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HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, NETTLE AND GORDON JJ

MILITARY REHABILITATION AND COMPENSATION COMMISSION — APPELLANT

AND

BENJAMIN JAMES EDWARD MAY — RESPONDENT

Military Rehabilitation and Compensation Commission v May
[2016] HCA 19
11 May 2016
S243/2015

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 2, 3(a) and 3(b) of the order of the Full Court of the Federal Court of Australia made on 30 June 2015, and in their place order that the appeal be dismissed.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

P J Hanks QC with P G Woulfe for the appellant (instructed by Moray & Agnew Solicitors)

R G McHugh SC with B K Nolan for the respondent (instructed by Legal Minds)

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CATCHWORDS

Military Rehabilitation and Compensation Commission v May

Workers compensation – Where employee vaccinated in course of employment and later felt unwell, described as "vertigo" – Where evidence did not establish nature and incidents of any physiological or psychiatric change – Whether employee suffered "injury" within meaning of s 4(1) of *Safety, Rehabilitation and Compensation Act* 1988 (Cth).

Words and phrases – "ailment", "disease", "disturbance of the normal physiological state", "injury", "injury (other than a disease)", "physiological change", "psychiatric change", "sudden or identifiable".

Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 4(1), 14(1).

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1 FRENCH CJ, KIEFEL, NETTLE AND GORDON JJ. The respondent, Mr May, served in the Royal Australian Air Force ("the RAAF") before being discharged. Mr May had become "significantly disabled" by dizziness. This "cut short what might have been a very promising career as a pilot in the RAAF"[1].

2 Mr May applied for compensation under s 14(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act") "in respect of *an injury* suffered by an employee [where] *the injury* results in death, incapacity for work, or impairment" (emphasis added).

3 The question on this appeal is whether Mr May's dizziness was an "injury" for the purposes of the Act and therefore compensable under s 14 of the Act. The Full Court said it was. For the reasons that follow, that conclusion cannot be supported and the appeal must be allowed.

Legislative framework

4 This appeal is concerned with the Act as at 29 November 2002[2], being the date Mr May lodged his claim.

5 Section 14 of the Act, entitled "Compensation for injuries", relevantly provided:

> "(1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of *an injury* suffered by an employee if *the injury* results in death, incapacity for work, or impairment." (emphasis added)

6 "[I]njury" was defined in s 4(1) of the Act to mean:

> "(a) a *disease* suffered by an employee; *or*
>
> (b) an *injury* (other than a *disease*) suffered by an employee, being a physical or mental injury *arising out of, or in the course of, the employee's employment*; or

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1 *Re May and Military Rehabilitation and Compensation Commission* [2011] AATA 886 at [66].

2 All references in these reasons are to the Act as at that date: see the compilation prepared as at 13 September 2002, taking into account amendments up to Act No 144 of 2001.

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(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), being an aggravation that arose out of, or in the course of, that employment;

but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment." (emphasis added)

7 "[D]isease" was defined in s 4(1) to mean:

"(a) any *ailment* suffered by an employee; or

(b) the aggravation of any such *ailment*;

being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth …" (emphasis added)

8 "[A]ilment" was defined in s 4(1) to mean "any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)".

Issues

9 Mr May did not contend that he suffered a "disease" within the meaning of par (a) of the definition of "injury" in s 4(1) of the Act. Rather, he claimed he suffered an "injury (other than a disease)" within par (b) of the definition of "injury" in s 4(1) of the Act.

10 This appeal concerns the proper construction of the phrase "injury (other than a disease)" in par (b) of the definition of "injury" in s 4(1) of the Act. That question of construction is determined by reference to the text, context and purpose of the Act[3].

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3 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

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Facts

11 Mr May was born in 1975. On 6 November 1998, he enlisted in the RAAF. At that time, he was healthy and fit. He was discharged on 30 July 2004 at the rank of Officer Cadet.

12 Between 10 November 1998 and 30 March 2000 (inclusive), in the course of his employment with the RAAF, Mr May was required to undergo a series of vaccinations. He said that he suffered a series of adverse reactions to these vaccinations.

13 On 29 November 2002, Mr May applied under s 14 of the Act for compensation in respect of "low immunity, fatigue, illnesses, dizziness – immune system/whole body", which, he maintained, he sustained as a result of the vaccinations he received while he was employed with the RAAF.

14 On 11 March 2003, a delegate of the appellant denied Mr May's claim, noting that specialists who had examined him had been unable to diagnose any specific condition or determine a cause for his symptoms, and the delegate was therefore unable to connect the claimed condition with his RAAF service ("the determination"). In April 2010, following an application by Mr May, the appellant reconsidered but affirmed the determination.

Previous decisions

Administrative Appeals Tribunal ("the Tribunal")

15 In 2010, Mr May applied to the Tribunal for a review of that second decision.

16 The Tribunal received extensive medical evidence about Mr May's medical history. The medical evidence relating to his "vertigo" included reports from a number of experts. Dr Barrie, an ear, nose and throat ("ENT") surgeon, reported that "[p]hysical examination reveals normal tests of balance with no gaze nystagmus"[4]. Dr Halmagyi, a neurophysiologist, "could find no vestibular abnormalities" and no "pathological cause for his minor vestibular symptoms"[5]. Dr Halmagyi noted that he found no validated example of immunisation causing

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4 *May* [2011] AATA 886 at [25].

5 *May* [2011] AATA 886 at [25].

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vestibular problems and had personally never seen someone in whom he attributed their vestibular problems to an immunisation.

17 Dr Tonkin, an ENT specialist, initially found mild imbalance inconsistent both with Mr May's symptoms and with Eustachian tube dysfunction. Further test results were all negative, including a balance test, which was normal[6]. Professor Fagan, a second ENT surgeon, reported he could not "find any evidence of any vestibular or central nervous system abnormality"[7]. Dr Kertesz, a third ENT surgeon, organised tests, the results of which were within normal limits, and noted no diagnosis[8]. Dr Pohl, a fourth ENT surgeon, noted Mr May's history of imbalance and vertigo associated with nausea and then described his examination findings as unremarkable. A subsequent MRA scan proved normal and Dr Pohl concluded that he was "unable to find a cause for [Mr May's] imbalance and dizziness"[9]. Dr Lowy, an occupational physician, reported that Mr May's "constellation of symptoms … is not consistent with substantial pathology within his vestibular system"[10]. Dr Dowe, a fifth ENT surgeon, agreed. Dr Moore, a psychiatrist, concluded that Mr May "does not suffer from a diagnosable psychiatric disorder" and that "no psychiatric disturbance … could better account for his symptoms"[11].

18 The Tribunal had "particular regard to" the evidence of Dr Loblay, a physician and the Director of the Allergy Unit at the Royal Prince Alfred Hospital, who gave evidence at the hearing and had many years' experience in the investigation and treatment of immune reactions, both to drugs and to vaccines[12]. The Tribunal found his evidence convincing and noted his opinion that it is "very unlikely that Mr May has suffered from an immunologically mediated adverse reaction to the vaccinations he was given"[13]. Dr Loblay also

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6 *May* [2011] AATA 886 at [27].

7 *May* [2011] AATA 886 at [28].

8 *May* [2011] AATA 886 at [29].

9 *May* [2011] AATA 886 at [30].

10 *May* [2011] AATA 886 at [31].

11 *May* [2011] AATA 886 at [31].

12 *May* [2011] AATA 886 at [56].

13 *May* [2011] AATA 886 at [56].

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expressed the view that Mr May's symptoms "could be categorized as a 'functional somatic disorder'"[14]. Dr Loblay opined that although Mr May was not malingering, his history was "not characteristic of an immune reaction to vaccinations"[15] and in his case there was "no biological mechanism consistent with a vaccine generating an immune response"[16]. Dr Loblay also opined that it was "not uncommon for a person to have symptoms without there being an explanation for the symptoms and without there being a diagnosable disease" and that Mr May's condition was an "illness", being a subjective description of his symptoms[17]. The absence of damage to the vestibular system meant that Mr May's "vertigo" could not be linked to an immunological reaction.

19 The Tribunal accepted that Mr May was (and became shortly after joining the RAAF) "significantly disabled" by his condition[18].

20 The Tribunal "loosely described" Mr May's "condition" as "vertigo"[19]. Mr May had stated that, following the vaccinations on 10 November 1998, he began to experience a swollen tongue within 30 to 60 minutes, and he felt dizzy and experienced nausea and diarrhoea. The clinical notes at the time indicated that his treating doctors thought he was "probably suffering from a viral illness and possibly bacterial gastroenteritis"[20]. After that time, he had a history of infections, particularly of the upper respiratory tract. However, the Tribunal accepted that none of the investigations undertaken by specialists had proved definitive and none of the specialist reports had attributed any pathological cause to the "vertigo"[21].

21 What then were the findings of fact made by the Tribunal?

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14 *May* [2011] AATA 886 at [32].

15 *May* [2011] AATA 886 at [34].

16 *May* [2011] AATA 886 at [35].

17 *May* [2011] AATA 886 at [35].

18 *May* [2011] AATA 886 at [48].

19 *May* [2011] AATA 886 at [61].

20 *May* [2011] AATA 886 at [53].

21 *May* [2011] AATA 886 at [55].

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22 First, there was a temporal relationship between the vaccinations and the symptoms described by Mr May (swelling of the tongue, dizziness, nausea and diarrhoea) but there was no medical explanation for his "illness" in the period following the vaccinations, where the "illness" was what Dr Loblay described as a "subjective description of a collection of symptoms"[22].

23 Second, there was no objective evidence of Mr May's swollen tongue or dizziness, or 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 those conditions with the vaccinations[23].

24 Third, there was no biological mechanism consistent with a vaccine generating an immune response. Although doctors diagnosed Mr May at various times as suffering from gastroenteritis and bacterial infections, there was no objective evidence connecting these conditions (which did not appear to be the current cause of his incapacity) with the vaccinations he received[24].

25 Fourth, there was no objective evidence of Mr May suffering what the Tribunal had "loosely described as ... vertigo" in the period following his vaccinations; nor was there any substantial pathology to explain his symptoms[25].

26 Fifth, although symptoms first emerged a short time after the vaccinations, the medical evidence (for example, of Dr Halmagyi and Dr Loblay) "discount[ed] the possibility" of any connection between the vaccinations given to Mr May and a physical injury that Mr May suffered[26].

27 Sixth, although Mr May was "significantly disabled" by "vertigo", the medical evidence indicated a lack of any pathology consistent with his symptoms, which meant that no diagnosis could be made[27].

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22 *May* [2011] AATA 886 at [58].

23 *May* [2011] AATA 886 at [59].

24 *May* [2011] AATA 886 at [60].

25 *May* [2011] AATA 886 at [61].

26 *May* [2011] AATA 886 at [62].

27 *May* [2011] AATA 886 at [62].

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28 These findings are important. It will be necessary to return to them.

29 The Tribunal concluded that Mr May had failed to establish his case: he had not demonstrated that he had suffered a physical injury amounting to a "sudden or identifiable physiological change"[28] in the normal functioning of the body or its organs attributable to the vaccinations received while serving in the RAAF[29]. Therefore, Mr May had not suffered an "injury (other than a disease)" for the purposes of par (b) of the definition of "injury" in s 4(1) of the Act. The Tribunal also held that he had not suffered a "disease" within par (a) of the definition of "injury" in s 4(1) of the Act[30].

30 Pursuant to s 43 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), the decision under review was affirmed.

Primary judge

31 Mr May then appealed to the Federal Court of Australia under s 44 of the AAT Act. Buchanan J concluded that the Tribunal had given careful consideration to Mr May's "thesis" for his ongoing difficulties but found that the thesis had "very little support in the medical evidence" and in fact was contradicted by the Tribunal's evaluation of that medical evidence[31]. Buchanan J dismissed the appeal, finding no legal error.

Full Court of the Federal Court

32 Mr May then appealed to the Full Court of the Federal Court under s 24 of the *Federal Court of Australia Act* 1976 (Cth) and, in addition, brought an application to that Court for judicial review of the Tribunal's decision, pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 39B of the *Judiciary Act* 1903 (Cth).

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28 See *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286 at 298 [35]; [2000] HCA 45.

29 *May* [2011] AATA 886 at [63].

30 *May* [2011] AATA 886 at [64]-[65].

31 *May v Military Rehabilitation and Compensation Commission* [2014] FCA 406 at [75].

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33 The central question in those proceedings was the proper construction of "injury" in s 4(1) of the Act and, in particular, whether the statutory concept of "injury" required a "sudden or identifiable physiological change"[32].

34 The Full Court found that the Tribunal made an error in reading "injury" as requiring a "sudden or identifiable physiological change" in every case[33]. The Full Court concluded that the inquiry posed by the statutory definition of injury was, instead, "whether the person has experienced a physiological change or disturbance of the normal physiological state (physical or mental) that can be said to be an alteration from the functioning of a healthy body or mind"[34].

35 The Full Court also held that the Tribunal made an error in considering that there was a requirement for a "diagnosis or medically ascertained cause" for there to be an "injury"[35]. Instead, the Full Court found that the Tribunal should have recognised that "injury" could be established by the drawing of inferences on a common-sense basis, independent of medical diagnosis[36].

36 The Full Court then held that the Tribunal was also wrong to insist upon a causal link between Mr May's vertigo and the vaccinations. The Full Court found that an injury under the Act will occur in the course of employment where the connection is temporal[37].

37 The Full Court concluded that there was no debate that Mr May was required to undergo the vaccinations as part of his employment with the RAAF and that he did so; that physical effects arose during performance of his duties[38];

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32 See *Kennedy Cleaning* (2000) 200 CLR 286 at 298 [35].

33 *May v Military Rehabilitation and Compensation Commission* (2015) 233 FCR 397 at 444 [205]-[207].

34 *May* (2015) 233 FCR 397 at 444-445 [209]. See also at 425 [110].

35 *May* (2015) 233 FCR 397 at 444-445 [209]. See also at 445 [211], 446 [216], 447 [220].

36 *May* (2015) 233 FCR 397 at 446-447 [217]-[218], [220].

37 *May* (2015) 233 FCR 397 at 447-448 [222]-[224].

38 *May* (2015) 233 FCR 397 at 448 [224].

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and that the Tribunal only needed to be satisfied that Mr May suffered an injury during the "protected period of work hours"[39].

38 The Full Court allowed the appeal, set aside the orders of Buchanan J and, in their place, relevantly ordered that the decision of the Tribunal be set aside and the matter be remitted to the Tribunal for determination according to law. The matter was remitted to the Tribunal to consider again whether Mr May has suffered an "injury" within the meaning of s 4(1) of the Act and whether the injury arose out of or in the course of his employment. The Full Court recognised that, given the Tribunal's findings about Mr May's vertigo, this matter came "close to a case where there may only be one answer"[40]. However, the Full Court accepted that a differently constituted Tribunal, properly instructed about what needs to be established for Mr May's "vertigo" to come within the concept of "injury", may take a different approach to significant aspects of the evidence, including Mr May's accounts of what he experienced[41]. The Full Court dismissed the application for judicial review under the *Administrative Decisions (Judicial Review) Act* and the *Judiciary Act* as unnecessary.

Contentions

39 On appeal to this Court, the appellant contended that the Full Court applied an incorrect concept of "injury (other than a disease)" and did not recognise that the Act treats "disease" and "injury (other than a disease)" as separate but related bases of liability. In particular, the appellant contended that the Full Court was wrong to hold that "injury (other than a disease)" did not require a "sudden or identifiable physiological change".

40 Mr May contended that there was nothing in the context, structure or purpose of the Act to require a "sudden or identifiable physiological change" and that the basic notion of "physical injury" is "something which involves a harmful effect on the body" or "a disturbance of the normal physiological state which may produce physical incapacity and suffering or death".

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39 *May* (2015) 233 FCR 397 at 448 [226] quoting *Kennedy Cleaning* (2000) 200 CLR 286 at 296-297 [28].

40 *May* (2015) 233 FCR 397 at 449 [233].

41 *May* (2015) 233 FCR 397 at 449 [233].

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Meaning of "injury" under s 4(1) of the Act

41 As seen earlier, subject to an exception for disciplinary action and other matters not now relevant, "injury" was defined in s 4(1) of the Act to mean:

> "(a) a *disease* suffered by an employee; *or*
>
> (b) an *injury* (other than a *disease*) suffered by an employee, being a physical or mental injury *arising out of, or in the course of, the employee's employment*; or
>
> (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), being an aggravation that arose out of, or in the course of, that employment;
>
> ..." (emphasis added)

42 The set of conditions answering the definition of "injury" in the Act relevantly comprises two sub-sets, "disease"[42] and "injury (other than a disease)"[43], the latter sometimes referred to, not necessarily helpfully, as injury simpliciter. They comprise separate but related bases of liability[44]. Each has a different meaning in the statutory scheme.

43 As appears from the definition of "disease", a "disease" for the purposes of the Act must be an ailment or an aggravation of an ailment. That is not sufficient to establish the existence of a disease. The ailment or aggravation thereof has to have been contributed to in a material degree by the employee's employment by the Commonwealth.

44 An "injury (other than a disease)" covers the other sub-set of "injury"[45]. Various aspects of this limb of the definition of "injury" should be observed. First, the phrase "other than a disease" means that if an employee establishes that

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42 par (a) of the definition of "injury" in s 4(1).

43 pars (b) and (c) of the definition of "injury" in s 4(1).

44 See also ss 6 and 7 of the Act, which define certain circumstances in which the employment connections for "injury" and "disease" will be satisfied.

45 par (b) of the definition of "injury" in s 4(1).

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they have a "disease" within par (a) of the definition of "injury", there is no need to consider par (b). Second, an "injury (other than a disease)" suffered by an employee must be "*a physical or mental injury* arising out of, or in the course of, the employee's employment"[46] (emphasis added). That is to say, the physical or mental injury has to have a causal or temporal connection with the employee's employment. Third, that need for a causal or temporal connection in respect of a "physical or mental injury" in par (b) directly raises the question – what does "injury" mean in that paragraph?

45 "Injury" in par (b) is used in its "primary" sense. As Gleeson CJ and Kirby J explained in *Kennedy Cleaning Services Pty Ltd v Petkoska*, if "something ... 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 that word"[47] (emphasis added).

46 That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee[48]. It may be, for example, the breaking of a limb[49], the breaking of an artery[50], the detachment of a piece of the lining of an artery[51], the rupture of an arterial wall[52] or a lesion to the brain[53]. Each would be described as an "injury" in the primary sense.

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46 par (b) of the definition of "injury" in s 4(1).

47 (2000) 200 CLR 286 at 300 [39]. See also at 298-299 [35], 300-301 [40].

48 *Kennedy Cleaning* (2000) 200 CLR 286 at 298-299 [34]-[35].

49 *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252-253; [1947] HCA 34.

50 *Hume Steel* (1947) 75 CLR 242 at 252-253.

51 *Hume Steel* (1947) 75 CLR 242 at 253.

52 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 332; [1996] HCA 31.

53 *Kennedy Cleaning* (2000) 200 CLR 286 at 289 [6], [8].

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47 However, as the Full Court correctly held[54], "suddenness" is not *necessary* for there to be an "injury" in the primary sense[55]. A physiological change might be "sudden and ascertainable"[56]. A physiological change might be "dramatic"[57]. The employee's condition might be a "disturbance of the normal physiological state"[58]. That an "injury" in the primary sense can arise, and can be described, in a variety of ways does not mean that "suddenness" is irrelevant. As the Full Court said, "suddenness" is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease[59] (as occurred in *Zickar v MGH Plastic Industries Pty Ltd*[60] and *Kennedy Cleaning*[61]). But it is the *physiological* change – the nature and incidents of that change – that remains central.

48 That an "injury" in the primary sense can arise, and be described, in a variety of ways was recognised by Gleeson CJ and Kirby J in *Kennedy Cleaning*[62] when their Honours stated:

> "[C]onsideration [must] 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

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54 *May* (2015) 233 FCR 397 at 424-426 [109]-[114], 426-427 [118], 443-444 [204]-[206].

55 See *Kennedy Cleaning* (2000) 200 CLR 286 at 298 [35], 300 [39], 301 [40].

56 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39].

57 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39].

58 *Hume Steel* (1947) 75 CLR 242 at 253; *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39].

59 *May* (2015) 233 FCR 397 at 425 [110].

60 (1996) 187 CLR 310 at 332.

61 (2000) 200 CLR 286 at 288-289 [5]-[8], 300 [39].

62 (2000) 200 CLR 286 at 300 [39].

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> characterisation as an 'injury' in the primary sense of that word." (emphasis added)

49 It is against that background that the Act requires the tribunal of fact to give consideration to "the precise evidence, on a fact by fact basis, … accepted at trial"[63] and then to ask certain questions in order to determine whether an employee is suffering a "disease" or an "injury (other than a disease)".

50 First, does the evidence amount, relevantly, to something that can be described as an "ailment"[64], being a physical or mental ailment, disorder, defect or morbid condition? Second, if so, was that state contributed to in a material degree by the employee's employment by the Commonwealth?

51 If the answer to both those questions is "Yes", there is a "disease" within par (a) of the definition of "injury". Of course, in some cases, the answer to those questions may be admitted. That is, the employee may admit that the answer to the first question, or both the first and the second questions, is "No".

52 If there is not a "disease" within par (a) of the definition of "injury", the tribunal of fact next inquires whether there is an "injury (other than a disease)" within par (b). The third question is – does the evidence demonstrate the existence of a physical or mental "injury" (in the primary sense of that word)? Generally, that will be determined by asking whether the employee has suffered something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state[65]. However, that judicial language is not to be construed or applied as if it were the words of a statute defining a necessary condition for the existence of an "injury (other than a disease)". The language of judgments should not "be applied literally to facts without further consideration of what is conveyed by the reasoning" in the cases from which it is derived, or without regard to the text and scheme of the Act[66].

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63 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39].

64 See pars (a) and (b) of the definition of "disease" in s 4(1).

65 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39]. See also at 298 [35]. Or, in the case of mental injury, a psychiatric disorder.

66 See *Comcare v PVYW* (2013) 250 CLR 246 at 256 [15]; [2013] HCA 41. See also at 256 [16] quoting *Brennan v Comcare* (1994) 50 FCR 555 at 572.

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53 If there be an "injury" in the primary sense of the word, the next question is – did that injury arise out of, or in the course of, the employee's employment by the Commonwealth? If that question is answered "Yes", there is an "injury (other than a disease)" within par (b) of the definition of "injury" in s 4(1) of the Act. In some circumstances, if the answer is "No", it may be necessary to ask whether the case is one involving aggravation of an injury. That question does not arise in this appeal.

54 It may be that there are circumstances in which the identification of a physiological change, a disturbance of the normal physiological state or a psychiatric disorder may satisfy the definition of "ailment" (and therefore result in a positive answer to the first question) but the second question is answered "No". But if that is the position on the evidence, there will not be any relevant overlap between a "disease" and an "injury (other than a disease)" in the definition of "injury" in s 4(1) of the Act. It reflects the fact that there are marked differences between arising "out of" or "in the course of" (in par (b)) and "contributed to in a material degree" (for par (a)) in the definition of "injury". And it simply means that the employee was unable to satisfy the different level of employment connection required under par (a) of the definition of "injury" under the Act.

55 This construction of the definition of "injury" in s 4(1) of the Act does not "rob"[67] the "disease" limb of utility. The "disease" limb of the definition remains an additional basis of liability[68].

56 The proper construction of the Act reflects the importance of the distinction drawn by the Act between "disease" and "injury (other than a disease)" in the definition of "injury" in s 4(1) of the Act and recognises that each creates a different basis for liability under the statutory scheme.

Not sufficient for an employee merely to feel unwell

57 The Full Court concluded that the inquiry demanded by the statutory definition of "injury" was "whether *the person has experienced* a physiological change or disturbance of the normal physiological state (physical or mental) that can be said to be an alteration from the functioning of a healthy body or mind"[69]

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67 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [40].

68 cf Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 April 1988 at 2192.

69 *May* (2015) 233 FCR 397 at 444-445 [209]. See also at 425 [110].

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(emphasis added). To the extent that conclusion suggested that subjectively experienced symptoms, without an accompanying physiological or psychiatric change, are sufficient to provide a positive answer to the first or third questions set out above, that conclusion should be rejected.

58 That is because, first, it overlooks that the Act provided that the appellant was liable to compensate in respect of "an injury" and that the focus of the Act is on "an injury".

59 Second, it overlooks that the Act draws an important distinction between "disease" and "injury (other than a disease)" and that "disease" and "injury (other than a disease)" are part of different limbs of the definition of "injury" in s 4(1). Each limb deals with a separate basis for something being an "injury". That is the reason for separate questions.

60 Third, as seen earlier, the word "injury" in "injury (other than a disease)" has a different meaning from the defined term "injury" in s 4(1) – it means "injury" in its primary sense. That necessarily requires consideration of the "precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change"[70].

61 Put another way, the proper construction of the Act recognises that an employee may genuinely complain of being unwell, but, in the context of the "injury (other than a disease)" limb of the definition of "injury", unless that employee can satisfy the tribunal of fact that he or she has suffered an "injury" (in the primary sense of the word), s 14 of the Act will not be engaged.

62 The "nature and incidents of the physiological [or psychiatric] change"[71] will determine whether there was an "injury (other than a disease)". The evidence to be adduced, of course, will vary from case to case and, where appropriate, may take into account common-sense inferences drawn from a sequence of events[72]. To take an extreme example, the dismemberment of a limb involves a physiological change as a matter of common sense. But there must be more than an assertion by an employee that he or she feels unwell.

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70 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39].

71 *Kennedy Cleaning* (2000) 200 CLR 286 at 300 [39].

72 cf *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538 at 563-564; [1940] HCA 45. But see also at 569-570.

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Application to Mr May's circumstances

63 What then is Mr May's position?

64 It is not in dispute that Mr May suffered a departure from a state of good health whilst he was employed with the RAAF. The Tribunal accepted that as a fact and made a finding to that effect[73]. But Mr May must establish that he suffered an "injury" as that term is defined in s 4(1) of the Act.

65 In the present case, the Tribunal held that Mr May did not have a "disease" within par (a) of the definition of "injury" in s 4(1) of the Act. That conclusion was unchallenged in this Court. Rather, Mr May contended that he has an "injury (other than a disease)" within par (b) of the definition of "injury" in s 4(1) of the Act.

66 The Tribunal was not satisfied on the evidence (lay and medical) that Mr May had suffered an "injury". Some of the findings of the Tribunal are worth restating. There was no medical explanation for Mr May's "illness", which had been described as a "subjective description of a collection of symptoms"[74]. There was no objective evidence of Mr May suffering "vertigo" in the period following his vaccinations, nor was there any substantial pathology to explain Mr May's symptoms[75]. For example, there was no objective evidence of Mr May's swollen tongue or dizziness, or pathology to support his account of those symptoms, apart from diarrhoea and upper respiratory tract infections, which were treated and subsequently resolved. The medical evidence indicated a lack of any pathology consistent with Mr May's symptoms, which meant that no diagnosis could be made[76]. Mr May did not suffer from a diagnosable psychiatric disorder and no psychiatric disturbance could better account for his symptoms.

67 Mr May asserted that he felt unwell. The Tribunal accepted that he felt unwell. But the "nature and incidents of the physiological [or psychiatric] change" suffered by Mr May were not established. There was no "injury" in the primary sense of that word.

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73 See [19]-[20], [22]-[24] above.

74 *May* [2011] AATA 886 at [58].

75 *May* [2011] AATA 886 at [61].

76 *May* [2011] AATA 886 at [62].

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68 It followed that it was not established that Mr May suffered an "injury (other than a disease)". As he suffered neither from a "disease" nor from an "injury (other than a disease)", neither of the two separate bases of liability for which the Act provided was made out.

69 Contrary to the conclusion of the Full Court[77], this was not a case where a different answer might have been reached if the matter was remitted to the Tribunal.

Orders

70 The appeal should be allowed. Paragraphs 2, 3(a) and 3(b) of the Order made by the Full Court of the Federal Court on 30 June 2015 should be set aside and, in their place, there should be an order that the appeal to the Full Court be dismissed. Consistent with the condition attaching to the grant of special leave, the appellant is to pay Mr May's costs of this appeal.

77 *May* (2015) 233 FCR 397 at 449 [233].

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71 GAGELER J. The content of, and relationship between, pars (a) and (b) of the definition of "injury" in the Act were considered by the Full Court of the Federal Court in *Australian Postal Corporation v Burch*[78]. Four propositions emerge from the reasoning in that case. Those propositions have not since been doubted. In my opinion, they ought now be regarded as settled.

72 First, "disease" is used in its statutorily defined sense in each of pars (a) and (b). Second, "injury" is used in its ordinary sense in par (b). Third, the bracketed exclusion in the reference in par (b) to "an injury (other than a disease)" serves simply to clarify that the connection with employment required for an injury to meet par (b) has no application to a physical or mental condition which has the connection with employment required to meet the statutory definition of a disease.

73 Fourth, the questions posed by pars (a) and (b) need not be asked in their statutory sequence. There is no need to ask whether a physical or mental condition is a disease in the statutorily defined sense used in par (a), if that physical or mental condition meets the description in par (b). To meet the description in par (b), it is enough that the condition is an injury in the ordinary sense which arises out of or in the course of employment.

74 That brings us to the central question in the present appeal: what exactly is the ordinary sense in which injury is used in the context of the Act? Plainly, injury "is not used in a global sense to describe the general condition of the employee following an incident"[79].

75 More than a century of teasing out the ordinary sense in which injury is used in the context of workers compensation legislation has shown that suffering an injury is not confined to "getting hurt" (an injury might be constituted by nothing more than "something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel"[80]) but that suffering an injury involves something more than merely "becoming sick"[81]. An injury, it has long been repeatedly explained, is some definite or distinct "physiological change" or "physiological disturbance" for the worse which, if not "sudden", is at

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78 (1998) 85 FCR 264 at 268.

79 *Canute v Comcare* (2006) 226 CLR 535 at 540 [10]; [2006] HCA 47.

80 *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242 at 246, cited in *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 553; [1960] HCA 25.

81 *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252; [1947] HCA 34.

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least "identifiable"[82]. The universality of that explanation has been questioned[83], and the comment has fairly been made that "a distinct physiological change is not itself an expression of clear and definite meaning"[84]. The expression has nevertheless been shown by repeated usage to have utility as an exposition of the particular sense in which injury has been used, and continues to be used, in the particular legislative context.

76 The Full Court of the Federal Court referred in the decision under appeal to an injury as "a physiological change or disturbance of the normal physiological state (physical or mental) that can be said to be an alteration from the functioning of a healthy body or mind"[85]. If read as equating a physiological change or disturbance sufficient to constitute an injury with any alteration from the functioning of a healthy mind or body, the reference would in truth involve a significant departure from the particular sense which the repeated explanations of injury in terms of a definite or distinct physiological change or disturbance have sought to convey.

77 Every ailment or worsening of an ailment can at some level be described as an alteration from the functioning of a healthy mind or body. Indeed every manifestation of an ailment or of the worsening of an ailment might potentially be so described. Not every ailment or worsening of an ailment can be described as an injury in the ordinary sense. At least in the case of a physical injury, to suffer an injury is more than just to experience the onset of dysfunction.

78 The understanding of an injury as a definite or distinct physiological change or disturbance was first expounded in cases in which catastrophic consequences of pre-existing medical conditions came to be recognised as capable of constituting injuries[86]. The exposition has remained particularly

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82 *Hetherington v Amalgamated Collieries of WA Ltd* (1939) 62 CLR 317 at 327-328, 330, 334; [1939] HCA 36 (citing *Oates v Earl Fitzwilliam's Collieries Co* [1939] 2 All ER 498 at 502); *The Commonwealth v Ockenden* (1958) 99 CLR 215 at 222-224; [1958] HCA 37; *The Commonwealth v Hornsby* (1960) 103 CLR 588 at 597; [1960] HCA 27 (citing in particular *James Patrick & Co Proprietary Ltd v Sharpe* [1955] AC 1); *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286 at 298-299 [35]-[36], 300 [39], 303 [50], 304 [54], 308 [67]; [2000] HCA 45.

83 *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 593; [1967] HCA 30.

84 *The Commonwealth v Hornsby* (1960) 103 CLR 588 at 608.

85 *May v Military Rehabilitation and Compensation Commission* (2015) 233 FCR 397 at 444-445 [209].

86 Cf *The Commonwealth v Hornsby* (1960) 103 CLR 588 at 597.

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useful in cases within that category. The analysis undertaken in those cases has always looked beyond mere alterations of physical or mental functioning of the mind or body to the identification of the physiological happenings which have resulted in those alterations: destruction of tissue[87], collapse of vertebrae[88], rupture of blood vessels[89], occlusion of an artery[90], development of a lesion[91]. The point of explaining an injury in terms of a definite or distinct physiological change or disturbance has been to highlight the necessity for such an analysis to be undertaken.

79 The need to identify some underlying physiological occurrence to justify the finding of a physical injury is perhaps best illustrated by the reasoning of the majority in *Zickar v MGH Plastic Industries Pty Ltd*[92], which concerned a worker who collapsed at work after the rupture of a congenital cerebral aneurism. Having said that "[i]f there was no rupture there would be no event answering the description of personal injury", Toohey, McHugh and Gummow JJ added "[b]ut there was such an event and the presence of a disease does not preclude reliance upon that event as personal injury"[93]. Together with Kirby J[94], their Honours concluded that the rupture itself was properly characterised as an injury in the normal sense[95].

80 The Full Court was right to point out in the decision under appeal that the Act and the case law do not "preclude an injury being established on the basis of an account by a claimant of the disturbances to her or his body or mind, without the necessity for a diagnosis of a recognised medical condition, or corroborating pathology or medical opinion" and to observe that "[w]hether or not the evidence of a claimant will be sufficient, if it is not supported, corroborated or confirmed

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87 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 553.

88 *Darling Island Stevedoring and Lighterage Co Ltd v Hankinson* (1967) 117 CLR 19; [1967] HCA 10.

89 *Accident Compensation Commission v McIntosh* [1991] 2 VR 253.

90 *Australian Postal Corporation v Burch* (1998) 85 FCR 264 at 268.

91 *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286.

92 (1996) 187 CLR 310; [1996] HCA 31.

93 (1996) 187 CLR 310 at 334.

94 (1996) 187 CLR 310 at 352.

95 (1996) 187 CLR 310 at 335.

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by independent medical opinion or pathology, will be a matter for the Tribunal's satisfaction on the evidence in each particular case"[96]. But the Full Court was wrong, in my opinion, to infer that the Tribunal proceeded on a different basis[97].

81 The Tribunal demonstrated that it understood the ultimate question which it needed to answer to determine Mr May's claim when it stated its conclusion in terms that it was "not satisfied on the balance of probabilities that Mr May suffered a physical injury – an injury simpliciter – amounting to a sudden or identifiable physiological change in the normal functioning of the body or its organs"[98].

82 The Tribunal, in my opinion, displayed no legal error in answering that question when (on the one hand) it accepted that Mr May experienced debilitating dizziness, which could "loosely" be described as "vertigo", and yet (on the other hand) it found itself unable to be satisfied that the dizziness was enough to show that Mr May had suffered an injury "in the absence of any physiological evidence, pathology or a known diagnosis to explain the symptoms"[99]. The Tribunal was addressing the sufficiency of the evidence to found a conclusion that Mr May suffered some definite or distinct physiological change or disturbance, in the sense commonly and appropriately used to describe a condition properly characterised as an injury in the ordinary sense. The Tribunal's acceptance that Mr May experienced debilitating dizziness was not enough to compel that conclusion. Common experience provided no guidance, and the medical evidence was inconclusive.

83 For these reasons, I agree with the orders proposed in the joint reasons for judgment.

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96 *May v Military Rehabilitation and Compensation Commission* (2015) 233 FCR 397 at 445 [212].

97 *May v Military Rehabilitation and Compensation Commission* (2015) 233 FCR 397 at 445 [212]-[214], 446 [216], 449 [231].

98 *Re May and Military Rehabilitation and Compensation Commission* [2011] AATA 886 at [63].

99 *Re May and Military Rehabilitation and Compensation Commission* [2011] AATA 886 at [52], [61], [63], [65].

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