

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

SHEPHERD, Daniel

v

THE STATE OF SOUTH AUSTRALIA (IN RIGHT OF THE
DEPARTMENT FOR CHILD PROTECTION)

JURISDICTION: South Australian Employment Court – Return
to Work Act 2014 – Hearing and Determination

CASE NO/S: ET-22-02574

HEARING DATE: 11 October 2023

JUDGMENT OF: His Honour Deputy President Judge Calligeros

DELIVERED ON: 15 January 2024

CATCHWORDS:

*The applicant seeks review of a decision to reject his claim for compensation for pericarditis due to having a third dose of COVID-19 vaccine – The respondent admits that the vaccine caused pericarditis but says that the injection did not arise from employment but from a lawful State Government vaccination directive – In the alternative the respondent says that any liability for any injury is excluded by legislation – **HELD:** 1. The injury arose as a result of both a vaccination mandate and the applicant’s employment - Section 7 of the Return to Work Act 2014 requires that employment be a significant contributing cause of a work injury, not its only or most significant cause – Section 7 is satisfied- 2. Section 32A of the Emergency Management Act 2004 (SA) (EM Act) does not prohibit the claim as the language of s 32A does not unmistakably and unambiguously lead to that conclusion - Rejecting the claim does not achieve the objects of the EM Act - The second reading speech of the EM Bill suggests the liabilities s 32A sought to avoid were unforeseen and novel rather than a well-known and established liability like workers compensation.*

Bjekic v State of New South Wales (Western Sydney Area Local Health District) [2022] NSWPIIC 214

Bjekic v State of New South Wales (Western Sydney Area Local Health District) [2023] NSWPICPD 27
Dawking v Secretary (Department of Education) [2022] NSWPIC 611
Secretary, Department of Education v Dawking [2023] NSWPICPD 23
The State of South Australia v Roberts [2018] SASCF 25
Roberts v State of South Australia [2016] SAET 58
The State of South Australia (in right of the Department for Technical and Further Education) v Roberts [2017] SAET 36
Comcare v Martin (2016) 258 CLR 467
Ward v State of SA (Department for Primary Industries and Regions SA (PIRSA)) [2016] SAET 28
Puntoriero v Water Administration Ministerial Corporation (1999) 199 CLR 575
Metropolitan Water Sewerage & Drainage Board v O.K. Elliott Ltd (1934) 52 CLR 134
Coco v The Queen (1994) 179 CLR 427
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1
Baker v Campbell (1983) 153 CLR 52
Hamilton v Oades (1989) 166 CLR 486
Bropho v Western Australia (1990) 171 CLR 1

REPRESENTATION:

Counsel:

Applicant: Dr P Salu
Respondent: Mr B Garnaut

Solicitors:

Applicant: Paul Alvaro Lawyers
Respondent: Melino Legal

- 1 Daniel Shepherd was required to have a third dose of COVID-19 vaccine if he wished to continue performing work as a child and youth support worker employed by the Department for Child Protection (DCP). Mr Shepherd had a third dose of the Pfizer mRNA COVID-19 vaccine (the vaccine) on 24 February 2022. The following day he experienced chest pain which grew steadily worse over the next few weeks. On 11 March 2022 Mr Shepherd thought he was having a heart attack and an ambulance was called. The cause of Mr Shepherd's chest pain has been diagnosed as post-vaccine pericarditis (the injury), an inflammation of the membrane that surrounds the heart.
- 2 Mr Shepherd made a claim for weekly payments of income support and medical expenses. The claim was rejected by the State of South Australia (the State). At first the State did not accept that the vaccine caused the injury. The State now admits that the third dose of the vaccine resulted in Mr Shepherd causing the injury and incapacity for work.
- 3 Despite the partial concession made, the State continues to defend the claim on two grounds. The State contends that the injury did not arise from employment within the meaning of s 7 of the *Return to Work Act 2014* (SA) (RTW Act). The State argues that the injury arose from a direction given under the *Emergency Management Act 2004* (SA) (EM Act). The State submits that if s 7 of the RTW Act is satisfied, s 32A of the EM Act excludes any liability which would otherwise arise from a direction given under the EM Act, and any act or omission of the State in relation to its management of the COVID-19 pandemic more generally.

Agreed Facts

- 4 The State prepared a statement of facts which Mr Shepherd agrees with. The agreed facts are:
 1. On 30 January 2020, the Director General of the World Health Organisation ('the WHO') called a Public Health Emergency of International Concern in relation to the novel coronavirus that causes COVID-19. Australia was thereby required to respond and prepare for the pandemic.
 2. On 11 March 2020, the WHO declared a Global Pandemic in relation to COVID-19.
 3. On 22 March 2020, the State Co-ordinator under the *Emergency Management Act 2004* ('EM Act') declared that a Major Emergency is occurring in respect of the outbreak of COVID-19 within South Australia. That declaration of Major Emergency remained in force pursuant to approvals given from time to time by the Governor and Administrator under the EM Act, until it was revoked on 24 May 2022.

4. In 2021, the Applicant worked at Baptist Care SA as a Child and Youth Support Worker, which organisation had a subcontract with the Department for Child Protection.
5. Whilst working with Baptist Care SA, the Applicant received two COVID-19 vaccinations on 19 August 2021 and 9 September 2021 respectively. Following these vaccinations, he had some adverse symptoms for about one to two weeks.
6. From about 19 October 2021, the Applicant commenced employment with the Department for Child Protection as a Child and Youth Worker. In that role:
 - 6.1. The Applicant worked in a residential care setting providing care and support to children or youths under the guardianship of the Chief Executive of the Department for Child Protection.
 - 6.2. The Applicant provided support to children and youths in person including assisting with daily life tasks in a group or shared living arrangement, assisting with group based activities, assisting with daily personal activities and providing therapeutic support.
 - 6.3. The Applicant may have been required to provide care and support at any particular time to a child or youth with a disability in circumstances where a significant number of the children and youths in the residential care settings have disabilities and plans under the National Disability Insurance Scheme.
 - 6.4. The Applicant may also have been involved in taking children and youths to hospitals and other health care settings, and attending with them for treatment and appointments.
7. On 28 January 2022, the State Co-ordinator made two directions under s 25 of the EM Act, which are referred to as the *Emergency Management (In-home and Community Aged Care and Disability Support Workers Vaccination No 4) (COVID-19) Direction 2022* and the *Emergency Management (Healthcare Setting Workers Vaccination No 6) (COVID-19) Direction 2022* (collectively, 'EM Vaccination Directions'). Both directions replaced previous directions and had the new effect of requiring, subject to certain conditions, a third (booster) dose of a COVID-19 vaccine to have been received by a person in effect within an identified 4 month period in order to engage in specified types of work or duties. A copy of the EM Vaccination Directions are contained in the Book of Legislation and Other Materials at pp 83 to 93.

8. The Applicant's role involved engaging in work or duties that were specified within the EM Vaccination Directions.
9. The Applicant received a letter dated 22 February 2022 from the A/Chief Executive of the Department for Child Protection. That letter referred to the requirements of the EM Vaccination Directions and gave certain directions in respect of providing evidence of vaccination status or a statement that the Applicant will not engage in work or duties while prohibited from doing so under the EM Vaccination Directions. A copy of the letter dated 22 February 2022 is contained in the Trial Book at pp 273 to 276.
10. On 23 February 2022, the Applicant and Mr Springham exchanged text messages in relation to whether the Applicant had received a third (booster) dose of a COVID-19 vaccine. In particular, Mr Springham referred to the "Department direction that we need to have the booster within 4 months of the second jab" and that evidence of a booking needs to be provided. The Applicant replied that he will get it tomorrow as "I just don't want to miss out on work over the weekend if it wipes me out" and "also leaves the team in a predicament". A copy of the text messages is contained in the Trial Book at pp 64 to 69.
11. On 24 February 2022, the Applicant received a third (booster) dose of a COVID-19 vaccine at the Wayville Clinic. The Applicant received that vaccine outside of his paid working hours.
12. From 25 February 2022, the Applicant started feeling unwell with severe chest pains. On the evening of 11 March 2022, the Applicant reports that his chest pains became unbearable and he was taken to Ashford Hospital via ambulance. Subsequently, the Applicant's symptoms have fluctuated, with current symptoms including feeling very fatigued and chest pains on a daily basis.
13. Since March 2022, the Applicant has been off work other than for a period between 19 September to 28 November 2022 where he worked in a part-time administrative role.
14. The Applicant has been diagnosed by cardiologists, Dr Waddy and Dr Mahar, with post vaccine pericarditis which is taking a long time to resolve.
15. The Respondent admits that the claimed injury of pericarditis was suffered by the Applicant by reason of the administration of the third (booster) vaccination on 24 February 2022.

Evidence

- 5 In addition to relying on the agreed facts, Mr Shepherd gave evidence by affidavit and orally. The key parts of his evidence are described below.
- 6 Mr Shepherd is 44 years old, married and the father of a five year-old boy. After working as a motor mechanic, Mr Shepherd commenced a degree in behavioural science at age 29. He graduated five years later and commenced working at Baptist Care SA as a child and youth support worker. Baptist Care SA had a contract to provide services to the DCP and Mr Shepherd worked with children and youth who were under the care of the DCP. In October 2021 Mr Shepherd commenced work as an employee of the DCP.
- 7 The first Pfizer COVID-19 vaccination Mr Shepherd had on 19 August 2021 whilst still employed by Baptist Care SA was encouraged but not required by the employer. Mr Shepherd had some minor symptoms afterwards, including aching joints, cold and flu symptoms and minor chest pains, but they resolved within a week or so. A second vaccination followed on 9 September 2021 after which Mr Shepherd had body aches, headaches and cold and flu symptoms for two weeks. He took time off work after the second vaccination due to the symptoms experienced.
- 8 In late January 2022, DCP employees were advised of an EM Act direction requiring them to have a third dose of an approved COVID-19 vaccine. Given the symptoms he had after the first two doses of vaccine, Mr Shepherd was reluctant to do so and ‘initially sat on the request’.¹
- 9 As noted above, on 23 February 2021 Mr Shepherd received a text message from Mr Springham, his supervisor, asking him if he had had a third dose of vaccine. Mr Shepherd told Mr Springham that he had not because he had been sick for a week after his second dose of vaccine. Mr Springham advised Mr Shepherd by text message that the DCP had directed that its employees had to have a third dose of vaccine within four months of having a second vaccine dose. Mr Springham advised Mr Shepherd that he was required to provide evidence of having booked a booster dose of vaccine. Mr Shepherd responded by text, advised that he would have a third dose of vaccine the next day and sent Mr Springham a screenshot to confirm that a vaccination booking had been made.
- 10 Mr Shepherd began to experience severe chest pain the day after he had his third dose of the vaccine. He was attending a TAFE institution that day but left at lunch time as he felt unable to remain. He arranged a tele-health consultation for the next day. For the next two weeks, Mr Shepherd experienced increasing levels of chest pain. He said that on 11 March 2022 the chest pain was unbearable and felt like someone was

¹ Affidavit of Daniel Shepherd dated 22 March 2023, Exhibit T1 48 [12].

kneeling on his chest. He thought he may be having a heart attack. He was taken by ambulance to the Ashford Hospital cardiac unit and seen by Dr Waddy, cardiologist, who told him that the chest pain was probably related to the third dose of vaccine and may be pericarditis.

- 11 Some 4 to 5 months after the chest pain commenced, Mr Shepherd noted some improvement. However, a further episode of severe chest pain followed and Mr Shepherd's symptoms returned.
- 12 In terms of current symptoms, Mr Shepherd said that he tires easily. He walks his son to a school some 400 metres from his home. He becomes tired walking back to his home. His pre-injury activities were hiking, walking and Chinese boxing, including hiking and jogging up and down Mount Lofty. Mr Shepherd is presently unable to perform those activities.
- 13 Mr Springham produced an affidavit and gave oral evidence. Mr Springham deposed that Mr Shepherd's probationary employment plan did not record any impediment to him performing normal duties. To the extent it may have been suggested there is a conflict between the contents of the plan and Mr Shepherd's evidence, I accept the evidence of Mr Shepherd. The State agreed that Mr Shepherd has been incapacitated for his normal duties at all relevant times. I find that if Mr Shepherd did not tell Mr Springham the full extent of his symptoms immediately after being injured, he either hoped that the symptoms would have abated as they did after his second dose of vaccine or he remained quiet as he did not wish to jeopardise his probationary employment status.
- 14 Mr Shepherd was a thoughtful and reliable witness whose evidence I accept. I find that he contemplated resigning from employment with DCP to avoid having a third dose of vaccine, but did not do so because he loved his job and it was difficult to find alternative work at the time.²
- 15 There is a discrepancy between one aspect of Mr Shepherd's evidence and the evidence of Mr Springham. Mr Shepherd maintained that Mr Springham told him that if he did not have a third dose of vaccine his employment would be terminated. Mr Springham said that he did not say that but rather reiterated the contents of the DCP letter of 22 February 2022 under the heading: 'Potential implications for your employment'.³ Mr Springham said that he supervised a DCP employee who had refused to be vaccinated. He said that the employee took any outstanding leave and then took leave without pay. The employee was not dismissed and recommenced working for DCP after the vaccination mandate was lifted.

² Tr 21, 36 – 44.

³ Trial Book Exhibit T1 273 – 76 at 275.

- 16 The portion of the 22 February 2022 DCP letter to employees relevant to this matter provides:

Managerial directions

Accordingly, I direct that

1. You must provide your line manager and DCPWHSIMServices@sa.gov.au by 5pm on 25 February 2022:
 - Evidence that you have received a third (booster) dose of a TGA approved COVID-19 vaccine; or
 - Evidence of a booking to receive a third (booster) dose; or
 - Evidence that you have previously been infected with COVID-19 within 4 months of your second dose of a COVID-19 vaccine; or
 - a copy of an exemption endorsed by the Chief Public Health Officer (or delegate).

OR

2. Alternatively,

- (a) You must by 5pm on 25 February 2022, confirm in writing to DCPWHSIMServices@sa.gov.au that you “will not engage in work or perform duties while prohibited from doing so under the Emergency Management Directions”; and
- (b) If at any point in time you form the view that you are not prohibited from performing your duties in accordance with the EM Directions in respect of any period after 1 March 2022, you must within one working day provide in writing to DCPWHSIMServices@sa.gov.au evidence on the basis of which you consider you are no longer prohibited from engaging in work or performing duties (eg evidence of having received a third (booster) dose, or an approved exemption).

Under the Professional Conduct Standards of the Code of Ethics for the South Australian Public Sector, public sector employees must comply with a lawful and reasonable managerial direction. Accordingly, if you fail to comply with the above managerial direction, I may commence disciplinary proceedings, which may lead to the termination of your employment.

Potential implications for your employment

If, in accordance with 2 a) above, you confirm in writing that you will not engage in work from 1 March 2022:

- In respect of the period from 1 March 2022 onwards, you may submit a leave application by 25 February 2022: applying to access any accrued annual leave, retention leave and/or long service leave entitlements; and/or apply for leave without pay (once your annual and long service leave entitlements have been exhausted), and any application will be assessed in accordance with existing policies and procedures and will not be indefinite.
- In respect of the period following the conclusion of any approved leave, unless you provide evidence which demonstrates that you can lawfully engage in work and perform duties in accordance with the EM Directions, consideration will be given to the further implications for your employment. These implications may involve cessation of remuneration or termination of your employment, as without the requisite vaccination against COVID-19 or an endorsed exemption, there may be limited potential to transfer you to alternative duties.

- 17 The letter of 22 February 2022 required DCP employees to either have a third dose of the vaccine, or confirm in writing that they would not undertake any work for DCP. Employees who did not agree to have a third vaccine dose were advised that they could take leave from work, but the period of leave would not be indefinite. Employees were also told that at the conclusion of any period of leave their employment may be terminated.
- 18 In evidence in chief, Mr Springham said he could not recall whether he had a conversation with Mr Shepherd about his vaccination status. In cross-examination Mr Springham agreed it was possible that he did. Mr Shepherd steadfastly maintained that Mr Springham had told him that his employment would be terminated if he did not have a third dose of vaccine.
- 19 From a practical viewpoint, not much turns on the discrepancy. Mr Shepherd was required to have a third dose of vaccine if he wished to keep working and receiving income. He had a three year-old son to support and his wife was working at a winery that was affected by the Chinese embargo on Australian wine and lost her job a few months after he became unwell.
- 20 Mr Shepherd's behaviour is consistent with him understanding that his employment would be terminated if he did not have a third dose of vaccine. His employment was still subject to probation when two EM

Act vaccination directions took effect. Mr Shepherd apologised to Mr Springham for taking time off work because of the injury.

- 21 Counsel for the State, Mr Garnaut, submitted that Mr Shepherd had likely reconstructed Mr Springham telling him that his employment would be terminated if he did not have a third dose of vaccine after replaying the events in question in his mind many times. Mr Garnaut added that what Mr Springham allegedly said goes beyond the ambit of the 22 February 2022 letter.
- 22 It is possible that Mr Shepherd came to believe Mr Springham told him that his employment would be terminated if he did not have a third dose of vaccine when Mr Springham did not say that. Mr Shepherd no doubt ruminated about how he came to be injured and it is not implausible that some reconstruction may have been involved. However, having heard both witnesses, and I prefer and accept Mr Shepherd's evidence on the issue. While Mr Springham gave his evidence openly and candidly, he agreed that it was possible he did have a conversation with Mr Shepherd about his vaccination status which he now cannot recall. Mr Springham had to deal with other employees at the time and the vaccine mandate was an important issue to the State. Mr Shepherd did not depart from or qualify his account in any way. He mentioned a DCP employee who was not offered any further work after declining to have a third dose of vaccine.

Legal basis of the vaccination mandate

- 23 As the parties agree that a major emergency within the meaning of s 23 of the EM Act existed in South Australia between 22 March 2020 and 24 May 2022, these reasons will only set out those provisions of the EM Act which are directly relevant to the issues to be decided.
- 24 Section 3 of the EM Act contains the following definition:

emergency means an event (whether occurring in the State, outside the State or in and outside the State) that causes, or threatens to cause—

- (a) the death of, or injury or other damage to the health of, any person; or
- (b) the destruction of, or damage to, any property; or
- (c) a disruption to essential services or to services usually enjoyed by the community; or
- (d) harm to the environment, or to flora or fauna;

Note—

This is not limited to naturally occurring events (such as earthquakes, floods or storms) but would, for example, include fires, explosions, accidents, epidemics, pandemics, emissions of poisons, radiation or other hazardous agents, hijacks, sieges, riots, acts of terrorism and hostilities directed by an enemy against Australia.

- 25 Section 14 of the EM Act provides that the Commissioner of Police from time to time is appointed as the State Co-ordinator.
- 26 Section 23 of the EM Act allows the State Co-ordinator to declare an emergency to be a major emergency. Such a declaration gives the State Co-ordinator a wide range of considerable powers including the ability to:
- enter into any property using such force as is necessary;
 - assume control of any land, body of water building or other thing;
 - take control of any person's real or personal property;
 - remove any person who obstructs a response or recovery operation to any place thought fit.⁴
- 27 On 28 January 2021 the State Co-ordinator gave an EM Vaccination Direction which required persons working in or in connection with healthcare to have a third dose of COVID-19 vaccine, the *Emergency Management (In-home and Community Aged Care and Disability Support Workers Vaccination No 4) (COVID-19) Direction 2022* (Direction 4). Mr Shepherd's work comes within the definition of 'intensive disability support services' in cl 4(1) of Direction 4. Clause 4(1) also provides that the 'prescribed time' to have a 'third (booster) dose of a TGA⁵ approved vaccine' is 'within 4 months of [a] positive COVID-19 test, or within 4 months of [a] second dose of a TGA approved or recognised COVID-19 vaccine'. Direction 4 took effect from midnight on 29 January 2022.
- 28 Direction 4 replaced an earlier direction which required persons working in a healthcare setting to have two doses of a TGA approved or recognised COVID-19 vaccine.
- 29 Clause 5 of Direction 4 provides that a person to whom Direction 4 applies may apply for a medical exemption from having a third dose of vaccine. Mr Shepherd knew that he could have sought an exemption but said that he understood the process would take time and he would not be

⁴ In order, ss 25(2)(a), (b), (d), (l).

⁵ Therapeutic Goods Administration.

able to work until it was concluded. I accept that to be an accurate assessment.

30 The *Emergency Management (Healthcare Setting Workers Vaccination No 6) (COVID-19) Direction 2022* (Direction 6) took effect from midnight on 29 January 2022 and applied to Mr Shepherd. Clause 5 of Direction 6 ‘applies to all persons engaging in work or duties at a healthcare setting’. The term ‘healthcare setting’ is defined very broadly in cl 4(1) and includes almost any place where services related to health are performed. Mr Shepherd agrees that some of his duties were performed in a healthcare setting.

31 The objects of the EM Act are described in s 2(1) as follows:

(1) The objects of this Act are—

(a) to establish an emergency management framework for the State that—

(i) promotes prompt and effective decision-making associated with emergencies; and

(ii) makes provision for comprehensive and integrated planning in relation to emergencies; and

(b) to promote community resilience and reduce community vulnerability in the event of an emergency.

32 Section 32A of the EM Act was introduced by s 2 of Part 1, Schedule 3 of the *COVID-19 Emergency Response Act 2020* (ER Act) and was subsequently amended to be as follows:

32A—Protection from liability—COVID-19

(1) Despite any other provision of this Act, or any other Act or law, no liability attaches to the Crown in respect of—

(a) any acts or omissions in connection with—

(i) the exercise or discharge, or purported exercise or discharge, of a power or function under a prescribed Act; or

(ii) the carrying out, or purported carrying out, of any direction or requirement given or imposed, or purportedly given or imposed, in accordance with a prescribed Act; or

(b) any failure to exercise or discharge a power or function under a prescribed Act,

in relation to the outbreak of the human disease named COVID-19 within South Australia (whether the relevant acts or omissions

or failure occurred before or after the commencement of this section).

(2) Despite any other provision of this Act, or any other Act or law, no civil or criminal liability attaches to a person for an act or omission in good faith in respect of—

(a) any acts or omissions in connection with—

(i) the exercise or discharge, or purported exercise or discharge, of a power or function under a prescribed Act; or

(ii) the carrying out, or purported carrying out, of any direction or requirement given or imposed, or purportedly given or imposed, in accordance with a prescribed Act; or

(b) any failure to exercise or discharge a power or function under a prescribed Act,

in relation to the outbreak of the human disease named COVID-19 within South Australia (whether the relevant acts or omissions or failure occurred before or after the commencement of this section).

(3) In this section—

prescribed Act means—

(a) this Act; and

(b) the *South Australian Public Health Act 2011*; and

(c) the *COVID-19 Emergency Response Act 2020*; and

(d) any other Act or law prescribed by the regulations.

33 Section 5 of the EM Act provides:

Interaction with other Acts

(1) Subject to this section, this Act is in addition to and does not limit, or derogate from, the provisions of any other Act.

(2) Where the provisions of this Act are inconsistent with any other Act or law, this Act prevails to the extent of the inconsistency.

34 The *Statutes Amendment (COVID-19 Permanent Measures) Act 2021* (PM Act) expressly amends nine Acts but does not refer to the RTW Act.

House of Assembly second reading speeches

35 The House of Assembly second reading speech of the *COVID-19 Emergency Response Bill 2020* states that s 32A provides that ‘no

liability attaches to the Crown in respect of any acts or omission in connection with the discharge of a power or function under this act...'.⁶

- 36 The House of Assembly second reading speech of the *Statutes Amendment (COVID-19 Permanent Measures) Bill*, clause 9 of which became s 10 of the PM Act and amended s 32A of the EM Act, states:⁷

Clause 9 of the bill amends the Emergency Management Act 2004 to provide that no civil liability attaches to the Crown with no civil or criminal liability attached to any person acting in good faith in respect of any acts or omissions in relation to a power or function under the COVID Act, the South Australian Public Health Act 2011 or other prescribed act in relation to the COVID-19 pandemic. It is important to have these provisions in place to ensure appropriate decisions can be made to manage the COVID-19 pandemic without fear of liability arising in the future.

Did the injury arise from employment?

- 37 Relevantly to this matter, s 7 of the RTW Act provides:

- (1) This Act applies to an injury if (and only if) it arises from employment.
- (2) Subject to this section, an injury arises from employment if—
 - (a) in the case of a physical injury—the injury arises out of or in the course of employment and the employment was a significant contributing cause of the injury; and
 - (b) ...
- (3) In connection with the application of subsection (2) to an injury that is, or results from, the aggravation, acceleration, exacerbation, deterioration or recurrence of a prior injury (a *prescribed event*)—
 - (a) in the case of an injury other than a psychiatric injury—employment must be a significant contributing cause of the prescribed event; and
 - (b) ...
 - (i) ...
 - (ii) ...

⁶ South Australia, *Hansard*, House of Assembly, 7 April 2020, 656.

⁷ South Australia, *Hansard*, House of Assembly, 17 March 2021, 4997.

and then the injury is only compensable to the extent of and for the duration of the relevant aggravation, acceleration, exacerbation, deterioration or recurrence.

- 38 Mr Garnaut cited some NSW authorities to support his submission that Mr Shepherd's injury arose from EM Act directives and not employment.
- 39 In *Bjekic v State of New South Wales (Western Sydney Area Local Health District)*,⁸ the applicant security officer was required by his employer to wear a face mask whilst working in a hospital during the COVID-19 pandemic. He then worked in a different hospital where he did not have to wear a mask but was returned to the first hospital and again had to wear a mask. He claimed that wearing a mask which covered his nose aggravated a pre-existing sinusitis condition. At first instance it was found that employment was not a substantial contributing factor to any aggravation of pre-existing sinusitis as required by the NSW equivalent of s 7(2)(a) of the RTW Act. The NSW Personal Injury Commission held:⁹

The effect of the health orders was to make the employment, which Mr Bjekic had been performing since 2017, injurious. The nature of the employment up to then had not been injurious, and it was the effect of the orders which was a substantial contributing factor, in the absence of any other contributing factors.

- 40 An appeal by Mr Bjekic was dismissed. Wood DP held that it was open to the decision maker at first instance to find that the injury was caused by government directives and not employment.¹⁰
- 41 In *Dawking v Secretary (Department of Education)*,¹¹ the NSW Personal Injury Commission held that an email sent to the applicant which anticipated a direction that school-teachers would need to be vaccinated against COVID-19 caused the applicant to sustain a compensable psychiatric injury. The email was inaccurate in that it included teachers who did not teach on a face-to-face basis and were not subject to the direction. The email also failed to advise that a teacher could take leave if they did not wish to be vaccinated. On appeal, Wood DP distinguished *Bjekic* on the basis that the applicant in that case would have breached a public health order if he had not worn a face mask whilst there would have been no breach of a public health order on the facts in *Dawking*.¹²

⁸ [2022] NSWPIIC 214.

⁹ *Ibid* [48].

¹⁰ *Bjekic v State of New South Wales (Western Sydney Area Local Health District)* [2023] NSWPIICPD 27.

¹¹ [2022] NSWPIIC 611.

¹² *Secretary, Department of Education v Dawking* [2023] NSWPIICPD 23 [107] – [108].

- 42 Dr Salu, counsel for Mr Shepherd, submitted that the approach of the Full Court of the Supreme Court in *The State of South Australia v Roberts*¹³ supports Mr Shepherd's claim. In *Roberts*, the worker was employed by TAFE and was teaching hairdressing to residents in a remote part of South Australia. The worker was accommodated in a motel provided by her employer on a very hot night. The air conditioning was not working so the worker opened a window. The fly screens on the windows were broken or ineffective and mosquitos entered the room. The worker sustained multiple mosquito bites, one of which caused her to develop polyarthritis, chronic fatigue, psychiatric symptoms and incapacity for work.
- 43 Kourakis CJ observed that '[t]he most obvious cause of Ms Roberts' injury was the mosquito bite',¹⁴ but observed that 'the causal chain does not end there'.¹⁵ The latter comment shows that while an injury may have a cause other than employment, that does not preclude the injury arising from employment within the meaning of s 7. While the term 'causation' is used to describe the function of s 7 and provisions like it, it is a label that can mislead. Section 7(1) does not require employment to cause an injury, but rather requires that the injury 'arose from employment'. That expression is bifurcated in s 7(2) to allow the injury to either arise out of or in the course of employment, the former being a 'causal' connection, noting the qualification already placed on that label. It may be more accurate to say that s 7 asks whether an injury can properly be attributed to employment having regard to the language of s 7.
- 44 The injury was a direct consequence of an EM Act vaccination direction and of Mr Shepherd's employment. The connection between employment and the injury is a strong one given I have found that Mr Shepherd would not have had a third dose of the vaccine if he had not been required to in order to continue working. The result is supported by the leading judgment of Parker J in *Roberts*. Referring to the High Court decision in *Comcare v Martin*,¹⁶ his Honour stated that while the decisions made by this court in *Roberts*¹⁷ were not just based on a 'but for' test of causation, that test is appropriate to use in some circumstances:¹⁸

It is quite clear that, in the context of the Commonwealth legislation, the High Court adopted a "but for" test for the purpose of determining whether the statutory causation requirement had

¹³ [2018] SASCF 25.

¹⁴ *Ibid* [4].

¹⁵ *Ibid*.

¹⁶ (2016) 258 CLR 467; [2016] HCA 43.

¹⁷ *Roberts v State of South Australia* [2016] SAET 58; *The State of South Australia (in right of the Department for Technical and Further Education) v Roberts* [2017] SAET 36.

¹⁸ [2018] SASCF 25 [95] – [96].

been satisfied. The High Court also stated “that it is doubtful whether there is any “common sense” approach to causation which can provide a useful, still less universal, legal norm”.¹⁹

It is clear from *Comcare v Martin* that when the question of causation is considered in the context of a statutory compensation regime, the issue must be decided by reference to the statutory text construed and applied in a manner which best effects its statutory purpose. Depending on the terms of the statute and its context and purpose, as the reasoning of the High Court in *Comcare v Martin* illustrates, the application of a “but for” test may, in some instances, be relevant and appropriate. However, the application of mere “common sense” is not the correct approach.

- 45 Parker J agreed with the view expressed at first instance in *Roberts* that the requirement that employment be a significant contributing cause of a work injury is to ‘disallow claims where an injury arose out of or in the course of employment but the employment was not in any real or meaningful sense responsible for the injury’.²⁰ His Honour explained how the ‘significant contributing cause’ requirement should be approached:²¹

The words “the employment was a significant contributing cause of the injury” require a decision-maker to identify the primary causes of the injury. The task of identifying causes and assessing whether employment was a significant cause of the injury necessitates that close attention be given to the facts and circumstances surrounding the employment of the worker. As I have previously observed at paragraph [101], a cause will only be “significant” if it is important or influential. The task of determining whether employment was a significant contributing cause requires an evaluative judgement.

- 46 Parker J adopted the view expressed at first instance in *Roberts*, and in *Ward v State of SA (Department for Primary Industries and Regions SA (PIRSA))*,²² that there can be more than one significant cause of an injury and that ‘a cause that is less important can nevertheless be a “significant contributing cause”’.²³
- 47 After considering the passages in *Roberts* set out above, I am satisfied that the injury arose out of employment and employment was a significant contributing cause of the injury. Employment was responsible for the injury in the purposive sense the High Court described in *Comcare v Martin*.²⁴ Mr Shepherd was required to have a third dose of

¹⁹ (2016) 258 CLR 467, 479; [2016] HCA 43 [42].

²⁰ [2018] SASCF 25 [111].

²¹ *Ibid* [106].

²² [2016] SAET 28.

²³ [2018] SASCF 25 [114].

²⁴ (2016) 258 CLR 467, 479; [2016] HCA 43 [42].

the vaccine to continue performing duties and be paid. The vaccine mandate would not have applied to him had he not been employed by DCP and working in a healthcare setting. The vaccination mandate and employment were both significant contributing causes of the injury.

- 48 To the extent that *Bjekic* might be seen to be in conflict with the outcome, it is a first-instance decision that was not made by a court and the appeal was not a hearing *de novo*. In any case, I must apply the law of this State. Mr Garnaut agreed that the reasoning in *Bjekic* is clearly distinguishable from that employed in *Roberts*.²⁵ Section 9A of the *Workers Compensation Act 1987* (NSW) differs in material respects to s 7 of the RTW Act. Parker J observed that the relevance of NSW authorities to s 7 is qualified by those differences.²⁶
- 49 The injury satisfies s 7 of the RTW Act and is a ‘work injury’ within the meaning of s 3 of the RTW Act.

Is the claim defeated by the Emergency Management Act?

- 50 Mr Garnaut submitted that to the extent that Mr Shepherd relies upon acts or omissions of the State as being responsible for the injury, s 32A(1)(a)(ii) of the EM Act protects the State from any liability which arises from a direction made under s 25 of the EM Act. Mr Garnaut referred to *Puntoriero v Water Administration Ministerial Corporation*,²⁷ a case where the appellants sought damages from a statutory corporation responsible for water management which was responsible for poisoning water the appellants used for farming. The High Court read down the immunity conferred by s 19 of the *Water Administration Act 1986* (NSW) (WA Act) and held that s 19 did not preclude the appellants recovering damages from the respondent statutory corporation. Section 19 provided:

(1) Except to the extent that an Act conferring or imposing functions on the [Corporation] otherwise provides, an action does not lie against the [Corporation] with respect to loss or damage suffered as a consequence of the exercise of a function of the [Corporation], including the exercise of a power:

- (a) to use works to impound or control water, or
- (b) to release water from any such works.

(2) Sub-section (1) does not limit any other exclusion of liability to which the [Corporation] is entitled.

²⁵ Tr 55, 22 – 25.

²⁶ [2018] SASFC 25 [81].

²⁷ (1999) 199 CLR 575; [1999] HCA 45.

(3) No matter or thing done by the [Corporation] or any person acting under the direction of the [Corporation] shall, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject the Minister or a person so acting personally to any action, liability, claim or demand.

51 In *Puntoriero*, McHugh J identified the limitations his Honour considered should be applied to s 19 of the WA Act applying a strict or jealous interpretation.²⁸

In terms, s 19(1) does not expressly provide that no action in negligence, nuisance, trespass or contract will lie against the respondent. Given the commercial functions of the respondent, it would be astonishing if s 19(1) was intended to deprive a citizen of the right to recover damages for the respondent's breach of a contract. It seems unlikely therefore that s 19 could have been intended to apply to *every* action brought against the respondent by a citizen who has suffered loss or damage by reason of the respondent's conduct. While the general terms of s 19(1), read literally, cover any action against the respondent, the principles of statutory construction to which I have referred require that the general words of the sub-section be read down so that they do not apply to functions of an ordinary character performed by the respondent and which are done pursuant to agreements with the consent of private citizens.

52 In *Metropolitan Water Sewerage & Drainage Board v O.K. Elliott Ltd*,²⁹ Starke J described the following principle:³⁰

Statutory powers must be exercised “with reasonable regard to the rights of other people,” and if an act is done in excess of the statutory power, or carelessly or negligently, then the person injured can put in force the ordinary legal remedy by action in the Courts of law.

53 In *Coco v The Queen*,³¹ four High Court Justices said the following:³²

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention

²⁸ Ibid [37].

²⁹ (1934) 52 CLR 134.

³⁰ Ibid 144.

³¹ (1994) 179 CLR 427; [1994] HCA 15.

³² Ibid 437, per Mason CJ, Brennan, Gaudron and McHugh JJ.

must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights. ((32) See *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992), 176 C.L.R. 1, at p. 12, per Mason CJ.)

54 Deane and Dawson JJ substantially agreed:³³

It is settled law that a court should not impute to a legislature an intention either to abolish or to modify a fundamental common law right or privilege unless the relevant legislation makes such an intention unambiguously clear. ((55) See, e.g., *Baker v. Campbell* (1983) C.L.R. 52, at pp. 96, 116, 123; *Hamilton v. Oades* (1989), 166 C.L.R. 486, at pp. 495, 500; *Bropho v. Western Australia* (1990), 171 C.L.R. 1, at p. 17.)

55 It follows that that a statutory power which interferes with fundamental rights, freedoms or immunities must be carefully construed and a strict or jealous interpretation adopted. The language of the provision must be analysed in the context of the Act as a whole to see whether the provision authorises the exercise of power in question.

56 Dr Salu submitted that an approach like the approach taken in *Putoriero* should be adopted. Mr Garnaut acknowledged that while provisions like s 32A should be construed strictly or jealously, a different approach may be called for when dealing with ‘emergency legislation and a specific statutory immunity in the context of a particular extraordinary circumstance of the global pandemic’.³⁴

57 The exclusion of liability effected by s 32A(1) is expressed to operate despite any other provision of the EM Act or any other Act or law. Subsection (1) provides that no liability attaches to the Crown in respect of any act or omission in connection with the exercise of a power or the carrying out of a direction or requirement in relation to COVID-19. Directions 4 and 6 clearly come within s 32A(1)(ii). Subsection (2) protects individuals from criminal or civil liability ‘for an act or omission in good faith’ in connection with the exercise of a power or the carrying out of a direction or requirement in relation to COVID-19.

58 Mr Garnaut suggested that Mr Shepherd was not required, in the true sense of the word, to have a third dose of the vaccine. While the letter of 22 February 2022 can be read in that way, the reality Mr Shepherd faced was being employed on a probationary basis in a very difficult labour market with a partner who worked in an insecure job (which came to an

³³ Ibid 446.

³⁴ Tr 62, 30 – 34.

end not long after he was injured) and with a young child to support. In my view, Mr Shepherd was required to have a third dose of the vaccine in the relevant sense of the word. He would not have been able to work or be paid had he not done so.

- 59 Dr Salu submitted that a liability under the RTW Act is neither civil nor criminal, but statutory. The submission relates to s 32A(2) and not s 32A(1) and therefore does not assist Mr Shepherd as his claim is brought against the State and not Mr Springham. In any case, the term ‘civil or criminal liability’ in s 32A(2) is used to describe the full range of legal liabilities rather than as distinct from a statutory liability. While liabilities under the RTW Act are statutory in origin, they can be classified as civil when they award compensation, or criminal when they create an offence.
- 60 Mr Garnaut’s submission that the context in which the EM Act was amended may require a different approach to that taken by the High Court in the authorities referred to above is well made. The authorities mainly concern statutory corporations, not powers given to the State to deal with a global pandemic. Despite that, it is not clear to me that Parliament intended for s 32A to defeat a valid claim for compensation by a State employee, injured through complying with a direction designed to protect citizens of the State. For the following reasons, I am not satisfied that Parliament intended s 32A to take precedence over a valid RTW Act claim.
- 61 The last sentence of the passage in the second reading speech of the EM Bill set out above states that the amendments made to s 32A were designed to ensure that proper decisions could be made about management of the pandemic without fear of future liabilities. That suggests that Parliament was concerned about liabilities which may be hard to foresee or which may be different to any liability previously encountered.
- 62 In contrast to the potentially unusual and unforeseen liabilities that the COVID-19 pandemic may give rise to, workers compensation liabilities are very well known and understood in South Australia and Australia in general. It is not surprising that some people who receive a dose of COVID-19 vaccine will sustain injury as a result. The cardiological opinions in this case support that assumption.
- 63 While on its face s 32A would exclude liability for the injury, it is reasonable to expect the EM Act would expressly exclude liability for workers compensation benefits for people injured by a COVID-19 vaccination they were required to have as a condition of their employment. Employees of the State are able to claim workers compensation if they can prove they have contracted COVID-19 from

their employment. Mr Shepherd's claim would not be precluded by the EM Act if having a third dose of the vaccine was not mandated but instead encouraged by DCP. Private sector employees not subject to the EM Act vaccination directions but nonetheless required by their employer to be vaccinated are not prevented from claiming compensation for vaccination related injuries.

- 64 While I accept Mr Garnaut's submission that the present context is somewhat different to that in *Putntoriero* and *Coco*, it is also the case that a well-known and understood liability like workers compensation is very different to the novel and unforeseen type of liabilities which the second reading speech suggests that the prohibition in s 32A is directed to.
- 65 That leads to a consideration of s 5 of the EM Act. Subsection (1) provides that the EM Act 'does not limit, or derogate from, the provisions of any other Act'. Whilst subsection (1) is subject to subsection (2), it is important to observe that s 5 starts with the proposition that the EM Act does not limit or derogate from any other Act. If Parliament had wished to express an intention to override the provisions of other Acts in a clear and unqualified way, s 5(1) would not be expressed in its present terms. Under subsection (2) of s 5, it is only where another Act or law are inconsistent with an EM Act provision that the EM Act prevails, and then to the extent of the inconsistency.
- 66 In *Puntoriero*, McHugh J observed that the WA Act could expressly have provided which actions did not lie against the statutory corporation in issue but failed to do so. His Honour said it would be 'astonishing' if s 19(1) of the WA Act was designed to deprive a citizen of the right to recover damages for a breach of the respondent's conduct.³⁵
- 67 The same can be said in this case. It would be astonishing if Parliament intended that an employee of the State, injured adhering to an EM Act direction, was to be precluded from receiving workers compensation.
- 68 I am not satisfied that Parliament intended to deny compensation to employees of the State injured by heeding a vaccination mandate designed to protect the health and welfare of citizens. The language used in a provision like s 32A must be 'unmistakable and unambiguous'³⁶ and is not sufficient to justify the result the State seeks in my view.
- 69 The State required Mr Shepherd to be vaccinated to continue working in a healthcare setting because it sought to protect and reduce the risk of infection to the public and general and those members of the public receiving healthcare services in particular. It would be ironic and unjust

³⁵ (1999) 199 CLR 575; [1999] HCA 45 [37].

³⁶ (1994) 179 CLR 427, 437; [1994] HCA 15 per Mason CJ, Brennan, Gaudron and McHugh JJ.

if Mr Shepherd was denied financial and medical support by complying with the State's desire to preserve public health.

- 70 The result arrived at is also consonant with the objects of the EM Act. Providing Mr Shepherd with compensation for his work injury does not prevent the State from making prompt and effective decisions, or comprehensive and integrated planning, under s 2(1)(a) of the EM Act. However, dismissing Mr Shepherd's claim would be contrary to the object in s 2(1)(b) of the EM Act to 'promote community resilience and reduce community vulnerability in the event of an emergency' as his physical and financial vulnerability would be disregarded.
- 71 The rejection of Mr Shepherd's claim should be set aside and it should be ordered instead that he receive weekly payments of income support and payment of medical expenses. The parties are to submit draft orders which reflect that conclusion within 14 days.