

AUSTRALIA / JUDGMENT

Hill v Repatriation Commission [2009] FCAFC 91

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FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

Hill v Repatriation Commission [2009] FCAFC 91

ADMINISTRATIVE LAW – veteran's entitlements – widow's pension – decision of Administrative Appeals Tribunal that veteran's death was "war-caused" – appeal allowed and matter remitted to Tribunal for determination according to law – whether primary judge erred in interpreting ss 5 D and 120A of Veterans' Entitlements Act 1986 (Cth) by concluding that neither "heart failure" nor "kidney failure" was capable of constituting a "kind of death" under that Act – primary judge correctly concluded that the Tribunal erred in law – Tribunal failed to determine why the veteran's heart failed – Tribunal failed to identify the cause or causes of the veteran's death

PRACTICE AND PROCEDURE – no cross-appeal or notice of contention filed – whether respondent entitled to raise cross-appeal at hearing, that primary judge ought to have dismissed the matter rather than remit to the Tribunal – notice of appeal at first instance sought order that matter be remitted to the Tribunal – no error by primary judge

Veterans' Entitlements Act 1986 (Cth) ss 5AB(2), 5D, 8(1)(b), 13(1), 120, 120A, 196B

Benjamin v Repatriation Commission (2001) 70 ALD 622 cited Brown v Repatriation Commission [2006] FCA 914 cited Bushell v Repatriation Commission (1992) 175 CLR 408 cited Byrnes v Repatriation Commission (1993) 177 CLR 564 cited Collins v Repatriation Commission [2009] FCAFC 90 referred to Doolette v Repatriation Commission (1990) 21 ALD 489 cited Fogarty v Repatriation Commission [2003] FCAFC 136 cited Repatriation Commission v Codd (2007) 95 ALD 619 cited Repatriation Commission v Cooke (1998) 90 FCR 307 cited Repatriation Commission v Deledio (1998) 83 FCR 82 applied Repatriation Commission v Hancock (2003) 37 AAR 383 applied Repatriation Commission v Law (1980) 147 CLR 635 cited Repatriation Commission v Law (1980) 31 ALR 140 cited Repatriation Commission v Towns (2003) 38 AAR 77 cited

MAUREEN HILL v REPATRIATION COMMISSION

NSD 333 of 2009

MANSFIELD, STONE & EDMONDS JJ

5 AUGUST 2009

ADELAIDE (HEARD IN SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION NSD 333 of 2009

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: MAUREEN HILL

Appellant

AND: REPATRIATION COMMISSION

Respondent

JUDGES: MANSFIELD, STONE & EDMONDS JJ

DATE OF ORDER: 5 AUGUST 2009

WHERE MADE: ADELAIDE (HEARD IN SYDNEY)

THE COURT ORDERS

THAT:

1. The appeal be dismissed.

2. The appellant pay to the respondent 60 per cent of its costs of the appeal.

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 eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION NSD 333 of 2009

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: MAUREEN HILL

Appellant

AND: REPATRIATION COMMISSION

Respondent

JUDGES: MANSFIELD, STONE & EDMONDS JJ

DATE: 5 AUGUST 2009

PLACE: ADELAIDE (HEARD IN SYDNEY)

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 This is an appeal from a decision of a judge of the Court given on 30 March 2009: Repatriation Commission v Hill [2009] FCA 270.

2 Maureen Hill is the widow of Dr John Walker (the veteran). He died on 21 June 2003, at the age of 79. He had operational war service and eligible war service (as defined in ss 6A and 7 of the Veterans' Entitlements Act 1986 (Cth) (the VE Act)) between 9 October 1942 and 8 December 1945 when he was a member of the Royal Australian Air Force. Mrs Hill claims to be entitled to a pension under s 13(1) of the VE Act on the basis that, in accordance with s 8(1)(b) of that Act, the veteran's death arose out of, or was attributable to, his operational war service and his eligible war service.

3 She claimed that the veteran died from two causes, heart disease and renal failure, and at least the heart disease was attributable to the veteran's war service. That was said to have followed from the veteran having developed a heavy smoking habit during, and as a result of his war service, and to have continued at least until 1999 and indeed after that time. The smoking habit was said to be a significant contributing factor to him developing the heart disease which caused his death.

4 The claim was rejected by the Repatriation Commission and by the Veterans' Review Board. The third level of decision-making was the Administrative Appeals Tribunal (the Tribunal). The Tribunal accepted Mrs Hill's claim.

5 An appeal on a question of law lies from a decision of the Tribunal to the Court. At first instance, a judge of the Court decided that the Tribunal had erred in law in reaching its decision. His Honour remitted her claim to the Tribunal to be considered according to law.

6 This appeal, in effect, seeks to re-instate the Tribunal's decision. The Repatriation Commission seeks to sustain the decision at first instance. In addition, although it did not cross-appeal, it was permitted to argue (with the consent of Mrs Hill) that the primary judge, having found legal error on the part of the Tribunal, should simply have dismissed Mrs Hill's claim rather than remitting it to the Tribunal for further consideration.

7 This appeal was argued at the same time as another appeal in which judgment has now been given: *Collins v Repatriation Commission* [2009] FCAFC 90 (Collins). The legal issue in both appeals was, in essence, the same. Consequently, there is some repetition in these reasons and in the reasons in Collins. Nevertheless, it is necessary to refer to the legislation and the relevant legal principles to address the issue raised on this appeal.

THE LEGISLATION

8 Section 13 of the VE Act provides that where the death of a veteran was "war-caused", or the veteran is incapacitated from a war-caused injury or a war-caused disease, the Commonwealth is liable to pay a pension by way of compensation to the dependants of the veteran or to the veteran in accordance with its terms.

9 Section 8 addresses the expression "war-caused" in relation to the death of a veteran. It relevantly provides:

(1) Subject to this section and section 9A, for the purposes of this Act, the death of a veteran shall be taken to have been war-caused if:

...

(b) the death of the veteran arose out of, or was attributable to, any eligible war service rendered by the veteran;

...

Section 9 addresses the expression "war-caused" in relation to injury suffered or disease contracted by the veteran. Section 9(1) largely mirrors s 8(1) in relevant respects.

10 In any claim under the VE Act, there are generally three fundamental and logically separate though often inter-related questions:

1. the nature of the injury, disease or death of the veteran;
2. the relationship of that injury, disease or death to the service of the veteran; and
3. the extent of the entitlement to benefits under the VE Act in respect of that war-caused injury, disease or death.

11 The first question is anterior to, and distinct from the second question: see *Benjamin v Repatriation Commission* (2001) 70 ALD 622 (*Benjamin*) per Moore, Emmett and Allsop JJ at 634-5:

Section 120(1) of the [VE] Act assumes the existence of a relevant injury or disease and provides a standard of proof for the determination of whether that injury or disease was war-caused. When the Commission, or the Tribunal on review, is required to determine whether a veteran is suffering from a particular injury or disease, that issue must be decided to the reasonable satisfaction of the decision-maker, in accordance with s 120(4) of the [VE] Act: see *Repatriation Commission v Budworth* (2001) 116 FCR 200 at 204, [15].

See also *Repatriation Commission v Cooke* (1998) 90 FCR 307 (*Cooke*) at 310 per French J (as he then was), *Drummond and Carr JJ*; *Repatriation Commission v Hancock* (2003) 37 AAR 383 (*Hancock*) at [9] per Selway J; *Repatriation Commission v Codd* (2007) 95 ALD 619 (*Codd*) at [22] per Gordon J.

12 There are special provisions under the VE Act facilitating proof of the relationship between injury, disease or death and war-service where the injury, disease or death is said to relate to operational service, that is the second question.

13 Section 120(1) of the VE Act relevantly directs the decision-maker, where it is claimed that the veteran is incapacitated by injury or disease related to operational service, or that the veteran's death related to operational service, to determine that the injury, disease or death was war-caused, unless it is satisfied beyond reasonable doubt that there is no sufficient ground for making that determination.

14 Section 120(3) then provides:

- (3) In applying subsection (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.

15 Each of those provisions is affected by s 120A of the VE Act.

16 Section 120A(3) and (4) provides:

- (3) For the purposes of subsection 120(3), a hypothesis connecting an injury suffered by a person, a disease contracted by a person or the death of a person with the circumstances of any particular service rendered by the person is reasonable only if there is in force:
 - (a) a Statement of Principles determined under subsection 196B(2) or (11); or
 - (b) a determination of the Commission under subsection 180A(2);

that upholds the hypothesis.

- (4) Subsection (3) does not apply in relation to a claim in respect of the incapacity from injury or disease, or the death, of a person if the Authority has neither determined a Statement of Principles under subsection 196B(2), nor declared that it does not propose to make such a Statement of Principles, in respect of:
 - (a) the kind of injury suffered by the person; or
 - (b) the kind of disease contracted by the person; or
 - (c) the kind of death met by the person;

as the case may be.

17 Consequently, for the purposes of considering whether the material before the Tribunal raises a reasonable hypothesis connecting the veteran's injury, disease or death with his operational service, the Tribunal has to inquire whether there was in force a relevant Statement of Principles made under s 196B(2), and if so to apply it in addressing the existence of such an hypothesis.

18 The steps involved in making the decision required by ss 13(1) and 120(1) and (3) of the VE Act as to whether an injury, disease or death is war-caused are explained in *Repatriation Commission v Deledio* (1998) 83 FCR 82 (*Deledio*) at 97-8 (per Beaumont, Hill and O'Connor JJ). If there is no applicable Statement of Principles, the decision-making process is that as explained in *Byrnes v Repatriation Commission* (1993) 177 CLR 564. The decision in *Deledio*, it is recognised by the parties, sets out the steps required to be taken where there is no issue about the cause of death (in the words used in s 196B and the relevant Statements of Principles "the kind of death") of the veteran on which the claim for a war widow's pension is made.

19 Generally, but not always, the first question is not contentious. The claimant asserts the nature of the injury, disease or death, and the focus is upon whether it is war-caused. However, if the nature of the claimed injury, disease or death is contentious, the decision-maker first has to decide that issue. Sometimes there is a dispute as to whether the claimed injury or disease in fact exists. That may be because there is an issue as to whether the claimed symptoms are genuine. Sometimes there is a dispute as to whether the medical symptoms and signs show the existence of the claimed injury or disease. There may be other reasons why the first question is contentious. It is not necessary to speculate about that.

20 It is on this appeal that the first question identifying the injury, disease or death, is determined on the balance of probabilities, or to the reasonable satisfaction of the decision-maker: Benjamin at 634-5 per Moore, Emmett and Allsop JJ; Cooke at 310 per French (as he then was), Drummond and Carr JJ and Hancock at [9] per Selway J.

21 For reasons which are discussed at greater length in Collins at [44]-[46], we consider that "death" appearing in ss 8 and 13 of the VE Act, and then in s 120, whether by itself or in the phrase "injury, disease or death" means the nature of the condition which causes the death, or put another way, the medical cause or causes of the death.

22 Indeed, that was common ground between the parties to the appeal.

23 We note that ss 8 and 13 look to the "death" of a veteran, but do not use the term "kind of death". Similarly, s 120 refers to the relationship of a veteran's death with the operational service of the veteran. It also does not use the term "kind of death". The term "kind of death" is introduced by s 120A(2) and (4) in the expressions "kind of injury", "kind of disease" and "kind of death" and the expression "particular kind of injury, disease or death" in s 196B(2). That expression refers to the circumstances in which a Statement of Principles may be determined and then applied to decide whether a hypothesis connecting an injury, disease or death is reasonable as assessed under s 120(1) and (3) as informed by s 120A(3).

24 In our view, the expression "particular kind of injury, disease or death" in s 120A(4) and s 196B(2) respectively is not intended to introduce any refined or different concept of causation, but simply to describe the circumstances in which a Statement of Principles must be determined and, if applicable, applied. That is apparent from s 196B itself. Section 196B(14) refers to when a factor causing or contributing to "an injury, disease or death" is related to service rendered by a veteran. The specified factors reflect in a general way the matters specified in ss 8 and 9 as to when the injury, disease or death of a veteran is war-caused. So much is clear from the consideration given to that expression by Selway J in Hancock at [9] and by Gordon J in Codd at [31]-[39]. We will not repeat their Honours' reasoning, with which we respectfully agree. There was no submission by the parties to the contrary.

25 Hence, the "kind of death" in terms of ss 120A(2) and (4) is also one which refers to the medical cause or causes of death (see eg per Selway J in Hancock at [8]-[9]; per Gordon J in Codd at [36]-[39]; per Spender, Tamberlin and Kenny JJ in Fogarty v Repatriation Commission [2003] FCAFC 136 at [34]; per Moore, Emmett and Allsop JJ in Benjamin at [53]-[54]; per Branson J in Brown v

Repatriation Commission [2006] FCA 914 at [22]-[33]; and per Tamberlin J in *Repatriation Commission v Towns* (2003) 38 AAR 77 at 86-7). The decision about the "kind of death" is also not made by applying ss 120 or 120A or any Statement of Principles under s 196B(2) of the VE Act. It is made independently of them. Once it is made, then for the purpose of deciding whether the "kind of death" is war-caused, in accordance with the Deledio principles, those provisions and any relevant Statement of Principles are to be applied.

26 It is also important to recognise that there may be more than one medical cause for a veteran's incapacity or death. *Repatriation Commission v Law* (1980) 147 CLR 635 (Law) recognised that. In that case, the veteran had died as a result of carcinoma of the lung (nine months) with myocardial infarction (three years) as a contributory cause. That was not in issue. That finding did not attract adverse judicial comment. The hypothesis presented by the widow of the veteran was that, as a result of his war service, the veteran had taken up smoking, which had led to the onset of his carcinoma and so to his death. The issue was whether, in terms of s 101 of the Repatriation Act 1920 (Cth), his death had arisen out of or was attributable to his war service. Section 101 was generally to the same effect as s 8(1)(b) of the VE Act and s 47(2) of that Act generally was to the same effect as s 120(1) of the VE Act. That Act was repealed and replaced by the VE Act: see s 3 of the VE Act. For present purposes, it is sufficient to note the similarity between the relevant wording of s 101 referred to and s 8(1)(b) of the VE Act: see also per O'Loughlin J in *Doolette v Repatriation Commission* (1990) 21 ALD 489 (Doolette) at 492, and the absence of any suggestion in the judgment of Aickin J (with whom Gibbs CJ, Stephen and Mason JJ agreed) that there could not be multiple medical causes of death.

27 The High Court upheld the decision of the Full Court of this Court (Bowen CJ, Brennan and Lockhart JJ): *Repatriation Commission v Law* (1980) 31 ALR 140. Their Honours at 151 said of the expression "attributable to":

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(1)(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.

That passage, of course, relates to the issue of whether the death was "war-caused", but it was a question considered in relation to each of the medical causes of the death of the veteran.

28 That passage was adopted, and applied, by O'Loughlin J in *Doolette*. That case concerned a claim by the widow of a veteran for a pension under the VE Act, following his death. The veteran had died following a myocardial infarction, to which his condition of diabetes mellitus type 2, first diagnosed in 1954, had been a significant contributing factor. The hypothesis put forward to connect the death to the veteran's service was that the veteran's death was war-caused because the diabetes was war-caused, either through stress experienced during war service, or by that stress leading to obesity which in turn produced diabetes, or by that stress aggravating a latent condition of diabetes. The fact that the veteran had suffered stress during his operational service

was not in dispute.

29 His Honour said at 492 that:

if death is hastened because of the accelerated progress of a disease, which acceleration was itself caused by a war-caused condition, the proper conclusion would be that death was attributable to war service.

Although the Tribunal had properly considered that the medical cause of the death included the diabetes, it was satisfied beyond reasonable doubt that no reasonable hypothesis existed connecting the veteran's death to his war service. That conclusion was not shown to have resulted from any error of law on the part of the Tribunal.

THE TRIBUNAL'S DECISION

30 The first issue of substance addressed by the Tribunal was the "kind of death" referred by the veteran. It did so in accordance with the decision in *Hancock* to ascertain whether a Statement of Principles applied in determining whether the veteran's death arose out of, or was attributable to, his operational service.

31 As we have noted, the first issue was really to identify the "death", that is the medical cause or causes of death, of the veteran. That issue was contentious before the sequential decision-makers. Once that decision was made, it would then inform the process of deciding whether the death was war-caused, because it would expose whether there was a relevant Statement of Principles to be applied. As the question is the same, whether inquiring as to the "death" or the "kind of death", nothing turns on that minor difference of approach. If a Statement of Principles applied, then s 120A would dictate how the Tribunal would determine whether, for the purposes of s 120(1) and (3), a reasonable hypothesis existed connecting the veteran's operational service with his death; if no Statement of Principles applied, s 120(3) identified the question to be addressed, but without reference to any template provided by a Statement of Principles.

32 The death certificate of the veteran, against the entry "Cause of death and Duration of Last illness" recorded:

(I) (a) Delirium secondary to acute and chronic renal failure-end stage, 1

year

(b) Heart failure, 2 weeks

(II) Progressive dementia, 2 years

33 The Tribunal referred to the medical evidence that the veteran developed an acute kidney disease in 1993, namely acute focal necrotising glomerulonephritis. Around that time, the veteran also developed hypertension as a consequence of the glomerulonephritis. His renal function deteriorated progressively, and markedly so by 2002. In 1999, the veteran had a small myocardial infarction. Investigation confirmed triple artery disease leading to coronary artery

bypass surgery. He was then diagnosed with ischaemic heart disease. The surgery had apparently good results, although the veteran had an episode of cardiac failure in June 2002 associated with chest infection and deterioration of renal function. He was also, from 2002, diagnosed with Alzheimer's type dementia.

34 It is not necessary to trace in detail the evolution of those conditions.

35 Professor O'Rourke, one of the two medical specialists who gave evidence attributed the veteran's ultimate heart failure to glomerulonephritis which caused hypertension and renal failure. He did not consider ischaemic heart disease was a factor in the veteran's death. His evidence was that, following the successful surgery in 1999, the veteran had recovered from his ischaemic heart disease, and did not suffer from that condition at the time of his death. As recorded by the Tribunal, he described the heart failure as diastolic ventricular failure attributable to his hypertension, age and renal failure, and not heart failure due to ventricular systolic failure (which may indicate ongoing ischaemic heart disease).

36 Professor O'Rourke said severe renal failure was the primary cause of death but that heart failure probably contributed to death, affecting its timing by a matter of hours or days. The Tribunal noted that he said "that heart failure was independent of renal failure but later he said that each makes the other worse".

37 Dr Butler, the other medical specialist, agreed that hypertension was secondary to the renal failure, and may have been inadequately controlled, but also (according to the Tribunal) that "it was more likely than not" that the effects of the previous myocardial infarct contributed to heart failure at the time of death. He said heart failure worsens renal failure because it impairs renal perfusion, and that renal failure probably contributed to heart failure because the veteran would not have responded to diuretic therapy.

38 The Tribunal expressed its understanding of the medical evidence, and its conclusion on the first issue in the following passage from its reasons:

In summary, we understood both doctors to accept that [the veteran] died of renal failure and heart failure and both accepted that the heart failure was a consequence of [the veteran's] hypertension caused by the glomerulonephritis. The difference of opinion was the extent to which IHD [ischaemic heart disease] contributed to the heart failure.

We understood [counsel for the Repatriation Commission] to argue that, if we accepted Professor O'Rourke's evidence, there was no connection between the causes of death listed in the Death Certificate and [the veteran's] service. Therefore the kind of death is not just the starting point in this case, but also the finishing point. We do not accept that that is so. We also do not accept [his] argument that there was only one kind of death, renal failure, because cardiac failure flowed from renal failure.

On the evidence, including that of Professor O'Rourke and Dr Butler, we find that there were two kinds of death: heart failure and kidney failure. We do not consider that either dementia or IHD [ischaemic heart disease] was a "kind of death". There is no SoP for either of the kinds of death we have found.

39 The second issue addressed by the Tribunal was whether there is a reasonable hypothesis connecting the veteran's death with his operational service. At that point, as noted, it is not required to make factual findings. It was to consider that question on the material before it: *Bushell v Repatriation Commission* (1992) 175 CLR 408 and it did not further advert to s 120A because it concluded (wrongly) that there was no relevant Statement of Principles.

40 Its focus was whether there was a reasonable hypothesis "linking heart failure and service".

41 For that purpose, it accepted that the veteran developed a heavy smoking habit during and as a result of his war service, and that he continued to smoke until at least his bypass surgery in 1999. It accepted that there is cogent medical opinion that smoking causes ischaemic heart disease.

42 Finally on this point, it considered the hypothesis that the ischaemic heart disease was in turn a cause of the veteran's death. It summarised the relevant medical evidence as follows:

The final element of the hypothesis is that IHD [ischaemic heart disease] contributed to [the veteran's] death. As we understand the evidence of Dr Butler and Professor O'Rourke, they agreed that there was no evidence of damage as a result of ischaemia within the two weeks before [the veteran's] death, but previous damage could have contributed to heart failure. Further, Dr Butler said that there was 10 or 20 per cent likelihood of systolic failure on the basis of IHD [ischaemic heart disease]. Professor O'Rourke also said that there was a less than 10 per cent probability that IHD played a role in [the veteran's] death. That is evidence from both doctors of a likelihood of a contribution from IHD [ischaemic heart disease] to [the veteran's] death. In a letter dated 7 September 2005 Dr Patel [the general practitioner] wrote that in his opinion "it is possible the ischaemic heart disease contributed to his demise".

43 The Tribunal regarded the evidence as supporting the hypothesis of ischaemic heart disease being one of a number of contributing causes to the death of the veteran, and so there was a reasonable hypothesis that his death was attributable to his operational service.

44 The Tribunal was then required by s 120(1) to consider whether it was satisfied beyond reasonable doubt that any element of the hypothesis raised had been disproved. It was not so satisfied.

45 Consequently, it accepted the claim.

46 It did not need to address an alternative hypothesis which sought also to link renal failure with ischaemic heart disease.

THE DECISION OF THE PRIMARY JUDGE

47 The primary judge noted that at material times there was in force a Statement of Principles concerning ischaemic heart disease (Statement of Principles No 53 of 2003 as amended by Statement of Principles No 9 of 2004, now replaced by Statement of Principles No 89 of 2007) (the IHD SoP). There was also a Statement of Principles concerning Mesangial IgA Glomerulonephritis (No 63 of 2001 as amended by No 75 of 2002) (the GN SoP). It appears that the generality of the description of the cause of death or kind of death of the veteran led the Tribunal to decide that the IHD SoP did not directly require its consideration. It is common ground that the GN SoP was not brought to the Tribunal's attention.

48 The Repatriation Commission submitted at first instance, and seeks to maintain on this appeal, that the Tribunal's findings about the death or the kind of death of the veteran wrongly conflated the medical cause of death with the actual death of the veteran. The Tribunal had specifically decided that ischaemic heart disease was not a "kind of death" of the veteran, so (it was argued) the Tribunal could not have been satisfied that there was a reasonable hypothesis connecting the veteran's death with his operational service which was premised on ischaemic heart disease having contributed to his death.

49 The primary judge at [52]-[53] concluded on the first contention:

Both Professor O'Rourke and Dr Butler confirmed that heart failure is a condition and not a disease. It follows from such evidence that the Tribunal's conclusion that the veteran's death resulted from 'heart failure and kidney failure' ignored the causes of such failures and conflates the 'terminal event or condition' with the medical cause of the veteran's death.

By failing to appreciate the underlying nature of the disease but directing its attention to the consequence of the disease, namely heart failure, the Tribunal failed to direct its attention to the circumstances leading to the 'kind of death'. Instead, the Tribunal had regard to the proximate or ultimate cause of death and committed an error of law of a similar kind referred to in *Codd* where the Tribunal found that the 'kind of death' met by the veteran was by road accident.

50 Then his Honour concluded that the Tribunal, if it considered (contrary to its express finding) that ischaemic heart disease was a cause of the death of the veteran, it would have been obliged to have applied the IHD SoP in determining whether a reasonable hypothesis existed, pursuant to s 120(1) and (3), linking the veteran's death by ischaemic heart disease (if that had been its finding) to his service. The Tribunal, his Honour found, had erred in not doing so. It was also in error, as his Honour found, to have had regard to the IHD SoP as providing a grounding for the reasonable hypothesis it accepted because it had found that ischaemic heart disease was not a cause of the veteran's death.

51 The primary judge also concluded that the Tribunal, having found that ischaemic heart disease was not a "kind of death", should then have considered whether glomerulonephritis (rather than "renal failure") as the relevant kind of death was one in respect of which a Statement of Principles existed. Because the GN SoP existed, and applied to that kind of death, the Tribunal erred in not applying it as required by s 120A(3) when it considered the existence of a reasonable hypothesis under s 120(3).

52 The Repatriation Commission sought to argue at first instance that, because smoking was not a factor which could connect operational service with glomerulonephritis under the GN SoP, that claim had to be dismissed. However, the primary judge declined to address that issue as it had not been the subject of submission to, or consideration by, the Tribunal.

53 The matter was remitted to the Tribunal to be heard and determined according to law.

THE GROUNDS OF APPEAL

54 On the appeal, it was argued on behalf of Mrs Hill that the primary judge erred in interpreting ss 5D and 120A of the VE Act by concluding that neither "heart failure" nor "kidney failure" was capable of constituting a "kind of death" under the VE Act.

55 Although the Repatriation Commission did not institute any cross-appeal, or give any Notice of Contention, strictly speaking it should not be entitled to raise on this appeal – as it sought to – the claim that the primary judge erred in law in remitting the matter to the Tribunal. It argued that, in the absence of any relevant evidence, there could be no satisfaction as to the existence of a reasonable hypothesis connecting the veteran's death from glomerulonephritis with his service. That is because none of the specified criteria in the GN SoP on which a reasonable hypothesis might exist connecting glomerulonephritis to war service could possibly have been satisfied. Smoking was not one of those criteria. Hence, it argued that its appeal at first instance should not only have been successful, but the primary judge should simply have dismissed Mrs Hill's claim. Counsel for Mrs Hill said she did not oppose the Repatriation Commission being given such leave as was necessary to enable it to regularise its position in relation to that contention.

56 We would not grant the Repatriation Commission leave to file and serve a cross-appeal out of time to achieve that outcome. Its Notice of Appeal at first instance did not seek an order that the claim of Mrs Hill be dismissed. It sought an order in the terms made by the primary judge that the matter should be remitted to the Tribunal. The Tribunal specifically recognised that it did not need to address a contention that death by "kidney disease" was caused or contributed to by the veteran's war service because it had accepted that his death from "heart disease" was war-caused.

57 Not only is there no basis in the circumstances for asserting error by the primary judge on the issue, but the issue has been expressly preserved by the Tribunal. This Court should not act as the primary decision-maker without the benefit of witnesses being heard and seen and the detailed submissions.

CONSIDERATION

58 The attack upon the reasoning of the primary judge concerned the passage in his Honour's reasons set out at [49] above, because (it was submitted) although both Professor O'Rourke and Dr Butler had said that heart failure is a "condition" and not a "disease", they had not expressly drawn that distinction in respect of kidney failure. From that point, the argument ran that his Honour had failed to consider the definition of "disease" in s 5D of the VE Act. Because that definition includes "any physical or mental ailment, disorder, defect or morbid condition", it was contended that the primary judge had erroneously drawn a distinction between the terms "condition" and "disease", and that as the death certificate said the renal failure was of one year's duration and the heart failure was of two weeks' duration, those conditions were each kinds of death and not merely the "proximate or ultimate" causes of death or the terminal events or conditions as his Honour found. The apparent inconsistency in the Tribunal's reasoning, demonstrated by its finding that ischaemic heart disease was not a "kind of death" but their finding that there was a reasonable hypothesis that war-caused ischaemic heart disease contributed to his death, was explained by asserting that death from ischaemic heart disease was an underlying cause of the heart disease which caused his death. Alternatively, it was put that death by heart disease was a kind of death to which no Statement of Principles was applicable, and a hypothesis of a reasonable connection with war service could be sustained on the basis that ischaemic heart disease was war-caused and was the underlying condition which caused the death of the veteran.

59 The contentions on the part of Mrs Hill, in our view expose the flaw in the Tribunal's reasoning leading to the error of law which the primary judge found.

60 The Tribunal was required to make a finding about the death, that is the medical cause or causes of the death of the veteran. The identification of the cause or causes of death then enables the Tribunal to ascertain whether, for the purposes of deciding whether the death is war-caused in accordance with ss 8, 120 and 120A, there is a Statement of Principles relevant to that particular kind of death and to apply it. Gordon J in Codd at [28]-[36] discussed the inter-relationship between those terms. Indeed, so much was accepted by counsel for Mrs Hill. It was also accepted that ascertaining the medical cause or causes of the death is a question of fact for the Tribunal on the balance of probabilities.

61 The certificate as to the cause of death is part of the evidence on which the medical cause or causes of the death is determined. It is not itself determinative of that issue. There was extensive other expert evidence, discussed by the Tribunal.

62 It is common ground that the Tribunal was required to decide the cause of death, that is the medical cause or causes of the death, of the veteran. The principal question of law ventilated at first instance and on appeal was whether it had done so by finding that the death was caused by "heart failure".

63 As explained above, there is a synchronicity between the finding of the cause or causes of death and the finding as to whether the death was war-caused. That is because, once the cause of death is ascertained, that finding will inform the question whether that particular kind of death is

one in respect of which a Statement of Principles has been made. That in turn indicates how the question of whether the death is war-caused is addressed in accordance with ss 8, 120 and 120A and as explained by the Deledio principles. Gordon J discussed that synchronicity in Codd at [28]-[36].

64 In our judgment, the primary judge correctly concluded that, in the matter, the Tribunal erred in law by concluding that the death was (relevantly) caused by heart failure.

65 The decision about the medical cause or causes of death is for the decision-maker, upon the material before it. The death certificate was a piece of evidence. There was extensive expert medical evidence, which the Tribunal generally accepted. It was clear both specialists agreed that ultimately the veteran's heart had failed. Both agreed that the veteran in 1999 had been diagnosed with ischaemic heart disease. The discussion of the medical evidence by the Tribunal centred on whether the failure of the veteran's heart was due solely to glomerulonephritis which caused hypertension and also renal failure, or whether the failure of the veteran's heart was in part caused also by ongoing effects of his previous myocardial infarct, caused by ischaemic heart disease. The Tribunal then noted the difference of medical opinion as to the extent to which, if at all, ischaemic heart disease contributed to the heart failure. One sign of ongoing heart function impairment from ischaemic heart disease will have been ventricular systolic failure, as distinct from diastolic ventricular failure attributable to hypertension, age and the veteran's renal dysfunction.

66 There was apparently no other conflict of views between Professor O'Rourke and Dr Butler.

67 However, in discussing that evidence, the Tribunal moved from that diagnostic question to the more general "heart failure". There was apparently no medical dispute that "heart failure" worsens renal failure because it impairs renal perfusion, so in that general sense, it found that although renal failure was the primary "cause" of death, "heart failure" contributed to it.

68 The Tribunal erred in law because it failed to determine why the veteran's heart gave up and why his renal function ceased. It failed to identify the cause or causes of his death. It recognised the issue between the two specialists as to the extent to which, if at all, ischaemic heart disease (in context, also the damage caused by the myocardial infarct which the ischaemic heart disease caused) contributed to the veteran's heart failing. For the purposes of ss 8, 120 and 120A, in our view, it was required to determine whether, on the balance of probabilities, ischaemic heart disease was a cause of the veteran's death.

69 The Tribunal, as shown by the passage from its reasons set out at [38] above, then decided that there were two kinds of death: heart failure and kidney failure. It did not consider that ischaemic heart disease was a "kind of death". It then proceeded to decide in terms of s 120(3), but without applying the IHD SoP, whether the material did not raise a reasonable hypothesis connecting the heart failure with the veteran's war service.

70 It accepted the veteran had developed a heavy smoking habit during and as a result of his service. It then identified the "next element of the hypothesis is the link between smoking and IHD [ischaemic heart disease]". It regarded the "existence of the [IHD SoP], which includes smoking as a factor, [as] a relevant matter". It regarded the link as reasonable. The "final element" of the hypothesis was that ischaemic heart disease contributed to the death. As that was a possibility on the medical evidence, that element of the hypothesis was also reasonably raised.

71 Hence, the Tribunal was satisfied that a reasonable hypothesis existed that the veteran's death was war-caused. It did so, in the face of its finding that ischaemic heart disease was not a cause of the veteran's death. By focusing erroneously on the cause of death only in a general way, by looking at the medical processes leading to the veteran's death and not to the medical cause or causes of the death, the Tribunal in effect found that a particular kind of death, namely death from ischaemic heart disease, was war-caused (in accordance with the reverse onus of proof prescribed by s 120(1) and (3)) even though it had rejected the claim that ischaemic heart disease was a cause of, or a particular kind of, death. It also, by its error, failed to apply the IHD SoP to determine if the death was war-caused in accordance with ss 120 and 120A (assuming it had found ischaemic heart disease to have been a medical cause of death).

72 The legal error of the Tribunal in this instance is similar to that found by Gordon J in Codd. In that case, the veteran died from injuries sustained in a road accident. The Tribunal found that the cause of death, or the kind of death, was "death by road accident". It thus failed to properly address the claim that the veteran's death in the road accident was caused by war-caused alcohol dependence which so impaired the veteran's concentration as to have contributed to the road accident.

73 Counsel for Mrs Hill argued that the definition of "disease" in s 5D of the VE Act indicates that the "condition" which leads to the death of a veteran may be determined as the medical cause of death, or as the kind of death. Section 5D(1) defines "disease" to mean:

- (a) any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or
- (b) the recurrence of such an ailment, disorder, defect or morbid condition;

but does not include:

- (c) the aggravation of such an ailment, disorder, defect or morbid condition; or
- (d) a temporary departure from:
 - (i) the normal physiological state; or
 - (ii) the accepted ranges of physiological or biochemical measures;

that results from normal physiological stress (for example, the effect of exercise on blood pressure) or the temporary effect of extraneous agents (for example, alcohol on blood cholesterol levels).

Reliance was placed, in particular, upon the expression "morbid condition" in that definition.

74 In that regard, it is also helpful to note s 5AB(2), which informs when a Statement of Principles under s 196B(2) should be made. It provides:

- (2) Information about a particular kind of injury, disease or death is taken to be sound medical-scientific evidence if:
 - (a) the information:
 - (i) is consistent with material relating to medical science that has been published in a medical or scientific publication and has been, in the opinion of the Repatriation Medical Authority, subjected to a peer review process; or
 - (ii) in accordance with generally accepted medical practice, would serve as the basis for the diagnosis and management of a medical condition; and
 - (b) in the case of information about how that kind of injury, disease or death may be caused—meets the applicable criteria for assessing causation currently applied in the field of epidemiology.

That provision, in particular subs (a)(ii), recognises that a medical condition is one which is to be identified at a proper level of specificity. It anticipates that a "medical condition" is to be capable of diagnosis and management. For example, to say that an injury or disease is an arm injury or an arm disease is not to describe a medical condition; nor would it be correct to say that, if death resulted from an arm injury or an arm disease, that would describe the medical condition which resulted in death.

75 The definition of "disease" also does not contemplate that a morbid condition should be capable of description only in a general way. It too requires the identification of the particular medical condition, based upon medical diagnosis. Otherwise, the injury required by ss 9 and 120 and 120A would not be capable of being rationally applied to determine if the disease is war-caused.

76 We also add that this contention on behalf of Mrs Hill appears to have been founded upon the expression "terminal event or condition" used by the primary judge in the passage set out at [49] above. His Honour was not there using the word "condition" in any technical sense. It is clear enough that ultimately death involves heart failure. His Honour was seeking to point out that the VE Act requires more than the recognition that death flowed from heart failure when it requires the identification of the "injury disease or death" and "the particular kind of injury disease or death" for the purpose of determining under ss 8, 9, 120 and 120A whether an injury, disease or death gives rise to an obligation under s 13(1) of the VE Act to pay a pension to a veteran or to the veteran's dependants.

77 It is clear that the medical evidence identified with some precision glomerulonephritis as a cause of the veteran's death. It is also clear that the Tribunal accepted that evidence. It led to renal failure as the consequence of the condition. To find the cause of death, in the light of that

evidence, as renal failure was (as the primary judge found) to complete the cause and the consequence. Had the Tribunal correctly identified that cause of death, it would have also recognised that the GN SoP was applicable. It would then have addressed the question whether that cause of death was war-caused in accordance with ss 120 and 120A as explained by the Deledio principles.

78 In this instance, the Tribunal did not consider the claim that death from renal disease was war-caused because it had already decided to accept Mrs Hill's claim on another basis. It was entitled, in that circumstance, to have declined to consider that claim. However, as the matter is to be remitted to the Tribunal, it is important to indicate that the Tribunal erred in law in the manner identified so that, if it becomes necessary to consider whether the glomerulonephritis was war-caused, the claim is properly addressed.

CONCLUSION

79 For those reasons the appeal is dismissed. The Repatriation Commission would not be given leave to file and serve out of time a cross-appeal to assert that the appeal should be allowed and the claim of Mrs Hill should be finally dismissed if that leave were sought. The orders made at first instance stand.

80 The parties were agreed that, subject to the Court's discretion, costs of the appeal should follow the event. We are disposed to order that Mrs Hill pay to the Repatriation Commission 60% of its costs of the appeal. That is arrived at after recognising that, because the putative contention of the Repatriation Commission was not allowed, Mrs Hill should be entitled to the costs of that issue having been ventilated. The percentage arrived at reflects a broad brush approach of offsetting those costs against the costs of the appeal.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield, Stone & Edmonds.

Associate:

Dated: 5 August 2009

Counsel for the Appellant: M Vincent

Solicitor for the Appellant: Kemp & Co Lawyers

Counsel for the Respondent: R Henderson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 20 May 2009

Date of Judgment: 5 August 2009

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