Recent developments in pure psychiatric/psychological injury claims

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This article will address whether one can have a pure psychological/psychiatric injury without a preceding physical injury. The parameters for pursuing such a claim will also be discussed.

Without rehashing the well-known traumatic shock type cases, it is trite to remember that the High Court in *Mt Isa Mines Limited v Pusey* (1971) 125 CLR was confronted with a claim by a plaintiff who had rendered post severe electrocution aid to an injured worker who subsequently died. The High Court held that it was not necessary that the particular injury from which the claim arose should have been foreseeable. It was sufficient to found liability that the class of injury, mental disorder, was foreseeable as a possible consequence of particular conduct, and accordingly the defendant, who had been negligent in allowing the initial electrocution of the worker, was liable. Barwick CJ and Windeyer J held that subject to certain limitations, it is no answer to such a claim that the particular makeup of the plaintiff contributed to the resulting mental disturbance. The case was perhaps most significant because it broadened nervous shock cases beyond the immediate family realm.

It will also be recalled in *Jaensch v Coffey* (198485) 155 CLR 549 that the High Court confronted the wife of an injured motorcyclist who subsequently saw him in hospital where the staff told her he was "*pretty bad*". The next morning she was advised he was in intensive care and shortly thereafter was told that he had had a "*change for the worse*" and she ought to come to the hospital as quickly as possible. The husband survived, but the wife suffered nervous shock as a result of what she had seen and been told. It was held that the driver of the car owed a duty of care to the wife and had acted in breach of that duty. The High Court certainly argued that there was a necessity for some proximity between plaintiff and defendant, but clearly in some cases, of which this was one, the impact of the events will occur after the accident, during the period of treatment, when the full facts are known.

Of course, one of the benefits, at least about the time of those cases, was the clear acceptance by the medical profession of traumatic shock as a recognised psychological injury. It would be appreciated that psychiatric medicine is developing at as great a rate as other medicine and one has seen a greatly enlarged appreciation of the psychiatric consequences of events in practical issues such as the late onset of traumatic shock suffered by Vietnam veterans. These types of issues inevitablymean that there will be a shifting emphasis on what is and what is not foreseeable as psychiatric/psychological injury pure and simple. If the facts can be sufficiently established, it is contended that many of the modern workplace stress type claims can equally fit into this category and one certainly sees a number of those types of claims from people like prison officers. Recall the words of Dixon J in *Bunyan v Jordan* (1937) 57 CLR 1 where His Honour said:

I have no doubt that such an illness (psychological illness) without more is a form of harm or damage sufficient for the purpose of any action on the case in which damage is gist of the action, that is, supposing that the other ingredients of the cause of action are present.

Perhaps the best way to tackle the issue is to refer to a couple of recent decisions which arguably show the expansion of the concept:

Carter v Pinewave Tourist Services Pty Ltd (Brisbane District Court No 1607/94), Shanahan CJ DC 20 December 1996.

In this case, the plaintiff was a man of limited educational standing who had received no particular management training at all and was employed as the second only employed driver by a small tourist bus service on the Gold Coast. What commenced as a pleasant driving job gradually shifted into one where he became the operations manager for the company through a period of time when the company went from a four driver operation to a significant commercial operation conducting up to 20 buses of various sizes with up to 30 permanent and casual drivers on the payroll.

From a purely practical point of view, the plaintiff's administrative knowledge grew with the company, initially attending to administrative matters involved in the day to day running of the company, which involved dealing with the correspondence, allocating drivers and buses to meet the orders for movementof tourists, the wages of the drivers, the hiring and firing of drivers, maintenance of vehicles and like issues. In that simple format, one would have thought that there was not the making of a potential for a major breakdown through stress. From a practical point of view limited to those facts, there probably was not. Further relevant facts were:

(a) the administrative role in addition to the operations role became so significant that the plaintiff sought assistance which was not forthcoming;
(b) the development of this ever-increasing pressure resulted in the plaintiff starting out doing the job from the front seat of his bus with a mobile telephone to a point where he was engaged full time in an office and seeking and not getting management support for additional administrative staff;
(c) the company was a privately owned company, owned by two drivers and their wives, none of whom had any interest in running the company and the couples were forever bagging the other and their wife to and in the presence of the plaintiff; ▶

(d) what started out from being a most unsatisfactory office, being the garage in the home of one of the persons which necessitated going through the home to get into the garage and through the home to use toilet facilities, changed to an ATCO shed on a vacant industrial block in Burleigh Heads with initially no water and toilet facilities, and appalling lack of management response to requests for proper facilities;

(e) each of the owner/drivers would abuse the plaintiff if the other received what was perceived to be a more favourable allocation for work on a given day - the plaintiff was invariably in trouble with one;

(f) the plaintiff's hours continued to extend because the drivers would not take the buses down to the industrial estate at Burleigh and tended rather to visit the plaintiff at home, necessitating his keeping cleaning equipment and like things in his own garage at home;

(g) often his days would extend from as early as 6.00am to as late as 10.30pm;

(h) the breakdown was precipitated by a nightmare day with closed airports and numerous consequent problems.

Being wise in retrospect, it was quite clear that over a fairly lengthy period of time, the plaintiff was dealing with enormous levels of stress because of the ongoing tension between the ownership families of the company, his own limitations in dealing with the levels of administrative requirement and his incapacity to achieve the perfection he had so well promoted to develop the company to what it was, all in a context where he received no management support but only ever criticism. This extended to the point of being openly criticised in front of one of the company's customers with whom he dealt with on a regular basis, by one of the owners. Pleas to the male owners for appropriate acceptance and administrative support essentially went unheeded, with each of the owners more concerned about other things.

In the net result, the plaintiff had a significant breakdown which had fairly long-standing and dire consequences and the evidence of he and his wife was accepted by the trial judge and he received an award for $170,000 odd, of which $115,000 was for economic loss and $30,000 for pain, suffering and loss of amenities of life.

The first defence argument was that the injury was not foreseeable and that encompassed two components, namely in the first instant that the plaintiff was not one of a class of persons who might foreseeably suffer psychological injury in the events which occurred, and secondly that even if psychological injury was foreseeable (the defence conceded there was no proximity argument given the employer/employee relationship), it must also be foreseeable that the shock will lead to a psychiatric injury which extends beyond a transient emotional reaction. This argument must be understood in the context that the plaintiff had filled out a multi-paged handwritten form (of which he had no recollection) shortly after the major breakdown in which he had answered certain questions in a way which might have suggested that he had a pre-accident disposition or potential (and/or history) to suffer an adverse psychological response to pressure and/or stress. The essential argument being run was that even if psychiatric injury was a foreseeable consequence of the conduct of the defendants, it was only this predisposition which in fact resulted in this plaintiff suffering the response he did to the events. That is, a person of normal fortitude would not have suffered the psychiatric injury, but at worst a transient emotional response. The defendant particularly relied upon *Gillespie v The Commonwealth of Australia* (1991) 104 ACTR 1 where a public servant in the Department of Foreign Affairs & Trade sued his employer for a breakdown he suffered when posted to a diplomatic mission in Venezuela where his health broke down. In giving judgment for the defendant, Miles CJ held that in considering whether the duty of the defendant was discharged, regard must be had to whether it was reasonably foreseeable that the plaintiff or a person in the plaintiff's position might be subject to some sort of psychological decompensation, beyond the difficulties and stresses to which most officers would ordinarily be prone in the circumstances which prevailed in Venezuela at the time of the plaintiff's service. In that case, it was in fact held that the circumstances did not require the defendant to give more than the most general warning, and in any event such a warning was unlikely to have deterred the plaintiff from applying for and accepting the post in Venezuela and hence was unlikely to have averted the damage of which he complained.

In the subject case, the trial judge rejected the suggestion of any propensity on the plaintiff's part and rather following the Mason J test in *The Council of the Shire of Wyong v Shirt* said the injury was foreseeable and had the plaintiff received proper management support he would not have been in the courtroom. The trial judge specifically found not just a failure to provide a safe system of work, but rather provision of a system where the two principals actively created an unhealthy work environment for a person without the skills and training to cope with the situation.

An alternative plea of contributory negligence was rejected on the basis that it had not been made out because the plaintiff either did not have or did not know he had a predisposition to the type of illness which caused him to collapse. This was obviously a psychiatric injury pure and simple, but one very much based on its own facts. It does show that a pure psychiatric injury claim is sustainable if the issues surrounding the work environment are clearly unacceptable.

Carlile v Council of the Shire of Kilkevan and Breitkreutz (Maroochydore District Court, No 12 of 1992) Dodds DCJ 21 December 1995.

This is the classic case of the employee coming into an established work gang with the first defendant, supervised by the second defendant who was the foreman. Without restating at length the facts, it is perhaps sufficient to say that for reasons that are not entirely clear, there was a personality clash between the foreman and the plaintiff, as a consequence of which the foreman used his position to repeatedly belittle, harass and generally make the plaintiff's working life unpleasant. It is clear from the judgment that there was corroborative proof of the second defendant's demeaning conduct and equally

there were discovered documents from which the court drew the inference that quite clearly a number of complaints had been made by the plaintiff and by the union representative and some steps had been taken to try and deal with the position, but clearly not adequate steps. At the end of the day, the plaintiff suffered a breakdown from the continual stress of his workplace and never returned to work, with an assessment of damages being recovered including $45,000 for pain, suffering and loss of the amenities of life, $80,000 for past economic loss and $90,000 for economic impairment. At the end of the day, the total assessment was $270,791.98, of which the plaintiff recovered $200,000 plus $9,080 interest clear of a $34,378.36 Workers' Compensation Board repayment.

There is an interesting discussion in the judgment about a claim for exemplary/aggravated damages, and one suspects, were it not for the excess of jurisdiction on the basic heads, having found for the plaintiff against the second defendant on the claim in trespass for his conduct in demeaning and belittling the plaintiff deliberately over a lengthy period of time, it is quite likely that the court may have awarded some additional exemplary damages. Significantly, at p31 of the judgment, His Honour said,

In today's Australian community, it is not acceptable (if it ever was) for a person in authority over another in a workplace to harass, belittle or demean that other as a method of enforcing his authority or relieving his frustration.

Space does not permit a detailed examination of the case, suffice it to say that the plaintiff succeeded against the employer on the basis of both negligence and breach of statutory duty.

His Honour referred to a similar English case of *Walker v Northumberland County Council* (1995) 1 All ER 737.

Conclusions

1 It is now well established that pure psychological/psychiatric injury per se is actionable in the same way as physical injury.

2 The categories in which this may now arise are perhaps broadening because of a better understanding of psychiatric injury by the medical profession.

3 One has to keep clearly in perspective that the test is whether or not a defendant should reasonably foresee that his conduct would expose the plaintiff to a risk of psychiatric personal injury. Perhaps unlike a direct injury situation, where an eggshell skull was irrelevant just as an eggshell personality is irrelevant (*Page v Smith* (1995) 2 All ER 736 (House of Lords)), one may have to examine more carefully the personality involved to ensure that the risk of psychiatric injury was foreseeable in an ordinary person.

4 All cases are decided on their own facts and it should be noted that in each case the court accepted that there had been attempts by the injured plaintiff to have management deal with the complaints. As one always has the prospect of some difficulty with a psychiatrically injured plaintiff in giving evidence, it becomes critically important to derive some corroborative evidence of conduct that is likely to result in psychiatric injury because a susceptible plaintiff may adopt an unreasonable approach to conduct which is going on around him and become quite paranoid about whether or not it is directed at or to him or her

5 It behoves employers at common law and under the *Workplace Health & Safety* legislation to respond to and deal with complaints of harassment and like issues in the workplace. ■

Chris Newton is a barrister in Brisbane. He presented the above paper at a recent Queensland Litigation at Sunrise seminar. For further information on psychiatric injury litigation contact Chris on **phone** 07 3229 3491.

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Law values dying asbestos worker's life at $6000

By legal writer JANET FIFE-YEOMANS

DOCTORS have given Rolly Sabbadini weeks to live because of a cancer he contracted through work but the law says his life is worth just $6000.

"What a sham, what a total sham. I would say the legal system is inhumane and the politicians should be ashamed down to their bones," said Mr Sabbadini, 62, virtually confined to bed and fighting for every breath as he suffers the virulent asbestos-caused lung cancer, mesothelioma.

Across Australia, lobbying from insurance companies and big business has led to governments gradually whittling away the rights of workers such as Mr Sabbadini to sue their employers over industrial accidents — moves which will lead to more dangerous workplaces, say lawyers.

The trade-off was to have been higher no-fault workers compensation benefits but barrister Peter Semmler, president of the Australian Plaintiff Lawyers Association, said that had not worked out.

He said lump-sum workers compensation benefits had never properly compensated for the lost rights of workers to sue their employers. Benefits for permanent brain damage are around $140,000, for example.

He said in South Australia the rights of employees to sue their employers for negligence over workplace accidents were abolished in 1992. In Victoria employees can sue only if they suffer an impairment of 30 per cent or more.

There are national moves to make such laws consistent across State and Territory boundaries and last week, Mr Semmler met officials from the federal Attorney-General's Department to argue against the moves.

"We are doing all we can. We are getting evidence about the effect on people's lives of inadequate compensation," said Mr Semmler.

He rejected claims that lawyers liked to fight it out in court because there was more money in it for them.

Mr Sabbadini's lawyer, John Gordon, said there was evidence of an explosion of workplace accidents in New Zealand where common law rights to sue had been abolished.

Mr Sabbadini, of Perth, contracted the first stages of mesothelioma when he worked at the disastrous Wittenoom blue asbestos mine in Western Australia's north as a young migrant from Italy between 1955 and 1959.

Unable to fight a court case because of his health, he agreed to an out-of-court settlement with his former employer, industrial giant CSR, which has admitted liability.

His settlement included payments for pain and suffering, loss of earnings and $6000 for the loss of his life.

Mr Gordon said people were unaware courts awarded only nominal amounts, rarely more than $15,000, for loss of life because it was considered difficult to put a price on it.

Mr Sabbadini said he did not want his death to be in vain and wanted to focus attention on anomalies in the law.

"The laws that have been made by politicians and legal people do nothing to rectify the problem where a worker's life has been shattered by his employer's negligence," said Mr Sabbadini, who said he did not even have the strength any longer to hug his two-year-old grandson.

Mr Sabbadini ... 'total sham'

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