

AUSTRALIA / JUDGMENT

Comcare v Houghton [2003] FCA 332

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FEDERAL COURT OF AUSTRALIA

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Comcare v Houghton [2003] FCA 332

VETERANS' AFFAIRS – member of Royal Australian Navy has acoustic neuroma (a benign tumour) surgically removed from right ear at expense of Commonwealth – no causal or temporal connection between the tumour and member's employment – prior to operation, useful hearing in right ear – following operation no hearing in right ear – whether entitlement to compensation under subs 14(1) of Safety, Rehabilitation and Compensation Act 1988 (Cth) in respect of loss of hearing – whether loss of hearing resulted from an "injury" "suffered" by member as an "unintended consequence" of "medical treatment" paid for by Commonwealth within subs 6A(2) of that Act – meaning of "unintended" – absence of full findings of fact to which law could be applied.

WORDS AND PHRASES – "unintended"

Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 6A, 14

Re Elliott and Comcare (2001) 64 ALD 423 cited

Vallance v R (1961) 108 CLR 56 cited

Re Eaton and Comcare (2002) 67 ALD 182 distinguished

Public Trustee (WA) v State Energy Commission; re McPherson (1979) 142 CLR 211 discussed

Repatriation Commission v Brown (1990) 12 AAR 253 discussed

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334 cited

Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust (2001) 185 ALR 649 cited

Harts Australia Ltd v Commissioner of Taxation (2001) 109 FCR 405 cited

Kockums AB v Commonwealth of Australia [2002] FCAFC 138 cited

Copyright Agency Ltd v Charles Sturt University (No 2) (2001) 53 IPR 383 cited

COMCARE v DAVID HOUGHTON

N 1175 OF 2002

LINDGREN J

14 APRIL 2003

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 1175 OF 2002

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY MEMBER DR J D CAMPBELL

BETWEEN: COMCARE

APPLICANT

AND: DAVID HOUGHTON

RESPONDENT

JUDGE: LINDGREN J

DATE OF ORDER: 14 APRIL 2003

WHERE MADE: SYDNEY

THE COURT ORDERS
THAT:

1. The decision of the Administrative Appeals Tribunal in proceeding N2000/1793 given on 15 October 2002 be set aside.
2. The matter be remitted to the Tribunal to be determined according to law.
3. The respondent have a certificate under subs 6(1) of the Federal Proceedings (Costs) Act 1981 (Cth) that in the opinion of the Court it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent in respect of the costs incurred by him in relation to the appeal.

THE COURT NOTES THAT:

1. There is no order for costs as between the parties to the appeal.
Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 1175 OF 2002

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY
MEMBER DR J D CAMPBELL

BETWEEN: COMCARE

APPLICANT

AND: DAVID HOUGHTON

RESPONDENT

JUDGE: LINDGREN J

DATE: 14 APRIL 2003

PLACE: SYDNEY

REASONS FOR JUDGMENT

introduction

1 The applicant ("Comcare") appeals to the Court under s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) on a question of law from a decision of the Administrative Appeals Tribunal ("the Tribunal").

2 The respondent ("Mr Houghton") had sought review by the Tribunal of a decision of the Reconsideration Officer of the Military Compensation and Rehabilitation Service dated 17 August 2000, affirming an earlier decision of an authorised delegate dated 5 July 2000. That decision, adverse to Mr Houghton, was that liability was not accepted for the hearing loss in Mr Houghton's right ear, because the hearing loss was not an "unintended consequence" of a surgical operation which Mr Houghton had undergone on 8 March 1999.

3 The Tribunal set aside the decision under review and determined that liability be accepted and that the matter be remitted to the Military Compensation and Rehabilitation Service for assessment of Mr Houghton's compensation entitlement.

4 At the heart of the Tribunal's decision was its construction of the expression "unintended consequence" in par 6A(2)(b) of the Safety, Rehabilitation and Compensation Act 1988 (Cth) ("the Act").

BACKGROUND FACTS

5 The following account of the background facts is taken from the Tribunal's Reasons for Decision. Mr Houghton joined the Royal Australian Navy on 25 June 1984. Apparently, he had suffered some degree of right ear hearing deficiency since childhood. When enlisting, Mr Houghton underwent a medical examination. It was recorded that he was suffering from some high frequency sensory neural hearing loss. In 1996/97, he was recorded as stating that he had become aware of a worsening of his right ear hearing deficiency.

6 On 22 February 1999 Mr Houghton was referred to Dr Benedict Panizza, an ear, nose and throat surgeon. He was diagnosed as having a right intracanalicular acoustic neuroma (a histologically benign tumour). There was no evidence that this tumour was related to Mr Houghton's employment. It was removed on 8 March 1999 by way of a "sub-occipital craniotomy" by Dr Panizza and Dr Michael Redmond, neurosurgeon.

7 Prior to the surgery, Mr Houghton already suffered from a 19.4% hearing loss in the right ear. As a result of the surgery he lost his remaining hearing in the right ear (referred to in documents in evidence as "81.6%" [sic]). Following the surgery, Dr Redmond recorded of Mr Houghton that "he had lost hearing in the right ear which was not unexpected". Dr Panizza recorded that Mr Houghton had "essentially, a dead ear on the right side as a result of having his acoustic neuroma removed".

8 Before the Tribunal there was no disagreement as to the facts. There was always a high degree of probability that surgical removal of the acoustic neuroma would entail a total loss of hearing in the right ear. In a consultant's report dated 2 February 1999, Dr Redmond had commented as follows:

"He has useful hearing right ear. I have suggested surgery with attempted hearing preservation. I have outlined the nature of surgery, including the risks – death, stroke, nerve injury VII, VIII, epilepsy, infection, CSF leak, meningitis and anaesthetic risk."

Perhaps the hearing loss was caused by "nerve injury VII, VIII". In the absence of evidence on the matter, I can only surmise.

9 Dr Joseph Scoppa, a consultant ear, nose and throat surgeon and medico-legal consultant, provided a report dated 7 August 2001 in which he recorded that Mr Houghton told him that Dr Panizza had told him (Mr Houghton) prior to the surgery that, because the tumour was small, there was a choice between two surgical approaches, namely:

- (a) to reach the tumour by going through the inner ear, which would certainly result in total and permanent hearing loss;
- (b) to reach the tumour by going behind the ear so as to maximise the chance of hearing preservation.

According to Dr Scoppa, Mr Houghton said that Dr Panizza had added that either approach "would probably result in total hearing loss", but that there was a "slim chance of hearing preservation with the post-auricular approach". Mr Houghton told Dr Scoppa that he had "opted for the behind-the-ear surgical approach in order to give himself some chance of hearing preservation". Dr Scoppa offered the following opinion:

"The surgical approach used on 8/3/99 was a suboccipital approach. This approach is commonly used when a patient with an acoustic neuroma has hearing that is worthwhile preserving. This would have been the case in Mr Houghton's situation because his pre-operative hearing loss was only 19.4%.

The probability of hearing preservation in acoustic neuroma surgery is poor, and most patients who undergo this type of surgery usually lose hearing irrespective of surgical approach used. There are numerous articles in the medical literature on so-called hearing preservation surgery for acoustic neuroma removal. I attach a representative article on acoustic neuroma surgery by Scrivenor and Segelov [BP Scrivenor and JN Segelov, "Acoustic Neuroma", The Medical Journal of Australia, vol 155, December 2/16, 1991 at pp 752-754]. I draw your attention to the following relevant paragraphs on page 753 of their article:

'The prime purpose of surgery in acoustic neuroma is the total removal of the tumour, while preservation of facial nerve function is next in importance. Preservation of hearing, usually possible only in very small tumours, represents the ultimate in achievement, but must be regarded as 'cream on the cake' rather than a routine target.

A small series of six patients was treated by a middle fossa approach, the aim being to preserve hearing in patients with a small tumour. The average tumour size in this group was only 1.2 cm but while there was no mortality or serious morbidity, facial nerve preservation still rested at the 50% mark and hearing preservation was not possible.'

It is clear therefore that it is the intention of the operating surgeon or surgeons to try and preserve any serviceable hearing that may be present pre-operatively in acoustic neuroma surgery by appropriate selection of the operative approach, but that this intention is rarely able to be achieved. Thus Dr Redmond is correct in stating in his report of 30 June 2000 that Mr Houghton's post-operative hearing loss 'was not unexpected', however the intention at surgery was to try and preserve the 81.6% hearing that Mr Houghton had prior to surgery, as evidenced

by the approach used and by Mr Houghton's pre-operative discussion with Dr Panizza.

It is further patently obvious that it was intended to preserve hearing at the time of surgery when one notes Dr Redmond's handwritten consultation report of 1/2/99 where he states:

'He has useful hearing in the right ear. I have suggested surgery with attempted hearing preservation!'

...

His hearing loss in the right ear is due to a combination of pre-operative and intra-operative loss of hearing. It was the intention of the operating surgeons to preserve hearing at surgery, but as it usual in such cases this proved to be unachievable." (my emphasis)

10 In summary, everyone "desired" or "hoped for" hearing preservation. It was in an "attempt" to achieve this that the post-auricular approach was chosen. However, the doctors and Mr Houghton knew, as was the fact, that even with this approach there was only a "slim" or "poor" chance of any hearing preservation – which, while not impossible, was "rarely able to be achieved", and was "'cream on the cake' rather than a routine target".

LEGISLATION

11 Subsection 14(1) of the Act provides that subject to Part II of the Act:

"... Comcare is liable to pay compensation in accordance with [the] Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment." (my emphasis)

12 Section 14 is the first section in Div 1 of Pt II of the Act. Division 2 deals with "Injuries resulting in death", Div 3 with "Injuries resulting in incapacity for work" and Div 4 with "Injuries resulting in impairment". Subsection 4(1) provides for certain words and expressions to bear given meanings in the Act "unless the contrary intention appears".

13 The word "impairment", which, it will be recalled, appeared in subs 14(1), was defined in subs 4(1) as follows:

"impairment means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function."

14 Subsection 4(1) defined the word "injury" to mean, relevantly:

"(a) a disease suffered by an employee; or

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

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

15 The word "disease" was defined in subs 4(1) as follows:

"disease means:

- (a) any ailment suffered by an employee; or
- (b) the aggravation of any such ailment;

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

16 The word "ailment" was defined in subs 4(1) as follows:

"ailment means any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)."

17 Clearly, a connection with employment is inherent in the subs 4(1) definition of "injury". But Mr Houghton's acoustic neuroma had no causal or temporal connection with his employment. I was informed from the Bar table that the Commonwealth paid for its surgical removal because of a contractual obligation on it to do so arising from the terms of Mr Houghton's employment.

18 Subsection 4(3) of the Act provided as follows:

"(3) For the purposes of this Act, any physical or mental injury or ailment suffered by an employee as a result of medical treatment of an injury shall be taken to be an injury if, but only if:

- (a) compensation is payable under this Act in respect of the injury for which the medical treatment was obtained; and
- (b) it was reasonable for the employee to have obtained that medical treatment in the circumstances."

This provision did not assist Mr Houghton because, although the tumour was an "ailment", it was not a "disease" (and therefore not an "injury"), because it was not "contributed to in a material degree by [Mr Houghton's] employment".

19 Section 6A was inserted in the Act by the Military Compensation Act 1994 (Cth) (shortly afterwards, subs (2) was re-cast in immaterial respects by the Defence Legislation Amendment Act 1995). Subsection 6A(1) identified those employees to whom s 6A applied. They included "members of the Defence Force", of whom Mr Houghton was one. Subsection (2) of s 6A was as follows:

"(2) If, at any time, whether before, on, or after, 1 December 1988:

(a) an employee to whom this section applies received or receives medical treatment paid for by the Commonwealth; and

(b) as an unintended consequence of that treatment the person suffered or suffers an injury;

the injury to the employee is taken to have arisen out of, or in the course of, the person's employment, whether or not the person has remained an employee to whom this section applies." (my emphasis)

The expression "medical treatment" was defined in subs 4(1) of the Act to mean, inter alia, "medical or surgical treatment by, or under the supervision of, a legally qualified medical practitioner". The surgical removal of Mr Houghton's acoustic neuroma was "surgical treatment" and therefore "medical treatment" (I may use both terms interchangeably).

20 In my opinion, the word "injury" in both places where it appears in subs 6A(2) does not bear its subs 4(1) meaning (cf *Re Elliott and Comcare* (2001) 64 ALD 423 at 441). Essential to all aspects of that definition is a causal or temporal connection with employment. But the purpose of s 6A is to create an entitlement to compensation which does not depend on the medical treatment's being of an "injury" in that sense (contrast subs 4(3) set out at [18] above). Provided only the medical treatment is paid for by the Commonwealth, subs 6A(2) deems the unintended consequential injury to which it refers, to have arisen out of or in the course of the person's employment, thereby attracting the operation of subs 14(1).

21 Mr Houghton, an employee to whom s 6A applied, received medical treatment in the form of the surgical removal of his acoustic neuroma, which was paid for by the Commonwealth. His claim must be, in terms of par 6A(2)(b) of the Act, that as an "unintended consequence" of that medical treatment he "suffered" an "injury", according to the ordinary meaning of the latter term. Certainly following the surgery Mr Houghton had lost his remaining hearing in his right ear, and that loss of hearing was an "impairment" for the purposes of subs 14(1). The question is whether that impairment was the result of an "injury" (not in the subs 4(1) sense) which was an "unintended consequence" of his "medical treatment". If it was, subs 6A(2) deems that injury to have arisen out of, or in the course of, Mr Houghton's employment, for the purposes of, notably, subs 14(1) and the definition of "injury" in subs 4(1).

REASONING OF THE TRIBUNAL

22 The Tribunal proceeded on documentary evidence, in particular, on the basis of what the various doctors chose to say in their medical reports. The doctors did not testify orally and so were not cross-examined. In my opinion, as will appear below, unfortunately this provided an inadequate evidentiary basis for resolving Mr Houghton's claim.

23 After outlining the parties' submissions, the Tribunal made factual findings generally in accordance with the summary set out earlier. The Tribunal stated (at [22]):

"The issue before the Tribunal is whether the hearing loss in the right ear was an unintended consequence of the surgery undertaken."

As will appear below, this was the wrong question to ask.

24 The Tribunal referred to the Concise Oxford Dictionary definition of "intend" as "purpose, design", and deduced from it (at [27]) that the word "unintended" in s 6A "would imply that one did not have a design or purpose to undertake a particular act, task or activity". The Tribunal stated at [29]:

"While the two surgeons may have entertained a desire or a hope prior to commencing the operation that there was a chance, albeit a small chance, that hearing in the affected ear may have been preserved post operatively, the Tribunal observes that there is much in evidence before the Tribunal in this matter, that would indicate that the preservation of hearing in the Applicant's affected ear was an unlikely outcome. In this regard, the Tribunal refers to the opinions of Drs Redmond, Panizza and Scoppa and the article by Drs Scrivener and Segelov attached to Exhibit A2."

The Tribunal continued, after referring to evidence before it, as follows:

"... it is evident to the Tribunal that while the two surgeons may have had a hope or desire that hearing will be maintained post operatively, the purpose of their particular surgical intervention was to remove the acoustic neuroma in toto, and that as a result of their surgical intervention a more than likely and indeed a highly probable consequence was a loss of hearing in the affected ear. Put simply, the Tribunal's view is that the surgeons intended to remove the acoustic neuroma, knowing that it was highly probable that the hearing would be lost in the affected ear as an integral part of the surgical endeavour. This was the purpose of their intervention and as such the Tribunal finds that the activity upon which the two surgeons embarked to remove the acoustic neuroma was an intended activity and as part of that activity it was highly probable that the Applicant would lose his hearing in the affected ear, that is an expected and highly probable consequence." (my emphasis)

25 Counsel for Comcare relies on the expressions "an integral part of the surgical endeavour" and "part of that activity" in this passage.

26 The Tribunal treated the word "unintended" in s 6A as meaning "undesired", and distinguished criminal law notions of the intended consequences of a person's acts as embracing consequences which are the foreseeable likely consequences of an act (cf *Vallance v R* (1961) 108 CLR 56). Accordingly, the Tribunal declined to follow *Re Eaton and Comcare* (2002) 67 ALD 182 ("Eaton"), in which that concept of intention had been applied in the context of the expression "unintended consequence" in s 6A.

27 In preferring the meaning of "undesired", the Tribunal noted that the Act was beneficial legislation and that s 6A introduced new rights and entitlements. It also referred to the Explanatory Memorandum to the Military Compensation Bill 1993 (Cth), which, at par 8, made it clear that the entitlement applied regardless of whether there was negligence associated with the medical treatment.

28 The Tribunal concluded (at [36]) that an "unintended consequence" for the purposes of s 6A of the Act was "a consequence which was not desired by the individual undertaking the act ...". That is to say, the Tribunal concluded that in the present case an "unintended consequence" was a consequence that was not desired, sought or aimed for by the operating surgeons. It followed, for the Tribunal, that the loss of Mr Houghton's hearing in his right ear was within the expression, being an undesired result of the surgical removal of the neuroma.

reasoning

29 In my opinion, the "issue before the Tribunal" as the Tribunal identified it (see [23] above) did not conform to the terms of the Act.

30 In resolving Mr Houghton's claim, it is necessary to attend closely to the terms of subs 6A(2) and to apply them to fully found facts. The word "unintended" and the expression "unintended consequence" should not be considered in isolation. They must be considered as part of a context in which the concepts of "medical treatment", "consequence", "suffered or suffers" and "injury" in subs 6A(2) and the word "impairment" in subs 14(1) also play a part.

31 Moreover, all these words were to be applied to the physical things, events and processes constituting Mr Houghton's operation, as to which, unfortunately, the Tribunal made no findings. For all that is revealed by the Tribunal's findings, Mr Houghton may not have "suffered" an "injury" which was a "consequence" of (and therefore conceptually distinct from) his "medical treatment".

32 According to subs 6A(2), it is the suffering of an "injury", rather than any ongoing impairment, which is referred to as the unintended consequence of the medical treatment. The scheme expressed in the Act can be illustrated as follows:

1. medical treatment paid for by the Commonwealth (par 6A(2)(a))
2. with the unintended consequential suffering of an injury (par 6A(2)(b))
3. resulting in, relevantly, impairment (subs 14(1))

The second of these three steps was not examined by the Tribunal; the Tribunal asked only whether the impairment of loss of hearing was an unintended consequence of the surgery.

33 In *Public Trustee (WA) v State Energy Commission; re McPherson* (dec'd) (1979) 142 CLR 211 at 225, Gibbs J said, in a different statutory context, that there was no difficulty in describing the progressive loss of hearing called "boilermaker's deafness" as an "injury", but his Honour immediately added:

"A person who suffers from that complaint [boilermaker's deafness] has undergone a harmful physiological change, which can be described as an injury in the ordinary sense of the word."

This additional sentence suggests that strictly his Honour understood the injury to consist of the "physiological change" which preceded and caused the loss of hearing.

34 In any event, in my opinion, whatever the position may be in other statutory contexts, when construing subs 6A(2) one must bear in mind the distinction, recognised in subs 14(1), between an injury and the impairment which results from it. Mr Houghton's loss of hearing was clearly an impairment. Subsection 14(1) calls for identification of the injury which caused it, and subs 6A(2) calls for identification of the medical treatment of which that same injury was a consequence. When those identifications are made, it may be that much of the difficulty associated with the word "unintended" will disappear.

35 The word "injury" has a wide meaning. Hill J considered the meaning of the word as it occurred in the Veterans' Entitlements Act 1986 (Cth) in *Repatriation Commission v Brown* (1990) 12 AAR 253 at 257–259, and concluded that it signified the suffering of some harm. In that case, his Honour was concerned with the grinding down of two healthy teeth to near the gum line in order to provide the foundation for the fitting of a bridge. Hill J thought that, regarded in isolation, the two healthy teeth might be seen to have been injured by being ground down, but that properly viewed, the grinding down was not harmful but beneficial. Accordingly, his Honour held that the grinding down itself did not constitute an "injury".

36 Similarly, it may be that full findings of fact in the present case would lead to the conclusion that Mr Houghton did not suffer an "injury" or did not suffer one which was a "consequence" of, and therefore conceptually distinct from, the "surgical treatment" itself. The present case seems to be distinguishable from *Repatriation Commission v Brown* and from *Eaton* in that there was, apparently (as at what moment of time, I do not know), a slim chance that whatever it was that caused Mr Houghton's loss of hearing would not occur, whereas there was no chance that the grinding down of Mr Brown's teeth or the surgical scarring of Ms Eaton would not occur. But the inadequacy of regarding "unintended" as meaning simply and without qualification, "undesired", is at least suggested by the fact that according to that understanding of the word's meaning, the deliberate grinding down of Mr Brown's two healthy teeth by the dentist and Ms Eaton's unavoidable surgical scarring would both qualify as "unintended" – surely an inapposite description of them.

37 It may be suggested that since Mr Houghton possessed hearing prior to the surgery and lacked it afterwards, the inference is irresistible that, for the purposes of subs 6A(2), he lost his hearing as a result of an "injury" which he "suffered" as a "consequence" of his "surgical treatment". I disagree. I do not know what caused Mr Houghton's loss of hearing – a matter which is the subject of specialist knowledge. The proper application of the network of statutory provisions required the Tribunal to make full findings of fact as to at least the following:

- the nature and functioning of human hearing;

- the nature and location of Mr Houghton's acoustic neuroma;
- the medical and surgical problems which Mr Houghton's condition presented;
- the precise nature of the two surgical procedures that were available for removal of the acoustic neuroma;
- the nature of the risk of loss of hearing which each of the procedures posed;
- steps available to be taken by the surgeons to reduce that risk;
- why it is so rare that hearing survives surgery of the kind that was undertaken;
- given that the approach is made from behind the ear, why it is that sometimes hearing is saved and sometimes lost;
- why Mr Houghton's hearing was lost.

38 It is uncontroversial that Mr Houghton lost such hearing as he had prior to the surgery as a result of something that happened while he was undergoing surgery. But until there are full findings of facts, one cannot say whether that something was the "suffering" of "injury" which was "an unintended consequence of [medical] treatment [paid for by the Commonwealth". It may be that full findings of fact will make it clear that whatever it was that caused Mr Houghton's loss of hearing is properly to be regarded as part and parcel of the operation or as a separate consequence of it. Full findings of fact may show that at some point of time it was clear that an injury causing loss of hearing was certain to occur. If so, further questions will arise.

39 Although the Tribunal asked itself the wrong question, I would sustain its decision if, but only if:

- the only inference available on the Tribunal's findings was that Mr Houghton's loss of hearing resulted from an "injury" which he "suffered" as a "consequence" of his "medical treatment"; and
- the word "unintended" meant simply and without qualification "undesired", "unsought" or "not aimed for".

Neither of these conditions is satisfied.

40 The first condition is not satisfied in the absence of full findings of fact.

41 As to the second condition, I need go only so far as to say that in my opinion subs 6A(2) does not encompass an injury which was, and was always known to be, an unavoidable direct consequence of the medical treatment, albeit one which those administering the treatment did not positively desire, seek or aim to produce. Yet this appears to be the meaning attributed to the word "unintended" by the Tribunal.

42 The Tribunal erred in law, first, by posing for itself the wrong question and, as a result, failing to make factual findings as to whether Mr Houghton "suffered" an "injury" as a "consequence" of "medical treatment"; and, secondly, by treating the word "unintended" as meaning simply and without qualification, "not desired by the individual undertaking the act".

43 In the absence of relevant factual findings I refrain from discussing further the meaning of "unintended" or "unintended consequence" in subs 6A(2). To do so is not necessary for the resolution of this appeal. It would be improper to attempt to give a free-floating definition of, or synonym for, the word or expression. The discussion would take place in a factual vacuum and would constitute the giving of judicial advice without any factual substratum and in relation to assumed facts: cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355–357; *Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust* (2001) 185 ALR 649; *Harts Australia Ltd v Commissioner of Taxation* (2001) 109 FCR 405 at 413; *Kockums AB v Commonwealth of Australia* [2002] FCAFC 138; and the cases cited in *Copyright Agency Ltd v Charles Sturt University (No 2)* (2001) 113 FCR 369 at [46]–[54].

CONCLUSION

44 For the above reasons the decision of the Tribunal should be set aside and the matter should be remitted to the Tribunal to be determined in accordance with law.

45 The proceeding had the potential to raise legal issues of general importance. From the viewpoint of clarification of the law, it is unfortunate that the lack of factual findings makes it presently impossible to resolve those questions. The attention of those responsible should be drawn to the unsatisfactory nature of subs 6A(2). Difficult questions touching its construction are bound to continue to arise.

46 My reasoning differs somewhat from Comcare's submissions. There should be no order as to costs as between the parties.

47 Mr Houghton applies for a certificate under the Federal Proceedings (Costs) Act 1981 (Cth). A certificate under subs 6(1) of that Act should be granted to him in respect of the costs incurred by him in relation to the appeal.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lindgren.

Associate:

Dated: 14 April 2003

Counsel for the Applicant: Mr A Robertson SC and Mr G Johnson

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: Mr M Smith

Solicitor for the Respondent: Wyatt Attorneys

Date of Hearing: 7 March 2003

Date of Judgment: 14 April 2003

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