

AUSTRALIA / JUDGMENT

Williams v Repatriation Commission [2001] FCA 601

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FEDERAL COURT OF AUSTRALIA

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Williams v Repatriation Commission [2001] FCA 601

administrative law – Veterans' entitlements – Application for widow's pension – Veteran died of coronary atherosclerosis – Veteran commenced to smoke during war-service – Issue before Administrative Appeals Tribunal as to whether veteran's death resulted from smoking – Repatriation Medical Authority had issued two Statements of Principles concerning ischaemic heart disease: SoP 80 of 1998, in force at date of veteran's death and initial decision refusing application for pension, and SoP 38 of 1999, in force at date of Tribunal decision – Tribunal rejected applicant's appeal, relying on SoP 80 of 1998 – Whether applicant entitled to rely on SoP 38 of 1999 – Whether Tribunal erred in its interpretation of SoP 80 of 1998 – Whether Tribunal's methodology conformed with the requirements of s 120 of Veterans' Entitlements Act.

Gorton v Repatriation Commission [2001] FCA 286 followed.

Repatriation Commission v Keeley (2000) 78 FCR 108 distinguished

Repatriation Commission v Thomson [2001] FCA 311 discussed

Costello v The Secretary, Department of Transport (1979) 2 ALD 934 applied

Veterans' Entitlements Act 1986: ss 120, 120A, 196B

JOAN MARY WILLIAMS v REPATRIATION COMMISSION

N39 of 2001

WILCOX J

25 MAY 2001

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY N39 of 2001

ON APPEAL FROM THE VETERAN'S DIVISION

OF THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: JOAN MARY WILLIAMS

APPELLANT

AND: REPATRIATION COMMISSION

RESPONDENT

JUDGE: WILCOX J

DATE OF ORDER: 25 MAY 2001

WHERE MADE: SYDNEY

THE COURT ORDERS
THAT:

1. The decision of the Veterans' Appeal Division of the Administrative Appeals Tribunal dated 15 December 2000 be set aside.
 2. The matter be remitted to the Veterans' Appeals Division of the Administrative Appeals Tribunal for further hearing (with or without further evidence, as the Tribunal may decide) and determination according to law.
 3. The respondent, Repatriation Commission, pay the costs of the applicant, Joan Mary Williams, incurred in connection with this proceeding.
- Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY N39 of 2001
ON APPEAL FROM THE VETERAN'S DIVISION
OF THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: JOAN MARY WILLIAMS
APPELLANT
AND: REPATRIATION COMMISSION
RESPONDENT
JUDGE: WILCOX J
DATE: 25 MAY 2001
PLACE: SYDNEY

REASONS FOR JUDGMENT

WILCOX J:

1 This is an application by way of appeal, under s 44 of the Administrative Appeals Tribunal Act 1975, from a decision of the Veterans' Appeal Division of the Administrative Appeals Tribunal. The application raises two issues: whether or not the Tribunal erred in law in its application of a particular Statement of Principles and whether the applicant, in the alternative, is entitled to rely upon a later Statement of Principles.

The facts

2 The appellant, Joan Mary Williams, is the widow of Colin Williams who died on 14 February 1999. The direct cause of Mr Williams' death was coronary atherosclerosis.

3 Mr Williams served in the Royal Australian Air Force from 12 January 1943 to 6 February 1946. Having regard to its date, and the fact that some service was at Morotai, his service constituted both "eligible war service" and "operational service" within the meaning of the Veterans' Entitlement Act 1986.

4 It was common ground at the hearing before the Tribunal that Mr Williams commenced to smoke during his period of war service. The case made by Mrs Williams before the Tribunal was that the coronary atherosclerosis that resulted in her husband's death resulted from his smoking; therefore, his death was "war caused" and she was eligible for a widow's pension pursuant to the Veteran's Entitlements Act. The Repatriation Commission, the respondent to this proceeding, disputed that claim.

5 At the date of Mr Williams' death, and also at the date (6 April 1999) when Mrs Williams' application for a widow's pension was rejected by a delegate of the Commission, there was in force a Statement of Principles ("SoP") concerning ischaemic heart disease, made by the Repatriation Medical Authority under s 196B of the Veterans' Entitlements Act. This SoP was Instrument No 80 of 1998. Clauses 4 and 5 relevantly provided as follows:

"4. Subject to clause 6, at least one of the factors set out in clause 5 must be related to any relevant service rendered by the person.

Factors

5. The factors that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting ischaemic heart disease or death from ischaemic heart disease with the circumstances of a person's relevant service are:

- (e) smoking at least five cigarettes per day or the equivalent thereof, in other tobacco products, for a period of at least one year immediately before the clinical onset of ischaemic heart disease; or
- (f) where smoking has ceased prior to the clinical onset of ischaemic heart disease,
- (i) smoking one or more but less than five pack years of cigarettes or the equivalent thereof, in other tobacco products, and clinical onset of ischaemic heart disease has occurred within five years of cessation; or
- (ii) smoking five or more but less than 20 pack years of cigarettes or the equivalent thereof, in other tobacco products, and clinical onset of ischaemic heart disease has occurred within 15 years of cessation; or
- (iii) smoking at least 20 pack years of cigarettes or the equivalent thereof, in other tobacco products, and clinical onset of ischaemic heart disease has occurred within 20 years of cessation; or..."

6 The term "pack years of cigarettes or the equivalent thereof, in other tobacco products" was defined in cl 8 of the SoP as meaning "a calculation of consumption where one pack year of cigarettes equals twenty tailor made cigarettes (being the 'standard' cigarette pack contents) per day for a period of one calendar year, or 7,300 cigarettes ..."

7 At the hearing before the Tribunal, both parties accepted that SoP 80 of 1998 was the relevant Statement of Principles for application in Mrs Williams' case. The contest concerned the application of this instrument. That situation changed at the hearing in this Court.

8 Mrs Williams gave evidence that, when she met Mr Williams in 1956, he was already a smoker. At the time of their marriage, in March 1957, in Mrs Williams' estimation, her husband was smoking about two packets of ready made cigarettes each day. She said he continued to smoke at this rate until the mid 1970's, when he was medically advised to cease smoking. At that time he gave up smoking in her presence. However, Mrs Williams thought her husband continued to smoke, at a reduced rate, when he was not with her.

9 The Tribunal received into evidence a statutory declaration of one William Bennett. It was in these terms:

"I have known Colin Williams for about 40 years and he smoked for that period. Although after being advised by his doctor to give it up some years back he continued smoking in social situations and he was still smoking the last time I was in his company which was Christmas 1998."

At the Tribunal hearing, no challenge was made to this evidence.

10 There was a question before the Tribunal as to the date of "clinical onset of ischaemic heart disease", within the meaning of SoP 80 of 1998. Dr David Barton, a general practitioner at a medical practice Mr Williams attended from 1996 until his death, said that until Mr Williams' death, "he had no symptoms of IHD". However, Dr M G Miller, a consultant physician who gave evidence for the applicant, thought that, on the balance of probabilities, atherosclerosis would have been present for many years before death. Dr Miller noted that Mr Williams had a history of chronic airways limitation and asthma and had suffered from wheeze and attacks of shortness of breath at rest and exertion. Dr Miller said:

"It is not usual (although it is possible as a result of acute arrhythmia), for ischaemic heart disease to first present as sudden death without any premonitory symptoms whatsoever. In my experience such patients often have symptoms of angina that have not been recognised, or if recognised, the symptoms are attributed to some other cause, such as 'indigestion'; in this case Mr and Mrs Williams attributed the symptoms to his chronic airways limitation and asthma.

In my opinion, it is a reasonable hypothesis to state that Mr Williams did suffer from angina since 1990 and that his ischaemic heart disease was clinically apparent, although undiagnosed, before his sudden death in February 1999."

11 There was also evidence, in the form of a report to the Commission, from Associate Professor D Richards, a cardiologist, that included the following:

"It is my opinion that dyspnoea for ten years prior to his death was partly due to ischaemic heart disease. It is my opinion that had I been asked to assess this man 10 years prior to his death, I would have included ischaemic heart disease among the differential diagnoses to explain dyspnoea. However, from the evidence you [the Respondent] have provided, it is my opinion that

one would not have concluded on the balance of probabilities that Mr Williams had angina 10 years prior to his death. Nevertheless, it is my opinion that a reasonable hypothesis exists that Mr Williams had myocardial ischaemia (angina pectoris) accounting for some of his dyspnoea during the decade before his death.

Thus Mr Williams satisfies paragraph 2(b) of Statement of Principles No. 80 of 1998, at the time of his death."

The Tribunal's reasons for decision

12 The Tribunal referred in its decision to ss 120 and 120A of the Veterans' Entitlements Act. It is desirable for me to set out parts of those sections.

13 Section 120 relevantly reads:

"(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.

...

(3) In applying subsection (1) or (2) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:

- (a) that the injury was a war-caused injury or a defence-caused injury;
 - (b) that the disease was a war-caused disease or a defence-caused disease; or
 - (c) that the death was war-caused or defence-caused; as the case may be, if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of a particular service rendered by the person.
- (4) Except in making a determination to which subsection (1) or (2) 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.

...

(6) Nothing in the provisions of this section, or in any other provision of this Act, shall be taken to impose on:

- (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.

14 Section 120A(3) provides:

"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."

15 The Tribunal summarised the evidence and then identified four issues:

"(a) the date when the veteran ceased smoking, or if that did not occur, the extent to which he continued to smoke;

(b) the onset of ischaemic heart disease, a disease which is accepted by both parties as the cause of death;

(c) whether the veteran meets the criteria in SoP No. 80 of 1998 in regard to the connection of IHD [ischaemic heart disease] with relevant service, based on the findings at subparagraphs (a) and (b) above; and

(d) the standard of proof to be applied."

16 The Tribunal immediately made a finding of fact: "the veteran changed his smoking habit in about 1975/76 from one or two packs per day to at most a minimal amount which has not been defined".

17 The Tribunal then indicated that, in the light of that finding, factor 5(f)(iii) of SoP 80 of 1998 "is the only viable alternative available to the Applicant". At a later stage of its reasons, the Tribunal explained this was because there was no credible evidence that supported the argument that the veteran smoked "at least five cigarettes per day ... for a period of at least one year immediately before the clinical onset of ischaemic heart disease" as required by factor 5(e). The Tribunal apparently considered this was so, whether clinical onset occurred at the date of death (February 1999) or ten years earlier.

18 Turning to factor (f)(iii), the Tribunal said:

"Where smoking has ceased, the veteran must have 'smoked at least 20 pack years of cigarettes ... and clinical onset of ischaemic heart disease has occurred within 20 years of cessation'. Thus, for this criteria to be considered, the clinical onset of ischaemic heart disease must have occurred no later than about 1995/96."

19 It will be apparent that the Tribunal was treating 1975/76 as a date of cessation of smoking, despite its earlier finding that, after that date, Mr Williams smoked "a minimal amount which has not been defined".

20 Before the Tribunal both parties accepted Mr Williams had ischaemic heart disease at the date of his death. However, there was an issue between them as to the standard of proof concerning the date of clinical onset of that condition. The applicant had submitted to the Tribunal that the relevant standard of proof "was that of reasonable hypothesis pursuant to sections 120(1) and (3) of the Act". The respondent contended s 120(4) applied.

21 Basing itself upon two decisions in this Court (*Repatriation Commission v Cooke* (1998) 90 FCR 307; 160 ALR 17 and *Repatriation Commission v Gosewinckel* [1999] FCA 1273; 59 ALD 690), the Tribunal held "the standard of proof required to establish causal relationship between the cause of death, coronary atherosclerosis and service in this matter is that in sections 120(1) and (3) of the Act". After referring to some authorities regarding those subsections, and to other aspects of the evidence, the Tribunal found the evidence was sufficient "to support the contention that a reasonable hypothesis can be raised connecting the veteran's death with service, pursuant to SoP No 80 of 1998 and s 120(3) of the Act". The basis of that finding was the evidence of Mrs Williams as to her husband's habits and health and the evidence of Professor Richards and Dr Miller.

22 The Tribunal went on:

"The Tribunal must now be satisfied pursuant to sections 120(1) of the Act, beyond reasonable doubt, that there is no sufficient ground for determining that the death of the veteran was war-caused. It having been conceded that the veteran's smoking habit was related to service, and the Tribunal having accepted the evidence that he ceased or reduced his smoking habit in the mid 1970s, the issue in contention is whether the clinical onset of ischaemic heart disease occurred prior to the mid 1990s and if the requirements of Factor 5(f)(iii) are to be met. Pursuant to section 120(6) of the Act, there is no onus of proof on either party on any matter relevant to this claim.

There is nothing in the evidence of the treating doctors Romero and then Barton that the clinical onset of ischaemic heart disease occurred prior to the death of the veteran. The Respondent notes that from the medical records made available to the Tribunal, Dr Barton saw Mr Williams over 50 times, yet stated that 'he had no symptoms of ischaemic heart disease'. At Exhibit R1, Dr Barton confirms that the veteran only started attending the Shoal Bay Medical Centre in 1996. No prior medical records are available to the Tribunal, although reference was made by Dr Barton at Exhibit A4 that Dr Pidcock diagnosed diabetes mellitus in 1993. Both Dr Miller and Professor Richards postulated that dyspnoea could have been due to ischaemia, however neither was able to offer an explanation as to why this had not been so diagnosed, other than the symptoms being masked by the chronic airflow limitation and asthma. The Tribunal notes the reliance placed by

Dr Miller on the article by Dr McGill in the American Heart Journal, but is bound by the principles established by the Repatriation Medical Authority in terms of clinical onset, and takes account of the evidence given in respect of the interpretation of clinical onset in *Re Robertson* [AAT 12,666, 2 March 1998]. In respect of the Medical Impairment Assessments undertaken by Dr Romero in 1997 and 1998, the Respondent submitted that whilst the assessments under chronic airways limitation and asthma showed some deterioration, there was no evidence to link this was heart disease, and no indication of chest pains.

On the material available to the Tribunal, the Tribunal is satisfied, beyond reasonable doubt, that there is no credible evidence or material relating to symptoms applicable to the clinical onset of ischaemic heart disease in 1995/1996, which would be necessary in order to meet Factor 5(f)(iii). That is, there is no sufficient ground for determining that the death of Mr Williams was war-caused.

The Tribunal must therefore affirm the decision under review."

Submissions in relation to SoP 80 of 1998

23 Mr Mark Vincent, counsel for the applicant, criticised the Tribunal's application of SoP 80 of 1998. Notwithstanding his position at the Tribunal hearing, but without objection by Ms Rhonda Henderson, counsel for the Commission, Mr Vincent also put an alternative argument: that his client was entitled to rely upon SoP No 38 of 1999, an instrument made by the Repatriation Medical Authority on 27 April 1999 to supersede SoP No 80 of 1998. I will defer consideration of the alternative submission until later.

24 In relation to SoP 80 of 1998, Mr Vincent said that, as the Commission had conceded Mr Williams' smoking was war-caused and he had smoked at least 20 pack years, "the only issue was whether and when the veteran stopped smoking".

25 Mr Vincent argued the Tribunal made a "premature finding of fact" in relation to the date when Mr Williams stopped smoking. He said: "The continuation of the smoking habit up to shortly before death is part of the hypothesis. The Tribunal was supposed to assume, for purposes of the hypothesis, the correctness of the assertion that the smoking continued". He referred to *Bushell v Repatriation Commission* (1992) 175 CLR 408, *Byrnes v Repatriation Commission* (1993) 177 CLR 564 and *Repatriation Commission v Deledio* (1998) 83 FCR 82. Mr Vincent said that, in making the statement (in the passage quoted at para 17 above) that factor 5(f)(iii) of the SoP is the only viable alternative available to the applicant, the Tribunal overlooked the necessity of applying the hypothesis that the smoking habit continued after 1975/76.

26 Mr Vincent claimed the Tribunal also erred in holding, at the s 120(3) stage of its inquiry, that it was satisfied beyond reasonable doubt that there is no credible material supporting the argument that Mr Williams was smoking at least five cigarettes per day during the period of at least one year immediately before the clinical onset of ischaemic heart disease. Mr Vincent said the Tribunal should have addressed that question only in the concluding phase of its inquiry, when it considered under s 120(1) whether it was satisfied, beyond reasonable doubt, that there is

no sufficient ground for determining that Mr Williams' death was war-caused.

27 Further, Mr Vincent contended the Tribunal misinterpreted factor 5(f)(iii) as requiring 20 pack years within 20 years of cessation of smoking. He argued the 20 pack years could have been smoked at any time, for example "in fits and starts over a 50 year period". He submitted the Tribunal also erred in apparently reading factor 5(e) as requiring the veteran to have smoked five cigarettes per day in the year prior to clinical onset of ischaemic heart disease. He said factor 5(e) only requires an average of five cigarettes a day for "at least" one year immediately prior to the clinical onset of ischaemic heart disease; a veteran may achieve that average by heavy smoking over many years, with only light smoking in the year immediately before clinical onset of the disease.

28 Ms Henderson contended the Tribunal made none of the errors attributed to it by Mr Vincent. She said the Tribunal was not obliged to assume, for the purposes of the hypothesis, that smoking continued: "the Tribunal was not required to make an assumption about that matter at all. It had Mr Bennett's unchallenged evidence". However, Ms Henderson argued the hypothesis connecting the veteran's death to smoking does not fit the "template" set out in factor 5(e) of SoP 80 of 1998 because Mr Williams did not smoke at least five cigarettes over a period of at least one year immediately prior to his death, or even immediately prior to the claimed clinical onset of ischaemic heart disease in about 1990.

29 Ms Henderson also disputed Mr Vincent's criticisms of the Tribunal's sequence of fact finding and reasoning. She said the course he took corresponded with that prescribed by the Full Court in Deledio.

Conclusions in relation to SoP 80 of 1998

30 The Tribunal accepted that Mr Williams continued to smoke after 1975/76, although only in a minimal, unquantifiable amount. Its acceptance of that fact is not surprising. It had unchallenged evidence from Mr Bennett that Mr Williams continued to smoke "in social situations", despite the medical advice given to him "some years back", presumably in the period 1975/76. Mr Bennett observed that Mr Williams was still smoking at "Christmas 1998", less than two months before his death.

31 In the face of this evidence, it is remarkable that the Tribunal discarded the possibility of the applicant making a case under factor 5(e). The Tribunal did not explain why it did this; but it must have regarded reduction of consumption to a "minimal" level as equivalent to a cessation of smoking.

32 It seems to be common ground between the parties that such an approach would be erroneous. The applicant argues the Tribunal was bound to assume the correctness of a hypothesis of continuation of smoking. The respondent accepts the evidence establishes the relevance of factor 5(e), but argues this factor is not satisfied because Mr Williams' consumption did not reach the rate of five cigarettes per day after 1975/76.

33 It seems to me it is erroneous, in point of law, to treat a reduction in cigarette smoking – even a reduction to a minimal level – as being a cessation of smoking. The difference between factor 5(e) and factor 5(f) is that the latter applies "where smoking has ceased". This must refer to cessation of the habit of smoking. It cannot be said that a person who continues to smoke on social occasions, even to a "minimal amount" (whatever that means), has abandoned his or her smoking habit. The person continues a smoking habit, though at a reduced smoking rate. It seems to me that, upon the basis of its own findings of fact, it was necessary for the Tribunal to consider the application to this case of factor 5(e).

34 Had it taken that course, the Tribunal would immediately have been confronted with the issue of interpretation that was raised in this Court. The question is whether it is legitimate, for factor 5(e) purposes, to take account of the veteran's cigarette consumption over the whole of his or her smoking life, and ascertain whether that consumption comes to an average of at least five cigarettes per day, or whether it is necessary there be a consumption rate of at least five cigarettes per day over the year immediately preceding the onset of the disease. The contention of the Commission does not countenance averaging, whether over the immediately preceding year or the whole of the veteran's smoking life. Any break in smoking, or any drop below five cigarettes per day, would destroy the veteran's claim. And if the veteran still had the smoking habit, at whatever consumption rate, at the date of clinical onset of the disease, factor (f) would have no application.

35 Factor 5(e) makes no reference to an average of five cigarettes per day. But the authors of the SoP must have intended to refer to an average figure. They could hardly have intended the entitlement be lost simply because the veteran's consumption occasionally fell below five cigarettes per day; for example, during a period of illness. This view of the matter is confirmed by the definition of "pack years of cigarettes or the equivalent thereof, in other tobacco products" in cl 8 of the SoP. It will be recalled the definition offers the alternatives of 20 tailor made cigarettes per day for a period of one calendar year "or 7,300 cigarettes".

36 If an average is permissible in relation to one year, it is difficult to see why it would not have been intended to be permissible to take into account, and apply an average to, the whole of the veteran's cigarette consumption. Factor (f)(ii) and (iii) demonstrate acceptance of the view that long-past smoking can have a causal connection with the onset of ischaemic heart disease.

37 If the Commission's contention is accepted, long-past smoking will often be disregarded. By way of hypothetical example, take the case of a veteran who commenced to smoke heavily during the Second World War and thereafter smoked two packs a day for 50 years. Because of health worries, the veteran then dropped his or her consumption to one or two cigarettes a day. Two years later, ischaemic heart disease was diagnosed. If, two years before clinical onset, the veteran had ceased smoking entirely, the veteran would have been covered by factor (f). But the veteran did not cease smoking, so that factor is inapplicable. Yet, on the Commission's argument, factor 5(e) is also inapplicable; the veteran did not smoke (or even average) five cigarettes per day over the twelve months immediately preceding clinical onset. The veteran's war-caused 50 year heavy-smoking history would be ignored.

38 It seems to me the better view is that SoP 80 of 1998 requires that, if the material placed before the Tribunal raises a reasonable hypothesis that the death of a veteran was connected with a smoking habit, formed during a period of war-service and continuing until death, the Tribunal must determine whether it is satisfied beyond reasonable doubt that the veteran's cigarette consumption, over the whole of his or her smoking life (being a period of at least one year), did not average at least five cigarettes per day.

39 My formulation of the critical question reflects my acceptance of Mr Vincent's submission that this question of fact arises at the final stage of the inquiry.

40 The Tribunal's misconstruction of factor 5(e) of the Statement of Principles was an error of law.

41 In Deledio the Full Court discussed the steps that must be undertaken in making a determination under s 120 of the Veterans' Entitlement Act. The steps were summarised at 97-98. It may be helpful if I relate that summary to the present case.

42 First, the Tribunal had to consider all the material before it, including the evidence of Mrs Williams, Mr Bennett and the various medical practitioners, and determine whether that material pointed to a hypothesis linking the death of Mr Williams to his war-service. Although this was a matter for the Tribunal to determine, it was obviously open to the Tribunal to find a hypothesis that Mr Williams commenced to smoke during his period of war service and continued to smoke for the remainder of his life (although at a reduced rate after 1975/76), and that the condition that caused his death was a result of that smoking. It is to be noted that, at this stage of its consideration of the case, the Tribunal should not have been concerned with the factual correctness of that hypothesis.

43 If the Tribunal did accept the existence of such an hypothesis, its next task was to ascertain whether there was in force a relevant SoP. It is common ground that any such instrument would have been one concerning ischaemic heart disease, and that there was such an instrument, although there is now an issue as to whether the relevant instrument was SoP 80 of 1998 or SoP 38 of 1999. At this stage of its consideration, the Tribunal was obliged to identify, and turn to, the relevant SoP.

44 The third step for the Tribunal was to determine whether the hypothesis fitted the template provided by the relevant SoP. Assuming for present purposes that the Tribunal had decided that SoP 80 of 1998 was available for use in this case, and that the hypothesis suggested by the material included the element that Mr Williams did not cease his smoking habit prior to clinical onset of his ischaemic heart disease – as, for example, because he continued to smoke until his death - the Tribunal was obliged to test that hypothesis against factor 5(e) of SoP 80 of 1998. If the Tribunal had interpreted factor 5(e) in the manner I have suggested, it would obviously have decided the hypothesis fitted the template and proceeded to the final stage.

45 In the final stage, the Tribunal would have had to ask itself whether it was satisfied, beyond reasonable doubt, that Mr Williams' death was not war-caused; for example, because it was satisfied beyond reasonable doubt that one or more essential elements of the adopted hypothesis were not true in fact. It must be emphasised it was only at this stage, and not before then, that the Tribunal was entitled to make determinations of fact.

46 The Tribunal did not follow the course I have set out. I think Mr Vincent is correct in describing as "premature" the Tribunal's finding concerning the date when Mr Williams stopped smoking. The point may seem pedantic, but it is not. At any early stage of its reasoning, the Tribunal will tend to be thinking in terms of the balance of probabilities. The Tribunal appears to have adopted that standard in the present case, in relation to the finding (in effect) that Mr Williams ceased to smoke in 1975/76. If a finding of fact is delayed until the final stage of the inquiry, the Tribunal is likely to be conscious of the need to be satisfied, beyond reasonable doubt, that an element of the hypothesis (such as continuation of smoking until death) is not true in fact.

47 The Tribunal's failure to follow the course of inquiry required by the Act, and which is clearly described in Deledio, was an additional error of law. Even on the basis that SoP 80 of 1998 was the only Statement of Principles available for use in this case, it is apparent the Tribunal's decision must be set aside.

SoP 38 of 1999

48 Like its predecessor, SoP 38 of 1999 specifies that, in relating death from ischaemic heart disease to war-service, one of the factors in clause 5 of the instrument must be related to the person's service. They include: factor 5(e), which applies "where smoking has ceased prior to the clinical onset of ischaemic heart disease", and factor 5(f) "where smoking has not ceased prior to the clinical onset of ischaemic heart disease". In the latter situation, the relevant criteria are:

"(i) smoking at least five cigarettes per day or the equivalent thereof, in other tobacco products, for a period of at least one year immediately before the clinical onset of ischaemic heart disease; or

(ii) smoking at least one pack year of cigarettes or the equivalent thereof, in other tobacco products, before the clinical onset of ischaemic heart disease."

49 Clause 8 of this instrument contains a definition of the term "pack years of cigarettes or the equivalent thereof, in other tobacco products" that is identical to the definition in SoP 80 of 1998.

50 Factor (f)(i) is similar in effect to factor 5(e) in the 1998 instrument; but factor (f)(ii) is new. It contains no limitation as to the period of smoking, other than it must be before the clinical onset of ischaemic heart disease. It is enough that smoking amounted to "one pack year"; that is, 7,300 cigarettes. The requirement will be satisfied if the veteran smoked at least 7,300 cigarettes, during the whole of his or her smoking career, before the clinical onset of ischaemic heart disease. It is readily apparent why the present applicant would wish to rely upon this instrument at any new

hearing undertaken by the Tribunal.

51 As previously mentioned, there is now an issue between the parties as to whether the applicant is entitled to rely upon SoP 38 of 1999 in the Tribunal's further consideration of this case.

The application of SoP 38 of 1999

52 Mr Vincent contended the applicant is entitled to rely upon SoP 38 of 1999, notwithstanding that it did not exist at the date of the decision of the Commission's delegate. He referred to *Gorton v Repatriation Commission* [2001] FCA 286, in which Stone J upheld the right of a claimant to rely upon a Statement of Principles that was issued after the delegate's decision, and was apparently more favourable to his case than the Statement of Principles in force at the time of the delegate's decision. In reaching that conclusion, her Honour considered and distinguished the Full Court decision in *Repatriation Commission v Keeley* (2000) 98 FCR 108.

53 The position in *Keeley* was the reverse of that in *Gorton*. In *Keeley* the claim was covered by the Statement of Principles in force at the date of the delegate's decision, but not by its successor, in force at the time of the Tribunal's decision. Heerey J (at first instance) held the situation was covered by s 50 of the Acts Interpretation Act 1901 which provides:

"Where an Act confers power to make regulations, the repeal of any regulations which have been made under the Act shall not, unless the contrary intention appears in the Act or regulations effecting the repeal:

- (a) affect any right, privilege, obligation or liability acquired, accrued or incurred under any regulations so repealed; or
- (b) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any regulations so repealed; or
- (c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or regulations had not been passed or made."

54 The Full Court affirmed Heerey J's view. At paras 35 and 36, Lee and Cooper JJ said:

"When the respondent lodged her claim for a pension under the Act, the respondent obtained a right to have that claim determined under the Act according to law. The right that accrued was a right to which s 50 applied: see *Continental Liqueurs Proprietary Limited v G F Heublein and Bro. Incorporated* (1960) 103 CLR 422 at 426 – 427, (on appeal (1962) 109 CLR 153.)

If the material relevant to the claim satisfied the requirements of the Act, the Commonwealth was liable under s 13 to pay a pension to the respondent and the Commission was bound to determine the claim accordingly. The right to have the claim determined under, and pursuant to, the Act, therefore, was more than an expectation that a request for a remedy or benefit would be considered or a hope that a remedy or benefit may be provided if a discretion were exercised in her favour pursuant to a power provided under an enactment: see *Director of Public Works v Ho Po Sang* [1961] AC 901. If an enactment provides that the exercise of a discretion is subject to review and re-determination under review procedures to be conducted according to law, even a mere expectation or hope may become a right to have a matter determined under the enactment upon initiation of a review proceeding pursuant to the enactment in respect of a decision made in the exercise of a discretion: see *Australian Coal and Shale Employees' Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 at 175, 178, 185, 194; *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 at 372 – 373; *Lee v Secretary, Department of Social Security* (1996) 68 FCR 491."

Kiefel J expressed similar views at paras 76 to 78.

55 Keeley was followed by a subsequent Full Court (Spender, Marshall and Merkel JJ) in *Arnott v Repatriation Commission* [2001] FCA 262.

56 That was the situation when Stone J decided *Gorton*. In paras 23 and 24 of her reasons, after referring to what was said by Lee and Cooper JJ in *Keeley* at paras 44 and 45, Stone J said:

"Their Honours note that the Act is silent on the effect of the revocation of a Statement and the determination of another Statement after the initial determination of a claim. In my opinion, it is not necessary where the later statement of principles is more beneficial, to rely on the reasoning that led the Court in *Keeley* to lean towards applying the earlier (and more beneficial) Statement of Principles. In particular, the decision in *Keeley* was based, in part, on the view that, with beneficial legislation such as the Act, a construction of substantive provisions least likely to cause unfairness is to be preferred. The decision in *Keeley* is not authority for the principle that, when choosing among current or revoked statements, the revoked statement is the one that applies. The Act provides in s 196B(7) and (8) for the continual updating of Statements of Principle so that current statements embody sound medical-scientific evidence against which claims are assessed. In providing for the Board to review decisions of the Repatriation Commission on the merits taking into account not only material considered by the Commission but also additional evidence, the Act evinces an intention for the claim to be assessed in the light of all available evidence, including medico-legal evidence as embodied in the most recent Statement of Principles; ss 138 and 139. The AAT also has the duty to review decisions of the Board on the merits and conduct a complete rehearing of the claim. As Bowen CJ and Deane J commented in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 in relation to appeals to the AAT,

'The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.'

The decision of the Court in Keeley can thus be seen as an exception to this position, dictated by the beneficial nature of the legislature to which the Court referred. The exception applies to preserve the benefit of an existing entitlement to be assessed in the context of a more favourable Statement of Principles."

57 Two weeks after the decision in Gorton, another Full Court decided Repatriation Commission v Thompson [2001] FCA 341. In that case there was no relevant Statement of Principles at the date of the delegate's decision; however, one came into effect prior to the Tribunal's hearing. By majority (Drummond and Emmett JJ; Whitlam J dissenting) the Court held the principle in Keeley applied to that situation; the claimant was entitled to have his case evaluated on the basis that there was no relevant Statement of Principles. Whitlam J preferred to follow another Full Court decision, Ogston v Repatriation Commission (1999) 86 FCR 578 (Burchett, Branson and R D Nicholson JJ) that, in such a case, the Statement of Principles applied to the Tribunal's determination. Section 50 of the Acts Interpretation Act was dismissed in Ogston with the comment that it "is concerned with the repeal of disallowable instruments. No question has arisen in this case concerning the repeal of a Statement of Principles".

58 The issue that has arisen in respect of attempts to rely upon an earlier Statement of Principles, or upon the non-existence of any earlier Statement of Principles, turns on the application or otherwise of s 50 of the Acts Interpretation Act. The question is whether the applicant has a vested right to have the application determined under the old rules. That question has nothing to do with the issue posed in Gorton, and in this case, where an applicant for a pension seeks to rely upon a later (and apparently more favourable) Statement of Principles.

59 However, in Thompson Drummond and Emmett JJ each made comments that may be regarded as touching upon the present situation. Unfortunately, they did so without reference to Gorton, of which they were presumably (and understandably) unaware when they prepared their reasons.

60 In paras 10 and 13 Drummond J said:

"The general principle of construction of both the common law and of provisions such as s 50 is that no Act, be it amending or repealing legislation or new legislation operating in an area for the first time, affects past facts or events upon which legal rights depend, unless a contrary intention appears in the statute. Section 50 states in statutory form the limb of this common law principle that applies to repealing enactments (which will include provisions in statutes in the form of amending legislation which are, however, inconsistent with provisions of the earlier Act: Mathieson v Burton (1971) 124 CLR 1 at 9 - 12 and at 20 - 22). It is the other limb of this same principle that applies to new enactments. Both limbs operate to prevent statutes that change the law from applying to facts or events that have already occurred and by reference to which legal

rights or liabilities have to be determined, unless a contrary intention is discernible in the particular statute: *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

...

I have difficulty with some of what was said by the majority in *Keeley*. Since legislative changes are *prima facie* to be taken as universally neutral in not affecting either accrued rights or accrued liabilities, I doubt that the fact that a change made in the statute law which is beneficial to a person claiming a right justifies departure from the *prima facie* rule since that change will, of necessity, be detrimental to the correlative liability of the person against whom the right is asserted. Cf *Doro v Victorian Railways Commissioners* [1960] VR 84 at 86. I think for the reasons given by Emmett J that changes made with respect to a Statement of Principles after the Commission's determination which are more favourable to the pension claimant than the earlier Statement are accommodated within s 31 the Veterans' Entitlements Act, rather than within a legislative intent identified in *Keeley* that review of a Commission determination should be in accordance with the most beneficial Statement of Principles in force at any time, if the majority in *Keeley* intended their comments at [46] to go that far. But I do not think there is justification for declining to apply the critical holding in that case that an accrued right to have a Commission decision on a pension claim reviewed in accordance with the law, including any Statement of Principles, in force when the application for review was made, then arises."

61 At paras 52 and 53 of his reasons, Emmett J referred to s 31 of the Act. He said:

"It is clear from the majority's view in *Keeley's Case* that the decision by the Commission of a claim could be affected by the determination of a Statement of Principles after the making of the application. It is possible, of course, that a Statement of Principles may affect an application beneficially. There is a mechanism, in s 31 of the Act, whereby that possibility may be acknowledged. Section 31(1) provides that where:

. the time has not expired for making application to the Board for a review of a decision of the Commission with respect to a claim for pension in accordance with clause 14; or

. an application has been made to the Board for review of such a decision but has not been determined by the Board,

the Commission may, in its discretion, review that decision.

Under s 31(2) where application has been made to the Tribunal for a review of a decision of the Commission that has been affirmed by the Board or a decision by the Board in substitution for decision for Commission but the review has not been determined, the Commission may, in its discretion, review that decision and, with the consent of the applicant, vary that decision."

62 Later, at para 58, Emmett J referred to the apparent intention of Parliament "to ensure that all claims made after 31 May 1994 will be determined in accordance with Statements of Principles where such Statements of Principles exist". He went on (at paras 59-61):

"That intention must be considered against the background of the scheme of review provided for under the Act. Thus, the principles applicable to a decision by the Board and a decision of the Tribunal are that the Board and Tribunal are required to make a decision on the basis of the material before it at the time of making the decision. Where the nature of the decision under review does not involve a consideration of accrued rights or liabilities but rather involves an investigation of whether the applicant has a present entitlement to a grant of a right or privilege, unless the amending law otherwise provides, the law to be applied is that in force on the day of the Tribunal's decision: *Costello v The Secretary, Department of Transport* (1979) 2 ALD 934 at 943 - 944.

The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before the decision maker. Rather the question for the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal: *Drake v Minister for Immigration & Ethnic Affairs* (1979) 24 ALR 577 at 589.

Once the Veteran had lodged an application to the Tribunal to review the decision of the Board, he had a right to have the decision of the Board reconsidered and determined by the Tribunal. It was not a mere matter of procedure. It was a substantive right. It was a right in existence at the time when the Statement of Principles was published. Accordingly, in the absence of a contrary intention, the right was protected: *Esber v The Commonwealth* (1992) 174 CLR 430 at 440 - 441."

63 It will be apparent there is a conflict between the view taken by Stone J in *Gorton* and some of the comments made in *Thompson*.

64 With respect to *Drummond* and *Emmett JJ*, I have difficulty in seeing that s 31 of the Veterans' Entitlements Act resolves the problem posed by a more favourable later Statement of Principles. That section merely authorises the Commission, in its discretion, to review a decision and, possibly, to vary it in such a way as to provide an outcome more favourable to the veteran. The section does not affect legal rights and a decision by the Commission not to exercise its powers is not subject to review by the Administrative Appeals Tribunal: see s 31(10).

65 It seems to me the conflict to which I have referred ought to be resolved by reference to the principles enunciated in *Re Costello*, mentioned by *Emmett J*. That was a decision of a three member panel of the Administrative Appeals Tribunal. The case concerned a decision of the Secretary of Transport refusing to grant the applicant a commercial pilot's licence. One issue was whether it was appropriate to apply the Air Navigation Order that was in force when the decision was made or its successor, which was in force at the time of the Tribunal's hearing. The Tribunal discussed this issue at some length, with references to several judicial decisions. At 943-944 the Tribunal summarised its understanding of the position:

"It is clear, firstly, that in the exercise of our review function under s 43 of the Administrative Appeals Tribunal Act 1975 we stand in the shoes of the decision-maker and that the exercise of our review jurisdiction is the occasion of a fresh exercise of administrative power. In the ordinary course of events, therefore, the Tribunal is entitled to have regard to the facts or matters as they

stand at the date of its decision. ... Where the relevant law at all material times is the same, no problem arises as to the law to be applied. But where, as in the present matter, the law has been changed between the date of the administrator's decision and the decision of this Tribunal, it seems to us that the question as to the law to be applied by the Tribunal must be resolved by having regard:

- (i) to the nature of the decision under review; and
- (ii) to the provisions of the legislation by which the change in the law is effected ...

The nature of the decision under review may require the Tribunal to consider the facts and circumstances before it in the light of the law at some anterior date in order to form an opinion as to the accrued rights or liabilities of the applicant. ... A subsequent change in the law will not affect the matter unless it is expressed to apply retrospectively...

But where the nature of the decision under review does not involve a consideration of accrued rights or liabilities but rather involves an investigation whether the applicant has a present entitlement to the grant of a right or privilege, we have concluded that, unless the amending law otherwise provides we should apply the law as amended as at the date of our decision."

(References omitted)

66 It will be noted that, in *Costello*, the Tribunal allowed for the possibility of an accrued right; but otherwise thought the relevant law was that pertaining at the date of the hearing. Such an approach is consistent with both *Keeley* and *Gorton*. It is also consistent with the general principle applied in *Drake*, cited by both Emmett J in *Thompson* and the Tribunal in *Costello*.

67 In context, the Tribunal's statement in *Costello* is not inconsistent with the comment of Drummond J in *Thompson* about any change affecting accrued rights or accrued liabilities; *Costello* was concerned, not with property rights, but with the public interest in maintaining air safety.

68 However, in the context of a pension claim, there may be an inconsistency between the Tribunal's approach in *Costello* and the comments of Drummond J in *Thompson*. To concede a claimant's entitlement to rely upon a later, more favourable, Statement of Principles is to increase the exposure of the Repatriation Commission to successful claims.

69 It seems to me that, in this situation, the considerations noted by Stone J achieve importance. As always, the task is to discern the apparent legislative intention. As Stone J pointed out, the Veterans' Entitlements Act is beneficial legislation. It is intended to err on the side of generosity, as is evidenced by the reverse criminal standard of proof embodied in s 120(1) of the Act. Moreover, again as Stone J noted, the Act provides for the continual updating of Statements of Principle. The idea is to ensure that current Statements will embody currently-accepted medical and scientific learning. In relation to legislation such as the Veterans' Entitlements Act, it can hardly be supposed Parliament would have intended that a benefit be denied to an applicant who could bring his or her case within a current Statement of Principles, simply because another,

now discarded, Statement of Principles was in force at the time of the Commission's decision. I believe that to be so, notwithstanding that the effect of allowing reliance on the later instrument will be to increase the Commission's pension obligations.

70 I respectfully agree with the approach taken by Stone J. Despite dicta in Thompson that may be seen as pointing in the opposite direction, I should follow Gorton. The consequence is that I hold it is open to the present applicant to rely upon SoP 38 of 1999, if she wishes, at the remitted hearing of the Tribunal.

71 My conclusion does not represent failure to follow the Full Court's decision in Keeley. Consistently with that decision, I hold the applicant has a vested right to rely upon SoP 80 of 1998, if she wishes. However, consistently with Gorton, she also has the right to put a case based on SoP 38 of 1999. I agree that, to use the vernacular, this means the applicant "has it both ways". But there is nothing unusual about that. This is the position in any case where a person acquires a vested right prior to the commencement of amending legislation; the person can rely on the vested right or, in common with everyone else, elect to rely on the new legislation.

Disposition

72 I propose to order that the matter be remitted to the Tribunal for further hearing, with or without further evidence (as the Tribunal may decide) and determination according to law.

73 The respondent submitted that, if the applicant succeeded only because of the availability of SoP 38 of 1999, there ought to be no order for costs. The argument was that the applicant should have taken that position before the Tribunal. I need not determine the submission; the applicant has also succeeded on an argument concerning the Tribunal's application of SoP 80 of 1998.

74 The respondent must pay the applicant's costs.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 25 May 2001

Counsel for the Applicant: M Vincent

Solicitor for the Applicant: Vardanega Roberts

Counsel for the Respondent: R M Henderson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 26 April 2001

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Prepared on 28 October 2026 · Esheria