

Relaxed evidentiary rules in veterans' legislation: a comparative and empirical analysis

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Introduction

[N]early half of the Australian Imperial Forces is dead, disabled or receiving war pensions. That indicates the stress experienced by those men who served with the Australian Imperial Forces. It is recognized that that army more than any other was subjected to continuous service because of its superb fighting qualities. Because of that, the country should at all times give the utmost consideration to any question of doubt as to whether the disability of an ex-soldier is due to war service or otherwise.²

And we pledged ourselves very definitely and unconditionally, for we said, "If you do your duty by Australia, Australia will do her duty by you."³

Shortly after the First World War, legislatures in most common law countries attempted to relax the evidentiary burden and standard that would otherwise have been imposed on veterans seeking disability pensions. This article examines the legislative changes in Australia, Canada, New Zealand, the United Kingdom and the United States of America relating to onus of proof, standards of proof, statutory presumptions, and requirements to draw inferences in favour of veterans since those initial provisions. The article then discusses whether the changes are likely to have had any substantial effect on

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² Mr Coleman, MP, *House of Representatives Hansard*, 21 March 1929, Vol 120, p 1630.

³ WM 'Billy' Hughes, MP, 21 March 1929, *House of Representatives Hansard*, vol 120, p 1644.

outcomes of claims by reference to the results of a survey conducted by the author, involving members of the Veterans' Review Board, concerning the application of the particular relaxed evidentiary rules in the *Veterans' Entitlements Act 1986* (Cth). These results support the proposition that there is a practical benefit in applying specific presumptive rules to decision-making over and above changes to the standard and onus of proof in order to promote particular beneficial outcomes.

While removing or reversing the onus of proof, or providing a generalised presumption that a decision-maker must give the veteran "the benefit of the doubt" may provide some beneficial decision outcomes, there cannot be any objective measure of compliance with such provisions, and judicial review of decision-making under such legislation will be relatively ineffective unless decisions are, on their face, blatantly wrong. In these circumstances, decision-makers are left to determine matters using their own notions of justice, which can change for better or worse over time (sometimes due to cynicism towards claimants by decision-makers and cynicism towards the agency by reviewing bodies), rather than by reference to any objective standard.

The kinds of legislative changes that are more likely to result in the beneficial decision outcomes expected by the legislature are those that can be objectively assessed by participants in the system (including veterans' organisations, the courts, the administration, and the legislature). Typically, the kinds of changes that are likely to produce such results are those where specific statutory presumptions have been created. While such systems might be subject to debate or criticism as to the beneficiality of the specific presumptions, they are more likely to produce consistent results and have the confidence of the veteran community than a system where the beneficiality is left to the discretion of the decision-maker as to how evidence is to be weighed to meet an ambiguously general beneficial statutory policy. Changes can be made to improve specific presumptions, whereas it is most unlikely that legislatures can change decision-makers' subjective attitudes concerning how they weigh evidence.

A presumption is a rule of law for the handling of evidence. It gives the person for whom the benefit of the presumption was intended, the advantage of not having to produce specific evidence to establish the point at issue. A presumption can be rebutted by evidence, and the law can provide that a particular standard of proof is to apply in order to

rebut a particular presumption.⁴ Similarly, the law can provide that particular evidence is required to raise the presumption in the first place.

In Australia and the United States of America, specific presumptions have been introduced for the benefit of veterans concerning the connection between particular kinds of injuries and diseases and service in the defence forces. The particular presumptions are variously based on pragmatism, political expediency and generally accepted epidemiological principles. Provided that evidence exists in a particular case to support the prerequisite conditions for the relevant presumption to apply, the relevant connection to service is presumed to exist unless there is substantial evidence to the contrary.

While the legislation operates somewhat differently in each country, there are common elements and similar systemic benefits that should be promoted and possibly extended to other areas of decision-making. Those advantages include:

- a claimant is not put to the trouble and expense of producing medical or scientific evidence to support the relevant service connection;
- consistency in decision-making is promoted by legislative recognition of particular modes of connection to service;
- the evidence required to meet the prerequisite presumptive circumstances is usually within the capacity of the claimant to provide and is likely to be found within, or supported by, official service records;
- as the government agency is put to the trouble and expense of producing evidence to rebut a presumption once it is raised, the veteran tends to be favoured because it is administratively easier for the decision-maker to grant a claim than reject it, but if it is rejected capriciously, it is very likely to be accepted on appeal;
- the question whether there is evidence sufficient to raise a presumption is an objective legal standard that can be tested in a court, and if it exists, a court will require the decision-maker to

⁴ For example, in a criminal trial there is a common law presumption that the accused is innocent. This presumption of innocence can be rebutted by evidence that proves beyond a reasonable doubt that the accused committed each of the essential elements of the offence.

- have given cogent reasons that identify and assess the evidence before it upholds a finding that the presumption has been rebutted;
- veterans can see that there is an objective standard applied to the determination of their claims; and
 - veterans' organisations are able to marshal their resources to lobby for adding to, or improving, existing presumptive rules for the benefit of their members as a group rather than dispersing their limited resources in providing similar expert evidence many times, with uncertain results, for the numerous individual claimants.

History of relaxed evidentiary rules in Australian veterans' law

Australian veterans' legislation prior to 1929 did not say anything about evidentiary requirements or the manner in which the decision-makers were to decide claims. The first legislation to introduce relaxed evidentiary rules was the *Australian Soldiers' Repatriation Act 1929* (Cth), which amended the *Australian Soldiers' Repatriation Act 1920* (Cth) by creating War Pensions Entitlement Appeal Tribunals and Assessment Appeal Tribunals. The legislation provided:

(2) Subject to this Act, an Appeal Tribunal and an Assessment Appeal Tribunal shall not, in the hearing of appeals, be bound by any rules of evidence but shall act according to substantial justice and the merits of the case and shall give to an appellant the benefit of the doubt:

Provided too that if the appellant or a representative of the appellant shall make out a *prima facie* case in support of his claim that the incapacity from which he is suffering or from which he has died was caused or aggravated by war service, the onus of proof that such incapacity was not in fact so caused or aggravated shall lie with the Commission.⁵

⁵ *Australian Soldiers' Repatriation Act 1920* (Cth), s 45W(2).

Sir Neville Howse⁶, the Minister for Health and responsible for Repatriation,⁷ explained this provision in the House of Representatives, saying:

[T]he onus of proof must be the responsibility both of the appellant and of the Entitlement Appeal Tribunal. In the first place a *prima facie* case must be made out by the appellant, and it is then the responsibility of the Appeal Tribunal to assist the claimant in every way possible to connect his disability with his service.⁸

The notion that the tribunal would assist the claimant was not in the legislation, and appears never to have been the practice, except to the extent that legislation relating to later tribunals has given them the power to request further information (that might or might not assist the claimant) from the department.⁹ The concept of a duty to assist the claimant to develop their case operates in the United States of America in relation to the department and has some operation in relation to the function of the United States Board of Veterans' Appeals.¹⁰

⁶ Neville Howse had been awarded the Victoria Cross for his gallantry under fire during the Boer War as a medical officer with the New South Wales Army Medical Corps: Williams J and Staunton A, *They Dared Mightily*, Australian War Memorial, Canberra, 1986, p 21.

⁷ 'Repatriation' involved not only bringing the Australian service personnel back to Australia after the war, but their resettling into Australian society and the provision of pensions and medical treatment for service-related disability and pensions for their dependants.

⁸ Second Reading Speech to the Australian Soldiers' Repatriation Bill 1929, *House of Representatives Hansard*, 14 March 1929, vol. 120, p 1211.

⁹ For example:

- Section 107VZ, *Repatriation Act 1920* (Cth) in relation to the Repatriation Review Tribunal. In *Repatriation Commission v Williams* (1984) 1 FCR 245 Fitzgerald J indicated that it was appropriate for the Tribunal to use this power to insist that further material be provided "where the medical evidence is deficient and could be improved."
- Section 152, *Veterans' Entitlements Act 1986* (Cth) gives such a power to the Veterans' Review Board.

¹⁰ 38 USC § 5107(a) provides: "... a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information [from another Federal department or agency]". In *Litke v Derwinski*, 1 Vet App 90

In 1933, the High Court of Australia considered an application by a veteran for a writ of mandamus to direct a War Pensions Entitlement Appeal Tribunal (the Tribunal) to hear and determine his appeal again.¹¹ By majority,¹² the court dismissed the application, taking a wide view of the Tribunal's procedural discretion and its "liberty to take into consideration whatever evidentiary matters it thought proper",¹³ indicating that the court could not review the Tribunal's assessment of the probity of the material before it, and that the Tribunal had not denied the applicant substantial justice by acting on medical evidence on which only the applicant's representative (and not the applicant) was permitted to make submissions.¹⁴ Starke J discussed the evidentiary provisions and noted:

The section deals with two things, the burden of proof and the weight of evidence. The burden of proving a prima facie case is cast on the appellant, but, if he proves such a case, the burden of proving that his incapacity was not in fact caused or aggravated by war service is cast upon the Commission. It may do so either by contradicting the appellant's evidence or by proving other facts. Suppose, however, after considering the nature and strength of the proofs offered in support or denial of the main fact to be established, the Appeal Tribunal is left in doubt as to which way it should decide that fact, then the section directs that the appellant shall be given the benefit of the doubt, or, in effect, enacts that in such circumstances the Commission has failed to satisfy the burden of proof cast upon it.¹⁵

(1990), the US Court of Veterans' Appeals held that this provision operated in such a way that the Board of Veterans' Appeals was required to remand (ie, remit to the Department) cases for "evidentiary development" under the Department's duty to assist the claimant in developing the facts pertinent to the claim when the appellate record was deemed to be inadequate.

11 *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 (*Bott's case*).

12 Rich, Starke, Dixon and McTiernan JJ.

13 *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at p!240, see also pp!249-250.

14 *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at p!244.

15 *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at p!250.

Justice Evatt dissented in relation to whether the Tribunal had accorded the veteran substantial justice, and held that by excluding him from its proceedings and only permitting his non-legally qualified representative to make submissions in relation to adverse medical evidence, and denying the applicant's request to cross-examine the authors of that evidence, the Tribunal had not accorded the veteran substantial justice.¹⁶

In 1934, s 45W was amended to add a further proviso to place the onus of proof on the Commission if a veteran who was incapacitated due to war service died by an accident.

In 1943, substantial changes were made to the veterans' legislation. The 1929 legislation had not expressly provided that the beneficial evidentiary rules would apply to the Repatriation Boards or the Commission, but it was clear from the parliamentary debates that such extension was intended.¹⁷ This was expressly provided for in 1943 by taking the provisions out of s 47W and substantially re-enacting them in s 39B, which expressly extended them to all decision-makers. The new section¹⁸ provided:

39B. (1) The Commission, a Board, an Appeal Tribunal and an Assessment Tribunal, in hearing, determining or deciding a claim, application or appeal, shall act according to substantial justice and the merits of the case, shall not be bound by technicalities or legal forms or rules of evidence and shall give to the claimant, applicant or appellant the benefit of any doubt—

- (a) as to the existence of any fact, matter, cause or circumstance which would be favourable to the claimant, applicant or appellant; or

¹⁶ *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at pp256-257.

¹⁷ For example, at *Hansard*, vol 120, p 1663, Mr Maxwell, Member for Fawkner, said: "I presume that the department, in dealing with applications, will adopt an attitude similar to that of the appeal board. The same onus of proof will apply."

¹⁸ This provision was drafted as a government amendment by Dr Evatt who left the High Court in 1940 and in 1941 became Attorney-General. In the course of the debates, *Bott's* case was mentioned by a number of MPs and is likely to have been of significance to Evatt in the drafting.

- (b) as to any question whatsoever (including the question whether the incapacity from which the member of the Forces is suffering or from which he has died was contributed to in any material degree, or was aggravated, by the conditions of his war service) which arises for decision under his claim, application or appeal.

(2) It shall not be necessary for the claimant, applicant or appellant to furnish proof to support his claim, application or appeal but the Commission, Board, Appeal Tribunal or Assessment Appeal Tribunal determining or deciding the claim, application or appeal shall be entitled to draw, and shall draw, from all the circumstances of the case, from the evidence furnished and from medical opinions, all reasonable inferences in favour of the claimant, applicant or appellant, and in all cases whatsoever the onus of proof shall lie on the person or authority who contends that the claim, application or appeal should not be granted or allowed to the full extent claimed.

There was considerable controversy surrounding the meaning and application of these provisions. Chairmen of War Pensions Entitlement Appeal Tribunals, on a number of occasions, felt compelled to defend their interpretation and application of this section in their Annual Reports to Parliament.¹⁹ In 1947, the Repatriation

¹⁹ Observations and explanations concerning the interpretation and application of this section appeared in:

Annual Report of No.12 War Pensions Entitlement Appeal Tribunal for the financial year 1944-45;

Annual Report of No.12 War Pensions Entitlement Appeal Tribunal for the financial year 1945-46;

Annual Report of No.11 War Pensions Entitlement Appeal Tribunal for the financial year 1946-47;

Annual Report of No.11 War Pensions Entitlement Appeal Tribunal for the financial year 1947-48;

Annual Report of No.11 War Pensions Entitlement Appeal Tribunal for the financial year 1952-53;

Annual Report of No.12 War Pensions Entitlement Appeal Tribunal for the financial year 1955-56;

Annual Report of No.11 War Pensions Entitlement Appeal Tribunal for the financial year 1958-59;

Annual Report of No.12 War Pensions Entitlement Appeal Tribunal for the financial year 1975-76.

Commission (the Commission) responded to a statement in one such Tribunal Annual Report in the Commission's own Annual Report. In April 1953, Attorney-General Spicer made a public statement concerning the meaning of the section. Later in the same year, an article by a former Army officer appeared in the *Australian Law Journal* criticising the application of the law by the Commission and the Tribunals, and making comparisons with United Kingdom veterans' law.²⁰ In 1955, a public meeting in the Sydney Town Hall was addressed by a solicitor, who criticised the way in which the law was being applied by the Commission and the Tribunals.²¹ The content of that address was strongly criticised by the Chairman of No.12 War Pensions Entitlement Appeal Tribunal in his Annual Report in 1956. In February 1960, another public statement concerning the interpretation of this section²² was made, this time by Attorney-General Barwick.

In 1971, Justice Toose of the New South Wales Supreme Court was appointed to inquire into the Australian Repatriation system. In 1975, he produced a detailed report on virtually every aspect of the system, including the beneficial evidentiary rules for determining pension matters. Justice Toose noted that there was much dissatisfaction with the evidentiary rules and their application.²³ He recommended that the matter be clarified, and stated that it was inappropriate for anyone to bear any onus of proof where the department had a duty to investigate

20 Riordan A W, "The Compelling Presumption of Attributability in British War Pension Claims" (1953) 27 *Australian Law Journal* 315.

21 Referred to in detail in the *Annual Report of No.2 War Pensions Entitlement Appeal Tribunal for the financial year 1955-56*.

22 Section 39B was renumbered in 1950 as s 47.

23 Toose P B, *Independent Enquiry into the Repatriation System*, AGPS, Canberra, 1975, Volume 1, at pp 251-252 said:

There was a considerable amount of evidence that Section 47 had caused much dissatisfaction and frustration. ...

Submissions made to the Enquiry from ex-service sources generally criticised the application in practice of the benefit of the doubt provisions in section 47 of the Act. It was said that no section was more controversial amongst members. When an area of doubt was raised, a member often did not get the benefit of it. It was claimed that it was a wrong principle that the doubt must be in the mind of the determining authority. ...

No submissions were made concerning inferences. Submissions were made that there should be a presumption of fitness, where a member on enlistment had been accepted as fit for service.

claims. He also noted that the criminal standard of proof (satisfaction beyond reasonable doubt) did not apply.²⁴

In support of a Bill to amend the Act in 1977, Cabinet was told that the proposed amendment would limit the beneficial effect of the existing provisions by requiring the determining authority to apply the benefit of a reasonable doubt after considering all the evidence rather than applying the benefit of a doubt to individual aspects of the case. In hindsight, such advice appears astounding. The new section stated:

47. (1) The Commission, a Board, an Appeal Tribunal or an Assessment Appeal Tribunal, in hearing, considering, determining or deciding a claim, application or appeal—

²⁴ Toose P B, note 23 at pp 253-254 said:

[I] am of the view that proceedings for determination of pension are administrative proceedings which are inquisitorial in character. The assumption by many that these are adversary proceedings has led to many of the doubts and uncertainties concerning 'benefit of the doubt'. This phrase has been given a mystique which is completely undeserved. The object of determination is to decide whether a claim has been made out. Because of difficulties of proof inherent in the circumstances of war, benefit of the doubt is given to a member. In addition to assist him in the proof of his claim reasonable inferences favourable to him are directed to be drawn. As pointed out by Sir Garfield Barwick, where there are competing inferences that inference which leads towards success for the member must be drawn, even though there may be more probable inferences against the member which could be drawn. Benefit of the doubt should arise only in the adjudication process, when a doubt arises as to whether the member should succeed. At this stage all reasonable inferences in favour of the member will have been drawn, and it is only then, if there is a doubt, that the member should receive the benefit of such doubt.

I am of the view that matters, such as the criminal burden of proof beyond all reasonable doubt, do not arise in pension proceedings. 'Benefit of the doubt' in the Repatriation legislation arises only in the matter of adjudicating if the determining authority is in doubt.

It has therefore been submitted that a determining authority should accept as proof of any fact favourable to the member, any credible evidence in respect thereof submitted by him that is not contradicted. This may be but another way of stating that a member shall have the benefit of all favourable inferences and of any doubt. If this approach were to be adopted it should be stated in the legislation.

It has also been submitted that there should be a presumption of fitness where a member has been certified fit for service, but with such a presumption being rebuttable on evidence of rebutting facts. This approach would seem reasonable and I am similarly of the view that there should be a presumption of unfitness where a member has been discharged as unfit for service. However, I do not consider that a presumption of fitness on discharge should arise where a member has not been discharged as unfit.

- (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) shall act according to substantial justice and the merits of all the circumstances of the case, and, without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to—
 - (i) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; or
 - (ii) an absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during service of a member of the Forces was not reported to the appropriate authorities.
- (2) The Commission, Board, Appeal Tribunal or Assessment Appeal Tribunal shall grant a claim or application or allow the appeal, as the case may be, unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim or application or allowing the appeal.

Section 47(2) clearly incorporated the criminal law standard of proof. In 1983, Cook and Creyke suggested that the courts should interpret this provision “so as to produce some sort of intermediate standard of proof appropriate to administrative proceedings” given that the rules as to admissibility of evidence differ markedly from the criminal context.²⁵ However, that was not to occur. Indeed, to a large extent the Repatriation Review Tribunal had anticipated the High Court in

²⁵ Cook C and Creyke R, “Repatriation Claims and the Burden of Proof of the Negative” (1984) 58 *Australian Law Journal* 263 at 273. I have given 1983 as the date of this article given that it states at p 273 that it reflected the law as at June 1983.

*O'Brien's case*²⁶ by applying a strict criminal standard in most cases since at least 1982.²⁷

The Annual Report of the Repatriation Review Tribunal for the year 1983-84 stated that its “set aside” rate was 13.5% in 1979-80; 34.4% in 1980-81; 66.6% in 1981-82; 87% in 1982-83; and 84.8% in 1983-84. It also noted that 97% of widow’s decisions were set aside in 1983-84.²⁸ Clearly something significant had happened to account for these dramatic changes. In 1983, the President of the Tribunal attributed it to the effect of the Federal Court’s judgment in *Law v Repatriation Commission*²⁹—the first court case to examine the evidentiary rules since *Bott’s case* in 1933.

In *Law’s case*, which went on appeal to the High Court, the court examined the previous evidentiary provisions. The High Court found that prior to 1977 the civil standard of proof applied, but that the Commission bore the onus of proof, and that since 1977 a reverse

²⁶ *Repatriation Commission v O'Brien* (1985) 155 CLR 422.

²⁷ Cook and Creyke came to the opposite conclusion in their 1983 article. However, this view appears to have been gained only by an examination of cases decided by the Federal Court, and not by an examination of representative samples of the Tribunal’s decisions. A few Tribunal panels were not applying the proper law, and naturally it was those cases that were appealed to the Federal Court. Because these aberrant Tribunal decisions skewed the cases that were being brought before the court, an examination of the court cases would have given an incorrect impression to Cook and Creyke as to the general approach of the Tribunal at that time. The fact that the Repatriation Commission contested those cases in the court would indicate that the criticism of the Commission’s view of the standard of proof provisions expressed by the President of the Tribunal in 1983 was warranted. In commenting on the high “set aside” rate, he said: “Until the Tribunal’s decisions are shown to be wrong in law, the Commission and Boards should apply the view of the law held by the Tribunal.” (*Annual Report of the Repatriation Review Tribunal, 1982-83*, AGPS, Canberra, 1983, p 5). In 1984, he said:

However generous a 97% success rate at final level may seem, the Boards, the Commission and the Tribunal are bound to follow the decisions of the High Court and Federal Court. As the body responsible for the administration of the Act, the Commission may pursue its view of the statute by seeking to persuade the High Court or Federal Court to change or restrict the interpretation which the High Court has given to ss.47 and 107VH. Alternatively, it may seek an amendment of the Act. Meanwhile, it is bound, like the Tribunal, to apply the statute as interpreted by the courts to any claim it determines.

²⁸ *Annual Report of the Repatriation Review Tribunal, 1983-84*, AGPS, Canberra, 1984, pp 6-7.

²⁹ *Annual Report of the Repatriation Review Tribunal, 1982-83*, AGPS, Canberra, 1983, p 5.

criminal standard of proof applied with a “heavy onus” of disproof on the Commission.³⁰

The general approach taken by the Repatriation Review Tribunal in accepting claims where the cause of the disease was unknown was upheld by the High Court in *Repatriation Commission v O'Brien*.³¹ The court held that for a claim to succeed there was no need for any evidence whatsoever suggesting a connection. The possibility of a connection with war service could be “left open” by the evidence and a claim must be granted unless the Commission could prove beyond reasonable doubt that the death or incapacity was not service related.³² Brennan J dissented, but still held that the criminal standard of proof applied. He said that a claim could only succeed if the evidence raised a reasonable hypothesis consistent with a connection between service and the death or incapacity.³³

In June 1985, legislation was enacted to limit the effect of *O'Brien's* case. The legislation divided veterans into two classes: those who had rendered “active service” or “peacekeeping service” and those who had not. For those who had not rendered such service, the standard of proof to be applied in all matters was “reasonable satisfaction”.³⁴ For those who had rendered “active service”³⁵ or “peacekeeping service” the legislation introduced the concept, inspired by Brennan J's dissenting judgment, of a “reasonable hypothesis”. While

30 Thus, while the government had purported to implement the Toose Inquiry's recommendations, in fact it had done the opposite, both in relation to standard of proof and onus of proof.

31 *Repatriation Commission v O'Brien* (1985) 155 CLR 422. This case was an appeal from a decision of the Administrative Appeals Tribunal rather than the Repatriation Review Tribunal. It was a matter in which the President of the Repatriation Review Tribunal had referred an “important principle of general application” to the Administrative Appeals Tribunal for determination.

32 *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 433-434.

33 *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 438.

34 In *Repatriation Commission v M J Smith* (1987) 15 FCR 327, 74 ALR 537 this was interpreted by the Full Federal Court as equating to the civil standard of proof, or “balance of probabilities”.

35 Under the *Veterans' Entitlements Act 1986*, instead of using the term “active service” (a term derived from the *Army Act 1888* (UK)), the Act speaks of “operational service”. This includes service in the two World Wars outside Australia and in later warlike operations.

retaining the words “beyond reasonable doubt”,³⁶ the Act provided that a claim was not to be granted unless a reasonable hypothesis was raised by the material before the Commission and that hypothesis had not been dispelled. The stated intention was to overrule *O’Brien’s* case and to provide that the evidence had to at least point positively to a connection existing, not merely leave the possibility open.³⁷

In 1986, with the introduction of the *Veterans’ Entitlements Act 1986* (Cth),³⁸ this provision was reworded. The 1986 Act also provided that there is no presumption of entitlement and that no party bears any onus of proof. The intention of the changes was to provide that, if upon an examination of all the material, a reasonable hypothesis was not raised, then the Commission was deemed to be satisfied beyond reasonable doubt that the claim should not be granted.

In 1987, the Full Federal Court delivered its judgment in *East v Repatriation Commission*.³⁹ That case was seen to have confirmed the Commission’s interpretation of the new reasonable hypothesis provisions. The court held that “to be reasonable, a hypothesis must possess some degree of acceptability or credibility – it must not be obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous. ... A reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts.”⁴⁰ The High Court refused an application by Mrs East for special leave to appeal.

In *Bushell v Repatriation Commission*⁴¹, the High Court held that there was a two stage process and that the first stage, that is, the “raising” of a reasonable hypothesis did not involve determination of

³⁶ The government did not have a majority in the Senate and it would have been unlikely to have been able to pass legislation removing this phrase. The government decided that the best it could do would be to limit its operation.

³⁷ Second Reading Speech, Hon. Mr Scholes MP, Acting Minister for Veterans’ Affairs, *House of Representatives Hansard*, 17 May 1985, pp 2644-2646.

³⁸ The *Veterans’ Entitlements Act 1986* (Cth) was fundamentally a consolidation of the various pieces of Repatriation legislation that had been enacted over the previous 66 years. Some 73 Acts were repealed by the *Veterans’ Entitlements Act 1986*. They are listed in Schedule 1 to the Act.

³⁹ *East v Repatriation Commission* (1987) 16 FCR 517, 74 ALR 518.

⁴⁰ *East v Repatriation Commission* (1987) 16 FCR 517 at 532-533, 74 ALR 518 at 533-534.

⁴¹ *Bushell v Repatriation Commission* (1992) 175 CLR 408, 109 ALR 30, 66 ALJR 753.

the facts. All that was required was that there be material that raised a reasonable hypothesis if the facts necessary for the hypothesis were true. The second stage then involved the examination of the facts to determine whether any of the raised facts were not true (beyond reasonable doubt) or if there were facts in existence (also determined beyond reasonable doubt) that were inconsistent with the hypothesis. The court also stated that it would be exceptional if a hypothesis were not held to be reasonable if it was proposed by a medical practitioner eminent in the relevant field of study, but that for the purposes of determining the reasonableness of a hypothesis, the Commission was bound to consider the views of opposing medical practitioners.

Immediately after this decision, the government attempted to introduce legislation to spell out, in detail, the decision-making process.⁴² However the Bill lapsed with the dissolution of Parliament for the 1993 General Election, and was not reintroduced with the re-election of the Labor Government. There was vehement opposition to the Bill from the veteran community, and the government chose to pursue a different course to achieve an amelioration of the effect of *Bushell's* case. It appointed a committee chaired by Professor Peter Baume, a former Liberal Party Minister, to inquire into the claims determining system and to produce recommendations for change.

Not long after *Bushell's* case, the High Court re-examined the legislation in *Byrnes v Repatriation Commission*.⁴³ The court reiterated the two stage test as found in *Bushell* and added that, for the purpose of raising a reasonable hypothesis, in some circumstances a fact could be assumed. Since *Byrnes'* case there have been a number of judgments of the Federal Court that have shown an inconsistent interpretation of the standard of proof provisions, especially in relation to questions as to what fact or facts can be assumed; how much material is needed to raise a reasonable hypothesis; and whether regard can be had to opposing evidence in determining whether or not a hypothesis is raised or is reasonable. Because full benches of the Federal Court had come to different conclusions on some of these issues, and the High Court had refused special leave to argue the issue in *Owens'* case⁴⁴, a five-member bench of the Federal Court was

42 Veterans' Entitlements Amendment Bill 1992.

43 (1993) 177 CLR 564, 116 ALR 210, 30 ALD 1, 18 AAR 1.

44 *Repatriation Commission v Owens* (1996) 70 ALJR 904.

specially constituted in *Repatriation Commission v Bey*.⁴⁵ In that case, the court unanimously endorsed the principles enunciated in *East's* case, stating:

A 'reasonable hypothesis' involves more than a mere possibility. It is a hypothesis pointed to by the facts, even though not proved upon the balance of probabilities. That understanding of the expression gives force to the word 'reasonable', is strongly supported by the history of the relevant provisions, and accords with the intention appearing in the Minister's second reading speech and with authority.

The reason given by the High Court for not granting special leave to appeal in *Owens'* case was that the Act had been amended to provide for a new regime in which the standard of proof provisions operated. In 1994, the Baume Committee⁴⁶ presented its report, entitled *A Fair Go*, to the Minister for Veterans' Affairs. In that report, the committee recommended reverting to the pre-1977 standard of proof. That is, if having assessed all the evidence on the balance of probabilities, the Commission could not be satisfied one way or the other (ie, the evidence was in a state of equipoise), the veteran would receive the benefit of the doubt, and the claim would be granted. It also recommended the establishment of an expert body to determine the medical issues. The only recommendation that the government accepted was the latter.

The Repatriation Medical Authority (the Authority) was established in 1994 to determine, in respect of kinds of injury, disease and death, Statements of Principles that set out the factors that must be related to service before a service connection can be said to exist. If the Authority has determined a Statement of Principle about a particular kind of injury, disease or death, a claim cannot be granted unless the veterans' circumstances are found to fall within one of the factors contained in that Statement of Principle.

The Statements of Principles provide a number of presumptive rules in relation to particular kinds of injury and disease. While a Statement of Principles takes the place of expert evidence, it only does so in a very

⁴⁵ A full bench is usually constituted by three judges.

⁴⁶ Professor Peter Baume, Air Vice Marshal Bomball and Robyn Layton QC.

limited sense. It is not evidence concerning any particular veteran, but is general evidence concerning all the possible causes of disease in veterans as a group. Meeting a factor in a Statement of Principles is a necessary, but not necessarily sufficient, element in the acceptance of a claim.⁴⁷ In a reasonable hypothesis matter, the finding of a reasonable hypothesis is merely a preliminary step in the process of determining the claim. As the High Court noted in *Byrnes* case, a claim must be rejected even if a reasonable hypothesis has been raised if the decision-maker finds a fact upon which the hypothesis was founded does not exist, or a fact exists that is inconsistent with the hypothesis. Thus, if it can be proved beyond reasonable doubt that some other cause operated to the exclusion of the hypothesised cause, the claim must be rejected. The same process applies in relation to reasonable satisfaction cases under the Statements of Principles regime. If it can be shown on the balance of probabilities that some other cause actually operated to the exclusion of the contended cause, the claim must be rejected.

Statements of Principles were not introduced to provide an extension of beneficiality: they were introduced to restrict the way in which reasonable hypotheses were to be found and the way in which decision-makers were to come to a finding of reasonable satisfaction. Nevertheless, they provide an objective difference between the two standards of proof, ensuring that the differential standards are applied by decision-makers. This is achieved by the Authority setting different levels of exposure to causative factors in its Statements of Principles depending on the standard of proof which they are to apply.⁴⁸

⁴⁷ Section 120A(3) uses the words, “is reasonable only if” (which indicates a necessary element). It does not use the words “is reasonable *if and* only if” (which would indicate a necessary and sufficient element). Similarly, s 120B(3) uses the words “is to be satisfied ... only if”, it does not use the words “if and only if”.

⁴⁸ For example, a Statement of Principles concerning colorectal cancer determined under s 196B(2) for the purposes of “reasonable hypothesis” matters provides a factor, smoking cigarettes or other tobacco products, where the equivalent of at least 15 pack years was consumed 20 years or more before the clinical onset of malignant neoplasm of the colorectum, whereas the reasonable satisfaction Statement of Principles determined under s 196B(3) provides, smoking cigarettes or other tobacco products, where the equivalent of at least 25 pack years was consumed 35 years or more before the clinical onset of malignant neoplasm of the colorectum: Repatriation Medical Authority Instruments Nos 58 and 59 of 2002 at <http://www.rma.gov.au>.

Thus Statements of Principles operate to create a presumption of causal connection once evidence has raised the existence of a factor that is contained within a Statement of Principles. However, the presumption is rebuttable by evidence that disproves that connection “beyond reasonable doubt” in the case of a veteran who has rendered “operational”, “hazardous” or “peacekeeping service”, or “on the balance of probabilities” for a veteran who has not rendered such service.

The legislation provides that individual veterans and organisations representing veterans can apply to the Authority to review its own decisions and, by so doing, can require it to conduct investigations into any kind of injury or disease for the purpose of making or amending Statements of Principles.⁴⁹ Veterans and their organisations also have the right to apply to another statutory body, the Specialist Medical Review Council (the Council), to review the contents of a Statement of Principles.⁵⁰ The Council can make recommendations to the Authority in relation to the making of a Statement of Principles or it can require the Authority to make specific amendments to a Statement of Principles.⁵¹

Decisions of the Authority and the Council are susceptible to judicial review by the Federal Court⁵² or a State Supreme Court.⁵³

In addition to the Statements of Principles determined by the Authority, the Repatriation Commission has been given a statutory discretion to make determinations having the same operative effect as Statements of Principles in respect of classes of veterans in circumstances where a particular decision of the Authority would exclude a class of veterans from obtaining a pension but the Commission’s view is that they should receive a pension.⁵⁴ The Commission has exercised this power in relation to Vietnam veterans

49 *Veterans’ Entitlements Act 1986* (Cth), s 196E.

50 *Veterans’ Entitlements Act 1986* (Cth), s 196Y.

51 *Veterans’ Entitlements Act 1986* (Cth), s 196W.

52 *Judiciary Act 1903* (Cth), s 39B (1A).

53 *Judiciary Act 1903* (Cth), s 39.

54 *Veterans’ Entitlements Act 1986* (Cth), s 180A.

who were exposed to Agent Orange and who have contracted particular types of cancer.⁵⁵

Comparative operation of relaxed evidentiary rules

Onus of proof

There are two types of onus of proof: the legal onus; and the evidentiary onus. Legislation generally only deals with the legal onus, that is, who bears the ultimate burden of proving the relevant connection with service. The evidentiary onus is a shifting onus, depending on the state of the evidence at any point in time. A presumption has the effect of shifting the evidentiary onus away from the party whom the presumption benefits.⁵⁶

Each country has approached the question of onus of proof differently. In the United Kingdom, the legal onus is on the Ministry unless the claimant makes the claim more than seven years after service, in which case it lies with the claimant. In Australia and New Zealand, the legislation expressly provides that there is no onus on anyone. While the Australian legislation requires the claimant to provide such evidence as the claimant considers relevant, this has not been taken to require a claimant to make out a *prima facie* case before the Secretary investigates the claim.⁵⁷ Nevertheless, the claimant is a compellable witness in any proceedings.⁵⁸ In Canada and the United States of America, the onus is on the claimant. In the United States of America, there is a preliminary requirement that the claimant make out a *prima facie* case in the nature of a “well-grounded claim” before the Secretary is required to assist the claimant in obtaining evidence of a service connection.

55 Acute myeloid leukaemia, chronic myeloid leukaemia, acute lymphoid leukaemia, and chronic lymphoid leukaemia: Repatriation Commission Instruments Nos 1 to 4 of 1995.

56 Morgan E M, “Some Observations Concerning Presumptions” (1931) 44 *Harvard Law Review* 906, 912 and 927.

57 Although, the claimant must identify the injury or disease that is the subject of the claim in a way that would assist the Secretary to investigate the claim: *Re Clough and Repatriation Commission* (1997) 44 ALD 457.

58 *Veterans' Entitlements Act 1986* (Cth), ss 19A, 32, 127, 128, 151.

Morgan has noted that the location of the legal onus of proof “is important at only one stage of the trial, and then only in a situation *which seldom occurs*—namely, when at the close of the evidence the mind of the trier of fact is in equilibrium upon the issue” (emphasis added).⁵⁹ If that is so, then the question arises as to whether there is any significant benefit to veterans in merely reversing the onus of proof or providing that the benefit of the doubt is to be given to the veteran when the evidence is in equipoise.

Standard of proof

In Australia a modified reverse criminal standard of proof applies for those veterans who have rendered operational, hazardous or peacekeeping service. A connection between injury or disease and service is deemed to have been disproved beyond reasonable doubt if, after consideration of all the material, a reasonable hypothesis has not been raised.⁶⁰

In New Zealand and Canada, the standard of proof is the civil standard, that is, on the balance of probabilities or the preponderance of the evidence.

In the United Kingdom, the reverse criminal standard applies to all claims. However, for claims made more than seven years after service, the claimant must produce “reliable evidence” to raise a “reasonable doubt” in his or her favour before the claim can be granted.

In the United States of America, there are a number of standards of proof that apply to different aspects of claims determining processes. Primarily, an equipoise civil standard applies to the ultimate question. That is, if at the end of the examination of the evidence there is an approximate balance of evidence for and against the success of the claim, the claim must be granted. However, there are certain presumptive rules that apply such that if the evidence shows (on the civil standard) that the claimant falls within the scope of a presumptive rule, the claim will be granted unless that presumption is rebutted on one of two standards (“clear and unmistakable evidence” or “clear and convincing evidence”) depending on the particular presumption. Both of these standards are more onerous than the civil standard. The

⁵⁹ Morgan E M, note 56 at 911.

⁶⁰ *Veterans’ Entitlements Act 1986* (Cth), s 120(1), (2) and (3).

Court of Appeals for Veterans' Claims⁶¹ has held "clear and convincing evidence" to be a higher standard of proof than "preponderance of the evidence" but less than "clear and unmistakable evidence". It equated "clear and unmistakable evidence" with another United States of America legal concept, "clear and unmistakable error", which it held meant "errors that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed." Thus it would appear that "clear and unmistakable evidence" would equate to evidence required to prove a matter beyond reasonable doubt.⁶²

In Australia,⁶³ the United States of America,⁶⁴ and the United Kingdom,⁶⁵ it has been held that jurisdictional facts (for example, whether the claimant is a veteran, or has rendered relevant service, or suffers from the claimed injury or disease) must be determined on the civil standard no matter what other standards might apply to other aspects of the determination of a claim.

Inferences

Canadian legislation requires the decision-maker to "draw all reasonable inferences in favour of the claimant."⁶⁶ It has been held to

61 *Vanerson v West*, 12 Vet App 254 (1999).

62 In a concurring opinion in *Vanerson v West*, but dissenting only as to the remedy (the Court remanded the matter for readjudication), Nebeker J said: "If rebuttal of a presumption could be accomplished by a preponderance of the evidence, with reasonable inferences drawn therefrom, we would have a different case for review. But such is not possible under an 'unmistakable' standard. Inferences are permitted, and while there is room for mistake even under the 'reasonable certainty' requirements of a 'clear and convincing' standard of proof case, only an inference that is iron clad and copper riveted can be 'unmistakable'. The evidence in this case ... is not 'undebatable', and I would reverse the Board's holding and direct the calculation of benefits"

63 *Ferriday v Repatriation Commission* (1996) 150 ALR 67; *Repatriation Commission v Cooke* (1998) 160 ALR 17; *Budworth v Repatriation Commission* (2001) 33 AAR 476, 66 ALD 285; *Benjamin v Repatriation Commission* (2001) 34 AAR 270, 70 ALD 622.

64 *Lauran v West*, 11 Vet App 80 (1998).

65 *Secretary of State for Social Security v Bennett* (unreported, 17 October 1997, Alliot J, High Court of Justice, Queen's Bench Division, PA/2/97, PA/5/96, PA/8/96).

66 A similar provision applied in Australia until 1977.

be an error of law for a decision-maker to make adverse findings without reference to evidence from which an inference could have been made in favour of the claimant.⁶⁷ In *Fillmore v Canada (Veterans Appeal Board)*,⁶⁸ the court held that in a case where medical evidence did not rule out the possibility that the applicant developed glaucoma during service, the Board had erred in failing to draw an inference in favour of the applicant and rejecting his claim for disability pension.

This would indicate that whether an inference can be drawn from particular evidence is a question of law rather than merely a question of fact. However, whether the inference has been displaced by other evidence is a question of weight and credibility, which cannot be examined on judicial review unless it is so unreasonable that no reasonable decision-maker could have come to such a conclusion.⁶⁹

In New Zealand, the decision-maker must draw all reasonable inferences in favour of the claimant from the evidence and all the circumstances of the case. Additionally, the claimant is to be given the benefit of any doubt as to the existence of any fact, matter, cause, or circumstance that would be favourable to the claimant.⁷⁰

Presumptions

While the “benefit of [a reasonable / the / any] doubt” provision has been taken as importing a standard of proof in the United Kingdom⁷¹ and in the United States of America⁷², it has not been taken as such in Australia, Canada or New Zealand. The approach taken in Australia, Canada and New Zealand to this phrase seems to be better explained as it being a presumptive rule or an inferential rule rather than a standard of proof (this is also the practical effect of its application in the United States of America even if the rhetoric of the courts is that it

⁶⁷ *Chénier v Canada (Veterans Appeal Board)* (10 September 1991, unreported, case number A-927-90)

⁶⁸ *Fillmore v Canada (Veterans Appeal Board)* (1990) 111 NR 354 (FCA).

⁶⁹ This appears to be the approach taken by the High Court of New Zealand in *Nixon v War Pensions Appeal Board and Auld*, unreported, 5 March 1993 (affirming *Auld v War Pensions Board* [1990] NZAR 40).

⁷⁰ Paragraph 18(2)(c) *War Pensions Act 1954* (NZ).

⁷¹ *Judd v Minister of Pensions and National Insurance* (1965) 5 WPAR 679, [1965] 3 All ER 642, [1966] 2 QB 580.

⁷² *Gilbert v Derwinski* (1990) 1 Vet App 49 at 55.

is a lesser standard of proof than the balance of probabilities). In these countries, the effect of giving the veteran the “benefit of the doubt” connotes that, if after assessing the evidence for credibility and weight, drawing reasonable inferences, and finding facts, the decision-maker is in doubt as to an important fact upon which the success of the claim depends, that doubt must be decided in favour of the claimant. In such a situation, prior to applying the “benefit of the doubt”, the matter is in equipoise. In other words, the situation is that the success of the claim depends on the finding of a particular fact and the evidence on that fact is uncertain or is equally divided, or there is a statutory requirement to draw favourable inferences (as there used to be in Australia and still is in Canada and New Zealand), and the state of the evidence is such that no relevant inference can be drawn either for or against the claimant. If that is the situation, the effect of the “benefit of the doubt” is to permit a favourable inference to be drawn where none could otherwise be drawn. Thus, once the decision-maker decides that the evidence overall does not indicate a rejection of the claim, but on the evidence there remains an important fact that the decision-maker is unable to decide to her/his reasonable satisfaction, that fact is *presumed* to exist even though it could not have been reasonably inferred from the evidence.

While this is a form of presumptive or inferential rule, it has been seen by some as reversing the onus of proof but this has been denied by the Canadian Federal Court. In *Hunt v Canada (Minister for Veterans' Affairs)*,⁷³ Muldoon J said:

The applicant must prove the civil standard that on a balance of probabilities, with the bonus of having this evidence put in the best light possible, his disease was contracted while in the service of his country. This civil standard must be read in concert with the entitling provision of section 21 of the *Pension Act*, RSC 1985, Chap P-7 [providing for certain presumptions].

⁷³ *Hunt v Canada (Minister for Veterans' Affairs)* (unreported, 20 March 1998, case number!T-217-97) at [9].

In *Hall v Canada (Attorney-General)*,⁷⁴ Reed J said:

While the applicant correctly asserts that uncontradicted evidence by him should be accepted unless a lack of credibility finding is made, and that every reasonable inference should be drawn, and any reasonable doubt resolved in his favour, he still has the obligation to demonstrate that the medical difficulty from which he now suffers arose out of or in connection with his military service; that is, the causal linkage must be established.

In *Metcalf v The Queen*,⁷⁵ Evans J said:

[W]hile claimants have the burden of proving their entitlement to a pension, they are considerably assisted by the provisions of section 39 of the *Veterans Review and Appeal Board Act* which direct the Board on the manner in which it must approach the evidence.

... While paragraphs (a), (b) and (c) of this section [39] may not create a reverse onus by requiring the respondent to establish that a veteran's injury or medical condition was not attributable to military service, they go a considerable way in this direction by requiring, in effect, that the claimants be given the benefit of any reasonable doubt.

Thus the onus of proof is not reversed in the sense that the claimant must produce sufficient evidence to lead the decision-maker to reach at least an equipoise position. However, the usual result of reaching that position—that the claimant would not succeed (because the preponderance of the evidence does not favour the claimant's

⁷⁴ *Hall v Canada (Attorney-General)* (unreported, 22 June 1998, case number T-2267-97), at [20]. In *Weare v Canada (Attorney-General)* (unreported, 11 August 1998, case number T-347-97), MacKay J said, at [21]: "In the absence of any evidence of causality presented by the applicant, it is not open to the Board to conclude that such causality exists where medical reports it has requested suggest otherwise. In these circumstances, the Board cannot simply infer that ailments developing many years after Mr Weare's discharge from the services were caused by his fall while in training in 1958."

⁷⁵ *Metcalf v The Queen*, (unreported, 6 January 1999, case number T-1136-98) at 6.

case)⁷⁶—is reversed by the operation of the presumptive rule that the ultimate fact necessary to accept the claim is to be inferred in such a situation.

Justice Oliver Wendell Holmes Jr took the view that all common law presumptions are based upon inference from the probability of the presumed event given the predicated facts.⁷⁷ This view was disputed by Morgan, who suggested common law presumptions are based upon a number of factors, including social policy; balance of ability to obtain evidence; procedural expediency or convenience; and logical considerations based on human experience (ie, probabilities).⁷⁸ While there might be debate about the basis of common law presumptions, it seems clear that the statutory presumptions in veterans' legislation fit within some or all of these bases, and it is appropriate that they do. Certainly, the discretionary determinations of the Commission made after the Authority has refused to include a particular connection in a Statement of Principles, are presumptive rules based on social policy considerations rather than the probabilities of causal connection.

Behind the reason for the exhaustive nature of Statements of Principles was the lack of confidence in non-medical tribunals to deal adequately with complex medical-scientific issues, and what the government saw as aberrantly generous decisions on the part of tribunals, leading to excessive government expenditure on pensions.⁷⁹

⁷⁶ *McDonald v Director-General of Social Security* (1984) 1 FCR 354; 6 ALD 6.

⁷⁷ *Greer v United States*, 245 US 559,561 (1918).

⁷⁸ Morgan E M, "Some Observations Concerning Presumptions" (1931) 44 *Harvard Law Review* 906.

⁷⁹ The Explanatory Memorandum to the Bill, at p 5, quoted from a statement of reasons in an Administrative Appeals Tribunal case (*Re McIntyre and Repatriation Commission*) where the Tribunal said: "Such fanciful views, while bordering on an insult to the intelligence, do not advance the positions of ex-servicemen. Whilst recognising that our findings of the fact are final, whether right or wrong, ... the Tribunal is concerned that so much money is consumed in repeated and persistent attempts to persuade it that there is factual support for the hypotheses advanced in this matter. If weak minded Tribunals accept such material, this will only lead to increased money being spent on computer searches for papers and witnesses' expenses, while avoiding a review of the present legislation with its fictionalised method of determining war pensions for veterans and their widows, who probably deserve them, for the service rendered, rather than for fanciful hypotheses advanced." The Explanatory Memorandum then cited a number of Tribunal cases that had, indeed, accepted that very hypothesis as being reasonable.

The United States of America Congress has not sought to make its presumptive rules exhaustive, although the view had been taken by the Administration, the Board of Veterans' Appeals and the Court of Veterans' Appeals⁸⁰ prior to 1994 that the list of radiogenic diseases was exhaustive in the sense that no diseases could be linked to radiation unless they were included on the list. This was overruled in *Combee v Brown*⁸¹ by the Court of Appeals for the Federal Circuit, when it was held that it was open to the claimant to produce evidence that his particular disease was caused by radiation, and to rely on the normal service connection provisions rather than the presumptive rules. The notion of exhaustive presumptive rules has not been further pursued in the United States of America.

Perhaps the relative impacts of service-related smoking habits as an avenue for acceptance of diseases has played a significant part in the different attitudes of Australian and American administrations to whether the presumptive rules should be exhaustive. In Australia, where service-related smoking accounts for the larger part of all grants of pensions, the Administrative Appeals Tribunal decision in *Re Chandler*⁸² (presided over by the President of the Tribunal, and thus of persuasive value) was seen by the department as creating a potential liability that the government could not afford. The Tribunal in that case accepted that the hypothesis of a veteran's service-related smoking causing his prostate cancer was not unreasonable.⁸³ This case was certainly one trigger for the creation of the Authority. This is borne out by the fact that within a matter of days after the members were appointed to the Authority, the Commission made a formal application to the Authority to investigate whether smoking could cause prostate cancer. The Authority subsequently convened an international conference on the issue and determined that there was no relevant connection.⁸⁴

⁸⁰ The Court of Veterans' Appeals was renamed the Court of Appeals for Veterans' Claims on 11 November 1998.

⁸¹ *Combee v Brown* 34 F.3d 1039 (Fed. Cir. 1994).

⁸² *Re Chandler and Repatriation Commission* (1993) 30 ALD 107.

⁸³ The Tribunal expressly stopped short of saying that the hypothesis was reasonable, but said that it could not find that it was *unreasonable*.

⁸⁴ The findings of the consensus conference held on 12-14 February 1996 are available at <<http://www.rma.gov.au/pubs/cancer.htm>>.

In the United States of America, by contrast, smoking had only occasionally been accepted by decision-makers as giving rise to liability for pension. While the Veterans' Administration's Office of General Counsel had issued an opinion in 1993 stating that such a connection could give rise to liability, very few decision-makers were aware of, or acted upon, that opinion. In any event, it became a moot point in 1997 with the passing of legislation expressly excluding liability arising from service-related smoking.⁸⁵ In 1997 in Australia, legislation was also enacted to exclude liability for smoking, but only in respect of smoking engaged in on or after 1 January 1998.⁸⁶ The American legislation covered smoking engaged in at any time. This distinction highlights why comparisons of acceptance rates of claims cannot readily be made between Australia and other countries. By far the greatest reason for acceptance of claims in Australia is service-related smoking addiction, whereas, in the United States of America, such a connection between disease and service is expressly precluded from giving rise to liability to pay a pension, and in Canada and the United Kingdom it is rarely accepted as being capable of giving rise to liability.

Decision-making survey

To assess the practical effect of certain evidentiary rules, a survey of members of the Veterans' Review Board was conducted over a period of six weeks. They were asked to answer certain hypothetical questions (Table 1, questions 1A to 1D) when they had *granted* claims under the *reasonable hypothesis* rules and other hypothetical questions (Table 2, questions 2A to 2C) when they had *rejected* claims under the *reasonable satisfaction* rules. The questions were designed to test how the outcome in each case might have been affected if the rules were different.

The questions and results for the reasonable hypothesis cases were as follows:

⁸⁵ 38 USC §§ 1110, 1131. This exclusion was inserted in 1998 by § 8202 of the *Transportation Equity Act for the 21st Century* as a savings provision to assist in paying for the programs in this otherwise unrelated legislation.

⁸⁶ *Veterans' Entitlements Act 1986*, ss 8(6), 9(7), 70(9A).

Table 1: Reasonable hypothesis cases—Grant of entitlement

1A. Would the result have been the same if you had applied the reasonable satisfaction standard to the reasonable hypothesis SoP?	Yes 41%	Maybe 27%	No 32%
1B. Would the result have been the same if you had applied the reasonable satisfaction standard to the reasonable satisfaction SoP?	Yes 42%	Maybe 16%	No 42%
1C. Did the relaxed evidentiary rules in s138 affect the result?	Yes 30%	Maybe 6%	No 64%
1D. If Yes or Maybe , was it because of taking into account:	<ul style="list-style-type: none"> • Hearsay evidence 11% • Effects of passage of time 26% • Unavailability of witnesses 17% • Deficiency in official records 37% • Other (specify) 9%* 		

* All of these were where a yes had been given to 1C, but none of the options in 1D had been circled (including the “Other” category).

The answers to question 1A indicate that nearly one third of grants *would* have been rejected had the less beneficial standard of proof applied, and a further 27% *might* have been rejected.

Question 1B was intended to demonstrate the practical effect, if any, of the Statements of Principles made under the reasonable hypothesis rules and those made under the reasonable satisfaction rules. The answers indicate that if the less generous Statement of Principles had been applied, nearly half of those claims that might still have been granted by applying the less generous standard of proof but under the more generous Statement of Principles, would certainly have been rejected under the less generous Statement of Principles.

The answers to question 1C indicate that the relaxation of the rules of evidence in section 138 of the *Veterans' Entitlements Act 1986* (Cth) would have been a deciding factor in just over a third of all grants under the reasonable hypothesis rules. That is, had the relaxation of those rules not applied, nearly a third of claims would not have been granted. However, when the different elements of relaxation are taken into account on their own, the relaxation of the need for independent witnesses to corroborate the veteran's evidence is the major factor in the success of those cases rather than the relaxation of the rule against hearsay evidence.

Relationships between answers in Table 1

The following table sets out the number of responses that were given for each possible combination of answers to the questions asked in Table 1. From this table, the relationships between each of the answers can be determined and analysed.

Table 1.1

1A	1B	1C		1D(a)	1D(b)	1D(c)	1D(d)	1D(e)
Y	Y	Y	10	3	4	3	2	2
Y	Y	M						
Y	Y	N	33					
Y	M	Y						
Y	M	M						
Y	M	N						
Y	N	Y						
Y	N	M						
Y	N	N						
M	Y	Y						
M	Y	M						
M	Y	N	1					
M	M	Y	4				4	
M	M	M						
M	M	N	9					
M	N	Y	6				3	3
M	N	M						
M	N	N	7					
N	Y	Y						
N	Y	M						
N	Y	N						
N	M	Y						
N	M	M	3		3			
N	M	N						
N	N	Y	12	3	7	6	11	
N	N	M	3					
N	N	N	15					
			103	6	14	9	20	5

Note: Y = yes, M = maybe, N = no)

Of those who answered **“yes”** to 1A (ie, the claim would still have been granted had the less generous standard of proof applied), 100% answered **“yes”** to 1B (ie, the claim would have been granted on the less generous standard of proof as well as the less generous Statement of Principles). One explanation for this result is that in a significant number of cases, the underlying facts are not in doubt, and the cause of the disease is so obvious that it would not matter which Statement of Principles or what standard of proof applied, the claim would be granted. To some extent this is confirmed by the fact that in 77% of these cases, the respondents said that the relaxed rules in section 138 played no decisive part in the decision.

Of those who answered **“maybe”** to 1A, one respondent answered **“yes”**⁸⁷ and the rest were evenly divided between **“maybe”** and **“no”** to 1B. That is, half of those who might have still granted the claim under the less generous standard of proof would not have granted the claim on that standard combined with the less generous Statement of Principles. A **“maybe”** answer to 1A would indicate that the evidence required to raise the facts required by a Statement of Principles might not be sufficient to be reasonably satisfied that they actually existed. The fact that the answer to 1B changed to a **“no”** would indicate that the difference in the result was not because of a doubt about the truth of the underlying facts, but because of the difference between the two Statements of Principles. Of those who answered **“no”** to 1A, all but one respondent⁸⁸ answered **“no”** to 1B.

The questions and results for the reasonable satisfaction cases were as follows:

⁸⁷ A “maybe” to 1A should not have resulted in a “yes” to 1B because it would indicate that a claim would have been granted using the *less* beneficial Statement of Principles while it might *not* have been granted using the *more* beneficial Statement of Principles.

⁸⁸ A “no” to 1A should have automatically meant a “no” to 1B, but one respondent answered “maybe” to 1B, indicating that a claim might have been granted using the *less* beneficial Statement of Principles while it would *not* have been granted using the *more* beneficial Statement of Principles.

Table 2: Reasonable satisfaction cases—Denial of entitlement

2A. Would the result have been the same if the reasonable hypothesis law had applied, but with the reasonable satisfaction SoP?	Yes 64%	Maybe 18%	No 18%
2B. Would the result have been the same if the reasonable hypothesis law had applied, with the reasonable hypothesis SoP?	Yes 59%	Maybe 11%	No 30%
2C. If the law were that the applicant had to be given the “ benefit of the doubt ”*, would this have changed the result? * Applying whatever you understand this would mean if it were a general principle governing decision-making.	Yes 24%	Maybe 20%	No 56%

The answers to 2A indicate that only 18% of rejected cases *would* have been granted and a further 18% *might* have been granted had the reasonable hypothesis rules applied to the facts of the case. That is, in 36% of rejected cases, the evidence was insufficient for the decision-maker to be reasonably satisfied that the required facts existed, but in at least half of them, the evidence was at least sufficient to raise a *prima facie* case that they existed. The change in the answers to questions 2A and 2B reflects the differences between the two types of Statements of Principles. This is discussed below. The answers to 2C indicate the effect of a “benefit of the doubt” rule on the assessment of the factual issues. This is also discussed below.

Relationships between answers in Table 2

Table 2.1 sets out the number of responses that were given for each possible combination of answers to the questions asked in Table 2.

Table 2.1

2A	2B	2C	
Y	Y	Y	4
Y	Y	M	9
Y	Y	N	57
Y	M	Y	
Y	M	M	
Y	M	N	
Y	N	Y	
Y	N	M	6
Y	N	N	
M	Y	Y	
M	Y	M	
M	Y	N	
M	M	Y	3
M	M	M	9
M	M	N	1
M	N	Y	9
M	N	M	
M	N	N	
N	Y	Y	
N	Y	M	
N	Y	N	
N	M	Y	
N	M	M	
N	M	N	
N	N	Y	12
N	N	M	
N	N	N	9
			119

Of those who answered “**yes**” to 2A, 92% answered “**yes**” and 8% answered “**no**” to 2B. This would indicate that for 8% of those rejected claims that would have been unaffected by a relaxed standard applying to the facts necessary to raise a hypothesis, their level of exposure to the causal factor in the Statement of Principles would have been sufficient to grant the claim had the more beneficial Statement of Principles applied to their case. Of those who answered “**maybe**” to 2A, 59% answered “**maybe**” and 41% answered “**no**” to 2B. This would indicate that the difference between the two types of Statements of Principles would have been a decisive factor in 41% of those cases that might not otherwise have succeeded applying the more beneficial standard of proof to the facts. As would be expected, 100% of those who answered “**no**” to 2A answered “**no**” to 2B.

The “benefit of the doubt” question (2C) did not presume that any Statements of Principles applied. Of those who answered “**yes**” to both 2A and 2B (that is, the claim would have been rejected under the most beneficial rules currently applying in Australia), 6% *would* have granted and a further 13% *might* have granted the claim under a “benefit of the doubt” rule. Of those who answered “**maybe**” to 2A, 55% *would* have granted and a further 36% *might* have granted the claim under a “benefit of the doubt” rule. Of those who answered “**maybe**” to 2B, 69% *would* have granted and 23% *might* have granted the claim under a “benefit of the doubt” rule. Only one of these respondents would not have granted the claim. Of those who answered “**no**” to both 2A and 2B, 57% would have granted the claim and the remaining 43% would have rejected the claim under a “benefit of the doubt” rule.

This appears to indicate that, for a significant number of respondents, the “benefit of the doubt” probably equates to the situation applying in Australia before 1994 or 1985. That is, it would be more generous than the most generous law currently applying in Australia. This is indicated by the finding that 19% of those who answered “**yes**” to both 2A and 2B *would* or *might* have granted the claim under a “benefit of the doubt” rule while rejecting it under the most beneficial current law, and by the finding that 69% of “**maybe**” respondents to 2B *would* have granted the claim under such a rule while only *maybe* granting it under the most beneficial current law.

However, for 43% of those who *would* have granted the claim under a reasonable hypothesis standard applying the less generous Statement of Principles, the claim would not have succeeded under a “benefit of

the doubt” rule. This would indicate that, for those respondents, such a rule would be somewhat less generous than the current “reasonable hypothesis” rules.

Given that respondents were asked to apply whatever they considered “benefit of the doubt” meant, it is not surprising that there was this inconsistency in the application of such a rule. Such disparity in views reflects the public disagreement regarding the meaning of such a provision as it applied in Australia from 1929 to 1977. It also reflects the very different interpretation of similar words in courts in the United Kingdom (importing a reverse criminal standard) compared with that of courts in Canada, the United States of America and Australia (when evidence is in equipoise, the claimant succeeds).

Relevance of the results

This survey only studied the decision-making of those Board members who chose to participate. It was not possible to determine accurately the proportion of relevant decisions made in the survey period that were included in the survey, but it is likely to have been slightly less than 50%.⁸⁹

The environment in which Board members make their decisions is different from that in which delegates of the Commission make their decisions. The Board sits as a panel of three members, one of whom is legally qualified, and the decision-making is generally by consensus and without dissent. Additionally, they usually have the advantage of hearing oral evidence from the applicant and therefore are in a better position to assess credibility. Thus, the results of this survey are not necessarily a good indication of the effect of the evidentiary rules on delegates of the Commission.

⁸⁹ This is estimated on the basis that over six weeks there would have been approximately 720 hearings involving 3 members per hearing (ie, potentially 2160 respondents). But of those hearings, only 60% would have involved an entitlement issue. There are approximately 1.2 entitlement matters on average per entitlement application. Approximately 80% of entitlement applications concern reasonable hypothesis rules and 20% concern reasonable satisfaction rules. In that period 18% of all entitlement matters were granted. If it is assumed that the grants were divided proportionately between the reasonable hypothesis and reasonable satisfaction cases, this would mean that there would have been a potential 224 reasonable hypothesis responses and 255 reasonable satisfaction responses fitting in the categories covered by the survey. In fact 103 and 119 responses, respectively.

Conclusions from the survey

Notwithstanding these reservations, the survey would appear to indicate that:

- where decision-makers are required to apply two standards of proof, they are able to differentiate between them in their application, and thus produce different outcomes;
- the different standards within the Statements of Principles make a significant difference to the outcomes in cases;
- a general instruction to give an applicant “the benefit of the doubt” tends to result in inconsistent interpretations and therefore inconsistent application.

Decision-making

Decision-making is an area of human behaviour that is the subject of significant academic research. There appears to be some general agreement among behavioural scientists that decision-makers tend to make decisions that reflect their personal biases and attributes, which may have many sources, including cultural, educational and environmental. Factors that have been shown to influence decision-making include whether it is being made by a group or as an individual; the goal of the decision-making process; the importance of the decision; the complexity of the task; the personality and psychological state of the decision-maker; intellectual capacity; the attitude of the decision-maker to the task, for example, complacency, avoidance, tolerance for uncertainty, or hypervigilance; perceived attractiveness or deservedness of a person who might benefit from a particular decision; situational matters such as time and resource pressures; rules and customs applicable to the process; and the range of available choices.⁹⁰

Very few of these factors could be said to be relevant matters to be taken into account by a statutory decision-maker. If their influence were adverted to in reasons for decision, a court would readily set aside the decision. However, time and again, studies have shown that

⁹⁰ Many of these factors are discussed in Radford, Mark H B, “Culture and its Effect on Decision Making”, *Perspectives on Judgment and Decision Making*, Loke, Wing Hong, editor, Scarecrow Press Inc, Lanham, Maryland USA, 1996, at pp 49-66.

these factors regularly influence the making of decisions. Therefore, it would appear that provided decision-makers do not disclose that these factors have been an influence, they can get away with it. The fact that they rarely disclose such influences is usually not because of any conscious intention to hide them, but because they are unaware, and may sincerely deny, that these factors have influenced them. Loke has said:

[I]ndividuals choose the first alternative that they perceive would give them a satisfactory solution to their problems. Hence individuals are bounded in their ability to make decisions by their finite cognitive capacity, affective attributes, and the environment. ... [M]ost human decision making tends to be concerned with the discovery and actual selection of satisfactory alternatives rather than in obtaining optimal decisions.⁹¹

Decision-makers in veterans' benefits agencies and tribunals are just as human as other decision-makers, and are likely to be influenced by similar factors. However, there are peculiar factors, other than the legislative schemes themselves, that are likely to be operating in the veterans' jurisdiction that would tend to set it apart from other administrative decision-making systems.

The notion of a societal debt being owed to veterans is likely to be an influential factor in the minds of decision-makers. This notion, one encouraged by society, is that those who have risked their lives to protect the political and national ideals of a society should be compensated for any loss occasioned in the course of their self-sacrificing efforts on behalf of that society. For some, there is a deeper sense of debt in that they believe that society should look after all the needs of veterans, whether those needs arose out of their service to society or not.⁹²

If that is the rationale, then it is probable that non-veteran decision-makers are more likely to be influenced by a "debt" notion than

91 Loke, Wing Hong, "Models of Judgment and Decision Making: An Overview", *Perspectives on Judgment and Decision Making*, Loke, Wing Hong (ed), Scarecrow Press Inc, Lanham, Maryland, USA, 1996, p 4.

92 Pearce D and Holman D, *Review of the Repatriation Medical Authority and the Specialist Medical Review Council*, Commonwealth of Australia, Canberra, 1997, pp 4-5.

veteran decision-makers, except of course when it comes to self-interest. A veteran decision-maker might see other veterans as no more deserving than themselves, whereas a non-veteran might have a sense that the veteran has done something special for them and their society, thus they owe the veteran something. This is supported by anecdotal evidence from decision-makers and other staff in veterans' agencies. It was also a view put in 1929, by Mr!George Yates, MHR, in relation to the Bill to establish the War Pensions Entitlement Appeal Tribunal:⁹³

I am not greatly enamoured of the provisions under which returned soldiers will comprise the personnel of the different boards. ... It has been my experience that returned soldiers receive just as harsh treatment from ex-soldiers as from civilians. I should be inclined to give an outsider the opportunity to administer this Act, rather than place its administration in the hands of a returned soldier. Civilians feel that they are under some obligation to the returned soldier, and would administer the Act in such a way that a far greater measure of justice would be meted out to returned soldiers than otherwise would be the case.

There has been a high proportion of veterans as decision-makers in Australia and the United States of America, and probably in the other countries. In Australia, the preference given to veterans in employment with the Repatriation Department and in appointment to statutory office within the portfolio meant that, until the 1960s, all of the decision-makers at all levels of the determining system (even the medical members of the Tribunals) were veterans.

When the author joined the Department of Veterans' Affairs in 1979, nearly all the decision-making positions in the Department were still held by Second World War veterans, and anecdotes regarding unequal treatment between former members of the different services, and between categories of ex-service personnel based on rank, corps, or decorations, were not uncommon. Elements of this can be seen in

⁹³ *Hansard*, vol 120, 21 March 1929, p 1645. The member for Wentworth, Mr Marks, said, at p 1672, "The soldier members may use a rod of iron on some of the boys. But we shall have to chance it."

Whiting's, *Be in it, Mate!*, a novel written as an exposé of supposed rorts in the Australian veterans' system, published in 1969.⁹⁴

Evidence and proof

While maximising accuracy in fact-finding is normally accorded high value in decision-making, it has to be weighed against other values such as speed, economy, procedural fairness, humaneness, public confidence, and the avoidance of vexation for participants.⁹⁵ In the veterans' jurisdiction, it also has to be weighed against a sense of obligation owed by the community to veterans.⁹⁶ The relaxed evidentiary rules in veterans' legislation indicate attempts to set such a balance at an appropriate level.

Twining and Stein⁹⁷ note that any fact-finding process will involve risk of error and that any criteria devised to distribute the risk between the parties is bound to rest on political morality. They cite the "beyond reasonable doubt" formula for criminal matters as an example: it gives protection to innocent persons from the risk of wrongful conviction while permitting some criminals to avoid penalty and remain free in the community.

In veterans' legislation, relaxing evidentiary rules may permit a significant number of claims to succeed that, in reality, have no connection with the veterans' service. Holman⁹⁸ made an estimate, based on principles of epidemiology, of the proportion of non-genuine cases that would succeed under the Statements of Principles regime in Australia. He noted that, in relation to some diseases, as low as 2 successful claims in 1,000 would be justified by a true causal

94 Whiting J, *Be in it, Mate!*, Veritas Publications, Adelaide, 1969. Discussed in chapter 16, "Be in it Mate!", of Lloyd C and Rees J, *The Last Shilling, A History of Repatriation in Australia*, Melbourne University Press, 1994.

95 Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992, at p xvii.

96 *Veterans' Review and Appeal Board Act 1995* (Can), s 3, expressly requires such considerations to be taken into account in decision-making. In other countries, the debates in Parliament or Congress clearly indicate that such matters are to be taken into account.

97 Twining W and Stein A, note 95

98 Pearce D and Holman D, *Review of the Repatriation Medical Authority and the Specialist Medical Review Council*, Commonwealth of Australia, Canberra, 1997.

connection and 998 would not, and that, generally, for veterans who had rendered operational service, the truly causal cases would amount to between 5% and 10% of all accepted claims. For those non-operational service veterans to whom the normal civil standard and onus is meant to apply, he estimated that the average would be “most unlikely to be anywhere near as high as 50%.”⁹⁹

Holman’s figures, derived using epidemiological principles, were based on estimates of actual cause in a relevantly exposed and diseased population, and the premise that it is rarely possible to be certain of the actual cause of any particular disease in any individual, except in cases of obvious direct injury or unique and sufficient causes. If it is known that factor A causes disease X, but it only causes it in a proportion of those people who were exposed to the factor and who have the disease (a statistical measure known as the “aetiologic fraction”¹⁰⁰) and it is not possible to identify which individuals were susceptible to the operation of that causal factor, the question to be decided at a policy level is how small a proportion must it be before a decision-maker should reject claims that service exposure to factor A caused any particular veteran’s disease X. If a strict balance of probabilities test were to apply, one might suggest that 51% would be the appropriate proportion. If it were less than that, it would mean that it is more likely than not that the veteran is in the group whose disease has some other cause. But a 51% acceptable proportion level would mean that in 49% of accepted cases the disease would not actually have been caused by the service factor. That level of non-genuine acceptance appears to be politically acceptable for ordinary civil cases.

On policy grounds in veterans’ matters, it might be decided that a smaller aetiologic fraction might be selected as the cut-off level, say 33%, at which claims would be rejected. But this would mean that while 67% of non-genuine cases would be properly rejected, 33% of rejected claims would, in fact, have been genuine. However, one could not tell which cases fell into that 33%. Where does one draw the line?

In Australia, Parliament has delegated to the Authority this policy decision in respect of as many kinds of injury and disease as the Authority sees fit to determine. The statute gives an indication of the level of beneficiality by providing that the Authority is to include

⁹⁹ Pearce D and Holman D, note 98 at pp 94-97.

¹⁰⁰ This concept is explained by Professor Holman in some detail in Pearce D and Holman D, note 98 at pp 117-125, particularly at pp 123-124.

factors such that it can be said for every case to which that factor applies, it would be a “reasonable hypothesis” that exposure to that factor contributed to the cause of the veteran’s disease.¹⁰¹ The courts have expanded on what is meant by a “reasonable hypothesis” in this context, by indicating that it must be more than a possibility, and must not be obviously fanciful, too remote, or too tenuous. As noted above, Holman indicates that the Authority has selected a generous level, even for those matters that are supposed to be decided on the balance of probabilities. In public forums, the Chairman of the Authority has indicated that the Authority aims to operate at a 5% cut off level for “reasonable hypothesis” matters, which he says is consistent with the “20 to 1” chance referred to by the High Court in *Byrnes*’ case as being consistent with the level of generosity intended for a “reasonable hypothesis”.¹⁰² This assessment appears to have been borne out by Holman’s findings.

In the United States of America, a similar approach has been taken in relation to particular kinds of diseases. Indeed, the designers of the Australian system borrowed its concept of “sound medical-scientific evidence” from the American legislation.¹⁰³ Diseases can be added to

¹⁰¹ In *VVAA v Cohen* (1996) 70 FCR 419, Tamberlin J said at p 422: “[T]he factors contained in a s.1196B(2) Statement must be such that it can be said, in relation to every person for whom a factor is relevant and who has suffered or contracted or died from the relevant kind of injury or disease, that a ‘reasonable hypothesis’ has been raised connecting that person’s injury, disease or death with his or her service.” (This passage was quoted with apparent approval in *VVAA v SMRC* [1999] NSWSC 403 (unreported, James J, Supreme Court of NSW, 4!May 1999, at pp 47-49).)

¹⁰² The High Court said: “It was not open to the Tribunal ... to say that the hypothesis relied on by the appellant was not reasonable because there was only a 20 to 1 chance of it being valid. A hypothesis within that degree of probability cannot as a matter of law be regarded as unreasonable for the purposes of s.120.”

¹⁰³ The author of this article wrote the drafting instructions for the Australian legislation and was closely involved in the development of policy for the Authority and the Statements of Principles system. The concept of “sound medical-scientific evidence” was developed from the starting point of the US legislation, which referred to “sound medical and scientific evidence”: 38 USC § 1116, and 38 CFR § 311, which provides definitions of “sound medical evidence” and “sound scientific evidence” for the purpose of determining what diseases should be added to the lists of presumptive diseases. For example, 38 CFR §1311(c)(3) provides, “‘**sound scientific evidence**’ means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and ‘**sound medical evidence**’ means observations, findings, or conclusions

lists of presumptive diseases if the presumptive connection is based on sound medical and scientific evidence.

Cohen stated that “at the heart of the idea of justice ... lies the principle that like cases should be treated alike. Justice substitutes the rule of law for the play of despotic caprice.”¹⁰⁴ Brennan J made a similar statement in *Drake’s* case concerning the application of government policy by tribunals.¹⁰⁵ Brennan J said:

There are powerful considerations in favour of a Minister adopting a guiding policy ... Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.

In *Routen v West*, the United States Court of Appeals for the Federal Circuit held that a presumption is a rule of law for the handling of evidence, affording a “party for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption. ... However, when the opposing party puts in proof to

which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.”

Section 5AB(2) of the *Veterans’ Entitlements Act 1986* (Cth) provides: “Information about a particular kind of injury, disease or death is taken to be ‘**sound medical-scientific evidence**’ if: (a) the information: (i) is consistent with material relating to medical science that has been published in a medical or scientific publication and has been, in the opinion of the Repatriation Medical Authority, subjected to a peer review process; or (ii) in accordance with generally accepted medical practice, would serve as the basis for the diagnosis and management of a medical condition; and (b) in the case of information about how that kind of injury, disease or death may be caused--meets the applicable criteria for assessing causation currently applied in the field of epidemiology.”

¹⁰⁴ Cohen J, “Freedom of Proof”, 1983, reprinted in Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992, at p 4.

¹⁰⁵ *Re Drake and the Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at p 640.

the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears.”¹⁰⁶

A determining system that has presumptive rules will tend to reduce the number of facts that need to be proved by evidence. The fewer issues that a decision-maker needs to decide, the greater the prospect of consistency in decision-making. Giving the task of determining the policy in relation to technical medical-scientific issues to experts who have a statutory duty to determine these issues must assist in promoting consistency and accuracy in decision-making in relation to these potentially contentious issues. In *Jensen v Brown* the United States Court of Appeals for the Federal Circuit noted the role of presumptions under American veterans' legislation:¹⁰⁷

Section 1154 makes it abundantly clear that special considerations attend the cases of combat veterans. These veterans may prove service-connection by ‘satisfactory lay or other evidence’ even in the absence of any official records. In addition, the Secretary ‘shall resolve every reasonable doubt in favor of the veteran’. This evinces a strong intent to provide generously for the service-connected disabilities of combat veterans by liberalizing the methods of proof allowed. It is crystal clear that the secretary may promulgate regulations implementing this liberalized concept of proof and may create evidentiary presumptions to resolve all reasonable doubts in the veteran’s favor; the rules should be structured so that if any error occurs, it will occur in the veteran’s favor.

Ullmann-Margalit described presumptions in the following way:

There is not only an element of arbitrariness or artificiality in presumptions, but also an element of bias. Given that there are two possible answers to the factual question under consideration, either ‘yes’ or ‘no’, the presumption rule is partial toward one of them and favors it in advance over the other. What we have here is not the proverbial situation of gauging, preferably blindfold, which side of an evenly balanced scale turns out to tip

¹⁰⁶ *Routen v West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998).

¹⁰⁷ *Jensen v Brown*, 19 F.3d 1413, 1416-1417 (Fed. Cir. 1994).

the balance. Rather, we are deliberately putting the thumb on one side of the scale to begin with.¹⁰⁸

That presumptions may tend to provide a “thumb on one side of the scale to begin with” is a concept that legislators seem to be inclined to agree with as can be demonstrated by the history of the relaxation of evidentiary rules.

One effect of a presumption is to put the decision-maker in the mental attitude that the law requires before commencing the task of assessing and weighing the evidence. Morgan notes:

The same attitude is really required by charging that the burden of proof is on the opponent, but the language of the ordinary charge does not impress this fact upon the jury. This view is like that of those judges who insist upon a charge upon the presumption of innocence in criminal cases. When forced to articulate their reasons, they say that it does away with the danger that the jury will begin with an assumption against the defendant because he has been indicted or otherwise formally charged with the offense for which he is on trial.¹⁰⁹

With specific presumptions, veterans and their advisers can know the rules before hand. If the system is flexible enough to permit a merits decision to be made on application to make new or change existing

¹⁰⁸ Ullmann-Margalit E, “On Presumption” (1983) 80 *Journal of Philosophy* 143, reprinted in Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992 at p 430. At p 438, she said: “It is this image of some fancied scales being atilt prior to any weighing which is conveyed by the ‘pre-’ of ‘presumption’. And it is the strength of the presumption which determines the weight required for reversing the balance. As for the question of the factors that determine the differential strength of presumptions, these have to do with the relative strength of the considerations in which the justification of each presumption is grounded, as well as with the ‘work’ it is expected to do. There are no generalizations that can be made here, except, perhaps for the tentative observation that strong presumptions can hardly be expected to be encountered outside the framework of the law.”

At pp 440-441, she said: “A presumption rule may be seen, then, as replacing arbitrariness with something like rational prejudice; although plainly prejudging an issue, it may nevertheless be defended as rational in the following twofold sense: (i) in any particular instance the presumption it relates to is open to rebuttal; (ii) the bias it promotes is independently justifiable.”

¹⁰⁹ Morgan E M, “Presumptions” (1937) 12 *Washington Law Review* 255, 274.

presumptive rules, and permit claims to be made afresh or reopened upon a new relevant rule being made, consistency within and respect for the system will be promoted. This form of distributive justice is more likely to promote the intention of the legislature than a system where there is very individualised justice that is dependent on evidence being obtained in each case on technical medical or scientific issues of causation. Further, if challenge is permitted by way of merits review and/or judicial review of presumptive rules, there will be even greater likelihood of acceptance and equitable outcomes.

In *McCartt v West*¹¹⁰ the Court of Appeals for Veterans' Claims held that if a veteran does not have one of the enumerated diseases for herbicide exposure, the presumption of exposure to herbicides does not apply, whereas if the veteran had one of the listed diseases, he would have been presumed to have been exposed because he served in Vietnam during the relevant period. A similar presumption is contained in the Authority's Statements of Principles for certain herbicide-related diseases.¹¹¹ A similar result would obtain under Australian law. These presumptive rules can only apply to the circumstances which they are stated to cover. They cannot be applied to other circumstances. Nevertheless, it is likely that a decision-maker would take these presumptive rules into account when considering other circumstances to which the same causal factor is said to apply.

As with presumptions, generally, a decision-maker is likely to take the easier path to decision-making and not seek to counter the presumptive

¹¹⁰ *McCartt v West*, 12 Vet App 164 (1999).

¹¹¹ For example, the Statement of Principles concerning malignant neoplasm of the lung provides: “‘**being exposed to herbicides in Vietnam**’ may be said to have occurred only if the person had, before the clinical onset of malignant neoplasm of the lung:

- (a) rendered more than 30 days service on land in Vietnam; or
- (b) regularly eaten fish, fish products, crustaceans, shellfish or meat from Vietnam; or
- (c) regularly eaten food cooked with water from Vietnam discoloured by sediment, or regularly drunk water from Vietnam discoloured by sediment; or
- (d) regularly inhaled dust in a defoliated area in Vietnam or regularly inhaled herbicide fog in Vietnam; or
- (e) sprayed or decanted herbicides in Vietnam as an occupational requirement.”

The legal validity of the inclusion of this presumption in the Statement of Principles is doubtful, as it appears that the Authority has gone beyond its powers in including this additional evidentiary rule about how a factor in a Statement can be met.

environment in which they operate. This is especially likely if the weight of the evidence required to overcome a presumption is high.

Conclusions

The survey of Veterans' Review Board members' decision-making indicates that decision-makers might be able to apply two different standards of proof to obtain different outcomes. However, the survey could not show whether that was because they applied a harsher standard for the reasonable satisfaction cases than they ought or because they were genuinely applying an appropriate generously beneficial standard for the reasonable hypothesis cases and the normal civil standard for the others.

One cannot readily devise a way to test this hypothesis, nor is it something that the courts can readily examine. Any "doubt" concerning whether the evidence is sufficient to satisfy a particular standard must necessarily be a doubt in the mind of the decision-maker. This point was made repeatedly in explanations by Tribunal chairmen, Attorneys-General and the Commission when explaining the "benefit of any doubt" provision in the *Repatriation Act 1920* (Cth). The explanation was given to disabuse veterans' representatives of the notion that the "doubt" could be an objectively ascertained element and to explain why disappointed veterans had not been denied "substantial justice".

The fact that it must be a subjective notion and is unchallengeable, except through *de novo* review, appears to be behind much of the discontent among veterans regarding the application of that provision.¹¹² What is "reasonable" for one person might not be so for another. Two judges can come to opposing views on the

¹¹² Cohen J, "Freedom of Proof", 1983, reprinted in Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992, at p 6 said: "[D]isagreement about the norms of proof tends to generate a much deeper sense of injustice. This is because of the common belief in a universal cognitive competence whereby, given a proper presentation of all the relevant evidence about any particular factual issue, either every normal and unbiased person would come to the same conclusion about it or at worst everyone would agree that it was an issue about which the norms of proof are indeterminate and reasonable people might venture different conclusions. That belief supports the view that, if well-informed people continue to express serious disagreement about any norms of proof, someone is being unreasonable or dishonest."

application of the *Wednesbury* reasonableness test as was evidenced in *Eshetu's* case.¹¹³

“According to Wigmore, evidentiary weight can never be subject to any rules predetermined by the law.”¹¹⁴ Similarly, Postema¹¹⁵ suggests that Jeremy Bentham would argue “that it is impossible to construct useful or adequate rules for the admission or exclusion of evidence, or for assessing its weight or reliability, precisely because there is no objective basis for making such assessments and judgments, and consequently any such rules would be entirely arbitrary.” He notes that Bentham, in *Rationale of Judicial Evidence*, “insists that judging the ‘degree of connexion’ between a principal fact and an alleged evidentiary fact is strictly an ‘instinctive operation’”. Not only, in his view, is the strength of evidence for a conclusion likely to be different on different occasions, but he often insists, this degree of strength [of evidence] *just is* the extent to which one feels persuaded of the truth of a proposition given the evidence, and that, of course, can vary widely from person to person.” Similarly, Schum and Martin have said that “we can *never* ask how correct or accurate is a person’s assessment of the probative weight either of an item of evidence or a collection of evidence given at trial”.¹¹⁶

While changing the standards of proof is likely to provide some beneficial decision outcomes, there cannot be any objective measure of those outcomes and judicial review is not particularly effective to ensure compliance.

By contrast, the use of presumptions and requirements to make favourable inferences is a mechanism that can be objectively assessed because they involve questions of law rather than merely questions of fact.

¹¹³ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

¹¹⁴ Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992, at p xx.

¹¹⁵ Postema G J, “Facts, Fiction and Law”, 1983, reprinted in Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992 at p 25.

¹¹⁶ Schum D A and Martin A W, “Formal and Empirical research on Cascaded Inference in Jurisprudence” (1982) 17 *Law & Society* 105, reprinted in Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992 at p 74.

The use of exclusive presumptive rules similar to Statements of Principles has been criticised by Zuckerman as being inconsistent with doing justice in the particular circumstances of a case because lawmakers cannot account for *all* the circumstances in advance.¹¹⁷ That criticism might be valid if there were a finality to pension claims for veterans, but Statements of Principles can be changed and claims reopened, and the content of Statements of Principles is intended to reflect the state of medical science at the time of their making, and thus take the place of the best available expert evidence. While Statements of Principles have not been subject to a legislative sunseting regime,¹¹⁸ the Authority has initiated its own program of review to endeavour to ensure that they are up-to-date.

The particular problem of widespread acceptance of service-related smoking and its enormous budgetary consequences for the veterans' pension system in Australia has meant that presumptive rules have become exclusive rather than an alternative means of accepting liability. It is likely that, without such peculiar budgetary consequences, a non-exclusive system could operate effectively for the benefit of both veterans and decision-makers. The United States of America system, while limited in its scope compared to that of the Australian, appears to operate effectively with adequate scope for judicial review to ensure compliance. The Canadian system, while it has limited presumptive rules, also appears to operate in such a way that the courts can ensure compliance with the rules.

¹¹⁷ Zuckerman A S, "Law, Fact or Justice" (1986) 66 *Boston University Law Review* 487, reprinted in Twining W and Stein A (eds), *Evidence and Proof*, Dartmouth Publishing Co Ltd, Aldershot, UK, 1992 at p 258. He said: "The principle of adjudication on the merits ... is concerned with doing justice in the particular circumstance of the case. It reflects the belief that neither legislative nor judge-made rules can, of themselves, provide a just solution to all the infinitely varying circumstances of individual litigants. Such rules can of course provide lists of material facts which, if found, would induce certain consequences. But these lists are bound to leave out factors which, when revealed in particular circumstances, may in justice require a different legal result. On the whole, it seems unjust to the individual litigant to prevent the possibility of an assessment of his claim that takes into account *all* the circumstances of his case, even those not listed in advance by the lawmaker."

¹¹⁸ Part 6 of the *Legislative Instruments Act 2003* (Cth), which received the Royal Assent on 17 December 2003 and will come into force on 1 January 2005, will introduce a sunseting regime that provides that if a legislative instrument has not been remade, it will generally cease to have effect after 10 years. This regime will promote the regular updating of legislative instruments such as the Statements of Principles.

The author suggests that the use of presumptions, coupled with rules as to the standard of evidence required to rebut them, is an appropriate mechanism for promoting the beneficiality of veterans' legislation. It is a mechanism that is both measurable and reviewable. As such, it is a mechanism that could and should be promoted and extended in its use.