

AUSTRALIA / JUDGMENT

Gilkinson v Repatriation Commission [2010] FCA 1292

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Gilkinson v Repatriation Commission [2010] FCA 1292

Citation: Gilkinson v Repatriation Commission [2010] FCA 1292

Appeal from: Gilkinson v Repatriation Commission [2010] AATA 23

Parties: DAVID GILKINSON v REPATRIATION COMMISSION

File number: NSD 136 of 2010

Judge: STONE J

Date of judgment: 25 November 2010

Catchwords: DEFENCE AND WAR – veterans' entitlements – meaning of "related to service" – whether Tribunal failed to pose and answer correct question – whether Tribunal should have applied s 196B(14)(b) of Veteran's Entitlement Act 1986 (Cth) rather than s 196B(14)(d) – meaning of "arose out of, or was attributable to" in s 196B(14)(b) – whether phrase has same meaning as in other sections of the Act – held that context of phrase in s 196B(14)(d) different from context in other sections – in s 196B(14)(d) phrase refers to dominant or effective cause but not necessarily the sole cause – consideration of s 196B(14) generally

DEFENCE AND WAR – veterans' entitlements – statement of principles – obesity – sleep apnoea – whether related to operational service – whether intermittent shift work during operational service was a dominant or effective cause of the applicant's obesity

Legislation: Repatriation Act 1920 (Cth) s 101(1)(b)

Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994 (Cth)

Veterans' Entitlements Act 1986 (Cth) ss 8(1)(b), 9(1)(b), 196B(2), 196B(14), 196B(14)(b), 196(14)(d)

Explanatory Memorandum to the Veterans' Affairs

(1994 – 95 Budget Measures) Legislation Amendment Bill 1994

Cases cited: Doolette v The Repatriation Commission (1990) 21 ALD 489

Elliott v Repatriation Commission [2002] FCA 26; 73 ALD 377

Hill v Repatriation Commission (2009) 177 FCR 434

Kattenberg v Repatriation Commission [2002] FCA 412; (73) ALD 365

Registrar of Titles (WA) v Franzon (1975) 132 CLR 611

Repatriation Commission v Bendy (1989) 18 ALD 144

Repatriation Commission v Law (1980) 31 ALR 140

Pearce and Geddes, Statutory Interpretation in Australia, 2001, 5th ed

Macquarie Dictionary, 2nd revised edition

Date of hearing: 4 May 2010

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 51

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IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION NSD 136 of 2010

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: DAVID GILKINSON

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: STONE J

DATE OF ORDER: 25 NOVEMBER 2010

WHERE MADE: SYDNEY

THE COURT ORDERS
THAT:

1. The application be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

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JUDGE: STONE J

DATE: 25 NOVEMBER 2010

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The applicant, Mr David Gilkinson, suffers from sleep apnoea. He claims that this condition is related to operational service within the meaning of the Veterans' Entitlements Act 1986 (Cth) (VE Act). On 14 September 2004 he lodged a combined application for the grant of pension entitlements in respect of sleep apnoea and for an increase in his existing pension. On 30 March 2005 the Repatriation Commission refused both claims.

2 The Commission's decision on both counts was affirmed by the Veterans' Review Board on 24 February 2006. The applicant's appeal to the Veterans' Appeal Division of the Administrative Appeals Tribunal was similarly unsuccessful in relation to his claim for a pension in respect of his sleep apnoea. On 22 September 2009 the Federal Court set aside the Tribunal's decision and remitted the matter to the Tribunal for further consideration; [2008] FCA 1441; 104 ALD 406. The Court found that the Tribunal had made an error of law in failing to consider the effect of shift work as a contributing factor to the applicant's condition.

3 Mr Gilkinson's claim was again reviewed by the Tribunal and on 15 January 2010 it was again rejected. Mr Gilkinson sought review of this second decision in this Court. He alleges that the Tribunal erred in law by failing to pose and answer the correct question. Reference in these reasons to the Tribunal and the Tribunal's decision is to the second Tribunal and its decision.

4 Before the Tribunal the applicant claimed that his operational service had led to weight gain that in turn led to the onset of sleep apnoea or its clinical worsening. He also claimed that the consumption of alcohol during his operational service had led to the clinical worsening of his sleep apnoea and that his "war-caused disease of chronic sinusitis caused chronic obstruction of the upper airways which in turn caused or contributed to the clinical worsening of, the Applicant's sleep apnoea".

5 It is not in contention that the applicant served in the Australian Navy from 10 July 1965 to 9 July 1977 and that during that time he experienced operational service within the meaning of the VE Act. Critical to the decision of the Tribunal was that this operational service was not one continuous period but consisted of ten separate periods between February 1970 and November 1972 during which HMAS Sydney was on duty in an operational area. The periods were:

1. From 16 February 1970 to 5 March 1970
2. From 21 October 1970 to 12 November 1970
3. From 15 February 1971 to 4 March 1971
4. From 26 March 1971 to 8 April 1971
5. From 13 May 1971 to 1 June 1971
6. From 20 September 1971 to 16 October 1971

7. From 26 October 1971 to 18 November 1971
8. From 24 November 1971 to 17 December 1971
9. From 14 February 1972 to 9 March 1972
10. From 1 November 1972 to 30 November 1972

The Tribunal pointed out that between these periods of operational service, the applicant spent time aboard HMAS Sydney, "whilst it was in Australian ports, undergoing refits, or visiting foreign ports as well as taking periods of leave, such periods amounting in total to 120 days plus travelling time from Sydney to his home town of Grafton".

Legislative framework

6 In *Elliott v Repatriation Commission* [2002] FCA 26; 73 ALD 377 at [2]-[9] I summarised the legislative framework within which the Commission is to make decisions on applications for pensions or increase of pensions under the Act. The summary is appropriate here:

- [2] Under the Act a veteran who has become incapacitated from a war-caused injury or disease is entitled to a pension; s 13. An injury or disease is taken to be war-caused if, inter alia, it results from an occurrence that happened while the veteran was rendering operational service; s 9. The reference to "incapacity" from a war-caused injury or disease is a reference to the effects of that injury or disease and is not a reference to the injury or disease itself.
- [3] The Act is strongly biased in favour of a veteran's claim that incapacity from an injury or disease relating to operational service is war-caused. The history and underlying policy of this approach is described by Heerey J in *Deledio v Repatriation Commission* (1997) 47 ALD 261. Heerey J's analysis was confirmed on appeal by the Full Federal Court which summarised, in four oft-quoted points, the course that the Tribunal must take; *Repatriation Commission v Deledio* (1998) 83 FCR 82 at 97 – 98 ("Deledio")
- [4] The effect of the Act leaning in favour of a veteran's claim is that such a claim must be accepted unless the Commission is satisfied beyond reasonable doubt that there is no sufficient ground for making that determination; s 120(1). The Act does not, however, leave the Court to apply the indeterminate expression, "beyond reasonable doubt" entirely at large. Section 120(3) specifies that the Commission "shall be satisfied" beyond reasonable doubt that the determination cannot be made 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." [Emphasis added]

- [5] The "whole of the material" may include material put forward by the applicant or by the Commission itself. The Commission must consider this material to determine if it raises an hypothesis connecting the veteran's condition with the relevant service and if any such

hypothesis is reasonable; *Byrnes v Repatriation Commission* (1993) 177 CLR 564 at 569 - 570. As was emphasised in *Deledio* at 98, there is no question of fact finding at this stage. Indeed, at this point the Tribunal is entitled to make assumptions about the existence of facts; *Repatriation Commission v Stares* (1996) 66 FCR 594 at 600 - 601. The decision whether the material enables the formation of a reasonable hypothesis must be made to the "reasonable satisfaction" of the Commission; s 120(4) of the Act. If, having considered the whole of the material, the Commission decides to its reasonable satisfaction that there is no such hypothesis then the application must fail; *Deledio*, points 1 to 3 at 97.

- [6] Section 120A(3) of the Act specifies that, subject to s 120A(4), an hypothesis connecting the injury or disease with the relevant service is reasonable only if there is in force a relevant Statement of Principles ("SoP") or a determination of the Commission that upholds the hypothesis. Section 120A(4) limits the force of this restriction by providing that s 120A(3) does not apply if there is neither:
- (a) a relevant SoP made under s 196B(2); nor
 - (b) a declaration by the Repatriation Medical Authority that it does not propose to make such an SoP.

- [7] If there is in force an SoP that upholds the hypothesis identified by the decision-maker then that hypothesis is reasonable. The position, as summarised in *Deledio* at 97, is that the hypothesis must be consistent with the 'template' found in the SoP. It must:

"contain one or more of the factors which the Authority has determined to be the minimum which must exist, and be related to the person's service ... If the hypothesis fails to fit within the template, it will be deemed not to be "reasonable" and the claim will fail."

- [8] It is important to note that consistency with an SoP goes only to establishing one element of what is needed for the Commission to determine, in accordance with s 120(1), that an applicant's injury or disease is war-caused. In other words, a reasonable hypothesis is necessary but not sufficient for such a determination. It is also necessary that the facts assumed by the hypothesis be established to the requisite standard laid down in s 120(1). Under that section the factual basis is taken to be established unless either:

- (a) one or more facts necessary to support the hypothesis are disproved beyond reasonable doubt; or
- (b) a fact inconsistent with the hypothesis is proved beyond reasonable doubt.

- [9] The Act also provides that:

- except in making a determination to which s 120(1) or (2) applies, the Commission shall decide the matter to its reasonable satisfaction; s 120(4),
- the Commission is not entitled to assume that an injury or disease is war-caused; s 120(5), and

- nothing in the Act or its provisions imposes an onus of proving any matter concerning the claim on a claimant or applicant for a pension, the Commonwealth, the Department or any other person; s 120(6).

The Statement of Principles

7 In this case, the existence of a reasonable hypothesis is established by the terms of the relevant Statement of Principles concerning Sleep Apnoea which is found in Instrument No.13 of 2005 (SoP). Sleep apnoea is defined in the SoP as:

Sleep disordered breathing characterised by periods of cessation or reduction in airflow at the nose and mouth, leading to arousals from sleep (disrupted sleep architecture), together with significant clinical consequences such as excessive daytime sleepiness, impaired memory, difficulty concentrating, morning headache, pulmonary hypertension, right heart failure or respiratory failure.

8 Clause 5 of the SoP sets out the factors that "must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting sleep apnoea" with the applicant's operational service. Factors applying to the clinical onset of sleep apnoea as well as to the clinical worsening of sleep apnoea are listed in the SoP. In so far as the present application is concerned, the factors relevant to the clinical onset or worsening of sleep apnoea include:

- chronic obstruction of the upper airways;
- obesity and,
- in relation to clinical worsening only, "consuming an average of at least 30 grams of alcohol per day for at least the six months before the clinical worsening of sleep apnoea".

9 Clause 6 of the SoP provides that in relation to the clinical worsening of sleep apnoea, chronic obstruction of the upper airways at that time is a factor only "where the person's sleep apnoea was suffered or contracted before or during (but not arising out of) the person's relevant service".

The applicant's claims before the Tribunal

10 The applicant attributed his sleep apnoea to his operational service and maintained that the material before the Tribunal raised the following hypotheses which were set out in the reasons of the Tribunal:

I. That there had been a clinical worsening of his sleep apnoea during service due to consumption of alcohol.

II. That operational service had led to weight gain such that he became obese and that in turn led to the onset of sleep apnoea or its clinical worsening.

III. That the Applicant's war-caused disease of chronic sinusitis caused chronic obstruction of the upper airways which in turn caused, or contributed to the clinical worsening of, the Applicant's sleep apnoea.

The Tribunal's decision

Clinical worsening of sleep apnoea

11 The Tribunal held that there was no evidence "that the Applicant's sleep apnoea clinically worsened during his period of operational service". In reaching this conclusion it noted that Professor Breslin said that sleep apnoea could be "more pronounced after a period of drinking" without the condition itself being worse. The Tribunal did not accept that the applicant's alcohol consumption was referable to his operational service and commented that the applicant had commenced to drink alcohol to excess long before his operational service commenced. While the Tribunal accepted that the applicant's alcohol consumption "increased incrementally during the course of his naval service", it did not accept that this was related to the stress of operational service:

Given that all he professed to have was a general apprehension regarding his voyages to Vietnam, we are satisfied beyond reasonable doubt that there was nothing concerned with the Applicant's operational service that caused him to drink more than he would otherwise have done, or to increase his intake of alcohol. We are therefore, satisfied beyond reasonable doubt that any facts necessary to support an hypothesis of alcohol-caused aggravation of sleep apnoea have been negated to the requisite standard.

Clinical onset of sleep apnoea

12 In evidence before the Tribunal there was some uncertainty as to the date of clinical onset of the applicant's sleep apnoea. The Tribunal was satisfied that the clinical onset was in 1968 when "according to the Applicant's evidence" his snoring was first the subject of comment. Despite this finding the Tribunal noted that the relevant expert, Professor Breslin, stated "he could not rule out a clinical onset in 1970-71, when [the applicant was] aboard HMAS Sydney". For this reason the Tribunal found that "a reasonable hypothesis may be said to have been raised that the clinical onset was during a period of operational service". The Tribunal therefore considered the applicant's claim that the stress of his operational service, and in particular from the shift work involved, had led to excessive intake of food and alcohol, both of which had led to the obesity which in turn was related to his sleep apnoea.

Contribution of shift work to applicant's obesity

13 The Tribunal considered evidence given by Professor Timothy Gill and Dr Dianne Volker as to the effects of operational service upon the applicant. It was not in contention that the applicant was obese at the time of his discharge from the Navy however the Tribunal noted that according to the evidence of Dr Volker, a dietician, the applicant was "already over-weight and well on his way to being obese ... in 1969". Dr Volker commented:

Obesity does not occur instantly, it takes time to accumulate excess energy storage. The adverse health effects of over-weight and obesity develop as gradually as the weight is gained.

14 Between May 1965 and March 1969, the applicant's weight increased from 57.2kg to 87.5kg – a gain of over half a kilo per month that is before he had experienced any operational service. The Tribunal noted that his medical records showed that the applicant had a BMI (body mass index) of 29.6 on 29 January 1970 which was also before he experienced any operational service. The SoP defines "being obese" as having a BMI of 30 or more resulting from "an increase in body weight by way of fat accumulation".

15 Professor Gill also accepted that given "the projectory of [the applicant's] weight gain and the fact that we do know he was obese when he was discharged from the navy", there was a chance that he was obese (ie had a BMI of 30 or more) during operational service. The professor also said that "if we were to use the classification [of obesity] which was applied at that time in the Navy, then it is likely that – it is clear that he was above the criteria to define obesity. In any event the Tribunal accepted that he was obese during his periods of operational service and went on to consider what part that service may have played in him becoming obese.

16 The applicant claimed that the stress of operational service compounded by shift work contributed to his obesity however the Tribunal rejected any connection between his obesity and shift work because of the nature and context of the shift work performed by the applicant. It stated:

What became apparent from the evidence was that the studies upon which Dr Volker based her opinion of shift work contributing to obesity did not fully apply to the Applicant.

The studies relied upon by Dr Volker, were of persons undertaking regular periods of shift work. The Applicant did not undertake such duties.

17 The Tribunal completely accepted and quoted the following evidence of Captain Macdonald as to the demands of watchkeeping on HMAS Sydney:

While the demands of watchkeeping in machinery spaces were often physically demanding, particularly in the tropics or an Australian summer, it needs to be recognised that this employment was not a continuous process throughout any particular year. SYDNEY only spent, on average, about 27 percent of any one year at sea, with regular breaks in sea time for port visits, storing, maintenance and leave for the ship's company. Fleet maintenance policies demanded that the ship undertake a self maintenance period (SMP) of about 10 working days in harbour

every three months or so and an extended refit of about 12-16 weeks every two years. Administratively there were also two or three ship's company long leave periods programmed each year.

18 In the circumstances described by Captain Macdonald both Dr Volker and Professor Gill agreed that the effect of shift work would be minimal. Both experts accepted that the relationship between shift work and obesity was based on research involving people who undertook regular periods of shift work rather than the intermittent periods described above. The Tribunal quoted Professor Gill's comment that the applicant had "a relatively short exposure to shift work and during this period had regular breaks away from shift work duties".

Contribution of alcohol to applicant's obesity

19 The Tribunal also considered the applicant's claim that his excessive alcohol consumption during the time he was posted to HMAS Sydney was related to the stress of operational service and contributed to his obesity. The applicant's evidence was that he commenced drinking alcohol in 1966-67 when serving on HMAS Melbourne however whilst he was posted to HMAS Sydney he increased his alcohol intake "because of stress". The Tribunal stated:

In evidence in chief the Applicant said that his alcohol consumption increased over the years and that he used to go out and get drunk at every opportunity. He continued to drink at that rate until he left the Navy.

20 This account was consistent with the comment of Dr Delaforce, a psychiatrist who provided a report dated 15 May 2001. Dr Delaforce noted that from the 1970s the applicant would drink to intoxication whenever he had a night off duty and that he "would drink 20-25 middies of beer a session from 1968 or 1969". In so far as his drinking while at sea was concerned Professor Gill and Dr Volker both expressed the opinion that alcohol while at sea would have had a "minor" (Professor Gill) or "not...a major influence" (Dr Volker) on the applicant's weight gain.

21 The Tribunal did not accept that the applicant's heavy drinking was attributable to the stress of his operational service. It referred to Dr Delaforce's report that the applicant did not identify any specific stressful occurrences and that when asked about "significant stressors" he referred to "difficulty putting up with 'idiots' and the 'over-educated authority figures' in the navy". On cross-examination before the Tribunal the applicant admitted that by "stress" he meant "a general apprehension and that it was hot and uncomfortable".

Tribunal's conclusion

22 The Tribunal held that while on operational service the applicant did not suffer stress as opposed to what the applicant described as "a general apprehension". In particular it rejected the applicant's claim that the shift work he was required to do caused him stress. In reaching this conclusion it relied on the evidence of Captain Macdonald, Dr Volker, Professor Gill, Dr Delaforce and the applicant himself.

23 The Tribunal stated that the applicant's heavy drinking was a continuation of his habit that arose prior to operational service. It stated:

What is clear is that the Applicant commenced to drink alcohol long before operational service and to drink it to excess. His alcohol consumption increased incrementally during the course of his naval service. Given that all he professed to have was a general apprehension regarding his voyages to Vietnam, we are satisfied beyond reasonable doubt that there was nothing concerned with the Applicant's operational service that caused him to drink more than he would otherwise have done, or to increase his intake of alcohol.

24 The Tribunal applied the meaning of "related to service" given in s 196B(14)(d) of the VE Act and concluded that it was satisfied "beyond reasonable doubt" that his operational service including shift work, "(such as it was) and his alcohol consumption did not contribute to his obesity in a material way". The Tribunal also stated its conclusion as follows:

We are satisfied beyond reasonable doubt that any events during the Applicant's operational service did not meet the threshold of being a material contributor to his obesity and hence any cause or aggravation of his sleep apnoea.

25 Given the wording of s 196B(14)(d) (see [29] below) to which the Tribunal specifically referred, it is 'obesity' rather than 'sleep apnoea' to which the question of aggravation by the applicant's operational service should be directed. In my view it is tolerably clear from the Tribunal's analysis that it did not detect either material contribution or aggravation of the applicant's obesity arising from his operational service and that the mention of sleep apnoea was a simple error of expression.

26 The Tribunal also rejected the applicant's claim "that his sleep apnoea was caused or clinically worsened by chronic obstruction of the upper airways". Although, the Tribunal noted that this claim had been rejected in previous proceedings, it considered the issue and rejected the claim. As the Tribunal's findings on this issue are not raised in its application for judicial review, there is no need to consider it further.

The present application

27 The applicant now appeals from the Tribunal's decision. The applicant claims that the Tribunal erred by failing to ask the correct question. He asserts that the correct question is whether the applicant's obesity arose out of or was attributable to his shift work or alcohol consumption on operational service in accordance with s 196B(14)(b). He submits that the Tribunal erred in that it applied s 196B(14)(d) which, in contrast to s 196B(14)(b), incorporates a requirement of materiality.

28 Section 196B sets out the functions of the Repatriation Medical Authority, one of which is to determine statements of principles. Relevantly, s 196B(2) provides:

If the Authority is of the view that there is sound medical-scientific evidence that indicates that a particular kind of injury, disease or death can be related to:

- (a) operational service rendered by veterans; or
- (b) peacekeeping service rendered by members of Peacekeeping Forces; or
- (c) hazardous service rendered by members of the Forces;

the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:

- (d) the factors that must as a minimum exist; and
- (e) 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 an injury, disease or death of that kind with the circumstances of that service.

29 Section 196B(2) raises the question of what is meant by "related to" for the purpose of s 196B. Subsections (3)-(13) concern various factors relevant to the making of statement of principles and do not address the meaning of "related to" where the phrase is used in a provision of a statement of principles that seeks to comply with s 196B(2)(e) such as cl 5 of the present SoP. The respondent, in its written submissions, contends that this question is answered by s 196B(14). In order to appreciate fully the respondent's submissions it is necessary to consider the whole section. The section provides:

A factor causing, or contributing to, an injury, disease or death is related to service rendered by a person if:

- (a) it resulted from an occurrence that happened while the person was rendering that service; or

- (b) it arose out of, or was attributable to, that service; or

- (c) it resulted from an accident that occurred while the person was travelling, while rendering that service but otherwise than in the course of duty, on a journey:

- (i) to a place for the purpose of performing that duty; or

- (ii) away from a place of duty upon having ceased to perform duty; or

- (d) it was contributed to in a material degree by, or was aggravated by, that service; or

- (e) in the case of a factor causing, or contributing to, an injury – it resulted from an accident that would not have occurred:

- (i) but for the rendering of that service by the person; or

- (ii) but for changes in the person's environment consequent upon his or her having rendered that service; or

- (f) in the case of a factor causing, or contributing to, a disease – it would not have occurred:
- (i) but for the rendering of that service by the person; or
- (ii) but for changes in the person's environment consequent upon his or her having rendered that service; or
- (g) in the case of a factor causing, or contributing to, the death of a person – it was due to an accident that would not have occurred, or to a disease that would not have been contracted:
- (i) but for the rendering of that service by the person; or
- (ii) but for changes in the person's environment consequent upon his or her having rendered that service.

30 In construing s 196B(14) it is necessary to consider the section in context. Section 196B is to be found in Division 1 of Part XIA. Division 1 is concerned with the establishment (s 196A), functions (s 196B) and powers (ss 196C-196K) of the Repatriation Medical Authority. A fundamental function of the Authority is to determine statements of principles. Section 196B(2)(d) and (e) provides that statements of principles must set out:

- (d) the factors that must as a minimum exist; and
- (e) 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 an injury, disease or death of that kind with the circumstances of that service.

31 Section 196B(14) explains what is required for a factor to be "related to service" rendered by a person. As Emmett J observed in *Kattenberg v Repatriation Commission* [2002] FCA 412, (73) ALD 365 at [9]:

It does that by enumerating a number of alternate meanings of the phrase "related to service". That is to say, it clarifies the circumstances in which the necessary causal relationship between a factor and service will be present.

32 The subsections of s 196B(14) address a variety of situations in which the question whether a factor is "related to service" might apply. The factor in question here is the applicant's obesity; see [12] above. The Tribunal's task was to consider which if any of the meanings given to "related to service" in s 196B(14) might apply. All the meanings except those referred to in subsections (b), (d) and (f) were clearly inapplicable.

33 The applicant did not submit that (f) was applicable however it was strongly argued that the meaning of "in relation to service" in s 196B(14)(b) applied. In its written submissions the applicant said:

The Tribunal erred in asking whether it was satisfied, beyond reasonable doubt, that the Applicant's alcohol consumption and shift work on operational service did not contribute to his obesity in a material way. Under ss 9(1)(b) and 196B(14)(b) the issue was simply whether there had been some contribution, regardless of whether it was material. The Tribunal erred in law by failing to pose and answer the correct question.

34 The applicant referred to the views expressed in *Repatriation Commission v Law* (1980) 31 ALR 140 (Law) where the Full Court of this Court construed the expressions "has arisen out of" and "is attributable to" appearing in s 101(1)(b) of the Repatriation Act 1920 (Cth) (1920 Act). In relation to the words "arisen out of" the Court observed, at 150, that they required "a consequential relationship of the incapacity or death with the service out of which it is said to arise" and added:

It is not useful to attempt to put a gloss upon the words of the Act by saying that the causal relationship must be "immediate", "direct" or "proximate" or by saying it connotes a "real", "sole", or "dominant" cause.

The Act does not say death which is "caused by" or "results from" his war service – phrases which might connote a proximate causal relationship. The expression 'arisen out of' is satisfied if some less proximate causal relationship is established. Of course, a suggested relationship which is fanciful is not sufficient; and a suggested relationship may be so tenuous as to preclude its consideration as answering the description "arising out of".

35 Concerning the expression "is attributable to" the Full Court referred to the use of the expression in different contexts that have been the subject of judicial discussion, such as in workers' compensation legislation, local government legislation and limitation statutes. It stated:

It seems clear that the expression "attributable to" in each case involves an element of causation. The cause need not be the sole or dominant cause: it is sufficient to show "attributability" if the cause is one of a number of causes provided it is a contributing cause. Under s 101(b) it is sufficient to show "attributability" if a member's war service is a contributing cause to the incapacity or death in respect of which the claim is made.

36 The applicant also referred to *Hill v Repatriation Commission* (2009) 177 FCR 434 (Hill) and *Repatriation Commission v Bendy* (1989) 18 ALD 144 (Bendy). As the Full Court in Law noted at 150:

The precise nature of the relationship denoted by the phrase depends upon the subject matter being dealt with, the context in which the expression is used and the circumstances of the particular case.

37 This comment is pertinent to the understanding of the analyses in Law, Bendy, and Hill as each of these cases was concerned with a provision different to s 196B(14). Law concerned the construction of s 101(1) of the 1920 Act which was repealed and replaced by the VE Act; see s 3. Bendy concerned s 9(1)(b) of the VE Act. At the time of these decisions there was no provision in the legislation for statements of principles and hence no equivalent to s 196B.

38 Section 101(1) was to be found in Division 6 of Part III of the 1920 Act which extended the application of Divisions 1 and 5 to "certain Male Members of the Forces (1939-1945 War). Divisions 1 and 5 of Part III were entitled, respectively, "Grant of Pensions" and "Service Pensions". Relevantly, s 101(1) provided:

- (1) Upon the incapacity or death –
 - (a) of any member of the Forces who was employed on active service, whose incapacity or death has resulted from any occurrence that happened during the period from the date of his enlistment to the date of the termination of his service in respect of that enlistment; or
 - (b) of any member of the Forces whose incapacity or death has arisen out of or is attributable to his war service,

the Commonwealth shall, subject to this Act, be liable to pay to the member, or his dependants, or both as the case may be, pensions in accordance with Division 1:

Provided that – ...

39 Section 9(1)(b) of the VE Act also uses the phrase "arose out of, or was attributable to" when referring to "the injury suffered, or disease contracted, by the veteran". The decision in *Bendy* predated the insertion of the concept of statements of principles into the VE Act which occurred with the passage of the Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994 (Cth). Hence the particular issue here as to the construction of s 196B(14) did not arise.

40 *Hill* concerned s 8(1)(b) of the VE Act. As there was no relevant statement of principles the case did not concern s 196B(14). Nevertheless the case did address the meaning of "arose out of, or was attributable to" as the phrase occurs in s 8(1)(b), which provides that the death of a veteran shall be taken to be war-caused if it "arose out of, or was attributable to" any eligible war service rendered by the veteran. It was in this context that the Full Court in *Hill* attributed the same meaning to the phrase in s 8(1)(b) as the courts in *Law* and *Bendy* attributed to the phrase where it occurred in s 101(1) of the 1920 Act and s 9(1)(b) of the VE Act respectively. The same approach was adopted by O'Loughlin J in *Doolette v The Repatriation Commission* (1990) 21 ALD 489.

41 Ordinarily, a phrase, such as "arose out of or was attributable to", occurring in several places in the same statute, is to be construed as having the same meaning each time it occurs; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J; see also Pearce and Geddes, *Statutory Interpretation in Australia*, 2001, 5th ed at 90-91. That general principle must, however, give way to contrary indications in the statute whether they are express or they arise from context. In my view when attention is given to all of the subclauses of s 196B(14), and when the purpose and structure of the section as a whole are considered, such contrary indications are evident. This conclusion is reinforced when, in the light of these aspects of s 196B, the section is compared with s 101(1)(b).

42 Relevantly, s 196B(2) refers to a particular kind of injury, disease or death being related to operational service on the basis of sound medical-scientific evidence. Section 196B(14) explains what "related to" means for the purpose of s 196B(2). If there is such a relationship within the meaning of s 196B(14) then a statement of principles will be determined by the Authority. It follows that where the question arises whether a particular disease is related to a person's service the phrase must bear one of the meanings given in s 196B(14).

43 Section 101(1) of the 1920 Act used the phrase "has arisen out of or is attributable to" to refer the whole range of relationships that might exist between the disease, injury or death of a member of the Forces and war service. Section 196B(14) is more nuanced. It extracts from the concept of "related to service" seven, more specific, meanings covered by that phrase. Those seven meanings are applicable in different situations however they are all instances of being related to service. I therefore accept the respondent's submission that s 196B(14) "is thus to be understood as a single definition, applicable in a variety of cases..."

44 The intention to provide greater precision and certainty to the concept of "related to service" by providing for statements of principles is self-evident. In any event, it is supported by comments in Division 2 of the Explanatory Memorandum to the Veterans' Affairs (1994 – 95 Budget Measures) Legislation Amendment Bill 1994:

In its approach to the concept of "reasonable hypothesis" as it appears in subsection 120(3) of the Principal Act, the Government has sought to amplify the requirements before an hypothesis can be found to be reasonable so that an opinion held by a single medical practitioner, however eminent, that does not have sound medical-scientific support, will no longer be sufficient as the basis of a reasonable hypothesis.

As part of the requirement that hypotheses have medical-scientific credibility and to ensure consistency in the determining of claims, decisions on the reasonableness of medical hypotheses will be decided by an independent body of eminent medical practitioners and medical scientists to be known as the Repatriation Medical Authority. Purely medical causation issues would not be decided by Departmental officers as delegates of the Repatriation Commission or, at review stages, by lawyers or laymen as at present.

The Repatriation Medical Authority will be given the power to determine from time to time those medical contentions that are based on sound medical-scientific evidence and that provide a relevant relationship between service and the disabilities claimed by applicants for pension and hence can form the basis for "reasonable hypotheses" for the purposes of subsection 120(3).

45 The Explanatory Memorandum also states that s 196B(14), referred to in the explanatory memorandum as s 196B(10), "lists all of the possible connections that might be encompassed by the expression "related to service". However in the application of a Statement of Principles to a particular case, only the appropriate and relevant connections as set out in the relevant liability provision ... can apply".

46 The comments in the Explanatory Memorandum add force to the argument that s 196B(14) has opened up the concept of "related to" to reveal the different meanings that the phrase might bear. It is clear that the section was intended to comprehend all the different meanings and, while not expressly stated, it supports the proposition that subclauses of the section should, if possible, not be read so as to render any one of them superfluous. This would, however, be the consequence of construing the section as the applicant contends. Any case that fell within subsection (d) would also fall within subsection (b). The requirement of materiality in the (d) would be superfluous because (b) would encompass all of the relationships encompassed in the first limb of (d) as well as others where the contribution of service to the injury, disease or death was not material.

47 Appropriately, the written submissions for the respondent drew attention to the internal structure of s 196D(14) and submitted:

- Paragraph (a) refers to an injury, disease or death that 'resulted from' an occurrence in the course of rendering service. Paragraph (b) then refers to something that 'arose out of, or was attributable to, that service'. These paragraphs refer to an injury, disease or death that would be said to be 'caused by' the service as a matter of common sense or ordinary language.
- Paragraph (c) extends the concept of a factor 'related to' service by expressly including a factor that 'resulted from' an accident in the course of related travel.
- Paragraph (d) extends the concept further by including an injury or disease which was 'contributed to' or 'aggravated by' (although not primarily caused by) the relevant service.
- Paragraph (e) applies only to a factor leading to injury, and extends paras (a) and (b) to cover an accident that 'would not have occurred but for' the person being engaged in the relevant service.
- Paragraph (f) applies to a factor leading to disease, and extends paras (a) and (b) to cover a factor that 'would not have occurred but for' the person being engaged in the relevant service.
- Paragraph (g) applies to a factor leading to death, and extends paras (a) and (b) to cover an accident or disease that 'would not have occurred but for' the person being engaged in the relevant service.

48 Generally speaking I accept this explanation of the section. I would add, however, some comment on the notion of the "common sense or ordinary language" meaning of "caused by". The respondent did not elaborate on this comment other than to say that paragraph (b) must be read "as adopting a more specific concept of causation than s 9(1)(b) or s 70(5), notwithstanding that the same language has been used".

49 Causation is a notoriously difficult concept about which much has been written; see generally, HLA Hart and Tony Honore Causation in the Law 2 ed 1985. It is neither necessary nor appropriate here to embark on a survey of the concept. It can be said, however, that subclause (b) is concerned with causation in fact not causation at law. The ordinary language meaning of

'caused by' when referring to causation in fact involves the concept of the relevant cause being the dominant or effective, although not necessarily the sole, cause of the nominated effect. This can be seen from the definition of "cause" in the Macquarie Dictionary, 2nd revised edition as "that which produces an effect; the thing, person, etc., from which something results". In other words subclause (b) requires the applicant's operational service to be the dominant or effective cause of the factor causing or contributing to the applicant's disease. The legislature's evident intention to provide a more refined and nuanced approach in the context of an applicable statement of principles would be undermined by the construction of the subclause for which the applicant contends.

50 The applicant's submission that the Tribunal should have applied the test of "related to" in s 196B(14)(b) was premised on the subsection having a lower threshold than s 196B(14)(d) with its requirement of materiality. On the meaning outlined above, however, subclause (b) imposes a more stringent test than subclause (d). In other words, the Tribunal applied the test that was more favourable to the applicant. In deciding that the applicant's obesity did not contribute "in a material way" to his sleep apnoea the Tribunal relied on findings of fact that it was entitled to make. On those findings the applicant could not have succeeded had subclause (b) been applied.

51 For these reasons I do not accept that the Tribunal erred in the manner alleged by the applicant and consequently the application to this Court must be dismissed with costs.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:

Dated: 25 November 2010

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