

## REPATRIATION—THE ROLES OF THE DOCTOR AND THE LAYMAN

*The discussion took place at a meeting of the Medico-Legal Society, held on 16th November, 1957, at 8.30 p.m., at the British Medical Association Hall, 426 Albert Street, East Melbourne.*

The discussion was opened by Mr. G. H. Lush.

MR. G. H. LUSH:

My duty tonight is the purely mechanical one of presenting to this meeting a brief analysis of the Repatriation Act 1920-1956 and the Regulations made under it for the purpose of providing a foundation for the discussion which is to follow.

No legal man can ever approach the examination of a Statute without complaining of the draftsmanship. The Repatriation Act presents more than its full measure of difficulties and complexities, and is clearly the product of a variety of political forces, not the least being pressure which the Returned Soldiers' League has from time to time been able to exert.

The Act is concerned to set up pension rights and to constitute bodies to administer the Act and determine in individual cases the rights to which ex-soldiers may be entitled under the Act.

The general scheme of the present analysis is to indicate the bodies which the Act sets up and to comment shortly on their constitution, then to deal with their functions, and then to deal with one or two particular provisions in the Act that are of particular significance in the exercise of those functions. Lastly, it is proposed to deal with the Regulations made under the Act, because it is under these Regulations that the medical treatment of ex-soldiers is carried out.

There are four types of bodies set up by the Act. The first is the Repatriation Commission itself, which is constituted by Section 8 of the Act, which states that it is to consist of not less than three and not more than five members appointed by the Governor-General. Apart from the fact that the Section provides that an organization representing returned soldiers throughout the Commonwealth (which as a result of definitions in SS. 6 and 23 means the Returned Soldiers' League) may submit a list of nominees from whom one may be appointed,

there is no provision requiring any member to have any particular qualification. The Governor-General is not bound to appoint from the list of nominees.

The second type of body is the Repatriation Board, one of which is constituted for each State—see Section 14. By Section 15, the members of the Boards are appointed by the Governor-General upon the recommendation of the Commission, and returned soldiers' organizations may submit lists of nominees to the Commission, which may recommend one of the nominees for appointment to the Board and the Governor-General may appoint the person so recommended. Again, there is no qualification required of a member of a Board.

The third type is the Entitlement Appeals Tribunal, the number of which is to be determined by the Governor-General. Each of these tribunals, which are provided for in Section 55, consists of a chairman and two other members. The chairman is to be a barrister or solicitor, and the other members are to be returned soldiers, and in this case one must be selected from a list of nominees submitted by an organization representing returned soldiers.

The fourth type of body is the Assessment Appeals Tribunal provided for by Section 65. The number of these is to be determined by the Minister, and each is to consist of a chairman appointed by the Minister and two other members. The chairman is to be both a returned soldier and a barrister or solicitor and the two members are to be medical practitioners. The Act appears to contemplate that the two members will be specialists appointed for the particular case or series of cases, because they are described as "medical practitioners who have the necessary knowledge of the nature of disability from which the appellant or appellants is or are suffering". The two medical members are to be selected from panels drawn up by the Department. The chairman is appointed for five years.

I turn now to examine some of the functions of these various bodies.

Section 24 of the Act is the main operative section dealing with pensions. It provides that upon the death or incapacity resulting from war service of a person who is a member of one of the eligible classes of persons the Commonwealth is to be liable to pay to him or his dependants or both pensions in accordance with the Act. Aggravation by war service of a pre-existing condition also entitles to a pension.

Section 24 is silent on the subject of what body is to decide disputed cases. Section 27, however, provides that the Boards, that is the Repatriation Boards set up under Section 14, shall determine the nature and extent of incapacity and the question whether incapacity or death resulted from war service. The Board is also to assess the rates of pensions.

The jurisdiction conferred by Section 27 on the Board is qualified by Section 27 (2) which says that the Commission may direct a Board to refer certain classes of cases to it if it thinks fit. Section 28 provides a general right of appeal to the Commission from any decision of the Board.

Further, by Section 31 the Commission has the right to review any decision, a power which appears to be intended to be exercised in cases in which there has been a change of circumstances or, possibly, fresh evidence.

It will be observed that neither the Board nor the Commission is required by the Act to include medical practitioners.

The functions of the Entitlements Appeals Tribunals are dealt with in Section 64. These tribunals may hear appeals by persons whose claims have been refused by the Commission upon the ground that incapacity or death did not result from war service. The section assumes that an appeal has already been taken from the Board to the Commission and has been refused by the Commission. The effect of the provisions of Section 64 is that the Entitlements Appeals Tribunals are not fact-finding bodies. They must deal with the case upon the evidence tendered below, and if fresh evidence is tendered they must refer the claim back to the Commission for reconsideration. The claimant can renew his appeal after reconsideration by the Commission.

The comment which may be made on these provisions is that a claim has, at this stage, come before a body consisting of a barrister or solicitor and two returned soldiers, but for some reason this body is excluded from fact-finding in general but is required to decide problems, which may obviously be highly technical, of causation.

The functions of the Assessments Appeals Tribunals are dealt with by Section 67 and Section 68. These Tribunals may hear appeals in cases in which either the Commission, a Board or an Entitlement Appeals Tribunal has determined that incapacity results from war service but is too trivial to warrant a pension. They also deal with applications for variation of

pension made by those already in receipt of pensions. Their powers are to assess a pension or to increase or reduce or continue a pension.

It will be remembered that the Assessments Appeals Tribunal includes two medical practitioners. It is, however, debarred from making any inquiry into the question whether incapacity results from war service and is confined to matters of assessment only. Moreover, although in matters of assessment it hears appeals from the Commission, under Section 71 if the Commission thinks that the Assessment Appeals Tribunal's decision has been affected by false evidence, which may well mean evidence which the Commission disbelieved when the matter was before it, the Commission may require a reconsideration. The Assessment Appeals Tribunal is not, however, bound by the Commission's views.

Time does not permit any exhaustive examination of all the sections of the Act which throw light on the working of these bodies, but I think that three should be referred to.

Section 47 provides that all the bodies mentioned are to act according to substantial justice, are not to be bound by the intangible things beloved by the parliamentarians known as technicalities or legal forms, or by the rules of evidence—the claimant is to get the benefit of the doubt on every question. The claimant is not required to furnish any proof in support of his claim, but the determining bodies are, rather curiously, directed to draw from the circumstances of the case all reasonable inferences in favour of the claimant, and the onus of proving that the claimant is not entitled to everything he claims rests on those who dispute his claim.

Section 48 deals with medical reports. On the face of it, it would appear to give the bodies referred to the right to demand a report from any medical practitioner, including the claimant's practitioner or practitioners. I entertain some doubt whether it would be so construed by a Court.

Section 72 is a section which has caused discussions between various governments and the legal profession: it provides for representation before Entitlements Appeals Tribunals or Assessment Appeals Tribunals. There are no provisions for representation before the Commission or before Boards, and the inference appears to be that representation before these is not permitted. Before either of the Appeal Tribunals, both the Commission and the appellant are entitled to be represented, but

not by legal practitioners. This is despite the fact that Section 72 clearly contemplates that the agent who represents a party may be paid. The Returned Soldiers' League is responsible for the perpetuation of this system of excluding the trained and providing a field of operation free of competition for the untrained.

I turn now to the legislation relating to medical treatment. In view of the known extent of medical services provided by the Repatriation Department it is surprising to find that the Act does no more than confer, by Section 124, a power to make regulations for providing for the establishment, control and administration of hospitals and other institutions for the care and welfare of members of the Forces. The regulations made under this power occupy only three pages, and they provide that a Deputy Commissioner may provide medical treatment in respect of incapacity due to war service and in respect of certain named diseases and for persons in receipt of pensions under the Act. The regulations throw no light on the internal organization of the Medical Services, except that by Regulation 69 a Deputy Commissioner may refuse to grant medical treatment or further medical treatment.

DR. H. A. MAUDSLEY said that the Assessment and Entitlement Tribunals were brought into existence in 1929 as a result of pressure put by returned soldiers upon Sir Neville Howse, then Minister for Repatriation.

He himself had been a member of an Assessment Tribunal, and had found that such a tribunal was dominated by the decisions of the Entitlement Tribunal on which no medical practitioners sat. The Entitlement Tribunal had to decide upon the basis of medical reports upon the causes of disabilities, and the work of the Entitlement Tribunal was not assisted by the giving by medical practitioners of reports which presented a golden view of the patient's claim.

The Assessment Tribunals were constantly dealing with persons who came before them again and again seeking increases because, apparently, a person who achieved the goal of one hundred per cent pension can receive medical treatment for any condition whatever.

The Assessment Tribunal was an independent body in the sense that it was appointed by the Government and so not under the control of the Repatriation Department. His experience was that the Department was extremely co-operative in dealing with requests and recommendations made by the Tribunal.

DR. G. NEWMAN MORRIS referred to certain cases within his experience. One was the case of a man who, in 1914, before leaving Australia spent a night with a somewhat casual lady friend and as a result developed what is commonly known as a social disease. This he concealed until his troopship left Fremantle. He ultimately lost a leg. This was accepted as due to war service, and he received an artificial leg. Much later, he went fishing one evening and in a moment of excitement stood up in the boat and fell overboard, because his artificial leg did not provide him with perfection of balance. He was drowned and his wife received a full widow's pension, which resulted directly from the original evening spent with a previous friend. Another case concerned a patient who had a full pension for chronic alcoholism, a condition which certainly existed before the war, but may have been aggravated during it. As his landlady received no rent from him she used to employ him on outdoor work on Saturday mornings. In the course of this work he injured his toe, and as a result developed gangrene and lost a leg. This drove him to further alcoholic heights, but he died covered by both the Repatriation Act and the Workers' Compensation Act.

Apart from particular cases he wished to draw attention to the position of the local medical officer who makes an unassignable contract with the Repatriation Commission to provide such ex-members of the Forces as select him as their medical practitioner with a continuous medical service at a markedly concessional rate. These agreements were onerous in the extreme, but it was very difficult for general practitioners in areas in which substantial numbers of ex-servicemen lived to avoid making them, and even more difficult to cancel them when they were made. The scheme seemed to contain the germs of socialisation.

MR. E. E. DUNLOP said that his personal view was that the Repatriation scheme in this country operated more justly than the Ministry of Pensions scheme in England. He had frequently had correspondence with the latter Ministry relating to prisoners of war, who had been under his care, and who had no hope of receiving pensions unless they could produce direct evidence of events on specific occasions. In the general confusion of war, this was impossible.

He had seen the War Veterans' Hospital at San Francisco, which was run by two university medical schools. It handled

patients with efficiency and expedition, and avoided the long delays characteristic of our system. The wasting of the time of the patient and staff under the Australian scheme was a wasteful matter which was not reflected in the financial figures of the scheme, but which must in fact involve heavy expense to the community.

JUDGE NORRIS said that the onus of proof section was open to criticism. It would have been simpler to say that every ex-serviceman suffering from disability at any time must be deemed to have received his disability in the course of war service unless the contrary is proved. The present language does not require the claimant to produce evidence but requires inferences in his favour to be drawn from something which is not specified and that he should be given the benefit of all doubts. It is never possible to know whether the direction as to the benefit of doubt has been observed because it cannot be known whether the tribunal had any doubt.

MR. J. T. BROCK introduced his guest, Mr. R. T. Unkles, the chairman of an Entitlement Appeals Tribunal.

MR. R. T. UNKLES said that comment had been made on the fact that the Entitlement Appeals Tribunal did not include medical members. In the United Kingdom there is provision for medical members on the equivalent tribunal, and there is also a right of appeal on questions of law.

The British attitude on this subject was undoubtedly coloured by the fact that Britain had been in many wars and had had many people injured in them, whereas this country had had a relatively slight contact with wars.

Mr. Unkles traced the history of the development of the Repatriation Act provisions from 1916 onwards, and said that he agreed that the working of the Act in its present form was such that many pensions were given for matters unrelated to war service. This could be described as liberal or charitable, and the question how long the country could afford to be liberal or charitable must be answered by political considerations. It would be unfortunate if it became necessary to reduce expenditure on pensions, because this would almost certainly be done by an overall reduction, whereas justice would probably be better served by cancelling the smaller pensions which were paid for minor disabilities and leaving the higher pensions at the present level.

The Returned Soldiers' League had been spoken of as if it were the villain of the piece, yet one might ask what the position would be if there had been no organization of ex-servicemen. If the scheme was regarded as over-liberal and over-kind to the ex-servicemen, it must be remembered that the scheme had assumed its present form because the country, through its parliamentary interests, wanted it in that form.

DR. JOHN WILLIAMS questioned whether it was right to err on the side of generosity. The effect of an undeserved pension is demoralizing. He did not think it justifiable to wait until a time of financial adversity was reached before attempting to introduce the more logical analysis of pension claims. He did not think that any just claim would be introduced as long as the Returned Soldiers' League retained its power in the parliamentary lobbies.

PROFESSOR JOHN HAYDEN said that the benefit of the doubt provision had extended beyond all reasonable limits. He agreed with Dr. Williams that there was a demoralizing influence inherent in pensions, particularly those given for minor disabilities which were no real handicap to persons in civil life. The recipient of such a pension tended to try to obtain increases.

He was attracted by the American scheme under which pensions and medical treatment were matters of separate administration. Such a scheme would avoid the entanglements of medical practitioners and public service clerks which occur in this country.

The Repatriation Department has in its possession one of the best collections of medical histories in the world. Approaches had been made to the Commission to allow these histories to be examined for research purposes, and, apart from other results, if this could be done the pension bill would, in all probability, be substantially reduced. These approaches were rejected under the influence of the Returned Soldiers' League, which was not interested in research which might reduce the pension entitlements of its members.

It was his belief that an examination was made of the percentage of appeals allowed by each entitlement and assessment tribunal, and the chairmen of tribunals with a low percentage of assessment appeals ran the risk of opposition from the Returned Soldiers' League when they sought reappointment at the end of their terms.