

AUSTRALIA / JUDGMENT

Tracy v Repatriation Commission [1999] FCA 1523

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FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

Tracy v Repatriation Commission [1999] FCA 1523

VETERANS' AFFAIRS – review of decision not to grant applicant assistance under Vehicle Assistance Scheme – whether applicant incapacitated by reason of a condition similar in effect or severity to that of a multiple amputee – whether Commission erred in not considering most recent evidence provided to it by applicant – interpretation of section 105(5)(d) Veterans' Entitlements Act.

Administrative Decision Judicial Review Act 1977, (Cth)

Veterans Entitlements Act 1986, (Cth) ss 104, 105

Minister for Aboriginal Affairs v Peko-Wallsend (1985) 162 CLR 24

Hindi v Minister for Immigration and Ethnic Affairs (1988) 91 ALR 586

Clifford v Repatriation Commission (1998) 14 ALD 721

Bull v Attorney-General (NSW) (1913) 17 CLR 370

Holmes v Permanent Trustee Co of NSW Ltd (1932) 47 CLR 113

Repatriation Commission v Hawkins (1993) 117 ALR 225 at 231

Repatriation Commission v Law (1981) 147 CLR 635

Repatriation Commission v Hayes (1982) 43 ALR 216

Secretary, Department of Social Security v Cooper (1990) 97 ALR 364

DOUGLAS HUBERT TRACY v REPATRIATION COMMISSION

LEE J

4 NOVEMBER 1999

PERTH

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY W 85 OF 1999

BETWEEN: DOUGLAS HUBERT TRACY

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: LEE J

DATE OF ORDER: 4 NOVEMBER 1999

WHERE MADE: PERTH

**THE COURT ORDERS
THAT:**

1. The decision of the Respondent be set aside and the matter remitted to the Respondent for determination according to law.

2. The Respondent pay the Applicant's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY W 85 OF 1999

BETWEEN: DOUGLAS HUBERT TRACY

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: LEE J

DATE: 4 NOVEMBER 1999

PLACE: PERTH

REASONS FOR JUDGMENT

1 This is an application under the Administrative Decision Judicial Review Act 1977 (Cth) ("ADJR Act") for an order of review in respect of a decision of the respondent (the Commission) refusing the applicant's application for a grant of assistance under s 105 of the Veterans' Entitlements Act 1986 (Cth) ("the Act").

2 Section 105 of the Act reads as follows:

Vehicle assistance scheme

- (1) The Commission may, by instrument in writing, prepare a scheme, called the Vehicle Assistance Scheme, for the provision of motor vehicles to veterans eligible under this section to participate in the scheme and for the payment of allowances towards the cost of running and maintaining vehicles so provided.
- (2) The Commission may, by instrument in writing, vary or revoke a scheme prepared under subsection (1) and approved under subsection (3).
- (3) A scheme prepared by the Commission under subsection (1), and an instrument varying or revoking such a scheme, have no force or effect unless approved by the Minister.
- (4) Where a scheme prepared by the Commission in accordance with subsection (1), or an instrument under subsection (2), has been approved by the Minister, the Commission shall furnish copies of the scheme or instrument to the Minister, and the Minister shall cause copies to be laid before each House of the Parliament within 15 sitting days of that House after the Minister received those copies.
- (5) A veteran is, subject to subsection (7), eligible to participate in the Vehicle Assistance Scheme if the veteran is incapacitated from war-caused injury or war-caused disease by reason of:

- (a) amputation of both legs above the knee;
- (b) amputation of one leg above the knee and, in addition:
 - (i) amputation of the other leg at or above the ankle and amputation of one arm at or above the wrist; or
 - (ii) amputation of both arms at or above the wrists;
- (c) complete paraplegia resulting in the total loss of voluntary power in both legs to the extent that there is insufficient power for purposeful use for stance or locomotion; or
- (d) a condition that, in the opinion of the Commission, is similar in effect or severity to a condition described in paragraph (a) or (b).
- .
- (6) The commission may provide benefits for veterans eligible to participate in the Vehicle Assistance Scheme under and in accordance with the provisions of that Scheme.
- .
- (7) For the purposes of subsection (5):
 - (a) a leg that has been rendered permanently and wholly useless above the knee shall be treated as if it had been amputated above the knee;
 - (b) a veteran shall not be taken to be incapacitated by reason of the disability described in paragraph (5)(c) unless the disability is such that surgical or other therapeutic measures are not reasonably capable of restoring power for purposeful use for stance or locomotion; and
 - (c) a reference to the Vehicle Assistance Scheme shall, unless the contrary intention appears, be read as a reference to:
 - (i) the Vehicle Assistance Scheme prepared under subsection (1) and approved by the Minister, but not being such a Scheme that has been revoked; or
 - (ii) if that Scheme has been varied under subsection (2) by an instrument approved by the Minister – that Scheme as so varied.

3 The Vehicle Assistance Scheme (the Scheme) prepared by the Commission pursuant to s 105 provides, inter alia, that the Commission may grant financial assistance to an 'eligible veteran' to purchase a motor vehicle. Under the terms of the Scheme a veteran must satisfy the Commission that the veteran will be able to drive the vehicle safely and in comfort and will drive it regularly or will be transported regularly in the vehicle by a partner or carer who is willing and able to drive the vehicle.

4 It is not in issue that for the purpose of s 105(5) of the Act the applicant, now 74, is a veteran who has a "war-caused disease". The applicant suffers from severe pulmonary emphysema.

5 Reports from two consultant physicians were provided to the Commission in support of the applicant's application. The reports were prepared in August and October 1998. Both physicians stated that the applicant was severely and permanently disabled by reason of impaired lung function and severely obstructed airways and had to be assisted by a continuous supply of oxygen. Even when so assisted he could not walk more than fifty metres.

6 The reasons provided by the Commission for the decision it made on 11 August 1999 stated that the Commission could not be satisfied "based on the available evidence above, that [the applicant was] unable to move [his] legs at all or stand (without oxygen support) and therefore meet the restrictive criteria under s 105(5)(d)"

7 The "available evidence above" was identified in a list of affidavits, correspondence and reports, the Commission stated it had considered. The list did not include an affidavit provided to the Commission sworn by the applicant on 20 July 1999. That affidavit stated that the applicant's condition had deteriorated since September 1998. In particular the applicant stated that he now had to use oxygen whilst at rest and could not perform any activity without being assisted by the inspiration of oxygen.

8 In its reasons the Commission did not refer to those claims of the applicant, and the statement of the Commission that it could not be satisfied that the applicant could not move his legs or stand unless assisted by oxygen was founded on the understanding of the circumstances described by the applicant in December 1997 and September 1998. The Commission concluded, on the then 'available evidence', that the applicant's condition was not similar in effect or severity to that of a double amputee because the applicant was able to walk some steps without the use of oxygen whilst a double lower limb amputee could not walk at all without the aid of prostheses.

9 It appears that the material contained in the affidavit of the applicant sworn in July 1999 was not part of the material considered by the Commission in August 1999. Whether or not the Commission understood and applied the proper construction of s 105 of the Act, the inadvertent exclusion by the Commission from its consideration of material submitted by the applicant meant that the true basis on which the applicant made the claim for a grant of assistance under the Act was not considered by the Commission. As Mason J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985) 162 CLR 24 at 45:

"It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of the making of the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of the material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker."

Whatever the proper construction of s 105 may be, a claim that the applicant could not stand or walk without being connected to an oxygen supply would have been relevant to the question whether the Commission could form the opinion referred to in s 105(5)(d) of the Act. It follows that the failure of the Commission to consider the further material provided by the applicant was a failure to take into account material that had to be considered by the Commission if it was to perform its function under the Act of determining the application put before it by the applicant.

10 Unless the claims of the applicant set out in his affidavit sworn in July 1999 were considered by the Commission it could not be said that there had been a genuine or proper consideration of the applicants application. (See: *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586 per Sheppard J at 597-600.)

11 Notwithstanding that it may have been by inadvertence alone that pertinent material the Commission had to consider was not considered when the Commission made its decision, ground for review under the ADJR Act will follow unless it could be said that the Commission would have been obliged to attribute no weight to that material and there would be no utility in making an order under the ADJR Act that the decision be reviewed.

12 Although the forgoing reasons make it unnecessary to deal with submissions on the proper construction of s 105 some comments should be provided on that issue.

13 Section 105 appears in Division 2 of Part 6 of the Act, (s 97-110), which provides for allowances and other benefits to be paid to veterans in prescribed circumstances. That context, and the purpose of the Act, provide guidance in determining the construction to be applied. If there is ambiguity in the meaning of such legislation a beneficial construction is to be preferred and the Act is to be construed "to give the fullest relief which the fair meaning of its language will allow". (See: *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 per Isaacs J at 384; *Holmes v Permanent Trustee Co of NSW Ltd* (1932) 47 CLR 113 per Rich J at 119.) Section 105(5) sets out specific circumstances in which an incapacitated veteran may receive a grant of financial assistance, but includes provision for a grant to be made in undefined circumstances limited only by reference to the specific provisions. According to the foregoing principle of construction such a provision is not to be construed narrowly so as to deprive an incapacitated veteran of a benefit to which that person would otherwise be entitled. (See: *Repatriation Commission v Hawkins* (1993) 117 ALR 225 at 231; *Repatriation Commission v Law* (1981) 147 CLR 635 per Aickin J at 652; *Repatriation Commission v Hayes* (1982) 43 ALR 216 per Keely J at 219; *Secretary, Department of Social Security v Cooper* (1990) 97 ALR 364 at 370.)

14 Section 105 provides for grants of financial assistance under the Scheme. The preceding section, s 104, provides for the payment of "a recreation transport allowance" in similar circumstances. Section 104 reads as follows:

Recreation transport allowance

- (1) Subject to this section, the Commission may grant an allowance, called recreation transport allowance, to a veteran who is suffering an incapacity from a war-caused injury or a war-caused disease of a kind described in column 1 of the following table:

Column 1 Column 2

Description Rate per

Fortnight

\$

- | | |
|--|-------|
| 1. Both legs amputated above the knees..... | 44.80 |
| 2. Negligible powers of locomotion so as to be capable of moving with the aid of crutches or walking sticks, for short distances only | 44.80 |
| 3. Handicapped with regard to locomotion to a degree that, in the opinion of the Commission, is similar to the degree of handicap with regard to locomotion associated with a disability described in item 1 or 2..... | 44.80 |
| 4. Both arms amputated at or above the wrists..... | 22.40 |
| 5. Both legs amputated below the knees..... | 22.40 |
| 6. One leg amputated above the knee and the other below the knee..... | 22.40 |
| 7. One leg amputated above or below the knee and one arm amputated below the elbow..... | 22.40 |
| 8. Blinded in both eyes..... | 22.40 |
| 9. Incapacitated to an extent that, in the opinion of the Commission, is similar in effect or severity to the extent of incapacity associated with a disability described in item 4,5,6,7 or 8..... | 22.40 |
| 10. Handicapped with regard to locomotion to a degree that, in the opinion of the Commission, is similar in degree to the handicap | |

with regard to locomotion associated with a disability described

in item 5,6,7or 8..... 22.40

(2) For the purposes of subsection (1):

- (a) a leg that has been rendered permanently and wholly useless above the knee or below the knee shall be treated as if it had been amputated above the knee or below the knee, as the case may be; and
 - (b) an arm that has been rendered permanently and wholly useless at or above the wrist or below the elbow, shall be treated as if it had been amputated at or above the wrist, or below the elbow, as the case may be.
- (3) Recreation transport allowance is payable to a veteran, in respect of the costs incurred by the veteran in travelling for recreational purposes, at the rate specified in column 2 of the table in subsection (1) opposite to the kind of incapacity described in column 1 from which the veteran is suffering.
- (4) Recreation transport allowance is not payable to a veteran under subsection (1):
- (a) In respect of any period during which the veteran is being cared for, at public expense, in a hospital or other institution; or
 - (b) If the veteran has participated, or is participating, in the Vehicle Assistance Scheme:
 - (i) during the period of 2 years commencing on, and including, the date on which the veteran was first provided with a vehicle under that Scheme;
 - (ii) during the period of 2 years commencing on, and including, the date on which a replacement motor vehicle grant was or is made under that Scheme in respect of the veteran;
 - (iii) during any period during which there is, under that Scheme, due and payable by the veteran to the Commission the whole or part of an amount equal to the cost to the Commission of providing the veteran with a motor vehicle under that Scheme; or
 - (iv) during any other period during which the veteran is, under that Scheme, eligible to be paid an allowance as a contributor towards the running and maintenance of a vehicle provided for the veteran under that Scheme.
- (5) For the purpose of the application of subsection (4), a vehicle provided for a veteran before 22 May 1986 under the scheme known as the "Gift Car Scheme" shall, after the commencement of this subsection, be deemed to have been provided under the Vehicle assistance Scheme.

15 Obviously s 104 is intended to apply to circumstances of wider import than those contemplated in s 105 but the underlying object of each section is to recognise that a veteran who suffers from a war-caused injury or disease from which incapacity has resulted may require the payment of an allowance or other financial assistance to improve his or her enjoyment of life. In

s 104 an allowance is to be paid in respect of costs incurred for travel for recreational purposes. Under s 105 a vehicle, and an allowance in respect of the running costs thereof, may be provided to such a veteran. Subject to s 104(4) a veteran may qualify for assistance under both provisions. Difficulties in determining the proper construction of s 104, discussed by the Administrative Appeals Tribunal in *Clifford v Repatriation* (1998) 14 ALD 721, also arise in relation to s 105.

16 In s 104 a veteran "who is suffering an incapacity" described in the section is entitled to an allowance. In some instances, an "incapacity" so described is a physical impairment from which incapacity may be expected to follow rather than the description of a limitation of ability to perform daily activities. As noted by the Tribunal in *Clifford* (at 726) such descriptions of "incapacity" describe particular injuries or conditions rather than degrees of incapacity.

17 In s 104 the described incapacities are set out as Items 1-9. In respect of Item 9 an allowance is payable to a veteran who is "incapacitated" to an extent similar in severity to the extent of incapacity "associated" with a "disability" described in Item, 4, 5, 6, 7 or 8. The "disability" described in Item 4 is the physical condition of amputation of both upper limbs at or above the wrists. Items 5, 6 and 7 describe conditions involving single or dual amputation of the lower limbs. Item 8 describes a condition of blindness in both eyes.

18 Any incapacity associated with the condition described in Item 4, or Item 8, would have only an indirect connection with restriction of movement by use of the lower limbs. In *Clifford* the Tribunal (in para 52) accepted that "the degree of locomotive handicap" was not the only factor to be considered in determining whether a veteran was "incapacitated" to the extent required by Item 9 for qualification for payment of an allowance.

19 Indeed Item 10 separately provides for the payment of an allowance where a veteran is "handicapped with regard to locomotion" in similar degree to the handicap with regard to locomotion "associated" with a disability described in Items 5, 6, 7 or 8. As may be expected such a comparison under Item 10 does not arise with regard to the effect of the disability described in Item 4. It must be intended, therefore, that Item 9 will cover an "incapacity" other than that identified in Item 10, for which the payment of an allowance for travel for recreational purposes is appropriate. The object of the section is to set out specific, and more general but analogous circumstances, in which the payment of such an allowance will be appropriate to ameliorate the effects of the war-caused injury or disease and, in particular, to assist the participation by such a veteran in social activities.

20 In s 105(5)(a) entitlement to a grant of financial assistance depends upon it being shown that a veteran "is incapacitated" by reason of the effect of physical impairment which results from a war-caused injury or disease. The degree of incapacity contemplated is not specified. Given that the section provides for a grant of financial assistance for the purpose of the purchase of a motor vehicle for the veteran it is likely to be intended that the incapacity suffered be of such degree that, ordinarily, the incapacity would preclude the use of public transport, whether for recreational or any other purpose.

21 Although s 105(5)(d) refers to a "condition" that, in the opinion of the Commission, "is similar in effect or severity to a condition described in paragraph (a) or (b)", namely amputated limbs, the paragraph is to be read as specifying a "condition" which effects incapacitation of the veteran in similar degree to that which would be anticipated by reason of the circumstances described in paragraphs (a) or (b). Under s 105(5) eligibility depends upon the veteran being incapacitated by reason of such a condition.

22 Given that the extent of physical impairment constituting a condition described in para (a) or (b), namely amputation of both legs above the knee or one leg above the knee with multiple amputation of other limbs, is a significant interference with the physical condition of a veteran it may be concluded that it is anticipated that such impairment will cause substantial incapacity in carrying out the normal activities of life and involve dependence upon mechanical aids or other equipment to alleviate such incapacity.

23 The requirements of s 105 are that there be a condition of disablement, other than a condition described in paras (a), (b) or (c), the result of war-caused injury or disease, that has incapacitated a veteran in similar degree to that which would be expected to occur by reason of the physical impairments described in paras (a) or (b). It is the degree of incapacity caused by a condition "similar in effect or severity" (emphasis added) that is the touchstone of subsection 105(d), not whether that condition amounts to replication of the actual physical impairment described in paras (a) and (b).

24 In the present case the evidence before the Commission of the extent to which the applicant is disabled may allow the Commission to form the opinion that the condition resulting from the war-caused disease from which the applicant suffers has caused such a degree of incapacity that it may be said that the applicant is "incapacitated" by reason of that condition, within the meaning of that term as used in s 105. That is, if the Commission were satisfied that the restriction of the applicant's ability to perform activities of daily life is of a degree to be expected by reason of either of the conditions described in paras (a) or (b) and restoration of some amenity of life may depend upon the provision of a vehicle for his use it could form the opinion that the applicant is an eligible veteran for the purpose of the Scheme. Whether the applicant is such a veteran will be a matter for the opinion of the Commission, duly formed after consideration of all relevant material. If the Commission is not so satisfied the question whether it may exercise a discretion under s 106 of the Act to grant the applicant such assistance as is deemed fit in all the circumstances may arise.

25 The decision of the Commission will be set aside and the matter returned to the Commission for determination according to law.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated:

Counsel for the Applicant: H N H Christie

Solicitor for the Applicant: Legal Aid Commission of WA

Counsel for the Respondent: P J Hanks

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 21 October 1999

Date of Judgment: 4 November 1999

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