

AUSTRALIA / JUDGMENT

Schulz v Repatriation Commission [2014] FCA 387

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FEDERAL COURT OF AUSTRALIA

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Schulz v Repatriation Commission [2014] FCA 387

Citation: Schulz v Repatriation Commission [2014] FCA 387

Appeal from: Schulz v Repatriation [2012] AATA 561

Parties: JOHN SCHULZ v REPATRIATION COMMISSION

File number: QUD 553 of 2012

Judge: DOWSETT J

Date of judgment: 22 April 2014

Catchwords: DEFENCE AND WAR – Veterans – Entitlements – application for pension – appeal from decision of Administrative Appeals Tribunal – where Repatriation Commission satisfied beyond reasonable doubt that conditions not linked to service – where statement of principles did not support a reasonable hypothesis – whether Repatriation Commission required to exercise power under Veterans' Entitlements Act 1986 (Cth) s 180A.

Legislation: Administrative Appeals Tribunal Act 1975 (Cth) s 43

Legislative Instruments Act 2003 (Cth)

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

Veterans' Entitlements Act 1986 (Cth) ss 6C, 7, 9, 13, 13AA, 13AB, 14, 15, 16, 19, 57, 79T, 93Z, 118ZS, 120, 120A, 135, 175, 180, 180A, 180B, 196A, 196B, 196E, 196Y

Cases cited: Bushell v Repatriation Commission (1992) 175 CLR 408 discussed

Byrnes v Repatriation Commission (1993) 177 CLR 564 cited

Repatriation Commission v Deledio (1998) 83 FCR 82 cited

Date of hearing: 6 February 2013

Place: Brisbane

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 36

Counsel for the Applicant: The Applicant appeared in person

Counsel for the Respondent: Ms H Bowskill

Solicitor for the Respondent: Australian Government Solicitor
IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION QUD 553 of 2012
ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: JOHN SCHULZ
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: DOWSETT J
DATE OF ORDER: 22 April 2014
WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. the application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
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DATE: 22 April 2014
PLACE: BRISBANE

REASONS FOR JUDGMENT

THE APPLICANT

1 The applicant ("Dr Schulz") has a substantial record of service with the armed forces of both Australia and New Zealand. In particular he served with the Royal New Zealand Army Medical Corps in Vietnam from 9 February 1971 until 26 August 1971. Such service was "operational service" for the purposes of s 6C of the Veterans' Entitlements Act 1986 (Cth) (the "Act"). Dr Schulz is a "veteran" as that term is defined in the Act. His operational service is eligible war-service pursuant to s 7. Section 9 provides that any injury suffered, or disease contracted, arising out of, or attributable to eligible war service will be a war-caused disease or injury. It is common ground that if Dr Schulz suffers from a war-caused injury or disease causing incapacity, he will be entitled to a pension pursuant to s 13 of the Act. Pursuant to s 14 Dr Schulz may "make a claim" for such a pension. Any application must be considered by the respondent (the "Commission"). Section 19 provides that the Commission may grant pensions "in accordance with the provisions of this Act".

VETERANS AND PENSIONS

2 Obviously, a member or former member of the armed forces may incur injury or contract disease in many different ways, only some of which may be relevantly associated with his or her service. Such service may take many forms, involving varying degrees of risk, deprivation and short- and long-term impact on the person's physical and mental well-being. The Australian people, through the Parliament, have long recognized the special sacrifices made by members of the armed forces in their service, particularly in overseas theatres of war and other overseas conflicts. This recognition has led to the establishment of pension regimes for service personnel who suffer from war-caused injury or disease as a result of such service. In some circumstances the regime extends to include persons who have served in the armed forces of other countries. For the purposes of the Act, Dr Schulz's New Zealand service is to be treated in the same way as would similar service by an Australian veteran.

3 It may often be difficult to establish the precise cause of an injury or the aetiology of a disease. In Dr Schulz's case the method to be adopted is regulated by s 120. That section relevantly provides:

Standard of proof

- (1) Where a claim under Part II for a pension in respect of the incapacity from injury or disease of a veteran, or of the death of a veteran, relates to the operational service rendered by the veteran, the Commission shall determine that the injury was a war-caused injury, that the disease was a war-caused disease or that the death of the veteran was war-caused, as the case may be, unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.
- (2) ...
- (3) In applying subsection (1) ... in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:
 - (a) that the injury was a war-caused injury or a defence-caused injury;
 - (b) that the disease was a war-caused disease or a defence-caused disease; or
 - (c) that the death was war-caused or defence-caused;

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

- (4) Except in making a determination to which subsection (1) ... applies, the Commission shall, in making any determination or decision in respect of a matter arising under this Act or the regulations, including the assessment or re-assessment of the rate of a pension granted under Part II or Part IV, decide the matter to its reasonable satisfaction.
- (5) Nothing in the provisions of this section, or in any other provision of this Act, shall entitle the Commission to presume that:
- (a) an injury suffered by a person is a war-caused injury or a defence-caused injury;
 - (b) a disease contracted by a person is a war-caused disease or a defence-caused disease;
 - (c) the death of a person is war-caused or defence-caused; or
 - (d) a claimant or applicant is entitled to be granted a pension, allowance or other benefit under this Act.
- (6) Nothing in the provisions of this section, or in any other provision of this Act, shall entitle the Commission to presume that:
- (a) a claimant or applicant for a pension or increased pension, or for an allowance or other benefit, under this Act; or
 - (b) the Commonwealth, the Department or any other person in relation to such a claim or application;

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

(7)

Where a veteran has performed operational service s 120(1) will assist him or her in establishing that an injury or disease is war-caused. However s 120(3) prescribes a condition precedent to the engagement of s 120(1). In *Bushell v Repatriation Commission* (1992) 175 CLR 408, the High Court considered the operation of s 120. Although the section was then in a somewhat different form, the differences are not presently relevant. In particular the High Court considered the inter-relationship between ss 120(1) and 120(3). At 412 – 413 the majority (Mason CJ, Deane and McHugh JJ) said:

There is no presumption that the injury, disease or death of veteran was war caused On the other hand, the claimant for a pension to which s. 120 applies has no "onus of proving any matter that is, or might be, relevant to the determination of the claim or application" That being so, the claim, having been made, must succeed unless the Commission "is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination" However, the meaning of the expression beyond reasonable doubt is not left at large. Satisfaction beyond reasonable doubt is deemed to be established if, after considering the whole of the material before it, the Commission is of the opinion that the material "does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular

service rendered by the person" But does this mean, as counsel for the Commission contended, that s. 120(3) exhaustively defines the content and the application of the concept of "reasonable doubt" mentioned in s. 120(1)? Or does it mean, as counsel for the appellant contended, that s. 120(3) merely states an evidentiary threshold which must exist before s. 120(1) is given its natural and ordinary meaning?

At 414 - 415 their Honours continued:

However, a hypothesis cannot be reasonable if it is "contrary to proved scientific facts or to the known phenomena of nature" Nor can it be reasonable if it is "obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous"... .

But leaving aside cases of those kinds, the case must be rare where it can be said that a hypothesis, based on the raised facts, is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge. Conflict with other medical opinions is not sufficient to reject a hypothesis as unreasonable. As we have earlier pointed out, it is not the function of s. 120(3) to require the Commission to choose between competing hypotheses or to determine whether one medical or scientific opinion is to be preferred to another.

Their Honours continued at 415 - 416:

The relationship between s. 120(1) and s. 120(3) is analogous to the raising of the common law "defence" of provocation in a trial for murder in respect of which it has been said ... :

it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried.

Likewise, it is the duty of the Commission under s. 120 to decide the claim on the material before it and, unless there is material which raises a reasonable hypothesis connecting the operational service with the incapacity or death, there is nothing upon which the Commission can find that the incapacity or death was war caused within the meaning of s. 120(1). But once the material raises such a hypothesis, the operation of s. 120(3) is spent and the case falls to be determined in accordance with s. 120(1). That is to say, the Commission must determine that the injury etc. was war caused unless it is satisfied beyond reasonable doubt that there is no sufficient ground for making the determination.

The Commission will be satisfied beyond reasonable doubt "that there is no sufficient ground for making [the] determination" if it is satisfied beyond reasonable doubt that it cannot accept the raised facts or so many of them as are necessary to support the hypothesis. Thus, if the Commission is satisfied beyond reasonable doubt that it cannot accept the raised facts because of the unreliability of the material which is claimed to support them or because of the superior reliability of other parts of the material before the Commission or because the raised facts

depend on inferences which the Commission is satisfied cannot be drawn, the Commission will be satisfied that there is no sufficient ground for making the determination. But unless the Commission is satisfied beyond reasonable doubt that there is no sufficient ground for the factual foundation of the hypothesis, the claim must succeed; we cannot conceive of a case where, for the purpose of s. 120(3), the hypothesis is reasonable having regard to the raised facts, yet the Commission could be satisfied, "beyond reasonable doubt, that there is no sufficient ground for making the determination" even though the raised facts are not disproved. Indeed, once there is sufficient factual material to point to a reasonable hypothesis connecting the injury etc. with the operational service, it seems convenient simply to treat the case as governed by the application of s 120(1). If that is done, the claim will succeed unless the Commission is satisfied beyond reasonable doubt that the factual foundation upon which the hypothesis can operate does not exist

4 The decision in *Bushell* apparently caused concern, leading to enactment of the Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994 (Cth) (the "amending Act"). This legislation established the concept of a "statement of principles". The nature of such a statement appears from s 196B of the Act, (inserted by the amending Act). Sections 196B(3) and 196B(6) provide:

- (3) If the Authority is of the view that on the sound medical-scientific evidence available it is more probable than not that a particular kind of injury, disease or death can be related to:
 - (a) eligible war service (other than operational service) rendered by veterans; or
 - (b) defence service (other than hazardous service and British nuclear test defence service) rendered by members of the Forces; or
 - (ba) peacetime service rendered by members;

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

- (c) the factors that must exist; and
- (d) which of those factors must be related to service rendered by a person;

before it can be said that, on the balance of probabilities, an injury, disease or death of that kind is connected with the circumstances of that service.

...

- (6) If, after carrying out the investigation, the Authority is of the view:
 - (a) that there is no sound medical-scientific evidence on which it can rely to determine a Statement of Principles under subsection (2) or (3) in respect of that kind of injury, disease or death; or

- (b) that the sound medical-scientific evidence on which it can rely is insufficient to allow it to do so;

the Authority must make a declaration in writing:

- (c) stating that it does not propose to make a Statement of Principles; and
- (d) giving the reasons for its decision.

The "Authority" is the Repatriation Medical Authority established pursuant to s 196A, apparently for the purpose of producing statements of principles. It is relevant to note that the Authority may, after due enquiry, either determine a statement of principles or declare that it does not propose so to do. The effect of such a decision appears from s 120A of the Act which relevantly provides:

- (1) ...
- (2) ...
- (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.

Such a decision is also relevant to the operation of s 180A which provides:

- (1) If:
 - (a) the Repatriation Medical Authority has determined, or has declared that it does not propose to make or amend, a Statement of Principles in respect of a particular kind of injury, disease or death (see section 196B); and

- (b) the Commission is of the opinion that, because the Statement of Principles is in force, or because of the decision by the Authority not to make or amend the Statement of Principles:
 - (i) claims for pensions in respect of incapacity from injury or disease of that kind made by veterans, members of the Forces, or members of a Peacekeeping Force, of a particular class; or
 - (ii) claims for pensions made by dependants of those veterans or members in respect of the death of such a veteran or member;

cannot succeed; and

- (c) the Commission is also of the opinion that, in all the circumstances of the case, those veterans, members or their dependants should receive a pension;

the Commission may, in its discretion, make a determination in respect of that kind of injury, disease or death under subsection (2) or (3), or determinations under both subsections (as the case requires).

- (2) A determination under this subsection in respect of a particular kind of injury, disease or death must be by legislative instrument and must:

- (a) state that it has effect only in relation to the class of veterans, members of the Forces, or members of a Peacekeeping Force referred to in subparagraph (1)(b)(i); and

- (b) state that it applies only in respect of claims relating to:

- (i) operational service rendered by a veteran; or

- (ii) peacekeeping service rendered by a member of a Peacekeeping Force; or

- (iii) hazardous service rendered by a member of the Forces; or

- (iv) British nuclear test defence service rendered by a member of the Forces; and

- (c) set out:

- (i) the factors that must as a minimum exist; and

- (ii) 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.

- (3) ...

- (4) ...

- (5) While there is in force under subsection (2) a determination in respect of a particular kind of injury, disease or death, any Statement of Principles in force under subsection 196B(2) in respect of that kind of injury, disease or death does not apply in respect of any veteran, member of the Forces, member of any Peacekeeping Force or dependant in relation to whom the determination has effect.
- (6) ...
- (7) 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 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.

5 The reason for the adoption of this approach in the amending Act appears from the explanatory memorandum which accompanied the relevant bill into the House of Representatives. At p 3 it is said that:

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 intention was clearly to modify the effect of the High Court's decision in *Bushell*, particularly to the extent that the decision established that an individual medical opinion might, by itself, be sufficient to support an hypothesis, notwithstanding the fact that the general body of medical opinion rejected it.

6 In summary the statutory regime provides that:

where the Authority has determined a statement of principles dealing with the relevant medical condition, the condition will only be war-caused if the Commission is satisfied that the veteran's operational service is connected to the condition in a manner which satisfies that statement of principles;

if the Authority has declared that it will not determine a statement of principles for a condition, there cannot be a reasonable hypothesis connecting that condition to the veteran's operational service;

notwithstanding the preceding propositions, the Commission may, by determination pursuant to s 180A, identify circumstances which will raise a reasonable hypothesis as to such connection for a certain class of veteran;

such a determination by the Commission will, for the purposes of the application of the statutory regime to the relevant class of veteran for the condition in question, effectively displace either any statement of principles made by the Authority for that condition, or any declaration that it would not make such a determination.

Where, for a particular condition, there has been neither a determination of a statement of principles nor a declaration that the Authority would not make such a determination, the Commission will proceed in accordance with the decision in *Bushell*. See s 120A(4).

7 The role of a statement of principles was addressed by the Full Court in *Repatriation Commission v Deledio* (1998) 83 FCR 82. At 97 their Honours said:

At the risk of being repetitious we would restate the course which the Tribunal is to take in a case, such as the present, (that is, one involving a claim to be decided after the 1994 Amendments) 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 that person as follows:

1. The Tribunal must consider all the material which is before it and determine whether that material points to a hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person. No question of fact finding arises at this stage. If no such hypothesis arises, the application must fail.
2. If the material does raise such a hypothesis, the Tribunal must then ascertain whether there is in force an SoP determined by the Authority under s 196B(2) or (11). If no such SoP is in force, the hypothesis will be taken not to be reasonable and, in consequence, the application must fail.
3. If an SoP is in force, the Tribunal must then form the opinion whether the hypothesis raised is a reasonable one. It will do so if the hypothesis fits, that is to say, is consistent with the "template" to be found in the SoP. The hypothesis raised before it must thus 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 (as required by ss 196B(2)(d) and (e)). If the hypothesis does contain these factors, it could neither be said to be contrary to proved or known scientific facts, nor otherwise fanciful. If the hypothesis fails to fit within the template, it will be deemed not to be "reasonable" and the claim will fail.
4. The Tribunal must then proceed to consider under s 120(1) whether it is satisfied beyond reasonable doubt that the death was not war-caused, or in the case of a claim for incapacity, that the incapacity did not arise from a war-caused injury. If not so satisfied, the claim must succeed. If the Tribunal is so satisfied, the claim must fail. It is only at this stage of the process that the Tribunal will be required to find facts from the material before it. In so doing, no question of onus of proof or the application of any presumption will be involved.

8 The approach prescribed in *Deledio* has been consistently adopted by this Court, both at first instance and on appeal. I shall return to the legislation, but it is convenient that I now say something about Dr Schulz's medical conditions and his claims.

DR SCHULZ'S MEDICAL CONDITIONS

9 Dr Schulz suffers from:

peritoneal adhesions;

ischaemic heart disease ("IHD"); and

hypertension.

In the case of each condition, there was a relevant statement of principles. It is not necessary that I consider the terms of those statements.

dr schulz's claim

10 On 23 February 2011 Dr Schulz lodged a claim, apparently pursuant to s 14 of the Act. In a letter accompanying his application he said:

I am aware that my application for ischaemic heart disease and hypertension probably will not succeed because of the Statements of Principles, but claiming my right to natural justice, I submit that my case will satisfy the parameters of Bushell and Byrne and that, in the circumstances of the case, the Commission can reasonably form the opinion that I should receive a pension for those disabilities.

11 The reference to Bushell is to the decision of the High Court to which I have already referred. The reference to "Byrne" is probably to the decision of the High Court in Byrnes v Repatriation Commission (1993) 177 CLR 564. That decision clarified certain aspects of the decision in Bushell. In particular, Byrnes establishes that where there is a relevant statement of principles which supports the claimant's application, that application may still fail, not only where a fact necessary to the hypothesis is disproven beyond all reasonable doubt, but also where a fact inconsistent with the hypothesis is so proven.

12 Dr Schulz referred to his service history and said:

I point out that the Congress of the United States of America has mandated presumption of herbicide exposure for all Vietnam veterans and 1st New Zealand Services Medical Team was in the heart of the US Army area of operations.

In the USA, The Institute of Medicine Veterans and Agent Orange, Update 2008, (the Report) was released on 24th July 2009. In keeping with the findings of the report, on 31st August, 2010, a (US) Final Regulation was entered in the Federal Register by the (US) Department of Veterans' Affairs to include ... ischaemic heart disease ... (IHD) among those conditions where the connection to Vietnam service is presumed.

On 27th October 2010, the RMA issued SOP 96/2010 accepting exposure to herbicides as a factor but with caveats which are not included in either the Final Regulation or the Report.

In 2006, The Institute of Medicine of the National Academies which conducts the review which results in the Report, had placed Hypertension at the same level that IHD is now in the Update 2008.

THE DELEGATE'S DECISION

13 Dr Schulz's application was rejected by the Commission's delegate (the "delegate") upon the basis that none of his conditions could be related to his operational service, having regard to relevant statements of principles. As to his IHD and hypertension, the delegate seems to have suspected that Dr Schulz was basing his claim upon the Act as it stood prior to the amending Act and sought to demonstrate that even on that mistaken basis, his claim would fail. In effect, the delegate understood him to be submitting that the decision in Bushell allowed him to rely on the

American research as establishing a sufficient hypothesis as to the connection between his conditions and his operational service, that research taking the place of the eminent medical practitioner referred to in Bushell. Assuming the correctness of the false assumption to which I have referred, the delegate rejected this approach on the basis that such research could not take the place of the eminent medical practitioner. This conclusion seems to suggest that the delegate would not act on the evidence as to such research, whereas she would have acted on the evidence of a relevant medical practitioner. The reason for this "preference" may have been that the American research and associated opinions were not established on the evidence to her satisfaction, whereas the opinion of the hypothetical medical practitioner would have been so established. However the delegate also concluded that such evidence as there was as to the research was not sufficient to support an appropriate hypothesis. Finally, the delegate pointed out that the amending Act had introduced the statements of principles regime, and that no relevant statement of principles supported Dr Schulz's claims concerning either his IHD or his hypertension.

DECISION OF THE VETERANS' REVIEW BOARD

14 Dr Schulz applied to the Veterans' Review Board (the "Board") for review of that decision. In his written submissions Dr Schulz again appears to have assumed that the approach adopted in Bushell and Byrnes had not been affected by the amending Act. At para 12 of the submissions he said:

Under the [Act], a veteran has to provide a 'reasonable hypothesis' connecting his complaint to his operational service. This was subsequently ruled upon by the High Court of Australia in what is referred to as "Bushell and Byrne" in which the Court adopted a variation of the Bolam principle by in effect holding that the opinion of a respected body of eminent medical practitioners, even if in the minority, is required to satisfy a causative link between operational service and the complaint.

Dr Schulz then referred to a particular committee, asserting that:

[T]he opinion of that body of eminent practitioners in the field satisfies the requirements of the [Act] and my claims for Ischaemic Heart Disease and Hypertension should be accepted.

15 He then asserted that his claims satisfied aspects of the relevant statements of principles. He now concedes that his claims concerning IHD and hypertension do not satisfy any relevant statement of principles. He also submitted that in any event, he did not accept that the statements of principles were binding upon him, asserting that any such acceptance would involve acceptance of the "revocation of my right to natural justice/procedural fairness". He then referred to ss 180A and 180B of the Act, submitting that they were enacted to "correct the chaos" arising out of contradictory decisions of the Commission. He submitted that statements of principles did not "bind" the Commission's delegates, so that they were free to determine a veteran's claim by reference to other medical or scientific evidence, even if the relevant statements of principles were not satisfied.

16 Dr Schulz then turned to the question of procedural fairness, pointing to authorities which establish that a person should not be prejudiced without being heard, and that a statute will not readily be construed as depriving a person of a right. His ultimate submission was that the delegate was obliged to consider the facts upon which he relied and to proceed in accordance with s 180A. Dr Schulz's submission seems to have been that where a veteran's application for a pension is not supported by a statement of principles, the delegate must, pursuant to s 180A, consider whether the Commission should make a determination pursuant to that section. To the extent that the reference to veterans of a particular "class" in s 180A might suggest that a determination may not apply only to one person, Dr Schulz submitted that:

The argument is flawed. The term "particular class" is not defined in the [Act] and under the rules of legislative interpretation, the ordinary meaning of the word is to be used in its context. As a veteran is always at the time of application a member of a class, there is no hindrance to the implementation of the section. The qualifying term only has significance when it comes to drafting the required Determination.

17 Dr Schulz then asserted that he had provided "reasonable hypotheses" for the connection of his IHD and hypertension to his operational service, and that there was no basis for concluding that his claim should not be accepted.

18 Dr Schulz was partially successful in that the Board determined that his peritoneal adhesions were war-caused. That aspect of the matter was remitted to the Commission for further consideration. The Board otherwise affirmed the delegate's decision. At para 6 the Board said:

In his written submission Mr Schulz argued that ss 180 and 180A of the Act empowered the Commission to determine a matter which did not satisfy a factor within the relevant Statement of Principles (SoP) if the hypothesis as presented had merit. Not to do so, the veteran said, would constitute a denial of natural justice. Mr Schulz further presented his contention at length during the hearing.

It then referred to the relevant legislation, observing that pursuant to s 120A of the Act:

... the Board is required to assess the reasonableness of hypotheses in accordance with any SoPs issued by the Repatriation Medical Authority or any relevant determinations or declarations under the Act.

19 The Board then referred to Dr Schulz's case and, in particular, to his assertions concerning the recognition in the United States of America of the risks associated with exposure to Agent Orange. The Board accepted "as an hypothesis" Dr Schulz's contention that exposure to Agent Orange in Vietnam caused his hypertension. It then referred to the relevant statement of principles, and concluded that none of the factors there set out was raised by the evidence. The Board was therefore of the opinion that:

... the material does not raise a reasonable hypothesis within the meaning of subsection 120(3). It follows that the Board is satisfied beyond reasonable doubt, for the purposes of subsection 120(1), that there is no sufficient ground for determining that the veteran's hypertension is war-caused.

As to his IHD the Board again accepted that Dr Schulz had raised an hypothesis linking this condition to his exposure to Agent Orange in Vietnam. However it concluded that none of the "minimum factors set out in the SoP is raised by the evidence ...". Thus there was no reasonable hypothesis within the meaning of s 120(3).

THE DECISION OF THE ADMINISTRATIVE APPEALS TRIBUNAL

20 Dr Schulz then applied to the Administrative Appeals Tribunal (the "AAT") for review of the decision. The grounds of his application were said to be:

1. The Delegate and the VRB failed to apply all relevant sections of the VEA in their adjudication; and had the Delegate and VRB so applied all relevant VEA sections they would [have] reasonably formed the opinion I deserved a pension:
2. The delegate and the VRB denied me natural justice by not examining the merits of my application.

In his written submissions to the AAT, Dr Schulz referred to various statements made during the parliamentary debate concerning the bill which led to the amending Act and associated documents. I shall not refer to that material in detail. The most common themes were:

the need for consistency in decision-making;

the establishment of a procedure for ensuring that "medical opinions supported by little or no medical-scientific evidence do not prevail against the carefully developed mass of medical-scientific opinion";

that the Commission be able to "overrule" any statement of principles made by the Repatriation Medical Authority, (apparently a reference to s 180A).

21 The AAT summarized Dr Schulz's arguments as follows:

Specifically, Dr Schulz argues that taking account of the material which lead (sic) to an amendment to the Act in 1994, the Repatriation Commission (and the Veterans' Review Board) was obliged to apply s 180A of the Act and to draft a legislative instrument making him eligible for a pension for the conditions of hypertension and IHD which, on his submissions, resulted from exposure to Agent Orange in South Vietnam.

The AAT also observed that:

Dr Schulz now submits the [Commission] and the [Board] were wrong in not pursuing his claim under s 180A of the Act. He says:

- a. He has never claimed that he satisfied the SoP.

- b. In relation to step 4 of [Deledio] (the fact determination stage), extracts of the Parliamentary debate and second reading speech pertaining to the [amending Act] reveal a need to accept medical evidence other than the [Authority's] determinations.
- c. The then Minister for Veterans' Affairs regarded that the power to further recognize conditions of veterans outside an SoP as pronounced by the [Authority] under s 196B of the Act, is available under s 180A of the Act.

22 The Commission submitted that Dr Schulz's case raised three questions namely:

is the Commission required to invoke s 180A in assessing an applicant's claim;

if it does not make a determination pursuant to s 180A, is there a "reviewable decision" under s 175 of the Act; and

if the claim is refused, and the respondent does not make a determination under s 180A, can the Tribunal make a determination under that section?

23 The Commission also submitted that the AAT had no power to make a determination under s 180A as the Commission had not delegated such power to it. Further, it submitted that there had been no submission made to the Commission which would enable it to consider the need for a determination pursuant to s 180A.

24 The AAT appears to have disposed of the issue concerning procedural fairness upon the basis that Dr Schulz had never applied to the Commission for a determination pursuant to s 180A, or provided the information necessary in order that the Commission could consider making such a determination. Thus no question of lack of procedural fairness arose.

25 As to the alleged failure by the Commission to apply all relevant provisions of the Act, the AAT considered that the matter was to be resolved by reference to the three questions posed by the Commission. Although Dr Schulz's case was based upon his perception of the meaning and effect of s 180A, it did not follow that the section should become the focus of the AAT's review of the decision. The decision under review was made pursuant to s 19 of the Act, applying the requirements prescribed by ss 120 and 120A. As I understand Dr Schulz's case, he submitted that in making such a decision the Commission was, in certain circumstances, to consider exercising its powers pursuant to s 180A. He submitted that where a veteran's application is not supported by any relevant statement of principles, the Commission must consider any evidence placed before it in order to decide whether to make a determination pursuant to s 180A, which determination would then support the claim. It may be that the Commission saw Dr Schulz's argument as possibly taking one of two different forms:

that in exercising the powers conferred by s 19, the Commission must consider whether to exercise the powers conferred by s 180A; or

that a veteran may seek a determination pursuant to s 180A, which question the Commission must then consider.

The Commission seems to have submitted that in either case, it was for the veteran to put material before the Commission in order to allow it to decide whether to make such a determination.

26 The AAT's reasons for dismissing this aspect of Dr Schulz's argument are a little difficult to understand. The Senior Member concluded that he should construe s 180A by reference to its terms, but with regard to the explanatory memorandum and "other secondary legislative material". He then concluded that the Commission could only satisfy subss 180A(2), (3) and (7) if a case were first put to the Commission for it to consider whether such a determination should be made. The Senior Member then noted that s 180A was permissive rather than mandatory, that it required that any determination deal in detail with certain identified matters and that no submission had been put before the Commission to justify its making such a determination.

27 The Senior Member then noted that Dr Schulz was seeking an order, directing the Commission to draft (and presumably issue) a determination. This, the Senior Member said, was "clearly impermissible" for three reasons. The first was the discretionary nature of the power conferred by s 180A. The second reason seems to have related to the Legislative Instruments Act 2003 (Cth) (the "Instruments Act"). Finally the Senior Member concluded that the AAT could not order the Commission to exercise its discretion under s 180A because the Commission had not delegated its power under that section to the AAT. He then concluded that the three questions posed by the Commission should be answered as follows:

the Commission was not "required" to invoke s 180A to "further answer" Dr Schulz's claim;

the failure to make a decision under s 180A was not a "reviewable decision" under s 175 of the Act; and

the AAT could not make a determination under s 180A as it had no legislative or delegated power so to do.

ERRORS IN THE AAT'S DECISION

28 Whilst these conclusions may, in some senses, be correct, I fear that the Senior Member's reasoning is faulty, probably as a result of the emphasis placed by the Commission on the three questions, and of the fact that Dr Schulz was unrepresented and, understandably, not able to see the risk inherent in adopting the Commission's approach. The error in that approach was that it shifted the focus away from ss 19, 120 and 120A, pursuant to which the original decision was made, and focussed on s 180A which was only relevant to the decision-making process to the extent that Dr Schulz could establish such relevance. The AAT seems to have accepted that Dr Schulz could have asked the Commission to make a determination pursuant to s 180A, but did not do so. In fact, his principal argument was that by applying for a pension, he did so. The AAT did not address that question. The AAT appears also to have relied on the absence of any delegation to it of the Commission's powers under s 180A. I doubt whether the Commission could delegate such power to a statutory body such as the AAT, the duties and powers of which are specified in its own legislation. For the same reason, I doubt whether the AAT could accept such a delegation.

However the question of delegation is, as far as I can see, irrelevant. Of course, pursuant to s 43(1) of the Administrative Appeals Tribunal Act 1975 (Cth), the AAT has the powers conferred on the Commission or the Board, at least to the extent that such powers are relevant to the decision under review.

29 The AAT has jurisdiction to review decisions of the Commission and the Board pursuant to s 175 of the Act. However that jurisdiction includes only the decisions there identified, namely decisions of the Commission which have been reviewed by the Board pursuant to s 135, decisions of the Board made in substitution for such decisions, and certain other classes of decision made under identified sections of the Act. The only relevant class of decision for present purposes seems to be decisions of the Commission which have been reviewed by the Board pursuant to s 135. Those decisions are decisions made in connection with claims for pensions and/or allowances. Thus it seems that a decision pursuant to s 180A will only be reviewable by the AAT if it is the case, as Dr Schulz submits, that the Commission must, in considering an application for a pension (which otherwise lacks the support of any statement of principles), consider whether to exercise its power pursuant to s 180A. If s 180A is not to be construed as prescribing a process to be undertaken in dealing with an application for a pension or allowance, then any decision under s 180A will not be subject to review by the AAT.

30 The decision-making process contemplated by s 19 is necessarily informed by other provisions of the Act, in particular ss 120 and 120A. However, before turning to those provisions it is appropriate to note two other aspects of the overall structure of the Act. The Act, in numerous sections, specifically identifies persons who may make application for the exercise of powers conferred by those sections. Sections 14, 15, 16, 13AA, 13AB, 57, 79T, 93Z and 118ZS all do so. Of particular interest in this regard are the provisions relating to the determination of statements of principles pursuant to Pt XIA of the Act. Pursuant to s 196B(4) the Authority must carry out an investigation (which may lead to the determination of a statement of principles) if a request is received pursuant to s 196E. Section 196E provides that "a person eligible to make a claim for a pension under Part II or IV of this Act" may make such a request. Dr Schulz's claim is made pursuant to Part II.

31 Pursuant to s 196B(7) the Authority may review a statement of principles, or a decision not to determine a statement of principles, and must do so if it receives a request by a person identified in s 196E. Again, Dr Schulz is such a person. The Act also provides for review of decisions of the Authority by the Specialist Medical Review Council (the "Council"), established pursuant to Part XIB. Pursuant to s 196Y a person who is eligible to claim a pension pursuant to Part II may request such a review. In light of these specific provisions it is difficult to construe s 180A as authorizing an application by a veteran, seeking the exercise by the Commission of its power pursuant to that section. The Commission might as a result of its consideration of a particular case, identify an anomaly in the operation of the statements of principles regime. However it is the content of a relevant statement of principles or a decision not to determine a statement of principles which will engage its power under s 180A.

32 I also note that decisions of the Board and the Council are not subject to review by the AAT, and that there is no express provision for review of decisions made pursuant to s 180A.

33 Turning to the procedure to be adopted in considering any application pursuant to s 19, that section itself identifies the material to which the Commission must have regard. However ss 120 and 120A are primarily relevant for present purposes. Section 120(1) must be read in light of s 120(3), at least for present purposes. As was pointed out in *Deledio* the first step is to identify any hypothesis connecting the injury, disease or death with the circumstances of the veteran's service. The second step is to consider the reasonableness or otherwise of the hypothesis, "reasonableness" having the meaning attributed to it by s 120A(3). An hypothesis will only be reasonable if there is in force, either a statement of principles or a determination of the Commission under s 180A(2) upholding the hypothesis. Clearly, s 120A(3) refers to an existing statement of principles and/or determination upholding the hypothesis. There is no suggestion that in the absence of any reasonable hypothesis, the Commission is to exercise its power pursuant to s 180A in order to remedy such absence.

34 The overall effect of the Act seems to be that a veteran who lacks the support of a statement of principles or a determination pursuant to s 180A, but nonetheless considers that he should be entitled to a pension, is to apply to the Authority for a determination of a statement of principles, or the variation of an existing statement of principles. If unsuccessful, he or she may apply to the Council for review. After that process has been exhausted the Commission may consider whether or not to exercise its powers pursuant to s 180A. However I see no reason for concluding that a veteran is entitled to apply for, and insist upon any exercise of the power pursuant to s 180A, or consideration by the Commission as to whether it should, or should not exercise that power. The focus of s 180A is on classes of veterans rather than upon the claims of individual veterans. Of course, as Dr Schulz has observed, he may well be a member of a class of veterans. No doubt the Commission would be able to determine whether or not his particular circumstances, or the circumstances of any other veteran are likely to be present in other cases. However it does not follow that, where a veteran's particular claim is not supported by an existing statement of principles or a determination pursuant to s 180A, the Commission must therefore consider whether or not to exercise its powers pursuant to that section. In other words s 180A vests power in the Commission but does not create personal rights vested in any veteran.

35 In Dr Schulz's case there are existing statements of principle relating to his conditions. Unfortunately for him, they do not support any hypothesis linking those conditions to his service. In those circumstances his hypotheses concerning those conditions are not reasonable and thus, the Commission was necessarily satisfied beyond reasonable doubt that there was no sufficient ground for making a determination in his favour.

ORDERS

36 In those circumstances the application must be dismissed. I shall hear submissions as to costs.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 22 April 2014

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