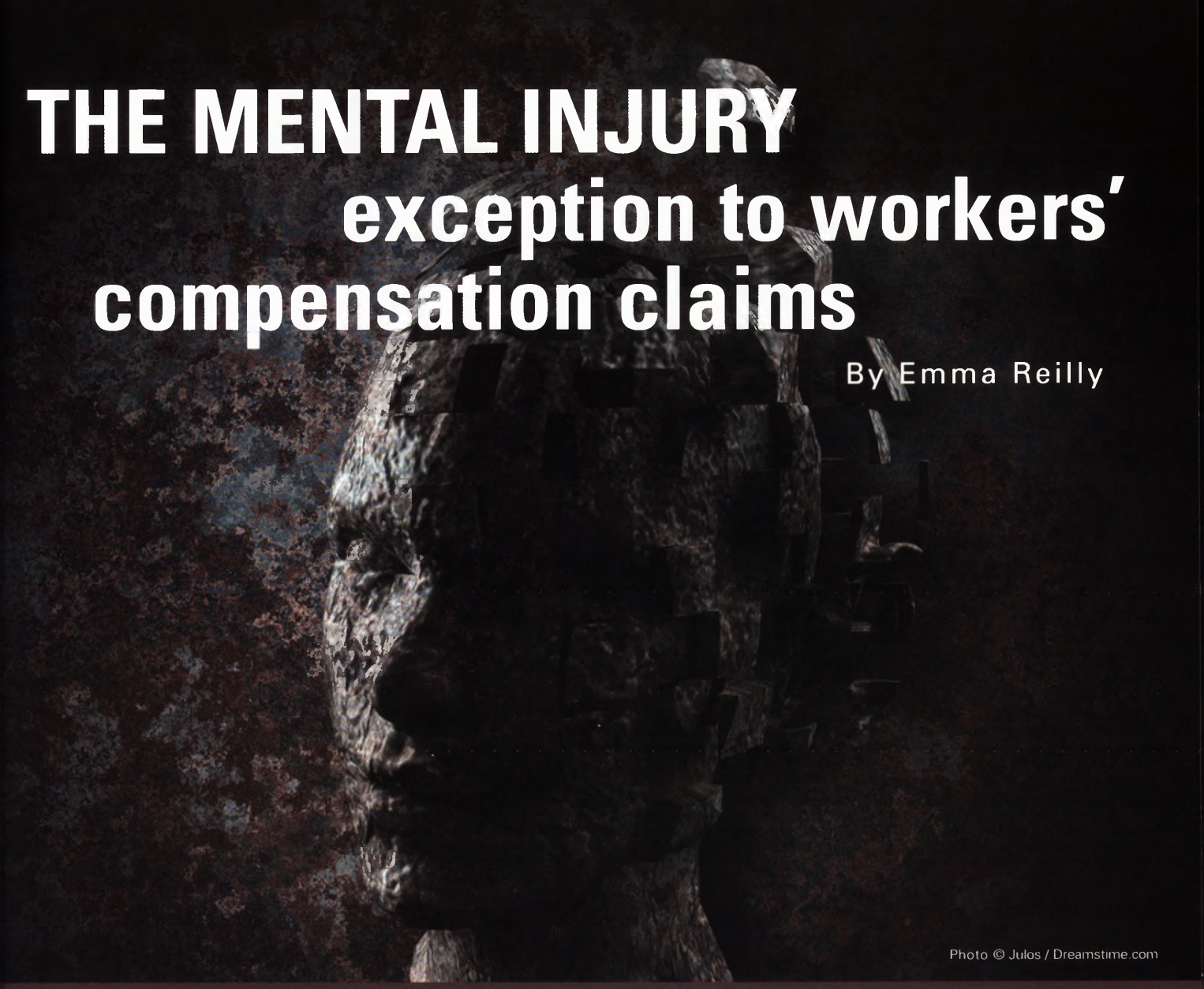
# THE MENTAL INJURY exception to workers' compensation claims

By Emma Reilly



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**An entitlement to workers' compensation benefits for pure psychological injury does exist.[1] However, in most jurisdictions, this is subject to an exception in respect of psychological injury that is caused by reasonable actions on behalf of an employer in certain discrete circumstances, concerning management functions.**

For example, s11A(1) of the *Workers Compensation Act* 1987 (NSW) provides that:

> 'No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.'

The current s11A was introduced by the *WorkCover Legislation Amendment Act* 1996 (NSW) and applies to all injuries received on or after 12 January 1997.

The provisions in other jurisdictions are described at the end of this article.

## WHAT IS A PSYCHOLOGICAL INJURY?

At common law, successful nervous shock claims or pure psychological injury claims require a diagnosable psychiatric injury.[2] For workers' compensation purposes, stress can give rise to an entitlement to benefits.[3] However, the nervous system must be affected, such that a physiological consequence is induced. As described in *Stewart v New South Wales Police Service*,[4] emotional impulse, anxiety state, frustration, upset and litigation neurosis do not constitute psychological injury for the relevant purpose.

The case of *Federal Broom Co v Semlitch*[5] involved a worker who developed delusions of pain after a work injury, in the context of pre-existing schizophrenia, and was unable to work. It was ultimately accepted by the High Court that the pain was intensely real to the worker, and that she suffered >>

a compensable injury, being an exacerbation of her pre-existing mental illness.

Once a psychological injury has been established, it must be shown to have arisen out of employment, and in most jurisdictions employment must be a substantial contributing factor, before there is an entitlement to compensation.

The interplay between s9A (the substantial contributing factor test in the NSW Act) and s11A (the mental injury exception, as described above) was examined in *Department of Education & Training v Sinclair*.[6] The Chief Justice of the NSW Supreme Court commented that:

> 'it is necessary to understand s11A to mean that the employer is not liable where, *to the extent that the employment contributed to the injury*, that contribution was wholly or predominantly caused by reasonable action taken [by the employer]'.

To interpret s11A in a more literal manner would preclude reliance on the provision and so potentially allow an award of compensation in respect of a psychological injury that was predominantly the result of a non-work cause.

## THE MENTAL INJURY EXCEPTION

Once a work-related psychological injury is established, the key elements to s11A are: *'wholly or predominantly'* and *'reasonable action'*. It is, of course, also essential that that any action taken be related to at least one of the stipulated elements (that is, *promotion, demotion, discipline,* etc).

The defence has been consistently difficult for employers to make out, because of matters such as:

- Psychological injuries are usually attributable to a multitude of factors, including incidents and relationships, and perceptions of same;
- The qualification of the word 'reasonable action' by the limitation of 'wholly or predominantly caused by';
- The defence will usually give rise to a factual analysis where, generally speaking, the judiciary will be required to determine between two or more diametrically opposed accounts of events. In the context of beneficial legislation, the evidence of a worker will often be preferred over that of a supervisor or other relevant senior employee.

### 'Wholly or predominantly'

For the mental injury exception to preclude an entitlement to compensation, the psychological injury must have been 'wholly or predominantly' caused by the employer's reasonable action in one of the stipulated areas.

The legislation requires more than a causative link between the injury and the employer's action. It requires a sole or predominant causative link. This gives rise to a balancing process among various causes and, arguably, the employer's reasonable actions should be at least the most intense or main cause.

There is a clear reluctance on behalf of the judiciary to conclude that a worker's injury was caused 'wholly or predominantly' by the reasonable action of an employer, where there is corresponding evidence to establish that the injury was the result of the general nature and conditions of the worker's employment, and/or other matters. Treating medical evidence can be important in an analysis of the actual cause of a psychological condition for this purpose. However, the causes of a psychiatric illness are often multi-factorial, even where all or most factors arise from the workplace.

A recent decision in respect of the mental injury exception in s11A of the NSW Act is the determination of an appeal against an arbitrator's decision in *Hobden v SE Illawarra Health Service*.[7]

In that matter, Ms Hobden was a nurse at Wollongong Hospital. She administered insulin medication to a patient with unstable blood-sugar levels, causing a hypoglycaemic episode. Ms Hobden then failed to inform her supervisor that the patient had elevated blood-sugar levels or that she had administered insulin, both of which she was required to do because she worked under supervision. Following the incident, Ms Hobden was reprimanded, and an investigation ensued. A period of incapacity for work followed, between 10 February 2009 and 4 May 2009, due to a psychological reaction to the incident itself, and a perceived breach of confidence by her supervisor. In addition to being distressed about the performance issue, Ms Hobden was afraid that the patient's husband would retaliate, and believed there was gossip about the incident on the ward.

In the NSW Workers' Compensation Commission, the employer did not dispute injury or incapacity. However, the employer attempted to mount a defence under s11A and, in fact, was initially successful in that regard. This decision was overturned by President Judge Keating on appeal, on the basis that:

- the employer had the onus of establishing a defence under s11A, and it was not Ms Hobden's onus to establish a causal link between matters such as the gossip and her psychological injury; and
- her psychological injury was caused by more than one factor, including matters that were not within the description of performance appraisal or disciplinary action, under s11A.

President Judge Keating was not satisfied that there was persuasive evidence that the performance appraisal fact-finding meeting in question was the whole or predominant cause of a psychological injury, so as to give rise to a successful defence on behalf of the employer under s11A.

This decision illustrates that even where justifiable and reasonable performance management is a substantial cause of an injury, the exception will not apply where other, important causal factors exist that do not fall within the exception.

### Reasonable action

This element also provides a fertile ground for dispute.

Reasonableness is a matter of fact, and not law. It is an objective test, as opposed to whether it must be 'reasonable' from the point of view of the worker. However, a court will likely conduct a broad enquiry. While the inevitable focus will be upon the action of the employer itself, a worker's entire employment history may be taken into account as a guide to the ultimate reasonableness of the employer's action.[8]

In the context of performance appraisal, a court might be critical of a large employer with a dedicated human resources department and formalised set of review procedures, if those are not followed. If an employer breaches its own guidelines for performance appraisal/discipline of workers, it has little hope of raising a valid s11A defence.

Conversely, if an employer adheres strictly to a carefully structured process of performance appraisal, which is sensitive and responsive to a worker's needs, and injury still results, a s11A defence might succeed.

That being said, actions in respect of promotion, demotion, performance appraisal, and so on usually involve more than a single step, the effect of which may be difficult to isolate from the cumulative effect of the entire process.

In looking at what is reasonable, the emphasis must be on 'fairness'. That is, has the employer adopted procedural fairness in its dealings with the injured worker?[9]

## THE EXCEPTION IN OTHER JURISDICTIONS

### Australian Capital Territory

Section 4(2) of the *Workers Compensation Act* 1951 (ACT) provides that:

> '"mental injury" (including stress) does not include a mental injury (including stress) completely or mostly caused by reasonable action taken, or proposed to be taken, by or on behalf of an employer in relation to the transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of a worker or the provision of an employment benefit to a worker.'

### Queensland

Section 32(5) of the *Workers Compensation and Rehabilitation Act* 2003 (QLD) provides that:

> 'Injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances:
>
> (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
>
> (b) the worker's expectation or perception of reasonable management action being taken against the worker;
>
> (c) action by the Authority or an insurer in connection with the worker's application for compensation.'

The Act provides examples of actions that may be reasonable management actions taken in a reasonable way, as follows:

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker; and
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.

### Victoria

In 2007, the Victorian government commissioned Mr Peter Hanks QC to review and report on the efficacy and sustainability of the Victorian workers' compensation scheme. The government responded to the Hanks Report in 2009, and later that year introduced a bill into parliament to amend the *Accident Compensation Act* 1985 (VIC) and the *Accident Compensation (WorkCover Insurance) Act* 1993 (VIC). The amending legislation was passed on 11 March 2010.

Under the previous law, certain workplace psychological injuries were not compensable, where they arose from a limited range of 'management action'. The exception was perceived as producing inconsistent outcomes. The Hanks Report recognised that the exception needed redrafting and clarification.

Three general areas of reform to the management and acceptance of work-related stress claims were proposed:

1. a conciliation process to require employers to proactively meet with employees prior to the acceptance of any stress claim;
2. clarification of the operation of the exception; and
3. the definition of 'management action' be updated to reflect contemporary management practices.

The government rejected the proposal in relation to compulsory conciliation and gave only qualified support to the redrafting of the exclusionary provision. The amending legislation provides for an extensive definition of what 'reasonable management action' means in this context. Management action includes reasonable steps taken in counselling workers and investigating allegations of misconduct.

As with other jurisdictions, injuries remain compensable where they were caused by unreasonable action. >>

In the context of beneficial legislation, the evidence of a worker will often be preferred over that of a supervisor or other relevant senior employee.

### Tasmania

Compensation is payable only for an injury which is a disease if employment contributed to a substantial degree (defined as major or most significant factor). Compensation is not payable in respect of a disease, which is an illness of the mind or a disorder of the mind and which arises substantially from:

- reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, or counsel a worker, or to bring about the cessation of a worker's employment;
- a decision of an employer, based on reasonable grounds, not to award or provide a promotion, transfer or benefit in connection with a worker's employment;
- reasonable administrative action taken in a reasonable manner by an employer in connection with a worker's employment;
- the failure of an employer to take action of a type referred to above in relation to a worker in connection with the worker's employment, if there are reasonable grounds for not taking that action; or
- reasonable action taken by an employer in a reasonable manner affecting a worker.

### Northern Territory

Section 3(1) of the *Workers Rehabilitation & Compensation Act* (NT) provides a definition of 'injury' and states that mental injuries are not compensable if they are an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment.

### South Australia

A disability consisting of an illness or disorder of the mind is compensable if, and only if, the employment was a substantial cause of the disability; and the disability did not arise wholly or predominantly from reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, counsel, retrench or dismiss the worker; or a decision of the employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with the worker's employment; or reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment; or reasonable action taken in a reasonable manner under this Act affecting the worker.

### Western Australia

In WA, according to s5(4) of the *Workers Compensation and Injury Management Act* 1981, mental injuries arising by gradual onset, such as stress-related depression and anxiety and similar conditions, are compensable in WA as they fall within the definition of an injury. However, those conditions are not compensable where the onset of the condition relates to dismissal, retrenchment, demotion, discipline or transfer or redeployment or the expectation of these actions, unless the employer acts in an unreasonable and harsh manner. These restrictions do not apply where the condition arises from an injury by accident.

### Commonwealth employees

Section 5A(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) provides that injury for the purposes of that legislation does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

Subsection (2) specifies that for the purposes of subsection (1) and without limiting that subsection, *reasonable administrative action* is taken to include the following:

(a) a reasonable appraisal of the employee's performance;
(b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
(c) a reasonable suspension action in respect of the employee's employment;
(d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
(e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
(f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment. ■

**Notes:** **1** In addition to secondary psychological injury, being the psychological consequences of work-related physical injuries. **2** *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 191 ALR 449. **3** See, for example, the definition of injury in s4 of the ACT Act: 'injury' means a physical or mental injury (including stress), and includes aggravation, acceleration or recurrence of a pre-existing injury. **4** (1998) 17 NSWCCR 202. **5** (1964) 110 CLR 626. **6** [2005] NSWCA 465. **7** [2010] NSWWCCPD 13 (8 February 2010). **8** *Melder v Ausbowl Pty Limited* (1997) 15 NSWCCR 454. **9** *Irwin v Director General of School Education* (8 June 1998, unreported).

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