IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S243 of 2015

BETWEEN: MILITARY REHABILITATION AND COMPENSATION COMMISSION
Appellant

and

BENJAMIN JAMES EDWARD MAY
Respondent

APPELLANT'S SUBMISSIONS

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Part I: Internet publication

1. This submission is in a form suitable for publication on the internet.

Part II: Issues

2. The Notice of Appeal identifies three grounds of appeal.

3. To understand the issues raised by these grounds of appeal, it is necessary to consider the way in which the matter came to the Full Court of the Federal Court of Australia on an appeal on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**).

4. The Full Court recognised that the Administrative Appeals Tribunal (the **Tribunal**) had posed two questions to discern the meaning of "injury simpliciter" – i.e. "injury (other than a disease) suffered by an employee" appearing in s 4(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the **SRC Act**):[1]

> First, in order to establish an injury simpliciter, is it sufficient to find that a person suffers symptoms in the course of employment and is not a malingerer, in the absence of any physiological evidence, pathology or a known diagnosis to explain the symptoms, or a psychiatric disorder to account for them? Second, in this situation, is subjective evidence of symptoms ... sufficient to establish a non-disease injury?

5. The Tribunal answered "no" to both questions. It considered itself bound by the current state of the law to do so. The law to which it referred[2] was the law as noted by Gleeson CJ and Kirby J in *Kennedy Cleaning Services Ltd v Petkoska* (2000) 200 CLR 286 (***Kennedy Cleaning***) at 298 [35]:

> [A] long line of decisions in Australia had recognised that an "injury", *being a sudden or identifiable physiological change*, could nonetheless qualify within the ordinary application of that expression appearing in workers' compensation legislation, although the change was internal to the body of the worker. (Emphasis added)

6. The Respondent was permitted to argue before the Full Court that the Tribunal had committed three errors of law within the meaning of s 44 of the AAT Act:

   6.1. *First*, the Tribunal misconstrued the statutory definition of the word "injury" in s 4(1) of the SRC Act, by giving the word meaning by reference only to the specific remarks of Gleeson CJ and Kirby J in *Kennedy Cleaning*, which were addressed to another statutory context, rather than construing the SRC Act as a whole in its own historical and legal context, assisted by cases such as *Kennedy Cleaning*;

   6.2. *Second*, the Tribunal misconstrued or misapplied the phrase "injury arising in the course of employment" by effectively requiring proof of a causal contribution of employment to an injury suffered temporally in the course of employment; and

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1 [2011] AATA 886 at [52].

2 [2011] AATA 886 at [6].

6.3. *Third*, the Tribunal misdirected itself as to the evidence that could be sufficient in determining whether the Respondent had suffered an "injury".[3]

7. The Full Court acknowledged that the issue in paragraph 6.1 above was not raised in that particular way before the primary judge.

8. The propositions in paragraphs 6.2 and 6.3 above depend on flawed reading of the Tribunal's decision.

9. The three grounds appearing in the Notice of Appeal are adequate to defend the Tribunal's central legal approach (see paragraphs 4 and 5 above) and rebut the Full Court's criticism of that approach (see paragraph 6 above).

10. The key questions underlying the Full Court's judgment, and which can usefully dispose of this appeal, are as follows:

10.1. How does the SRC Act respond to a person who suffers a self-described, functional somatic disorder? Relatedly, does the person have to establish a "disease" (including the need to establish that employment is a material contribution to the disease) in order to obtain compensation? And can the person otherwise obtain compensation under the "injury (other than a disease)" limb?

10.2. Is it enough for the person to report symptoms (feelings of ill-effect, which are not mere malingering), which emerged while at work, but where the tribunal of fact is not satisfied on the evidence (lay and medical) that there was any sudden or identifiable change in the normal functioning of the person's body, or indeed that the person suffered any known psychiatric disorder, which can explain the symptoms?

11. That line of questioning accepts as beyond challenge in an appeal under s 44 of the AAT Act that the Tribunal was entitled to reject that part of the Respondent's case that asserted that he was injured by vaccinations at work producing his feelings of ill-effect (see paragraph 15 below). Had the Tribunal accepted such a case the Respondent would have established an injury simpliciter.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

12. The Appellant has considered whether notice should be given under s 78B of the *Judiciary Act 1903* (Cth). No such notice is required in this matter.

Part IV: Judgments below

13. The judgments below were:

13.1. *Re May and Military Rehabilitation and Compensation Commission* [2011] AATA 886;

13.2. *May v Military Rehabilitation and Compensation Commission* [2014] FCA 406;

13.3. *May v Military Rehabilitation and Compensation Commission* [2015] FCAFC 93; (2015) 322 ALR 330; (2015) 66 AAR 495.

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3 *May v MRCC* [2015] FCAFC 93; (2015) 322 ALR 330 at 335, [19(a)-(c)].

Part V: Background

14. On 6 November 1998, the Respondent enlisted in the Royal Australian Air Force (the **RAAF**). He was discharged on 30 July 2004 at the rank of Officer Cadet.

15. On 29 November 2002, the Respondent lodged a claim under the SRC Act for rehabilitation and compensation in respect of what he claimed to be "low immunity, fatigue, illnesses, dizziness". Central to his claim were his assertions that:

    15.1. he suffered symptoms shortly after receiving vaccinations in the course of his employment by the RAAF on 10 November 1998; and

    15.2. those symptoms were caused by those vaccinations.[4]

16. The Appellant denied the Respondent's claim, noting that the specialists who had examined the Respondent could not diagnose any specific condition or determine a cause for his symptoms. The Respondent sought review by the Tribunal.

Tribunal decision

17. On 14 December 2011, the Tribunal affirmed the Appellant's decision to deny liability to pay compensation to the Respondent.

18. Before doing so, the Tribunal received the following medical evidence:

    18.1. Dr Barrie, ear, nose and throat (**ENT**) surgeon, reported that "[p]hysical examination reveals normal tests of balance with no gaze nystagmus".[5]

    18.2. Dr Halmagyi, neurophysiologist, "could find no vestibular abnormalities", and no "pathological cause for his minor symptoms".[6]

    18.3. Dr Tonkin, ENT specialist, found mild imbalance, inconsistent both with the Respondent's symptoms and with Eustachian tube dysfunction; and reported that test results were all negative, and the balance test result was normal.[7]

    18.4. Professor Fagan, ENT surgeon, reported: "I cannot find any evidence of any vestibular or central nervous system abnormality".[8]

    18.5. Dr Kertesz, ENT surgeon, conducted tests, which were within normal limits, and noted no diagnosis.[9]

    18.6. Dr Pohl, ENT surgeon, reported a history of imbalance and vertigo associated with nausea, described his findings as unremarkable and reported that an MRA scan had proved normal. He was "unable to find a cause for [the Respondent's] imbalance and dizziness".[10]

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4 [2011] AATA 886 at [2], [11] and [12].

5 [2011] AATA 886 at [25].

6 [2011] AATA 886 at [25].

7 [2011] AATA 886 at [27].

8 [2011] AATA 886 at [28].

9 [2011] AATA 886 at [29].

10 [2011] AATA 886 at [30].

18.7. Dr Lowy, occupational physician, reported that "[the Respondent's] constellation of symptoms ... is not consistent with substantial pathology within his vestibular system"; and Dr Dowe, ENT surgeon, agreed.[11]

18.8. Dr Moore, psychiatrist, reported that the Respondent "does not suffer from a diagnosable psychiatric disorder" and that "no psychiatric disturbance ... could better account for his symptoms".[12]

19. The evidence of Dr Loblay, physician and Director of the Allergy Unit at Royal Prince Alfred Hospital, requires special attention, as the Tribunal "had particular regard" to his written and oral evidence[13] and found it "convincing".[14]

20. Dr Loblay opined that:

20.1. "it [is] very unlikely that [the Respondent] has suffered from an immunologically mediated adverse reaction to the vaccinations he was given";[15]

20.2. the Respondent's symptoms "could be characterised as a functional somatic disorder", similar to, but not being, chronic fatigue syndrome;[16]

20.3. although the Respondent was not malingering, his history was not characteristic of an immune reaction to vaccinations;[17]

20.4. there was no biological mechanism consistent with a vaccine generating an immune response;[18]

20.5. it was not uncommon for a person to have symptoms without an explanation for the symptoms or a diagnosable disease;[19]

20.6. the Respondent's condition was an "illness" being a subjective description of symptoms;[20] and

20.7. in the absence of damage to the vestibular system, the Respondent's vertigo could not be linked to an immunological reaction.[21]

21. Faced with that body of unanimous and mutually reinforcing medical evidence, the Tribunal identified the two questions noted at paragraph 4 above, which it considered that the Respondent's case posed, and answered them in the negative.

22. In doing so, the Tribunal made a series of findings of fact, having regard to both the lay and expert testimony.

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11 [2011] AATA 886 at [31].

12 [2011] AATA 886 at [31].

13 [2011] AATA 886 at [34].

14 [2011] AATA 886 at [56].

15 [2011] AATA 886 at [32].

16 [2011] AATA 886 at [32]

17 [2011] AATA 886 at [34].

18 [2011] AATA 886 at [35].

19 [2011] AATA 886 at [35].

20 [2011] AATA 886 at [35].

21 [2011] AATA 886 at [35].

22.1. There was a *temporal* relationship between the vaccinations and the symptoms described by the Respondent (swelling of the tongue, dizziness, nausea and diarrhoea) but there was no medical explanation for the Respondent's "illness", described by Dr Loblay as a subjective description of a collection of symptoms.[22]

22.2. There was no objective evidence of the Respondent's swollen tongue or dizziness, or of a pathology to support his account of his symptoms, apart from diarrhoea and upper respiratory tract infections, which were treated and subsequently resolved. Nor was there any objective evidence connecting the conditions with the vaccinations.[23]

22.3. There was no biological mechanism consistent with a vaccine generating an immune response, nor any objective evidence connecting other conditions (not the current cause of the Respondent's incapacity) with the vaccinations the Respondent received.[24]

22.4. There was no objective evidence of the Respondent suffering "what [the Tribunal] loosely described as ... vertigo" (the principal cause of his current disability) in the period following his vaccinations; nor was there any substantial pathology to explain the Respondent's symptoms.[25]

22.5. Although the Respondent was significantly disabled by vertigo, the medical evidence was that there was no pathology consistent with the Respondent's symptoms, so that no diagnosis could be made.[26]

22.6. Although symptoms first emerged a short time after the vaccinations, the medical evidence (for example of Dr Halmagyi and Dr Loblay) "discounted the possibility" of any connection between the vaccinations given to the Respondent and a physical injury.[27]

23. In doing so, the Tribunal took into account the factual the Respondent's contention as to "injury (other than disease)", namely that his symptoms followed shortly after, and could be attributed to, his vaccinations.[28] The Respondent's case was that he got hurt because of the vaccinations that he was required to receive at work.

24. The Tribunal's ultimate conclusions appear in its reasons at [63],[29] and make clear that, on the evidence, and having regard to the way that the Respondent made his case that he got hurt (i.e. vertigo due to the vaccinations suffered at work), the Respondent had failed to establish his case: he could not demonstrate the necessary sudden or identifiable physiological change in the normal functioning of the body or its organs attributable to the vaccinations received while at work.

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22 [2011] AATA 886 at [58].

23 [2011] AATA 886 at [59].

24 [2011] AATA 886 at [60].

25 [2011] AATA 886 at [61].

26 [2011] AATA 886 at [62].

27 [2011] AATA 886 at [62].

28 [2011] AATA 886 at [49].

29 [2011] AATA 886 at [63].

25. In coming to that conclusion, the Tribunal referred to and applied[30] the formulation in *Kennedy Cleaning*,[31] concluding that the Respondent had not suffered an "injury (other than a disease)" for the purposes of the SRC Act as in force at the time of the Respondent's claim.[32]

26. It is separately noteworthy that, although the Respondent did not contend that he suffered a "disease",[33] the Tribunal considered that possibility and rejected it on the facts.[34] No attack has been made by the Respondent on that conclusion.

27. The Respondent appealed from the Tribunal's decision to the Federal Court .

Federal Court decision

28. On 30 April 2014, Buchanan J dismissed the Respondent's appeal,[35] finding that there was no legal error, arising from any wrongly decided questions of law or otherwise, which vitiated the Tribunal's findings of fact.[36] Buchanan J concluded that the Tribunal gave careful consideration to the Respondent's "thesis" for his difficulties (i.e. that he got hurt because of the vaccinations) but found that it had very little support in the medical evidence and, indeed, was contradicted by the Tribunal's own evaluation of the medical evidence.[37]

Full Federal Court decision

29. The Respondent appealed to the Full Court of the Federal Court. In that appeal, as noted at paragraph 6 above, the Respondent argued that the Tribunal:[38]

29.1. misconstrued the definition of "injury" in s 4(1) of the SRC Act, by relying too heavily on the remarks of Gleeson CJ and Kirby J in *Kennedy Cleaning*;

29.2. misconstrued or misapplied the phrase "injury arising in the course of employment" by requiring proof of a causal contribution of employment to the injury suffered temporally in the course of employment; and

29.3. misdirected itself as to the evidence that could be sufficient in determining whether the Respondent had suffered an "injury".[39]

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30 [2011] AATA 886 at [6], [43], [58], [63].

31 (2000) 200 CLR 286 at 298, [35] (Gleeson CJ and Kirby J).

32 See paragraph (b) of the definition of "injury" in s 4(1) of the SRC Act as it applied at the time of the Respondent's claim. See now paragraph (b) of the definition of "injury" in s 5A(1) of the SRC Act.

33 [2011] AATA 886 at [50].

34 [2011] AATA 886 at [64]-[65]. At the time of the Respondent's claim, "disease" was defined in s 4(1) of the SRC Act. See now s 5B(1) of the SRC Act.

35 *May v MRCC* [2014] FCA 406.

36 [2014] FCA 406 at [76].

37 [2014] FCA 406 at [75].

38 (2015) 322 ALR 330 at 335, [19(a)-(c)].

39 The amended notice of appeal filed in the Full Court added the contentions that the Tribunal had erred "by failing to find that a constellation of symptoms as reported by the [Respondent] is capable, without 'objective' evidence by way of corroboration of any reported symptoms, of being an injury within s 4 of the SRC Act"; and "in finding that it was necessary for the medical witness to opine 'definitively' whether the [Respondent] had suffered an adverse reaction": (2015) 322 ALR 330 at 360 [135] and 363, [147].

30. The central question in the appeal concerned the proper construction of "injury (other than a disease)" in s 4(1) of the SRC Act: whether, as a matter of construction, the statutory concept of "injury" was informed by the phrase "sudden or identifiable physiological change" in the *Kennedy Cleaning* sense.[40]

31. A Full Court found that the Tribunal erred in law in each of the three respects alleged. Specifically, the Full Court made the following findings:

31.1. The Tribunal *erred* in reading "injury (other than a disease)" as requiring a "sudden or identifiable physiological change" in every case. The inquiry was more general than that: whether the person experienced a physiological change or disturbance of the normal physiological state (physical or mental) that is an alteration from the functioning of a healthy mind or body.[41]

31.2. The Tribunal *erred* in its supposed "insistence" that there be a causal link between the Respondent's vertigo, and his vaccinations in the RAAF.[42] An injury will arise in the course of employment (one of the alternative connections with employment contemplated by the definition of "injury") where the connection is temporal, there being no need for a causal link between employment and the injury.[43]

31.3. The Tribunal *erred* in thinking that there was a requirement for "diagnosis or medically ascertained cause": once the correct statutory construction had been reached, the Tribunal should have recognised that "injury (other than disease)" could be established by a variety of means, including the drawing of inferences on a common-sense basis independent of medical diagnosis.

32. The Full Court set aside Buchanan J's orders and the Tribunal's decision, and remitted the matter to the Tribunal for determination "according to law".

33. The Full Court's reasons appear in paragraphs [211], [220] and [224], which address the Tribunal's purported errors and capture the Full Court's approach. According to the Full Court, the Tribunal should have found that:

33.1. the Respondent was obliged to receive vaccinations at work and he did so;

33.2. the Respondent suffered physical effects shortly after he received vaccinations at work;

33.3. those physical effects warranted the label of "vertigo", a condition that should be viewed as a departure from the functioning of a healthy body;

33.4. the Respondent was not required to produce any objective medical evidence, or formal medical diagnosis, before the Tribunal could determine that an injury was suffered in the course of employment; and

33.5. a common sense inference was available that the injury was suffered in the course of employment, and was not denied by adverse medical inferences.

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40 (2015) 322 ALR 330 at 368-369, [171]-[176].

41 (2015) 322 ALR 330 at 355, [110], 367, [169] and 374, [207] (for example).

42 (2015) 322 ALR 330 at 377-378, [222].

43 (2015) 322 ALR 330 at 378, [224]. See also at 378, [226] and 379, [228]. (The second error had not affected the result in the Tribunal: the central, and sufficient, reason for the Tribunal's finding that the Respondent had not shown that he had sustained an "injury" was the absence of evidence that he had sustained a "sudden or identifiable physiological change".)

Part VI: Argument

Error of Law 1: The Tribunal applied the correct concept of "injury (other than a disease)"

Applying the SRC Act, as a matter of principle, to a person in the position of the Respondent on the factual findings of the Tribunal

34. The starting point, not clearly recognised by the Full Court, is that the SRC Act treats injuries simpliciter and diseases as separate but related bases of liability. Although the bases may overlap in a given case, they have different meanings and different work to do in a statutory scheme, which operates with more or less stringency depending on which basis is claimed.

34.1. That is clear from the s 4(1) definition of "injury" (founding liability under s 14 of the SRC Act) – with its distinct elements. Paragraph (a) refers to "disease suffered by an employee"; and paragraphs (b) and (c) refer to "injury (other than a disease) suffered by an employee".[44]

34.2. Although "disease" was defined in s 4(1) of the SRC Act,[45] "injury (other than a disease)" was not defined and must carry its ordinary meaning.

34.3. "Injury" and "disease" carry different ordinary meanings: "There is a distinction, according to the common use of language, between getting hurt and becoming sick."[46]

35. To adopt Latham CJ's words in *Hume Steel Ltd v Peart*[47] (***Hume Steel***), the task is to explicate the distinction between "getting hurt" and "becoming sick" within the statutory scheme.

The unspoken premise in s 4(1) of the SRC Act: a person may have neither an injury simpliciter nor a disease

36. A further result from the language of s 4(1) must be borne in mind: in some cases a person may genuinely complain to be unwell although the tribunal of fact cannot conclude that the person has been "hurt" or has "become sick" in the course, or as a result, of their employment.

37. The common sense underlying that unspoken premise is illustrated by Dr Loblay's evidence – accepted by the Tribunal in full as noted in paragraph 19 above – that it is not uncommon for a person to have inexplicable symptoms without a diagnosable disease:[48] a state described by Dr Loblay as a functional somatic disorder.[49]

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44 See now s 5A (definition of "injury") and s 5B (definition of "disease") of the SRC Act.

45 See now s 5B of the SRC Act.

46 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 332.1 (quoting *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252 (Latham CJ)).

47 (1947) 75 CLR 242 at 252 (Latham CJ).

48 [2011] AATA 886 at [35].

49 [2011] AATA 886 at [32].

38. The Full Court, in its exposition of the legal issues, failed to appreciate that the Tribunal as fact-finder determined that the Respondent fell into that category of cases captured by the unspoken premise.

38.1. The Respondent did not assert a case of disease (i.e. "becoming sick") that was materially contributed to by his employment; and in any event the Tribunal found that such a case could not be made out.

38.2. The Respondent asserted a case of injury other than disease (i.e. "getting hurt") temporally and causally related to work, but in a very specific way – he "got hurt" because he was forced to undergo vaccinations at work; and shortly thereafter and due to those vaccinations he suffered the effects of dizziness labelled as vertigo. But the Tribunal rejected that case on the facts. Whatever inference might have been available, had the evidence rested solely on the temporal connection between undergoing vaccinations and reporting dizziness, the medical evidence positively discounted such a connection. The Tribunal, reasoning as fact-finder, found that medical evidence persuasive in rebutting any such case.

38.3. That left the Respondent as a person who genuinely felt he was suffering symptoms of dizziness, but with no basis to conclude any change had occurred in the normal functioning of his body. His experience of symptoms could not be linked to a sudden or ascertainable change in his body's normal functioning. Nor was there any recognisable psychiatric disorder.

39. These factors reveal the central differences between the Tribunal and the Full Court. Once it rejected the Respondent's "getting hurt" case on the facts (almost inevitably, given the overwhelming weight of the medical evidence discounting it), the Tribunal recognised the unspoken premise: can one be said to be "injured" or to have "got hurt" because, while at work, one experiences unpleasant effects that cannot be attributed to some sudden or identifiable change in the normal functioning of the body or a psychiatric disorder? Do self-described functional somatic disorders qualify as injuries simpliciter? The Tribunal correctly said "no".

40. In failing to appreciate that unspoken premise in s 4(1) of the SRC Act, the Full Court adopted a dramatically expanded concept of "physiological change" to help dispose of the injury simpliciter category of cases, such that any "alteration from the functioning of a healthy body or mind" involves an injury (other than a disease): see the Full Court's reasons at [110]-[112]. The alteration need not be sudden. It need not be identifiable: one need not be satisfied there was any particular change in the functioning of the body, nor was any recognised psychiatric disorder required. It is enough that the person feels unwell, which affected his or her capacity for work, and that the ill-feeling came on at work.

41. The Full Court appeared to accept that suddenness or identifiability may be necessary in some cases to ascertain an injury simpliciter separate from an identifiable underlying disease. In such cases there is a very clear role for medical opinion to identify that there is a disease, and then to identify whether there is some event or change to the functioning of the body that can be distinguished from the disease itself so as to attract the label of "injury (other than a disease)" with its easier gateway to compensation.

42. However, in a case where there is no identifiable underlying disease on the evidence available, it seems that a radically expanded pathway to compensation is available. As long as the person reports feeling unwell in some sense, and the reports first emerged at work, the person has suffered an injury.

43. There are at least two vices in the Full Court's expanded concept of injury:

43.1. *First*, the Full Court has overlooked that the definition of "disease" includes "any ailment suffered by an employee". On one view, where an employee reports a "subjective description of a collection of symptoms" that might be described as an "illness",[50] the employee has an "ailment", which is compensable under the disease limb (if material contribution is made out). Yet, without having to show anything more than the onset of such an ailment at work, the employee can also assert injury simpliciter, thereby rendering the higher threshold for disease superfluous.

43.2. *Second*, whether the "subjective description of a collection of symptoms" that might be described as an "illness"[51] can be described as an "ailment", to allow self-described functional somatic disorders – which include chronic fatigue syndrome[52] – to qualify as injuries simpliciter and evade the stricter threshold for disease simply *eviscerates* the meaning of "injury" in common usage as taken up in the SRC Act.

44. The Full Court's approach, therefore, misunderstands the necessary distinction between the different concepts in the SRC Act, and the unspoken premise in s 4(1) that a person may genuinely report symptoms yet not meet the standard required of either concept.

45. The Tribunal as fact-finder is obliged by the SRC Act to ask itself: what injury to the body or mind has a person such as the Respondent suffered? How did that person "get hurt"? There is no meaningful distinction between "getting hurt" and "being sick" if any self-described, functional somatic disorder can be an injury simpliciter.

46. We turn next to the authorities, which are instructive.

Zickar

47. In *Zickar v MGH Plastic Industries Pty Ltd* (***Zickar***)[53] the Appellant collapsed at work after the rupture of a cerebral aneurism and suffered severe brain damage. The aneurism was a congenital weakness. The question was whether, under legislation relevantly similar to the SRC Act[54], the rupture of the aneurism was compensable as an injury, discrete from the underlying disease of aneurism.

48. All seven Justices proceeded on the basis that an injury, as distinct from a disease, was characterised by a sudden or identifiable physiological change distinct from any underlying disease. The majority and minority Justices divided on whether such a physiological change must have an external cause.

48.1. The minority (Brennan CJ, Dawson and Gaudron JJ) quoted[55] with approval Gibbs CJ in *Hockey v Yelland*,[56] where his Honour distinguished

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50 See the Tribunal's findings: [2011] AATA 886 at [48], [58], [65].

51 See the Tribunal's findings: [2011] AATA 886 at [48], [58], [65].

52 [2011] AATA 886 at [32].

53 (1996) 187 CLR 310.

54 The relevant statutory definition, reproduced in (1996) 187 CLR 310 at 314, draws the common distinction between a "personal injury" and a "disease". Their Honours also saw no substantial difference between "injury by accident" and "injury": (1996) 187 CLR 310 at 326.6.

55 (1996) 187 CLR 310 at 324.7.

56 (1984) 157 CLR 124 at 137.

between the natural progression of an autogenous disease and an injury that was externally caused:

> ... a sudden identifiable physiological change may be an injury *if it results from some external cause during the course of the employment* ...[57]

48.2. Their Honours took the view that the mere progression of a disease could not be an "injury by accident", but a sudden and distinct physiological change could amount to "injury by accident".[58]

48.3. The principal majority judgment (Toohey, McHugh and Gummow JJ) differed from the minority in one respect: "external cause" was not the point of distinction between injuries simpliciter and diseases. They agreed with Murphy J's analysis in *Accident Compensation Commission v McIntosh*,[59] to the effect that it did not matter whether a sudden rupture of blood vessels was caused by an internal or external agent.[60]

48.4. The fourth majority Justice, Kirby J, saw the fact that the rupture was a "sudden or identifiable physiological change" as decisive of its characterisation as an injury as distinct from a disease.[61]

Kennedy Cleaning

49. *Kennedy Cleaning*[62] was a case in which the Appellant collapsed at work on the occurrence of a brain lesion, which caused a stroke. She had previously suffered from rheumatic mitral valve disease – a heart condition, which can manifest with bouts of quivering (fibrillation) that may lead to the release of a clot (embolism) into the blood stream. Such a release occurred here. Thus the stroke was due to a cerebral embolus secondary to her underlying valvular heart disease.[63]

50. The Appellant in *Kennedy Cleaning* sought to distinguish *Zickar* on the basis that the current case was to be decided under ACT legislation[64] that was materially different to the NSW legislation considered in *Zickar*.[65] The Appellant argued the brain lesion and resulting stroke was the progression of the underlying disease and compensable only as a disease (if material contribution from employment were established, which it was not) and not as an injury.[66]

51. That attempt failed:[67] the High Court confirmed that an employee who claims compensation for an injury simpliciter (thereby invoking a temporal, as opposed to

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57 Emphasis added by Brennan CJ, Dawson and Gaudron JJ. The definition of "injury" considered in *Hockey v Yelland* was substantially the same as the definition considered in *Zickar*: see (1996) 187 CLR 310 at 324.2, referring back to 322.3; and compare 314.6.

58 (1996) 187 CLR 310 at 326.2-326.3.

59 [1991] 2 VR 253 at 262.

60 (1996) 187 CLR 310 at 335.7.

61 (1996) 187 CLR 310 at 336.8, 352.3.

62 (2000) 200 CLR 286.

63 (2000) 200 CLR 286 at 288-9 [5]-[6].

64 The relevant legislative provisions dealing with "injury" and "disease" appear in (2000) 200 CLR 286 at 291.7-292.9 [14], [15] and [16].

65 (2000) 200 CLR 286 at 291.4 [13].

66 (2000) 200 CLR 286 at 296.3 [26].

67 (2000) 200 CLR 286.

causal, connection with employment) must demonstrate that he or she had suffered some kind of sudden or identifiable physiological change or disturbance of the normal physiological state – that is, something distinct from any underlying disease – whether that change had an external or internal cause.[68] Specifically:

51.1. On the facts, the employee had suffered a lesion, which was "a sudden change or disturbance to her physiological state"[69] in a particular part of her brain, which immediately rendered her incapacitated for work. It did not matter in establishing injury simpliciter that the "sudden physiological change" was connected to an underlying disease process, provided that the change could be distinguished from the underlying disease.[70]

51.2. The High Court concluded that the Appellant's stroke was distinguishable from the existing pathology or morbid condition, which could of itself be classified as a disease, and which directly or indirectly caused the sudden event to occur. Accordingly, the High Court concluded that the Appellant's stroke amounted to an "injury".

The Full Court wrongly distinguished Zickar *and* Kennedy Cleaning

52. As is apparent from its reasons at [109]-[110], the Full Court considered that the references to "sudden" or "identifiable" physiological change in *Zickar* and *Kennedy Cleaning* were not requirements for establishing injury simpliciter in every case. Rather, the Full Court said, they are useful in a case where there is a need to distinguish between an established disease and its consequences and effects (the Full Court reasoned at [111] that this was not such a case); and, secondly, that much prior legislation required that injuries in the workplace take place "by accident".

53. Neither point justifies distinguishing *Zickar* and *Kennedy Cleaning*.

54. The first point can be answered on two levels: one peculiar to the facts of this case and one more general. As noted above, it is an available view on the findings of the Tribunal that the "subjective description of a collection of symptoms" or the "illness" suffered by the Respondent qualified as an "ailment" within paragraph (a) of the definition of "disease". On that basis, the case lines up on all fours with the precise facts and ruling of *Zickar* and *Kennedy Cleaning*, even viewed at their narrowest. There must be some sudden or identifiable physiological change discrete from that underlying ailment or disease to qualify as an injury simpliciter. Otherwise, the Respondent must fall back on establishing a material contribution from the employment to the ailment, which he failed to do.

55. At a more general level, no doubt on the particular facts of *Zickar* and *Kennedy Cleaning*, there was a diagnosed disease, and the concept of "sudden or identifiable physiological change" assisted in distinguishing an injury from a mere progression of the disease. However, the Justices' discussion should not be read as relating *only* to the case where there was an established pre-existing disease.

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68 (2000) 200 CLR 286 at 298.7, [35], 299.2, [36] and 300.6, [39] (Gleeson CJ and Kirby J), 303.4, [50] and 304.8, [54] (Gaudron J), 308.6, [68] (McHugh, Gummow and Hayne JJ).

69 (2000) 200 CLR 286 at 289.8, [8] (Gleeson CJ and Kirby J).

70 (2000) 200 CLR 286 at 299.2, [36] (Gleeson CJ and Kirby J), and at 306 [62]. And see the Full Federal Court's similar point in *Australian Postal Corporation* v *Burch* (1998) 85 FCR 264 at 269, citing *ACC v McIntosh* [1991] 2 VR 253 at 264.

Their Honours' discussion was more general in terms and effect and designed to describe the ordinary concept of "being hurt" within the statutory expression.

56. That is particularly apparent in the passages from Gleeson CJ and Kirby J in *Kennedy Cleaning* at 298 [35] (as noted in paragraph 5 above) and also at 300 [39]:

> All of these cases require that consideration be given to the precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change accepted at trial. If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an "injury" in the primary sense of the word.

57. The Full Court in its reasons at [111] considered that if there was no diagnosed disease, whose progression could be assessed as inevitable or not, the concepts of "sudden" or "identifiable" should be done away with, and instead one should simply apply the approach of Latham CJ in *Hume Steel.*

58. The problem is that Latham CJ's judgment in *Hume Steel* was one of the authorities cited by Gleeson CJ and Kirby J in *Kennedy Cleaning* at [39] as supporting the more general proposition that there must be a sudden or identifiable change. Thus, *Hume Steel* supports the case, not denies it. In the cited passage from *Hume Steel*, Latham CJ was at pains to point out that breaking an artery or the lining of an artery could be as much an injury to the body as breaking an arm. Each involved a harmful effect on the body. Each was a disturbance of the normal physiological state, which may produce physical incapacity, suffering or death.

59. One struggles in vain to find an analogy from the ruling in *Hume Steel* to the facts of a case where there is a functional somatic disorder. As illustrated by the facts here, what was the injury to the body? It was not the undergoing of the vaccinations, because that was rejected on the factual findings based on the unanimous medical evidence. What was left? Nothing more than the experience of symptoms, which could be described as vertigo and which left the Respondent feeling disabled. This "subjective description of a collection of symptoms" might be described as an "illness" but did not allow the Tribunal to identify any injury to the body.[71] There was nothing sudden and nothing identifiable that had happened to the Respondent's body so as to bring about his incapacity. There was no recognised psychiatric disorder. There were inexplicable symptoms, but nothing more.

60. To be clear, "identifiable" in this context directs attention to:

60.1. current medical thinking (which may, but need not, be based on objective pathology); or

60.2. any facts that permit drawing a common sense or lay inference (noting that an inference cannot be drawn if it is inconsistent with, or excluded by, accepted medical evidence: see paragraph 80 below).

61. As to the second point noted at paragraph 52 above, in its survey of earlier cases, the Full Court erred in suggesting that qualifiers such as "sudden" and "identifiable"

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[71] See the Tribunal's findings: [2011] AATA 886 at [48], [58], [65].

derived from the notion of "injury by accident" in early workers compensation statutes.[72]

61.1. That view is denied by the relevant statutory provisions considered in *Zickar* and *Kennedy Cleaning*, which did not require that an employee suffer an injury "by accident". All that was required was that a worker's injury occur in the course of employment.

61.2. In both cases, the High Court held that a sudden or identifiable change, distinct from any underlying disease, is required in order to fulfil the statutory concept of "injury".

61.3. The important question for the High Court in *Zickar* and *Kennedy Cleaning* was the demarcation between "injury" as distinct from "disease" (rather than injuries "by accident"), on the one hand, and the natural consequences of a disease (whether idiopathic, autogenous or otherwise), on the other hand.

61.4. The distinction between "injury" and "disease" in the compensation context, and the significance of a "sudden or identifiable physiological change", was emphasised by Gleeson CJ and Kirby J in *Kennedy Cleaning*:[73]

> The disease provisions remain as alternative and additional heads of entitlement where a disease pathology exists with the appropriate employment connection, and does not manifest itself in the kind of sudden physiological change or disturbance of the normal physiological state that will constitute an "injury" in the primary sense.

61.5. To the same effect, McHugh, Gummow and Hayne JJ said that the evidence of the lesion suffered by the employee was evidence of "a sudden change or disturbance to the physiological state of the respondent and thus in its ordinary sense as connoting primarily an injury".[74]

The Full Court's approach tends to elide or erode the distinct statutory requirements of "injury (other than disease)" and "disease"

62. The Full Court's approach to "injury" risks devaluing the important statutory distinction between a condition recoverable as "an injury (other than a disease)" and a condition recoverable a "disease".

63. The above submissions have sought to demonstrate that the Tribunal correctly found, contrary to the Full Court's approach, that the mere recounting of "symptoms" by a non-malingerer cannot establish "an injury (other than a disease)". For instance, those symptoms could be:

63.1. explained by the presence of an "ailment" (which might be a "disease") as opposed to an "injury (other than a disease)", which requires a causal connection with employment before it is compensable; or

63.2. explained by lifestyle factors, such as lack of sleep or substance abuse (not the findings of fact here); or

63.3. simply inexplicable.

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72 (2015) 322 ALR 330 at 355, [112].

73 (2000) 200 CLR 286 at 300-301, [40].

74 (2000) 200 CLR 286 at 306, [62].

64. It is now necessary to take a larger look at how the concepts of "injury (other than a disease)" and "disease" are used in the SRC Act. Both concepts involve some form of departure from the functioning of a normal healthy body, but the text and structure of the SRC Act demonstrate that "injury" and "disease" are, and are intended to be, distinct concepts requiring separate consideration. They may overlap on the facts of a given case, but they remain distinct. Thus:

64.1. The relevant definitions, for instance, speak of a "disease", on the one hand, and an "injury (*other than* a disease)",[75] on the other hand.

64.2. The definitions impose quite different tests of employment-connection.

(a) The necessary connection with employment, in the case of "an injury (other than a disease)" may be no more than temporal.[76]

(b) On the other hand, at the time[77] of the Respondent's claim, a disease was only compensable if an "ailment", or an aggravation of an "ailment", was contributed to in a material degree by employment.[78]

65. Further support for the notion that injuries simpliciter and "diseases" are distinct phenomena under the SRC Act arises from the different ways in which the SRC Act defines the circumstances in which an "injury (other than a disease)" and a "disease" are deemed to satisfy the requisite level of employment connection.

65.1. Section 6(1)(b)(i) of the applicable version of the SRC Act, for example, deemed the word "injury" to include an injury sustained while an employee was at his or her place of work, for the purposes of employment, or while he or she was temporarily absent from that place during an ordinary recess in employment.[79] The emphasis is on *when* an injury is sustained.

65.2. Section 7(2), on the other hand, deemed the word "disease" to include a disease contracted by an employee where the incidence of that disease among persons who had engaged in the same employment as the employee was higher than the incidence of the disease among persons who had engaged in other employment in the place where the employee was ordinarily employed.[80] The emphasis is on *causation*.

65.3. There would be no need for such different terminology and approaches if the concepts of "injury" and "disease" were coextensive, as set forth in [110] and [209] of the Full Court's reasons.

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75 Emphasis added.

76 At the time of the Respondent's claim, the relevant provision was paragraph (b) of the definition of "injury" in s 4(1) of the SRC Act. See now s 5A(1)(b) of the SRC Act.

77 Now the contribution must be "to a significant degree", meaning substantially more than material: see s 5B of the SRC Act. For a discussion of the required connection, see *Comcare v Canute* (2005) 148 FCR 232 at 249-250, [67] (French and Stone JJ); *Comcare v Sahu-Khan* (2007) 156 FCR 536 at 542 [13] (Finn J).

78 At the time of the Respondent's claim, a disease was only compensable if an "ailment", or an aggravation of an "ailment", was contributed to in a material degree by employment: see the definition of "disease" in s 4(1) of the SRC Act, as it stood then. Now, s 5B(1) of the SRC Act requires a contribution to a significant degree by employment.

79 Compare s 6(1)(b) of the current SRC Act.

80 Compare s 7(2) of the current SRC Act.

66. The distinctness of "injuries" and "diseases" is also consonant with other deeming provisions of the SRC Act.

66.1. Section 7(4), which allows a deemed date to be attributed as the date when a "disease" was contracted, can be contrasted with the absence of any such deeming provision for an injury simpliciter – indicating an assumption that an "injury" will have an obvious and immediate commencement.

66.2. In contrast to the inclusion of a deemed commencement date for a "disease", s 6 of the SRC Act contains elaborate provisions that define or delimit a discrete or identifiable event or period of employment in which an "injury" will meet the statutory definition – the examples given indicate or imply that something sudden or identifiable needs to occur within the protected period of employment, rather than a physiological change being contributed to by employment. The examples include an injury sustained as a result of an "act of violence", an injury sustained while "at [an employee's] place of work", and an injury sustained while "travelling" for certain purposes.

66.3. Section 7(7) is an important exclusionary provision applying only to diseases, the purpose and effect of which could readily be set to nought if the distinction between diseases and injuries simpliciter were to be elided.

67. At [110] of its reasons, the Full Court elided the distinction between "injuries" and "diseases"; indeed, it eschewed the need for *any* point of distinction by its support for the notion that injuries simpliciter (like all diseases) simply involve physiological change or disturbance of the normal physiological state (or an alteration from the functioning of a healthy body or mind). The Full Court went on to deprecate the utility of "qualifications" or "constraints" of the kind discerned by this Court in *Zickar* and *Kennedy Cleaning* ("sudden or identifiable"); and, at [112], suggested, wrongly, that points of distinction "may have less relevance" where one has "physiological changes without apparent aetiology or any real diagnostic explanation".

68. Contrary to the Full Court's reasoning at [110] and [112], the distinction between "injuries" and "diseases" will be of most relevance and importance where, as here:

68.1. the physiological changes would, on one view, be capable of answering the description of a "disease", being an "ailment"; or

68.2. on any view, the "condition" has no apparent aetiology or any medical explanation.

Canute

69. Further, the approach taken by the Full Court is not supported by the High Court's reasons in *Canute v Comcare* (2006) 226 CLR 535.

69.1. The relevant passage, cited by the Full Court,[81] treats injuries and ailments disjunctively. In that regard, the High Court held that the definition of injury

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[81] (2015) 322 ALR 330 at 356, [113].

is expressed in terms of the resultant effects of an "incident" or "ailment" on an employee's body.[82]

69.2. The word "incident" seems to be used in the passage cited to denote an event that is capable of suddenly, or identifiably, leading to an "injury". Contrary to the Full Court's conclusions, the passage cited carries with it connotations of "an injury (other than a disease)" amounting to a sudden or identifiable change, rather than the mere progression of an underlying disease or an inexplicable constellation of symptoms.

Error of Law 2: The Tribunal did not require proof of a causal connection in determining whether there was an "injury (other than a disease)"

70. Contrary to the Full Court's finding at [228], the Tribunal did not dismiss the Respondent's application for review because it believed there had to be a causal connection between the Respondent's employment and his claimed "injury". Rather, the Tribunal affirmed the Appellant's decision denying liability under the SRC Act because it was not satisfied that there was an *injury* in the first place.

71. As noted above, the Respondent's core case of injury was that he got hurt at work because the vaccinations he was made to have led to his symptoms. The Tribunal had to address that case, which (if it had been made out on the facts) would have been a complete means for the Respondent to succeed. He would have established an injury simpliciter – "I got hurt by needle injection, a sudden and identifiable external event which caused my symptoms and thus a change in the normal functioning of my body". At the same time, he would have established both the causal and temporal limbs of injury arising out of and in the course of his employment.

72. Thus the Tribunal correctly and necessarily addressed that case. By finding, as it was entitled to do given the overwhelming medical evidence, that the vaccinations did not lead to the symptoms, the Tribunal was rejecting the case of injury simpliciter put by the Respondent.

73. That left only the question identified above: was the mere experience of symptoms of ill-effect, coming on at work, but not attributable to any identifiable internal or external event, an injury simpliciter?

74. Thus, unless the Tribunal had addressed the supposed connection between the vaccinations and the symptoms, it would have fallen into error at the stage of injury.

Error of Law 3: The Tribunal was entitled to treat medical science as negating any common sense inference of fact

75. Even though the Respondent may present a theory of his case that relies on no medical evidence – that the vaccinations caused his symptoms because the symptoms followed shortly thereafter – that thesis must ultimately be assessed against the available medical evidence.

76. The Tribunal was charged with the fact finding task of assessing the Respondent's thesis against the medical evidence that was available.

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82 *Canute v Comcare* (2006) 226 CLR 535 at 540 [10] (Gummow ACJ, Kirby, Callinan, Heydon and Crennan JJ).

77. As noted above, the medical evidence played two key roles in this case.

78. First, it unanimously demolished the Respondent's thesis. It allowed the Tribunal to reach the conclusion that the vaccinations did not lead to the Respondent's symptoms. The Tribunal was entitled to find that the Respondent's case theory was inconsistent with "trustworthy expert opinion".[83] That is, the Tribunal engaged in the very reasoning exercise that the Full Court said at [220] that it had failed to do. Any common sense inference thrown up by the sequence of events was rejected on the medical evidence.

79. The second role for the medical evidence, looking more broadly beyond the vaccinations issue, was to enquire whether the Respondent's symptoms could be related to any other diagnosis or pathology, enabling one to identify an injury.

80. The Full Court was mistaken in finding that no clinically supported diagnosis or "objective clinical evidence" was required to establish the occurrence of an "injury" in cases of the present kind.[84]

80.1. The authorities cited by the Full Court, starting *with Adelaide Stevedoring Co Ltd v Forst*[85] (***Forst***), were concerned with whether a clearly diagnosed injury had a *causal* relationship with an incident or another injury. None of the authorities addressed the question whether a claimed injury actually existed: each of the injuries involved in those cases had been diagnosed clinically. The point made by Dixon J in *Forst* (see paragraph 80.3 below) can be seen to have a wider application.

80.2. Here, the expert medical evidence was that: there was no pathological cause for the Respondent's symptoms;[86] he had mild imbalance, inconsistent both with his symptoms and with Eustachian tube dysfunction;[87] there was no evidence of any vestibular or central nervous system abnormality;[88] ENT tests were within normal limits;[89] an MRA scan had proved normal;[90] the Respondent's symptoms were not consistent with a substantial pathology within his vestibular system;[91] and there was no biological mechanism consistent with a vaccine generating an immune response – the vertigo could not be linked to an immunological reaction.[92]

80.3. In the face of that evidence (summarised in more detail in paragraphs 18-20 above), to the extent that the *Forst* line of authority might have been relevant, the observation of Dixon J in that case, at 569 ("an important

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83 (1940) 64 CLR 538 at 569 (Dixon J).

84 (2015) 322 ALR 330 at 375-377, [212]-[220].

85 (1940) 64 CLR 538; and the 10 cases cited in (2015) 322 ALR 330 at 377, [219].

86 [2011] AATA 886 at [25].

87 [2011] AATA 886 at [27].

88 [2011] AATA 886 at [28].

89 [2011] AATA 886 at [29].

90 [2011] AATA 886 at [30].

91 [2011] AATA 886 at [31].

92 [2011] AATA 886 at [34]-[35].

principle": Herron CJ in the NSW Court of Appeal in *EMI (Aust) Ltd v Bes*)[93] is relevant:

> ... upon a question of fact of a medical or scientific description a court can only say that the burden of proof has not been discharged where, upon the evidence, it appears that the present state of knowledge does not admit of an affirmative answer and that competent and trustworthy expert opinion regards an affirmative answer as lacking justification, either as a probable inference or as an accepted hypothesis.

80.4. In the present matter, the Tribunal concluded that the medical evidence indicated a lack of any pathological or clinical support for the Respondent's symptoms.[94] And the Tribunal found that the medical evidence (for example of Dr Halmagyi and Dr Loblay) excluded the possibility of any connection between the vaccinations given to the Respondent and a physical injury.

80.5. On that evidence, the present state of knowledge did not admit of an affirmative answer to the question: "Had the Respondent experienced a sudden or identifiable physiological change or disturbance of the normal physiological state?" It might equally be said that, on the evidence, an affirmative answer to that question would have lacked justification, either as a probable inference or as an accepted hypothesis.

80.6. Accordingly, it was right that the Respondent's case before the Tribunal failed when Dixon J's observations in *Forst* are borne in mind.[95] Because the Tribunal could not proceed beyond a state of speculation or uncertainty as to the existence of an "injury (other than a disease)", the Respondent's claim correctly failed.[96] That is, the Tribunal was entirely justified in reaching the conclusion that it expressed in paragraph [52] of its reasons, and the Full Court was mistaken when it found that the answers given in that paragraph were "affected by legal error".[97]

Conclusion

81. The Respondent's case before the Tribunal was based on the concept of "injury (other than a disease)" and eschewed the concept of "disease". His case theory was that "in the course of [his] employment" he got hurt as a result of the vaccinations. The Tribunal evaluated the evidence before it and rejected that proposition in reliance on the overwhelming medical evidence. Once the vaccinations were put to one side as irrelevant, it found no other basis on which to conclude that the Respondent had suffered an "injury (other than a disease)" in the course of employment. At this stage of its analysis the Tribunal applied the orthodox approach to the ordinary meaning of "injury (other than a disease)" (or an "injury simpliciter") in *Zickar* and *Kennedy Cleaning*. Nothing in the facts of the case, or the specific language of the SRC Act, called for a departure from that approach.

82. The Full Court devised its own test for "injury (other than a disease)" – one which: rejects the need for a "sudden or identifiable" change or disturbance to the

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93 [1970] 2 NSWR 238 at 241/31-34.

94 [2011] AATA 886 at [62].

95 As the Tribunal recognised: [2011] AATA 886 at [52].

96 *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 358 (Woodward J).

97 (2015) 322 ALR 330 at 359 at [130].

functioning of the body or mind; conflates the mere experience of symptoms with the existence of an "injury (other than a disease)"; and erodes the distinction between injury and disease, and extends compensation to cases where there is disease without injury and without the material contribution required for disease, or beyond that, to a case of mere feeling of ill-effect without disease or injury at all.

83. The Full Court's approach should be rejected.

Part VII: Legislative provisions

84. *Safety, Rehabilitation and Compensation Act 1988* (Cth), as at 29 November 2002, ss 4(1), 6, 7, 14 (Annexure A).

85. *Safety, Rehabilitation and Compensation Act 1988* (Cth), as at 18 December 2015, ss 4(1), 5A, 5B, 6, 7, 14 (Annexure B).

Part VIII: Orders sought

86. In relation to proceeding NSD485/2014 in the Federal Court of Australia, the Appellant seeks the following orders.

86.1. The appeal be allowed.

86.2. Set aside orders 2 and 3 made by the Full Court on 30 June 2015 and, in their place, order that:

2. The appeal be dismissed.

86.3. The Appellant is to pay the Respondent's costs in this Court.

Consistent with the condition attaching to the grant of special leave in this matter,[98] the Appellant does not seek to disturb the costs orders made in the Respondent's favour in the Full Court.

Part IX: Time estimate

87. It is estimated that two hours will be required for the presentation of the Appellant's oral argument.

Dated: 18 December 2015

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98 [2015] HCATrans 302 at lines 355-364.