

AUSTRALIA / JUDGMENT

Collins v Repatriation Commission [2008] FCA 1982

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FEDERAL COURT OF AUSTRALIA

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Collins v Repatriation Commission [2008] FCA 1982

VETERANS' ENTITLEMENTS – determination of 'kind of death' – degree of causation of or contribution to death necessary for characterisation as a particular kind of death

Administrative Appeals Tribunal Act 1975 (Cth), s 44

Veterans' Entitlements Act 1986 (Cth), ss 8, 13, 120, 120A, 196B and 196G

Doolette v Repatriation Commission (1990) 21 ALD 489

Langley v Repatriation Commission (1993) 43 FCR 194

Repatriation Commission v Codd (2007) 95 ALD 619

Repatriation Commission v Hancock [2003] FCA 711

JUNE COLLINS v REPATRIATION COMMISSION

NSD 863 of 2008

EMMETT J

9 DECEMBER 2008

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NSD 863 of 2008

BETWEEN: JUNE COLLINS

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: EMMETT J

DATE OF ORDER: 9 DECEMBER 2008

WHERE MADE: SYDNEY

**THE COURT ORDERS
THAT:**

1. The appeal be dismissed.
 2. The Appellant pay the Respondent's costs of the appeal.
- Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NSD 863 of 2008

BETWEEN: JUNE COLLINS

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: EMMETT J

DATE: 9 DECEMBER 2008

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 This appeal, pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) (the Tribunal Act), is concerned with the notoriously difficult provisions of the Veterans' Entitlements Act 1986 (Cth) (the Act). In particular, it is concerned with the phrases "kind of death" and "particular kind of death" in s 120A and other provisions of the Act.

2 The appellant, Ms June Collins, is the widow of Mr Donald Collins (the Veteran). The Veteran served in the Royal Australia Air Force from January 1943 until January 1946. That service constitutes eligible war service for the purposes of the Act. Because the Veteran served overseas during World War II, the whole of his service constitutes operational service for the purposes of that Act.

3 The Veteran died in March 2005 at the age of 83. Ms Collins claimed a war widow's pension on the basis that the veteran's death was war-caused. The respondent, the Repatriation Commission (the Commission), refused the claim and the Veterans Review Board affirmed that refusal. Ms Collins then applied to the Administrative Appeals Tribunal (the Tribunal) for review of the decision. On 2 May 2008, the Tribunal affirmed the decision under review. The appeal before this Court was brought from that decision under s 44 of the Tribunal Act. Under s 44, an appeal lies only on a question of law. Before stating the contentions of Ms Collins as to the error of law asserted, it is necessary to say something about the Tribunal's decision and the statutory context.

4 Section 13 of the Act imposes a liability on the Commonwealth to pay a pension to a veteran's dependants where the death of the veteran was war-caused. Section 8 of the Act relevantly provides that the death of a veteran is to be taken as being war-caused if the death arose out of or was attributable to any eligible service rendered by the Veteran.

5 Section 120(1) provides that where a claim for a pension in respect of the death of a veteran relates to operational service rendered by the veteran, the Commission must determine that the death of the veteran was war-caused unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination. Section 120(3) provides that the Commission is to be satisfied beyond reasonable doubt that there is no sufficient ground for determining that

the death was war-caused if the Commission is of the opinion that the material before it does not raise a reasonable hypothesis connecting the death with the circumstances of the particular service rendered by the veteran.

6 Section 120(4) relevantly provides that, except in making a determination to which s 120(1) applies, the Commission, in making any determination or decision in respect of a matter arising under the Act or the Regulations made under the act, is to decide the matter to its reasonable satisfaction. However, those provisions are then qualified, relevantly, by ss 120A and 196B. Section 120A applies to a claim that relates to the operational service rendered by a veteran. Section 120A(2) provides that if the Repatriation Medical Authority (the Authority) has given notice under s 196G that it intends to carry out an investigation in respect of a particular kind of death, the Commission is not to determine a claim in respect of a death of that kind unless the Authority has determined a statement of principles under s 196B in respect of that kind of death or has declared that it does not propose to make such a statement of principles.

7 Under s 120A(3), an hypothesis connecting the death of a person with the circumstances of any particular service rendered by the person is, for the purposes of s 120(3), reasonable only if there is in force a statement of principles that upholds the hypothesis. However, s 120A(3) does not apply in relation to a claim in respect of the death of the person if the Authority has neither determined a statement of principles nor declared that it does not propose to make such a statement of principles in respect of the kind of death met by the person.

8 Section 196B(2) relevantly provides that, if the Authority is of the view that there is sound medical-scientific evidence that indicates that a particular kind of death can be related to operational service rendered by veterans, the Authority must determine a statement of principles in respect of that kind of death, setting out the factors that must, as a minimum, exist and which of those factors must be related to service rendered by a person before it can be said that a reasonable hypothesis has been raised connecting a death of that kind with the circumstances of that service. Section 196B(14) provides that a factor causing or contributing to a death is related to service rendered by a person if it arose out of or was attributable to that service.

9 The death certificate in respect of the Veteran records the following under the item labelled "cause of death and duration of last illness":

- (1)(a) Pulmonary Embolism, days
- (1)(b) Myocardial Infarction (Acute), days
- (2) Motor Axonal Neuropathy, years

Hypertension, years

10 The Tribunal had the assistance of medical evidence from Dr Russell Butler, who was called by Mrs Collins, and Professor Michael O'Rourke, who was called by the Commission. Both witnesses expressed some misgivings about the accuracy of the medical information on the death certificate.

11 Dr Butler's view was that ischemic heart disease suffered by the Veteran had no causative relationship to pulmonary embolism, but was a separate factor contributing to death. Dr Butler said that the Veteran's ischemic heart disease increased his likelihood of dying once the pulmonary embolism had occurred. He said that the death rate from pulmonary embolism is high, but ischemic heart disease would make it even higher. In his view, the chance of dying would have been around 90 to 95% without the coronary artery disease, but with the disease it would be almost 100%. In summary, Dr Butler considered that the Veteran may have died more quickly by reason of the ischemic heart disease. He said that it was more likely than not that the ischemic heart disease contributed to the Veteran's death and that he died more rapidly than he would have done in the absence of ischemic heart disease. He considered that, while the magnitude of that effect was difficult to assess, it was probably a matter of hours or, at most, a few days. He agreed that that was a reference to the timing of the Veteran's death rather than to its likelihood.

12 Professor O'Rourke did not consider that ischemic heart disease played a significant part in the Veteran's death, which was attributable to massive pulmonary embolism. He expressed the view that pulmonary embolism caused hypertension and shock and that that caused troponin elevation. While there was evidence of troponin elevation in the Veteran, Professor O'Rourke considered that that was due to extreme hypertension. Professor O'Rourke's view was that the Veteran's death was caused by massive pulmonary embolism originating from venous thrombosis in the presence of debilitating neurological disease. Professor O'Rourke considered that the contribution of ischemic heart disease to the Veteran's death was negligible. He considered that his evidence and that of Dr Butler were in agreement, in that they agreed that ischemic heart disease may have made a difference of a matter of hours or days to the timing of the Veteran's death.

13 In the light of that evidence, summarised by the Tribunal in its reasons, the Tribunal considered that the evidence showed that ischemic heart disease hastened, but was not the cause of, the Veteran's death. The Tribunal found that the Veteran's death was caused by the pulmonary embolism, which, it found, occurred as a consequence of motor axonal neuropathy which the Veteran had suffered for many years. The Tribunal found that, while the Veteran may have died when he did, rather than some hours or days later, because he had ischemic heart disease, the ischemic heart disease was not the cause or even one of the causes of the Veteran's death. Rather, the Tribunal found the cause of death was the pulmonary embolism. The Tribunal then said that, in the language of ss 120 and 120A of the Act, the kind of death met by the Veteran was death by pulmonary embolism.

14 The Tribunal stated its task as being to consider all of the material before it and to determine whether that material pointed to a hypothesis connecting the death of the Veteran with the circumstances of the particular service rendered by him: if no such hypothesis arose, the application must fail. The Tribunal observed that Mrs Collins' case proceeded on the basis that the kind of death met by the Veteran was death by ischemic heart disease. The material presented to the Tribunal on behalf of Mrs Collins sought to draw a connection between the Veteran's operational service and that ischemic heart disease. However, there was no material that sought to draw a connection between the Veteran's service and his death by pulmonary embolism. The Tribunal concluded that, in the light of its finding that the kind of death met by the Veteran was death by pulmonary embolism, the application must fail.

15 In Mrs Collins's supplementary notice of appeal of 4 July 2008, two grounds of appeal were stated as follows:

1. The Tribunal incorrectly held that a medical condition found to be contributory to the death of the Veteran, namely ischemic heart disease, was not a kind of death of the Veteran for the purposes of s 120A of the Act.
2. Further, or in the alternative, the reasons for the decision of the Tribunal do not clearly set out its finding as to whether or not ischemic heart disease contributed to the death of the Veteran, in that the reasons do not refer to the evidence or other material upon which the Tribunal made that finding.

16 There is no substance, whatsoever, in the second ground. I have indicated the findings that were made by the Tribunal, which appear to me to be unequivocal. The Tribunal expressly found that ischemic heart disease hastened, but was not the cause of, the Veteran's death and that, while the Veteran may have died when he did rather than some hours or days later because of his ischemic heart disease, the ischemic heart disease was not the cause or even one of the causes of his death. The Tribunal made patently clear the evidence upon which it based those findings, namely, the evidence of Professor O'Rourke and Dr Butler.

17 The first ground arises because of the difficulty of the language of the relevant provisions of the Act. At the end of the day, I do not consider that there was any error of law on the part of the Tribunal and it may be that there is really no question of law raised. Nevertheless, in light of the arguments that have been put and the complexity of the provisions, I will say something about my understanding of their effect.

18 It may be that, if death is hastened because of the accelerated progress of a disease, being acceleration caused by a war-caused condition, the death was attributable to war service (see *Doolette v Repatriation Commission* (1990) 21 ALD 489 at 492). Further, where a veteran contracts a disease that he was likely to have contracted in any event but, because of war service, the contraction of the disease has been accelerated, it may be possible to conclude that the disease is attributable to war service (see *Langley v Repatriation Commission* (1993) 43 FCR 194 at 204). However, the situation in the present case is different from the circumstances to which I have just referred. In the present case, the ischemic heart disease did not contribute in any way to the

pulmonary embolism that was the cause of the Veteran's death.

19 If the ischemic heart disease had been shown to have had some cause or connection with the pulmonary embolism, the position might have been different. However, there was no material before the Tribunal that would support such a contention. It may be that multiple medical conditions cause a particular death. In such a case, it may be necessary that all of those conditions be considered for the purpose of determining whether there is a relevant statement of principles applicable. If one of the multiple medical conditions is a cause of death and that condition was itself caused by war service, then that may be sufficient to establish an entitlement to a pension (see *Repatriation Commission v Hancock* [2003] FCA 711 at [8]).

20 Certainly, in order to ascertain whether a statement of principles applies, it is necessary to identify the kind of death met by the Veteran. The identification of the kind of death is the critical step in the analysis, but in determining the kind of death, the proof is on the balance of probabilities (see *Hancock* [2003] FCA 711 at [9]). Clearly enough, the phrase "kind of death met by a person" is concerned with causation. It is not a question about whether the death was slow, fast or otherwise, it asks questions of medical causation about the cause of death in the context of the Act.

21 The question of the kind of death met by a veteran is a question of medical causation of the death, although that might include contributing or underlying causes in the sense to which I have already referred (see, for example, *Repatriation Commission v Codd* (2007) 95 ALD 619 at [31] and [39]). That is to say, if there is a cause that contributes to the ultimate cause of death, then that cause may have some relevance. The factual finding made by the Tribunal in the present case, however, is that, while the ischemic heart disease may have caused the Veteran's death to occur hours or days earlier, it did not in any way contribute to the pulmonary embolism, which was the actual cause of death.

22 I do not consider that there was any error of law on the part of the Tribunal. It follows that the appeal must be dismissed.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 22 December 2008

Counsel for the Applicant: M Vincent

Solicitor for the Applicant: Kemp & Company

Counsel for the Respondent: RM Henderson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 9 December 2008

Date of Judgment: 9 December 2008

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