HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

KENNEDY CLEANING SERVICES PTY LIMITED APPELLANT

AND

VESELA PETKOSKA RESPONDENT

Kennedy Cleaning Services Pty Limited v Petkoska [2000] HCA 45
31 August 2000
C16/1999

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with D J C Mossop for the appellant (instructed by Hunt & Hunt)

F X Costigan QC with G J Lunney for the respondent (instructed by Romano & Co)

CATCHWORDS

Kennedy Cleaning Services Pty Limited v Petkoska

Workers' compensation (ACT) – Injury – Personal injury arising in the course of employment – Employee had diseased heart valve and suffered a lesion caused by a blood clot which resulted in a stroke – Whether mutually exclusive statutory regimes for "injury" and "disease".

Words and phrases – "injury" – "disease" – "lesion".

Workers' Compensation Act 1951 (ACT), ss 6(1), 7(1), 9, 9A, 9B.
Workers Compensation Act 1987 (NSW), s 4.

1 GLEESON CJ AND KIRBY J. This is an appeal from the Full Court of the Federal Court of Australia[1]. It concerns the conclusion of that Court that a worker who had suffered a stroke in the course of her employment was entitled to benefits under the *Workers' Compensation Act* 1951 (ACT) ("the Act") because she had suffered a "personal injury" as provided by s 7(1) of the Act. The Full Court applied the reasoning of the majority of this Court in *Zickar v MGH Plastic Industries Pty Ltd*[2]. In our view, the Full Court was correct to do so and the appeal should be dismissed.

The facts

2 Mrs Vesela Petkoska (the respondent) was employed by Kennedy Cleaning Services Pty Ltd (the appellant). On 9 September 1992, in the course of her employment, she was cleaning rooms at the Australian National University in Canberra. Her husband was working with her but on another level of the same building. He went looking for her and discovered her sitting in a chair, crying and unable to speak. She was taken to hospital by ambulance and underwent various tests. She was incapacitated for work. When she made a claim for compensation under the Act, liability was declined. In February 1994, she brought proceedings in the Magistrates Court at Canberra.

3 Because, at the time of the hearing, the respondent was still unable to communicate, the sole evidence in the Magistrates Court comprised that of her husband, deposing to the uncontested circumstances of her collapse whilst working and various medical reports which were received into evidence without objection. The main issue for determination was whether the respondent was entitled to compensation under the Act in respect of her undisputed incapacity. To succeed, the respondent had to show that such incapacity resulted from a "personal injury" within s 7(1) of the Act or from her contracting or suffering an aggravation or acceleration of a disease to which her employment was a contributing factor within s 9(1) of the Act.

4 The medical reports provided a description of the pathological events that preceded the condition suffered by the respondent which was described, in general terms, as a "stroke".

5 For some years before September 1992, the respondent had been diagnosed as suffering from rheumatic mitral valve disease. This is a condition of the heart that, in some cases, manifests itself with bouts of quivering

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1 *Petkoska v Kennedy Cleaning Services Pty Ltd* (1998) 87 FCR 526.

2 (1996) 187 CLR 310 ("*Zickar*").

(fibrillation) that may lead to the release of a clot (embolism) into the bloodstream. According to Dr R M McCredie, the rhythm of atrial fibrillation carries a significant risk of emboli release, even in an otherwise normal heart. Dr McCredie considered that the respondent had moderately severe mitral stenosis as a result of previous exposure to rheumatic fever. However, the first serious manifestation of her illness was when the embolus was produced which caused her stroke. The doctor described what had happened: "[A] blood clot ... [formed] in the left atrium and [broke] off, and on this occasion happened to pass directly to the left [temporo-parietal] region of her brain." Dr McCredie was of the opinion that this process was "precipitated by her paroxysm of atrial fibrillation". Dr McCredie stated that it was "a common phenomenon for the onset of atrial fibrillation to produce the first recognisable symptoms of mitral stenosis, either by producing shortness of breath, or, in fact, by producing an embolus, as in this case".

6 After her removal to hospital, an echocardiograph was performed on the respondent under the supervision of Dr C R Ashton. This confirmed mitral stenosis with a dilated left atrium. A CT scan was also undertaken. It showed "a lesion in the left parieto temporal area". Dr P French, a cardiologist, observed that the "CT scan revealed evidence of a left-sided lesion which was felt to be responsible for the stroke". He described the stroke as "due to a cerebral embolus secondary to the valvular heart disease".

7 The medical opinions were unanimous that the employment of the respondent was not a contributing factor to the contraction of the underlying mitral stenosis found in the respondent's heart. Nor did her employment with the appellant aggravate or accelerate this underlying condition. The magistrate dismissed the respondent's claim to compensation in so far as it was based on s 9(1) of the Act. That conclusion is not now in contest. If the respondent's entitlements under the Act fell to be decided in terms of s 9(1) as a case for "[c]ompensation for ... incapacity through disease", it was accepted that the respondent would fail. However, that left her alternative claim which was that she was entitled to recover compensation for "personal injury" within s 7(1) of the Act.

8 The course which the proceedings took at trial, involving no oral evidence on the part of medical witnesses, although economical and perhaps understandable, imposes on the judiciary an obligation to give meaning to the expressions used in the medical reports, some of which are technical. The word "lesion", for example, in its ordinary use, connotes primarily an injury, in the sense of a sudden impairment of the function of affected tissue or a morbid

change in the functioning of the body[3]. But medical[4] and forensic[5] dictionaries indicate that the word is sometimes used in modern medical parlance to include changes in organs and tissues through a disease process. There was no clarification by oral evidence of the way in which the particular medical experts were using the word in this case. However, having regard to the whole of the medical evidence, the way in which the proceedings were conducted, the sudden and dramatic consequences of the "stroke" and the findings of the magistrate at first instance, it is appropriate to conclude that the word "lesion" in the medical reports here meant a sudden change or disturbance to the physiological state of the respondent. It was localised in a particular part of her brain. It immediately rendered her incapable of speech and incapacitated her for work.

The history of the proceedings

9 Magistrate Fryar upheld the respondent's entitlements under s 7(1) of the Act. She found that[6]:

> "The applicant has a diseased heart valve, but the applicant's incapacity is caused by the injury to her brain, the stroke. Clearly something physical has happened causing an injury to that part of the brain, something that in my view, although probably initiated by the disease of her heart, is not a part of the progression of the disease."

10 By reference to *Zickar*[7], her Worship concluded that what had occurred was a "sudden or identifiable physiological change", which was properly classified as a "personal injury"[8]. She was unable to distinguish the injury to part of the brain (the "lesion") that was shown to have occurred in this case from the rupture which had been held to be an "injury" in *Zickar*. On that basis, she found that the respondent was entitled to an award of compensation.

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3 *The Macquarie Dictionary*, 3rd ed (1997) at 1231.

4 Thomson, *Black's Medical Dictionary*, 33rd ed (1981) at 532; Martin (ed), *Concise Medical Dictionary*, 2nd ed (1985) at 342.

5 Levitt, *Short Encyclopaedia of Medicine for Lawyers* (1966) at 242.

6 *Petkoska v Kennedy Cleaning Services Pty Ltd* unreported, Magistrates Court, 24 June 1997 at 2.

7 (1996) 187 CLR 310.

8 *Petkoska v Kennedy Cleaning Services Pty Ltd* unreported, Magistrates Court, 24 June 1997 at 2.

11 The appellant appealed to the Supreme Court of the Australian Capital Territory. The appeal was heard by Crispin J[9]. He upheld the appeal. After referring to past authority of this Court and the decision in *Zickar*, Crispin J concluded[10]:

> "In the present case there is no evidence that the respondent suffered any rupture. Indeed, the mechanism which had led to her hemiplegia was described in contra distinction to 'the usual form of stroke which is a cerebral [haemorrhage] or bleed'. In these circumstances I am obliged to find that the respondent did not suffer an injury within the meaning of section 7 of the *Workers' Compensation Act*."

12 A further appeal was then taken by the respondent to the Full Court of the Federal Court. That Court unanimously upheld the appeal and restored the magistrate's award. Although the approaches of the judges constituting the Full Court differed as between that favoured by Higgins J, on the one hand, and that accepted by Finn and Merkel JJ, on the other, all of the judges approached the matter as one requiring the application of the principles stated by the majority of this Court in *Zickar*[11]. Whilst importance was attached to the precise definitions of "injury" and "disease" appearing in different workers' compensation legislation[12], all of the judges also derived assistance for the approach which they favoured from the decision of the Appeal Division of the Supreme Court of Victoria in *Accident Compensation Commission v McIntosh*[13]. That decision had, in turn, been approved by the Justices of this Court constituting the majority in *Zickar*[14].

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9 *Kennedy Cleaning Services v Petkoska* unreported, Supreme Court of the Australian Capital Territory, 7 November 1997.

10 *Kennedy Cleaning Services v Petkoska* unreported, Supreme Court of the Australian Capital Territory, 7 November 1997 at 14.

11 (1998) 87 FCR 526 at 534 per Higgins J, 535 per Finn and Merkel JJ.

12 (1998) 87 FCR 526 at 534 per Finn and Merkel JJ.

13 [1991] 2 VR 253 ("*McIntosh*").

14 (1996) 187 CLR 310 at 335-336 per Toohey, McHugh and Gummow JJ, 344 per Kirby J.

13 At the hearing of the application for special leave, the appellant disclaimed an intention to invite this Court to reopen its decision in *Zickar*[15]. Instead, it was made clear that the appellant's position was that *Zickar* could be distinguished, most notably because of the different terms of the legislation considered in that case (the *Workers Compensation Act* 1987 (NSW)) and the provisions of the Act presently applicable. Had the appellant signalled an intention or need to reopen and reverse the holding in *Zickar*, this might have presented significant difficulties for the grant of special leave having regard to the considerations that normally govern the review of past authority of the Court, particularly where it is recent authority. Special leave was granted on the footing sought. This appeal now comes pursuant to that grant of special leave. The sole stated ground of appeal is that the Full Court of the Federal Court erred in holding that the respondent had suffered an injury for the purposes of s 7(1) of the Act.

The applicable legislation

14 Before turning to the arguments of the parties, it is appropriate to collect those provisions of the Act which govern the outcome of this appeal. The key provision, under which the respondent succeeded in the Magistrates Court and in the Full Court, is contained in s 7(1) of the Act which reads:

> "Where a worker suffers personal injury arising out of or in the course of the worker's employment, the employer is liable to pay compensation in accordance with Schedule 1."

The Act does not contain a definition of "personal injury". However, the word "injury" was defined in s 6(1) of the Act at the relevant time as follows:

> "'injury' means any physical or mental injury and includes aggravation, acceleration or recurrence or a pre-existing injury".

15 Although it was held (and is not now in dispute) that the respondent fell outside the provisions of s 9 of the Act dealing with "[c]ompensation for ... incapacity through disease", it is necessary to set out the relevant provisions in order to understand the appellant's arguments. Those provisions appear in ss 9, 9A and 9B of the Act. Relevantly, s 9 states:

> "(1) Where –

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15 Transcript of proceedings, *Kennedy Cleaning Services Pty Ltd v Petkoska*, 6 August 1999 at 3.

(a) a worker contracts a disease or suffers an aggravation, acceleration or recurrence of a disease; and

(b) any employment of the worker by his or her employer was a contributing factor to the contraction of the disease or the aggravation, acceleration or recurrence, as the case may be, whether or not the disease was contracted or the aggravation, acceleration or recurrence was suffered in the course of that employment;

subsections (2) to (5) (inclusive) have effect.

(2) If –

(a) ...

(b) the total or partial incapacity for work of the worker,

results from the disease ... then, for the purposes of this Act, unless the contrary intention appears –

(c) the contraction of the disease, or the aggravation, acceleration or recurrence, as the case may be, shall be deemed to be a personal injury to the worker arising out of the employment of the worker by his or her employer; and

(d) the date of ... the commencement of the incapacity ... shall be deemed to be the date of the injury.

(3) Where a liability of an employer in respect of a disease of a worker arises by virtue of this section, any other employer who, prior to that liability so arising, employed the worker in any employment that caused or contributed to the disease shall, subject to subsection (4), be liable to pay to the employer from whom compensation is recoverable such contribution as is ... settled by arbitration.

(4) An employer shall not be liable under subsection (2) or (3) in respect of a disease if the worker, at the time of entering the employment of that employer, made a wilful and false representation that the worker did not suffer, or had not previously suffered, from that disease."

16 "Disease" is defined in s 6(1) of the Act to include:

"any physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development, and also includes the aggravation, acceleration or recurrence of a pre-existing disease".

17 The provisions of ss 9A and 9B deal respectively with employment-related diseases and compensation for disease. Section 9A provides, relevantly:

> "Without limiting by implication the operation of section 9 where –
>
> (a) a worker has suffered, or is suffering from a disease ...;
>
> (b) the disease is a disease of a kind specified in the regulations as a disease that is related to employment of a kind so specified; and
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> (c) the worker was, at any time before symptoms of the disease first became apparent, engaged in employment of that kind;
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> then, for the purposes of this Act, unless the contrary is established, the employment in which the worker was so engaged shall be deemed to have been a contributing factor to the disease."

18 Section 9B contains a deeming provision whereby, unless the contrary is established, in certain cases where symptoms of the disease first became apparent whilst a worker was engaged in any employment, that employment shall be taken for the purposes of the Act to have been a factor contributing to the worker's contracting the disease when certain preconditions are fulfilled.

19 In order to evaluate the appellant's attempt to distinguish the decision of this Court in *Zickar*, it is also appropriate to set out the critical provisions of the *Workers Compensation Act* 1987 (NSW) that were applied in that case. By s 4 of that Act at the time *Zickar* was decided, it was provided as follows:

> "In this Act:
>
> ***injury***:
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes:
>
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration, and

(c) does not include (except in the case of a worker employed in or about a mine to which the *Coal Mines Regulation Act 1982* applies) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

20 The appellant submitted that the provisions of the New South Wales Act were materially different from the provisions of the Act applicable in this case. The respondent agreed that there were differences but submitted that these reinforced, and did not detract from, the applicability of *Zickar* to her claim.

The earlier decisions of this Court

21 Problems of the kind presented in this appeal have a long history in the decisions of this Court. Initially, under United Kingdom and Australian workers' compensation legislation, recovery of compensation in the case of a disease was commonly excluded, in effect, by two provisions[16]. The first was the requirement, in most of the legislation as originally expressed, to show that the incapacity complained of by the worker had arisen both "out of" and "in the course of" employment with the employer. More significantly perhaps, as Latham CJ pointed out in *Hume Steel Ltd v Peart*[17]:

> "[D]iseases are excluded from the English Act, not because they are not injuries, but because the onset and development of such a disease cannot be brought within the conception of the word 'accident'".

22 The second provision which operated to exclude compensation for disease was that most early workers' compensation legislation required proof of "personal injury by accident". This was the language of s 9(1) of the *Commonwealth Employees' Compensation Act* 1930 (Cth) when *Kavanagh v The Commonwealth*[18] was decided. Gradually, over the space of several decades, these provisions in workers' compensation legislation were changed. The words of connection to the employment were rendered disjunctive ("arising out of *or* in the course of the employment")[19]. The words "by accident" were deleted

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16 A comprehensive history of the comparable provisions in United Kingdom and New South Wales workers' compensation legislation appears in *Higgins v Galibal Pty Ltd* (1998) 45 NSWLR 45 at 60-77 per Powell JA.

17 (1947) 75 CLR 242 at 252.

18 (1960) 103 CLR 547.

19 cf *Higgins v Galibal Pty Ltd* (1998) 45 NSWLR 45 at 75.

altogether. Particular provisions in relation to recovery in the case of diseases were later added. It is important to keep these statutory changes in mind when considering earlier authority. Indeed, as the Court emphasised in *Zickar*[20], it is essential to measure any particular claim against the precise language of the applicable legislation. Generalities are dangerous. The duty of the decision-maker is to apply the language of the relevant legislation to the facts as found in the particular case.

23 Because of the recent review of past authority in *Zickar*, it would be pointless to trace the earlier decisions once again. The only basis for undertaking such a review would be if the appellant's case were that *Zickar* had been wrongly decided and should now be reversed by this Court. Although the appellant ultimately indicated a willingness to ask the Court to take that step, its primary submissions, to the very end of the appeal, were that this course was not necessary. It contended that *Zickar* was distinguishable and that, on the true construction of the Act applicable here, the respondent's claim fell outside the confines of an "injury" in s 7(1) of the Act.

24 It is appropriate to take the appellant's submissions at face value and to consider whether, consistent with the approach of the majority in *Zickar*, the different statutory language of the legislation under consideration there, and the Act under consideration here, permits, or requires, a different outcome. It would seem surprising that an "injury" of the kind described in *Zickar*, being a rupture of a cerebral aneurism causing severe brain damage, would be distinguishable from an "injury" of the kind described by the medical evidence in this case, being a lesion in the left parieto-temporal area of the respondent's brain caused by the blood clot which passed into that region of her body and resulted in her stroke. There is nothing in the reasons of the majority in *Zickar* that would suggest that a rupture, as such, was what the Court was concerned with. It was no more than a particular kind of internal event qualifying as an "injury", as that word was used in its primary sense. However, different legislation can sometimes lead to different results. There is therefore no alternative but to compare the respective legislative provisions and then to measure them against the holding, or at least the approach, that emerges from the majority reasons in *Zickar*.

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20 (1996) 187 CLR 310 at 328 per Toohey, McHugh and Gummow JJ.

The appellant's argument

25 The appellant submitted that a long line of authority in this Court, before and including *Hockey v Yelland*[21], limited the cases in which a change in physiology, properly classified as the outcome of a "disease", could nonetheless fall within the concept of a "personal injury" as that expression is primarily used in workers' compensation legislation. The appellant relied on what Gibbs CJ said in *Hockey*[22]:

> "[E]ven if, contrary to my present view, a disease which is not autogenous, but is caused or exacerbated by an external stimulus, can come within the description of injury simpliciter and so within the opening words of the definition, it is clear that an autogenous disease which happens to manifest itself in the course of employment is only an 'injury' if it [falls within specific provisions including certain employment-related diseases in the definition of injury].
>
> ... On the one hand, if an autogenous disease naturally progresses until it results in incapacity, there is no injury within the opening words of the definition: if the incapacity is to be compensable it must fall within [the provisions including certain employment-related diseases in the definition of injury]. On the other hand, a sudden identifiable physiological change may be an injury if it results from some external cause during the course of the employment."

26 The appellant pointed out that Mason, Brennan and Dawson JJ had agreed[23] with these observations which, it was submitted, were applicable to the Act governing the entitlements of the respondent. The appellant submitted, nonetheless, that the stroke suffered by the respondent was, in the terms used in *Zickar*, "merely the culmination or climax of a progressive disease"[24]. It could not be treated as a case of "injury". It had to qualify under the "disease" provisions of the Act to be compensable, or not at all. Because it was now common ground that the employment with the appellant was not a contributing

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21 (1984) 157 CLR 124. See also *Kavanagh v The Commonwealth* (1960) 103 CLR 547; *The Commonwealth v Hornsby* (1960) 103 CLR 588; *Favelle Mort Ltd v Murray* (1976) 133 CLR 580.

22 (1984) 157 CLR 124 at 137.

23 (1984) 157 CLR 124 at 139 per Mason J, 147 per Brennan J, 147-148 per Dawson J.

24 (1996) 187 CLR 310 at 333.

factor either to the contraction of the disease or to the aggravation or acceleration of such disease, the respondent was bound to fail.

27 In the joint majority reasons in *Zickar*, it was pointed out that the worker's claim in *Hockey* had come before the Court in a particular way. The issue in *Hockey* was whether an error had been shown on the face of the record which was amenable to relief by certiorari. The reasons of Gibbs CJ must be understood in "the confined context"[25] in which those reasons were expressed. *Zickar* did not come to the Court under such procedural restraints, and neither does this appeal.

28 The appellant did not confine itself to past authority on the point. It drew attention to what it described as the "two separate regimes for compensation in relation to injury and disease" appearing in the provisions of the Act. Behind the differentiation in the treatment of cases of "personal injury" in the primary sense and of "disease" was, it was suggested, a policy reflected in the Act that there should be a higher degree of work connection with, and contribution to, incapacity resulting from a "disease" than in the case of a "personal injury" for which it was enough that the injury had arisen "out of or in the course of the worker's employment". Much authority demonstrates that, since the adoption of the disjunctive formulation ("or"), replacing the previous conjunctive requirement ("and"), and the deletion of the qualifying phrase "by accident", many injuries are compensable simply because they have occurred during the protected period of work hours, although they have no other connection with the worker's employment[26].

29 The appellant deployed a number of arguments in support of its construction of the Act. In particular, it laid emphasis upon parts of the definition of compensable diseases which, it submitted, were incompatible with an approach to the Act that permitted the end result of a disease process nonetheless to qualify as a "personal injury" within s 7(1) of the Act simply because that end result involved a physiological event, such as the one at issue here. It was said that this approach to the Act: failed to read the structure and policy of the legislation as a whole; failed to give adequate weight to the juxtaposition between "personal injury" and "disease" injuries for which the Act

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25 *Zickar* (1996) 187 CLR 310 at 333.

26 See eg *Weston v Great Boulder Gold Mines Ltd* (1964) 112 CLR 30 where the worker recovered after being assaulted at work by another employee who was not on duty at the time and ought not to have been in the employer's premises, following an earlier incident that was entirely unconnected with the worker's employment; cf *Kavanagh v The Commonwealth* (1960) 103 CLR 547.

provided; and effectively deprived employers of the possibility of entitlements to contribution from other employers as envisaged by s 9(3), with the assistance of ss 9A and 9B, and exemption from liability as envisaged by s 9(4). Moreover, it was submitted, it left little, if any, work for s 9 of the Act to perform. Finally, it was submitted that the inclusion of ss 9A and 9B demonstrated the legislative intention that disease and injury be treated separately in the Act.

30 There is some force in the arguments of the appellant. As the division of opinion in *Zickar* within the majority and as between the majority and the minority in that case illustrates in the context of the *Workers Compensation Act* 1987 (NSW), difficulties can arise in giving meaning to statutory provisions for "personal injury" simpliciter and entitlements to compensation in the case of employment-related "diseases". Nevertheless, for two fundamental reasons, we consider that the appeal must fail.

31 The first reason is that it is difficult to reconcile the appellant's construction of the Act with the approach to similar legislation favoured by the majority in *Zickar*. The second is that this conclusion is reinforced when the details of the legislation applied in *Zickar* are compared with those contained in the Act applicable here. Far from assisting the appellant, we would uphold the respondent's submission that the differences in the legislation reinforce the applicability of the reasoning in *Zickar* and sustain the award of compensation in favour of the respondent.

The application of *Zickar* to this case

32 The essential thesis that lay behind the appellant's construction of the Act was that it established mutually exclusive classifications between "injury" and "disease" claims. Whilst this is an arguable approach to the operation of provisions such as ss 7(1) and 9 of the Act, and whilst it was the general approach favoured by the minority in *Zickar*, in the context of the *Workers Compensation Act* 1987 (NSW), it is an approach inconsistent with the reasoning, conclusions and orders favoured by the majority in that case.

33 In *Zickar*, it was uncontested that the incapacity was suffered by the worker following the rupture of an aneurism in his brain. That rupture was described as almost certainly the result of a congenital weakness which was the consequence of a progressive condition operating on a defect of the blood vessel wall which gradually became "thinner and thinner until finally the pressure of the blood behind it [tore] it"[27]. Sometimes, according to the evidence in *Zickar*, the

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27 *Zickar* (1996) 187 CLR 310 at 331 per Toohey, McHugh and Gummow JJ quoting the evidence of Dr Stening.

blood's clotting mechanisms stop the bleed from progressing but "eventually that blood clotting mechanism breaks down and then there is a major rupture which is usually fatal"[28]. It was in these circumstances that the employer argued in *Zickar*, with success in the New South Wales Court of Appeal, that the case had to be considered within the special parts of the definition of "injury" which addressed compensation in the case of a "disease"[29]. Because there, as here, the worker could not establish that the employment was a contributing factor to the contraction of the disease or had aggravated, accelerated, exacerbated or deteriorated the disease, the result would follow that the claim would fail. However, a majority of this Court rejected that approach. The Court upheld the worker's entitlement.

34 There are differences in the approaches adopted in the majority comprised of the joint reasons of Toohey, McHugh and Gummow JJ, and the reasons of Kirby J in *Zickar*. But less important than the differences are the points in common which all members of the majority recognised and emphasised.

35 These included the reminder that 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. It did not have to be external or necessarily produced by external causes[30]. Moreover, the inclusion in the definition of "injury" in s 6(1) of the Act of "mental injury" makes it plain beyond argument in this case that the injuries for which the Act provides are not confined to those originating externally to the body of the worker.

36 Secondly, the mere fact that a sudden physiological change is in some way connected with an underlying "disease" process does not, of itself, prevent the classification of such a change as an "injury" within the primary statutory provisions that apply to such a case. All the members of this Court in the majority in *Zickar* referred with approval to the remarks of Murphy J in *McIntosh*, with whom both Crockett and Cummins JJ agreed[31]. The reasoning in

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28 *Zickar* (1996) 187 CLR 310 at 331 per Toohey, McHugh and Gummow JJ quoting the evidence of Dr Stening.

29 *Workers Compensation Act* 1987 (NSW), s 4(b).

30 *Zickar* (1996) 187 CLR 310 at 335 per Toohey, McHugh and Gummow JJ, 347 per Kirby J referring to *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242 and *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 553.

31 [1991] 2 VR 253 at 253 per Crockett J, 264 per Cummins J.

McIntosh was also accepted by the Full Court of the Federal Court in the present case[32]. In *McIntosh*, the Court was considering a case involving a sudden rupture of blood vessels and a consequent cerebral haemorrhage arising from arteriovenous malformation. It was called upon to decide whether such a rupture could amount to a "physical injury" within the Victorian workers' compensation legislation. In the passage specifically approved in the joint majority reasons in *Zickar*[33], this is what Murphy J said[34]:

> "If the rupture is due to blood pressure, arteriosclerosis, arteriovenous malformation, or any other congenital or diagnostic aetiology, it is nonetheless a rupture – something quite distinct from the defect, disorder or morbid condition, which enables it to occur."

37 In the reasons of Kirby J[35], he also referred to a passage in *McIntosh* elaborating this approach where Murphy J continued[36]:

> "Long before the inclusion of these references to 'disease' in the definition of 'injury', claims for coronary occlusions, cerebral haemorrhage, ruptured aneurysms, aorta, oesophagus etc had commonly been made and had succeeded if occurring during a protected period, on the basis that they were 'injury by accident', being clearly a physical injury – and accidental – being unexpected by the worker at the time that they occurred".

38 The Full Court of the Federal Court in *Australian Postal Corporation v Burch*[37], a decision delivered before the Full Court decision presently before this Court, also accepted the logic of the reasoning in *McIntosh*. In *Burch*, the Court went on to cite the following further remarks from *McIntosh*[38]:

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32 *Petkoska v Kennedy Cleaning Services Pty Ltd* (1998) 87 FCR 526 at 535 per Finn and Merkel JJ.

33 (1996) 187 CLR 310 at 335.

34 [1991] 2 VR 253 at 262.

35 (1996) 187 CLR 310 at 344.

36 *McIntosh* [1991] 2 VR 253 at 263.

37 (1998) 85 FCR 264.

38 (1998) 85 FCR 264 at 269 citing Murphy J in *McIntosh* [1991] 2 VR 253 at 264 (emphasis in original).

> "It is a remarkable development that today it is being suggested that in an Act which has consistently demonstrated a widening of cover to a worker, (being in the nature of social insurance or security) the *inclusion* in the definition of 'injury' of references to disease contributed to by the employment has prompted argument that mishaps, formerly accepted without debate to be 'injury', are no longer to be so considered, but are rather to be characterised as the very disease to which they are due, and excluded, unless work contributes to them."

39 It is impossible to reconcile the approach urged by the appellant in this case with the reasoning of the majority in *Zickar*. If the appellant's approach were adopted, the mere fact that an ascertainable lesion or dramatic physiological change had taken place[39] or that the normal physiological state had been disturbed[40] would be irrelevant because it would be no more than the outcome, direct or indirect, of a progressive congenital or other disease process. However, this is not the way the majority approached the matter in *Zickar*. It is also inconsistent with the approach in *McIntosh* and *Burch*. All of those 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 that word. If such an injury happens within the protected period of employment, it is ordinarily compensable without proof of a specific causal connection with the worker's employment[41]. If the propounded "injury" is distinct from the underlying pathology that constitutes a "disease" that directly or indirectly caused the sudden event to occur, it is unnecessary to proceed to the alternative and additional basis whereby, in such cases, compensation may also be recovered for the disease process if the statutory preconditions are met[42].

40 The foregoing approach does not rob the disease provisions of the Act of utility. They would apply in cases of a disease in the nature of dermatitis, lead poisoning, brucellosis and many others of a progressive type. The disease provisions remain as alternative and additional heads of entitlement where a

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39 *McIntosh* [1991] 2 VR 253 at 257.

40 *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252-253.

41 *Higgins v Galibal Pty Ltd* (1998) 45 NSWLR 45 at 52 citing Mills, *Workers Compensation (New South Wales)*, 2nd ed (1979) at 3.

42 *Zickar* (1996) 187 CLR 310 at 335; *McIntosh* [1991] 2 VR 253 at 262.

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. There is no reason to read the word "injury" down because of the alternative and additional definition of compensable disease conditions. On the contrary, considerations of the language and structure of the Act, of legislative history and of the proper approach to construing such legislation reinforce the conclusion to which the majority came in *Zickar*.

The applicable legislation confirms this conclusion

41 Returning to the primary obligation of any decision-maker faced with a problem such as the present, which is to construe the legislation applicable in the case, a reflection on the language of s 9 of the Act reinforces the foregoing conclusion to which more general considerations have brought us. It is worth noting at the outset, as was pointed out by Higgins J[43], that the statute itself refrains from expressly stating that "injury" and "disease" are alternatives, as it might have done.

42 It is true that there are distinctions between the *Workers Compensation Act* 1987 (NSW) considered in *Zickar* and the Act applicable in this case. However, far from supporting the submissions of the appellant, they run in the opposite direction. In the New South Wales statute which was construed in *Zickar*, the kind of argument advanced by the employer in this case could at least draw upon the way in which alternative definitions of "injury" were afforded by the New South Wales Parliament in the one section of the Act which differentiated between the primary meaning of the word and the secondary meaning in the case of "a disease" or "any disease". This was a point upon which the judges in the minority laid emphasis in *Zickar*[44]. But it loses force in the case of the Act in question here for three reasons.

43 First, the provision for compensation for incapacity through disease is made in s 9 of the Act, which is separate from s 7 of the Act which provides for compensation for personal injuries in the primary sense of that term. The structural argument advanced for the elucidation of the definition of "injury" in *Zickar* is therefore weakened in this case. On the face of things, if a worker could show that he or she has suffered a "personal injury" within the four corners of s 7(1) of the Act, that would be enough. There would be no need to progress to the entirely different and later section of the Act (s 9) providing for

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43 *Petkoska v Kennedy Cleaning Services Pty Ltd* (1998) 87 FCR 526 at 533.

44 (1996) 187 CLR 310 at 326.

compensation for incapacity through disease. The worker would already have qualified for compensation. Nothing more would need to be proved.

44 Secondly, when the terms of s 9 are examined, it will be observed that s 9(2)(c) deems the contraction of a disease or the aggravation, acceleration or recurrence of such disease in the specified cases to be "a personal injury to the worker arising out of the employment of the worker by his or her employer". This provision makes it clear that the legislation is drawing a distinction between an *actual* personal injury (covered by s 7(1) of the Act) and a *notional* such injury (covered by s 9). This is another textual reason for approaching the Act in a way that first decides whether the worker is entitled to succeed by demonstrating an *actual* injury of the kind for which s 7(1) provides. Only if this fails is it necessary to consider the *notional* injury for which, by a statutory fiction, s 9(2)(c) provides.

45 Thirdly, this view of the operation of s 9 is still further reinforced by the language of s 9(3). That sub-section provides for contribution by another employer whose employment caused or contributed to the disease. However, it does so only where the liability of an employer in respect of a disease of a worker "arises by virtue of this section". This is a further recognition, albeit minor, that s 9 is dealing with a particular category of compensation for incapacity through disease. Where an actual "personal injury" of the kind referred to in s 7(1) is proved, it is no more possible for such contribution (or for the disqualification in s 9(4)) to apply than it is in the ordinary case where a worker suffers a personal injury arising out of or in the course of the worker's employment. In such cases, the burden falls upon the employer to whom that expression is addressed. The mere fact that there may be an antecedent pathology or that the injury arose without fault or contribution by employment with the employer does not disqualify the worker from recovery of compensation from such employer.

46 Therefore, when close attention is paid to the legislation applicable in the case, as this Court has said it must be[45], it supports the availability of s 7(1), notwithstanding the fact that prior to the "personal injury" that occurred (the lesion in the left parieto-temporal region of the brain responsible for the stroke) there was an existing pathology or morbid condition which itself could be classified as a "disease" (mitral stenosis with atrial fibrillation resulting in emboli formation).

47 It follows that the magistrate at first instance and the Full Court of the Federal Court were correct in their application of the reasoning of the majority of this Court in *Zickar* to the facts as found and the Act applicable in this case.

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45 *Zickar* (1996) 187 CLR 310 at 328.

Although a muted appeal, if necessary, to reopen *Zickar* was mentioned by counsel for the appellant at the end of his argument, it should not be granted. This was not the basis upon which special leave was given. It was not the way in which the appellant primarily argued its case. *Zickar* is a recent decision of the Court where, as the report indicates, the Court was specially reconstituted to ensure a decision of the entire Court. The point of principle was there reargued before the entire Court precisely to allow an authoritative decision to be given[46]. It ought not to be reopened, especially in so short a time. No basis for doing so has been shown. In our view, the essential reasoning of the majority in *Zickar* was correct. It is applicable to these proceedings.

Order

48 The appeal should be dismissed with costs.

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46 Noted (1996) 187 CLR 310 at 311.

49 GAUDRON J. The facts are set out in the joint judgment of McHugh, Gummow and Hayne JJ, with whose reasons I generally agree. I wish, however, to add some observations of my own.

50 Whether physiological change resulting from a progressive disease that is not employment related is or is not an injury for the purposes of workers' compensation legislation depends on the terms of the legislation in question. There is no doubt that, as a matter of ordinary language, the word "injury" is apt to include sudden physiological change resulting from a disease, as in the case of stroke resulting from progressive heart disease or the rupture of an aneurysm as a result of the progressive weakening of an arterial wall[47].

51 In a number of cases in this Court, culminating in *Hockey v Yelland*[48], legislative provisions, which generally speaking, defined "injury" to mean an injury arising out of or in the course of employment and to include an employment related disease, were construed on the basis that the provisions relating to disease were exhaustive of the disease related consequences which constituted a compensable injury[49]. That process of construction appears to have originated in the judgment of Jordan CJ in *Kellaway v Broken Hill South Ltd*[50].

52 The approach taken by Jordan CJ in *Kellaway's Case* was also taken by the Privy Council in *Slazengers (Australia) Pty Ltd v Burnett*[51]. The decision in that case was followed by this Court in *Darling Island Stevedoring and Lighterage Co Ltd v Hussey*[52] and in subsequent decisions up to and including

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47 See *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252-253 per Latham CJ. See also *The Commonwealth v Ockenden* (1958) 99 CLR 215 at 223-224 per Dixon CJ, Fullagar and Taylor JJ; *Hockey v Yelland* (1984) 157 CLR 124 at 137 per Gibbs CJ; *Accident Compensation Commission v McIntosh* [1991] 2 VR 253 at 263 per Murphy J (Crockett and Cummins JJ agreeing); *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 326 per Brennan CJ, Dawson and Gaudron JJ, 335 per Toohey, McHugh and Gummow JJ, 347 per Kirby J.

48 (1984) 157 CLR 124.

49 See *Hume Steel Ltd v Peart* (1947) 75 CLR 242; *Darling Island Stevedoring and Lighterage Co Ltd v Hussey* (1959) 102 CLR 482; *The Commonwealth v Hornsby* (1960) 103 CLR 588; *Darling Island Stevedoring and Lighterage Co Ltd v Hankinson* (1967) 117 CLR 19; *Favelle Mort Ltd v Murray* (1976) 133 CLR 580.

50 (1944) 44 SR (NSW) 210.

51 [1951] AC 13 at 21 per Lord Simonds.

52 (1959) 102 CLR 482.

Hockey v Yelland[53]. In *Zickar v MGH Plastic Industries Pty Ltd*[54], however, a different approach was taken. In particular, the words "personal injury arising out of or in the course of employment" were given their ordinary meaning. More particularly, they were not read down on the basis that that part of the definition which referred to employment related disease was exhaustive of the disease related conditions which constitute a compensable injury.

53 In *Zickar*, Brennan CJ, Dawson J and I dissented on the basis that the meaning of "injury" was concluded by earlier authority[55] – authority which the appellant in that case sought to distinguish but did not challenge[56]. However, the approach taken in *Zickar* is, in my view, preferable to that taken in the earlier cases. It is one that requires that the words of a statutory definition be given their ordinary meaning unless the contrary is clearly intended – an approach which, in my view, should be taken with respect to all statutory definitions. It was the approach adopted by this Court in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[57] and it is the only approach that enables those who are bound by a statute to ascertain the content of the law which governs their rights and obligations.

54 As McHugh, Gummow and Hayne JJ point out in their judgment in this matter, *Zickar* is not determinative of the present matter. This matter falls to be decided by reference to the provisions of the *Workers' Compensation Act* 1951 (ACT) ("the Act"). The Act provides, in s 6(1), that:

> "'injury' means any physical or mental injury (including stress) [and] includes aggravation, acceleration or recurrence or [sic] a pre-existing injury".

It would seem tolerably clear that, in that definition, "or" was intended to be "of". That aside, however, the words of the definition should, in my view, be given their ordinary meaning. Indeed, given the form in which "injury" is defined, I know of no rule of statutory construction which might suggest otherwise. And when the words of the definition are given their ordinary meaning, they clearly

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53 (1984) 157 CLR 124.

54 (1996) 187 CLR 310.

55 (1996) 187 CLR 310 at 326.

56 (1996) 187 CLR 310 at 312.

57 (1994) 181 CLR 404 at 420. See also *Police v Thompson* [1966] NZLR 813 at 818 per North P.

extend to a sudden physiological change, even one that results from a progressive disease.

55 By s 7(1) of the Act, a worker is entitled to compensation if he or she "suffers personal injury arising out of or in the course of the worker's employment". Again, there is nothing either in the terms or in the form of that sub-section to suggest that it does not mean what it says. The argument that it does not, depends entirely on s 9 of the Act which, subject to an exception in the case of an employee who, at the time of entering employment, makes a "wilful and false representation" as to his disease-free status[58], confers an entitlement to compensation if a worker's employment is "a contributing factor to the contraction of [a] disease or the aggravation, acceleration or recurrence [of a disease] ... whether or not the disease was contracted or the aggravation, acceleration or recurrence was suffered in the course of that employment".

56 Given the terms of ss 6 and 9 and given, also, the structure of the Act, s 9 must be construed, in my view, as conferring a right to compensation which is in addition to and not in derogation of the right conferred by s 6. And that is so notwithstanding that, in the case of an employment related disease, an employer is entitled, pursuant to s 9(3) of the Act, to contribution from a previous employer if that employment "caused or contributed to the disease".

57 The appeal should be dismissed with costs.

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58 Section 9(4) of the Act.

58 McHUGH, GUMMOW AND HAYNE JJ. This is an appeal from the Full Court of the Federal Court of Australia (Higgins, Finn and Merkel JJ)[59]. The Full Court allowed an appeal by the present respondent against a decision of the Supreme Court of the Australian Capital Territory. That Court had set aside the decision of a magistrate in favour of the respondent on her claim for compensation pursuant to the provisions of the *Workers' Compensation Act* 1951 (ACT) ("the Act"). The effect of the orders of the Full Court was to reinstate the award made by the magistrate. The Full Court was correct in deciding as it did, and the appeal to this Court should be dismissed with costs.

59 The appeal turns upon the proper construction of provisions of the Act; in particular s 7(1), which imposes a liability to pay compensation where workers suffer certain personal injuries, and s 9, which, in certain circumstances, deems the contraction of a disease or the aggravation, acceleration or recurrence of a disease to be a personal injury to the worker which arises out of the employment of the worker. Provisions of this nature appear in various forms in past and present legislation in a number of jurisdictions and have been the subject of much litigation. However, as was emphasised by this Court in one of those cases, *Zickar v MGH Plastic Industries Pty Ltd*[60], the first inquiry must be not as to what was decided in other cases upon differently drawn statutes, but as to the proper construction of the particular provisions in question.

60 The appellant was the respondent's employer. She was employed as a cleaner. The essential facts were not in dispute. They were summarised as follows by Higgins J, who gave the leading judgment in the Full Court[61]:

> "The medical evidence established that the worker had a pre-existing medical condition being a stenosis, or partial blockage, of the mitral valve. The mitral valve is one of the valves controlling blood flow into the heart. That condition could be described as a disease. A symptom of the diseased mitral valve was cardiac arrhythmia. That followed from dilation of the left atrium. Such a condition may give rise to the formation of an embolism, or blood clot. That is what occurred in this case.
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> Thereafter, the embolism came away and entered the worker's arterial system. It travelled to the brain and there occluded, or blocked, a

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59 *Petkoska v Kennedy Cleaning Services Pty Ltd* (1998) 87 FCR 526.

60 (1996) 187 CLR 310 at 328. That appeal concerned the construction of the *Workers Compensation Act* 1987 (NSW).

61 (1998) 87 FCR 526 at 527-528.

> cerebral artery. That occurred in the left temp[o]ro-parietal region of the brain. Very shortly thereafter whilst at work, the worker suffered a stroke which has resulted in her then and continuing incapacity for work.
>
> It is conceded on behalf of the worker that none of the above stated mechanisms was in any way caused or contributed to by the work activity or any aspect of it."

61 The respondent was taken to hospital from the workplace and at hospital underwent various tests. These included a CT scan. This showed a lesion in the left temporo-parietal area and the lesion was thought to be responsible for the stroke which the respondent had suffered. The magistrate had found that the respondent's incapacity was caused by the stroke and that "something physical" had happened, causing an injury to the left temporo-parietal region of the brain.

62 The medical evidence before the magistrate included a report by Dr Joubert, a Consultant Neurologist. In that report he wrote:

> "A CT scan done on 11/9/1992 revealed a large area of infarction in the left parietal lobe."

"Infarction" describes the death of tissues due to the blocking of blood supply, especially the blocking of an artery[62]. As Gleeson CJ and Kirby J point out in their reasons for judgment, it is appropriate to treat the present case on the footing that the term "lesion" was used in the medical reports to indicate a sudden change or disturbance to the physiological state of the respondent and thus in its ordinary sense as connoting primarily an injury.

63 The term "injury" is defined in s 6(1) of the Act as meaning "any physical or mental injury" and as including "aggravation, acceleration or recurrence of[63] a pre-existing injury". Section 7(1) states:

> "Where a worker suffers personal injury arising out of or in the course of the worker's employment, the employer is liable to pay compensation in accordance with Schedule 1."

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62 *The New Shorter Oxford English Dictionary*, (1993), vol 1 at 1360.

63 This is the text of the original print of what was then the Workers Compensation Ordinance 1951 (ACT). The text of the current reprint uses the word "or" rather than "of", an apparent error.

It will be apparent that s 7(1) imposes a liability upon employers in respect of personal injuries which answer either of two criteria. The first is that the injury be one "arising out of" the employment, and the second that the injury be one "in the course of" the employment.

64 In the present case, the respondent suffered personal injury "in the course of" her employment. Therefore, s 7(1) was attracted and the appellant was made liable to pay compensation in accordance with Sched 1 of the Act. The respondent puts her case upon the satisfaction of the second criterion. She did not contend that the injury was one "arising out of" the employment. The two criteria are expressed disjunctively in s 7(1), the relevant phrases being separated by the word "or". In sum, the appellant's submission would relieve it of the liability which otherwise follows from the satisfaction of the second criterion, for the reason that the respondent did not meet the first criterion. Given the terms in which s 7(1) is expressed, that would be an odd result.

65 The appellant supports its case by reference to other provisions in s 9 of the Act. Section 9(2) has effect where the conditions specified in s 9(1) are satisfied. These are twofold and are expressed as follows:

> "(a) a worker contracts a disease or suffers an aggravation, acceleration or recurrence of a disease; and
>
> (b) any employment of the worker by his or her employer was a contributing factor to the contraction of the disease or the aggravation, acceleration or recurrence, as the case may be, whether or not the disease was contracted or the aggravation, acceleration or recurrence was suffered in the course of that employment".

The term "disease" is defined in s 6(1) of the Act as including "any physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development" and as also including "the aggravation, acceleration or recurrence of a pre-existing disease".

66 If the conditions specified in s 9(1) are met and if the total or partial incapacity for work of the worker results from the disease, then pars (c) and (d) of s 9(2) operate. These state:

> "(c) the contraction of the disease, or the aggravation, acceleration or recurrence, as the case may be, shall be deemed to be a personal injury to the worker arising out of the employment of the worker by his or her employer; and

(d) the date of the death, the date of the commencement of the incapacity or the date on which the medical treatment was first obtained, whichever is the earlier, shall be deemed to be the date of the injury".

However, although the incapacity of the respondent for work may be described as having resulted from her disease, the deeming provision in par (c) of s 9(2) did not operate. This was because it was not shown that her employment by the appellant was a contributing factor to the disease. Without the presence of that contributing factor, the criteria specified in s 9(1) were not met. That had the consequence that s 9(2) could not have any effect to deem the respondent to have sustained a personal injury arising out of her employment, thereby attracting the first limb of s 7(1).

67 The Full Court proceeded on the footing, which we do not understand as having been challenged in the appellant's submissions to this Court, that the lack of an external cause will not necessarily exclude the disabling event from being characterised correctly as a "personal injury" for the purposes of s 7(1). Finn and Merkel JJ said that it was not a prerequisite to the finding of an "injury" which is of an internal nature, that a physical event or incident involve a "rupture or breaking", and that an occlusion, causing a disturbance of the normal physiological state, will suffice[64].

68 The circumstance that a sudden physiological change has been caused or provoked by disease does not prevent it from constituting a "physical injury" for the purposes of s 7(1). To deny the entitlement of the respondent to an award in her favour, the appellant, in substance, submitted that, where the facts of a given case attracted the second limb of s 7(1) and might have attracted the operation of both limbs had the facts been other than they were, the worker was entitled under neither limb.

69 This striking conclusion was said to follow from the special treatment of "disease" by the deeming provision in s 9. In the present case, the respondent suffered from a disease but could not bring the catastrophe which befell her within the deeming provision. The appellant contends the respondent must fail because s 9(2) indicates that what falls within the term "disease" cannot also fall within the term "personal injury". These submissions proceeded on the assumption that, in the statutory provisions in question here, there is a strict dichotomy between "injury" and "disease". Further, the employment must be a contributing factor to the contraction of the disease or its aggravation,

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64 (1998) 87 FCR 526 at 535.

acceleration or recurrence (s 9(1)(b)) before the deeming provision will operate. It did not operate here, so the respondent must fail completely.

70 To reason in this way turns around the operation of s 7(1) upon the facts of this case. The respondent was stricken by reason of a disease, but she also sustained an injury "in the course of" her employment. The respondent's entitlement to compensation which thereby arose was not denied, and s 7(1) did not cease to operate in her favour, because she could not also show, by reference to the circumstances of the contraction of her disease or its effects, that she was deemed to have sustained an injury "arising out of" her employment.

71 A different result could obtain where what befell the complainant did not answer the statutory description of a "personal injury". Given the appropriate factual basis, the worker might still be able to rely on s 9 to show a deemed personal injury arising out of the employment. Moreover, in such a case, the employer may have rights to contribution from a prior employer[65].

72 There was much discussion in submissions to this Court of the significance for the present case of the construction given to the New South Wales legislation in issue in *Zickar*. This emphasis by the appellant was somewhat misplaced. The respective statutes are so cast that the present case was more strongly in favour of the worker than was that in *Zickar*, even though, of course, the appellant worker in *Zickar* succeeded. The *Workers Compensation Act* 1987 (NSW), which was in issue in *Zickar*, defined the term "injury", so far as relevant, as follows:

> "(a) means personal injury arising out of or in the course of employment;
>
> (b) includes –
>
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor; and

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65 Section 9(3) states:

> "Where a liability of an employer in respect of a disease of a worker arises by virtue of this section, any other employer who, prior to that liability so arising, employed the worker in any employment that caused or contributed to the disease shall … be liable to pay to the employer from whom compensation is recoverable such contribution as is, in default of agreement, settled by arbitration."

(ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration".

In their joint judgment in *Zickar*, Toohey, McHugh and Gummow JJ saw the issue as follows[66]:

> "The personal injury upon which the appellant relies is the rupture of the arterial wall. There can be no doubt … that this event constituted personal injury and it is not in dispute that what occurred took place in the course of the appellant's employment. Equally it is not in issue that the aneurism itself, that is the swelling of the blood vessel, was a disease from which the appellant was suffering prior to the rupture. Does the existence of this disease take the matter into par (b) of the definition so that the appellant must show his employment to have been a contributing factor?"

Their Honours dealt with the question of construction as follows[67]:

> "That par (a) begins with the word 'means' and par (b) begins with the word 'includes', suggests that par (b) is designed to give an extended meaning to 'injury' by going beyond personal injury and to a disease in the circumstances prescribed[68]. In particular, there is no rule of construction which requires inclusive words to be read as exclusive of any elements which otherwise fall within the meaning of the word or expression being defined[69], and no occasion with this legislation for the imposition of such a construction."

Kirby J, the other member of the majority, said[70]:

> "No longer is there a dichotomy between 'personal injury' in its full sense and 'disease injury' within the additional part of the definition. A worker

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66 (1996) 187 CLR 310 at 332.

67 (1996) 187 CLR 310 at 329-330.

68 cf *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105-106; *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 401-402, 403-404.

69 See *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 588-589 per Barwick CJ.

70 (1996) 187 CLR 310 at 351.

is entitled to succeed if he or she can bring a claim within either head of recovery."

73 With respect to the legislation under consideration in this appeal, failure to attract one criterion of liability, by reason of the inapplicability of a deeming provision, should not be treated as having the consequence that the party otherwise rendered liable by the application of the alternative criterion of liability is relieved of that liability.

74 The appeal should be dismissed with costs.

75 CALLINAN J. The respondent suffered an underlying rheumatic mitral valve disease: that is, a narrowing of the mitral valve which predisposes such a person to rhythm disturbances, particularly atrial fibrillation which in time may cause blood clots to be formed in the heart and to travel to the brain, in which event, as indisputably occurred here on 9 September 1992, the person may suffer a stroke. In consequence the respondent became permanently incapacitated for work.

76 The condition had been present for many years. The respondent had suffered three miscarriages and had undergone two surgical abortions because of her condition. Only one of her six pregnancies went to term.

77 The occurrence of the stroke was fortuitous: it could have occurred at any time. It was common ground that it was not associated with work and was in no way related to stress or exertion.

78 The respondent brought proceedings in the Magistrates Court of the Australian Capital Territory[71] pursuant to the *Workers' Compensation Act* 1951 (ACT) ("the Act"). The only issue was whether the stroke and the resulting incapacity gave rise to an entitlement to compensation under the Act for personal injury[72] as it was common ground that she had not suffered an acceleration or an aggravation of a disease that had been contributed to by her employment[73].

79 On 24 June 1997 Magistrate Fryar found that it was the respondent's pre-existing mitral stenosis which caused the cerebral embolism and that the stroke was not related to any activity by the respondent at work. Nonetheless the Magistrate found that the stroke, whilst initiated by the disease, was an "injury" within the meaning of the Act. On this basis the Magistrate found that the respondent was entitled to compensation under s 7 of the Act.

80 An appeal to the Supreme Court of the Australian Capital Territory by the appellant was heard by Crispin J who set aside the decision of the Magistrate. His Honour was of the opinion that as there was no evidence of a "rupture" of the kind described in *Zickar v MGH Plastic Industries Pty Ltd*[74] the respondent had not suffered an injury within the meaning of s 7 of the Act.

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71 Magistrate Fryar (24 June 1997).

72 s 7(1) of the Act.

73 s 9(1) of the Act.

74 (1996) 187 CLR 310 at 334.

81 The respondent then appealed to the Full Court of the Federal Court of Australia (Higgins, Finn and Merkel JJ)[75]. Higgins J did not think that any logical distinction could be made between a "rupture" of an organ and the blocking of an artery[76]. His Honour, after a review of numerous cases, concluded that there was no prevailing judicial opinion that an "injury" could not include a sudden physiological change, even as a consequence of a disease[77]. It followed, his Honour held, that the Magistrate here was entitled to reach the decision that she did and that the appeal should be allowed. In brief additional reasons Finn and Merkel JJ substantially agreed with Higgins J.

The Appeal to this Court

82 In this Court the appellant advances two contentions: that authority[78] compels the conclusion that the stroke could not, in the circumstances of this case be regarded as an injury; and, that the language of the Act which governs the case and the underlying policy which can be discerned from it also dictate that conclusion.

83 Whilst there are some similarities between the various statutes considered in the cases to which the parties referred, none of them is in the same form and terms as the Act which falls to be construed here[79]. It is therefore appropriate to deal with the second argument of the appellant first.

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75 *Petkoska v Kennedy Cleaning Services Pty Ltd* (1998) 87 FCR 526.

76 (1998) 87 FCR 526 at 529.

77 (1998) 87 FCR 526 at 532.

78 See *Darling Island Stevedoring and Lighterage Co Ltd v Hussey* (1959) 102 CLR 482 at 497; *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 587; *Hockey v Yelland* (1984) 157 CLR 124 at 133; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 333.

79 Contrast for example ss 34(1) and 34(3)(a) of the *WorkCover Queensland Act* 1996 (Q):

> "**Meaning of 'injury'**
>
> (1) An **'injury'** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.
>
> …
>
> (3) **'Injury'** includes the following –

(Footnote continues on next page)

84 The appellant submits that the Act provides two separate regimes for compensation in relation to injury and disease. The regime making provision for compensation for "disease" requires a higher degree of connexion with the worker's work than is required for a compensable injury: that in the case of the former the work must "contribute" to the disease, and, in the latter only that the injury be suffered in the course of the employment.

85 Section 7 is the section which deals with compensable injuries and provides as follows:

> "**Compensation for personal injury**
>
> (1) Where a worker suffers personal injury arising out of or in the course of the worker's employment, the employer is liable to pay compensation in accordance with Schedule 1.
>
> (2) Where a worker is required by the terms of his or her employment, or is expected by his or her employer, to attend a trade, technical or other training school, that employment is, for the purposes of this Act, to be taken to include that attendance.
>
> (3) If it is proved that the injury to a worker is attributable to the worker's serious and wilful misconduct, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.
>
> (4) Compensation shall not be payable where the injury to, or death of, a worker is caused by an intentionally self-inflicted injury.
>
> (5) An amount of compensation payable under a provision of this Act in respect of an injury is, unless the contrary intention appears, in addition to any amounts of compensation paid or payable under any other provision of this Act in respect of that injury."

86 Section 9 deals with diseases. It is in this form:

> (a) a disease contracted in the course of employment, whether at or away from the place of employment, if the employment is a significant contributing factor to the disease".

"**Compensation for death or incapacity through disease**

(1) Where –

(a) a worker contracts a disease or suffers an aggravation, acceleration or recurrence of a disease; and

(b) any employment of the worker by his or her employer was a contributing factor to the contraction of the disease or the aggravation, acceleration or recurrence, as the case may be, whether or not the disease was contracted or the aggravation, acceleration or recurrence was suffered in the course of that employment;

subsections (2) to (5) (inclusive) have effect.

(2) If –

(a) the death of the worker; or

(b) the total or partial incapacity for work of the worker,

results from the disease, or the worker obtained medical treatment in relation to the disease, then, for the purposes of this Act, unless the contrary intention appears –

(c) the contraction of the disease, or the aggravation, acceleration or recurrence, as the case may be, shall be deemed to be a personal injury to the worker arising out of the employment of the worker by his or her employer; and

(d) the date of the death, the date of the commencement of the incapacity or the date on which the medical treatment was first obtained, whichever is the earlier, shall be deemed to be the date of the injury.

(3) Where a liability of an employer in respect of a disease of a worker arises by virtue of this section, any other employer who, prior to that liability so arising, employed the worker in any employment that caused or contributed to the disease shall, subject to subsection (4), be liable to pay to the employer from whom compensation is recoverable such contribution as is, in default of agreement, settled by arbitration.

(4) An employer shall not be liable under subsection (2) or (3) in respect of a disease if the worker, at the time of entering the employment of that employer, made a wilful and false representation that the worker did not suffer, or had not previously suffered, from that disease.

> (5) A claimant for compensation under this section in respect of a worker's disease shall, if so required, furnish the employer who is liable to pay compensation to the claimant with such information as to the names and addresses of the worker's other employers as the claimant possesses."

87 "Disease" is defined by s 6(1) in this way:

> "'disease' includes any physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development, and also includes the aggravation, acceleration or recurrence of a pre-existing disease".

88 The Act defines "injury" as follows[80]:

> "'injury' means any physical or mental injury (including stress) and includes aggravation, acceleration or recurrence of a pre-existing injury".

89 Several matters may be noted about the definitions. The mere fact that there are two of them means that the legislature obviously intended that there be a real distinction between them. If the legislature's intention had been to ensure that all occurrences in the workplace giving rise to some infirmity, however caused or developing, were to be compensable it would have been a very simple matter to do so, for example, by an all-embracing definition of injury clearly incorporating the notion of diseases with all their manifestations and consequences. The definition of "disease" does not use words apt to describe an injury. In ordinary language one would regard an ailment, disorder, defect or morbid condition as something quite different from an injury. The use of the word "development" is significant. People do not "develop" injuries. The words "aggravation, acceleration or recurrence" must refer to a pre-existing or previous state or condition of being. The sense conveyed overall is of a medical condition of a kind quite different from an injury.

90 In my opinion the notion of a physical injury or mental injury as an untoward occurrence distinct from a disease is reinforced by the reference in s 7 to "personal injury" rather than to "injury" simpliciter which is the defined term. "Personal injury" suggests an actual event of injury to the person, albeit perhaps that the incapacitating event or infirmity may occur or materialise internally.

91 It is not difficult to see why a legislature in respect of a no-fault system as this one is might wish to enact a more stringent test for the recovery of compensation for a disease than for an injury, particularly if the ordinary or primary meaning of an injury be taken as an event which relevantly and usually will involve some physical or mental insult. Whilst perhaps there may be injury

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80 s 6(1) of the Act.

in some circumstances without such an insult, in the case of a physical or mental insult occurring in the course of a worker's employment or arising out of the employment, the identification of that event will not normally be difficult, and its connexion with the employment, albeit that it may be a temporal connexion only, will be readily apparent, and will therefore provide a fairly transparent basis for compensation.

92 The legislature on the other hand clearly did not regard a mere, temporal connexion as a basis for compensation in the case of a disease or its aggravation, acceleration or recurrence. Instead of a temporal connexion there has to be an aetiological or causative (contributory) relationship between the work and the disease. And it is easy to see why this view might be taken by a legislature. To treat an injury as compensable simply because of its occurrence at work, might, at first sight perhaps, be regarded as an illogical indulgence, which, for policy reasons does not need to be extended to a disease that is not work related. It may also be good economic, industrial and social policy to provide a remedy for an injury at work (not deliberately inflicted) in order to give an incentive to employers to take strong affirmative measures to make the workplace in all respects as safe as possible. However the same justification does not exist in the case of disease because there is nothing that an employer can do to guard against its manifestation or climax when it has no connexion with the workplace or work required by the employer.

93 That the legislature had considerations of this kind in mind when the Act was enacted, may, in my opinion be discerned from an examination of the relevant provisions in context. And ss 9A and 9B of the Act are important parts of that context.

94 Section 9A provides:

"**Employment-related diseases**

Without limiting by implication the operation of section 9 where –

(a) a worker has suffered, or is suffering from a disease, or the death of a worker results from a disease;

(b) the disease is a disease of a kind specified in the regulations as a disease that is related to employment of a kind so specified; and

(c) the worker was, at any time before symptoms of the disease first became apparent, engaged in employment of that kind;

then, for the purposes of this Act, unless the contrary is established, the employment in which the worker was so engaged shall be deemed to have been a contributing factor to the disease."

95 Section 9B provides:

"**Compensation for disease**

(1) Any employment in which a worker who has contracted a disease was engaged at any time before symptoms of the disease first became apparent shall, unless the contrary is established, be taken for the purposes of this Act to have been a contributing factor to the worker's contracting the disease if the incidence of the disease among persons who have engaged in that kind of employment is significantly greater than the incidence of the disease among persons who have engaged in employment generally in the place where the worker was ordinarily employed.

(2) Any employment in which a worker who has suffered an aggravation, acceleration or recurrence of a disease was engaged at any time before symptoms of the aggravation, acceleration or recurrence first became apparent shall, unless the contrary is established be taken for the purposes of this Act to have been a contributing factor to the aggravation, acceleration or recurrence if the incidence of the aggravation, acceleration or recurrence of the disease among persons suffering from the disease who have engaged in that kind of employment is significantly greater than the incidence of the aggravation, acceleration or recurrence of the disease among persons suffering from the disease who have engaged in employment generally in the place where the worker was ordinarily employed.

(3) The death of a worker shall be taken for the purposes of this Act, to have been contributed to by a disease if, but for that disease, the death of the worker would have occurred at a significantly later time.

(4) An incapacity for work or facial disfigurement of a worker shall be taken for the purposes of this Act to have been contributed to by a disease if, but for the disease –

(a) the incapacity or disfigurement would not have occurred;

(b) the incapacity would have commenced, or the disfigurement would have occurred, at a significantly later time; or

(c) the extent of the incapacity or disfigurement would have been significantly less.

(5) This section shall not be construed as limiting the operation of section 9."

96 By authorising the specification by regulation of certain diseases as being, in certain kinds of employment, work related diseases, s 9A reinforces the

necessity of a relationship beyond the temporal, between the work and the disease as a basis for compensation. Section 9B also sheds light upon the distinction between an injury and a disease by its use of the word "contracted". An injury will ordinarily be inflicted or suffered and not "contracted". And s 9B(2) stresses again the need for a causative relationship between the work and the disease, which is supplied in this instance by a deeming provision.

97 To give too wide a meaning to the term "injury" would be to deprive "disease" of much, or all of its meaning which could hardly have been the legislature's intention. By enacting the provisions to which I have referred the legislature must have intended to draw a bright line of distinction between them. And courts, either by references to cases decided on other statutory provisions or otherwise should be slow to blur that line of demarcation. Nor should the outcome of any case depend upon a search for some external or internal tearing, lesion, scratching, breaking or rupture of some part of the body, and, if found, whether it occurred as no more than a stage or progression of a disease, to hold that occurrence to be an injury and not a disease. I doubt whether medical science in its current state of knowledge would so regard it and nor will I. In my opinion such an outcome has about it an air of artificiality. Some diseases may manifest themselves or progress in such a way as to produce changes, or even ruptures that current medical practice may not even be able to identify. Why, in principle, it might be asked, should a worker recover compensation for chickenpox unconnected with the worker's work which reveals itself and causes infirmity either by a rash or actual lesions[81] which appear on the worker's body during a working day, and, say, brucellosis causing disabling fever[82] and fatigue at work but unrelated to the work, and not involving any rupture or lesion.

98 In argument there was use interchangeably of the words "lesion" and "rupture" which can be synonyms for each other. The parties can hardly be blamed for that. The word "lesion" was used in the medical evidence in this case[83]. The word "rupture" has often been used in this Court[84], as it was here by the Full Court of the Federal Court[85]. But that employment is neither warranted nor appropriate. It is not the language of the Act or indeed, of any of the statutes

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81 *Butterworths Medical Dictionary*, 2nd ed (1978) at 342.

82 *Butterworths Medical Dictionary*, 2nd ed (1978) at 264.

83 For example, see the report of Dr Peter French, cardiologist, 8 December 1994.

84 For example, see transcript of proceedings, 7 March 2000 at 18, 20 (lines 748, 760 and 853). See also *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 334.

85 (1998) 87 FCR 526 at 529.

which have been construed in the Australian cases referred to by the parties[86]. To look for synonyms for words of everyday usage and well understood according to their ordinary meaning is not only unnecessary, but also may confuse the real issues.

99 Accordingly, I have no doubt that an injury is something quite different from a disease or some aspect, manifestation, development, maturation or progression of a disease, not only in ordinary, everyday terms, but also by reference to the definitions in the Act, the context in which they appear, and the elaborately different regimes that the Act prescribes for compensation for them.

100 The respondent here, according to that understanding and within the meaning of the Act, did not suffer an injury. Nor did she in any way contract or suffer from a work related disease of the kind that the Act requires as a condition for compensation under it.

101 For those reasons I would allow the appeal.

102 However, because there was argument based upon them I should make some reference to the cases decided on different statutes.

103 Those cases would in my view in any event provide no sound foundation for a decision in favour of the respondent in this case. In *Hockey v Yelland*[87] this Court gave careful consideration to the meaning of the term "injury" as used in the *Workers' Compensation Act* 1916 (Q)[88]. The definition there of personal injury included either a causative or a merely temporal connexion with the work of a worker as it used the words, "arising out of *or in the course* of employment". The definition was expressed inclusively (unlike the definition of "injury" here) to bring within its ambit an aggravation or acceleration of any disease, but only if the employment were a factor in the aggravation or acceleration. Gibbs CJ summarised the effect of much of the English and Australian case law on the meaning of the expressions "injury" and "injury by accident"[89]. His Honour

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86 For example, see *Darling Island Stevedoring and Lighterage Co Ltd v Hussey* (1959) 102 CLR 482; *Favelle Mort Ltd v Murray* (1976) 133 CLR 580; *Hockey v Yelland* (1984) 157 CLR 124; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310.

87 (1984) 157 CLR 124.

88 s 3(1).

89 (1984) 157 CLR 124 at 133-137. See also at 132-133 where his Honour discusses the following cases: *South Maitland Railways Pty Ltd v James* (1943) 67 CLR 496 at 502; *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 556-557; *The*

(Footnote continues on next page)

accepted that each of those expressions had been held to include physiological harm such as the tearing of a muscle, or a blood vessel, and even the contraction of a disease[90]. But as his Honour pointed out, the cases in which this broad, and, I would interpolate, rather strained meaning was adopted, were decided under legislation making no specific provision for diseases or providing for a special or limited class of disease only[91].

104 After a discussion of the cases following *Hume Steel Ltd v Peart*[92], Gibbs CJ said[93]:

> "I respectfully agree with the opinion of Stephen and Mason JJ that *Slazengers (Australia) Pty Ltd v Burnett* and *Darling Island Stevedoring and Lighterage Co Ltd v Hussey* establish that the definition of injury in s 6(1) of the NSW Act, which is indistinguishable for present purposes from that in s 3(1) of the Queensland Act, includes a disease only if it falls within par (a) or par (b), and so only if employment was a contributing factor. I see no reason to doubt the correctness of the construction placed upon the definition in those cases, but even if, contrary to my present view, a disease which is not autogenous, but is caused or exacerbated by an external stimulus, can come within the description of injury simpliciter and so within the opening words of the definition, it is clear that an autogenous disease which happens to manifest itself in the course of employment is only an 'injury' if it comes within par (a) or par (b)."

105 There was no disagreement on this construction by Mason, Wilson, Brennan and Dawson JJ although Wilson J and Dawson J wrote separate judgments.

106 The other case much debated in argument was *Zickar v MGH Plastic Industries Pty Ltd*[94]. There this Court (Toohey, McHugh, Gummow and

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Commonwealth v Oliver (1962) 107 CLR 353 at 359, 362, 366; *Weston v Great Boulder Gold Mines Ltd* (1964) 112 CLR 30; *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 at 154-155, 158.

90 (1984) 157 CLR 124 at 133.

91 (1984) 157 CLR 124 at 133-136: *James Patrick & Co Pty Ltd v Sharpe* [1955] AC 1 and *Kavanagh v The Commonwealth* (1960) 103 CLR 547.

92 (1947) 75 CLR 242 at 252-253.

93 (1984) 157 CLR 124 at 136-137.

94 (1996) 187 CLR 310.

Kirby JJ; Brennan CJ, Dawson and Gaudron JJ dissenting) divided narrowly upon the construction of s 4 of the *Workers Compensation Act* 1987 (NSW) which defined personal injury arising out of, or in the course of employment, in such a way as to include (as effectively did the Queensland Act under consideration in *Hockey*) "the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor …". In *Zickar* the worker had collapsed at work when a congenital, cerebral aneurysm ruptured. The majority held that the worker had suffered a personal injury in the course of his employment and therefore a compensable injury.

107 Toohey, McHugh and Gummow JJ[95] said that there could be no doubt that the rupture that occurred to the worker's arterial wall constituted personal injury having regard to the medical evidence in that case and the authorities, including *Peart.* Their Honours quoted with approval a passage from the reasons of Latham CJ[96]:

> "There is a distinction, according to the common use of language, between getting hurt and becoming sick. The former would be described as an injury and the latter would generally not be so described. But it requires little analysis to show that an injury may be either external or internal. It appears to me to be difficult to draw any satisfactory distinction between the breaking of a limb and the breaking of an artery or of the lining of an artery. One is as much an injury to the body, that is, something which involves a harmful effect on the body, as the other. Each is a disturbance of the normal physiological state which may produce physical incapacity and suffering or death. Accordingly, in my opinion the detachment of a piece of the lining of the artery in the present case should be held to be an injury."

108 With respect I think that that statement begs the question. It looks exclusively to a result rather than to the cause (injury or disease) and fails to give due weight to the distinction which the Act under consideration there and other Acts seek to draw, between infirmities which are caused by personal injuries and infirmities which are an aspect of a disease. Indeed I would think that every disease would involve some disturbance of the normal physiological state. If that is so and disturbance of a normal physiological state is to be the test, then every or almost every disease will also be an injury.

109 Perhaps the presence of a disease may not always exclude the occurrence of a personal injury consequential upon and which has a relationship with that

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95 (1996) 187 CLR 310 at 332.

96 (1947) 75 CLR 242 at 252-253.

disease. I doubt that to be so, but in any event I do not agree that a mere manifestation, or occurrence, or a progression of a disease, or an aspect of it, can itself be an event of, or a personal injury within the meaning of this statute which evinces a clear intention to distinguish between, and to attach different legal consequences to a disease and a personal injury.

110 Kirby J, the other member of the majority in *Zickar*, in a separate judgment[97] expressed the opinion, that to the extent that *Hockey* endorsed the approach in the earlier cases of *Slazengers (Australia) Pty Ltd v Burnett*[98] and *Darling Island Stevedoring and Lighterage Co Ltd v Hussey*[99], it was incorrectly decided. In my opinion his Honour was, with respect, right to hold that *Zickar* could only be decided in the way it was by effectively overruling *Hockey*. True it is that *Hockey* was a case in which the worker sought prerogative relief, but in order to decide whether that relief should be granted, it was necessary for the Court to decide, and it did decide the respective and different statutory meanings of the words "injury" and "disease" under the statute applying there and its analogues or near analogues elsewhere.

111 His Honour, Kirby J's conclusion was that the sudden tear which caused the haemorrhage and the clot in that case did constitute a personal injury[100]. In doing so his Honour did however acknowledge the consequential difficulties in distinguishing between an injury and disease[101]:

> "The approach to the definition of 'injury' which I favour does not necessarily mean that every catastrophe connected with a progressive disease will fall within the definition of 'personal injury', primarily so defined. Whether, in the case of a progressive disease, leading inevitably to a sudden or identifiable pathological change, it can be said that such change constitutes a 'personal injury' can be left to determination on a case by case basis. It must be assumed that Parliament intended the extended definition, enacted to cover cases of 'disease' within s 4(b) of the 1987 Act, to have some operation."

112 The minority in *Zickar*, Brennan CJ, Dawson and Gaudron JJ, unequivocally held that the reasoning and decision in *Hockey* compelled the

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97 (1996) 187 CLR 310 at 336.

98 [1951] AC 13.

99 (1959) 102 CLR 482.

100 (1996) 187 CLR 310 at 352.

101 (1996) 187 CLR 310 at 352.

dismissal of the appeal[102]. Unlike Toohey, McHugh and Gummow JJ[103], but in accordance with the reasoning of Kirby J on this point, the minority did not regard the approach of the Court in *Hockey* as having in any way been confined by the precise question which arose there, whether error on the face of the record sufficient to justify a grant of certiorari could be identified. The minority were of the view that the decision in *Hockey* was no more than the last of a consistent and unbroken line of authority[104].

113 It is unnecessary for me to express any further opinions on the consistency or otherwise of the relevant decisions of this Court given on the meaning of other similar but certainly far from identical statutes from time to time. Nor do I with respect find them helpful in construing this statute or in deciding this case.

114 I would allow the appeal with costs and order that the respondent pay the appellant's costs of the appeals to Crispin J and the Full Court of the Federal Court.

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102 (1996) 187 CLR 310 at 325.

103 (1996) 187 CLR 310 at 333.

104 (1996) 187 CLR 310 at 325.