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MILITARY INJURIES More than one minefield

Provisions offsetting compensation already received by veterans

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Unintended outcomes, such as the award of a negative quantum of compensation, are likely to be experienced by some Defence Force members if they make more than one unrelated claim.

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PARLIAMENTARY INTENTION, AS expressed in the form of a bill and subsequent Act, can sometimes create a minefield for the executive, as was demonstrated in a recent veterans compensation matter.

The case, *James v Military Rehabilitation and Compensation Commission* [2010] FCAFC 95, is one that affects a proportion of serving and ex-serving members of the defence forces who have suffered injury or disease prior to July 2004 and then injure themselves again after July 2004.

The result can mean, in some circumstances, the individual is assessed as having no compensation entitlement due to suffering a further injury. The case principally turned on statutory interpretation.

This full Federal Court decision, on appeal from an Administrative Appeals Tribunal (AAT) decision, decided that the interpretation of s.13(4) of the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (Cth) (the MRC Transition Act) by the Military Rehabilitation and Compensation Commission (the Commission), is not in doubt, and the offsetting regime[1] under Chapter 25 of GARP-M[2] (the guide) that the Commission relied upon is cor-

rect.

The facts

The appellant, Leut. James, an officer of the Royal Australian Navy, made a claim under the *Military Rehabilitation and Compensation Act 2004* (Cth) (the MRA) in respect of a right knee injury suffered in February 2005. Prior to the commencement of the MRA, Leut. James had earlier suffered two other injuries:

- right ankle (resulting in osteoarthritis); and
- left knee.

Leut. James' entitlement to compensation for the earlier injuries arose, and was satisfied, under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRCA). Specifically, Leut. James suffered a right ankle injury in June 1992, and in September 1997, he was awarded lump sum compensation of $18,864.75 under the SRCA. In about June 1998, Leut. James suffered a left knee injury and, on 23 May 2001, was awarded compensation of $20,094.08 under the SRCA.

With respect to Leut. James' injury suffered after July 2004 (right knee injury) and his entitlement to further compensation, the Commission applied a method which offset the compensation already paid to Leut. James under the SRCA in respect of the left knee and right ankle injuries.

The amount calculated (using the Commission's offsetting method under the guide) resulted in Leut. James being assessed as having a negative quantum entitlement in terms of compensation. This was calculated by taking Leut. James previous compensation payments into account as part of a whole person impairment system, resulting in a negative quantum of damages payable.

Relevant parts of legislation

MRA

Section 319 provides for the making of a claim for compensation under the MRA.

Section 67 provides:

"Guide to determining impairment and compensation

"(1) The Commission may determine, in writing, a guide setting out:

(a) criteria to be used in deciding the degree of impairment of a person resulting from a service injury or disease; ...".

MRC Transition Act

Section 13 of the MRC Transition Act provides:

"Bringing across impairment points from a VEA or SRCA injury or disease ...

(4) The Commission may include in the guide under section 67 of the MRA one or more methods of working out the amount of compensation a person is entitled to ... A method may (but does not have to) include a method of offsetting payments made to the person under the VEA or the SRCA in respect of the old injury or disease." (Note: VEA refers to *Veterans' Entitlements Act 1986*.)

Issue

The principal issue the court had to determine was the proper mode of calculating the compensation payable to a claimant under the MRA, where the claimant had previous entitlement and claim to compensation under the SRCA. The issue being whether the provisions of the Commission's guide are valid. The resolution of this issue involved consideration of both the MRA and the MRC Transition Act.

Leut. James argued the amount calculated under the guide for the impairment resulting from the right knee injury, taking into consideration the proper award under the SRCA for his earlier injuries, would be a minus figure if the guide was valid. Leut. James' principal argument was, of course, that the guide was not valid. The Commission contended that the Award under the SRCA for the left knee and right ankle had to be subtracted (offset) from the amount calculated for the right knee injury under the MRA, producing a minus figure.

Among other things, Leut. James argued that:

- s.13(4) of the MRC Transition Act should be read down so as to not permit an unintended destruction of a claimant's right to seek damages at common law; and
- s.13(4) of the MRC Transition Act should be read down because it is concerned with the quantification, not the creation of a claimant's entitlement to compensation.

Decision

The full Federal Court decided purely on statutory interpretation grounds. In upholding the AAT's decision the full court did not discuss the underlying policy issues surrounding the Commissions approach to offsetting.

The court in support of the AAT's decision stated the Commission's approach to interpreting the Act is not in doubt, and the introduction of the guide was not beyond the real exercise of power conferred by the Transitional Act. Section 13(4) of the MRC Transition Act specifically contemplates that entitlements under the SRCA may be offset by a guide set up by the Commission (GARP-M) against MRA entitlements, without fixing a limit as to the effect of that setting off before reaching the point of zero entitlements.

The court also supported the AAT's decision with respect to the guide reference to an old injury ("old injury or disease"), as referring to injuries and diseases for which liability to pay compensation had been determined under either the VEA or the SRCA. This was said to be "consistent with the scheme of compensation provided in the MRA" and the power given to the Commission "to determine a method, if it wishes", to offset payments made to the person under the VEA or the SRCA.

Consideration outside of the decision: parliamentary intent

The second reading speech of the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003 (the Transition Bill) specifically set out that: "A member who suffers an injury or illness after that date ... (July 2004) ... will be able to combine prior impairments from the SRCA and the VEA with the new arrangements to get the best possible outcome."

In addition, the MRC bill refers in a number of places to the situation of a person who has suffered injury and received compensation for an injury under the SRCA and VEA, and who again suffers injury under the MRA 2004 – it states "entitlements to compensation will be 'enhanced'".

A potentially unintended result

The current offsetting approach, in the opinion of the writers, is an undesirable one. Applying a formula provided for in the guide (which was created by the Commission) resulted in Leut. James receiving no additional payment at all for permanent impairment for his new injury. Under the particular formula in the guide, he received

"The current approach denies those who serve in Australia's name and expect to receive just and fair compensation for new injuries arising after 2004 from the Military Rehabilitation and Compensation Act 2004."

nothing in addition to what he had already been paid with respect to the earlier (unrelated) injuries under the SRCA. This was so because the formula in the guide takes into account previous payments under the SRCA and the VEA, even where the previous injury is unrelated to the current claim, that is: "old injuries are taken into account in unrelated new injuries".

To use a more vivid and extreme illustration of injuries suffered by a Defence member while on duty in similar circumstances to Leut. James, it is useful to explore the Commission's likely approach to offsetting in the situation such as the Royal Australian Navy diver who recently lost his arm and part of his leg in Sydney Harbour as a result of a well-publicised shark attack.

If, for example, the Navy diver had also suffered a previous back injury prior to July 2004 and had received a lump sum compensation payment in accordance with the SRCA or was in receipt of a disability pension in accordance with the VEA from, for example, a deployment in East Timor or due to his particular period of service, then the Navy diver could also have been assessed as having no entitlement to compensation for his loss of arm and leg.

Extraordinarily, the Navy diver may also have been assessed as having a *negative* quantum of damages payable as a result of the shark attack. Controversially, the diver's loss to the shark may technically have indebted him to the Commission to repay an amount of damages previously awarded. (It is noted, however, the Commission's current policy is not to recover in this circumstance.)

Although not as widely known to the public, similar treatment is possible for ADF personnel suffering injuries while on deployment in Afghanistan or Iraq.

The current approach denies those who serve in Australia's name and expect to receive just and fair compensation for new injuries arising after 2004 from the MRA. They find they are penalised due to having suffered from a previous injury that was covered by the SRCA or the VEA. In effect, the longer a veteran has served, the greater the probability they will have suffered more injuries as a result of their service. The current system has the long-term veteran disadvantaged by receiving less compensation for a new injury suffered after July 2004, compared to the veteran who is injured after that date for the first time.

Implications

It will be interesting to see what happens from here. While this situation does not affect all who are serving or have served in the Australian Defence Force, it does affect a proportion of Defence serving and ex-serving personnel, and with the rate of injury to Australian service men and women in Iraq and Afghanistan on the rise, it is perhaps a matter of time before the Commission's approach to "offsetting" reaches the High Court for determination.

In that respect it is useful to consider the neutral evaluation recently conducted by Senior Member Carstairs of the Administrative Appeals Tribunal in the case of *Daniel Cunningham v Military Rehabilitation and Compensation Commission*, when evaluating the following question which relates to a similar situation to that of the case in point: "whether the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* gives the Commission a discretion to refrain from offsetting payments made to the applicant under the *Veterans Entitlement Act 1996* and the *Safety Rehabilitation and Compensation Act 1988* when calculating the applicant's entitlement to compensation for permanent impairment under the MRA".

In response to the question posed, Senior Member Carstairs made the following observations (extracted from the evaluation):

- "It reasonably would be expected that 'old injuries' would be taken into account in a new legislative regime where the nature of the claim had to deal with circumstances of, say aggravation;
- "It is rather more surprising that 'old injuries' are taken into account in unrelated new injuries. But it seems the guide does not simply take account of 'old injuries' in instances of aggravation or clinical worsening;
- "Section 13(4) of the [MRC Transition Act] uses what can be described as permissive words: the method *may (but does not have to) include a method of offsetting payments* already paid with respect to the old injuries under the VEA and the SRCA; [emphasis added]
- "... once formulated the [Commission] was required to apply the guide. *There was no direction to make another kind of determination*; [emphasis added]
- "The guide may use one or more methods for working out permanent impairment ... it would appear, then, that the [Commission] did not avail itself of the permissive language in s.13(4) of the MRC Transition Act to provide a range

of possible methods. It settled on one method only and that is as provided for Chapter 25 of the guide;

❑ "When I commenced my examination of the question posed, I thought that there was some merit to the applicant's argument. It did seem an unfair outcome given the acknowledged medical evidence;

❑ "Whatever discretion might have been available to the [Commission] in choosing to incorporate one or more methods by which old or new injuries might be assessed, it chose to have one method only. The [Commission] was entitled to do this by the terms of s.13(4);

❑ "The mandated matters were that old injuries and new injuries both had to be counted; and

❑ "In that sense the legislation did not provide a clean slate which the injuries occurring after the introduction of the MRA would be examined."

Conclusion

In terms of the current divide over the approach taken with respect to offsetting, the various ex-service organisations and those legal representatives who align with them maintain that parliamentary intent has not been followed with regard to the Commission's approach. On the other side, the Commission maintains it has created a guide which is in accordance with the power given to the Commission under the MRA to "determine a method, if it whishes to offset payments made".

While offsetting does not affect all current serving and ex-serving individuals, there is now a growing proportion who enlisted prior to 2004 who may have VEA or SRCA injuries and coverage, and who are currently serving, for example in Afghanistan, Iraq, East Timor and other locations.

In our opinion, the Commission should make clear to these Defence personnel that if they have previously received compensation under the SRCA or the VEA, in the event they suffer an injury in their next deployment, they may not be entitled to any new compensation. For example, if a veteran sustains a shrapnel wound to their leg that results in a permanent impairment assessed at 10 impairment points, and the veteran had suffered an impairment from, say a previous arm injury covered under the VEA and/or the SRCA, they may receive no (or only a small) periodic payment or lump sum benefit under the MRA.

Depending on the level of impairment suffered in their new injury, under the current offsetting regime they may even be assessed as having a negative quantum entitlement (which as mentioned is not recovered by the Commission as a matter of current policy), or they may have only a small compensation payment than would otherwise be the case. The actual outcome for each individual would depend on the differences in assessment scoring between the SRCA guide and the guide, the nature of the previous and new impairment, and whether the SRCA impairment has improved or worsened over time.

In summing up, this issue seems to have created a minefield for the executive and, in this case, the Commission, which may require parliamentary intent to be rediscovered. In the event that the Commission has misinterpreted the intent of the MRA or the MRC Transition Act, it may lead to creation of a reconsideration system of the Commission's decisions dating back over the last six years. ❑

ENDNOTES

1. The 'offsetting regime' refers to a system whereby an individual who sufferes injury as a result of Defence service prior to July 2004 and is awarded compensation under either *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (SRCA) or *Veterans Entitlement Act 1986* (Cth) (VE Act), and then suffers further injury after July 2004 – When calculating the individual's compensation entitlements for the new injury, the amount of compensation paid out previously is subtracted from the new quantum before any further compensation is awarded.

2. Being an instrument created by the Commission out of the *Military Rehabilitation and Com-*