider the applicable principles. There is no criticism of the statement by the Tribunal of those principles.

[13] Despite having concluded that it was not satisfied on the balance of probabilities that CAD was a cause of death, the Tribunal reiterated the conclusions in the medical evidence in support of the third hypothesis that CAD was a cause of death and found that this was a reasonable hypothesis connecting Mr Byrne's death with his war service (at [88] – [89]).

[14] Mrs Byrne points to the Tribunal's finding at [66] that CAD was not a cause of death on the balance of probabilities. She submits that this left open the possibility that the

contribution of CAD to Mr Byrne's inability to survive once in the water was sufficient for the purposes of s 120(1) of the Act, to establish that the death was 'war-caused' within s 8 of the Act. The Tribunal did not, however, stop its analysis at that stage of its reasoning. It rejected the premises on which the possibility was based. It specifically considered whether it was satisfied that Mr Byrne's death did not arise out of a cardiac event and concluded, in the light of all of the evidence, that it was so satisfied.

[15] The Tribunal acknowledged (at [90]) that, having found a reasonable hypothesis, Mrs Byrne's claim would succeed unless the hypothesis was disproved beyond reasonable doubt in accordance with the principles enunciated in *Byrnes* at 571 and noted in the Tribunal's decision. It then stated at [91]:

'Having considered all the evidence, we are satisfied beyond reasonable doubt that Mr Byrne's death did not arise out of and was not attributable to a cardiac event of a kind described by Associate Professor Richards, Dr Craig, Dr Freeman or Dr Burn, that is, a cardiac event that was a consequence of IHD or CAD.'

That was the evidence considered in detail under the heading 'consideration of the kind of death'.

[16] The Tribunal expanded on that conclusion with respect to IHD at [92] and, at [93] said:

'The opinions relating death to IHD and CAD were based essentially on there being no water in Mr Byrne's lungs and his 'inability' to save

himself. Those opinions concluded that death was caused by such a cardiac event rather than by drowning. On the evidence, we are satisfied beyond reasonable doubt that Mr Byrne drowned, and that neither IHD nor CAD contributed to his death.'

'[T]he evidence', as referred to in that paragraph, clearly refers back to the detailed discussion of the evidence earlier in the Tribunal's reasons. It was that evidence which disproved the hypothesis that Mr Byrne's ability to survive in the water was impaired by war-caused CAD.

The Court then concluded:

[17] There was detailed consideration of the evidence in the Tribunal's reasons. The Tribunal cited that evidence as the basis for its conclusion. The reasons explain how and why the Tribunal came to its conclusion. It rejected the premises on which the hypothesis of CAD as a cause of death was based. Once those premises were rejected, the hypothesis that CAD impaired Mr Byrne's ability to survive once in the water could not stand. In context, it cannot be said that the Tribunal failed to give reasons for its satisfaction, beyond reasonable doubt, that the cause of death was drowning, to which CAD made no contribution.

Formal decision

The Court dismissed the appeal and awarded costs to the Repatriation Commission.

**Rodda v Repatriation Commission
& Principal Member of the VRB**

Madgwick J
[2006] FCA 1689
5 December 2006

***Dismissal of VRB application –
whether applicant or
representative provided Principal
Member with a response to
s155AA notice***

On 3 September 2002 Mr Rodda applied for review of the Commission's decision; assessing pension at 100% of the general rate. He sought pension at the special rate.

On 19 December 2002 the Board received a signed form from Mr Rodda stating that Mr Woodcock of the Coffs Harbour RSL would represent him at his review hearing. The form also stated that Mr Woodcock would advise the Board when both men were ready for a hearing to be arranged.

On 20 October 2004, the Board's Registrar sent Mr Rodda a Notice under s 155AA VEA requiring Mr Rodda to inform the Board as to whether his application was ready to proceed to hearing or, alternatively, whether he wished to withdraw it, or finally, if he wished to continue with the application but was not yet ready to proceed, to provide a reasonable explanation for the delay. Two documents, entitled 'Form 1' and 'Form 2' respectively, were enclosed with the notice for the purposes of this information being supplied. The s 155AA

notice explained that Mr Rodda could complete and return Form 1 himself, or alternatively, Mr Rodda could authorise someone else to represent him in relation to the notice by using Form 2. The notice stated that:

'If you wish, you may authorise someone to represent you in relation to this notice. The authorisation must be in writing. Form 2 is enclosed for this purpose. You should not send Form 2 back to me. You should give it to the person you have authorised to represent you so that he or she can send it to me together with the statement I have requested within the 28 days allowed. If you choose to be represented in relation to this notice and your representative fails to respond or does not provide a reasonable explanation within the 28 days, your application must be dismissed.' (Original emphasis.)

A copy of this letter was also sent to Mr Woodcock.

On receiving the s 155AA notice, Mr Rodda contacted Mr Woodcock immediately. According to Mr Rodda's evidence at the AAT:

I ... phoned [Mr Woodcock's] RSL office and related to Mr. Woodcock the contents of the notice under s155AA, which he at that stage had not received. I asked him if I should sign the document and bring it down to him. He replied, 'No, we don't need to do that, I'll take care of it. Don't you do anything!' I then replied 'OK then if that's what you think is the way to go that's OK with me.' I concurred with what Mr Woodcock suggested should occur in that he knew better than I.

On Mr Woodcock's advice I did nothing further. I had complete faith in Mr Woodcock's advice and I was happy for him to deal with it.

On 17 November 2004 Mr Woodcock sent an email to the Board's Registrar stating that a 's31 review' had been submitted on behalf of Mr Rodda and seeking an extension of time. The Registrar replied the following day, saying that the Act required Form 2 to be completed, and in particular, 'Mr Rodda's appointment of you to respond to the Notice ... as well as your response'. The Registrar explained that arranging for Mr Rodda to complete Form 1 was an alternative, and outlined the requirements for completing that particular form. In concluding the email, the Registrar reiterated that 'the Act requires that things be done this way'.

On 19 November 2004, the Board received back the Form 1 and Form 2 documents, both of which had been completed by Mr Woodcock. The authorisation section of the Form 2 document that was required to be completed by Mr Rodda had been left blank. On that same day the Registrar sent Mr Woodcock another email which spelled out the requirements for completing the forms again.

On 13 January 2005, Mr Rodda's application for review of the Commission's decision was dismissed because the delegate had not received a written statement from Mr Rodda, or from a representative authorised for that purpose, as was required by s 155AA(5).

Mr Rodda's appeal to the AAT was dismissed, and he then appealed that decision to the Federal Court.

The applicant's arguments

The essence of Mr Rodda's argument was that the oral authorisation given by Mr Rodda to Mr Woodcock was sufficient notwithstanding that s 155AC(2) says that an applicant 'must' authorise a representative in writing to respond to a s 155AA notice.

Mr Rodda referred to a statement in *Project Blue Sky*¹⁰⁶ to the effect that although an act done in breach of a statutory provision is unlawful and 'Failure to comply with a directory provision "may in particular cases be punishable"', the act may nevertheless be valid. The Court outlined some of Mr Rodda's arguments as follows:

[32] The applicant submitted that several factors indicate that actual but informal authorisation ought not invalidate the response given: the scope and object of the whole statute; the language of the relevant provisions; the nature of the preconditions and their place in the legislative scheme; the consequences if the response was invalid; and finally, the consequences if the response was valid.

[33] As to the scope and object of the whole statute, the applicant rightly characterised the Act as 'beneficial legislation', to be interpreted liberally, and in a manner that facilitates the provision of benefits to eligible veterans.

[34] In relation to the language of the relevant provisions, the applicant argued that while the provisions repeatedly use the imperative 'must', that factor does not, of itself, determine whether the response given by Mr Rodda's representative is invalid. Rather, what has to be considered are the consequences of a failure to comply with such an instruction and the consequences of requiring compliance, regardless of the circumstances.

[35] ... the applicant submitted that the Explanatory Memorandum makes clear that the requirement for a written authorisation under s 155AC(2) exists to protect applicants, because of the importance of that response to an applicant. Consequently, the essential requirement is authorisation in fact, which was given in Mr Rodda's case. The requirement for it to be in writing was to protect Mr Rodda. It is not a provision cardinal to the objective of the statute. The applicant argued that it is unlikely that Parliament intended that a failure to comply with a provision to protect applicants could lead to their applications being dismissed and a response, actually authorised by an applicant, being rendered invalid and of no effect.

[36] The applicant also drew attention to the context in which the Act was created. Parliament would be aware that many veterans are now elderly; s 147(2) – which prohibits representation before the Board by persons with legal qualifications – argued against excessive concern with formalities. It is a well-known feature of Board proceedings that much of the advice available to applicants is provided by volunteers, many of whom lack legal expertise in

¹⁰⁶ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

reading legislation and case law, and in addition, are veterans with their own problems. Such a system has been institutionalised, with the Department sponsoring training for those volunteers who provide assistance. It cannot have been Parliament's intention that the dismissal provisions be implemented in a 'too technical and narrow way' when veterans before the Board are often so represented and advised.

[37] The applicant argued that the consequences of treating a response such as Mr Rodda's as invalid were too unfair to have been intended by Parliament. Because the age of the veteran at the time at which the form is lodged can affect the veteran's eligibility for a pension under s 23 or s 24 of the Act, dismissing an informally authorised response as invalid could, as here, have a profound effect on a veteran who had reached 65 but whose claim had been lodged before he or she reached that age.

The Commission's arguments

The Commission's arguments were summarised by the Court as follows:

[40] ... The Explanatory Memorandum showed that the legislature had deliberately chosen the most definitive possible means of ensuring that a veteran's representative is authorised. Because *Project Blue Sky* (at [78]) mandates that the Court has a duty to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have, any attempt to read down the requirement for an authorisation in writing would defeat the intention of s 155AC. Reliance was also placed on the

statement by the High Court in *Project Blue Sky* (at [78]) that: 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision'.

[41] In this respect, the Commission submitted that it would be impossible to think that Parliament intended to create a provision that said merely, 'You must do this', but then abandon that requirement in situations where a person had been misadvised to the contrary. Parliament was not likely to have used mandatory language such as 'must' if it intended to undercut or relax that imperative in certain sets of circumstances.

[42] The Commission submitted that the requirement for writing serves both the interests of applicants and the Board. The exercise of providing a written authority was intended to bring home to the applicant the significance of his/her situation, and protect him/her from the activities of unauthorised persons. The corollary of this is that a written authority also enables the Board to be confident that a representative who submits a written statement on behalf of an applicant has been duly authorised. It is clear from the Explanatory Memorandum that it is the Principal Member who must be satisfied that a representative is duly authorised because the Principal Member is placed under a statutory *compulsion*, rather than given a discretion, to dismiss the matter in certain circumstances. It is no answer to say that at some later stage a person might send a written authority: the statutory scheme is predicated on the basis that, after a delay of at least two years, there are 28 days in which to

comply, and at that point the Principal Member comes under a mandatory duty to act. (His Honour's emphasis)

The Court's conclusions

Madgwick J considered these arguments and said:

[54] The result of the applicant's interpretation is that a practical burden would be imposed on the Principal Member either to establish somehow that an applicant for review has not, orally or by conduct, authorised a purported representative, or to require the purported representative to obtain the applicant's written authorisation after the expiry of the 28 day period. (The Registrar in this case required that of the purported representative within the 28 day period).

[55] Regrettably for the applicant, it seems to me legally necessary that the respondents' interpretation must be regarded as the less unsatisfactory one and, therefore, is the interpretation that must prevail. Notwithstanding that the Act was intended beneficially for veterans, there are three reasons for this.

[56] The first is that, if the applicant's submissions are accepted, the Act's specific and detailed provisions are set at naught. Those provisions allow a two year delay; provide for formal notice from the Principal Member of the Board; require specific written authorisation of a purported representative; and then mandate dismissal of the review application after 28 days. The Principal Member would, on the applicant's approach, be required after such 28 day period at least to go through the whole notification process again and perhaps do more, in an inquisitorial fashion, to establish from the applicant personally

whether a purported representative was actually authorised. The express statutory scheme would be rendered pointless.

[57] The second reason is that the result which follows for the applicant is not so unexpected that it might have, as it were, passed under the radar of parliamentarians when they enacted the relevant dispositive amendments. It is a well-known incident of the repatriation pension schemes that claimants aged over 65 have much greater difficulty qualifying for a 'TPI pension' at the higher rates. It is obvious enough that a two year plus delay could push a claimant past that age limit. There can be no confident attribution to Parliament of an intention that the disorienting provisions, themselves dependent upon procedural steps, should, on that account, not have what appears to be their plainly intended effect.

[58] The third is that, in many fields of legal entitlement to monetary benefits, it is a common consequence of a failure to comply with procedural steps, with which a claimant has a duty to comply, that the entitlements may be lost. A generous balance has here been made by the legislature: over two years to progress a review application and minimal procedural responsibilities placed on a review applicant to avoid summary dismissal of his/her application after that time. The provisions are aimed at both requiring the dismissal by the Principal Member of long outstanding claims not being duly prosecuted and avoiding such dismissal only where there is clearly and reliably presented to the Principal Member a satisfactory response for

which an applicant actually takes personal responsibility. The means of assuring such reliability to the Principal Member is that the applicant must specifically authorise such a response, authorise it separately from instructing his/her general representative in relation to the claimed review, and do so in writing. Nevertheless those responsibilities are actually placed on applicants. There is insufficient reason to ascribe a parliamentary intention to waive those responsibilities when they have not been met, where it later emerges that the applicant was content to stand by what the representative had to say.

Formal decision

The Court dismissed the appeal and awarded the Commission costs.

Repatriation Commission v Dunn

Nicholson J
[2006] FCA 1703
8 December 2006

Prostate cancer – high fat diet – material needed to raise a connection between the diet and service

Mrs Dunn continued her late husband's claim for disability pension in respect of prostate cancer, which she claimed was caused by a high fat diet related to his operational service in the RAN in Japan and Korea in the 1940s and 1950s.

At the AAT, the parties had agreed that the first three steps of the *Deledio* process had been met. That is, the material before the AAT raised a hypothesis of a

connection between service and prostate cancer, that there was a relevant SoP to be applied, and that the hypothesis of a connection was reasonable. It was only in relation to the fourth step that the AAT addressed its attention, that is, whether the hypothesis has been disproved beyond a reasonable doubt.

On appeal, the Commission argued that there was no material pointing to all the elements of the factor in the Statement of Principles (SoP) and so, it was an error of law for the AAT pass straight to step 4. The Court allowed this point to be raised on appeal notwithstanding that the Commission had conceded that a reasonable hypothesis had been raised in the AAT.

The Court accepted this ground of the Commission's appeal because there was no evidence before the AAT pointing to a link between the veteran's continued high fat diet years after his service and the circumstances of his service. The Court also accepted the Commission's argument that the AAT had failed to address the connections with service required by s 9 of the VEA, and similarly, the Court accepted an argument that the AAT had erred in failing to make a finding that Mr Dunn's increased level of animal fat consumption, to the level prescribed by the SoP factor, was related to his operational service within the meaning of that term in s 196B(14).

Formal decision

The Court allowed the appeal and remitted the matter to be reheard by the tribunal. There was no order as to costs.

Federal Magistrates Court of Australia

Cox v Repatriation Commission

Jarrett FM
[2006] FMCA 1744
24 November 2006

Reasonable hypothesis – post traumatic stress disorder – alcohol abuse – lumbar spondylosis – Deledio process

Mr Cox claimed a number of disabilities were due to his operational service. In particular, this case focussed on his claims for post traumatic stress disorder, alcohol abuse, and lumbar spondylosis. The AAT found that these conditions were not war-caused.

In relation to post traumatic stress disorder and alcohol abuse, the applicant relied upon a number of incidents that he claimed happened that were stressful. The AAT found that only two of the alleged events met the description of 'severe stressor' for the relevant Statements of Principles. In relation to those events, it found the hypotheses were reasonable, but at step 4 of the Deledio process, found beyond reasonable doubt that the alleged events did not actually occur.

Mr Cox challenged the AAT's decision on the ground that it had failed to provide adequate reasons for its decision. The Court said:

[34] ... In my view that is not so. The Tribunal discarded the evidence of a Mr Gentle, because the Tribunal thought that it might be infected by personal animus toward the applicant.

[35] The applicant's claims were corroborated in large part by the evidence of a Mr Young. As to the discovery of bodies on patrol, the Tribunal did not accept the evidence of either witness because of what the Tribunal described as 'glaringly different accounts' given by each witness. ... [I]n my view the finding of the Tribunal was open on the evidence before it. It might be the case that I would have described the inconsistencies differently, but that is not to the point.

[36] Further, the Tribunal explained that the lack of any report of the discovery made by the men told against the creditworthiness of the applicant and Mr Young. In my view, the reasons for discounting the evidence of the applicant and Mr Young are set out by the Tribunal.

[37] Again, because of the lack of a report about the incident involving the accidental discharge of a weapon, when such a report might have been expected, the Tribunal discounted the evidence of the applicant and Mr Young. Its reasons for doing so appear on the face of the Tribunal's reasons.

[38] The Tribunal did not accept the applicant's evidence about the tiger incident. Its reasons for not doing so are brief. ... They need to be seen against

the determinations already made against the applicant's credit referred to above. Seen against these findings, in my view the reasoning process of the Tribunal is clear. ...

[40] In my view, the Tribunal has not misinterpreted the applicant's evidence about the tiger incident. It set out, accurately, the evidence about that event and assessed that the threat that the applicant felt might amount to a severe stressor. In my view, a fair reading of the Tribunal's reasons indicate that it was using the word 'encounter' in a broad sense and was not meaning to convey that the applicant had actually met up with a tiger. Ultimately, however, the Tribunal found against the applicant on the facts and his claim failed.

In relation to lumbar spondylosis, the applicant had claimed that he sustained a back injury when he fell from a water truck on or about 4 December 1961, and he referred to hospital notes when he was hospitalised for scrub typhus on 15 December 1961 that made mention that the applicant complained of a dull pain 'across the small of the back'.

The AAT made a finding that 'the back pain symptoms are clearly accounted for by the applicant's scrub typhus condition'. The Court said:

[44] ... There is, however, no evidence that would support such a finding. I was taken to none in the course of submissions and I have been unable to identify any evidence that would support that conclusion. At the very least, before an inference to that effect could be drawn, evidence that scrub typhus causes back pain of some description would be necessary. There

does not appear to be any evidence to that effect. The finding should also be seen in the context of the evidence that the applicant had been thrown from the water cart and knocked unconscious. The hospital notes for 7 and 8 December, 1961, made soon after the accident, refer to back pain [AR 392].

[45] The Tribunal's finding of fact in that regard appears, therefore, to be erroneous in that it is not supported by any evidence that was before it. That, however, does not raise an issue of law that would permit the appeal to succeed. At best it is an error of fact.

The Court did, however, find an error of law in relation to how the AAT had dealt with the claim that Mr Cox's lumbar spondylosis was related to heavy lifting. The Court found that the AAT did not give reasons for its conclusions, and so had made an error of law.

The appeal was granted but only in relation to the lumbar spondylosis issue.

Repatriation Commission v Malady

O'Dwyer FM
[2006] FCA 1050
8 December 2006

Major depression – alcohol abuse – Deledio process – identification of hypothesis – consideration of the whole of the material

The AAT had found that Mr Malady suffered from borderline personality disorder, post traumatic stress disorder, major depressive disorder, drug dependence or drug abuse, and alcohol

dependence or alcohol abuse. The AAT found that there were reasonable hypotheses connecting all these conditions with Mr Malady's service in East Timor, but, under step 4 of the *Deledio* process, found beyond reasonable doubt that personality disorder and post traumatic stress disorder were not war-caused. The AAT accepted that the other disabilities were war-caused.

The Repatriation Commission appealed this decision on the basis that the AAT had not properly applied the *Deledio* process, but had passed to step 4 without a proper examination of all the material to determine whether it had raised reasonable hypotheses at step 3.

The Court said:

[101] ... The approach taken in respect of the PTSD condition is indicative of the error in approach by the Tribunal to the other conditions it found were war-caused. To put the emphasis on stage four, at the expense of the proper considerations demanded by stage three, is to skew the process with the potential result of considering at stage four a hypothesis that would otherwise have been found not to be reasonable at stage three.

[102] The Tribunal when it addressed stage three found that all five hypotheses under consideration were reasonable. In doing so it did not identify them, but appears to have simply taken the approach that because the hypothesis echoes a factor in the SoP, it is reasonable. That is clearly contrary to *Hill*. His Honour Heerey J in *Blair v Repatriation Commission* (2005) FCA 1076 at [25] highlighted that it is

impermissible to assume or assert facts which are said to found the hypothesis. The Tribunal did not adopt the right approach when it found that the hypothesis in respect of PTSD was reasonable even though all of the expert evidence is that it did not fit the template of the applicable SoP. In that example, there was not the evidence to support a finding that there was the kind of stressor referred to in the threshold diagnostic criterion in clause 2(b) of the SoP, namely:

The person who has been exposed to a traumatic event in which the person experienced, witnessed or was confronted with an event or events that involve actual or threatened death or serious injury or a threat to a physical integrity of self or others and the person's response involving intense fear, helplessness and/or horror.

[103] All of the evidence before the Tribunal by Dr Strauss, Dr Cole and consistently with the material in Dr Green's report was that the hypothesis did not meet that criterion. Had the Tribunal applied the correct approach to stage three, it would not, (in this case, could not), have found the hypothesis reasonable.

...

[107] The approach of the Tribunal of not paying sufficient attention to the third stage of the *Deledio* process has led to hypotheses being found reasonable which could not be reasonable having regard to the whole of the material as applied to the template set out in the relevant SoP. In the words of the Full Court in *Hill* at [53]:

... As the authorities show, however, in order to satisfy sections 120(3) and 120A(3) of the Act, there must be more than a hypothesis of connection that is consistent with the relevant SoP. In order to satisfy these provisions, the material must 'raise' or 'point to' such a hypothesis and this hypothesis, as raised or pointed to by the material, must fit the relevant SoP.

The Court also agreed with the Commission's argument that in finding that Mr Malady suffered from alcohol dependence or alcohol abuse, the AAT erred in law by failing to find from which of those two distinct medical conditions Mr Malady was suffering. The Court said:

[133] ... It is quite evident, in my view, that the conditions of dependence or abuse are mutually exclusive and it fell to the Tribunal to determine which was appropriate and when its clinical onset happened. In failing to do so, the Tribunal erred.

The Commission also argued that the AAT had failed to consider the time of clinical onset by reference to the symptoms of alcohol dependence. The Court agreed and said:

[140] ... When assessing the reasonableness of the hypothesis against the template of the SoP the Tribunal was obligated to have regard to symptoms of 'alcohol dependence' in clause 2(b) of SoP 76 of 1998. It was also obligated to determine the time of clinical onset of the alcohol dependence.

[141] Where a factor in a SoP relies on 'clinical onset' it is imperative, in my view that after a consideration of the whole of the material at stage three,

there must be evidence pointing to a date for the clinical onset. If there is not, at stage three, it can be concluded that the hypothesis is not reasonable.

The Court found that the AAT had made the same mistakes in relation to drug dependence and drug abuse as it had in relation to alcohol dependence and alcohol abuse.

Formal decision

The Court upheld the Commission's appeal, set aside the AAT's decision, remitted the matter to be reheard, and awarded costs to the Commission.

Editor: what this case means

This case parallels *Milenz's* case (see p 171). A hypothesis will not be raised if the material does not point to it. It is not sufficient for a case based on a factor in a SoP to be suggested by an applicant or representative if the evidence is not there in the first place to raise the hypothesis. Such a case will not pass step 1 of *Deledio*.

To pass step 3, all the essential elements of the SoP factor need to be pointed to or raised by the material. If the timing of clinical onset is included as an element in the SoP factor, the material must point to the time of onset and the decision-maker must indicate what the time of onset was based on the evidence that points to it.

For a SoP to apply, it is necessary for the evidence to establish that the diagnostic criteria required by that SoP are established by the evidence. Those criteria are also necessary to be pointed to in relation to deciding whether the material points to the time of clinical onset as fitting the requirements of the SoP.

Statements of Principles issued by the Repatriation Medical Authority

October – December 2006

Number of Instrument	Description of Instrument
35 of 2006	Revocation of Statement of Principles (Instrument No 169 of 1996) and determination of Statement of Principles concerning acute myeloid leukaemia and death from acute myeloid leukaemia.
36 of 2006	Revocation of Statement of Principles (Instrument No 170 of 1996) and determination of Statement of Principles concerning acute myeloid leukaemia and death from acute myeloid leukaemia.
37 of 2006	Revocation of Statement of Principles (Instrument No 15 of 2000) and determination of Statement of Principles concerning myelodysplastic disorder and death from myelodysplastic disorder.
38 of 2006	Revocation of Statement of Principles (Instrument No 16 of 2000) and determination of Statement of Principles concerning myelodysplastic disorder and death from myelodysplastic disorder.
39 of 2006	Revocation of Statement of Principles (Instrument No 83 of 1997) and determination of Statement of Principles concerning rotator cuff syndrome and death from rotator cuff syndrome.
40 of 2006	Revocation of Statement of Principles (Instrument No 84 of 1997) and determination of Statement of Principles concerning rotator cuff syndrome and death from rotator cuff syndrome.
41 of 2006	Revocation of Statement of Principles (Instrument No 37 of 1994 as amended by No 195 of 1995) and determination of Statement of Principles concerning external burn and death from external burn.
42 of 2006	Revocation of Statement of Principles (Instrument No 38 of 1994 as amended by No 196 of 1995) and determination of Statement of Principles concerning external burn and death from external burn.
43 of 2006	Revocation of Statement of Principles (Instrument No 147 of 1995) and determination of Statement of Principles concerning decompression sickness and death from decompression sickness.
44 of 2006	Revocation of Statement of Principles (Instrument No 148 of 1995) and determination of Statement of Principles concerning decompression sickness and death from decompression sickness.
45 of 2006	Determination of Statement of Principles concerning pulmonary barotrauma and death from pulmonary barotrauma.
46 of 2006	Determination of Statement of Principles concerning pulmonary barotrauma and death from pulmonary barotrauma.

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47 of 2006	Determination of Statement of Principles concerning dysbaric osteonecrosis and death from dysbaric osteonecrosis.
48 of 2006	Determination of Statement of Principles concerning dysbaric osteonecrosis and death from dysbaric osteonecrosis.
49 of 2006	Determination of Statement of Principles concerning shin splints and death from shin splints.
50 of 2006	Determination of Statement of Principles concerning shin splints and death from shin splints.

Copies of these instruments can be obtained from Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001 or at <http://www.rma.gov.au/>

Conditions under Investigation by the Repatriation Medical Authority

as at 31 December 2006

Description of disease or injury	<i>SoPs under consideration</i>	Gazetted
Achilles tendonitis or bursitis	<i>Instrument Nos. 53/96 & 54/96</i>	19-11-03
Acute sprains and acute strains	<i>Instrument Nos. 50/94 & 51/94</i>	19-11-03
Acute stress disorder	<i>Instrument Nos 5/99 & 6/99 as amended by 56/99 & 57/99</i>	7-09-05
Albinism	<i>Instrument Nos. 49/95 & 50/95</i>	15-06-05
Alkaptonuria	<i>Instrument Nos. 13/95 & 14/95 as amended by 188/95 & 189/95</i>	15-06-05
Alpha-1 antitrypsin deficiency	<i>Instrument Nos. 19/95 and 20/95</i>	15-06-05
Analgesic nephropathy	<i>Instrument Nos. 56/94 & 57/94 as amended by 277/95 & 278/95</i>	28-06-06
Anxiety disorder	<i>Instrument Nos. 1/00 & 2/00</i>	1-09-04
Benign prostatic hypertrophy	<i>Instrument Nos. 133/95 & 134/95</i>	28-06-06
Benign neoplasm of the eye	<i>Instrument Nos. 1825/95 & 183/95</i>	28-06-06
Binge eating disorder	—	15-06-05
Bipolar disorder	<i>Instrument Nos 128/96 & 129/96</i>	24-03-04
Carcinoma in situ of the skin	—	7-09-05
Cardiac myxoma	<i>Instrument Nos. 13/98 & 14/98</i>	28-06-06
Cardiomyopathy	<i>Instrument Nos 19/98 & 20/98 as amended by 22/02 & 23/02</i>	2-03-05
Cataract, acquired	<i>Instrument Nos. 37 & 38 of 2001 as amended by 32/02 & 33/02</i>	1-03-06
Cataract, congenital	<i>Instrument Nos 237/95 & 238/95 as amended by 12/03 & 13/03</i>	15-06-05
Cerebrovascular accident	<i>Instrument Nos 30/02 & 31/02 as amended by 57/03 & 58/03</i>	15-06-05
Charcot-Marie-Tooth disease	<i>Instrument Nos 51/95 & 52/95</i>	15-06-05
Chicken pox	<i>Instrument Nos 58/94 and 59/94, as amended by 186/95 and 187/95</i>	15-06-05

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Description of disease or injury	<i>SoPs under consideration</i>	Gazetted
Cholelithiasis	<i>Instrument Nos 33/94 & 34/94 as amended by 223/95 & 224/95 and 9/02 & 10/02</i>	28-06-06
Cirrhosis of the liver	<i>Instrument Nos 35/98 and 36/98</i>	02-11-05
Clonorchiasis	<i>Instrument Nos. 7/95 & 8/95</i>	28-06-06
Cuts, stabs, abrasions and lacerations	<i>Instrument Nos. 54/94 & 55/94</i>	28-06-06
Dental caries	<i>Instrument Nos. 366/95 & 367/95</i>	1-09-04
Depressive disorder	<i>Instrument Nos. 58/98 & 59/98</i>	1-09-04
Diverticular disease of the colon	<i>Instrument Nos. 67/94 & 68/94 as amended by 87/97 & 281/95</i>	28-06-06
Dyspepsia	—	7-09-05
External bruises and contusions	<i>Instrument Nos 43/94 & 44/94</i>	28-06-06
Fibromuscular dysplasia	<i>Instrument Nos. 51/97 & 52/97</i>	28-06-06
Fracture	<i>Instrument Nos. 11/94 & 12/94 as amended by Nos. 219/95 & 220/95</i>	19-11-03
Gaucher's disease	<i>Instrument Nos. 21/95 & 22/95</i>	15-06-05
Haemophilia	<i>Instrument Nos. 53/95 & 54/95 as amended by 215/95 & 216/95</i>	15-06-05
Hallux valgus, acquired	<i>Instrument Nos. 47/98 & 48/98</i>	15-06-05
Hallux valgus, congenital	<i>Instrument Nos. 300/95 & 301/95</i>	15-06-05
Hepatitis A	<i>Instrument Nos 41/94 & 42/94</i>	15-06-05
Hepatitis E	<i>Instrument Nos 46/94 & 47/94</i>	15-06-05
Hereditary spherocytosis	<i>Instrument Nos 57/95 & 58/95</i>	15-06-05
Herpes zoster	<i>Instrument Nos 60/94 & 61/94</i>	15-06-05
Horseshoe kidney	<i>Instrument Nos 17/95 & 18/95</i>	15-06-05
Huntington's chorea	<i>Instrument Nos 107/95 & 108/95</i>	15-06-05
Idiopathic fibrosing alveolitis	<i>Instrument Nos 15/98 & 16/98</i>	15-06-05
Idiopathic thrombocytopenic purpura	<i>Instrument Nos. 19/97 & 20/97</i>	28-06-06
Ingrown toenail	<i>Instrument Nos 13/94 & 14/94 as amended by 221/95 & 222/95</i>	28-06-06
Intervertebral disc prolapse	<i>Instrument Nos 130/96 & 131/96 as amended by 92/97 & 93/97</i>	23-06-04
Ischaemic heart disease	<i>Instrument Nos 53/03 & 54/03 as amended by 9/04 & 10/04</i>	15-06-05
Lipoma	<i>Instrument Nos. 69/95 & 70/95 as amended by 191/95 & 192/95</i>	28-06-06
Loss of teeth	<i>Instrument Nos 5/03 & 6/03</i>	2-03-05
Macular degeneration	<i>Instrument Nos. 25 and 26 of 2003</i>	1-03-06
Malignant melanoma of the skin	<i>Instrument Nos. 39 and 40 of 2001</i>	1-03-06
Malignant neoplasm of the bile duct	<i>Instrument Nos 17/00 & 18/00</i>	22-12-04
Malignant neoplasm of the bladder	<i>Instrument Nos 23/00 & 24/00</i>	28-12-05
Malignant neoplasm of the endometrium	<i>Instrument Nos 129/95 & 130/95 as amended by 183/96 & 184/96 and 45/03 & 46/03</i>	02-11-05
Malignant neoplasm of the lip epithelium	<i>Instrument Nos. 41/01 & 42/01 as amended by 49/01 & 50/01</i>	1-03-06

Repatriation Medical Authority

Description of disease or injury	SoPs under consideration	Gazetted
Malignant neoplasm of the oesophagus	<i>Instrument Nos. 115/96 & 116/96 as amended by 11/98 & 12/98</i>	1-09-04
Malignant neoplasm of the urethra	<i>Instrument Nos. 233/95 & 234/95</i>	28-06-06
Marfan syndrome	<i>Instrument Nos 9/95 & 10/95</i>	15-06-05
Meniere's disease	<i>Instrument Nos 77/01 & 78/01</i>	5-05-04
Mesothelioma	<i>Instrument Nos 52/94 & 53/94 as amended by 199/95 & 200/95</i>	28-06-06
Multiple osteochondromatosis	<i>Instrument Nos 1/99 & 2/99</i>	15-06-05
Myasthenia gravis	<i>Instrument Nos 263/95 & 264/95</i>	15-06-05
Myopia, hypermetropia and astigmatism	<i>Instrument Nos 23/99 & 24/99</i>	15-06-05
Non-melanotic malignant neoplasm of the skin	<i>Instrument Nos 15/06 & 16/06</i>	28-06-06
Opisthorchiasis	<i>Instrument Nos. 5/95 & 6/95 as amended by 125/95</i>	28-06-06
Osteogenesis imperfecta	<i>Instrument Nos. 11/95 & 12/95</i>	15-06-05
Otosclerosis	<i>Instrument Nos. 13/96 & 14/96</i>	28-06-06
Parkinson's disease	<i>Instrument Nos. 36/02 & 37/02</i>	2-03-05
Peptic ulcer disease	<i>Instrument Nos 21/99 & 22/99</i>	23-06-04
Peritoneal adhesions	—	1-03-06
Pinguecula	<i>Instrument Nos. 251/95 & 252/95</i>	28-06-06
Plantar fasciitis	<i>Instrument Nos.3/00 & 4/00 as amended by 47/03 & 48/03</i>	19-11-03
Polycystic kidney disease	<i>Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99</i>	1-09-04
Polymyalgia rheumatica	<i>Instrument Nos. 89/96 & 90/96</i>	28-06-06
Post traumatic stress disorder	<i>Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99</i>	1-09-04
Presbyopia	<i>Instrument Nos. 314/95 & 315/95</i>	28-06-06
Pterygium	<i>Instrument Nos. 45 & 46 of 2001 as amended by Nos. 53 & 54 of 2001</i>	1-03-06
Sarcoidosis	<i>Instrument Nos. 288/95 & 289/95</i>	28-06-06
Secondary parkinsonism	<i>Instrument Nos 38/02 & 39/02</i>	2-03-05
Sickle-cell disease	<i>Instrument Nos. 109/95 & 110/95 as amended by 193/95 & 194/95</i>	28-06-06
Soft tissue sarcoma	<i>Instrument Nos 23/01 & 24/01</i>	20-08-03
Spasmodic torticollis	<i>Instrument Nos. 33/97 & 34/97</i>	28-06-06
Spina bifida	<i>Instrument Nos 59/95 & 60/95</i>	15-06-05
Systemic lupus erythematosus	—	28-09-05
Trigeminal neuralgia	<i>Instrument Nos. 23/95 & 24/95</i>	28-06-06
Tuberculosis	<i>Instrument Nos. 81/97 & 82/97</i>	1-09-04
Von Willebrand's disease	<i>Instrument Nos. 61/95 & 62/95</i>	15-06-05
Wilson's disease	<i>Instrument Nos. 15/95 & 16/95</i>	15-06-05

AAT and Court decisions – October to December 2006

AATA = Administrative Appeals Tribunal
HCA = High Court of Australia
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court
SRCA = *Safety, Rehabilitation and Compensation Act 1988*
Seafarers RCA
= *Seafarers Rehabilitation and Compensation Act 1992*

Application for review

dismissal of Veterans' Review Board application
- failure to respond to notice by authorised representative
- applicant did not authorise representative in writing
Rodda (Madgwick J)
[2006] FCA 1689 8 December 2006

Circulatory disorder

aortic aneurysm
- hypertension
Jacobsen, M (Army) (death)
[2006] AATA 981 20 November 2006
cardiomyopathy
- alcohol
McPhee, R (RAAF)
[2006] AATA 771 8 September 2006
cerebrovascular accident
- hypertension
McLoughlin, H (Army) (death)
[2006] AATA 937 3 November 2006
McCall, C (Army) (death)
[2006] AATA 1006 24 November 2006
hypertension
- alcohol
McLoughlin, H (Army) (death)
[2006] AATA 937 3 November 2006
Cotton (Rares J)
[2006] FCA 1523 16 November 2006
Fisher, J V (Navy)
[2006] AATA 993 23 November 2006
- meaning of 'cannot be decreased'
Cotton (Rares J)
[2006] FCA 1523 16 November 2006
- clinical onset
Flint, J (Army)
[2006] AATA 889 19 October 2006

Jacobsen, M (Army) (death)
[2006] AATA 981 20 November 2006
- salt
Flint, J (Army)
[2006] AATA 889 19 October 2006
Jacobsen, M (Army) (death)
[2006] AATA 981 20 November 2006
McCall, C (Army) (death)
[2006] AATA 1006 24 November 2006
- smoke haze
Jenkin, L M (RAAF) (death)
[2006] AATA 1030 1 December 2006
ischaemic heart disease
- smoke haze
Jenkin, L M (RAAF) (death)
[2006] AATA 1030 1 December 2006
- smoking
Hatchman, G (Army) (death)
[2006] AATA 876 16 October 2006
- cessation
Walkley, A S (Army)
[2006] AATA 923 30 October 2006
subarachnoid haemorrhage
- hypertension
Jenkin, L M (RAAF) (death)
[2006] AATA 1030 1 December 2006

Date of effect

unaware of right to make claim
- cannot be backdated earlier than 3 months before claim made
Johnston, J
[2006] AATA 627 17 July 2006

Death

accidental death
- drowning
Byrne (Bennett J)
[2006] FCA 1667 5 December 2006
- train collision
- lack of concentration due to anxiety disorder
Codd, K (Army)
[2006] AATA 905 24 October 2006

AAT and Court decisions – October to December 2006

kind of death	whether a veteran or member of the Forces
- correct diagnosis	- entertainer in Vietnam
McKewen, B (Army)	- Ministerial determination
[2006] AATA 838 2 October 2006	Wooding, R
Martyn, J I	[2006] AATA 907 26 October 2006
[2006] AATA 895 20 October 2006	- whether a representative of AFOF
Jans, F J	Wooding, R
[2006] AATA 974 16 November 2006	[2006] AATA 907 26 October 2006
Byrne (Bennett J)	whether an allied veteran
[2006] FCA 1667 5 December 2006	- meaning of 'defence force established by an allied country'
- death by drowning	Cmielewski
Byrne (Bennett J)	[2006] AATA 1063 11 December 2006
[2006] FCA 1667 5 December 2006	- underground forces in Poland
- death by road accident	- Holy Cross Brigade
Codd, K (Army)	Cmielewski
[2006] AATA 905 24 October 2006	[2006] AATA 1063 11 December 2006
- terminal event	- National Armed Forces (NSZ)
Jans, F J	Cmielewski
[2006] AATA 974 16 November 2006	[2006] AATA 1063 11 December 2006
Disability pension – assessment of incapacity	Endocrine and metabolic disorder
GARP	diabetes mellitus
- Chapter 7 – ear, nose & throat	- whether contributed to death
- tinnitus	Martyn, J I (death)
Johnson, K W (Army)	[2006] AATA 895 20 October 2006
[2006] AATA 890 20 October 2006	Entitlement and liability
- Chapter 15 – intermittent impairment	aggravation
- epistaxis	- inability to obtain appropriate clinical management
Johnson, K W (Army)	Money, D (Navy)
[2006] AATA 890 20 October 2006	[2006] AATA 998 22 November 2006
- sleep apnoea	Evidence and proof
Johnson, K W (Army)	application of <i>Deledio</i> steps
[2006] AATA 890 20 October 2006	- assessing reasonableness of hypothesis
- Chapter 17 – disfigurement & social impairment	Jensen, R
- deviated nasal septum	[2006] AATA 979 20 November 2006
Johnson, K W (Army)	conflicting evidence
[2006] AATA 890 20 October 2006	- s119 VEA cannot be used to resolve conflicts in evidence
- solar keratoses	Rigby, N
Johnson, K W (Army)	[2006] AATA 770 8 September 2006
[2006] AATA 890 20 October 2006	credibility
Eligible service	- exaggeration
qualifying service	Johnson, K W (Army)
- whether incurred danger from hostile forces of the enemy	[2006] AATA 890 20 October 2006
- Cowra breakout	
Leplaw, N	
[2006] AATA 936 3 November 2006	

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- failure to tell story on previous occasions
Johnson, K W (Army)
[2006] AATA 890 20 October 2006
- inconsistencies in evidence
Hatchman, G (Army) (death)
[2006] AATA 876 16 October 2006

Impairment

- permanent
 - onset of permanent impairment
Glendenning, P A (SRCA)
[2006] AATA 1050 5 December 2006
- whether temporary or permanent
 - intermittent symptoms
Glendenning, P A (SRCA)
[2006] AATA 1050 5 December 2006

Injury and disease

- clinical worsening
 - application of diagnostic criteria
Milenz (Finn J)
[2006] FCA 1436 8 November 2006
 - meaning
Milenz (Finn J)
[2006] FCA 1436 8 November 2006

Neurological disorder

- Alzheimer's disease
 - alcohol
Cragg, T C (Army) (death)
[2006] AATA 917 27 October 2006
- dementia pugilistica
 - whether contributed to death
McKewen, B (Army) (death)
[2006] AATA 838 2 October 2006

Practice and procedure

- Departmental guidelines
 - use of for consistency
McPhee, R (RAAF)
[2006] AATA 771 8 September 2006

Psychiatric disorder

- alcohol abuse or dependence
 - aggravation
 - no evidence of clinical worsening
Brook, S (RAAF)
[2006] AATA 894 20 October 2006

- clinical onset
Hayler, J (Navy)
[2006] AATA 944 7 November 2006
- diagnosis
Vock, E (Army)
[2006] AATA 837 2 October 2006
- alcohol abuse and alcohol dependence are separate diseases
Milenz (Finn J)
[2006] FCA 1436 8 November 2006
- experiencing a severe stressor
 - death of baby
Brook, S (RAAF)
[2006] AATA 894 20 October 2006
 - diving
Hayler, J (Navy)
[2006] AATA 944 7 November 2006
 - picket duty
Hill, C
[2006] AATA 925 31 October 2006
 - scare charge
Wilson, J (Navy)
[2006] AATA 999 24 November 2006
- anxiety disorder
 - clinical onset
 - not within 2 years of alleged stressor
Jensen, R
[2006] AATA 979 20 November 2006
 - diagnosis
 - diagnostic criteria not met
Patterson, R
[2006] AATA 994 23 November 2006
 - experiencing a severe stressor
 - picket duty
Hill, C
[2006] AATA 925 31 October 2006
 - sinking of HMAS *Waree*
Jensen, R
[2006] AATA 979 20 November 2006
- depressive disorder
 - experiencing a severe stressor
 - picket duty
Hill, C
[2006] AATA 925 31 October 2006
 - scare charge
Wilson, J (Navy)
[2006] AATA 999 24 November 2006

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pathological gambling
 - gambling during service
 Hill, C
 [2006] AATA 925 31 October 2006

post traumatic stress disorder
 - diagnosis
 Hill, C
 [2006] AATA 925 31 October 2006
 Hayler, J (Navy)
 [2006] AATA 944 7 November 2006

- experiencing a severe stressor
 - diving
 Hayler, J (Navy)
 [2006] AATA 944 7 November 2006

social phobia
 - diagnosis
 Vock, E (Army)
 [2006] AATA 837 2 October 2006

Remunerative work & special rate of pension

kind of work the person was undertaking
 - administrative
 - clerical officer
 Miles, A
 [2006] AATA 843 4 October 2006
 Johnson, K W (Army)
 [2006] AATA 890 20 October 2006

- communications
 - Telstra linesman
 Miller, K F
 [2006] AATA 841 4 October 2006

- hospitality / personal services
 - cook
 Harbers, W
 [2006] AATA 924 31 October 2006

remunerative work
 - meaning
 - hobby
 Barbie, B
 [2006] AATA 1018 29 November 2006

whether prevented by war-caused disabilities alone
 - effects of non-accepted disabilities
 Moles, K G
 [2006] AATA 861 6 October 2006
 Wade, R A
 [2006] AATA 1001 24 November 2006

- parenting responsibilities
 Harbers, W
 [2006] AATA 924 31 October 2006

- redundancy
 Miller, K F
 [2006] AATA 841 4 October 2006
 Miles, A
 [2006] AATA 843 4 October 2006

- refusal to undertake treatment for accepted disabilities
 Johnson, K W (Army)
 [2006] AATA 890 20 October 2006

Respiratory disorder

bronchial asthma
 - diagnosis
 Jans, F J (death)
 [2006] AATA 974 16 November 2006

bronchopneumonia
 - terminal event
 Jans, F J (death)
 [2006] AATA 974 16 November 2006

idiopathic fibrosing alveolitis
 - inability to obtain appropriate clinical management
 Money, D (Navy)
 [2006] AATA 998 22 November 2006

Service pension

income test
 - exempt lump sum
 Peek, I D
 [2006] AATA 947 8 November 2006

- royalty payments
 Peek, I D
 [2006] AATA 947 8 November 2006

- Taxation Office interpretation of 'income' not relevant
 Peek, I D
 [2006] AATA 947 8 November 2006

invalidity service pension
 - capacity to undertake remunerative work
 Hill, C
 [2006] AATA 925 31 October 2006

Spinal disorder

cervical spondylosis
 - degenerative process
 Johnson, K W (Army)
 [2006] AATA 890 20 October 2006

- trauma
 - fall
 - Smith, S J** (RAAF)
[2006] AATA 982 20 November 2006
 - head injury
 - Johnson, K W** (Army)
[2006] AATA 890 20 October 2006
 - no objective evidence
 - Johnson, K W** (Army)
[2006] AATA 890 20 October 2006

Visual disorder

- cataract
- trauma
 - metal filings
 - Somerset, E P** (RAAF)
[2006] AATA 1021 30 November 2006
 - penetrating injury
 - Somerset, E P** (RAAF)
[2006] AATA 1021 30 November 2006

Words and phrases

- cannot be decreased
 - Cotton** (Rares J)
[2006] FCA 1523 16 November 2006
- clinical worsening
 - meaning
 - Milenz** (Finn J)
[2006] FCA 1436 8 November 2006
- experiencing a stressor
 - whether subjective or objective
 - Byrne** (Collier J)
[2006] FCA 1326 11 October 2006
- inability to obtain appropriate clinical management
 - appropriate investigations not conducted
 - Money, D** (Navy)
[2006] AATA 998 22 November 2006
- must
 - Rodda** (Madgwick J)
[2006] FCA 1689 8 December 2006