

AUSTRALIA / JUDGMENT

Repatriation Commission v Turner [2004] FCA 1184

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FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

Repatriation Commission v Turner [2004] FCA 1184

VETERANS' ENTITLEMENTS – appeal from the decision of the Administrative Appeals Tribunal that the respondent's post traumatic stress disorder was related to defence service – HMAS Melbourne collision with USS Frank E Evans – whether the Administrative Appeals Tribunal applied the correct standard of proof – inappropriate reference to Repatriation Commission v Deledio (1998) 83 FCR 82 in reasons of the Administrative Appeals Tribunal – finding of fact that there was an aggravation of respondent's post traumatic stress disorder during defence service – finding of fact that there was an inability to obtain appropriate clinical management

Administrative Appeals Tribunal Act 1975 (Cth) s 44

Veterans' Entitlements Act 1986 (Cth) ss 70, 120, Division 2, Pt IV

Repatriation Commission v Deledio (1998) 83 FCR 82 referred to

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 referred to

REPATRIATION COMMISSION v GRAEME TURNER

No Q 72 of 2004

SPENDER J

BRISBANE

10 SEPTEMBER 2004

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY Q 72 OF 2004

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: REPATRIATION COMMISSION

APPLICANT

AND: GRAEME TURNER

RESPONDENT

JUDGE: SPENDER J

DATE OF ORDER: 10 SEPTEMBER 2004

WHERE MADE: BRISBANE

**THE COURT ORDERS
THAT:**

1. The application be dismissed.
2. The applicant pay the respondent's costs of and incidental to the application, to be taxed if not agreed.

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

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY Q 72 OF 2004
ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: REPATRIATION COMMISSION
APPLICANT
AND: GRAEME TURNER
RESPONDENT
JUDGE: SPENDER J
DATE: 10 SEPTEMBER 2004
PLACE: BRISBANE

REASONS FOR JUDGMENT

1 This is an appeal pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) ("the AAT Act") by the Repatriation Commission ("the Commission") from a decision by the Administrative Appeals Tribunal ("the AAT") which determined that the post traumatic stress disorder ("PTSD") of Mr Turner was related to his defence service.

2 Mr Turner ("the respondent") was born on 4 March 1951 and saw service in the Navy from 31 May 1968 until 14 September 1978. He had "defence service" as defined by the Act from 7 December 1972 to 14 September 1978, the date of his discharge from the Navy. The respondent lodged two separate claims with the Commission under the Veterans' Entitlements Act 1986 (Cth) ("the Act"). The first of these was lodged on 29 March 2000 and the second on 1 October 2001.

3 In relation to the claim lodged on 1 October 2001, the Commission refused the respondent's claim for recognition of PTSD and alcohol abuse/dependence on 5 October 2001. The respondent sought a review of the decision of the Commission by the Veterans' Review Board ("the VRB") which on 2 May 2002 affirmed the decision of the Commission. On 22 August 2002, the respondent applied for a review of the VRB's affirmation of the Commission's decision by the AAT. On 19 March 2004 the AAT varied the decision of the Commission, in part, by determining that the respondent's PTSD was "defence-caused", but otherwise affirmed the decision under review.

4 This application is the appeal by the Commission from the decision by the AAT that the respondent's PTSD was "defence-caused".

5 The respondent served on HMAS Melbourne in the period from 21 September 1968 until 10 August 1969. He served as an ordinary seaman (Gunnery). The period of service on the HMAS Melbourne was neither "operational service" nor "eligible service" within the meaning of the Act.

6 The respondent was discharged from the Navy as being Physically Unfit for Naval Service, as a result of a long-standing injury to his right knee and subsequent damage to his left knee. The record of the respondent's medical examination on discharge disclosed that the respondent suffered from the knee injuries of which he complained. The record also showed that he had no recorded mental abnormalities and that he did not complain of any mental suffering.

7 In June 1969, whilst the respondent was serving on the HMAS Melbourne and whilst he was on life-buoy duty, he witnessed the collision of the HMAS Melbourne with the USS Frank E Evans. At that time, the respondent was covered by workers compensation legislation and not by the Act.

8 It is common ground that the respondent was traumatised by the event, during which he witnessed and participated in the recovery of the bodies of dead American sailors. The respondent says he witnessed American sailors struggling in vain to escape the sinking vessel.

9 In 1970 the respondent was posted to HMAS Queensborough, which was a member of the patrol boat fleet until, in 1974, he became stationed at HMAS Cairns, a naval base. He was later posted to the HMAS Melbourne (a ship) from 13 January 1975 to 22 June 1975, to HMAS Buccaneer (a ship) from 23 June 1975 to 8 March 1976, and to HMAS Brisbane (a ship) from 9 March 1976 to 2 June 1976.

10 A claim by the respondent to the Commission made on 29 March 2000 was that he suffered from anxiety/stress which was caused by the incident wherein the HMAS Melbourne collided with the USS Frank E Evans. He also claimed that his accepted service-related conditions, being injury to right knee with haemarthrosis – resolved, solar skin damage, and bilateral sensorineural hearing loss with tinnitus, were worsening since he left the service in 1979.

11 Subsequent to the submission of the respondent's claim of 29 March 2000, the Department of Veterans Affairs received a report from Dr John Rogers, consultant psychiatrist, dated 7 June 2000. In that report Dr Rogers said:

'When seen initially there were a number of symptoms he described going back over the years following his service in the Australian Navy and in particular following the sinking of the "Evans" in the China sea in June 1969. He was serving aboard the air craft carrier "Melbourne" which sliced through the "Evans" severing it completely in two. Graeme Turner was on life buoy sentry duty at the time and has vivid memories of the incident, which have recurred both as flashbacks by day and vivid dreams at night. Visibility was poor, however he remembers the mayhem with attempts to rescue some of the sailors from the "Evans". He remembers seeing some attempting to get out through portholes which were unable to be opened. Many attempted to get out of the front half, which was hanging vertically in the water for a period. The metal where it was sliced through was as sharp as a razor he said causing significant injury to the men. Altogether 73 American Sailors went down with the "Evans" they spent some time searching through the water for survivors.

He served in the Navy between 1968-1978. There were no provision made for the crew of the "Melbourne" from the point of view of dealing with the stress. They returned to Australia and he went on doing various courses returning to sea in about 1971. In a continuous way following the collision he experienced vivid nightmares and sleep walked. His Naval colleagues covered for him he said in terms of this behaviour which he was reluctant to talk about with the Medics. He also describes continuing episodes of tearfulness and a heavy increase in his alcohol consumption.

...

After leaving the Navy in 1978 he joined the Railways and has been working with them as an engine driver since 1979 to the present. He has continued to experience dreams and flashbacks and likewise has continued to keep these experiences to himself.

Dr Rogers summarised his conclusions:

'This 49 year-old Naval Veteran and survivor of the collision between the "Melbourne" and the "Evans" in 1969 presents for examination at your request. Immediately following the collision which he witnessed as the sailor on watch, he experienced very distressing dreams and flashbacks by day, slept walked and had regular panic episodes. These symptoms were accompanied by accelerated alcohol consumption, which likewise continues to the present. The symptoms although known to his colleagues were kept to himself and until very recently he has not communicated them to anyone. There was no formal psychological debriefing process following the incident and he continued to serve in the Navy until 1978. Subsequently he has worked with Railways as an Engine driver.

...

In my opinion he is suffering from a severe and chronic post traumatic stress disorder related to the collision with the "Evans". He has also developed physical dependence on alcohol and more recently there have been indications of a major depressive illness.'

12 The determination of the Commission on 20 June 2000 (which was the determination of the claim lodged 29 March 2000) accepted the respondent's claim for bilateral sensorineural hearing loss with tinnitus, but refused his claim for PTSD, depressive disorder and alcohol dependence/abuse. As a result of that determination, the respondent's pension was increased to 60 per cent of the general rate.

13 In rejecting the claim for PTSD, the reasons of the delegate of the Commission of 20 June 2000 included the following:

Post traumatic stress disorder is determined in accordance with the RMA Statement of Principles, Instrument number 4/99 amended by 55/99.

Your Contention

In your claim you have contended that post traumatic stress disorder can be causally [sic causally] related to the incident when the HMAS Melbourne sank the HMAS Evans in the South China Sea.

· Severe stressor

Although there is a history of having experienced a severe stressor as defined in the Statement of Principles, this did not occur on eligible service.

Although there is a history of having experienced a severe stressor as defined in the Statement of Principles, this was not due to any identifiable illness or injury which can be related to service.

Aggravation of post traumatic stress disorder by factors that are due to service can only be considered if this condition developed before the end of service covered by the Veterans' Entitlements Act. Post traumatic stress disorder developed after this service therefore I cannot take any possible aggravation into account. I can only consider whether this service caused the condition.

The circumstances of this case do not satisfy the Statement of Principles issued by the RMA in respect of post traumatic stress disorder. As a result I find that all the evidence does not show any reasonable connection between post traumatic stress disorder and eligible defence service as a serving member. I am reasonably satisfied it was not caused by eligible defence service.

14 The statement 'Post traumatic stress disorder developed after this service' is quite inconsistent with the finding in the report of Dr Rogers. That error caused the delegate to fail to consider whether there was an aggravation of the respondent's PTSD to which his defence service was a contributing factor. That issue is the central question governing the Commonwealth's liability in respect of the respondent's PTSD.

15 The further application by the respondent lodged with the Commission on 1 October 2001 for acceptance of PTSD and substance abuse was again based on the incident of the collision between the HMAS Melbourne and the USS Frank E Evans.

16 On 5 October 2001 a delegate of the Repatriation Commission rejected this claim. The reasons for the decision of 5 October 2001, insofar as they relate to PTSD, simply repeat the reasons of the delegate of the Commission of 20 June 2000.

17 On 5 November 2001, the VRB received an application from the respondent for review of the decision of the delegate made on 5 October 2001.

18 On 2 May 2002, the VRB rejected the respondent's claim, saying:

'11. In a report dated June 7 2000 ... Dr Rogers the psychiatrist says:

"In my opinion (Mr Turner) is suffering from a severe and chronic post traumatic stress disorder related to the collision with the "Evans". He has also developed physical dependence on alcohol

..."

12. The Board accepts this evidence and finds accordingly.
13. The collision referred to is that between HMAS Melbourne and USS Evans which occurred in June 1969. HMAS Melbourne "sliced through the Evans severing it completely in two". It was a horrific experience for Mr Turner who was on life buoy duty at the time. He "has vivid memories of the incident, which have occurred both as flashbacks by day and vivid dreams by night".
14. If this incident had occurred in a period of eligible service the Board would have had no hesitation in finding that both Mr Turner's claimed conditions generated an entitlement to a pension under the Veterans' Entitlements Act. Unfortunately the accident did not occur during a period of operational service nor did it occur during a period of eligible defence service. In those circumstances the Veterans' Entitlements Act does not apply. The Commission had no choice but to reject the claim and the Board has no choice but to affirm that rejection. We do so with great regret.'

19 It is relevant, having regard to the grounds of the Commission's appeal to the Federal Court, to note that the reasons of the VRB for its decision (which is the decision which was the subject of review by the AAT) correctly noted that the respondent's 'defence service as defined in the Act was from 7 December 1972 to 14 September 1978' and that, concerning the standard of proof, the VRB said:

'6. In respect of the veteran's defence service, subsection 120(4) of the Act applies. Therefore, the Board is required to decide all relevant matters to its reasonable satisfaction. This means that the Board has to decide whether, on the balance of probabilities, his claimed conditions were defence-caused.

7. As the claim was lodged after 1 June 1994, the Board is also required to apply section 120B of the Act in reaching its decision. This means that the Board is required to decide matters to its reasonable satisfaction in accordance with any Statements of Principles issued by the Repatriation Medical Authority or any relevant determinations or declarations under the Act.'

20 Division 2 of Pt IV of the Act defines the circumstances in which compensation is payable in respect of injuries or disease which are "defence-caused".

21 Subsection 70(1) of the Act relevantly provides:

'Where:

...

- (b) a member of the Forces ...has become incapacitated from a defence-caused injury or a defence-caused disease;

the Commonwealth is, subject to this Act, liable to pay:

...

- (d) in the case of the incapacity of the member – pension by way of compensation to the member;

in accordance with this Act.'

22 Subsection 70(5) of the Act relevantly provides:

For the purposes of this Act, the death of a member of the Forces ... shall be taken to have been defence-caused, an injury suffered by such a member shall be taken to be a defence-caused injury or a disease contracted by such a member shall be taken to be a defence-caused disease if:

- (a) the death, injury or disease, as the case may be, arose out of, or was attributable to, any defence service, or peacekeeping service, as the case may be, of the member;
- (b) subject to subsection (8), the death, injury or disease, as the case may be, resulted from an accident that occurred while the member was travelling, during any defence service or peacekeeping service of the member but otherwise than in the course of duty, on a journey to a place for the purpose of performing duty or away from a place upon having ceased to perform duty; or
- (c) the death is to be deemed by subsection (6) to be defence-caused, the injury is to be deemed by subsection (7) to be a defence-caused injury or the disease is to be deemed by subsection (7) to be a defence-caused disease, as the case may be; or
- (d) the injury or disease from which the member died, or has become incapacitated:
 - (i) was suffered or contracted during any defence service or peacekeeping service of the member, but did not arise out of that service, or
 - (ii) was suffered or contracted before the commencement of the period, or the last period, of defence service or peacekeeping service of the member, but not during such a period of service;

and, in the opinion of the Commission, the injury or disease was contributed to in a material degree by, or was aggravated by, any defence service or peacekeeping service rendered by the member, being service rendered after the member suffered that injury or contracted that disease; ...

23 It is clear that whether or not the respondent's PTSD was "defence-caused" has to be considered against the requirements set out in subs 70(5)(d)(ii) of the Act.

24 The standard of proof to be applied in the application of these provisions is that referred to in subs 120(4) of the Act, being "to its reasonable satisfaction". By subs 120B(3) the Commission is to be reasonably satisfied that an injury was defence-caused only if the material before the commission 'raises a connection between the injury ... of the person and some particular service rendered by the person' and there is in force a Statement of Principles ("SoP") that 'upholds the

contention that the injury ... of the person is, on the balance of probabilities, connected with that service.'

25 In this case, the respondent's PTSD arose as the result of the collision between the HMAS Melbourne and the USS Frank E Evans. That collision occurred during non-eligible or non-defence service. The consequence is that the respondent, in order to show that his condition was related to his defence service, was required to satisfy the AAT that, during his defence service from 7 December 1972 to the end of his service on 14 September 1978, his condition was worsened by an 'inability to obtain appropriate clinical management for post traumatic stress disorder'.

26 The AAT concluded that the respondent's PTSD was 'related to his defence service'.

27 In summary, the Commission's arguments on its appeal concerning that conclusion are:

'(a) That the Administrative Appeals Tribunal ("the AAT") applied the incorrect provisions of the Veterans' Entitlements Act ("the Act") in determining whether or not the Respondent's claimed condition was "defence-caused";

(b) The AAT applied the incorrect standard of proof in determining whether or not the Respondent's claimed condition was "defence-caused";

(c) In applying the Statement of Principles ("the SoP") the AAT failed to require and identify a causal nexus between the claimed condition and the Respondent's "defence service";

(d) The AAT applied the incorrect test in determining whether or not there existed a subjective inability to obtain appropriate clinical management for the Respondent's Post Traumatic Stress Disorder ("PTSD");

(e) The AAT failed to give adequate reasons in relation to the finding that Respondent had a subjective inability to obtain appropriate clinical management for PTSD.'

28 It is therefore necessary to consider in some detail the reasons the AAT gave for its conclusion.

29 Under the heading "Facts before the Tribunal", the AAT said:

'4. Mr Turner enlisted in the navy as a young man. He was serving aboard HMAS Melbourne on the night it collided with the USS Frank E Evans. He was on lifebuoy duty that evening: he was responsible for throwing flotation devices to sailors who fell overboard. His description of what happened as the ships collided was vivid and frightening. He said he watched as bodies were fished out of the water. He saw one American sailor in particular trying to escape the wreck of his ship by climbing through the scuttles. The man became trapped and sank before the applicant's eyes.

5. This particular aspect of the incident appears to have stayed with the applicant in the form of recurrent dreams that he says became more prevalent after he transferred to serve on patrol boats in 1972 [I note his service on HMAS Queensborough commenced in 1970]. During this period – which roughly coincides with his commencement of eligible defence service [which commenced in fact on 7 December 1972] – he dreamed of sharks coming through the scuttles of the patrol boat.
6. Soon after the collision, when the Melbourne docked in Singapore, the applicant said he began to drink heavily. That pattern appeared to continue more or less uninterrupted throughout the remainder of his service. He and a friend went AWOL (absent without official leave) when the Melbourne returned to Australia. Mr Turner said the pair spent about eight days in a hotel in Kings Cross, drinking heavily. They returned to their ship when the money ran out. They had nowhere else to go, but the applicant said he made it clear he did not want to return to the navy. The applicant was never charged over his absence. He was given a transfer instead.
7. The applicant subsequently served on HMAS Queensborough. He said he coped by blocking out the experience aboard the Melbourne. He was not entirely successful: he said he began to engage in a ritual each night of untucking the sheets in his bed so he could escape quickly in the event of an emergency. He also had some bad dreams. He said he had more difficulty blocking out the unpleasant memories and dreams when he transferred to Cairns and began serving on patrol boats during 1972.
8. He said the dreams (especially the dream about sharks coming through the scuttles) became more common. He became a regular sleepwalker. He described an incident where he awoke to find himself cursing an ironing board that he believed was obstructing his path. He said his motivation diminished. He said he also continued his pattern of heavy drinking.
9. When at sea, he was able to purchase the beer rations issued to other sailors who preferred not to drink. His mates covered for him, and he conceded there was no reason for his officers to be aware of either his drinking habits or his sleep disturbances.'

30 Under the heading "The Law", the AAT said:

- '11. The relevant statements of principles are No 4 of 1999 (as amended by no 55 of 1999) and No 7 of 1998. The applicant relies on factor 5(c) of each statement of principles.
12. The decision of the Full Federal Court in *Repatriation Commission v Deledio* (1998) FCR 82 says I must consider whether the applicant's account raises a reasonable hypothesis. The assessment is made having regard to the relevant statements of principles.'

31 The reference to Repatriation Commission v Deledio (1998) 83 FCR 82 ("Deledio") is totally misconceived. Deledio is concerned with the circumstance of "operational service". The present inquiry is concerned with an entitlement to compensation because of a claimed nexus between the injury or disease and "defence service". It is surprising that nowhere in the reasons of the AAT is the statutory basis for the claimed entitlement to compensation identified, nor the relevant standard of proof provisions, s 120(4) and s 120B.

32 The AAT correctly identified the relevant SoPs. Factors 5 and 6 of the SoP in respect of PTSD provides:

'Factors

5. The factors that must exist before it can be said that, on the balance of probabilities, post traumatic stress disorder or death from post traumatic stress disorder is connected with the circumstances of a person's relevant service are:
 - (a) experiencing a severe stressor prior to the clinical onset of post traumatic stress disorder; or
 - (b) experiencing a severe stressor prior to the clinical worsening of post traumatic stress disorder; or
 - (c) inability to obtain appropriate clinical management for post traumatic stress disorder.

Factors that apply only to material contributions or aggravation

6. Paragraphs 5(b) to 5(c) apply only to material contribution to, or aggravation of, post traumatic stress disorder where the person's post traumatic stress disorder was suffered or contracted before or during (but not arising out of) the person's relevant service; paragraph 8(1)(e), 9(1)(e) or 70(5)(d) of the Act refers.'

33 Under the heading "Testing the Hypothesis", the AAT said:

'13. The applicant says his conditions were aggravated because he was unable to obtain appropriate clinical management of his PTSD and alcohol abuse conditions. He gives two reasons: because (a) (according to his treating psychiatrist) his PTSD would have made him secretive and unwilling to seek help; and (b) there were cultural barriers that discouraged sailors from seeking help for any form of psychiatric disorder. He said the cultural barriers were particularly real given his age and the fact he worked on a small ship in the company of "Old Salts" (older, more experienced sailors), and where he perceived he was obliged to go through naval medical personnel before seeking help.

14. The meaning of "aggravation" was considered by the High Court in Federal Broom Co Pty Limited v Semlitch (1964) 110 CLR 626. Windeyer J explained (at 637) a condition was aggravated if the consequences of the sufferer's affliction become more serious. His Honour added (at 639) the real question was:

whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient.

15. The difficulties in obtaining appropriate clinical management of a condition were discussed in the Full Federal Court's decision in *Brew v Repatriation Commission* (1999) 94 FCR 80. Merkel J noted the expression should be interpreted with an eye to practical reality. The Veterans' Entitlements Act 1986 is beneficial legislation, after all.
16. It was accepted in *Brew* that references in the statements of principles to an inability to obtain clinical management did not mean the applicant was physically prevented from obtaining help, or that help was unavailable. Merkel J said (at paragraph 30 of the judgement)

It would be erroneous to limit "inability" to "some overwhelming psychological or emotional incapacity". If a veteran is subjected to any psychological or emotional circumstances which are such that, as a matter of practical reality, the veteran could not reasonably be expected to take steps to obtain appropriate clinical management ... I see no reason why those circumstances are not capable of constituting a "condition of not being able" to obtain treatment.

17. With those statements in mind, Mr Honchin [counsel for the respondent] referred me to the opinion of Dr Rogers. The doctor said in his report:

The reluctance to communicate his distress was partly due to with the naval ethos at the time but also and more importantly was a direct consequence of his PTSD symptoms themselves which are characteristically kept secret or denied.

18. The doctor's opinion suggests it is reasonable to assume the applicant was unable to obtain appropriate clinical management of either condition. But Mr Stoner [the departmental advocate] said I could not rely on the applicant's PTSD as a source of inability because it was not itself an accepted condition. He referred to the Full Court's decision in *McKenna v Repatriation Commission* (1999) 86 FCR 144. In that case, the veteran suffered from ischaemic heart disease and relied on the presence of hypertension as the means of establishing the causal link between his ultimate condition and his eligible service. The Court rejected the claim, saying the veteran could only establish the causal link if he could show that his hypertension itself arose out of service – which required consideration of the statement of principles relating to hypertension. The applicant was unable to establish any link between the hypertension and his service.
19. The decision in *McKenna* makes sense. One cannot establish a link between a condition and eligible service by relying on another condition if that other condition is unrelated to service. The whole point of the legislative scheme is to require the Commonwealth to take responsibility for conditions that were caused, one way or another, by the veteran's service in the armed forces. If one keeps that objective in mind, it is possible to distinguish the decision in *McKenna* from the present case. In this case, the applicant says his condition was aggravated by the circumstances of his service. In particular, his doctor says PTSD made

the applicant reluctant to seek help – it may even have made him secretive. Subject to being satisfied there was in fact an aggravation, it is possible to find PTSD was the source of an inability to obtain appropriate clinical management. I think that is so even where the condition was not technically caused by eligible service for the purposes of obtaining a pension, albeit that it had its genesis while he was in the Navy.

20. If I am wrong in that conclusion, it is nonetheless possible that the cultural factors on their own described by Dr Rogers could be the source of an inability to obtain appropriate clinical management of the conditions.'

34 Under the heading "Fact Finding", (confining attention only to the claimed condition of PTSD), the AAT said:

'21. I am satisfied the PTSD condition was aggravated after the applicant commenced duties on the patrol boats in 1972, during his defence service. While he was drinking heavily and had engaged in other behaviour (like untucking his sheets) and had some dreams in the immediate aftermath of the collision in 1969, I am satisfied from his evidence that the dreams and sleepwalking and de-motivation became worse after 1972. I accept his explanation that he was no longer able to block out the night of the collision after he commenced service on the patrol boats.

22. His condition was therefore aggravated in that the effects of the condition became more serious on the patient: *Federal Broom Co Pty Limited v Semlitch* (1964) 110 CLR 626 at 639 per Windeyer J.'

...

24. The applicant made it clear he did not like visiting doctors. I accept Dr Rogers' explanation that the applicant's PTSD made him reluctant to seek help for a condition he did not understand. I also note the applicant was not necessarily aware he was sick – he said during his oral evidence that he did not realise his condition was abnormal. But I am also satisfied he was distressed by the symptoms, and wanted to do something about them apart from self-medicating with alcohol. I am therefore satisfied the applicant's condition constituted an inability to seek appropriate clinical management of his illness.
25. Even if the applicant's condition could not be considered to be the source of an inability to obtain management, I am satisfied cultural factors were capable in their own right of creating an inability [to] seek assistance. The applicant was a very young man when he joined the Navy. He was apparently impressionable. He spoke of a culture within the Navy that discouraged sailors from seeking medical assistance for anything but the most serious physical conditions. He said the "Old Salts" (longer-serving sailors) would actively discourage younger sailors from seeking assistance. He said there was particular sensitivity about seeking help for anything that might suggest a mental disorder when one served on a small ship, as sailors were conscious they must be able to trust their shipmates with their lives. He believed he was unable to approach civilian doctors for assistance – even when off-duty – without going through naval medical personnel on the base. The naval medical personnel

on the patrol boat base in Cairns were not qualified doctors.

26. I am satisfied after hearing all the evidence that Mr Turner genuinely felt unable to seek help for the symptoms he was experiencing. He was not merely discouraged from seeking help; he actually felt incapable of doing anything about the bad dreams and the sleepwalking and other symptoms because of his environment.'

35 On this appeal, it is unnecessary to consider the alternative question of whether the "cultural barriers" referred to established an inability to seek appropriate clinical management of the respondent's PTSD: I merely note that, in my opinion, it is not sufficient merely to find, as the AAT did in par 25 of its reasons, that cultural factors were capable in their own right of creating an inability to seek assistance (my emphasis). Similarly in my opinion, it is not sufficient to establish the "inability" referred to in Factor 5(c) of the SoP, to find that it is possible that cultural factors on their own could be the source of an inability to obtain appropriate clinical management of the condition, as the AAT opined in par 20 of its reasons, which is set out above (my emphasis).

36 The primary criticism of the AAT's decision by the Commission on this appeal is that the AAT misapplied the correct provisions of the Act and applied an incorrect standard of proof, it being asserted that the AAT erroneously applied the "satisfaction beyond reasonable doubt test" referred to in subss 120(1) and (3) of the Act.

37 Notwithstanding the reference to Deledio, in my opinion, on a fair reading of the entirety of the decision of the AAT, the AAT did not apply Deledio and, in particular, did not seek to follow the four-step test set out in Deledio for the application of subss 120(1) and (3) of the Act.

38 The language of the AAT is redolent of being "reasonably satisfied". The AAT expressed itself:

'I am satisfied the PTSD condition was aggravated after the applicant commenced duties on patrol boats in 1972, during his defence service. ... I am satisfied from his evidence that the dreams and sleepwalking and de-motivation became worse after 1972. ... I am ... satisfied the applicant's condition constituted an inability to seek appropriate clinical management of his illness. ... I am satisfied cultural factors were capable in their own right of creating an inability [to] seek assistance. ... I am satisfied after hearing all the evidence that Mr Turner genuinely felt unable to seek help for the symptoms he was experiencing.'

39 The obligation imposed in the circumstances of this case by subs 120(4) and s 120B of the Act is one of being reasonably satisfied that the material before the AAT raised a connection between the injury and the particular service rendered by the respondent, which is upheld by the SoP for PTSD and, in particular, factor 5(c) of that SoP.

40 In my opinion, the AAT applied the correct standard of proof, and addressed the requirements of the Act in relation to entitlement in the context of "defence service".

41 The AAT found as a fact that the condition of PTSD was aggravated while the respondent was performing duties on patrol boats in and after 972, during his defence service. The AAT also found that the respondent's condition 'constituted an inability to seek appropriate clinical management of his illness.' This language, though loose and imprecise, I take plainly to mean that the respondent felt unable to, and was unable to seek appropriate clinical management of his illness, and that the reason for that inability was the respondent's PTSD.

42 There was evidence before the AAT to support each of its findings of fact.

43 There are some unsatisfactory features of the reasons given by the AAT for its conclusion. Nonetheless, as four members of the High Court (Brennan CJ, Toohey, McHugh and Gummow JJ) said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272:

... the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. (See *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 616).'

44 Notwithstanding the inappropriate reference to Deledio, the reference to "Testing the Hypothesis" and the absence of any reference to ss 70, 120(4) and 120B of the Act, it is plain that, applying the applicable standard of proof, the AAT found that there was an aggravation of the respondent's PTSD during his defence service and, in the context of factor 5(c) of the SoP for PTSD, there was, during his defence service, an inability to obtain appropriate clinical management for PTSD, with the consequence that the PTSD was connected with the circumstances of the respondent's defence service.

45 In my judgment, on a fair reading of the reasons of the AAT, the AAT correctly addressed the issues it had to determine, and made findings on material questions of fact which were open to it on the evidence. Looking at the reasons as a whole, the reasoning process of the AAT is exposed, and the reader is informed as to why the AAT decided as it did.

46 In my opinion, none of the grounds of the application has been made out. The application should be dismissed, and the applicant pay the respondent's costs of and incidental to the application, to be taxed if not agreed.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender .

Associate:

Dated: 10 September 2004

Counsel for the Applicant: Mr Roger Derrington

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: Mr Darin Honchin

Solicitor for the Respondent: Purcell Taylor Lawyers

Date of Hearing: 22 July 2004

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