

AUSTRALIA / JUDGMENT

Blair v Repatriation Commission [2005] FCA 1076

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FEDERAL COURT OF AUSTRALIA

Blair v Repatriation Commission [2005] FCA 1076

VETERANS' ENTITLEMENT – claim that Lyme disease caused by operational service – hypothesis put forward that applicant bitten by tick, tick carried pathogens – whether Tribunal introduced burden of proof by requiring evidence of facts for hypothesis to be "reasonable"

Veterans' Entitlements Act 1986 (Cth) ss 9, 120(1) and (3)

East v Repatriation Commission (1987) 16 FCR 517 applied

Repatriation Commission v Bey (1997) 79 FCR 364 applied

Repatriation Commission v Deledio (1998) 83 FCR 82 at 93 applied

Byrnes v Repatriation Commission (1993) 177 CLR 564 at 571 applied

JOHN ALEXANDER WILLIAM BLAIR v REPATRIATION COMMISSION

NO TAD 2 OF 2005

HEEREY J

8 AUGUST 2005

MELBOURNE (HEARD IN HOBART)

IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY TAD 2 OF 2005

BETWEEN: JOHN ALEXANDER WILLIAM BLAIR

APPLICANT

AND: REPATRIATION COMMISSION

RESPONDENT

JUDGE: HEEREY J

DATE OF ORDER: 8 AUGUST 2005

WHERE MADE: MELBOURNE (HEARD IN HOBART)

**THE COURT ORDERS
THAT:**

1. The appeal is dismissed.
 2. The applicant pay the respondent's costs to be taxed.
- Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
- IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY TAD 2 OF 2005
BETWEEN: JOHN ALEXANDER WILLIAM BLAIR
APPLICANT
AND: REPATRIATION COMMISSION
RESPONDENT
JUDGE: HEEREY J
DATE: 8 AUGUST 2005
PLACE: MELBOURNE (HEARD IN HOBART)

REASONS FOR JUDGMENT

1 The applicant appeals from a decision of the Administrative Appeals Tribunal constituted by the Hon R J Groom DP affirming a decision of the respondent which had been affirmed by the Veterans' Review Board.

2 The applicant had claimed that he suffered from Lyme borreliosis (Lyme disease) and that that disease was war-caused within the meaning of s 9 of the Veterans' Entitlements Act 1986 (the Act). It was not in dispute that the applicant was at the relevant time engaged in operational service and that the applicable provisions are s 120(1) and (3) of the Act. Relevantly those provisions are:

"(1) Where a claim under Part II for a pension in respect of the incapacity from ... disease of a veteran ... relates to the operational service rendered by the veteran, the Commission shall determine that ... the disease was a war-caused disease ... unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.

...

(3) In applying subsection (1) or (2) in respect of the incapacity of a person from ... disease ... related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:

(a) ...

(b) that the disease was a war-caused disease or a defence-caused disease;

(c) ...

as the case may be, if the Commission, after consideration of the whole material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the ... disease ... with the circumstances of the particular service rendered by the person."

3 No Statement of Principles has been determined by the Repatriation Medical Authority in relation to Lyme disease and thus the provisions of s 120A of the Act are not relevant.

Evidence before the Tribunal

4 The applicant served in the Royal Australian Navy from 16 January 1965 until 14 April 1969. He engaged in a number of periods of operational service while serving on HMAS Vendetta.

5 On 8 November 1965 in Borneo the applicant went on a shore excursion which included a visit to a plantation. While on the excursion the applicant got some minute insects all over his hands. They were prickling him very severely. He had trouble dislodging them and washed them off in the river. They were numerous, perhaps a couple of dozen.

6 Nine days after the excursion the applicant fell ill with flu like symptoms which were diagnosed as viremia. He had a temperature of 104 degrees Fahrenheit and a three day history of coryzal symptoms leading to headaches, malaise, and aches in his limbs and back. He was then discharged.

7 Lyme disease is a tick transmitted disease which can cause chronic skin problems, headaches, musculo-skeletal pains and a range of other symptoms. The hallmark symptom is a bright red bullseye-like rash that develops at the site of the tick bite. This rash is called erythema migrans (EM). *Borrelia afzelii* are a known cause of Lyme disease, particularly in the Eurasian region.

8 The applicant did not claim in evidence that he had EM after the Borneo excursion and there was no reference to it in the medical records from HMAS Vendetta. Nor is there any reference to any tick or other insect bite in those records.

9 There was in evidence an article in the Scientific American of September 1994 which states that a tick has to be attached to a body for a period of thirty-six to forty-eight hours before an infectious dose of the pathogen will be transmitted.

10 The most accurate serological test for Lyme disease is the "western blot" test. In November 1995 a serum sample from the applicant was sent to the Royal North Shore Hospital for this test. The serum tested positive to *borrelia afzelii*.

11 Dr Richard Barry, a retired Professor of Microbiology gave evidence on behalf of the applicant and said that there were no pieces of evidence which would "automatically exclude diagnosis" of Lyme disease. However there was evidence from Dr Bernie Hudson of Royal North Shore Hospital that a positive serological test for Lyme disease is not conclusive evidence that a subject has the disease. Dr Barry said that he believed that the applicant was at some stage exposed to a *borrelia afzelii* like organism. Although not known at the time, this was "highly likely" to be endemic in South-East Asia. He said the confirmation of the diagnosis and the timing of the illness could be supported by information related to tick bites and the occurrence of EM like lesions.

12 The following exchange took place between Mr Hart, counsel for the applicant, and Dr Barry:

"Mr Hart: Is the evidence of Mr Blair as to his exposure to insects in the river in Borneo significant when it comes to providing the linkage?

Dr Barry: I think it is quite significant as a possible linkage. The thing that has to be mentioned is that the tick factor – these ticks; they go through various life cycle stages and so, the first of those life stages is little embryonic form, which is really very, very small. It is the size of a pinhead or so, and in an area, where say, ticks are prevalent, you will find on the tips of blades of grass, you will find hundreds of these little things, which are just hanging around there to hitch onto a warm blooded mammal. So, it sounds to me like they probably were, either tick larvae or in the intermediate stage in the development of the tick."

13 The Tribunal recorded that Dr Barry was asked specifically about the possible hypothesis by Mr Hart in the following terms:

"Mr Hart: Is there anything in the facts that have been made to you, including Mr Blair's subsequent evidence regarding exposure to the small insects, which would enable you so [sic] say that there does not exist a reasonable hypothesis linking his exposure to Lyme disease?

Dr Barry: No, I don't think there are any pieces of evidence which would automatically exclude the diagnosis of the disease.

Mr Hart: ... so there is nothing which would enable you to say that the hypothesis is fanciful, is subject contrary to any known fact, any known research, or is it contrary to any know [sic] law of nature?

Dr Barry: The answer to that is no. But qualified by the comment that, of course, nevertheless it has to remain speculative."

Tribunal's decision

14 The Tribunal referred to the Full Court decisions in *East v Repatriation Commission* (1987) 16 FCR 517 and *Repatriation Commission v Bey* (1997) 79 FCR 364. The Tribunal found that on the whole of the material a hypothesis had been advanced connecting the Lyme disease to the applicant's eligible service. As characterised by the Tribunal that hypothesis was that Lyme disease is spread by ticks carrying various types of borrelia including borrelia afzelii. The applicant was at some stage exposed to an afzelii-like organism, ticks carrying afzelii may have been in Borneo when the applicant was there during his operational service, the applicant may have been bitten by a tick carrying borrelia afzelii and as a result the applicant may have contracted Lyme disease. The Tribunal noted that Dr Barry appeared to confirm, although in somewhat ambiguous terms, that the hypothesis was reasonable. Nevertheless it remained for the Tribunal to be so satisfied, taking into account all the evidence before it. There were two fundamental questions that could be asked which went to the very foundation of that hypothesis. They were:

- (a) Where is the evidence that the applicant was actually bitten by a tick in Borneo when he was there in 1965? and;
- (b) What is the basis for the claim that borrelia afzelii were in fact present in Borneo at the time?

15 After discussing the evidence already mentioned the Tribunal found that the applicant did have annoying and unidentified insects on his hands for a period of time during the excursion in Borneo but that they were removed by him during that day. He referred to a section of Dr Barry's report which said:

"However the only way in which he could have been infected is by way of a tick bite, so that here his historical recall of his index of illness is important. This is because tick bites are different from the bites of other insects, such as midges and mosquitoes, in that the larval tick (pin head size) burrows into the skin and remains attached for days while it grows as it engorges its blood meal; most LB patients not only recall where they were when the tick attachment occurred, but describe efforts to remove it, and also remember the itchy, sore swelling of EM."

16 The Tribunal noted that the applicant did not claim in evidence that he had EM after the excursion and there is no reference to it in the medical records from the ship nor is there any reference to the tick or other insect bites. The Tribunal referred to the Scientific American article already mentioned, and accepted those comments

"as an authoritative statement and as evidence that a tick has to be attached to the body for a long period of time before Lyme disease can be transmitted."

17 There was, the Tribunal pointed out, no evidence that the applicant was actually bitten by a tick let alone evidence that it remained lodged in his skin for many hours. Similarly there was no evidence that the applicant had EM following the excursion. The Tribunal referred to a letter of the applicant dated 16 March 1996 to the Commission which referred to the recreational trip but made no reference to the insects. The Tribunal referred to the evidence of Dr Barry that his "suspicion is that the ticks occur in Borneo and similar places" and that they "travel as passengers on migratory birds" and "end up down as far as Macquarie Island".

18 Dr Barry had concluded that as to the flu like symptoms the applicant suffered after the trip:

"I wouldn't put a strong correlation between those symptoms and the possible exposure to Lyme disease."

The Tribunal found that those symptoms could equally have been caused by some type of influenza or similar condition. There was evidence before the Tribunal that *borrelia afzelii* is present in the cooler climates of Europe and Asia. There is also evidence that Lyme disease is present in the United Kingdom and Australia. The applicant has worked in the United Kingdom for five years and also in Algeria. He had lived and worked for many years in Tasmania and also lived in Victoria.

19 The Tribunal noted Dr Barry's acceptance that "there is actually absolutely no factual evidence to support" the contention that *borrelia afzelli* may have travelled to Borneo.

20 The Tribunal's conclusion was expressed as follows:

"52. Accepting the evidence before me and without considering issues of proof, I find on all of the evidence, that there is no sound basis for the hypothesis advanced on behalf of the applicant. There is no evidence that *Borellia Afzelii* were actually present in Borneo at the relevant time and no evidence that the applicant was bitten by a tick during the excursion, let alone evidence that a tick was present on his body for the length of time necessary for the disease to be transmitted.

53. The hypothesis advanced in this case is based merely on the possibility that the applicant may have been bitten by a tick carrying Lyme disease during the one day recreational excursion in Borneo in 1965. The facts as advanced to [sic] not provide the essential foundation for the hypothesis.

54. As was said in *Repatriation Commission v Bey* (supra):

'A reasonable hypothesis involves more than a mere possibility. It is an hypothesis pointed to by the facts ...'

55. I therefore find that the hypothesis advanced in this case is not a reasonable hypothesis within the meaning of s 120(3) of the Act."

Grounds of appeal

21 The first ground of appeal was that the Tribunal approached its task of determining whether a reasonable hypothesis existed by requiring the applicant to establish as a fact one or more of the matters giving rise to the hypothesis, thereby introducing a burden or onus of proof.

22 The second ground was that the Tribunal ought to have found that a reasonable hypothesis existed upon the evidence and thereafter allowed the claim to succeed unless the respondent established that one or more facts necessary to support the claim were disproved beyond reasonable doubt or that the respondent established that the truth of a fact inconsistent with the hypothesis was proved beyond reasonable doubt.

23 The third ground was that by finding that the existence of a reasonable hypothesis required evidence of the presence of *borrelia afzelii* in Borneo at the relevant time and that there was no evidence the applicant was bitten by a tick during his operational service the Tribunal treated the hypothesis as a mere possibility rather than an hypothesis pointed to by the facts.

Conclusion on the appeal

24 Whether the material raises a "reasonable hypothesis" for the purposes of s 120(3) is a question of fact for it involves no more than a determination whether a hypothesis in connection is reasonable: *Bey* at 373.

25 The Tribunal did not disregard that mandate. It was required to examine the evidence and did so. As the Full Court said in *Repatriation Commission v Deledio* (1998) 83 FCR 82 at 93, it is impermissible merely to assume or assert the facts which are said to found the hypothesis. For the reasons it gave, it was quite open for the Tribunal to conclude that critical elements of the hypothesis, namely that *borrelia afzelii* were present in Borneo and that the applicant was bitten

by a tick, did not pass beyond the level of mere speculation. Indeed as to the latter element, there was positive adverse evidence and inferences pointing to the contrary.

26 Put another way, the hypothesis was shown to be contrary to known scientific facts: *Byrnes v Repatriation Commission* (1993) 177 CLR 564 at 571. The Tribunal was entitled to find that the evidence showed that the removal of the insects and the lack of the EM symptoms pointed against the Borneo excursion being the occasion on which the Lyme disease was contracted.

Orders

27 The appeal will be dismissed with costs.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey.

Associate:

Dated: 8 August 2005

Counsel for the Applicant: Mr L Wall

Solicitor for the Applicant: Wallace Wilkinson & Webster

Counsel for the Respondent: Mr B Morgan

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 6 June 2005

Date of Judgment: 8 August 2005

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Prepared on 26 October 2026 · Esheria