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.’

**Further Reading**


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


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**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-
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tion had been made under the first mechanism. Such
processes of the Court.’

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 direc-
tions or that Justices refuse leave to proceed. ‘If, on the face of
the “process”, there is a possibility that it is not frivolous, vex-
acious 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 ear-
lier 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 Comm-
monwealth 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 rele-
ant 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 prohib-
ited 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 broadcast-
ing the results of horse races observed from a tower erected
on the front lawn of a house across the road from the race-
course. 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 distinc-
tion between founding liability on the infliction of unjusti-
fied 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 enjoy-
ment, 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 nu-
issance 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 intel-
lectual 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