

THE OXFORD
COMPANION
— • TO THE • —

HIGH COURT OF AUSTRALIA

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retained in the legislative overhaul in 1986. The new test, introduced pointedly to negate the High Court's interpretation in *O'Brien*, was intended to ensure that a pension would be payable only if there was more than a theoretical connection between disease, injury, or death and service.

As *Bushell v Repatriation Commission* (1992) indicated, the hoped-for improvement in the standard of proof was not achieved. Allen Bushell's claim, which involved similar medical issues to those in *O'Brien's* case, had earlier been rejected by the Repatriation Commission, the Veterans' Review Board, the Administrative Appeals Tribunal, and the Full Federal Court. The High Court concluded there must be *some* evidence if a claim was to meet the 'reasonable hypothesis' test. However, in words that served to undo the expected benefits of the new test, the majority added: 'The case must be rare where it can be said that a hypothesis based on the raised facts, is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge.'

Following *Bushell*, claims again increased. As the minister commented when introducing the 1994 amendments, if the High Court's interpretation had been permitted to stand, by the year 2001–02, it was estimated claims would cost \$235 to \$440 million a year, and the cumulative costs over ten years would be \$1.2 to \$2.2 billion. The government again responded, with legislation avowedly designed to reverse the effect of the decision in *Bushell*. A new body, the Repatriation Medical Authority (RMA), comprising a panel of medical experts, was to set out in legislative form the exclusive circumstances in which particular diseases, injuries, or death could be linked to service. If a claim did not fall within the legislative template it failed. The Court has not yet commented on these provisions although, in November 2000, it refused special leave to appeal aspects of the scheme in *Repatriation Commission v Keeley*.

What is apparent from this chronicle is that the evidentiary provisions in the veterans' legislation are sacrosanct. Even when a government inquiry in 1994 recommended that the civil standard be substituted and the negative burden of proof on the Commission abandoned, the Parliament, faced with the probable backlash from veterans' groups, chose a less contentious route, the RMA scheme. The privileged position of its veterans' community was not to be eroded—at least in any overt fashion. Toohey provided the epitaph for this story in *Bushell* when he said: 'Most of the problems have arisen through attempts to provide a scheme for veterans which is beneficial but which, at the same time, excludes claims that are fanciful. This accommodation has proved most difficult where the aetiology of a disease is unknown or uncertain.'

ROBIN CREYKE

Further Reading

Catriona Cook and Robin Creyke, 'Repatriation Claims and the Burden of Proof of the Negative' (1984) 58 *ALJ* 263

Robin Creyke and Peter Sutherland, *Veterans' Entitlements Law* (2000)

Report of the Independent Enquiry into the Repatriation System (Toose Report) (1975) vol 1

Reports of the Veterans' Entitlements Act Monitoring Committee (1988) and *Government Response to the Veterans' Entitlements Act Monitoring Committee* (1988)

Vexatious litigants. It is evident from the original High Court Rules that the Justices did not anticipate that there would be a large number of vexatious litigants. It was not until 9 March 1943 that a specific Rule entitled 'Prevention of Vexatious Proceedings' was inserted.

This Rule had its genesis in events that began with the issue of a number of writs out of the Hobart District Registry in 1942 by one Angus Dean against Dr EJ Hanly. Hanly was the warden of the Tasman Council responsible for collecting rates in the Hobart area. Dean was later joined in his activities by Horace Benjafield. Dean and Benjafield were members of a group that believed there should be reform of the monetary system. They also contended that war expenditure could and should be met by the issue of the necessary funds by the Commonwealth Bank, and accordingly that war loans with their burden of interest were entirely unnecessary. Their activities led to a Board of Inquiry being established under the National Securities (Inquiries) Legislation.

The Court began to take their activities seriously when writs were issued against Latham, Starke, and McTiernan, and the litigants began writing privately to Starke. A draft of the proposed Rule was circulated by Starke. On 3 September 1942, Latham had a conversation with Evatt, who by then had become Commonwealth Attorney-General, at which he stated his reluctance to suggest any legislation, whether by statute or by Rule of Court, which would be regarded as designed to give some special protection to judges against proceedings directed against them. Evatt thought it might have a salutary effect if a Rule of Court were made empowering a Justice, if the Justice thought fit, to stay proceedings on a writ issued by a person who had failed to pay any costs incurred in litigation previously instituted by that person in the High Court. Starke and Rich did not support Evatt's proposal. Rich, commenting on the proposal, wrote: 'I think this cannot or should not be inserted. We are not a debt collecting agency. Action in the Bankruptcy Court is available.' The Justices had no such inhibition in signing the new proposed order. Curiously, neither Dean nor Benjafield was declared a vexatious litigant by the Court.

On 13 June 1952, Goldsmith Collins became the first person to be declared a vexatious litigant pursuant to an order made by Williams. This did not stop Collins' activities. He successfully argued that the lodging or giving notice of appeal was not instituting a 'proceeding' within the meaning of the order made by Williams. Collins, buoyed by his success, went too far when he issued a writ out of the Supreme Court of Victoria, the endorsement of which alleged that Williams and three other named persons had conspired against him. The Commonwealth Attorney-General obtained an order from Taylor committing Collins to Pentridge Prison for one month for contempt. Collins purged his contempt by apologising unreservedly to the Court and Williams. He subsequently served a number of terms of imprisonment for contempt of the Supreme Court of Victoria.

Constance May Bienvenu was the next person to be declared vexatious by the High Court on 19 August 1971. Bienvenu had taken the Victorian branch of the Royal Society for the Prevention of Cruelty to Animals (RSPCA) to court over its by-laws. She succeeded in the case but, in a curious decision, Starke awarded costs against her. The RSPCA bank-

rupted her in an attempt to obtain its costs. This action set in motion a trail of litigation that had her declared vexatious in the Supreme Court of Victoria. Bienvenu then turned her attention to the High Court. A writ was issued by Frank Jones, then Deputy Registrar at the Principal Registry, on the direction of Barwick, naming Jones and the Principal Registrar, Neil Gamble, as defendants. The alleged cause of action was that they had conspired to deny Bienvenu her constitutional rights by refusing to supply her free of charge with a copy of the Constitution. The matter was heard by way of demurrer before a Full Court, which dismissed the action. Bienvenu continued to issue proceedings, which ultimately led the Commonwealth Crown Solicitor to take the proceedings that led to her being declared a vexatious litigant.

The Court has an inherent power to restrict vexatious applications, but only in proceedings that are already before it. The High Court Rules provide two separate mechanisms for preventing the commencement of vexatious proceedings. First, if a person seeks to file a document that a Registrar considers to be, on its face, 'an abuse of the process of the Court or a frivolous or vexatious proceeding,' the Registrar must seek a direction from a Justice. The Justice can direct that the process be issued (that is, that the document be accepted for filing), or that it not be issued without the leave of a Justice. Secondly, if the Court or a Justice is satisfied that a person 'frequently and without reasonable ground has instituted vexatious legal proceedings,' it may order that the person not be allowed to institute any proceeding without leave. The first mechanism restricts the issuing only of the process that is the subject of the direction; the second restricts the person named in the order from having any process issued without leave.

These mechanisms are not lightly invoked. As McHugh explained in *Re Davison's Application* (1997), it is only in 'very clear cases' that Registrars approach Justices for directions or that Justices refuse leave to proceed. 'If, on the face of the "process", there is a possibility that it is not frivolous, vexatious or an abuse of the process of the Court, the matter will be left to be dealt with in accordance with the ordinary curial processes of the Court.'

Between 1996 and 1999, an average of only eight applications a year were made for leave to issue process after a direction had been made under the first mechanism. Such applications have usually been unsuccessful, but not always: in *Re Davison's Application (No 2)* (1997), Gaudron granted the applicant leave to issue a process that Gummow had earlier directed the Registrar not to issue without leave.

Orders under the second mechanism are rarer still. As Toohey explained in *Jones v Skyring* (1992), the power to make such orders reinforces the Court's power 'to protect its own process against unwarranted usurpation of its time and resources and to avoid the loss caused to those who have to face actions which lack any substance'. Because of the nature of such an order (restricting a person's access to the Court), it can be made only in limited circumstances: upon the application of the Commonwealth or a state Attorney-General or Solicitor-General, the Australian Government Solicitor, or the Principal Registrar of the Court.

An order made under the second mechanism in the High Court Rules is the only way the Court can restrict a particular

person from commencing any action in the Court. In *Commonwealth Trading Bank v Inglis* (1974), the Court decided that, although it has an inherent power to exercise control over the making of unwarranted and vexatious applications in actions that are pending in the Court, it has no inherent jurisdiction to make an order 'impeding a particular person in the exercise of the right of access to the court'.

Importantly, as explained in *Jones v Skyring*, it is not relevant whether the person is acting maliciously or in bad faith. The question is not whether legal proceedings have been instituted vexatiously but whether the proceedings are in fact vexatious. A person who frequently, and without reasonable ground, institutes vexatious legal proceedings can be prohibited from instituting any further proceeding regardless of his or her motives. Strictly speaking, it is the proceedings, not the litigants, that are vexatious.

FRANK JONES
JAMES POPPLE

Victoria Park Racing v Taylor (1937). In this case, a majority of the Court refused to stop a radio station from broadcasting the results of horse races observed from a tower erected on the front lawn of a house across the road from the racecourse. In the process, the Court considered principles of nuisance, copyright, privacy, the nature of property rights, and the role of the Court in developing the common law.

The judgments reflect what Dixon referred to as a distinction between founding liability on the infliction of unjustified damage or on breach of a specific legal duty. Rich and Evatt, in separate dissenting judgments, relied on the former. While they each acknowledged that there was no general right to privacy in Australia, they argued that the general principles of the tort of nuisance encompassed what they considered to be the illegitimate interference with the rights of the property owner in this case. The rights of the property owner should include a right to profitable enjoyment, undiminished by the non-natural use of neighbouring land. Evatt adopted the language of the United States Supreme Court in *International News Service v Associated Press* (1918) to assert that in endeavouring 'to reap where it has not sown', the broadcasting company was doing more than merely looking over its neighbour's fence. Both Evatt and Rich decided that common law principles such as nuisance could adapt to changing social contexts to provide protection against the broadcaster's actions.

The other three members of the Court—Dixon, Latham, and McTiernan—each rejected the US position and refused to extend the notion of property to prevent the conduct in this case. Any copyright in the racing guide or the results of the race did not protect the information conveyed, but only the original manner in which that information was expressed. To be protected, any compilation of information required some originality beyond the mere presentation of facts. Thus, to draw on the information in the racing guide when describing the running of the races did not constitute an infringement of copyright. Nor was there any property in the spectacle of each race. These Justices emphasised that intellectual property does not protect all the intangible elements of value that flow from the use of ingenuity, knowledge, skill, or labour—an emphasis that has continued to determine the