

AUSTRALIA / JUDGMENT

East, E.N. v Repatriation Commission [1987] FCA 383

COURT

Administrative Appeals Tribunal Act 1975 s.44.

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CATCHWORDS

VETERANS' ENTITLEMENTS - Pension claim - Death of veteran from cancer of unknown aetiology - Necessity for "reasonable hypothesis" linking death to war service - What constitutes a reasonable hypothesis — Relevance of evidence of quantum of exposure - Methodology of respondent's expert witness in commenting upon hypothesis advanced on behalf of applicant. Veterans' Entitlements Act 1986 ss.8, 9, 13, 119, 120.

Repatriation Act 1920 (now repealed) s.47.

Administrative Appeals Tribunal Act 1975 s.44.

WA G.130 of 1986

EVELYN NELLIE EAST v REPATRIATION COMMISSION

Jenkinson, Neaves and Wilcox JJ

Sydney

22 July 1987

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY No. WA G.130 of 1986

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GENERAL DIVISION

On Appeal from the

Veterans' Appeals Division

of the Administrative

Appeals Tribunal

BETWEEN: EVELYN NELLIE EAST

Applicant

AND: REPATRIATION COMMISSION

Respondent

CORAM: JENKINSON, NEAVES and WILCOX JJ

PLACE: SYDNEY

DATE: 22 JULY 1987

MINUTES OF ORDER

THE COURT ORDERS

THAT:

1. The appeal be dismissed.

2. The applicant pay to the respondent its costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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DATE: 22 JULY 1987

REASONS FOR JUDGMENT

THE COURT: This appeal raises, in a novel legislative setting, a familiar problem: the appropriate response to a claim for a pension, consequent upon the death of a war veteran, where the effective cause of that death is not able to be established. The conceptual foundation for the payment of such a pension is the existence of a causal link between the service and the death of the veteran; but the chronic

problem arises because, in an understandable desire to take a

generous attitude to such claims, Parliament has from time to time inserted in the relevant legislation provisions designed

to mitigate the problems of proof of a causal relationship.

Background: the early legislation

Commonwealth legislation providing directly for the payment of benefits to ex-service personnel and their dependants was enacted in 1920. It was then called the

Australian Soldiers' Repatriation Act 1920 and was renamed in

1950 as the Repatriation Act. This Act, although heavily amended over the years, remained in force until its supercession and repeal by the Veterans' Entitlements Act 1986, the current legislation. The original Act contained no provisions regarding either the standard or the onus of proof. Section 23 imposed upon the Commonwealth a liability to pay appropriate pensions upon the death or incapacity of a member of the Forces "whose death or incapacity results or has resulted from any occurrence happening during the period he was a member of the Forces". The only provision dealing with the consideration of claims by the Repatriation Boards constituted under the Act was s.37, which empowered a Board to reject a claim by a dependant "if the Board is satisfied that the grant or continuance of the "pension is undesirable". There was a right of appeal from the Boards to the Repatriation Commission constituted under the Act. Under this Act the onus of proof rested upon the claimant. If the necessary causal link could not be established, the claim

failed.

In 1929 the Act was amended to provide for new tribunals, the War Pensions Entitlement Appeals Tribunals and the War Pensions Assessment Appeals Tribunals. Provisions governing the proceedings of those tribunals were added. They included s.45W(2) which read as follows:

"Subject to this Act, an Appeal Tribunal and an Assessment Appeal Tribunal shall not, in the hearing of appeals, be bound by any rules of evidence but shall act according to substantial justice and the merits of the case and shall give to an appellant the benefit of the doubt:

Provided too that if the appellant or a representative of the appellant shall make out a prima facie case in support of his claim that the incapacity from which he is suffering or from which he has died was caused or aggravated by war service, the onus of proof

that such incapacity was not in fact so caused or aggravated shall lie with the Commission."

Section 45W(2) related only to proceedings before the Tribunals, but in 1935 the rigour of the position at Commission level was relaxed by the insertion into the Act of a new section, numbered 39B. That section required that the Commission, in the determination of appeals, "act according to substantial justice and to the merits of each case, and shall

give to an appellant the benefit of any reasonable doubt."

Notwithstanding the concession given by the final words of s.45W(2) an appellant, before either of the tribunals, bore the burden of establishing a prima facie case of causation. This came to be regarded as unduly onerous. In 1943 ss.39B and 45W(2) were each repealed. In lieu thereof a substituted s.39B(1) -- renumbered as s.47 -- was introduced which provided that the Repatriation Commission, a

Repatriation Board or a tribunal hearing, determining or

deciding a claim, application or appeal "shall act according to substantial justice and the merits of the case, shall not be bound by technicalities or legal forms or rules of evidence and shall give to the claimant, applicant or appellant the benefit of any doubt--

- (a) as to the existence of any fact, matter, cause or circumstance which would be favourable to the claimant, applicant or appellant; or
- (b) as to any question whatsoever (including the question whether the incapacity from which the member of the Forces is suffering or from which he has died was contributed to in any material degree, or

was aggravated, by the conditions of his war service) which arises for decision under his claim, application or appeal."

Sub-section (2) made it unnecessary for the claimant, applicant or appellant to furnish proof and empowered and required the Commission, Board or Tribunal "to draw ... from all the circumstances of the case, from the evidence furnished and from medical opinions, all reasonable inferences in favour of the claimant, applicant or appellant, and in all cases whatsoever the onus of proof shall lie on the person or authority who contends that the claim, application or appeal should not be granted or allowed to the full extent claimed". This new section remained in that form until 1977. Whether or not the section was satisfactory in its practical operation -- as to which see Cook and Creyke "Repatriation claims and the Burden of Proof of the Negative" 58 Australian Law Journal 263 at p.266 -- It was remarkably free of litigation; not a single case on the section going to the High Court of

Australia in its 34 years of operation.

The 1977 amendments

In 1975 the Independent Enquiry into the Repatriation System, constituted by Toose J, recommended amendments to s.47 (Report pp.251-256). In 1977 the section was amended, although not in the manner recommended by the Enquiry. This amendment introduced into the Act for the first time a concept taken from the criminal law: proof beyond reasonable doubt. The new s.47 read:

"47. (1) The Commission, a Board, an Appeal Tribunal or an Assessment Appeal Tribunal, in hearing, considering, determining or deciding a claim, application or appeal--

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) shall act according to substantial justice and the merits and all the circumstances of the case, and, without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, Matter, cause or circumstance, including any reason attributable to--

- (1) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; or
- (1i) an absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a member of the Forces was not reported to the appropriate authorities.
- (2) The Commission, Board, Appeal Tribunal or Assessment Appeal Tribunal shall grant the claim or application or allow the appeal, as the case may be, unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim or application or allowing the appeal."

Sub-section (2) was amended in 1979; but not so as to affect

the previous requirements as to onus and standard of proof.

It was not long before the effect of the new provisions was considered in the High Court. In *Repatriation Commission v. Law* (1981) 147 CLR 635 Aickin J, with whom Gibbs CJ, Stephen and Mason JJ all agreed, made these comments at p-643 about s.47, as it stood prior to 1977:

"It will be observed that the onus of proof was placed on the person or authority contending that the claim, application or appeal should not be granted or allowed. In relation to appeals that meant in substance that the onus of proof was placed on the Commission. The nature of the onus was not stated specifically but there can be no doubt that it was the ordinary civil onus, i.e. that of proving the material facts on the balance of probabilities, but it was an onus which required that degree of proof of a negative Proposition. The precise operation of the 'benefit of any doubt' in such a context is not altogether clear but presumably it meant no more than a doubt as to the balance of probabilities in respect of each of the matters on which entitlement depended."

His Honour at p.644 compared the new sub-section (2):

"The significant difference between the old and the new provision is that the standard of proof is specified. The new provision provided that the Commission, Board or Tribunal must be satisfied beyond reasonable doubt of the negative proposition that there were insufficient grounds for allowing the claim or appeal. The new section did not use the expression 'onus of proof' but the fact that the Tribunal was placed under a duty to grant a claim or allow an appeal unless so satisfied is enough to place the onus of proof to the specified standard on the Commission."

The O'Brien case

The full ramifications of the differences between the old and the new s.47(2) became apparent in the later case of

Repatriation Commission v. O'Brien (1985) 155 CLR 422. This

was not a death claim. The respondent sought a pension in respect of incapacity said to arise out of his war service. The facts of the case are unremarkable and the case might have been determined without any discussion of the wider effects of s.47(2). However, when the matter was before a Full Court of

this Court ~- see *O'Brien v Repatriation Commission* (1984) 1

FCR 472 -- Keely and Fitzgerald JJ had referred, at pp.498-499, to those effects:

"If there is material which tends to disprove a fact, the question arises whether the non-existence of that fact is the only rational conclusion on all the material, including such material, if any, as points to the possibility that the fact does exist. A 'real' possibility of the existence of that fact may be founded on something in the material which points to its existence or may arise from a lack of sufficient cogency in the material to disprove its existence or from some deficiency in the range of that material. A real possibility of the existence of a fact may be left open by material although there is nothing in the material which points to that possibility. The possibility may in such circumstances be 'speculative' but it is nonetheless 'real', not 'fanciful', in the relevant sense, for the very reason that, on the evidence, the non-existence of the fact is not the only rational conclusion.

If there is no material in respect of a fact, or if the material is neutral in the sense that it leaves the existence of the fact unknown, there is no rational basis for a choice between the conclusion that the fact does exist and the conclusion that it does not. The non-existence of that fact is not the only rational conclusion. There is no need that there also be material which points to a 'real' possibility of the existence of that fact. That 'real' possibility is left open by the evidence.

Thus, it may not be established beyond reasonable doubt that incapacity or death is not 'connected with' war service either because there is material which points positively to a cause of the incapacity or death which is or might be so 'connected' ... or because of some inadequacy in the material to show the absence of a connection."

In the High Court the Commission challenged those views, arguing that, if there is no accepted evidence that a claimant's incapacity arose out of or is attributable to his war service, the claim must fail. A majority of the High Court (Gibbs CJ, Wilson and Dawson JJ) rejected that argument. Their Honours referred to four relevant considerations: that no onus of proof of a claim was placed on a claimant; that there could be no guarantee that all relevant facts would be discovered; the need to take into account the matters referred to in s.47(1)(b); and the requirement that a claim be granted unless the Commission "is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim". They proceeded, at pp.433-434:

"When regard is had to these considerations, it

seems to us to be impossible to lay down the

law by saying that if the material in a

particular case does not provide some positive inference in favour of the requisite connexion between death or incapacity and war service then the Commission or Review Tribunal as the case may be must be satisfied beyond reasonable doubt that there are insufficient grounds to grant the claim."

At p.434 the majority specifically approved the passage in the judgment of Keely and Fitzgerald JJ set out above.

Brennan J dissented. That dissent is important in connection with subsequent events. After pointing out at p.438 that proceedings before the Commission or a Board are inquisitorial rather than adversarial his Honour said:

"Section 47 thus operates in a context where an investigation has been carried out with reasonable diligence and where all the relevant facts ascertained in the investigation and furnished by the claimant are before the decision-maker. If the facts thus ascertained support a reasonable hypothesis that the claimant is entitled to a benefit under the eligibility provisions of the Act, the Board or the Commission must determine to grant the claim. If a reasonable hypothesis of entitlement arises on some of those facts, the Board or Commission must determine to grant the claim unless other facts dispel the hypothesis beyond reasonable doubt. If the Board or Commission is satisfied that no reasonable hypothesis of entitlement is supported by the facts or that any such reasonable hypothesis is dispelled beyond reasonable doubt, the Board or Commission should reject the claim. Where, on the whole of the material no reasonable hypothesis of entitlement arises, there are 'insufficient grounds for granting the claim!'"

The consequence of the majority view in O'Brien was that in any case where, at the end of the day, it was impossible to determine the cause of an incapacity or death -- or, in the case of an incapacitating or fatal disease, the cause of that disease -- the application must succeed. Cause being unknown, the Commission could not negative, beyond reasonable doubt, the possibility that there was a causal relationship between the veteran's war service and his or her subsequent incapacity or death. Where cause was unknown

claims would, therefore, have to be allowed even though there

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were no facts to suggest a connection between the incapacity or death and the war service; and such claims were, quite

properly, allowed in the period immediately following O'Brien.

The 1985 amendment

This situation was quickly seen by the Government as unacceptable. In May 1985, only three months after the High Court's decision in O'Brien, a Bill to amend s.47, amongst other provisions, was placed before Parliament. The Minister's Second Reading Speech -- see Parliamentary Debates (House of Representatives) 16 and 17 May 1985 pp.2644~2648 -- makes it clear that the proposed amendment to s.47 was a direct response to the decision in O'Brien and that it was proposed on financial grounds. At p.2645 the Minister said:

"It has always been accepted that the repatriation pension system should be generous. Nevertheless generosity seems to have gone beyond reasonable bounds in a Situation where a pension must be granted in respect of a veteran's incapacity or death even if there is no evidence raising a reasonable possibility of a link between the incapacity or death claimed and the veteran's period of eligible war service. This in fact is the position because the effect of section 47, in the light of its interpretation by the courts, is to bring the determination of disability pension claims close to one of automatic acceptance for the vast majority of claims. It is not surprising that claims for disability pension are pouring into the Department of Veterans' Affairs and that expenditure on disability pensions and war widows' pensions is increasing rapidly -- by 55 per cent and 70 per cent respectively over the past three years."

The proposed amendment of s.47 included the insertion
of the following new sub-sections:

11.

"(2) Where the Commission is considering and determining a claim for a pension with respect to the death or incapacity of a member of the Forces, the Commission shall not grant the claim if it is reasonably satisfied--

{a) that the investigation of the claim did not disclose material, and there is no other material before the Commission, that raises a reasonable hypothesis that there exists a connection required by this Act to exist between the death or incapacity of the member and the member's war service; or

(b) that any such reasonable hypothesis raised by material before the Commission has been dispelled.

(3) Subject to sub-section (2)--

(a) in respect of a claim for a pension made under section 24--

(i) by a member of the Forces whose war service included qualifying war service; or

(1i) by a dependant of a deceased member of the Forces who died before 12 November 1958 and whose war service included qualifying war service,

the Commission shall grant the claim unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim; and

- (b) in respect of any other claim for a pension--the Commission shall not grant the claim unless it is reasonably satisfied that there are sufficient grounds for granting the claim."

The Minister explained at p.2646 that the draft adopted the scheme discerned by Brennan J in his dissenting judgment in O'Brien:

"The Bill I am now introducing draws on Mr Justice Brennan's proposition. It provides in respect of all claims for pension that, where the Repatriation Commission is reasonably satisfied that the material before it does not raise a reasonable hypothesis of a connection

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between the death and capacity of a veteran and the veteran's war service, or that any such hypothesis which has been raised, has been dispelled, a pension shall not be granted. The requirement that there be established such a reasonable hypothesis of a war service connection is intended to ensure that a pension is not payable merely because there is a theoretical connection which is of a remote, fanciful or tenuous nature.

In addition, it is proposed to continue to apply the criminal standard of proof to claims for pensions in respect of: First, a disability where a veteran had overseas war service or where, during service in Australia in World War II, the veteran was personally engaged in direct combat against the enemy; second, a disability where a veteran was allotted for operational service in Korea, Malaya, Borneo or Vietnam; third, a disability suffered by a member of the Defence Force where he served on peace-keeping duties overseas or where the member is involved in hazardous duties so designated by the Minister for Defence; and fourth, death for these three categories except where the veteran or member died or dies 40 years or more after eligible service.

In respect of claims in relation to the four categories I have just mentioned, I want to make it clear that a claim must be granted unless the determining authority is satisfied beyond reasonable doubt that there are insufficient grounds for doing so. This is the standard of proof, subject to the proposed requirements that there be a reasonable hypothesis of a link between death or incapacity and service, that presently applies."

In the result the amendments were adopted in s.16 of the Repatriation Legislation Amendment Act 1985.

The Veterans' Entitlements Act

In drafting the Veterans' Entitlements Act 1986 the

Government departed in some respects from the effect of the 1985 amendments but it maintained its intention to overrule

13.

O'Brien. Speaking of cl.119 of the Bill, which became s.120 of the Act, the Minister explained the matter in this way in his Second Reading Speech -- see Parliamentary Debates (House of Representatives) 16 October 1985 at pp.2181-2182:

"I stress that the Government remains firm in its intention to overrule the O'Brien decision. I refer honourable members in that regard to the detailed reasons given in the second reading speech on the May 1985 legislation. The Government does not accept that a pension should be payable where there is no evidence to suggest a war service relationship to the claimed disability or death. While the ex-service community generally accepts that the O'Brien decision went too far, its view is that a provision should be developed that overturns the O'Brien decision while maintaining the effect of the earlier High Court decision in the Law case.

It has been possible in preparing the revised draft of clause 119 of the VEB to reach a Substantial measure of consensus. New sub-clause 119(1) will now extend the generous criminal standard of proof to veterans in respect of any operational service they have had. This involves an extension on the June 1985 legislation as some veterans who served in the Northern Territory during World War II will now also receive the benefit of the criminal standard.

Sub-clause 119(1) will require a favourable determination to be made in relation to a pension Claim unless the Repatriation Commission is satisfied beyond reasonable doubt that there is no sufficient ground for doing so. However, the Commission will be required to be satisfied beyond reasonable doubt where, after consideration of the whole of the material relevant to a pension claim, there is no reasonable hypothesis raised and, if raised, there does not remain a reasonable hypothesis of a service connection to a veteran's death or incapacity. Similar provision is made in clause 119 in respect of hazardous service of regular Defence Force personnel or peacekeeping service by members of a peacekeeping force. Clause 119 provides that all other decisions made under repatriation legislation are to be made on the civil standard of proof. To accommodate ex-service community concerns, the new clause 119 makes clear that there is no onus of proof on any person in relation to a claim or application."

14.

Section 8 of the Veterans' Entitlements Act sets out

the circumstances under which the death of a veteran is to be taken to be a war-caused death. It reads:

"8.(1) Subject to this section, for the purposes of this Act, the death of a veteran shall be taken to have been war-caused if--

- (a) the death of the veteran resulted from an occurrence that happened while the veteran was rendering operational service;
- (b) the death of the veteran arose out of, or was attributable to, any eligible war service rendered by the veteran;

- (c) the death of the veteran resulted from an accident that occurred while the veteran was travelling, while rendering eligible war service but otherwise than in the course of duty, on a journey to a place for the purpose of performing duty or away from a place of duty upon having ceased to perform duty;
- (d) in the opinion of the Commission, the death of the veteran was due to an accident that would not have occurred, or to a disease that would not have been contracted, but for his or her having rendered eligible war service or but for changes in the veteran's environment consequent upon his or her having rendered eligible war service; or
- (e) the injury or disease from which the veteran died--
 - (1) was suffered or contracted while the veteran was rendering eligible war service, but did not arise out of that service; or
 - (11) was suffered or contracted before the commencement of the period, or last period, of eligible war service rendered by the veteran, but not while the veteran was rendering eligible war service,

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and, in the opinion of the Commission, the injury or disease was contributed to in a material degree by, or was aggravated by, any eligible war service rendered by the veteran, being service rendered after the veteran suffered that injury or contracted that disease,

but not otherwise." None of the qualifications imposed upon sub-s.(1) by the remainder of s.8 1s presently material.

The concepts of war-caused injury and war-caused disease are dealt with by s.9(1); the sub-section stipulating similar circumstances as the test of whether a given injury or disease 1s war-caused.

Section 119(1) provides that, 1n considering, hearing or determining, and in making a decision in relation to, a claim under Part II, the Commission -- and so the Tribunal --

"(£) 1s not bound to act in a formal manner

and 1s not bound by any rules of evidence, but may inform itself on any matter in such manner as it thinks just;

- (q) shall act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities; and
- (h) without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to--

- (1) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; and

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(ii) the absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a veteran, or of a member of the Defence Force or of a Peacekeeping Force, as defined by sub-section 68(1), was not reported to the appropriate authorities."

Relevantly, s.120 reads:

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

(2)...

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

- (a) that the injury was a war-caused injury or a defence-caused injury;
- (b) that the disease was a war-caused disease or a defence-caused disease; or
- (c) that the death was war-caused or defence-caused,

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

(4) or

- (5) Nothing in the provisions of this section, or in any other provision of this Act, shall entitle the Commission to presume that---

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- (a) an injury suffered by a person is a war-caused injury or a defence-caused injury;
- (b) a disease contracted by a person is a war-caused disease or a defence-caused disease;
- (c) the death of a person is war-caused or defence-caused; or

- (d) a claimant or applicant is entitled to be granted a pension, allowance or other benefit under this Act.
- (6) Nothing in the provisions of this section, or un any other provision of this Act, shall he taken to impose on--
 - (a) a claimant or applicant for a pension or increased pension, or for an allowance or other benefit, under this Act; or
 - (b) the Commonwealth, the Department or any other person in relation to such a claim or application,

any onus of proving any matter that is, or might he, relevant to the determination of the claim or application.

(7) ose"

The present facts

This case is typical of those which have, over the years, caused such frequent legislative activity.

The applicant, Evelyn Nellie East, 1s the widow of the late Vaughan East, who died on 16 January 1983 from carcinomatosis and toxaemia due to hypernephroma of the left kidney. Mr East served in the Royal Australian Air Force from 4 September 1939 to 10 May 1945 as a "general duties pilot", rising to the rank of Flight Lieutenant. He was overseas

during two periods: from 23 August 1940 to 30 July 1941 in

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the Middle East (apparently on secondment to the Royal Air Force), and from 8 September 1942 to 1 April 1943 in New Guinea. Mr East was a "veteran" within the meaning of that

term in s.5(1) of the Veterans' Entitlements Act 1986.

The hypernephroma which caused Mr East's death first became manifest in 1979. The aetiology of hypernephroma is not known. On 11 October 1982 Mr East made a claim under the

Repatriation Act 1920 for "medical treatment and pension".

The claim was rejected by a Repatriation Board a few days before his death. On 15 February 1983 Mrs East, as the legal personal representative of her husband's estate, lodged an appeal to the Repatriation Commission against that decision. The appeal was disallowed and, on 18 October 1983, Mrs East lodged an application to the Repatriation Review Tribunal for review of that decision. Whilst that application was still pending Mrs East lodged, in her own behalf, a claim for a pension in respect of her husband's death. That claim also was rejected by a Repatriation Board and, on appeal, by the Repatriation Commission. It also was referred to the

Repatriation Review Tribunal.

As neither of the applications to the Repatriation Review Board had been decided by 1 January 1985, when the

Repatriation Legislation Amendment Act 1984 came into effect,

both decisions fell for review, pursuant to s.55 of that Act, by the Veterans' Review Board. That Board heard both matters together. It affirmed the decisions of the Repatriation

Commission rejecting the claims.

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On 4 April 1986 Mrs East applied to the Administrative Appeals Tribunal for the further review of those decisions. However, before the Tribunal could deal with

the matter, on 22 May 1986, the Veterans' Entitlements

(Transitional Provisions and Consequential Amendments) Act

1986 came into force. By virtue of s.19(2) of that Act the pending applications for review had thereafter to be treated as if they had been made under s.175 of the Veterans' Entitlements Act 1986. The effect of s.19(4) of the transitional Act was to require that the decision of the Tribunal upon each of the applications should be such decision as the Tribunal considered to be, in all the circumstances of the particular case, in accordance with the provisions of the

Veterans' Entitlements Act and the transitional Act. It is

important to note that the determination was not to be in

accordance with the provisions of the Repatriation Act as they

had stood at any particular time, such as the date of either

claim or the death of Mr East.

Part II of the Veterans' Entitlements Act relates to

pensions. It includes s.13 which relevantly provides: "13. (1) Where--

- (a) the death of a veteran was war-caused; or
- (b) a veteran has become incapacitated from a war-caused injury or a war-caused disease, the Commonwealth is, subject to this Act, liable to pay--

- (c) in the case of the death of the veteran--pensions to the dependants of the veteran; or

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- (d) in the case of the incapacity of the veteran--pension to the veteran,

in accordance with this Act." The definition of "veteran" contained in s.5 of the Act applies to s.13: see s.13(11).

The Tribunal heard evidence from two medical witnesses: Dr Donald Hainsworth, a forensic pathologist, and Dr Martin Buck, an oncologist. Dr Hainsworth gave evidence that he had examined the file relating to Mr East to determine whether there were facts which could lead to a reasonable hypothesis connecting Mr East's war service to his death. He identified three factors upon which he based an hypothesis of a causal connection: the consumption by Mr East of quinine as an anti-malarial agent, stress and change of life-style and, as he put it, "It is well known that the diet of men in the war at this time, especially those serving in the Middle East as the deceased did, was lacking in vitamins A and C and was high in nitrites". Dr Hainsworth gave reasons for postulating a link between these factors and the development of the hypernephroma many years later.

Dr Buck disputed Dr Hainsworth's hypothesis. He said that, despite extensive studies, the only established formal association between an environmental factor and the development of renal cancer was in connection with smoking. There was a reverse geographic relationship between the incidence of malaria -- and, therefore, the consumption of

quinine -- and the incidence of renal cancer. For these, and

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other, reasons Dr Buck said that, upon the basis of present knowledge, there did not appear to be any environmental factor during Mr East's war service or later life which would predispose him to the development of any malignancy. In particular he saw no association with the later development of

a renal cancer.

The question whether there was a reasonable hypothesis connecting Mr East's war service with his death was, of course, relevant because of the terms of s.120(3) of

the Veterans' Entitlements Act, set out above.

The Tribunal's decision

The Tribunal, constituted by Mrs Rosemary Balmford (Senior Member), Dr N Marinovich, and Major General K J Taylor, recognized the importance of s.120(3) to the proceedings before it. In its decision it said:

"Sub-section 120(3) requires that the Commission not form its opinion as to whether the material before it does or does not raise a reasonable hypothesis of the kind required until 'after consideration of the whole of the material before it'. ... In the process of considering the whole of the material, hypotheses may be raised and dispelled. After that process, if a particular hypothesis which has been raised has not been dispelled, then the material before the Commission raises that hypothesis."

The Tribunal went on to consider, and to reject, a submission made on behalf of Mrs East that the absence of

evidence in disproof of a connection between war service and

22.

death is itself sufficient to raise a reasonable hypothesis, the Tribunal placing some emphasis upon the inclusion in sub-s.(3) of the word "reasonable". Having referred to the meaning of "reasonable" in various contexts, the Tribunal said:

"... whatever the word 'reasonable' may mean, its presence in sub-section 120(3) cannot be ignored. Medicine is a branch of biology, and generalisations in biology are almost invariably based on probabilities, not absolutes. It has been said that the only universal biological law is 'All biological laws have exceptions' ... As Dr. Buck said in evidence, there are no absolute truths in medicine."

It may well be said that, in a biological

science, such as the study of the aetiology of cancer, the possibility of a direct

association can never be disproved. In that sense, any factor A which is present in the relevant environment of an individual, may be

a component in the causation of any condition B from which that individual suffers. But our acceptance of that aspect of reality does not lead us to the conclusion that the statement 'Factor A is a component in the causation of condition B' is for the purposes of sub-section 120(3), necessarily and inevitably, without reference to evidence, a reasonable hypothesis connecting condition B, from which a veteran suffers, with factor A, found to be one of the circumstances of the particular service rendered by that veteran."

The Tribunal proceeded to consider the evidence regarding Dr Hainsworth's hypothesis. The Tribunal accepted that Mr East took quinine on various occasions during and after his service in New Guinea but it commented:

"However, to maintain his hypothesis, Dr.

Hainsworth needed to suggest that the

administration of quinine was 'perhaps not

terribly well controlled' ... a matter on which we have no evidence."

23.

In relation to stress, the Tribunal noted that in early 1944 a Medical Board had found that Mr East was suffering from "anxiety state" and a "condition of malaise". Although the Tribunal commented upon the absence of any other evidence -- for example from Mrs East -- regarding the psychological effect upon Mr East of his wartime service it did accept "that as a pilot on active service Mr East suffered Significant stress: and it is manifest that his lifestyle and environment would have changed significantly during both his

eligible and his operational service".

The Tribunal pointed out that there was no evidence from which it could reach any conclusion as to dietary deficiencies. It denied any knowledge that men serving in the Middle East suffered a diet lacking in vitamins A and C and high in nitrates. The Tribunal said that "information on the subject of diet of servicemen in World War II is available"

and evidence could have been obtained upon that matter.

The Tribunal summarized the position, as it saw it, in these words:

"66. The position thus is that as to the diet, we have no evidence on which to ground any hypothesis, reasonable or otherwise. We are prepared to accept that Mr. East did take quinine during his operational service, and did undergo stress, and change of lifestyle and environment.

67. The difficulty in producing evidence in these cases is, of course, that unless there is a theory (to avoid, for the moment, the word 'hypothesis') that a quantity X (however vague and approximate X may be) of factor A produces condition B, then evidence as to the existence of factor A need not be related to quantity. To put it another way: the

24.

applicant's argument is that a theory which only goes so far as to suggest that circumstance A is a factor in the development of condition B, is a sufficient 'reasonable hypothesis', without any inclusion in the theory of an estimated quantity (intensity, duration in time, volume, percentage) of circumstance A which is to be required if A is to relate to the development of B. If some estimate of the quantity of A was necessary to the hypothesis, it would be more difficult to raise the hypothesis. Thus, in effect, the applicant is submitting that the mere existence of A in the circumstance of the particular service rendered by the veteran (that is to say, in the present context, the operational service, by virtue of sub-section 120(1)) will suffice to raise the hypothesis.

68. We consider that if a hypothesis is to be relied upon as 'reasonable', some quantitative component must form a part of that hypothesis. The quantity of A required may be 'the merest trace'; 'an instant of exposure'; 'one part in a million' or the like. But, if decisions are to be made on any basis requiring evidence (and sub-section 120(3) relates to the effect of

'the material' before the Commission) there must be some relation between a stated quantity (however vague) of A required by the hypothesis, and the quantity of A which the evidence shows to have existed in the circumstances of the veteran's service. We appreciate that there will be many cases in which records are unavailable ... and there will be difficulties in obtaining the requisite evidence. But in our view, the principle which we have enunciated here follows inevitably from the language which Parliament has used. It is in cases of that kind that paragraph 119(1)(h) ... will come into play; the principle is unaffected."

In relation to the conflict of medical evidence, the Tribunal said:

"73. We consider that none of the four hypotheses propounded by Dr. Hainsworth, when tested against the evidence of Dr. Buck, reaches the point, ... at which it becomes 'reasonable'. We are of the opinion, after consideration of the whole of the material before us, that none of those four hypotheses is raised by that material; in other words, all the material having been taken into

25.

consideration, none of the four exists as a reasonable hypothesis in terms of sub-section 120(3). Dr. Buck's evidence was based on 'received contemporary medical science' ... The qualifications of Dr. Buck in this field are impeccable and were not challenged. Although Dr. Hainsworth pointed out that, as a pathologist, part of his role was to determine the cause of death, his qualifications as an expert on the causation of cancer were substantially inferior to those of Dr. Buck.

74. +%It is not necessary for us to recapitulate the evidence of the witnesses which is already set out, and upon which we have reached our conclusion. However, there is one matter on which we would wish to comment. To support his argument that the lapse of some 35 years between the operational service rendered by Mr. East and the manifestation of his condition of hypernephroma was consistent with his hypotheses, Dr. Hainsworth relied on statements in texts, ... Those statements are, understandably, expressed in terms related to cancers generally. It does not appear to us to be logically possible for those statements to apply, with any useful degree of precision, to the forms of cancer as to which the aetiology is unknown: of which hypernephroma is agreed on both sides to be one. If the aetiology of a condition is unknown, it is not possible to reach any conclusion as to the time which may elapse between its initiation and its manifestation. The fact that lead times measured in decades have been established in the case of some of the few cancers (out of hundreds) which have a known cause does not, in our view, in the present state of medical science, justify an extrapolation to the whole field. It is sufficient, in this context, to refer to the well-known cancers of childhood, for which, in the nature of things, the lead times cannot approach those lengths.

75. For the reasons given, we consider that a decision affirming the decision under review is, in all the circumstances of this case, in accordance with the provisions of the Entitlements Act and the Transitional Act."

26.

The applicant's submissions: the requirement of a "reasonable hypothesis"

The conclusion reached by the Tribunal upon the question whether there existed a reasonable hypothesis connecting Mr East's death with his war service was a conclusion of fact, as to which there is no right of appeal to this Court: see Administrative Appeals Tribunal Act 1975 s.44. However, the applicant contends that, in reaching this conclusion, the Tribunal fell into errors of law concerning two subjects: the construction and application of s.120 and the reasoning of Dr Buck.

Firstly, it is said that the Tribunal misconstrued s.120 and, in particular, what was meant by the requirement for a reasonable hypothesis connecting the death with the war service. Two alternative submissions are put. The first contention is of fundamental importance. It is said that, contrary to the view of the Tribunal and whatever may have been the intention of the Government, s.120, in effect, retains the O'Brien position: provided that there is a real possibility of a causal relationship between war service and incapacity or death and in the absence of proof beyond reasonable doubt of facts negating that relationship, the

claim must succeed. Referring to *Green v The Queen* (1971) 126

CLR 28 at p.33, counsel argue that the formula "beyond reasonable doubt" has a settled meaning in the criminal law, as excluding only "fantastic and unreal possibilities". Thus

the effect of the adoption of that phrase in s.120(1) is to

27.

exclude a determination adverse to the claimant in any case where there exists a possibility which is not fantastic or unreal, that is real. Counsel submit that the words "reasonable hypothesis" in sub-s.(3) take their colour from sub-s.(1); meaning the real possibility of causal connection which would preclude a finding beyond reasonable doubt that there was no such connection. They say that in any case where the cause of incapacity or death, or the aetiology of the disease causing incapacity or death, is unknown there must be a real possibility of connection; hence the claim must be

allowed.

We do not accept this submission. It seems to us to pay insufficient regard both to the history of the legislation

and to the meaning of the phrase "reasonable hypothesis".

As appears from the background material set out above, there had been four distinct phases in the history of veterans' legislation in Australia before 1985. Those phases

may be summarized as follows:

1920 - 1929 Onus on claimant to prove case on balance of probabilities; no provision re doubt.

1929 - 1943 Onus on claimant to prove prima facie case; but claimant to have benefit of any ultimate doubt.

28.

1943 - 1977 No onus on claimant. Claimant to have benefit of any ultimate doubt.

1977 - 1985 No onus on claimant. Commission to negative claim beyond reasonable doubt.

The obvious intention of the 1985 amendment was to reverse, to some extent, the trend towards improvement of the position of claimants. Parliament wished to retain the requirement that the Commission should negative claims beyond reasonable doubt but to limit the operation of that requirement to cases where there was some reason to believe in the existence of a causal connection. The models provided by the first and second phases of the legislation were rejected; but, equally, so was the position which applied in phases three and four. The implication as to intention arising out of the history of the legislation is supported by the express statement of the Minister that the Government wished to overrule the effect of O'Brien. Yet, if this submission of the applicant were correct, the pre-1985 position would be retained.

The means chosen to give effect to that intention were apt. The adoption of Brennan J's notion of a reasonable hypothesis meant that Parliament was requiring something by

way of causal link, but which fell short of proof of the link

-- even prima facie -- as a fact. The meaning of the phrase "reasonable hypothesis" was felicitously explained by a

Veterans' Review Board in Stacey (Nos V83/N396, V84/0821 and

V28/072); words quoted by the Administrative Appeals Tribunal

in Re Dell and Repatriation Commission (1986) 9 ALD 596 at

p.615:

"A hypothesis may be conveniently defined as: 'proposition made as basis for reasoning, without assumption of its truth; supposition made as starting point for further investigation from known facts; groundless assumption': The Concise Oxford Dictionary.

The addition of the word 'reasonable' would however seem to imply that what is required is more than a mere hypothesis. In the opinion of the Board, to be reasonable, a hypothesis must possess some degree of acceptability or credibility -- it must not be obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous. For a reasonable hypothesis to be 'raised' by material before the Board, we think it must find some support in that material -- that is, the material must point to, and not merely leave open, a hypothesis as a reasonable hypothesis. At the same time, however, a hypothesis may be reasonable without having been proved (either on the balance of probability or beyond reasonable doubt) to be correct as a matter of fact. Were it otherwise, it would no longer be a hypothesis but would have been elevated to some higher status. Accordingly a connection asserted by a hypothesis to exist between death or incapacity and service may still be reasonable even though theoretical, and it may be theoretical in either or both of at least two senses: by postulating a known medical fact but in circumstances not known to have definitely existed in the instant case; or by postulating a medical principle which science is not yet able to definitely prove but is unable to describe as unreasonable."

30.

We agree with this analysis. A reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts. It is an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities.

Quantitative evidence

The second submission put on behalf of the applicant in connection with s.120 is that the Tribunal was wrong to reject Dr Hainsworth's evidence because he omitted to give any quantitative evidence of the factors to which he referred,

The argument is that it can never be right to reject an hypothesis that factor A caused the veteran's condition B because of an absence of evidence as to the quantity or intensity of A experienced by the veteran.

Given the findings of the Tribunal, it is not clear that the correctness of this contention would affect the outcome of the present case. But, in any event, the contention goes too far. The necessity for quantitative evidence in a particular case must depend upon the nature of the hypothesis being expounded. For example, if a Tribunal accepts medical evidence that condition B may be caused by any degree of exposure to factor A, that the veteran was exposed to factor A and that he or she subsequently developed condition B, it would be wrong to reject the claim because of

an absence of evidence as to the extent of the exposure. The

31.

hypothesis itself makes quantity irrelevant. If, on the other hand, the evidence is that exposure to quantity X of factor A may cause condition B, the hypothesis cannot be described as reasonable unless there is reason to believe that the veteran was exposed to factor A to the extent of quantity X.

The need for "particular" evidence

After pointing out the absence of evidence as to the dietary deficiencies assumed by Dr Hainsworth, the Tribunal commented that the applicant's case on that matter "is being put on the basis that evidence as to the particular circumstances of the veteran is largely irrelevant to the raising of a 'reasonable hypothesis'". The Tribunal went on to express the view that, for an hypothesis to be reasonable, "it must be grounded on evidence as to the circumstances of the particular service rendered by the veteran". The comment was made that the applicant had elected not to adduce any evidence on the matter of diet or, indeed, the extent of

stress and of quinine consumption.

These passages in the Tribunal's decision were attacked as evidencing two errors of law: first, that the Tribunal wrongly regarded the applicant as bearing an onus of proof; second, that the Tribunal ignored s.119(1)(h) of the

Veterans' Entitlements Act.

32.

We do not think that either stricture is justified. The rule that, in curial proceedings and in the absence of a legislative provision to the contrary, an applicant for relief must prove the facts necessary to ground the claim has no relevance to the administrative determination of claims under

the Veterans' Entitlements Act: see *McDonald v Director*

General of Social Security (1984) 1 FCR 354 at pp.356-357 and

pp.368~369. It would have been an error for the Tribunal to see Mrs East as bearing an onus even to establish a reasonable

hypothesis.

However, having said that, the practical situation remains that it will often be in the interests of a party to proceedings before the Tribunal to adduce particular evidence; the reason being that, in the absence of that evidence, the Tribunal will not be free to make the decision sought by that party. In a case where that party apparently makes a conscious decision, with the benefit of legal advice, not to deal with that matter the Tribunal would be justified in assuming that the party had no evidence on the point which would assist the case: cf *Jones v Dunkel* (1959) 101 CLR 298. In the present case, the Tribunal did not speak of onus. It simply observed that there was no evidence of the particular matters and that the applicant had apparently made a conscious decision not to deal with the subject; the implication being that any evidence available to her

upon that matter would not have assisted her case. We see no error of law in that statement.

33.

We see nothing to suggest that the Tribunal ignored s.119(1)(h), which commands the Tribunal, in proceedings before it, to take into account the difficulties of ascertaining relevant facts. The Tribunal was dealing with

facts which it thought would have been provable.

Dr Buck's evidence

The second segment of the applicant's argument arises out of the facts of this particular case. In his evidence Dr Buck, citing from a text book on oncology, listed five criteria which he thought ought to be applied when attempting to link an epidemiological agent to the later development of a cancer. He suggested that, if the association failed to satisfy the five criteria, it might be regarded as faulty in some respect. Dr Buck did not say that the absence of one or more of the criteria necessarily negated the link.

The submission is put that the Tribunal erred in rejecting Dr Hainsworth's hypothesis because, in the Tribunal's view, it failed to satisfy the five criteria. But, leaving aside the question whether this was a conclusion of fact or of law, it is clear that the Tribunal did not take that course. The Tribunal said this:

"Sub-section 120(3) may well not require the establishment of a definite association in terms of the five criteria on which Dr. Buck relied. ... But the process of testing, against those five criteria (or against similar appropriately-based scientific criteria), a hypothesis associating an epidemiological agent with the later development of a cancer is, in our view, an appropriate process by which to measure the

34.

reasonableness of that hypothesis. As Dr. Buck said, an hypothesis of an association which does not satisfy all the five criteria, may well indicate what he described as 'a tenuous association'. It is possible to argue that everything affects everything else ... Somewhere along the path from the minimal relationship expressed in those words at one extreme to absolute certainty of a connection at the other extreme (as where a joint is ankylosed as a result of gunshot wounds to that joint received in action), a hypothesis becomes 'reasonable' in terms of sub-section 120(3), interpreted in accordance with its purpose. It is not necessary for us to define the point at which that occurs."

Other criticisms

Counsel for the applicant make several other criticisms of the Tribunal's rejection of Dr Hainsworth's hypothesis. In one submission they point to Dr Buck's concession in cross-examination that it is possible that stress and a concentration of nitrites are causes of cancer. But, accepting that concession, it was for the Tribunal to determine as matters of fact whether it was satisfied as to the existence of these two factors and whether it was reasonable to hypothesise a link between them and the hypernephroma.

Other criticisms arise out of conflicts of opinion between Dr Hainsworth and Dr Buck, counsel criticising Dr Buck's reasons for rejecting Dr Hainsworth's views. It is unnecessary to set out these submissions; they go only to the correctness of the Tribunal's findings of fact.

In our view the decision of the Tribunal evinces no error of law. It follows that the appeal must be dismissed.

The applicant must pay the costs of the respondent.

I certify the thirty-four (34)

preceding pages to be a true copy of

the Reasons for Judgment of

their Honours Mr Justice Jenkinson,

Mr Justice Neaves and Mr Justice Wilcox. Associate: Ais Vil

Date: 22 July 1987

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Date of hearing: 21 May 1987

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