AUSTRALIAN WORKERS’ COMPENSATION LAW AND ITS APPLICATION

Psychological Injury Claims
# TABLE OF CONTENTS

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TABLE OF CONTENTS</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>FOREWORD</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>PSYCHOLOGICAL INJURY RELATED WORKERS’ COMPENSATION</strong></td>
<td>5</td>
</tr>
<tr>
<td>Introduction</td>
<td>5</td>
</tr>
<tr>
<td>Background</td>
<td>5</td>
</tr>
<tr>
<td>Specific research questions</td>
<td>6</td>
</tr>
<tr>
<td>Summary of findings</td>
<td>7</td>
</tr>
<tr>
<td>Legislation</td>
<td>7</td>
</tr>
<tr>
<td>Case law</td>
<td>8</td>
</tr>
<tr>
<td>Definition of psychological injury</td>
<td>8</td>
</tr>
<tr>
<td>Contribution test</td>
<td>8</td>
</tr>
<tr>
<td>Exclusionary provisions that apply to psychological injuries</td>
<td>9</td>
</tr>
<tr>
<td>Secondary psychological injuries</td>
<td>10</td>
</tr>
<tr>
<td>Conclusion</td>
<td>11</td>
</tr>
<tr>
<td>Recommendation</td>
<td>11</td>
</tr>
<tr>
<td><strong>COMMONWEALTH</strong></td>
<td>12</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>12</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>24</td>
</tr>
<tr>
<td><strong>SEAFARERS REHABILITATION AND COMPENSATION ACT (1992)</strong></td>
<td>26</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>26</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>31</td>
</tr>
<tr>
<td><strong>AUSTRALIAN CAPITAL TERRITORY</strong></td>
<td>33</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>33</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>39</td>
</tr>
<tr>
<td><strong>NEW SOUTH WALES</strong></td>
<td>42</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>42</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>55</td>
</tr>
<tr>
<td><strong>NORTHERN TERRITORY</strong></td>
<td>58</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>58</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>61</td>
</tr>
<tr>
<td><strong>QUEENSLAND</strong></td>
<td>64</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>64</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>69</td>
</tr>
<tr>
<td><strong>SOUTH AUSTRALIA</strong></td>
<td>71</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>71</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>76</td>
</tr>
<tr>
<td><strong>TASMANIA</strong></td>
<td>78</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>78</td>
</tr>
<tr>
<td><strong>VICTORIA</strong></td>
<td>87</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>87</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>94</td>
</tr>
<tr>
<td>A. Psychological Injuries Generally - Legislation And Interpretation</td>
<td>96</td>
</tr>
<tr>
<td>B. Secondary Psychological Injuries</td>
<td>104</td>
</tr>
</tbody>
</table>

1
Prior to engagement on this project, I had been involved with Phillips Fox in analysing Commonwealth legislation with a focus on 'psychological injury'. This project has in effect been an extension of that earlier research to encompass each jurisdiction in Australia, and to provide an overview of comparative findings. The outcome of the research was a little surprising to me. I had initially contemplated that there would be greater inconsistency amongst the jurisdictions both as to relevant tests but also in terms of application of those tests on a case by case basis. The research has dispelled my initial concern on the level of consistency amongst the relevant jurisdictions, and instead, has confirmed that the rising cases of psychological injury should arguably be handled through greater focus on rehabilitation and prevention.

The survey of the legislation has indicated that there are not major differences between the Australian jurisdictions in regard to the provision of compensation for psychological injuries suffered by an employee. It seems that the respective pieces of legislation try to balance the competing interests of employers and employees and come up with similar outcomes.

The primary qualification that is common to all jurisdictions is that the claimant must suffer an injury arising out of employment. This has resulted in uniformity of interpretation because the tribunals and courts in the various jurisdictions rely upon each others decisions.

The language used in the legislation is necessarily vague, eg 'arising out of', 'reasonable'. This gives considerable flexibility to decision-makers in reaching a conclusion. It is necessary to recognise the practical fact that, no matter what the intention seen as underlying the legislation, the impression that a claimant makes on a decision-maker, whether it be the original decision-maker or a tribunal or court on appeal, will carry great weight. No words will constrain sympathy in a hard case or lack of it where it appears that the claimant is exaggerating his or her symptoms. This is not a field of law where the language used in an Act will guarantee an outcome: cf the decision to treat 'significant' and 'substantial' as meaning the same thing.

However, looking at the terminology in the legislation as set out above, it can be seen that the two areas in which there is a definite distinction between the jurisdictions is in regard to the level of contribution that employment must have had to the injury and in the exclusions from eligibility for compensation.

There is a range of choice as to the level of contribution between 'material' and 'major'. However, a review of the cases does not reveal that this has had a marked effect on outcomes. This is largely for the reason set out above relating to the choice that these indeterminate expressions leave to a decision-maker.

On the other hand, there does appear to be a distinction between the Commonwealth and the other jurisdictions in relation to the exclusion from eligibility for compensation for a psychological disease arising from reasonable management practices. Some decisions holding Commonwealth employees eligible for compensation would probably have been decided otherwise in the States. This absence of a 'reasonable management' exclusion at the Commonwealth level requires review to ensure consistency with the provisions introduced at the State and Territory level.
While there are some differences they have not generally, except at the margins, had a significant impact on the likely outcomes of individual worker's compensation cases. A compelling case for extensive legislative change is difficult to justify. Instead, the primary focus of tackling the problem of accelerating psychological injury claims in the workplace may lie in greater resource allocation focused on prevention and rehabilitation.

Professor Dennis Pearce
PSYCHOLOGICAL INJURY RELATED WORKERS' COMPENSATION

Introduction

1 This report was commissioned by the Office of the Australian Safety and Compensation Council to conduct an analysis of arrangements in Australia for the management of workers' compensation claims for psychological injuries.

2 The report is in response to a request by the Workplace Relations Ministers' Council for the Australian Safety and Compensation Council to:

'Research the different employment contribution tests and exclusionary provisions and examine options for defining a minimum benchmark for determining employment contribution tests and report to WRMC.'

Background

3 Stress, or stressors, are something that people undergo every day - it is part of normal human functioning, and actually keeps the heart pumping and our bodies working.

4 The term 'psychological injury' describes a range of conditions relating to the functioning of people's minds. While often prompted by workplace stressors, these conditions can be caused by physical injuries, diseases, exposure to toxins or underlying psychiatric issues.

5 Workers' compensation claims for psychological injuries characteristically:

- are a major contributing factor to workers' compensation costs, which are normally funded by employer paid premiums
- constitute the greater part of difficult and sensitive workers' compensation cases, and
- are complex and demand a high level of medical and legislative knowledge on the part of the decision makers involved in determining whether entitlements to workers' compensation exist.

6 There are different approaches in workers' compensation jurisdictions to defining compensable and non-compensable psychological injuries.

7 Generally, each jurisdiction's workers' compensation legislation provides for compensation arising from workplace injuries. There are differing definitions of injury, but in the main, the term 'injury' encompasses the full range of physical injuries, illnesses and diseases which may affect people in the workplace.

8 Each is characterised by the need to determine, at some point in the process of claiming workers' compensation, that there was an employment contribution to a person's injury.
There are also exclusionary provisions in each piece of legislation. These are designed to preclude people from an entitlement to workers’ compensation where a psychological injury may manifest from the normal and reasonable activities of an employer. Broadly, these exclusionary provisions deal with reasonable disciplinary action, failure to obtain a benefit and the like.

Most discussions around the management of psychological injury claims are in the context of an initial claim for compensation, for example a person suffering the immediate effects of depression arising from bullying in the workplace. There are, however, many psychological injury cases that manifest as secondary conditions. In other words, they are a product of the initial injury.

Many cases have gone before the courts for interpretation of phrases or words in workers’ compensation legislation.

Specific research questions

In order to comprehensively analyse the arrangements in Australia for the management of workers’ compensation claims for psychological injuries, it was necessary for Phillips Fox to carry-out research of the following aspects in each jurisdiction:

- the legislation that is in force in each jurisdiction and supporting instruments such as regulations
- how psychological injuries within each jurisdictions’ legislation is defined
- how courts in each jurisdiction have interpreted those definitions
- the changes that have been made, over time, of the interpretation of psychological injuries, for example, changing from disease to injury
- the legislative tests to determine whether a psychological injury exists
- the legislative tests for determining employment contribution to psychological injuries in each jurisdiction
- the exclusionary provisions, if any, that apply to psychological injuries
- how secondary psychological injuries are treated in each jurisdiction
- where a secondary psychological injury exists, the legislative tests to determine if a compensation entitlement exists
- the exclusionary provisions for secondary psychological conditions

This report has considered each jurisdiction thoroughly as illustrated in the chapters of this report, by considering the relevant legislation and case law. The methodology adopted in the research project was to consider every reported decision, with the principal focus on the leading decisions in each jurisdiction.
Summary of findings

14 In the following chapters, the worker's compensation schemes of each jurisdiction in relation to psychological injury are analysed. The comparison of each of the jurisdictions, and the major findings, are summarised below.

15 The below comparative analysis is deliberately kept simple. We do not assert that there is always consistency in decision making from one jurisdiction to the other. Each of the jurisdictions has its own peculiarities in respect of legislation and those individuals appointed to interpret that legislation to the facts of each case. Instead, our focus has been identifying areas of general consistency, or lack thereof.

16 As will become apparent from the below paragraphs, while there are differences in jurisdictions, they are not as great as one might have initially predicted.

17 Finally, the findings that follow are necessarily general in nature, and amount to a summary of the analysis which can be taken from research into each of the individual jurisdictions. It has not been an easy task given the size of legislation and case law that had to be considered. Our comparative component of the project has focused on the main areas of likely interest to the Office of the Australian Safety and Compensation Council as originally set out in our terms of engagement.

Legislation

18 Each jurisdiction provides a distinct legislative framework under which its workers' compensation system is defined. The legislative framework in each jurisdiction is consistent in the provision of remedies to employees that are injured out of or in the course of employment. The remedies for injured employees in each jurisdiction generally include:

• sick leave
• social security payments
• workers compensation benefits and
• common-law damages.

19 The legislative framework provided throughout the various jurisdictions is also consistent in a sensible approach to the compensation of injuries, both in relation to their application on injured workers, and the circumstances where compensation should be excluded.

20 Each jurisdiction distinguishes psychological injuries from other illnesses and diseases, and provides the mechanism by which a psychological injury is compensated.
Case law

21 Each jurisdiction contains its own mechanism for establishing case law. As illustrated in the research, the courts/tribunals in the various jurisdictions have taken a generally consistent approach to the interpretation and application of the law relating to psychological injuries in compensation claims.

22 It should be emphasised that while there has generally been a consistent approach, from time to time, one can identify a decision which is out of keeping with a majority of cases. Some of these cases are subsequently overturned on appeal. Others simply sit apart from other cases, and are readily distinguishable based on their own facts. This level of discrepancy would be expected even if each jurisdiction had the same legislation. Apart from the inherent differences in judges, magistrates and other decision makers, it has to be understood that the interpretation of the law is evolving, and that some degree of difference in approach can be expected.

Definition of psychological injury

23 In all jurisdictions psychological injuries attract the payment of compensation by virtue of the general definition of injury that is included in the relevant legislation. In a number of instances ‘disease’ is defined to include any physical or mental ailment, disorder, defect or morbid condition. This would embrace a psychological injury.

24 In the ACT injury is defined to mean a ‘physical or mental injury (including stress)’ but the reference to mental injury is not further particularised except to exclude from eligibility for compensation a mental injury arising from reasonable action by an employer relating to employment.

25 In the NT and Tasmania a definition relating to mental impairment is included but that relates to aspects of the amount of, or payment of, compensation, not to eligibility for compensation.

26 In NSW there is a definition of psychological injury and this is used to reduce the range of injuries that are compensable by excluding physiological effects on the nervous system. However, apart from this limitation, the general law relating to compensable injuries applies.

Contribution test

27 Different descriptions are used in the various jurisdictions for the required level of contribution that has to be shown for an injury to qualify for compensation. This is often described as the causal connection test. In summary the tests applied in each jurisdiction are as follows:

| “material”  | Commonwealth |
|            | Northern Territory |
| “substantial” | ACT |
|             | New South Wales |
|             | South Australia |
"significant"
Queensland
Victoria
Western Australia

"major or most significant"
Tasmania.

28 'Substantial' has been held in SA to mean 'predominant'. In Queensland it has been held that 'significant' has no different effect than 'substantial'. In WA the change in that legislation from 'material' to 'significant' was said to be intended to make the qualifying test harder.

29 It would appear that the requirement for a 'material' contribution prescribes a lower threshold than the other tests. The Tasmanian standard appears to be the most onerous.

30 It is our view that these slightly differently worded tests have rarely made any difference to the outcome of most cases. In practice, they rarely make a difference in outcome because decision makers are generally influenced by the impression of an employee, and they have sufficient flexibility using any of the current contribution tests, to decide in favour or against an employer on whether the requisite causal connection is met.

Exclusionary provisions that apply to psychological injuries

31 All jurisdictions contain legislative provisions which relate to the exclusion of an entitlement to compensation. Though the exclusionary provisions in each jurisdiction vary, they generally include the following:

1. **Reasonable action relating to employment**

32 In the context of psychological injuries the most significant exclusion relates to management practices.

33 In the Commonwealth there is an exclusion for injuries arising out of reasonable disciplinary action and failure to obtain a promotion or other appointment or benefit.

34 In all the other jurisdictions there is a specific provision denying compensation for psychological injuries arising from reasonable management action relating to the claimant’s employment. The terms of this exclusion are expressed differently but the outcome seems to be generally the same. A similar provision has not yet been inserted into the Commonwealth jurisdiction.

2. **Serious and wilful misconduct**

35 Each jurisdiction specifies that an employee will not be entitled to claim compensation for an injury that is the result of serious and wilful misconduct by the employee, unless the injury results in death.
3. **Intentional self infliction of injury**

36 All jurisdictions except SA and WA provide that a psychological injury claim in relation to an injury that arises as a result of a self inflicted injury will not be compensable.

37 However, in the case of the WA, though there is no provision that specifically preclude compensation in relation to self inflicted injuries, the statute provides that liability is only attracted in circumstances of personal injury by accident. Thus, an injury sustained by a person that was deliberately self inflicted will be precluded as it could not be said to have occurred by accident.

38 In the Commonwealth, self inflicted injuries which result in death are not specifically excluded from legislation, and therefore in certain circumstances compensation may still be payable in relation to a person who has committed suicide.

4. **False representation, fraud, etc**

39 In all jurisdictions except NSW and NT, legislation specifically provides that a worker who misrepresented to the employer that he or she did not previously suffered from a particular disease will be precluded from compensation.

40 However, in NT it is arguable that such a representation is serious and wilful misconduct, and therefore will preclude any entitlement to compensation.

41 Further, all jurisdictions except NT provide that a claim which has been brought in a fraudulent or dishonest manner will be excluded from compensation. However, it can again be argued that cases brought in a fraudulent manner are excluded in NT since they can be categorised as serious and wilful misconduct.

Secondary psychological injuries

42 There is no special provision relating to secondary psychological injuries in the Commonwealth, the ACT, the NT and Queensland. In these jurisdictions the question whether a secondary psychological injury is compensable will be determined having regard to the general provisions of the relevant legislation relating to injuries.

43 The same position applies in NSW, Victoria and WA except in relation to compensation for permanent impairment. In these jurisdictions a secondary condition is not to be taken into account in assessing permanent impairment.

44 SA has specific provisions relating to secondary disabilities which would apply to psychological injuries. The qualification for a secondary disease to be compensable is more difficult to establish than in the case of primary injuries. No provision is made about permanent impairment.
Tasmania also has provisions which differentiate between primary and secondary injuries, but seemingly not in a manner that creates a major disparity between the respective rights to be paid compensation. Secondary psychological injuries are not to be taken into account in assessing permanent impairment.

Conclusion

Overall, Australian jurisdictions apply similar statutory provisions for assessing eligibility for compensation of psychological injuries suffered by employees. There are some exceptions, but generally one employee in one jurisdiction can expect a similar outcome on eligibility for compensation to a different employee working in another jurisdiction.

There are some areas where a greater degree of consistency in legislation could be appropriate. An example relates to the exclusion for reasonable management action. As it currently stands, there is differing legislation in each of the jurisdictions, and no provision at the Commonwealth level. There is accordingly a possibility of differing outcomes for employees in different jurisdictions. The inclusion of an exclusionary provision at the Commonwealth level would appear justified.

Overall, our assessment is that most cases are dealt with based on their unique circumstances, and by and large any difference in relevant legislation in each jurisdiction, is unlikely to impact on the outcome of a case. Accordingly, no compelling case can be made for extensive legislative change in this area, although some fine tuning could be justified.

The solution to increasing psychological injury claims is unlikely to be found in the amendment of legislation. As stated above, the approach of each jurisdiction in Australia is generally consistent. The law in each jurisdiction is also generally applied consistently by relevant courts and tribunals.

Recommendation

Greater benefits might be obtained through attempts at prevention and early rehabilitation of psychological injuries. We believe that additional resources focused on rehabilitation and prevention may prove to be the key to management of the growing incidents of psychological injury.
A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?

51 The first scheme of workers’ compensation for Commonwealth employees was established with the enactment of the Workmen’s Compensation Act 1912. The 1912 Act provided for ‘the payment of compensation to all workmen, directly, and in some cases indirectly, employed by the Commonwealth, who may be injured in the course of, or by reason of their employment’.

52 In 1930, the Commonwealth Employee’s Compensation Act 1930 (1930 Act) was enacted. This Act repealed the Workmen’s Compensation Act 1912 and replaced it with a more extensive system of compensation for Commonwealth employee’s. Twelve Acts were passed between 1944 and 1970 each amending the 1930 Act.

53 In March 1970 the Compensation (Commonwealth Employees) Act 1971 passed, repealing the 1930 Act and its amending Acts. This Act was also amended many times and by one of these amendments became Compensation (Commonwealth Government Employees) Act 1971 (1971 Act).

54 The Safety, Rehabilitation and Compensation Act 1988 (SRC Act) was introduced in 1988. Section 139 of the SRC Act repealed the 1971 Act.

55 The SRC Act applies where injury occurs after 1 December 1988. However, where injury was sustained prior to that date, the 1971 and the 1930 Act still have application. Section 124(2) provides that where an injury occurred before 1 December 1988, compensation is only payable if it would have been payable under the 1971 Act (or previous Acts if applicable).


58 For the purposes of this project, we will confine ourselves to the SRC Act.

59 Compensation is also provided under the Seafarers Rehabilitation and Compensation Act 1992. This scheme is dealt with separately.
How are psychological injuries defined in the legislation?

60 The definition of 'injury' in section 4(1) of the SRC Act is as follows:

'injury' means:

• a disease suffered by an employee; or
• 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
• 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;
• but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

61 The definition of 'disease' in section 4(1) of the SRC Act is in the following terms:

'disease' means:

• any ailment suffered by an employee; or
• 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.

How have courts in each jurisdiction interpreted those definitions?

62 Disease, as noted above, is defined in section 4 of the SRC Act. The definition refers to an employee suffering from an *ailment*. Drummond J made it clear in *Comcare v Mooi* (1996) 23 AAR 160 (*Mooi*) that the use of the word *ailment* signals a legislative intention 'to cover the whole range of physical and mental illnesses from major to minor ones' (at page 164). His Honour said a claim should not be rejected simply because the employee's condition cannot be identified as a recognised medical condition. However, his Honour added (at 164-165) it was:

'...essential for...a worker to be able to demonstrate that, having regard to his circumstances, he is in a condition that is outside the boundaries of normal mental functioning and behavior.'

The *Mooi* case involved an employee of the Department of Defence who claimed compensation for a 'stress reaction' to events in the course of his employment. These included a departmental reorganisation and associated
uncertainty, alleged ostracism during an overseas training course, allegations that he was having an affair, and disappointment about not being given additional training or higher duties. The Administrative Appeals Tribunal (AAT) initially allowed the applicant's claim for compensation. While it was 'not the opinion at any stage that the applicant was mentally ill or mentally disturbed or suffered from a psychological disorder' it accepted that he had been 'psychologically distressed' by events in the workplace and found that this amounted to an 'injury' for the purposes of section 14 of the Act. Essentially, the Tribunal found that if the applicant suffered from a condition which was brought on by his employment and resulted in incapacity, then he was entitled to compensation.

This decision was set aside by the Federal Court on appeal. Justice Drummond stated that an employee needed to show more than that he suffered from an incapacitating condition brought on by his employment. He needed to show that he suffered from 'something that could be regarded as an injury or something that can be regarded as a disease'. Justice Drummond went on to say that a person could have a disease for the purposes of the Act even if his condition could not be 'identified with the label of a recognised medical condition'.

Justice Drummond agreed that there was a distinction between clinically significant, ie, abnormal behaviour in the circumstances of a particular patient, and behaviour which, even though unusual, can be said to fall within the range of behaviour that persons unaffected by mental illness could be expected to exhibit in those same circumstances.

Justice Drummond also referred to submissions made by Comcare about the legislative history of the Commonwealth Workers Compensation legislation. He noted that 'there has been a continuous liberalisation of the requirements to be satisfied by the Commonwealth employees to be entitled to workers compensation'.

Have there been, over time, changes from the interpretation of psychological injuries?

63 The courts have not deviated from the findings of Drummond J in Mooi. Accordingly, 'a condition that is outside the normal boundaries of normal mental functioning and behaviour' remains the test.

What are the legislative tests to determine whether a psychological injury exists?

64 For a psychological condition to be compensable it must be:

(a) in relation to the employee's 'employment'; and

(b) 'materially contributed' to by the employee's employment.

(a) employment

65 In relation to the first issue, 'employment' was considered by the High Court in Federal Broom Co v Semlitch (1964) 110 CLR 626 (Federal Broom).
Briefly the facts of the *Federal Broom* case were that on 1 December 1960, while working in a Federal Broom Company factory, Ms Semlitch (the employee) sustained a muscle strain when attempting to lift a box that was too heavy for her. Liability was accepted for the employee’s physical injury and she was compensated under the *Workers Compensation Act 1920-1926 (NSW)* until early 1961.

Unfortunately, the employee also suffered from chronic schizophrenia which deteriorated significantly after the incident. The employee developed ‘delusions of pain in her lower right side and was utterly unable to work’. It was accepted, generally, that there was no rational explanation for the employee’s complaints of pain. Justice Windeyer stated that, while the employee’s complaints of pain were clearly delusional they were nevertheless ‘intensely real to her’. He stated that the employee was:

> ‘persuaded, irrationally but none the less really, that there is something wrong with her or in her right side - that the pain or discomfort, or ‘soreness’ or ‘nastiness’ as she calls it, which she for no objectively discernable reason feels, is caused by some physical thing that is ‘wrong’ inside her. At times she is actually persuaded that she can feel with her hands something in her side that is the cause of the discomfort’.

The employee’s claim for compensation was allowed at first instance by Judge Wall of the Worker’s Compensation Commission. Judge Wall accepted that the employee had an injury which had been contributed to by her employment. An appeal against this decision was dismissed by the Full Court of the Supreme Court of NSW (although one Judge dissented).

The *Federal Broom* decision was appealed to the High Court and was again dismissed (this time unanimously). The High Court (McTiernan, Kitto, Taylor, Windeyer and Owen JJ) all agreed that the employee had suffered a compensable ‘injury’, being the exacerbation of her pre-existing mental illness. They all accepted that a condition would be compensable when its symptoms deteriorated even if there was no change in the underlying pathological condition.

In rejecting a submission that ‘employment’ only covered ‘the inherent features or essential incidents of employment, and not other occurrences’, Justice Kitto (with whom Taylor and Owen JJ agreed) stated:

> ‘Where it is possible to identify as a contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease some incident or state of affairs to which the worker was exposed in the performance of his duties and to which he would not otherwise have been exposed, I see no misuse of English in condensing the statement of fact by simply saying that the employment was a contributing factor to the aggravation etc’.

Justice Windeyer stated:

> ‘when the Act speaks of ‘the employment’ as a contributing factor it refers not to the fact of being employed, but to what the worker in fact does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed’.
Justice Windeyer went on to ask ‘can the event to which a disordered mind irrationally attributes physical suffering, that is real to the patient but delusional, be properly called a contributing factor?’ Windeyer J found that it could. He stated:

‘it seems to me that the incident which precipitated or stimulated, however irrationally, the worsening of [the employee’s] condition could be regarded as a factor contributing to it. It was said that in any event she might have broken down sooner or later: that some other incident might have provided a focus for her delusions. But it was this event at work which in fact did so’.

(b) material contribution

68 The major change from the 1971 Act provision is that the ailment or aggravation must have been contributed to in a ‘material degree’ by the employment for a disease to be compensable.

69 In Australian Telecommunications Commission v Treloar (1990) 26 FCR 316 (Treloar), the Federal Court found an error of law disclosed in the AAT’s distinguishing of the definition of disease under the 1971 Act and 1988 Act. The Court held that there was a requirement of materiality in the nature of the causal nexus required in an aggravation of disease claim under the 1971 Act.

70 Treloar involved a Telecom employee who claimed compensation for a malignant melanoma which he claimed had been contributed to by skin damage (resulting from exposure to the sun) in the course of his employment.

The AAT allowed the employee's claim. While it did not accept that the employee's condition had been caused by his employment, it did accept that his employment 'played some role, albeit a small one, in contributing to [the melanoma's] development'. In considering whether the contribution was sufficient to entitle the employee to compensation the Tribunal distinguished the provisions under the SRC Act and the 1971 Act.

The Tribunal found that:

if the applicant's case fell to be determined under the definition of 'disease' in s. 4(1) of the New Act, that is establishing that the melanoma was caused by, or that its aggravation was contributed to in a material degree by the applicant's employment, he must necessarily fail. However, as we have decided that his case falls to be determined under the 1971 Act, any contribution, however small, by the circumstances of employment, entitles the applicant to succeed.'

71 Treloar was appealed to the Federal Court. When the matter initially came before the Federal Court it was heard by Justice Davies. Davies J, upheld the appeal and (essentially) found that there was no practical difference between the 1971 and the 1988 Acts. He stated that both Acts required that 'the contribution be causally significant or, to use another term, material'. His Honour referred to a number of cases in different jurisdictions dealing with the term 'material contribution'. He stated that:

'In each case, the reference to materiality serves to make it clear that the contribution required is contribution of a causal nature, that a contribution which is de minimis, which did not influence the
course of events or which was so tenuous as to be immaterial is to be ignored. The term 'material' is not used in the loose sense...'of substantial import or much consequence' but rather in its legal sense of 'pertinent' or 'likely to influence'.

Justice Davies went on to say that:

'The contributing factor need do no more than contribute in a material way. The factor is not required to be the real, proximate or effective cause of the disease or of its development. When several separate factors together cause the contraction of the disease or its acceleration, aggravation or recurrence, all that is required is that one such factor exhibits the necessary connection with the worker's employment... A contribution which is so small as to be immaterial which has no causal significance, is not sufficient'.

72 Treloar was overturned on appeal by the Full Federal Court. Sweeney ACJ, Sheppard and Foster JJ did not accept that the Tribunal had misdirected itself in relation to the application of the 1971 Act.

The Full Federal Court stated that all that the 1971 Act required was a 'contribution' from employment, the contributing factor did not need to be of any particular size or degree: 'All that is required is that the relevant aspects of the employment add their measure to the creation of the condition, its aggravation or acceleration. They must, in truth, be part of the cause. If they are not, then, they do not 'contribute'.

In relation to the 1988 Act, the Full Federal Court stated that:

'The use of the word 'material' in connection with the words 'contributing factor' in the legislation...is not intended to add to the section any significance which has not already been found in the words used by the legislature. It has served only to emphasise that the section is not brought into play unless it be established by evidence that features of employment did in fact and in truth contribute to the condition complained of. The causal connection must be established on the balance of probabilities and not left in the area of possibility or conjecture. Once a link is established, however, it matters not that the contribution be large or small'. [emphasis added]

73 In a recent decision of Comcare v Canute [2005] FCAFC 262 (Canute) the Full Federal Court appears to have taken a somewhat different approach. The Court at paragraph 68 stated:

'... On this basis, the observations of the Full Court in Treloar at 323 that the relevant causal connection must be established on the balance of probabilities and not left in the area of possibility of conjecture are not controversial. Equally, it is plain that the present legislation was not intended to require that an employee demonstrate that their employment caused the disease or that it was the most important factor. It would also appear that the imposition of a 'but for' test remains inappropriate. Having said this, the changes brought about by the enactment of the SRC Act were intended to require that the contribution be 'more than a mere contributing factor' and, as such, the comments of the Court in Treloar must be assessed in this light. Content must be given to the word 'material'
contained in the definition of disease in the legislation as it presently stands. ...

... There may of course be questions of degree where, although the initial injury is a sine qua non for the contraction of the later disease, it is such a minor contributing cause that the employment could not, via that initial injury, be said to have materially contributed to the disease. ...

Canute may take the concept of material contribution further than Treloar in that it appears that the case requires that the contribution be more than just a mere causal link (however insignificant).

In Weigand v Comcare [2002] FCA 1464 (Weigand) an employee of the Australian Taxation Office claimed compensation for a major depressive disorder associated with numerous grievances that he had with his employer and his concerns about the way in which they were handled. The applicant complained about the workplace itself (smoking, the air conditioning and the smell of paint) as well as about difficulties that he had with his colleagues and supervisors. He also complained about issues that may have fallen within the exclusionary provisions (such as his failure to be promoted and not being granted leave when he wanted it).

The applicant's claim was disallowed by Comcare and affirmed by the AAT. The Tribunal found that the applicant suffered from a major depressive disorder but that this condition was related to his 'obsessive compulsive personality traits' and not to his employment. The Tribunal stated that the applicant was clearly vulnerable to aggravations of his condition, but attributed this vulnerability to 'personality factors'.

Weigand was overturned on appeal by the Federal Court and remitted to the Tribunal to determine whether the applicant's condition had been materially contributed to (rather than caused) by the events that he referred to in the course of his employment. Justice Von Doussa suggested that some of the medical specialists (and the Tribunal) had been distracted by a consideration of whether the applicant's perceptions were objectively reasonable.

Von Doussa J in referring to earlier decisions of Semlitch and Treloar stated that:

'It will be noted that Kitto J (in Semlitch) does not introduce any qualification or refinement to the meaning to be given to 'employment' which would require some qualitative assessment of the incident or state of affairs that could be characterised as a breach of reasonable work practices, discriminatory conduct, harassment, unlawful conduct, or conduct of a kind that a reasonable employer would guard against. All that is required is that the employee is exposed to an incident or state of affairs in the course of the performance of his duties and to which he would not otherwise have been exposed, which is a contributing factor to the ailment or the aggravation of an ailment suffered by the employee. A perception held by an employee will meet a 'reality' test for the purposes of the definition of disease if it is a perception about an incident or state of affairs that actually happened'.

18
His Honour then went on to find that it was open for the Tribunal, if it applied to correct test, to find that one or more of the events referred to by the applicant had materially contributed to his condition. His Honour stated:

‘For that to be the case there is no requirement at law that the interpretation placed on an incident or state of affairs by the employee, or the employee’s perception of it, is one that passes some qualitative test based on an objective measure of reasonableness. If the incident or state of affairs actually occurred, and created a perception in the mind of the employee (whether reasonable or unreasonable in the thinking of others) and the perception contributed in a material degree to an aggravation of the employee’s ailment, the requirements of the definition of disease are fulfilled’.

Von Doussa J also reiterated that ‘an injury, being a disease, will be compensable if it is an aggravation of an ailment to which the employment was merely one of a number of factors that contributed in a material degree’. This was consistent with earlier comments made by Davies J in Treloar and Welsford (although he did not refer to those cases directly).

77 Decisions such as Westgate, Rodriguez and Wiegand make it clear that even if the employer has acted appropriately and there is no evidence to support the employee’s allegations of harassment and discrimination, if the events which the employee perceived to be harassment in fact occurred, then they will be sufficient to give rise to a material contribution. This may be a particularly unpalatable and frustrating result for an employer who has adopted ‘reasonable management action’.

What exclusionary provisions apply to psychological injuries?

78 Comcare is not liable to pay compensation in respect of an ‘injury’ (being a disease) if the injuries are:

- due to reasonable disciplinary action (section 4(1) of the SRC Act);
- due to failure to obtain promotion, transfer or benefit (section 4(1) of the SRC Act);
- intentionally self inflicted (section 14(2) of the SRC Act)
- caused by that employee’s serious and wilful misconduct (section 14(3) of the SRC Act); or
- due to the employee making a false representation, connected with their employment (section 7(7) of the SRC Act).

79 The operation of these exceptions has been significantly affected by the recent decision of the Full Federal Court in Hart v Comcare [2005] FCAFC 16 (Hart). The case involved an employee of the Department of Defence who claimed compensation after she failed to be appointed to three positions that she had applied for. When Comcare disallowed her claim on the basis that it resulted from a ‘failure to obtain a promotion’ the employee expanded her claim to include allegations of harassment and discrimination. She claimed, essentially, that one of her managers was conspiring with others to prevent her from being
promoted and that she had been harassed for exposing the incompetence of her supervisors and uncovering a fraud several years earlier.

The AAT found that the employee’s failure to be promoted resulted in distress and disappointment and materially contributed to her adjustment disorder. It accepted that this clearly fell within the exclusionary provisions. However, the Tribunal in allowing Ms Hart’s appeal under section 14 of the SRC Act, relied on Mooi and held that Ms Hart’s failure to obtain a promotion was not the sole cause which gave rise to her injury.

80 The Federal Court, on Comcare’s appeal, overturned the Tribunal’s decision and this decision was affirmed on appeal to the Full Court. An application to the High Court for special leave to appeal against the Full Court decision was refused.

The Full Federal Court held that the legislature had not intended to limit the operation of the exclusion to situations where an employee’s condition has arisen solely as a result of the exclusion. This meant that there was no liability in relation to Ms Hart’s injury because one of the contributing factors in the cause of her injury was her failure to obtain a promotion in connection with her employment.

81 The effect of this decision was to overturn previous authority that had suggested that the exclusionary reason had to be the only cause of the injury, a test that had proved very difficult to establish. It now seems that it is sufficient to demonstrate that the exclusionary factor contributed to the injury suffered. This should make it easier to deny a claim for compensation if one of the exclusionary factors is found to have occurred.

(a) reasonable disciplinary action

82 Once a claimant lodges a claim in the context of a psychological injury, there are three questions that arise:

- has he/she suffered a condition that is ‘outside the boundaries of normal mental functioning and behaviour’ and therefore, a psychological ‘disease’ for the purposes of the SRC Act;
- if so, was the disease he/she suffers from materially contributed to by his/her employment with the employer; and
- if so, do any of the exclusionary provisions apply (ie is the disease or injury a result of reasonable disciplinary action taken against him/her by his/her employer).

83 Compensation is not payable for a psychological injury, as a result of reasonable disciplinary action taken against an employee, in accordance with section 4(1) of the SRC Act (reproduced above).

84 The term ‘disciplinary action’, in the context of the definition of ‘injury’, is ‘reasonable action lawfully taken against an employee in the nature of or to promote discipline’ and is not limited in its meaning to action involving a sanction or punishment (see Re Rizkallah and Australian Postal Corporation (1991) 14 AAR 348). The scope of the term ‘reasonable disciplinary action’ has been previously considered by the Tribunal. In Re Wicks and Telstra Corporation
In 1992 the Federal Court (Cooper J) considered the matter in Commission for the Safety, Rehabilitation and Compensation for Commonwealth Employees v Chenhall (1992) 37 FCR 75 (Chenhall). Cooper J held, at page 83, that the phrase, 'disciplinary action' means no more than 'reasonable action lawfully taken against an employee in the nature of or to promote discipline'. Cooper J enlarged on this. He saw 'the relevant discipline' as constituted by 'the body of duties and such rules of conduct or behaviour as are applicable to and enforceable against the employee by virtue of his or her employment by the Commonwealth'.

Cooper J in Chenhall significantly emphasised that it must be the disciplinary action itself, and not 'the steps anterior to the decision to take such action ... Thus, action taken to determine whether or not disciplinary action will be taken against an employee, although it may be characterised as part of a system or process to maintain discipline, is not action within the meaning ... in the Act' (page 84). Cooper J then went on to identify what may be lawful disciplinary action. He said this depends on the nature of the duties, the rules of conduct or behaviour and the means provided by statute or at common law to enforce them. He posed three questions to be answered in a case such as this:

- What discipline or rules of conduct apply to an employee of the Commonwealth?
- In what circumstances can the Commonwealth as an employer take action of a disciplinary nature to enforce the discipline or rules of conduct against the employee?
- What type of action may the Commonwealth take against an employee if the circumstances giving occasion to the taking of disciplinary action exist?

The division of disciplinary action between the preliminary investigative steps and the steps taken after a decision has been made to commence disciplinary proceedings has caused problems in the application of this exclusionary factor. In the recent decision of Hart (above), the Full Federal Court, although not directly referring to the issue, appeared to raise some question in relation to the proposition put forward by Cooper J in Chenhall. In Hart, the Full Court suggested that the action of the AAT in drawing a distinction between the process behind promotion and the promotion itself was unnecessary. It is possible that, although the Hart decision related specifically to failure to obtain promotion, the principle stated is applicable to the other exclusionary provisions. Reference should also be made to the AAT decision in Zoric and Australian Postal Corporation [2005] AATA 592 where the Tribunal seemed to give the approach in Chenhall a narrow application.

**failure to obtain promotion, transfer or benefit**

Compensation is not payable for a psychological injury suffered by an employee as a result of their failure to obtain a promotion, transfer or benefit, pursuant to section 4(1) of the SRC Act (reproduced above).
Reference should be made to Hart (above) in relation to the ambit of this exclusion.

Heerey J discussed the concept of failure to obtain a promotion, transfer or benefit in *Trewin v Comcare* (1998) 84 FCR 171, in which he stated (at 177):

'Moreover the concept of `failure ... to obtain a promotion, transfer or benefit in connection with ... employment' has to be applied in the context of Commonwealth employment where there is a complex regime of industrial regulation with Awards, workplace agreements and appeal systems. Sometimes employees might have career-related legal rights, at other times no more than understandings and expectations. I think the intention to be deduced from the exception to the definition of `injury' in s4 is that Parliament recognised that injury, and particularly stress, might arise out of (sometimes no doubt quite justified) disappointment in Commonwealth careers but concluded that injuries so arising were, for policy reasons, not to be compensable.'

An argument was put in *Gold's v Comcare* [1999] FCA 1481, based on Drummond J's remarks set out above, that there was a distinction between concerns about the promotional system and a failure to obtain promotion. This was given short shrift by Cooper J. His Honour stated:

'The finding in the present case was not that the applicant had concerns about the promotional system. It was that she was bitterly disappointed that she was not promoted to an ASO3 position and that she was frustrated and angry because her promotion from an ASO1 to an ASO3 position was slower and less predictable than she had anticipated.'

In contrast with the interpretation of the word 'obtain' where the Federal Court has read the term strictly, the Federal Court in *Trewin* interpreted the word 'benefit' broadly. In *Trewin*, Heery J stated that the failure to obtain a 'benefit' in section 4 is not restricted to charity or gratuity but include:

- an act of kindness
- anything that is for the good of a person or thing.

**(c) intentionally self inflicted injury**

The SRC Act precludes payment of compensation in respect of an injury that has been deliberately inflicted. Section 14(2) states:

'14(2) Compensation is not payable in respect of an injury that is intentionally self-inflicted. …'

For obvious reasons regard must be had to whether the effects of a psychological injury meant that an employee did not appreciate that their actions would result in self-harm (ie was it an intentional act).

An 'intentional' act is one of a person's own volition. An act is not intentional where their mind has become so unhinged as to dethrone the power of volition. Carelessness or accident is also not sufficient to establish an intention for self-harm.

In *Pearce and Comcare* (AAT 13572, 22/12/98), the Tribunal in respect of a claimant who committed suicide, decided that her suicide notes made it plain...
that she knew that what she was doing was wrong. It could not be said that her 'mind was so unhinged as to dethrone the power of volitio' per Lord Hamworth MR in Church v Dugdale and Adams Ltd (1929) 22 BWCC 444 at 449.

(d) employee's serious and wilful misconduct

Section 14(3) of the SRC Act precludes the payment of compensation, depending on the degree of injury, where an employee's wilful misconduct results in a psychological injury unless the injury results in death, or serious and permanent impairment.

An employee who is under the influence of alcohol or a drug is taken to be guilty of serious and wilful misconduct (section 4(13) of the SRC Act).

Justice Finn said in Comcare v Calipari [2001] FCA 1534:

'Section 14(1) of the SRC Act creates a liability in Comcare to pay compensation to employees to whom the Act applies in respect of injuries suffered which result in death, incapacity for work, or impairment. Section 14(3) limits that liability in the following way:

Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment.

Provisions of this type employing the 'serious and wilful misconduct' formula have a long history in workers' compensation legislation: see eg Johnson v Marshall, Sons & Co Ltd [1906] AC 409. For present purposes I would note that the word 'serious' in the formula describes the misconduct in question and not the actual consequences of it. Nonetheless, because the s 14(3) disentitlement arises where the injury is caused by the misconduct it is well accepted that the seriousness of the misconduct is to be evaluated having regard to whether that conduct would be attended by the risk of non-trivial injury: see Johnson v Marshall, Sons & Co Ltd, at 416.

On occasion judicial and scholarly exegesis of the formula has applied the term 'serious' not only to the misconduct in question but also to the injury the risk of which is created or increased by the misconduct. So in Hills v Brambles Holdings Ltd (1987) 4 ANZ Insurance Cases 60-785, for example, Green CJ in paraphrasing observations in several earlier decisions (including Marshall's case) observed that for conduct to amount to serious and wilful misconduct, 'it must [inter alia] be such as to give rise to an immediate risk of serious injury' (emphasis added) ibid, at 74,797; see also Richards v Faulls Pty Ltd [1971] WAR 129 at 131-132. This usage is unexceptionable if it is understood as signifying no more than the converse of trivial injury. If it is intended to signify more than that and to postulate a positive requirement, it can find no justification in the terms of the statute itself nor in the general run of authoritative expositions of the formula...'

(e) employee making a false representation, connected with their employment

Section 7(7) of the SRC Act states:

'False representation as to disease.
A disease suffered by an employee, or an aggravation of such a disease, shall not be taken to be an injury to the employee for
the purposes of this Act if the employee has at any time, for the purposes connected with his or her employment or proposed employment by the Commonwealth or a licensed corporation, made a wilful and false representation that he or she did not suffer, or had not previously suffered, from that disease.'

100 Compensation is thus not payable if a claimant made a wilful and false representation that he/she did not suffer from a previous disease. The exclusion is analogous to penal provisions in that section 7(7) of the SRC Act imposes the loss of compensation entitlements for a 'wilful and false' representation. The key is that the statement must be both 'wilful' and 'false'. Therefore, a statement must not only be untrue but its making must be intentional or deliberate.

101 It follows from this that a false statement that arises from carelessness or mistake is not sufficient for the purpose of applying this exclusion. In Wilson and Comcare (AAT 11317, 18/10/96), the Tribunal was satisfied that the applicant's false statements in an employment questionnaire about his prior history of back problems arose from carelessness or mistake rather than deliberate falsity.

The exclusion applies to pre-employment questionnaires.

B. Secondary Psychological Injuries

How are secondary psychological injuries treated?

102 Section 14 of the SRC Act states:

'Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

Compensation is not payable in respect of an injury that is intentionally self-inflicted.

Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment.'

103 If a compensable injury causes the employee to contract a disease then it is open to conclude that the employment contributed, in a material degree, to the contraction of that disease. As noted above, Canute made interesting comments in relation material contribution and it not being a minor contributing cause. There has to be an causal nexus between the original injury and the secondary sequela.

What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?

104 As noted above, compensation is not payable in respect of an injury or disease unless a compensable sequel results (Australian Telecommunications Commission and Glennie (1982) 5 ALN N56B).
In a case where there is a sudden and distinct physiological change as the product of the inevitable development of a progressive disease from which a person suffers, and where such a change can in no way be attributable to, or associated with, some incident of his/her employment, there is no personal injury by accident. This was the conclusion reached by the High Court in The Commonwealth v Ockenden (1958) 99 CLR 215, which considered the 1930 Act. In that case as a consequence of rheumatic fever, Mr Ockenden had developed incompetency of the aortic valve and aortic regurgitation. That condition was a consequence of rheumatic fever and the condition developed in the course of his employment. Dixon CJ, Fullagar and Taylor JJ said:

'... the traditional view must still prevail that a physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment unless it is associated with some incident of the employment. Indeed to hold otherwise would be to strip the work 'accident' of all meaning by treating as such any distinct physiological change which is nothing more than the sole and inevitable result of the ravages of a disease. Such changes, even if they can be called accidents, occur not in the course of employment, but, it may, perhaps be said, in the course of the disease.' (pages 223-224)

In Australian Telecommunications Commission v Tzikas (1985) 5 AAR 173, Smithers J said:

'If by his finding that the four specified sequelae played a part in the respondent's mental illness the Tribunal meant no more than that in the course of the respondent's natural illness the mind noted the situations described in the sequelae and, according to its naturally impaired mental process, developed a desire that the situation in items two and three should continue definitely or a desire to punish Telecom for the situations described in items one and four, then it could not be said that any of the sequelae were factors which contributed to cause an aggravation of the natural illness. They constituted a reason for action by the impaired mind but did not cause it.' (page 186)

In essence, a psychological sequela materially contributed to by an initial injury which arose out of or in the course of the employment would be compensated as a secondary condition. The Full Court in Canute commented that the initial injury should not be a minor contributing cause.

Are there any exclusionary provisions for secondary psychological conditions?

Same as above.
SEAFARERS REHABILITATION AND COMPENSATION ACT (1992)

A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?


110 The 1992 Act repealed the Seamen's Compensation Act 1911 as a new system of compensation for seafarers who are injured in the course of their employment in the maritime industry. The 1992 Act is the result of the Commonwealth government's decision to reform the seafarers compensation along the lines of the Safety, Rehabilitation and Compensation Act 1988 (SRC Act).

111 There are four Acts associated with the new seafarers scheme:

(a) Seafarers Rehabilitation and Compensation Act 1992;

(b) Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992;

(c) Seafarers Rehabilitation and Compensation Levy Act 1992; and


112 Section 19 of the Act provides that the Act applies to the employment of employees on a prescribed ship that is engaged in trade or commerce.

113 The 1992 Act extends to all places outside Australia, including the external territories (section 18), but not to employees covered by the SRC Act or employees covered by the State and territory workers compensation laws.

114 The interpretation and application of the Act has been greatly influenced by the interpretation of the SRC Act (see previous entry).

How are psychological injuries defined in the legislation?

115 'Injury' is defined in section 3 of the Act as:

a) ‘a disease; 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;

but does not include anything suffered by an employee as a result of reasonable disciplinary action taken against the
employee, or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.'

'Disease' is defined in section 3 of the Act as:

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.'

Ailment is defined as 'any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)' (section 3 of the Act).

How have courts in each jurisdiction interpreted those definitions?

Drummond J made it clear in Comcare v Mooi (1996) 23 AAR 160 (Mooi) that the use of the word ailment signals a legislative intention 'to cover the whole range of physical and mental illnesses from major to minor ones' (at page 164). His Honour stated (at 164-165) it was:

'...essential for...a worker to be able to demonstrate that, having regard to his circumstances, he is in a condition that is outside the boundaries of normal mental functioning and behavior.' [emphasis added]

In Nicholas and Norwest Shipping [2002] AATA 806, the Administrative Appeals Tribunal (AAT) stated:

'The Tribunal accepts the applicant's evidence that he suffered stress in connection with his employment by the respondent but finds, on the whole of the medical evidence, that such stress alone was also within the bounds of 'normal mental functioning and behaviour' and did not constitute a psychological or psychiatric disorder. Accordingly, the Tribunal finds that the abovementioned feelings of 'demoralisation, frustration and anger', together with the stress, experienced by the applicant do not constitute an 'injury' within the meaning of the Act and are therefore not compensable under the Act: see Comcare v Mooi (1996) 69 FCR 439 at 444-447.'

The Federal Court case of Pacific Manning Company Pty Ltd v Barton [2003] FCA 498 concerned the respondent, Barton, who was employed as a merchant seaman by the applicant. During his time on the vessel 'Pacific Conqueror' the respondent developed a fear of accidents, experiencing symptoms of anxiety. Von Doussa J classified the psychiatric condition suffered by the respondent as an 'injury' as per the definition of 'injury' in section 3 of the Act.

Have there been, over time, changes from the interpretation of psychological injuries?

There have been no substantial changes since the Federal Court's decision of Mooi.
What are the legislative tests to determine whether a psychological injury exists?

(a) employment

122 Section 3 of the Act notes that an ‘injury’ must arise out of, or in the course of, an employee’s employment in order to be compensable.

123 Section 9 of the Act outlines a number of situations where an injury will be said to have arisen out of, or in the course of, employment. Situations include:

- as a result of an act of violence that would not have occurred apart from the employment, or the performance by the employee of the duties or functions of his or her employment; or

- if the employee is a seafarer:
  i. while the employee was on board the prescribed ship on which he or she was employed or engaged; or
  ii. while the employee was temporarily absent from that ship during an ordinary recess in that employment and not at his or her place of residence; or
  iii. if the employee is a trainee—while the trainee was undergoing a required course of training, or was in any other place (other than his or her place of residence) during an ordinary recess in that course of training.

124 Section 10 outlines a number of ways in which a disease contracted by the employee is deemed to have been contributed to in a material degree by the employee’s employment. They include employment related diseases specified in writing by the Minister; and diseases whose incidence in the employment of the employee is significantly greater than amongst people who have engaged in other employment.

125 As noted above, a condition to be a compensable injury, must have either arisen out of his employment, or in the course of his employment. This is clearly what is required pursuant to the definition of injury in section 3 of the Act. This essentially implies that there must be a temporal connection between what is claimed and the worker’s employment.

126 The Court in *Favelle Mort Limited v Murray* (1976) 133 CLR 580 (*Mort*) dealt with the issue of ‘arising out of and in the course of employment.’ In *Mort*, Jacobs J stated:

"The nature of the work done in the employment need not be a factor contributing to the onset of the disease. It need only be the employment which is the contributing factor. The employment... is simply the carrying out by the worker of his duties as directed by the employer at a particular place and at a particular time. The respondent was required by the appellant to be at his work at the particular place and at the particular time. At the place and time he suffered the exposure and infection which led to the disease. It must follow that the exposure and infection which led to the disease were the result of him being engaged in his employment at that particular place and at that particular time. This is to say much more than that"
he contracted the disease in the course of his employment in a temporal sense. In addition to this temporal factor there was the factor of location, not a casual or chance location but a location imposed upon him by his employment which was the actual source of the disease. I find it irrelevant that he might just as well have contracted the disease at another time or place when he was not in the course of his employment, even if this be assumed to be so. Though it is not sufficient that the disease be contracted in the course of employment, it is sufficient if the disease invades his body as a result of its presence in his place of employment during the time of his employment; then the employment is a contributing factor.’

(emphasis added)

(b) material contribution

127 Pursuant to section 3 of the Act, in the case of psychological injuries (diseases), it is not sufficient that the condition arose out of or in the course of employment. The worker must establish that it was materially contributed to by his or her employment. Hence a temporal connection alone is not sufficient. The question is whether the worker's psychological condition was contributed to in material degree by his or her employment.

128 Similar to the Comcare jurisdiction, the Courts and Tribunals interpreting the Act have applied *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316 (*Treloar*) when determining what the word 'material' means. In *Treloar* the Federal Court held that a de minimis contribution of the workplace suffices and it is irrelevant that other non-work related factors may have also contributed to the injury or disease.

129 The Full Federal Court in *Treloar* stated:

'The use of the word 'material' in connection with the words 'contributing factor' in the legislation...is not intended to add to the section any significance which has not already been found in the words used by the legislature. It has served only to emphasise that the section is not brought into play unless it be established by evidence that features of employment did in fact and in truth contribute to the condition complained of. The causal connection must be established on the balance of probabilities and not left in the area of possibility of conjecture. Once a link is established, however, it matters not that the contribution be large or small'.

(emphasis added)

130 Pincus J in *O'Neill v Commonwealth Banking Corporation* (1987) 75 ALR 154 (at 159) stated:

'When the tribunal says that problems were 'generated by the respondent himself', that seems to mean, by the condition from which he suffered. It is, of course, not the law that mental conditions caused by employment are compensable only if there is unusual stress or extra stimulus, although no doubt the absence of such stress would make it more difficult to show a causal connection between a mental condition and the employment. Nor is it the law that only neurotic conditions arising in circumstances in which an ordinary man of normal personality would become neurotic (if there are such circumstances) are compensable.'
Once a worker has established that his or her condition is causally connected, he/she must then satisfy section 26 of the Act. Section 26 of the Act requires it to be established that the applicant suffered a mental ‘injury’ (as defined in section 3 of the Act), namely, psychological injury, by reason of his or her employment and that that ‘injury’ resulted in his or her incapacity for work, or impairment.

**What exclusionary provisions apply to psychological injuries?**

A worker will not be entitled to compensation if any of the following apply:

(a) self-inflicted injury and wilful and serious misconduct (section 26(2) and (3) of the Act);

(b) voluntary assumption of risk (section 9(4) of the Act);

(c) wilful and false representation (section 10(7) of the Act); or

(d) a worker’s psychological condition, being a ‘disease’, is as a result of failure by him/her to obtain a promotion, ... or benefit in connection with his or her ... employment (section 3 of the Act).

**Subsection 26(2) of the Act states:**

(2) ‘Compensation is not payable for an intentionally self-inflicted injury.

(3) Compensation is not payable for an injury that is not intentionally self-inflicted but is caused by the serious and wilful misconduct of the employee, unless the injury results in death, or serious and permanent impairment.’

The word ‘intentionally’ has been interpreted by courts to mean an intentional act. The word wilful has been interpreted as an intent to mislead.

Section 12 of the Act deems being under the influence of alcohol as engaging in serious and wilful misconduct.

**Subsection 9(4) of the Act**

An injury will not be deemed to have arisen out of or in the course of employment where a worker voluntarily and unreasonably submits to an abnormal risk of injury (section 9(4) of the Act).

In McKenzie & Anor v Holyman & Sons Pty Ltd (1939) 61 CLR 584, the High Court held that a seaman assisting in a rescue of another seaman was doing so in the course of his employment and did not fall within the exclusionary provision.

**Subsection 10(7) of the Act**

In accordance with section 10(7) of the Act, compensation is not payable if a seaman made a wilful and false representation that he or she did not suffer from a previous disease. The key is that the statement must be both ‘wilful’ and
'false'. Therefore, a statement must be untrue and intentional or deliberate. The courts have said that for a representation to be wilful, there must be an intention to mislead.

**(d) disciplinary action and failure to obtain a promotion, etc**

139 The definition of injury in section 3 of the Act excludes from its scope ‘anything suffered by an employee as a result of reasonable disciplinary action taken against the employee, or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.’

140 When considering reasonable disciplinary action, the Tribunal in *Re Inglis and Comcare* Q95/335 (27 August 1997) stated:

'Ve rule that ‘reasonable’ includes, in addition to the consideration required by the dicta in *Webb* as adopted in *Choo*, the additional consideration of whether the disciplinary action was attended by circumstances of fairness'.

141 The courts have applied *Commissioner for the Safety, Rehabilitation and Compensation of Commonwealth Employees* v *Chenhall* (1990) 37 FCR 75 in finding that steps taken in contemplation of disciplinary action and/or to determine whether or not disciplinary action may be taken lacked the essential characteristics of disciplinary action and therefore an injury arising from such steps was not covered by the exclusionary provision.

142 See relevant discussion in this regard in the Comcare jurisdiction.

**B. Secondary Psychological Injuries**

**How are secondary psychological injuries treated?**

143 Whilst there is no specific provision dealing with secondary psychological injuries, sections 3 and 26 of the Act operate to captured secondary psychological injuries.

144 Therefore, pursuant to section 26(1) of the Act, compensation is payable to a worker in accordance with the Act in respect of a mental injury, which he or she suffered in the course of his or her employment.

145 So long as the secondary psychological injury can be connected to a worker’s employment, it will be treated the same as a primary condition.

**What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?**

146 As noted above, there is no specific section for determining whether a compensation entitlement exists specifically in relation to secondary psychological injuries. However, should a claim be made involving a secondary psychological condition being classed as an ‘injury’, as defined in section 3 of the Act, the legislative tests relevant to psychological injuries generally will
apply. That is, it arose out of, or in the course employment and was materially contributed to by work.

147 In essence, a psychological sequela materially contributed to by an initial injury which arose out of or in the course of the employment would be compensable as a secondary condition.

**Are there any exclusionary provisions for secondary psychological conditions?**

148 The exclusionary provisions relevant to psychological injuries generally apply.
AUSTRALIAN CAPITAL TERRITORY

A. Psychological Injuries Generally - Legislation And Interpretation

**What legislation is in force and what supporting instruments such as regulations affect those laws?**

149 *Workers Compensation Act 1951 (Act).*

150 The Act provides for a no-fault system of compensation for work related injuries.

151 The 1951 Act was substantially amended by a number of significant amendments.

152 The Workers Compensation Regulations 2002 commenced on 1 July 2002. Injuries sustained prior to this date are dealt with in accordance with the provisions in operation at the time of the injury.

153 ACT WorkCover is a government agency responsible for administering the workers compensation legislation.

**How are psychological injuries defined in the legislation?**

154 Section 4(1) of the Act defines injury as:

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

155 Section 4(2) of the Act states:

> "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."

156 The Dictionary in the Act defines disease as:

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

**How have courts in each jurisdiction interpreted those definitions?**

157 The terms 'mental injury (including stress)', and 'disease' have not been extensively discussed by the courts. In general, the courts weigh up the medical evidence to determine whether the worker is suffering from a diagnosed condition. If, on the medical and other evidence, the worker suffers from a
mental condition that causes incapacity, it is taken to be an 'injury' under the Act.

158 Mere exposure to stress in the workplace can lead to an 'injury' being suffered by the worker. In *Hellsing v British Aerospace Australia Ltd* [2001] ACTSC 98, a worker suffered from stress which manifested itself in various health problems. The stress was said to have arisen as a result of inadequate or incompetent supervision in the workplace. Although not an issue at the Supreme Court hearing, this was sufficient to be an 'injury' under the Act, however the injury was described.

159 In *Walden v Ansett Transport Industries (Operations) Pty Ltd t/as Ansett Australia* (unreported, 16 October 1995), the Magistrate found that the psychological condition (anxiety) and associated skin condition both amounted to a 'disease' as defined in the Act. The cause of the injury was 'stress, tension, constant pressure and anxiety at work' due to the worker's personal attributes including age, employment background, training, and confidence in his ability to perform the duties properly.

160 In *Coventry v Ansett Transport Industries (Operations) Pty Ltd* (unreported 17 December 1999), Magistrate Doogan accepted the worker's general practitioner's diagnosis that the worker was suffering from a personal injury, being stress, and the worker's evidence that it resulted from employment. The worker was suffering from high blood pressure and took limited time off work.

161 A case where stress at work was not sufficient to cause an injury was *Taurasi v AFS Catering Pty Ltd* (unreported, 8 December 2000) (*Taurasi*). Magistrate Burns disregarded opinions from psychiatrists and psychologists diagnosing conditions including depressive illness, severe anxiety or 'chronic specific phobia', to find that the worker was not suffering from any psychological or psychiatric condition.

Magistrate Burns accepted the distinction between what he referred to as the normal human feelings of anger and outrage experienced by the claimant arising out of her perception of her treatment by her employer and a 'psychiatric disturbance' that would constitute an 'injury' under the Act. The worker was found to have suffered from a temporary adjustment disorder, that was not compensable as it did not arise out of or in the course of employment. Having recovered from this disorder, the worker's current symptoms were not a 'psychiatric disturbance' that was an 'injury' under the Act.

162 General practice in the ACT has been increasingly to rely on the Diagnostic and Statistical Manual of Mental Disorders IV ('DSM-IV') for the correct diagnosis of psychological and psychiatric disorders. This makes it clear what condition the worker is suffering from having regard to standard criteria, and therefore whether they would be totally or partially incapacitated and entitled to compensation.
Have there been, over time, changes from the interpretation of psychological injuries?

163 Under the old regime, an 'injury' was defined as a 'personal injury by accident'. Judicial interpretation however limited the requirement of an 'accident' so that all that was required was a sudden physiological change.

164 The amendment of the legislation so that the words 'by accident' were removed in 1983 meant that it was easier to establish stress claims because they often develop gradually. Early stress claims were often a claim for aggravation of a physical condition such as diabetes or a heart condition due to excessive stress in the workplace. In recent years, claims for recognised psychological conditions are generally accepted, regardless of the specific diagnosis.

What are the legislative tests to determine whether a psychological injury exists?

(a) employment

165 The enabling section in relation to an injury is section 30 of the Act. An employer is liable to pay compensation if a worker of the employer suffers personal injury arising out of, or in the course of, the worker's employment (section 30(1)).

166 The test of 'arising out of or in the course of employment' places on the worker an onus to establish that there is a causal link between the worker's condition and his or her employment.

167 Subsections 30(1) and (2) of the Act state:

(1) 'An employer is liable to pay compensation under this Act if a worker of the employer suffers personal injury arising out of, or in the course of, the worker's employment.

(2) However, if the injury is caused by a disease, the injury is taken to have arisen out of, or in the course of, the worker's employment only if the employment substantially contributes to the injury. '

168 An injury will be taken to have arisen out of or in the course of employment when it is somehow connected with the employment. In Klatt v Enicor Pty Ltd (unreported 13 February 1996), the worker developed a psychological disorder as a result of an alleged sexual assault by the employer. Magistrate Dingwall held that the assault did not occur, so that there was no 'injury' to the worker, but went on to discuss whether, if there was an injury, the worker would be entitled to compensation. Magistrate Dingwall stated that since the event at which the conduct occurred was organised by the employer, with the intention of furthering good relations between management and a member of the staff, it was for a purpose connected with employment and the injury, if it occurred, arose out of or in the course of employment.

169 In Ansett Transport Industries Operations Pty Ltd v Srdic (ACT g12 of 1982, 22 September 1982), Justice Toohey held that if an injury occurs while the worker is performing his duties, or doing something incidental to the actual performance of those duties, it arises in the course of his employment. In Bronzin v AWA Limited (unreported, 14 August 1992), Magistrate Ward held that an injury that
occurred while the worker placed his roster of pick-ups to be done on the ward to his next shift in a safe place, due to the exhaustion suffered by the worker as a result of his work, was an injury arising out of the employment.

170 The worker may show either that the injury arose out of the employment, or that the injury arose in the course of employment.

(b) material contribution

171 In the case of injury caused by a disease, the employment must substantially contribute to that disease (section 30(2) of the Act).

172 In Lawrence Rees v British Aerospace Australia [2001] ACTSC 43 (Rees) Chief Justice Miles (on appeal from the Magistrates Court) stated:

‘... It has to be remembered that questions of causation in legal proceedings are to be decided in a 'common sense' way, and that a 'but for' test is not always conclusive or appropriate: see March v E & M H Stramare (1991) 171 CLR 506. Sometimes value judgment is involved, although it may not be recognisable as such except in borderline cases. Cases involving the causation of stress are often borderline cases, as I think this one is. In a general sense it could hardly be denied that the appellant’s stress had some relation to his job at the tracking station, his relationships with supervising staff, the hours during which he worked, his working conditions including noise, and his tinnitus. But the Magistrate found that the stress was the 'direct result of his own conduct', that is to say essentially his failure and refusal to participate in management programs directed towards efficiency and, as a distinct matter, his unshakeable belief in the dishonest management of the superannuation scheme. The use of the term 'direct result', I think, indicates that the other matters relating to his job referred to above were not irrelevant, but for the purposes of deciding whether there had been injury arising out of or in the course of his employment they were overwhelmed by the conduct of the worker himself, which was so personal to him that the other matters could not in any common sense way be regarded as 'causing' his stress. To put it another way, it would not be fair to load the employer with responsibility for having caused the stress.’

173 As a general rule therefore, the employment contribution requirement is to be decided in a common sense manner, and will often depend on the medical evidence. For example, in Norris v Ansett Australia (unreported, 10 March 1998), Magistrate Ward concluded that the worker’s bipolar disorder was substantially contributed to by the stressful conditions at work on the balance of medical opinion.

174 Section 29 makes special provision for an abnormal incidence of a disease. It provides:

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

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

What exclusionary provisions apply to psychological injuries?

There are many exclusionary provisions in the Act that apply to psychological injuries. These include:

- a condition 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;
- intentionally self-inflicted injury (section 82(2));
- serious and wilful misconduct (section 82(3));
- wilful and false representation (section 27(4)); or
- professional sporting activity (section 84).

(a) Reasonable action taken by the employer (s 4(2))

Section 4(2) of the Act states:

'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.'

The question of whether an injury was caused in the course of employment by action of this type is to be decided in a common sense way. In Rees, Chief Justice Miles said (considering the old section 6(1A) equivalent provision):

'Thus it is (and, it seems to me, always was) a question of fact whether action taken by an employer with regard to the reorganisation of staff, shutdown of plant, introduction of new work practices, changes in remuneration and the like (usually encompassed in the term 'industrial relations') resulted in 'injury' to a worker who found such action stressful. The
question is to be determined on the type of action taken by the employer and the type of reaction in the worker. Thus it seems to me that whilst s 6(1A) does not apply in the present case, it calls attention to the need for a worker claiming to suffer injury arising out of or in the course of employment to show more than a stressful condition following as a matter of temporal sequence the introduction of changes, or refusal to implement changes, to the organisation of the employer's business.'

Miles CJ here places the onus on the worker to show that an injury caused by stress does not result from an exclusionary factor. The section 4(2) exception was not argued in this case, but nevertheless the court found that the stress was caused as a 'direct result of [the worker's] own conduct' in relation to the actions of the employer, and compensation should not be awarded.

In *Coventry v Ansett Transport Industries (Operations) Pty Ltd* (unreported, 17 December 1999), Magistrate Doogan considered whether action taken by the employer was 'reasonable'. In holding that the action was not reasonable, she relied on the facts of the case, including that the worker was accused of falsifying a booking (which was a serious allegation), the person alleging this was not present at any of the meetings with the worker, the worker was denied the opportunity of questioning this person, and there was action taken in the form of changes to the roster and cancelled training which was seen as a form of 'punishment' by the worker. The personal injury, being stress, was therefore compensable.

(b) Intentionally self-inflicted injury (s 82(2))

Section 82(2) states:

'Compensation is not payable if the injury to, or death of, the worker is caused by an intentionally self-inflicted injury.'

(c) Serious and Wilful misconduct (section 82(3))

Section 82(3) of the Act provides that if it is proved that the injury to a worker is attributable to the worker's serious and wilful misconduct, then any compensation in respect to the injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.

In the case of *Jackson v P.D. Mulligan (Canberra) Pty Ltd* (unreported, 20 October 1997), the employer's allegations of serious and wilful misconduct were rejected, and the worker was awarded compensation for personal injury that occurred during a workplace fight. The Magistrate noted that the worker did not instigate the fight, and that the employer was aware of the amount of fighting that occurred in the workplace and did nothing to rectify the issue over a number of years. So despite the grave danger and potentially serious consequences of fighting, the conduct was not 'serious and wilful misconduct'.

(d) Wilful and false representation (s 27(4))

Section 27(4) states:

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

181 There do not appear to be any cases that discuss the application of this section.

(e) Professional Sporting Activity

182 Section 84 of the Act states:

'A person is not entitled to receive compensation for an injury sustained as a result of his or her engagement in professional sporting activity.'

B. Secondary Psychological Injuries

How are secondary psychological injuries treated?

183 Secondary injuries were traditionally treated as part of the original injury if the primary injury 'caused' the secondary psychological condition. In Nestoroski v Berkeley Challenge Property Services Pty Ltd (unreported, 16 May 1991), a worker who suffered a whiplash injury in the course of his employment was found to have suffered a psychological reaction to that injury, and since that incapacitated him for work, he was entitled to compensation for that secondary psychological injury.

184 In Citygroup Pty Ltd v Rujak (unreported, 19 November 2002), the worker claimed that she had developed psychological problems, being anxiety, depression and functional overlay, secondary to, and arising from, the original work accident for which compensation was paid. The employer argued that the respondent had recovered from the original physical injury, being the aggravation of a degenerative spinal condition, and was no longer totally incapacitated. The worker argued that psychological disorders in addition to the physical condition were continuing, and incapacitated her for work.

Magistrate Campbell considered the medical and other evidence and concluded that there was no sound evidence that the aggravation of the degenerative condition caused by the original accident had abated. The Magistrate stated:

'One cannot precisely draw the line as to where the actual physical incapacity ceases and a psychological reaction to that incapacity begins, but I am satisfied that a combination of the two has resulted in the worker being totally incapacitated for work.

I am not satisfied on the balance of probabilities that the injury, as described in the original application in 2000, is not still an operative cause of the worker's inability to earn an income. Accordingly the employer's application for termination of payments must fail. I am satisfied on the balance of probabilities that the combination of the physical and psychological injuries have resulted in the applicant being incapacitated for work since September 2000.'

185 If the worker is incapacitated as a result of a secondary psychological condition, which results from the primary injury, then as the primary injury is still an
'operative cause' of the incapacity, the secondary condition will be compensable as part of the primary injury.

186 In the recent decision of the Court of Appeal in *Noveska v Citygroup Pty Ltd & anor* [2005] ACTCA 38, the Court held that the worker was not entitled to compensation for the primary or secondary injury. The worker had claimed compensation for personal injury, with anxiety and depression as sequelae of later onset, secondary to the pain caused by the physical injury. The Master found that no physical injury occurred in the incident, therefore any pain or related psychological condition was not compensable. The anxiety and depression would have been compensable if the primary injury had been found to occur, as it developed as a result of that primary injury.

187 *Blazeski v City Group Challenge Pty Ltd & Berkeley Challenge Pty Ltd* (unreported, 22 July 2005), involved a worker who suffered two injuries, and developed a chronic pain syndrome as a result. Magistrate Fryar found that the worker suffered from an injury to her neck while at work with the second respondent, and as a result suffered some incapacity. The Magistrate found that she suffered from a further injury to her back at work with the first respondent, before the worker had recovered from the first injury. The combination of the two injuries led to development of a chronic pain disorder. The Magistrate held that the first injury continued to be an effective and operative cause of the incapacity which the applicant suffered following the second injury. The second respondent was therefore liable to pay compensation.

188 The test, therefore, for whether the employer will be liable in relation to a secondary psychological injury depends on whether there is any causal connection between it and the primary injury. If the secondary psychological injury that causes incapacity results from the primary injury, the incapacity is due to the primary injury and the psychological injury is compensable.

**What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?**

189 There is no specific legislative test to determine whether a compensation entitlement exists in relation to secondary psychological injuries.

190 Section 30 relevantly provides:

(1) 'An employer is liable to pay compensation under this Act if a worker of the employer suffers personal injury arising out of, or in the course of, the worker's employment.

(2) However, if the injury is caused by a disease, the injury is taken to have arisen out of, or in the course of, the worker's employment only if the employment substantially contributes to the injury.'

191 A compensation entitlement in relation to a secondary psychological injury therefore will arise, if it has resulted from an injury arising out of, or in the course of employment, or when the injury is a disease, if it has resulted from a disease to which the employment substantially contributed.
Are there any exclusionary provisions for secondary psychological conditions?

192 The exclusionary provisions that apply generally to injuries under the Act and psychological injuries as discussed above similarly apply to secondary psychological injuries. There are no exclusions specifically for secondary psychological injuries.
A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?

193 The *Workers Compensation Act 1987* (Act) commenced operation on 1 July 1987. The Act was not wholly retrospective in its effect, and the changes it created left a number of provisions from its predecessor, the *Workers’ Compensation Act 1926*, relevant for injuries sustained before the commencement of the new Act. Therefore, if an injury occurred before 1 July 1987 many substantive provisions of the 1926 Act still apply.

How are psychological injuries defined in the legislation?

194 'Injury' is defined in section 4 of the Act as follows:

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

195 Section 11A(3) of the Act provides for a modified definition of 'psychological injury' by adding to the established definition of injury (above) under section 4 by stating:

> 'A *psychological injury* is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.'

196 Section 11A(4) of the Act states:

> 'This section does not affect any entitlement to compensation under this Act for an injury of a physical nature even if the injury is a physical symptom or effect of a psychological injury, so long as the injury is not merely a physiological effect on the nervous system.'

197 Sections 4 and 11 of the Act do not state that the disorder must fall within one of the internationally recognised systems of classification of mental illness, such as DSM IV. It 'extends' the meaning of the term *psychological injury* to include the
physiological effect of such a disorder on the nervous system. This part of the definition appears to be no more than a restatement of the principle in *Federal Broom Co v Semlitch* (1964) 110 CLR 626 (*Semlitch’s case*).

**How have courts in each jurisdiction interpreted those definitions?**

198 The Macquarie Dictionary defines ‘physiological’ as:

‘consistent with the normal functioning of an organism’.

199 Blakiston’s Gould Medical Dictionary defines ‘psychological’ as:

‘Pertaining to natural or normal functional processes in living organisms, as opposed to those that are pathologic’.

200 A worker must suffer more than mere stress, or upset, or anger (see *Thazin-Aye v WorkCover Authority (NSW)* (1996) 12 NSWCCR 340 (*Thazin-Aye’s case*)). It is clear that the worker must prove on balance that he or she suffered a psychological injury, something serious, with proper identifiable symptoms, and something more than a transitory condition, or stress or anger. In *Thazin-Aye*, the worker had suffered frustration and emotional upset because she was not allowed to work in the field in which she wished to work, for which she had been trained, and for which she had had a theoretical appointment in the New South Wales Public Service. The employer, WorkCover Authority, refused to give the worker duties which she had a right to perform. It was held that she had not sustained injury, not because the circumstances were not compensable, but because she only had an emotional condition relating to her frustration and upset, rather than a physiological effect to satisfy the requirement of injury as required in *Anderson Meat Packing Co Pty Ltd v Giacomantonio* [1973] 47 WCR (NSW) 3 and *Austin v Director General of Education* (1994) 10 NSWCCR 373.

201 In *Austin v Director General of Education* (1994) 10 NSWCCR 373 (*Austin’s case*) there was a finding that the worker had a chronic anxiety state following his removal from teaching a particular class. The trial Judge had made a factual finding that there was no physiological effect. The Court of Appeal upheld the trial Judge’s decision that to constitute a ‘frank’ injury under section 4 of the Act there must be a physiological effect.

202 The question of what is required for physiological effect has been more recently discussed by his Honour Judge Burke in *Bhatia v SRA (NSW)* (1997) 14 NSWCCR 568. That decision is one of a large number of useful contributions to the jurisprudence of workers compensation by Burke J. His Honour at 576-580 discussed the difference between physiological effect and physical effect. His Honour summed (at 579-580) up his view of the law in this manner:

‘All the Act is concerned with is injury to a worker. A worker is what he is. He is both mind and matter which function as one integrated, symbiotic entity—as a single organism. Whether it is either or both of the perceived elements that is injured is really immaterial. The ultimate question is, has the worker received injury? Has the human organism which is the worker become dysfunctional? Any condition as debilitating and long lasting as the effects of these relevant incidents on Mr Bhatia could hardly be conceived as anything but injury.

In my view Mr Bhatia’s response to the incidents and their sequelae has been and is psychopathological. He has
sustained physiological injury and certainly not exhibited mere emotional impulse. Such results from the events now relied upon as giving rise to the condition and its consequence is total incapacity—and a need for substantial medical treatment.’

In *Anderson Meat Packing Co Pty Ltd v Giacomantonio* [1973] 47 WCR (NSW) 3 (Giacomantonio) the distinction between physiological/emotional impulse in psychological injury cases was dealt with by Jacobs and Hope JJA, who stated:

'It is established that mental shock or trauma can be an injury within the meaning of s 6 of the Act provided that the shock affects the nervous system so that it may be said that a physiological effect and not a mere emotional impulse is produced. *Yates v South Kirkby Collieries Ltd* [1910] 2 KB 538. Once there is a physiological effect and not a mere emotional impulse then the injury can be in the course of employment even though it is not occasioned by any external force or agency.’

The principle in *Yates v South Kirkby Collieries Ltd* [1910] 2 KB 538 (Yates’s case) is that if the psychological injury produces symptoms which affect the normal functional processes of the body then that injury is a psychological injury.

### Have there been, over time, changes from the interpretation of psychological injuries?

The legal principles have developed over time in the following decisions (most of which have already been discussed above):

(a) *Yates v South Kirkby Collieries* [1910] 2 KB 538;

(b) *Federal Broom Co v Semlitch* (1964) 110 CLR 626;

(c) *Anderson Meat Packing Co Pty Ltd v Giacomantonio* [1973] 47 WCR (NSW) 3;

(d) *Austin v Director-General of Education* (1994) 10 NSWCCR 373;

(e) *Zinc Corporation v Scarce* (1995) 12 NSWCCR 566; and


In Yates’s case (above) Cozens-Hardy MR said:

‘When a man in the course of his employment sustains a nervous shock producing a physiological injury, not a mere emotional impulse, he meets with an accident arising out of and in the course of his employment.’ [emphasis added]

What then is ‘a mere emotional impulse’? The Macquarie Dictionary defines ‘emotion’ as:

‘A state of agitation of the feelings actuated by experiencing fear, joy.’

Blakiston’s Gould Medical Dictionary defines ‘emotion’ as:

‘Strong feeling, often of an agitated nature, accompanied frequently by physical and psychic reactions.’
It therefore follows that 'mere emotional impulses' are strong feelings of an agitated nature that do not cause the person to become dysfunctional.

In *Federal Broom v Semlitch* (above) the worker, following a neck strain at work, suffered schizophrenia alleging that her employment was a contributing factor. The High Court found that a functional mental illness was a disease which could be aggravated by work. It further decided that in determining whether there had been an aggravation, the underlying illness (i.e. schizophrenia) is not separable from its symptoms. Ms Semlitch had delusions of suffering great pain in her right side, and there was no rational basis for her belief.

Justice Windeyer in his judgment took a hard look at the principle in Yates case. He pointed out that the source of this physiological symptom versus mere emotions principle was the theory of the 17th century philosopher Descartes. At 635 Justice Windeyer stated:

>'The dualism of Cartesian philosophy, its inveterate distinction between mind and matter, continues to influence ideas of illness and disease.'

Justice Windeyer pointed out that Ms Semlitch was suffering from a disorder of the mind which was functional not organic. It was nevertheless a disease. Justice Windeyer at 636 stated:

>'To regard bodily symptoms as always the product of an ailment, rather than of its essence, may be to treat concomitance as consequence ... A rigid separation of a disease from its symptoms is difficult in the field of psychosomatic and neurological ailments. In the field of purely functional mental disorders I think it is impossible....

As I cannot conceive of the mind apart from its functioning I cannot conceive of it as being disordered or diseased apart from its manifestly disordered functioning. I therefore find it impossible to conceive of the malady as distinct from its manifestations.'

So far as Justice Windeyer was concerned the degree of abnormality of behaviour, beliefs and feelings that demonstrates a morbid condition of the mind and consequently a disease within the meaning of the Act is primarily a medical question. Ms Semlitch's pain was an irrational belief no different than Mr Scarce's or Mr Austin's anxiety states, or Mr Giacomantonio's visions of God. It had absolutely nothing to do with the natural or normal functional process of Ms Semlitch's body--on the contrary it had everything to do with the somatisation of Ms Semlitch's agitated emotions.

In *Anderson v Giacomantonio* (above) the facts were that Mr Giacomantonio had hallucinations of God, the Saints and the Devil in a freezing room. He then developed an anxiety state, which Judge Ferrari found was the result of his work in that the vision had occurred in the course of his employment. However, the Court of Appeal took the view that all that the worker suffered was 'very severe emotional fright as a result of his hallucinations'. The medical evidence suggested to the Court of Appeal that the anxiety state was the result of the vision rather than the shock emanating from it. It follows therefore that the injury arising out of something unreal, and consequently non-work-related, was not the result of his employment. The principle in Yates case does not seem to have an application in those circumstances.
In Austin’s case, Davidson J had found there was no physiological effect, but he had not considered the issue of an aggravation of a pre-existing disease. The Court of Appeal continued to follow the principle of the need for a physiological effect despite evidence that the anxiety state rendered Mr Austin unfit for work. Justice Powell dissented. He took the view that what Giacomantonio decided was ‘while mental shock or nervous shock can be an injury within the meaning of the Act in an appropriate case, it will only be appropriate to find there has been such an injury where there is evidence that the shock has affected the nervous system so that it may be said that a physiological affect, and not a mere emotional impulse is produced.’ So far as Justice Powell was concerned, the anxiety disorder with despondent mood represented sufficient dysfunction to amount to a physiological effect.

In Scarce’s case (above), the worker, traumatised by the death of workmates in a mining accident, could not go back into the mine because of an anxiety state. The Court of Appeal found there was no evidence that the deaths had produced a physiological effect and said that the anxiety state was a mere emotional impulse.

In Bhatia’s case (above) at 578, Burke J asserts that psychological injury in practical terms means:

‘no more than that in some degree, in one way or another, the person has become dysfunctional–does not function normally.’

Legislative tests to determine whether a psychological injury exists

(a) employment

In Kooragang Cement Pty Ltd v Bates (1994) 10 NSWCCR 796, the NSW Court of Appeal advised judges of the NSW Supreme Court to approach the vexatious question of causation by taking a commonsense approach to the causal chain and asking that ultimate question posed by section 4 of the Act namely: was the worker’s injury the result of his or her employment?

Hence before proceeding any further, the worker must establish that his or her disease (being an injury) arose in the course of employment (section 4 of the Act).

The term 'employment' in section 9A(1) includes matters incidental or ancillary to the employment of the conditions in which it is performed (Muscat v Woolworths Ltd [2000] 20 NSWCC 16). A substantial contributing factor within the meaning of the section is not equivalent to an injury arising out of employment, as the test is less stringent than that (Mercer v ANZ Banking Group Ltd (2000) 20 NSWCCR 70). In Muscat v Woolworths Ltd (above), the Court conveniently summarises the position as:

"For an employment to be a substantial contributing factor to an injury within the meaning of s 9A of the Act, it is sufficient that the injury arose in the course of employment and has some causal connection with employment less than arising out of employment. The test is thus less stringent than that requiring that the injury arose out of and in the course of employment. Mercer v ANZ Banking Group (2000) 20 NSWCCR 70 applied."
218 While a finding that injury arose during the course of employment is not determinative of employment being a substantial contributing factor, having regard to section 9A(3) of the Act, it is however a relevant consideration (see *Supair Pty Ltd v Sweeney* (2000) 20 NSWCCR 514).

219 For an injury to ‘arise out of employment’ giving rise to liability for payment of compensation, there must be a causal connection between the injury and the work that was required to be performed. If the person’s employment in that particular job caused, or to some extent contributed to the injury sustained, then the injury can be taken to have arisen out of the employment (see *Nunan v Cockatoo Docks and Engineering Co Pty Ltd* (1941) 41 SR (NSW)). In *Smith v Australian Woollen Mills Ltd* (1933) 50 CLR 504, Starke J. said, at page 517:

"The expression 'arising out of' imports some kind of causal relationship between the employment, but it does not necessitate direct or physical causation. Was it part of the injured person’s employment to hazard, to suffer, or to do that which caused his injury? It must arise out of the work which the worker is employed to do – out of his service: *Stewart v Metropolitan Water Sewage and Drainage Board* (1932) 48 CLR 216 at 226."

220 Causal connection was also considered in the case of *Tarry v Warringah Shire Council* [1974] WCR (NSW) 1 (CA). His Honour, at page 518, said:

"An injury which arises directly out of circumstances encountered, because to encounter them falls within the scope of employment, is an injury arising out of the employment. If the worker is injured by contact physically with some part of the place where he works, then apart from the question of his own misconduct, he at once associates the injury with his employment."

221 The phrases ‘arising out of employment’ and ‘in the course of employment’ are alternatives, and that satisfying one of the alternatives is sufficient in order to meet the requirements of the section.

222 In answering the question of whether a worker has been injured in the course of employment, it helpful to ask – was the worker doing something which he or she was reasonably required or authorised to do in order to carry out his or her duties (see *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126). In *Muscat v Woolworths Ltd*, Neilson J, in considering the phrase ‘in the course of employment’, said:

"However, it is clear that they [viz the Court of Appeal] at least accept that there must be a causal linkage of some sort between the injury and the employment, although not such as great a causal linkage as ‘arising out of employment’."

223 In *Hatzimanolis v A.N.I. Corporation Limited* [1992] HCA 21, the High Court expanded the concept of 'in the course of employment' to cover not only the actual work which a worker is employed to do, but also 'the natural incidents connected with the class of work'. Hence, if a worker suffers an injury during an interval in an overall period of work, the injury will not automatically fall outside the course of employment.
Section 9A of the Act, which applies only to injuries received after 12 January 1997, states:

'(1) No compensation is payable under this Act in respect of any injury unless the employment concerned was a substantial contributing factor to the injury.

(2) The following are examples of matters to be taken into account for the purposes of determining whether a worker’s employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):

(a) the time and place of injury,
(b) the nature of the work performed and the particular tasks of that work,
(c) the duration of the employment
(d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker’s life, if he or she had not been at work or had not worked in that employment,
(e) the worker’s state of health before the injury and the existence of any hereditary risks,
(f) the worker’s lifestyle and his or her activities outside the workplace.

(3) A worker’s employment is not to be regarded as a substantial contributing factor to a worker’s injury merely because of either or both of the following:

(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker’s employment,
(b) the worker’s incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or occupational rehabilitation service as referred to in Division 3 of Part 3, or the worker’s death, resulted from the injury. ...’

After the worker has established that his or her condition ‘arose out of or in the course of employment’, pursuant to section 9A of the Act, the worker must than establish that his/her employment was a ‘substantial contributing factor’ to the injury for the employer to be liable. Except in relation to journey and recess claims, and claims by union representatives under section 12 of the Act.

Once the worker has established that:

- he or she has a psychological condition;
- which arose out of employment; and
was substantially contributed to by employment.

The Worker faces a fourth hurdle being section 11A of the Act which further excludes liability in cases of psychological injury where the 'wholly or predominant cause' of the injury was 'reasonable action with respect to', transfer, discipline, promotion etc (further discussed below).

The global requirement that all injuries be 'substantially caused' by employment before compensation is payable was brought into being when section 9A of the Act was inserted by the WorkCover Legislation Amendment Act 1996. Section 11A(1) of the Act was also amended to its present form.

The Attorney General, in the second reading speech, described the purpose of the amendments as:

'... [T]he bill will limit compensation coverage to situations where employment is a substantial contributing factor to the worker's injury or disease. This is in line with the primary objective of compensating workers who suffer injuries that have a proper link with the workplace, rather than those whose injuries have only a remote or tenuous connection with work.

The amendments specify that the weaker test of considering whether an injury arose out of or in the course of employment will no longer be enough by itself.

Questions relevant to whether employment was a substantial factor in a worker's injury can include the time and place of the injury, the nature and duration of the work, whether it was merely a coincidence that the injury occurred at work and the extent of any non-employment contributing factors.

In the case of psychological stress claims, the substantial contributing work factor requirement for claims generally subsumes the provision introduced on 1 January 1996 that workers' employment should be a 'substantial cause' of the stress condition.' (New South Wales, Parliamentary Debates, Legislative Council, 26 November 1996, 6509–6510 (The Hon Jeff Shaw — Attorney General, and Minister for Industrial Relations)).

Prior to the introduction of section 9A of the Act, it sufficed to establish that the injury arose out of or in the course of the employment. That suggests that either the employment caused or materially contributed to the injury or that it occurred while engaged in the performance of the employment, a purely temporal connection. Either nexus sufficed. With the operation of section 9A of the Act, a causal connection became a requisite element for any compensable injury. Not only must the employment be a causal factor in the genesis of the injury, but it must also be a substantial causal factor. Section 9A(3) of the Act specifically provides that arising out of the employment or occurring in the course of the employment, or both, does not per se satisfy the requirement of the employment being a substantial contributing factor.

Deane J in Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union (1979) 27 ALR 367 stated that:

'substantial is not only susceptible of ambiguity; it is a word calculated to conceal a lack of precision.'

The word 'substantial' is defined by section 11A(5) of the Act as:
'11A(5) - A worker's employment is not to be regarded as a substantial cause of a psychological injury merely because the employment is a real or actual cause of the injury. The term 'substantial' is used in this section in the sense of real and important'.

232 The legislature has, in section 11A(5) of the Act, required that the cause be 'important' as well as 'real'. The Macquarie Dictionary defines 'important' as:

1. of much significance or consequence. 2. mattering much. 3. of more than ordinary title to consideration or notice. 4. prominent.'

233 The addition of the word 'important' adds a qualitative sense to the requirement of reality. That conclusion is reinforced by section 11A(1)(b) of the Act which introduces a more onerous test for causation into section 11A of the Act.

234 'Substantial' is a common English word conveying imprecise magnitude, but an impression that something is serious, weighty, important, sizeable or large, it must be more than de minimis (see Harpur v State Rail Authority (NSW) [2000] NSWCC 3). To establish that a particular factor is 'substantial' is more onerous than establishing that such was 'material' or 'significant' - the terms used in the equivalent Commonwealth and Victorian legislation.

235 The NSW Court of Appeal has considered what constitutes a 'substantial contributing factor' in two leading decisions:

(a) Mercer v ANZ Banking Group Ltd (2000) 48 NSWLR 740; and

(b) Dayton v Coles Supermarkets Pty Ltd (2001) 22 NSWCCR 256.

236 In Dayton v Coles Supermarket Pty Ltd [2001] NSWCA 153, the worker alleged that certain stressful events were not a substantial factor. On appeal the worker argued that 'substantial' meant 'real or of substance and not insubstantial or nominal'. It was argued that a thing could be 'minor' without being 'insubstantial or nominal'. Meagher JA, dismissing the appeal, said that accepting the worker's argument would render no meaning to the term 'substantial'.

237 In Mercer v ANZ Banking Group Ltd (2000) 48 NSWLR 740, the NSW Court of Appeal noted that there may be more than one substantial contributing factor to an injury. In that case, Mason P, with whom Meagher and Beazley JJJA agreed, said:

'The term 'substantial' may have various shades of meaning. Having regard to the context, it may mean 'large or weighty' or 'real or of substance as distinct from ephemeral or nominal' (Tillmanns Butchery Pty Ltd v Australasian Meat Industry Employees Union (1979) 42 FLR 331 at 348 per Deane J; Wong v Silkfield Pty Ltd (1999) 73 ALJR 1427 at [27]).

Here the word 'substantial' qualifies 'contributing factor'. Obviously it is the extent of the causal link which is at issue. Bishop CCJ [at first instance] recognised this. At [29] of his judgment he held that the meaning to be adopted was that 'substantial' meant 'more than minimal, large or great'. In my view, that was the correct approach, remembering that word is used in the relative sense, recognising that other causative factors may be present. Section 9A does not require that the employment must be 'the' substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a
particular condition: cf *University of Tasmania v Cane* (1994) 4 Tas R 156.’

238 The New South Wales Parliamentary Debates covering both the 1995 and 1996 amendments to section 11A of the Act make it clear that the purpose of the amendments was to arrest the serious decline in the New South Wales WorkCover scheme. It was a privative measure designed to make it harder for claims for psychological injury to succeed. To similar ends other States and Territories had introduced into their compensation laws a definition of injury involving the use of the word 'significant' and 'substantial' in the test of causation.

239 The perceived problem these legislative initiatives were seeking to cure was the outcome of decisions such as *MGH Plastics Industries Pty Ltd v Zickar* (1994) 10 NSWCCR 543. Such decisions were criticised for compensating injuries that had no connection, or too tenuous a connection with the employment.

**What exclusionary provisions apply to psychological injuries?**

240 Section 11A of the Act was first inserted into the Act by the *WorkCover Legislation Amendment Act 1995*, a year before section 9A of the Act, for the purpose of applying 'reasonable restrictions' upon claims for psychological injury. Section 11A of the Act does not apply to injuries received before the commencement of that section (i.e. 1 January 1996).

241 Section 11A of the Act states:

1) No compensation is payable under this Act in respect of an injury that is a psychological injury unless:

   (a) the employment concerned was a substantial cause of the injury, and
   
   (b) the injury was not 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. ...

   (5) A worker's employment is not to be regarded as a substantial cause of a psychological injury merely because the employment is a real or actual cause of the injury. The term 'substantial' is used in this section in the sense of real and important.

242 Section 11A of the Act means 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 with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal.

243 For the exclusionary provision to apply the following questions arise:

- Was the injury the result of one or more of the following actions taken by the employer:
(a) transfer;
(b) demotion;
(c) promotion;
(d) performance appraisal;
(e) discipline;
(f) retrenchment;
(g) dismissal; or
(h) provision of employment benefits.

- If the answer to any of the questions in 7.4.1 is in the affirmative, then was that action reasonable?
- If the answer to 7.4.2 is in the affirmative, then was the injury wholly or predominantly caused by that reasonable action?

244 The Macquarie Dictionary gives many meanings for the word ‘transfer’ including the following:

'To convey or remove from one place ... to another.'

245 'Transfers' in the industrial context are movements from one place to another. They usually involve shifting workplaces but not confined to change in location. In determining whether or not there is a transfer, a change in the nature and responsibilities of the work performed may be of more importance than a change in the place where the work is carried out (see Manly Pacific International v Doyle [1999] NSWCA 465) (Doyle’s case).


'The provisions of s11A have been changed. Counsel agreed what provisions were in force as at July/August 1996 and provided me with a copy of those provisions (significant amendments have been made since that time). The onus of demonstrating that the applicant's injury was not caused by the reasonable action of the employer, rests on the applicant herself, whereas, when s11A was amended, the onus was shifted, to fall on the respondent employer. As at July and August 1996, the provisions of s11A provided that no compensation would be payable in respect of a psychological injury 'unless ... the injury was not wholly or predominantly caused by reasonable action...’ This was a very circuitous and obscure expression of the law which had to be amended to clarify it. There are three negatives contained in the former expression of the law, namely 'no compensation' and, 'unless' and 'not wholly or predominantly caused'. It is an onus difficult for an injured worker to meet--to establish that her psychological injury was not wholly or predominantly caused by the reasonable action of the employment. It was for this reason then, and to shift the onus, that the 11A [sic] was amended to provide 'No compensation is payable ... in respect of an injury that is a psychological injury if the injury was wholly...
As seen above in Irwin’s case the criterion of section 11A(1)(b) of the Act is ‘reasonable action taken ... by or on behalf of the employer’. The words ‘with respect to’ are of wide application. Transfer, demotion, promotion, etc may be the subject of the action or proposed action taken by or on behalf of the employer or matters with respect to which that action or proposed action is connected or may themselves constitute the action or a part of the action. However, the provision does not speak of an injury caused by the transfer, demotion, promotion, etc of a worker but of an injury caused by action taken or proposed to be taken by or on behalf of the employer with respect to such a matter. The words 'performance appraisal, discipline, retrenchment or dismissal or provision of employment benefits to workers' all clearly refer to matters other than the performance by a worker of his duties. The paragraph is thus looking to the worker’s response to the employer’s action or proposed action, not to the worker’s response to employment conditions encountered after a transfer, demotion, promotion, etc.

The formulation in section 11A of the Act extends to the entire process involved in the action taken by the employer including the course of an investigation (see Department of Education and Training v Sinclair [2005] NSWCA 465).

The words 'with respect to provision of employment benefits to workers' have a wide application (see Pirie v Franklins Ltd [2001] NSWCC 167 and Kashwaha v Queanbeyan City Council [2002] NSWCC 25). Both of the above decisions were adopted by Fitzgerald J in Manly Pacific International Hotel Pty Ltd v Doyle (1999) 19 NSWCCR 181) who said (at par 27):

'...transfer, demotion, promotion, et cetera, may be the subject of the action or proposed action taken by or on behalf of the employer or matters with respect to which the action or proposed action is connected or may themselves constitute the action or a part of the action. The words 'performance appraisal, discipline, retrenchment or dismissal or provision of employment benefits to workers' all clearly refer to matters other than the performance by the worker of his duties. The paragraph is thus looking to the worker's response to the employer's action or proposed action not to the worker's response to the employment conditions encountered after a transfer, demotion, promotion, et cetera.'

The phrase 'provision of employment benefits' in section 11A(1) of the Act apparently has not been the subject of interpretation, search via Austlii on the internet having yielded no decided cases in relation to the phrase from either the Compensation Court of NSW or the NSW Court of Appeal.

'Provision' appears to be self-explanatory as meaning to provide. The meaning of 'employment' in section 9A of the Act was considered by Neilson, J in Stewart v NSW Police Service [1998] NSWCC 57. Neilson, J stated that employment means the work that the worker is required to do including all its elements; ‘Its
It is the word ‘benefit’ in the phrase that is imprecise in meaning. In common usage ‘benefit’ usually has a positive component. So, what is a ‘benefit’ in relation to employment? To fall within section 11A(1) of the Act do ‘benefits’ have to be related to the formal conditions of employment through an award or the contract of employment, or is the word wide enough to include benefits informally agreed upon between a worker and his/her supervisor or manager? Given the wide interpretation ascribed to the word ‘employment’ in Manly Pacific International Hotel (above), arguably a similarly wide interpretation may be given to the word ‘benefit’.

The Chambers Dictionary defines the noun ‘benefit’ to mean:

‘any advantage, natural or other; a kindness; a favour’

This definition would appear to encompass any positive advantage, formally or informally provided, that is related to the worker’s employment, including all its elements ‘Its nature, its conditions, its obligations and its incidents’.

Section 11A(1)(b) of the Act also requires that the employer’s action be ‘reasonable’. ‘Reasonable’ means reasonable in all the circumstances of the case.

In Buxton v Bi-Lo Pty Ltd (1998) 16 NSWCCR 234 the Court pointed out that Strouds Judicial Dictionary gives the word ‘reasonable’ the prima facie meaning of reasonable in regard to those circumstances of which the actor called on to act reasonably knows or ought to know (see Re A Solicitor [1945] KB 368 at 371.) The actor here is clearly the employer.

In the Australian context, Opera House Investment Pty Ltd v Devon Buildings Pty Ltd (1936) 55 CLR 110 at 116 declared ‘reasonable’ to mean ‘reasonable in all the circumstances of the case’. Given the context of section 11A(1)(b) of the Act was situations of industrial law. The dominant principle of Australian industrial law that applies in cases of discipline, dismissal, demotion, appraisal, retrenchment etc. is one of fairness. In essence, it is the Australian concept of ‘a fair go’. Accordingly, in Buxton’s case the Court concluded that only if the employer’s action in all the circumstances was fair could it be said to be reasonable. In deciding the issue of fairness the Court applied an objective test of the reasonable observer of all the circumstances of the case.

Even if the whole of the employment-related cause of the injury was the product of reasonable actions with respect to, say, discipline or transfer, it might not be said to be the ‘wholly or ‘predominant’ cause of the injury. The presence of other, albeit non-employment-related, ‘substantial causes’ could preclude such a characterisation and hence make section 11A of the Act inoperative.

‘Wholly’ is self explanatory. Psychiatric cases sometimes turn upon single traumatic events, but more often they involve multiple stressors not all of which may be work related. The meaning of the word ‘predominantly’ requires interpretation.
The Macquarie Dictionary defines the verb ‘predominate’ as:

‘1. to be the stronger or leading element preponderate; prevail.
2. to have or exert controlling power. 3. to surpass others in authority or influence. 4. to be more noticeable or imposing than something else. 5. to dominate or prevail over.’

The adverb ‘predominantly’ appears to be used in the sense that section 11A(1)(b) of the Act cause was stronger and prevailed over other causes.

In *Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*), the Court of Appeal noted that the arbitrator determined to follow the authority of *Commission for Safety Rehabilitation and Compensation of Commonwealth Employees v Chenhall* (1992) 37 FCR 75 to hold that the Appellant’s actions up to 12 August 2002 (ie the day that the Defendant was informed of the charges) were not ‘action with respect to … discipline’. The Court of Appeal went on to say:

‘With respect to s 11A, his Honour (Sheahan J) had 'difficulty' with the Arbitrator’s narrow definition of 'action with respect to discipline', however his Honour considered that nothing turned on this as the Arbitrator went on to find that the Appellant’s actions were unreasonable. His Honour was correct to doubt the Arbitrator’s reliance on *Chenhall* (1992) 37 FCR 75. That case involved the determination of whether an injury arose out of ‘reasonable disciplinary action’. Those words are necessarily narrower than the words presently applicable — ‘reasonable action with respect to discipline’: see also *Ritchie v Department of Community Services* (1998) 16 NSWCCR 727 at [45]. The conclusion in *Chenhall* that the statutory foundation there under consideration does not extend to the investigatory process does not apply to the Act. The formulation in s 11A extends to the entire process involved in, relevantly, ‘discipline’ including the course of an investigation.’

It can be seen from the *Sinclair* case that the NSW legislature has attempted to broaden the exclusionary provisions beyond the *Safety, Rehabilitation and Compensation Act 1988* (and *Chenhall*).

### B. Secondary Psychological Injuries

**How are secondary psychological injuries treated?**

Searches via Austlii on the internet yielded limited decided cases in relation to secondary psychological injuries from either the Compensation Court of NSW or the NSW Court of Appeal. Practitioners suggest this is because it is arduous to establish a frank injury.

As noted above, section 11A(3) of the Act states:

'A psychological injury is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.'

As noted above, section 4 of the Act purports that a disease is not an injury unless it is contracted by the worker in the ‘course of employment’. Section 4 of the Act states:
(a) means personal injury arising out of or in the course of employment;

(b) includes:

(i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor; and

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

266 For a worker to establish that his or her secondary psychological injury was contracted in the course of employment, he or she must establish that it is a ‘secondary psychological injury’ to the original work related injury (physical injury), and that the psychological injury was caused by the injuries for which the employer was responsible (substantial contributing factor), not by other matters for which the employer was not liable.

267 Notwithstanding section 65A of the Act relates to non-economic loss, it states:

'primary psychological injury means a psychological injury that is not a secondary psychological injury.

psychological injury includes psychiatric injury.

secondary psychological injury means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury.'

What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?

268 To determine liability in respect of a secondary psychological condition, the following questions arise:

- does the worker suffer from a psychological injury as defined by section 4 and section 11A of the Act;

- whether the worker can establish that it is a ‘secondary psychological injury’ to the original work related injury (physical injury). (which is compensable in accordance with the Act – compensable injury);

- if so, whether the psychological condition was 'substantially contributed' by the compensable injury (that is, it was caused by the injuries for which the employer was responsible and not by other matters for which the employer was not liable), pursuant to section 11A(5) of the Act; and

- if so, whether that contribution was wholly or predominantly caused by reasonable action taken with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal, pursuant to section 11A of the Act.
Are there any exclusionary provisions for secondary psychological conditions?

269 Same as above (ie section 11A of the Act applies).

270 According to section 65A of the Act, permanent impairment is not payable in respect of a ‘secondary psychological injury’ under section 66 of the Act.

271 Section 65A of the Act states:

'Special provisions for psychological and psychiatric injury

(1) No compensation is payable under this Division (either as permanent impairment compensation or pain and suffering compensation) in respect of permanent impairment that results from a secondary psychological injury.'
A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?

272 Work Health Act 1986 (Act).

273 The current legislation commenced operation, in the main, on 1 January 1987. If a worker was injured prior to this date, he or she may choose to pursue their entitlements under the repealed Workers' Compensation Act.

274 Since 1991, the Act has undergone some significant changes. However, no changes have changed the Act insofar as psychological conditions are concerned.

275 The Work Health Court hears primary appeals.

How are psychological injuries defined in the legislation?

276 The definition of 'injury' in section 3(1) of the Act is as follows:

"Injury', in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his or her employment and includes:

- a disease suffered by an employee; and
- the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease;

but does not include 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.'

277 The definition of 'disease' in section 3 (1) of the Act is as follows:

"disease' includes a physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development and whether contracted before or after the commencement of Part V.'

278 The definition of 'mental stress' in section 49 of the Act is as follows:

"mental stress' means anxiety, depression or other mental condition that affects a person's psychological, emotional or physical well-being.'
How have courts interpreted those definitions?

279 A ‘physiological change’ in the functioning of a worker is what is required for there to be a ‘disease’. (Kavanagh)

Have there been, over time, changes from the interpretation of psychological injuries?

280 The Courts have used the definitions as stated in the Act. There has been no significant changes over time.

What are the legislative tests to determine whether a psychological injury exists?

a) employment

281 The test is that the injury must satisfy the definitions as stated in section 3 of the Act. The Act and the case law tends towards a two pronged approach:

- there must be an injury (as defined in s 3); and
- the injury must arise ‘out of or in the course of’ a worker’s employment.

282 Section 4 of the Act sets out the circumstances in which an injury is to be taken to arise ‘out of or in the course of’ employment. It requires a causal or temporal connection with employment.

283 In Ah-Quee v Heytesbury Beef Pty Ltd [2004] NTMC 095, the Court held that a psychiatric reaction to a worker’s physical injury characterised as a ‘severe adjustment disorder with depression, anxiety and paranoid thinking’ would satisfy the definition of an injury as set out in section 3 of the Act. When assessing the injury Lowndes SM said:

‘Mental injury is clearly compensable under the Act provided the other preconditions for entitlement to compensation are established, in particular that the injury resulted in or materially contributed to incapacity.’

284 Other NT decisions relating to ‘arising out of or in the course of employment’ follow the general approach on the topic.

b) material contribution

285 In 1991 amendments were made to the Act to include a requirement for the nature of a worker’s employment to have materially contributed to an injury or disease, or aggravation, acceleration or exacerbation of a disease in order for it to be compensable. The 1991 amendments only apply to an injury (disease) suffered by a worker after 14 October 1991.

286 Subsection 4(6A) states:

‘Subject to this section, a disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker’s employment unless the employment in which the worker is or
was employed **materially contributed** to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation."

287 Subsection 4(8) states:

'For the purposes of this section, the employment of a worker is not to be taken to have materially contributed to:

(a) an injury or disease; or
(b) an aggravation, acceleration or exacerbation of a disease,

unless the employment was the real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation.'

288 Subsection 4(8) of the Act was amended in 1998 such that now the employment has to be *the* real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation whereas before it only had to be a cause.

289 The Courts have summarised the requirements to make a claim under the Act as follows:

- the claimant must be a worker as defined in the Act;
- the claimant must have suffered an injury as defined in the Act;
- the injury must arise out of or in the course of the claimant's employment with an employer;
- the injury must result in or materially contribute to the claimant's incapacity as defined in the Act; and
- none of the exclusionary provisions apply.

290 In interpreting the tests to determine employment contribution to psychological injuries Thomas J in *White v Pink Batts Insulation P/L* [2000] NTSC 27 said:

'To establish causation the plaintiff must establish a material contributing cause. Any cause which is more than minimal is to be regarded as material.'

291 Trigg SM held in *Sharon Louise Spellman (supra)* that in cases involving the aggravation of pre-existing injuries or diseases it was immaterial that the incapacity would in any case have been the end result.

292 With reference to injuries occurring gradually Trigg SM held:

'If the worker alleges that the injury occurred by way of a gradual process (s 4(5)) then he or she must establish that their employment 'materially contributed to the injury'. To do that the worker must bring him or herself within s 4(8) of the Act.'

293 The requirement that an injury’s contribution to a claimant's incapacity must be 'material', has, as with the Commonwealth jurisdiction, been read down by the courts over the years. So long as it is shown that the employment was one of the causes, the worker will have satisfied the material contribution test. The employment need not be a substantial cause. The Northern Territory Courts
have applied *Treloar v Australian Telecommunications Commission* (1990) 97 ALR 321, regarding the meaning of ‘material contribution’ in interpreting section 4 of the Act. The High Court in *O'Brien v Repatriation Commission* (1984) 53 ALR 477 discussed material contribution as encapsulating the notion of ‘real’.

**What exclusionary provisions apply to psychological injuries?**

294 Compensation is not payable in respect of an ‘injury’ if the injuries are:

- due to reasonable disciplinary action (section 3(1));
- due to failure to obtain promotion, transfer or benefit (section 3(1));
- caused as a result of reasonable administrative action taken in connection with the worker’s employment (section 3(1));
- deliberately self inflicted (section 57(1)(a)); or
- attributable to his or her serious and wilful misconduct (not being an injury resulting in his or her death or permanent or long-term incapacity) (section 57(1)(b)).

295 Section 57 states:

‘Compensation not payable in certain circumstances

(1) Compensation is not payable under this Part in respect of an injury to a worker -

(a) that was deliberately self inflicted; or

(b) (not being an injury resulting in his or her death or permanent or long-term incapacity) attributable to his or her serious and wilful misconduct.’

296 Deliberately self inflicted speaks for itself. However, serious and wilful means that the conduct must be both serious and wilful. Wilful implying a degree of intent.

**B. Secondary Psychological Injuries**

**How are secondary psychological injuries treated?**

297 There is no direct reference to secondary psychological injuries in the Act. However, case law on the subject indicates that, as long as there is no intervening event, they are considered to be part of the original injury.
What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?

298 As noted above, there are no specific legislative tests for determining whether a compensation entitlement exists in relation to secondary psychological injuries. However, guidance is available from case law that deals with the issue.

299 In Beyan v Serco Sodexho Defence Services Pty Ltd [2003] NTMC 59, the Court discussed the notice requirements applicable to claims and what further requirements there might be for secondary psychological injuries. The case involved a worker who was suffering from a psychiatric condition that was a reaction to an injury sustained to his back when he slipped at work. Luppino SM stated:

'It is clear that [a] psychiatric injury, if directly attributable to the initial injury, is properly characterised as a sequela to the initial injury in the absence of any intervening act.'

300 In Sharon Louise Spellman v Returned Services League of Australia Alice Springs Sub-branch Incorporated [2004] NTMC 087 Trigg SM came to a similar conclusion. Trigg SM held that notice of subsequent injuries was not needed to be made at the time of an initial injury.

'The onus of proving that a physical or mental consequence is itself part of the original injury (and by this I mean that there is a causal link between the original work injury and the consequence that is now being considered without any 'novus actus') would be upon the worker in each case. In some cases this would be an easy task, but in others it may not be.

The onus is upon the worker to prove on the balance of probabilities that there is [a causal connection between the two injuries]. If the worker fails in this regard, then if it is to be compensable it must be a new injury, and therefore the notice and claim provisions of the Act would apply to it.'

301 Lowndes SM in Ah-Quee v Heytesbury Beef Pty Ltd [2004] NTMC 095 set out the test for specific situations involving secondary psychological injuries where a physical injury sustained by a claimant aggravated or exacerbated a pre-existing mental condition:

'In order to establish a mental injury in the nature of an aggravation and/or exacerbation of [a worker’s] paranoid psychosis, [he or she] must prove (1) the pre-existence of that paranoid psychosis and (2) that the worker’s physical injury … aggravated and/or exacerbated that mental illness.'

Lowndes SM then interpreted the decision in Kirkpatrick v Commonwealth of Australia (1985) 62 ALR 533:

'A distinction has to be drawn between, on the one hand, the sequelae making a sick mind sicker and contributing to incapacity, and, on the other hand, a sick mind latching on to the factors so described that, in one sense, they play a role in the illness, but not in such manner as to add to the existing incapacity.'

Lowndes SM quoted Kitto J in Federal Broom v Semlitch (1964) 110 CLR 626:

'Where an untoward occurrence in a worker's employment causes a pre-existing mental disorder to manifest itself in a
new delusion, it seems to me proper to say that there is an exacerbation of the mental disorder.’

302 All of the requirements, outlined at paragraph 6.5, to making a claim apply in relation to secondary psychological conditions. Thus, the primary physical condition must have materially contributed to the worker’s secondary psychological condition.

**Are there any exclusionary provisions for secondary psychological conditions?**

303 The exclusionary provisions are the same as for injuries generally and are mentioned above.
A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?

304 Workers’ Compensation and Rehabilitation Act 2003 (Act).

305 The 2003 Act commenced in all material aspects on 1 July 2003, repealing the 1996 Act.

306 The Act is supported by the Workers' Compensations and Rehabilitation Regulation 2003 (Regulation) which sets out the legal requirements for the workers' compensation scheme defined under the Act.

307 WorkCover is a Queensland Government owned statutory authority, set up by the Act, that is the main provider of workers' compensation insurance to Queensland employers and is the peak body for managing claims. Section 109 of the Act states that unless an employer is a self-insurer then WorkCover must cover any compensation benefits.

How are psychological injuries defined in the legislation?

308 The definition of 'injury' in section 32 of the Act is as follows:

(1) An injury is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

(2) However, employment need not be a significant contributing factor to the injury if section 34(2) or 35(2)11 applies.

(3) Injury includes the following--

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

(b) an aggravation of the following, if the aggravation arises out of, or in the course of, employment and the employment is a significant contributing factor to the aggravation--

(i) a personal injury;

(ii) a disease;

(iii) a medical condition if the condition becomes a personal injury or disease because of the aggravation;
(c) loss of hearing resulting in industrial deafness if the employment is a significant contributing factor to causing the loss of hearing;

(d) death from injury arising out of, or in the course of, employment if the employment is a significant contributing factor to causing the injury;

(e) death from a disease mentioned in paragraph (a), if the employment is a significant contributing factor to the disease;

(f) death from an aggravation mentioned in paragraph (b), if the employment is a significant contributing factor to the aggravation.

(4) For subsection (3)(b), to remove any doubt, it is declared that an aggravation mentioned in the provision is an injury only to the extent of the effects of the aggravation.'

How have courts interpreted those definitions?

309 There seems to be no judicial commentary on what is a ‘disease’. However, the issue of what constitutes an ‘injury’ has come before the courts on occasions. For example, the Industrial Court of Queensland in Asuncion Ellis AND Q-COMP (No. 2) (C/2005/69) held that ‘a mishap which causes the body to experience pain may be characterised as an 'injury’’. In most cases however, the question whether or not a claimant has suffered an injury was resolved without requiring detailed consideration and the focus of the case was on whether the claimants employment was ‘a significant contributing factor’ to that injury.

310 The meaning of ‘injury’ was discussed by the High Court in Darrin Zickar v MGH Plastic Industries Pty Limited (1996) 71 ALJR 32 (Zickar). The High Court concluded that ‘a sudden physiological change need not be associated with any external event to constitute a physical injury.’

311 The Queensland Courts have adopted the High Court’s approach in Zickar.

Have there been, over time, changes from the interpretation of psychological injuries, for example, changing from disease to injury?

312 There has been little or no changes from Zickar.

What are the legislative tests to determine whether a psychological injury exists?

(a) employment

313 The definition of injury and the provisions dealing with entitlement to compensation require the compensable injuries to have a nexus with the course of the employment undertaken by the worker. The definition of ‘injury’ qualifies personal injury with the words 'arising out of, or in the course of, employment if
the employment is a significant contributing factor to the injury’ (section 32(1) of the Act).

314 Section 30(3) states ‘a reference to an employer of a worker who sustains an injury is a reference to the employer out of whose employment, or in the course of whose employment, the injury arose.’

315 President Hall said in Avis v WorkCover (2000) 165 QGIG 788 ‘...the test posited by the words ‘arising out of’ whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship which would be necessary if the phrase used were ‘caused by’.’

316 In Collins v SGIO 86 QGIG 728, the Industrial Court accepted the Magistrate’s finding of fact that an oil company executive, engaged in a social game of golf with other oil industry people, was playing the game in the course of his employment. A significant factor was that the game was in normal business hours and for the purpose of his employer’s business.

317 Section 33 of the Act states:

‘This subdivision does not limit the circumstances in which an injury to a worker arises out of, or in the course of, the worker’s employment.’

318 Section 34 'Injury while at or after work attends place of employment' states:

‘An injury to a worker is taken to arise out of, or in the course of, the worker’s employment if the event happens on a day on which the worker has attended at the place of employment as required under the terms of the worker’s employment:

a) while the worker is at the place of employment and is engaged in an activity for, or in connection with, the employer’s trade or business; or

b) while the worker is away from the place of employment in the course of the worker’s employment; or

c) while the worker is temporarily absent from the place of employment during an ordinary recess if the event is not due to the worker voluntarily subjecting themself to an abnormal risk of injury during the recess.

For subsection (1)(c), employment need not be a significant contributing factor to the injury.’

319 Sections 35 and 36 of the Act relate to journey provisions. In other words an injury to a worker is also taken to arise out of, or in the course of, the worker’s employment if the event happens while, for instance, on a journey between the worker’s home and place of employment.

(b) material contribution

320 The phrase ‘significant contributing factor’ appeared in the 1990 Act but was replaced in 1996 by the expression ‘the major significant factor causing’. The former test was then reinstated from 1 July 1999, applying to injuries sustained on or after 1 July 1999 and continues to apply in the 2003 Act.
In *King v Parsons* [2005] QSC 214 it was said that it is a factual question as to whether or not an applicant’s employment is a significant contributing factor. The case involved a postman who was on a motorcycle and while carrying out his duties was struck by a car as it exited its driveway. The case was dismissed for other reasons but McMurdo J still discussed the issue of employment contributions to accidents. He held that as the applicant's work required him to ride a motorcycle in the place where he had been at the time of the accident, the applicant's employment had been a significant contributing factor to the injury.

In *Hawthorne v Thiess Contractors P/L & Anor* [2001] QCA 223 the Court noted a difference in the common law and statutory tests for when a claimant's employment is classed to have contributed to an injury. Under the statute it is when the employment is a 'significant contributing factor,' yet under the common law the requirement was that it simply be a contributing factor not a significant one. The Court stressed that the legislature could not have intended there to be two different tests and a further avenue available to claimants who did not satisfy the requirements in the Act, and as such it favoured following the test in the Act.

In *Newberry v Suncorp Metway Insurance Ltd* [2005] QSC 210 Dutney J quoted from a NSW case, *Mercer v ANZ Banking Group Ltd* [2000] NSWCA 138, which considered the corresponding provisions of the NSW legislation. The NSW legislation refers to employment needing to be a 'substantial contributing factor' which is different to the terminology used in the Queensland legislation. However, his Honour said that there was no material difference between use of the terms 'substantial' or 'significant' and as such, the discussion in *Mercer* of the relevant provision is applicable to interpreting the Queensland provision.

> 'Here the word 'substantial' qualifies 'contributing factor'. Obviously it is the extent of the causal link which is at issue. Judge Bishop recognised this. At 273 [29] of his judgment he held that the meaning to be adopted was that 'substantial' meant 'more than minimal, large or great'. In my view this was the correct approach, remembering that the word is used in a relative sense, recognising that other causative factors may be present. Section 9A does not require that the employment must be 'the' substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a particular condition.'

The facts in the *Newberry* case are that the claimant, a truck driver, was involved in an accident while driving his truck for work. The judge held that as the claimant was only at the place of the accident because his work required him to be there, and that he would not have been exposed to the danger but for the employment, the employment was a 'significant' contributing factor.

In *Robert Malcolm Boyd and Q-COMP (C/2005/65)* in the Industrial Court of Queensland it was accepted that the claimant, Boyd, had suffered a psychological injury and that it had occurred in the course of his employment, but an issue arose as to whether or not his employment had been a significant contributing factor. Boyd had become increasingly paranoid in his workplace about things he believed were happening when in fact he had been imagining them. The incident that gave rise to the claim involved Boyd being asked to a meeting with two fellow colleagues. Boyd believed he was likely to be demoted when in fact the other colleagues just wanted to discuss the upcoming workload. Boyd claimed that he had suffered a psychological injury as a result of the
meeting. The Court rejected his claim, noting that the 'workplace issues' identified by Boyd 'were but pure fantasy'. The Court stated:

'It seems to me...that it was his perception of what was going to happen at the meeting rather than what, in fact, did occur at the meeting that was the cause of the injury.'

**What exclusionary provisions apply to psychological injuries?**

325 A worker is not entitled to compensation in the following circumstances:

(a) reasonable management action (section 32(5)) ;

(b) injury was intentionally self inflicted (section 129);

(c) injury arose as a result of serious and wilful misconduct (section 130); or

(d) fraudulent claim (section 533).

**(a) reasonable management action**

326 Section 32(5) of the Act states:

'An 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.

*Examples of actions that may be reasonable management actions taken in a reasonable way:*

• action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker;

• 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.'

**(b) intentional self-inflicted injury**

327 Section 129 states:

'Compensation is not payable for an injury sustained by a worker if the injury is intentionally self-inflicted.'

328 Essentially section 129 disentitles a worker from compensation if the worker’s injury is intentionally self inflicted. The onus is on the employer to prove this fact.

**(c) serious and wilful misconduct**

329 Section 130 states:
Compensation is payable for an injury sustained by a worker that is caused by the worker’s serious and wilful misconduct only if:

a) the injury results in death; or
b) the insurer considers that the injury could result in a WRI (work related impairment) of 50% or more.

However, compensation is not payable if the injury could result in a WRI of 50% or more arising from:

a) a psychiatric or psychological injury; or
b) combining a psychiatric or psychological injury and another injury.

If the insurer and the worker cannot agree that the worker’s injury could result in a WRI of 50% or more:

a) the degree of impairment that could be sustained by the worker may be decided only by a medical assessment tribunal; and
b) the insurer must refer the question of the degree of impairment to a tribunal for decision.

(d) fraudulent claim

Section 533 states:

'a person must not in any way defraud or attempt to defraud an insurer.'

A worker must not say anything to the Authority, WorkCover, or the insurer that the worker knows is false or misleading. A worker must not give the Authority, WorkCover or a self insurer a document containing information the person knows is false or misleading (section 534 (3) of the Act).

B. Secondary Psychological Injuries

How are secondary psychological injuries treated?

There is no direct reference to secondary psychological injuries in the Act. However, as long as the injury satisfies the definition of an 'injury', as it is expressed in the Act, it will be treated in a like manner.

What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?

There are no specific legislative tests for determining whether a compensation entitlement exists in relation to secondary psychological injuries. However, the causal connection must be established for the condition to be work related.

Firstly, the tests for determining generally if a psychological injury exists are applicable (and mentioned above), but to reiterate, there must be an injury as defined in the Act, and the claimant's employment must be a significant cause of that injury. Subsequent to this it needs to be shown that the psychological injury, if it is claimed that it resulted out of a primary injury, is causally linked to
the original injury. Otherwise, a new application for compensation would be assessed in its own right.

335 In *Shiell v Australian Hospital Care Pty Ltd* [1998] QSC 113 (4 June 1998) the Queensland Supreme Court was dealing with a plaintiff who had fallen at work and injured her arm and then subsequently developed a depressive disorder. There had been several other contributing factors to the plaintiff's depression. However, the Court held that due to the direct chronological link between the incident in which the initial physical injury occurred, and the development of the plaintiff's persisting psychological condition, they were causally linked. As such, the plaintiff's claim succeeded under the Act and damages were awarded accordingly.

**Are there any exclusionary provisions for secondary psychological conditions?**

336 The exclusionary provisions are the same as for injuries generally and are mentioned above.
A. Psychological Injuries Generally - Legislation And Interpretation

**What legislation is in force and what supporting instruments such as regulations affect those laws?**

337 *Workers Rehabilitation and Compensation Act 1986* (Act) repealed the *Workers Compensation Act 1971*.

338 The 1986 Act commenced on 30 September 1987 creating a new system of workers' compensation in South Australia. Although the former Act (1971 Act) is repealed, it remains applicable for injuries sustained before 30 September 1987.

339 South Australia first introduced workers compensation legislation in 1900 with the *Workmen's Compensation Act*. It was based on English legislation. In 1932 the Act was changed and remained in force until it was repealed by the 1971 Act.

340 This discussion is confined to the 1986 Act.

**How are psychological injuries defined in the legislation?**

341 Compensation pursuant to the 1986 Act is payable in respect of compensable 'disabilities'. 'Disability' is defined in section 3(1) of the Act as:

 '(a) any physical or mental injury including:
 loss, deterioration or impairment of a limb, organ or part of the body or of a physical, mental or sensory faculty;
 (i) a disease; or
 (ii) disfigurement; or
 (b) where the context admits - the death of a worker, and includes a secondary disability.'

342 Section 3 of the Act defines disease as including:

 (a) 'any physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development; and
 (b) any disability to which section 31 applies.'

343 Psychological conditions come under the definition of disease (being a disability), pursuant to section 3 of the Act.
How have courts in each jurisdiction interpreted those definitions?

344 Deputy President Judge McCusker in Jakas v WorkCover Corporation/QBE Mercantile Mutual Workers Compensation (SA) Ltd (Adelaide Ship Construction International Pty Ltd) [2002] SAWCT 25 said:

‘...the mere fact that a sudden physiological change is in some way connected with an underlying ‘disease’ process does not, of itself, prevent the classification of such a change as an ‘injury’ within the primary statutory provisions that apply to such a case.

If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an ‘injury’ in the primary sense of that word. ...If such an injury happens within the protected period of employment, it is ordinarily compensable without proof of a specific causal connection with the worker’s employment (Higgins v. Galibal Pty Ltd (1998) 45 NSWLR 45 at 52 citing Mills, Workers Compensation (New South Wales), 2nd ed, 1979, p3). If the propounded ‘injury’ is distinct from the underlying pathology that constitutes a ‘disease’ that directly or indirectly caused the sudden event to occur, it is unnecessary to proceed to the alternative and additional basis whereby, in such cases, compensation may also be recovered for the disease process if the statutory preconditions are met (Zickar at 335, McIntosh at 262).’

345 A discrete and sudden physiological change is compensable as an injury.

346 The High Court’s decision of Zickar has also been applied in South Australia.

Have there been, over time, changes from the interpretation of psychological injuries?

347 No changes have been made.

What are the legislative tests to determine whether a psychological injury exists?

(a) employment

348 Disease was originally defined to include the deterioration of a physical, mental or sensory faculty for which there is no obvious proximate cause. The Supreme Court in WorkCover v Ascione (1989) interpreted this so that some non-work related diseases were compensable if the disability occurred in the course of employment. The 1986 Act picked up from where the 1971 Act left off and put beyond doubt that diseases are only compensable if they are work related.

349 Section 30 of the Act states:

(1) Subject to this Act, a disability is compensable if it arises from employment.

(2) Subject to this section, a disability arises from employment if-
(a) in the case of a disability that is not a secondary disability or a disease - it arises out of or in the course of employment; or

(b) in the case of a disability that is a secondary disability or a disease -
   (i) the disability arises out of employment; or
   (ii) the disability arises in the course of employment and the employment contributed to the disability.

A disability will not be compensable unless it is established that on the balance of probabilities it arises from employment (s 31(1) of the Act).

In Burch v State of South Australia (1998) 71 SASR 12, Lander J stated:

'Section 30 is clear enough. A disability which is not a secondary disability or disease is compensable if it arises out of or in the course of employment. However, if the disability is a secondary disability or a disease it is only compensable if it arises out of employment or it arises in the course of employment and the employment contributed to the disability.

In the case of a disease or a secondary disability mere temporal connection is not enough. The disability must arise out of the employment or if not arise in the course of employment and the employment contributed to the disability.'

The phrase 'arise from employment', as noted above, requires a causal connection which in turn requires a commonsense, practical approach rather than a scientific approach to causation (Conkey and Sons Ltd v Miller (1977) 51 ALJR 583; Migge v Wormald Bros Productions Ltd [1972] 2 NSWLR 29).

For the purpose of determining whether there is a causal connection, regard should be had to Woolworths Ltd v Allen (NSW Court of Appeal, 25 May 1988, unreported) (Woolworths), particularly the judgments of Kirby P and McHugh JA.

In assessing the evidence it is necessary to adopt that conclusion which the applicable sequence of events would naturally inspire in the mind of any commonsense person instructed in pathology, due cognisance being given to any expert evidence bearing on the topic. (MLA Holdings Pty Ltd. v Smith (1996) 13 NSWCCR 224 at 231).

Olsson J in the Full Supreme Court in Van Than Pham v Workers Rehabilitation and Compensation Corporation and Wingfield Heat Treaters ((1995) unreported judgment Supreme Court of South Australia S5056) dealt with the issue of causation in regard to psychological injuries. His Honour agreed with the submissions of counsel as to the correct approach in law, stating:

'Mrs. Shaw, of counsel for the worker, criticised this finding as exhibiting a fallacious approach, in common with that expressed by the Review Officer. It was her strong contention that the matter did not fall to be decided on the basis of whether or not the medical evidence, as ultimately accepted, 'established a compelling relationship between' the relevant accident and the onset of the subsequent disabling psychiatric symptoms, as suggested by the Tribunal. That test was expressly rejected by the Full Court in Dahl and Anor v Grice [1981] VR 513 at 522.
Rather, she said, the correct approach in law was, given that there was a reasonable body of medical evidence which indicated that it was possible that such a causal link existed, did the evidence as a totality, lead to the inference that, on the balance of probabilities, the disabling symptoms were in fact the consequence of the incident - particularly having regard to the temporal links between the two. Alternatively, she argued, an equally appropriate mode of reasoning was to consider what was the presumptive inference which the relevant sequence of events would naturally inspire in the mind of any common sense person uninstructed in pathology and then give effect to it in terms of probability in absence of conclusive medical evidence denying that conclusion."

356 In some circumstances the Act provides a presumption in the absence of proof to the contrary that the factual relationship is established (s31(2) of the Act).

357 As well, the Act provides a statutory presumption that where a disability consists of the aggravation, acceleration, exacerbation, deterioration or recurrence of a pre-existing heart disease, which arises in the course of employment, it will be presumed in the absence of proof to the contrary that the employment contributed to the injury (section 31(5) of the Act). In other cases it will be for the worker to establish that the condition from which the worker suffers is a disability within the meaning of the Act and arises from employment.

(b) material contribution

358 Under section 30A of the Act, a disability that consists of a disorder of the mind caused by stress is compensable if, and only if, the stress arising out of employment was a substantial cause of the disability, and under sub-section (2)(b) the stress did not arise wholly or predominantly from the reasonable actions taken in a reasonable manner by the employer, or a decision of the employer when dealing with the worker in the ways listed under section 30A(b)(i), (ii) and (iii). It is established law that the worker carries the onus of proving the qualifying requirements of section 30A of the Act.

359 In Westgate v Australian Telecommunications Commission (1987) 17 FCR 235 (Westgate), Davies J emphasised that it was not necessary that a worker show that there was a special, unusual or wrongful factor of the employment that was the contributing factor. It was sufficient that some specific incident of the employment positively contributed to the worker’s mental health condition. Such a conceptual approach appears applicable to the issue of causation in South Australia, even though the statutory environment differs from that considered in Westgate. The fact that there might also have been other contributing factors having no direct relationship with the employment is irrelevant, provided that an incident of the employment can be shown, on the evidence, to have been a substantial contributing factor.

360 There is a series of authorities that bear on the meaning of the phrase ‘substantial cause’, as employed in section 30A of the Act. However, it is unnecessary, for present purposes, to go beyond the discussion of this topic by the majority of the Full Bench in The Institute of Medical and Veterinary Science v Auld [2000] SAWCT 155 (Auld).

361 The Full Bench in Auld rejected the propositions that ‘substantial’ connoted something akin to predominant, or that, if there were other causes that could be categorised as predominant, then employment could not still be a substantial
cause. It accepted that the word was used in the relative sense and that the relevant causative factor did not need to be the substantial contributing cause. Substantial was used in the sense of ‘real or of substance’. What was involved in each instance was a question of fact.

362 The word ‘substantial’ has been interpreted, much like the word ‘material’ in other jurisdictions, very broadly to not disentitle the worker so long as his or her employment was a real contributing factor.

What exclusionary provisions apply to psychological injuries?

363 Psychological injuries are not compensable if the disability arose from:

(a) reasonable action of employer (section 30A(b));

(b) misconduct (section 30); or

(c) fraud (section 120).

(a) reasonable action of employer

364 A disability will not be compensable under section 30A if the disability arose from:

'Section 30A (b)

(i) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, counsel, retrench or dismiss the worker; or

(ii) 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

(iii) reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment; or

(iv) reasonable action taken in a reasonable manner under this Act affecting the worker.'

(b) misconduct

365 Except in the case of death or permanent total incapacity for work, a worker will not be presumed to be acting in the course of employment if he or she is guilty of misconduct or contravenes the employer’s instructions during any of the following:

• at the place of employment before work begins (to prepare for work), during an authorised break or after work ends;

• at an educational institution under the terms of an apprenticeship or other legal obligation; or

• at a place to receive a medical service, to obtain a medical report, to participate in a rehabilitation program or to apply for or receive compensation (section 30B(2)(a); section 30(3)).

366 It is a bar to claim compensation if the condition arose as a result of:
366 a serious and wilful misconduct by the worker; or
367 the influence of alcohol or a drug, other than a lawfully obtained drug (section 30B(2)(b) of the Act).
367 Misconduct found sufficient to constitute a bar to compensation has included the following:

- theft and dishonesty (*Mitsubishi Motors Aust Ltd v Manuel* (1991));
- dangerous driving in the employer's car park (*Govas v CSR Ltd* (1991));
- constant abuse and harassment of co-workers and supervisors (*Mitsubishi Motors Aust Ltd v Jones* (1992); and
- larceny (*Beames v State of SA (Police Department)* (1993)).

**(c) fraud**

368 A person who obtains a payment or any benefit under the Act by dishonest means is guilty of an offence, and may be subject to a penalty or imprisonment for one year (section 120(1) of the Act). A person who aids, abets, counsels or procures the obtaining of a benefit under the Act by dishonesty, or solicits or incites such is also guilty of an offence and subject to penalty (section 120(2) of the Act).

**B. Secondary Psychological Injuries**

**How are secondary psychological injuries treated?**

369 A secondary disability is defined in section 3 of the Act as:

> 'secondary disability means a disability that is, or results from, the aggravation, acceleration, exacerbation, deterioration or recurrence of a prior disability.'

370 A secondary disability supposes the pre-existence of a disability.

**What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?**

371 Section 30(1) of the Act states:

> '(1) ... a disability is compensable if it arises from employment.

(2) ... a disability arises from employment if -

(a) in the case of a disability that is not a secondary disability or a disease it arises out of or in the course of employment; or

(b) in the case of a disability that is a secondary disability or a disease -

(i) the disability arises out of employment; or
(ii) the disability arises in the course of employment and the employment contributed to the disability.'

372 This definition requires there to be a causal connection between the secondary disability or a disease and the employment.

373 That is to say:-

- a disability that is an injury (ie not a disease) is compensable without more, if it arises in the course of the employment. Of course it is also compensable if it arises out of the employment.

- if a disease arises out of the employment it is also compensable. If the disease arose in the course of the employment there has to be a causal relationship with the employment.

374 But if the only connection of the disease with the employment is that the disease arose in the course of the employment an additional fact must be proved, ie that the employment substantially contributed to the disability produced by the disease.

375 In essence it is still a question of fact whether the disability arises from employment and the causation of the worker's mental condition must have been 'substantially caused' by the first injury, and hence his or her employment.

**Are there any exclusionary provisions for secondary psychological conditions?**

376 The same exclusionary provisions apply as above.
A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?


378 Workers’ Compensation legislation was first introduced in 1910 and since has seen substantial amendments and changes. In 1986 the Tasmanian Law Reform Commission recommended major changes to the workers compensation scheme. The Act has since been amended on a number of occasions. One such amendment was *Workers Rehabilitation and Compensation Amendment Act 2000* which also established the Workcover Tasmania Board.

379 Other legislation includes the *Workplace Health and Safety Act 1995*, which is the Occupational Health and Safety legislation operating in Tasmania, setting out the duties and requirements of employers. It is supported by the *Workplace Health and Safety Regulations 1998*. There are further mandatory and voluntary codes of practice and standards in force, however these do not deal with psychological injuries and the workers’ compensation scheme.

How are psychological injuries defined in the legislation?

380 Section 3(1) of the Act states that:

'injury includes -

(a) a disease; and

(b) the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the employment was the major or most significant contributing factor to that recurrence, aggravation, acceleration, exacerbation or deterioration

381 Section 3(1) also provides that:

'disease means any ailment, disorder, defect or morbid condition, whether of sudden or gradual development.'

382 Psychological injuries are injuries under the Act because they fall within the meaning of 'disease’ in section 3(1).

383 Section 3(1) states:

'psychiatric impairment means an illness of the mind or a disorder of the mind.'
How have courts in each jurisdiction interpreted those definitions?

384 There has been little judicial consideration of what is sufficient to constitute 'an ailment, disorder, defect or morbid condition, whether of sudden or gradual development'. This will usually turn on medical evidence of a diagnosed condition.

385 In the case of *Glozier v State of Tasmania* [2000] TASSC 186 (*Glozier*), the worker suffered from a traumatic incident while at work and was subsequently totally incapacitated for work. The issue at the hearing was the nature and extent of psychological disability and the cause of it. Justice Underwood considered the evidence and held that the applicant suffered from a psychiatric illness as a result of the incident, so that liability to pay compensation was established. Justice Underwood said:

‘... the plaintiff continued to suffer from symptoms of anxiety and depression caused by the stressor in March 1995 and its sequelae. It is immaterial whether those symptoms bear the label, post-traumatic stress disorder, or simply anxiety and depression, because I accept the account of them given by the plaintiff, her children and her former fellow employees. Such symptoms were, and are chronic, and were, and are, so severe that the plaintiff has been, and still is, unable to function normally in society. As such, I find that they constitute a recognisable psychiatric illness whether they satisfy the diagnostic criteria to bear the label post-traumatic stress disorder or not.’

386 Although this decision was before the amendment in 2001 that introduced specific references to psychological injuries, the definition of 'disease' was unaffected. Therefore, a condition will be an 'ailment, disorder, defect or morbid condition' if the symptoms are so severe that the worker is 'unable to function normally in society', regardless of the diagnosis given to those symptoms.

387 *Glozier* has not been reviewed in subsequent decisions, so that the test 'unable to function normally in society' still applies. However, since this case the term 'illness of the mind or disorder of the mind' has been added to the Act, and it is unclear whether this affects the decision from *Glozier*.

388 There is no judicial consideration of what constitutes an 'illness or disorder of the mind'. In general, the Courts tend to rely on medical evidence to prove the existence of psychological symptoms that cause an impairment. In the context of the section 25(1A) exclusion for reasonable administrative action, the Courts rely on medical evidence to prove the existence of a psychological injury, and then focus on the cause of that injury to determine whether the section applies. This has led to a range of conditions being considered to be an illness or disorder of the mind for the purposes of that section.

389 The courts defer primarily to medical evidence as to whether a psychological condition exists, and focus on the evidence of symptoms affecting the worker.
Have there been, over time, changes from the interpretation of psychological injuries?

Psychological injuries were not specifically referred to in the Act until 2001, when the Workers Rehabilitation and Compensation Amendment Act 2000 amended sections 3(1), 25(1A), 71(2) and 72(2). Since these amendments, discussion of the meaning of 'illness of the mind or disorder of the mind' would be expected, but has yet to eventuate. As such, the test for whether an 'ailment, disorder, defect or morbid condition' remains whether there are symptoms that prevent the worker from 'functioning normally in society', or whether there is an 'illness of the mind or disorder of the mind'.

There have however, been changes in the interpretation of secondary psychological injuries arising from physical injuries, which is discussed in detail below.

What are the legislative tests to determine whether a psychological injury exists?

(a) employment

Liability to compensate workers for injuries is determined by section 25(1), which provides:

'If in any employment -
(a) a worker suffers an injury, not being a disease, arising out of and in the course of his employment; or
(b) a worker suffers an injury, which is a disease, arising out of and in the course of his employment and to which his employment contributed to a substantial degree, within the meaning of section 3(2A) -
his employer is, except as is otherwise provided by this Act, liable to pay compensation in accordance with this Act ...'

Section 3(2A) provides:

'For the purposes of this Act, employment contributed to a disease to a substantial degree only if it is the major or most significant factor.'

The legislative employment contribution test is whether the psychological injury, being a disease, arises out of and in the course of employment, and the employment was the major or most significant contributing factor (s25(1) (b)).

Tasmania is the only jurisdiction in Australia to retain 'and' in the phrase 'arising out of and in the course of'. This is narrower than the other jurisdictions which have adopted the alternative 'or'.

Section 25(5) states:

'Without limiting subsection (1), but subject to subsections (1A) and (2), an injury arises out of and in the course of a worker's employment if the injury occurs during attendance at the worker's place of employment on a working day.'
Section 25(6) further provides:

'For the purposes of this section, an injury does not arise from a worker's employment if it occurs -

(a) while the worker is travelling in either direction between the worker's place of residence and the worker's place of employment, except where that journey occurred -

(i) at the request or direction of the employer; or

(ii) if the journey is work related, with the authority (express or implied) of the employer; or

(b) while the worker is travelling between places where the worker is employed by different employers; or

(c) while the worker, on a working day, is temporarily absent from the worker's place of employment, except where that absence occurs at the request or direction, or, if it is work related, with the authority (express or implied), of the employer; or

(d) during a social or sporting activity which takes place away from the worker's place of employment, except where the worker's involvement in that activity forms part of the worker's employment or is undertaken at the request or direction, or with the authority (express or implied), of the employer.'

Section 25(7) adds:

'For the purposes of subsection (6)(a)(ii), a journey is not work related by reason only of the fact that it is for the purpose of enabling a worker to travel-

(a) to his or her place of employment from his or her place of residence; or

(b) to his or her place of residence from his or her place of employment.'

An injury therefore arises out of and in the course of employment if the injury occurs while at the worker's place of employment on a working day. It will not arise out of employment where the injury occurred during travel between the worker's residence and employment, travel between different places of work for different employers, while temporarily absent from the place of employment, or during a social or sporting activity taking place away from the worker's place of employment, unless the travel, absence or activity is at the request or direction of, or with the authority of, the employer.

(b) material contribution

Section 3(1) provides:

'injury includes -

... 

(b) the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the employment was the major or most significant contributing factor to that
Therefore, when the worker is claiming compensation for the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease, it will not constitute an injury under the Act unless the employment arose out of and in the course of employment and was the **major or most significant contributing** factor to that recurrence, aggravation, acceleration, exacerbation or deterioration.

In the second reading speech introducing the Bill, the Minister stated:

'it is emphasised that the use of the term 'substantial' is designed to require that the employment has played an essential part in the onset of the disease…'

In S. *v*- *Tasmanian Country Club - Casino Pty Ltd* (Ref No. 898/03) [2004] TASWRCT 13, the Tribunal considered the employment connection requirements of ‘arising out of and in the course of employment’ and ‘the major or most significant contributing factor’ in relation to an aggravation of tenosynovitis of the wrists. The Tribunal found that the temporal connection with work, the absence of evidence of other possible causes, and predominant medical opinion led to the conclusion that the aggravation arose out of and in the course of the worker's employment. There was no evidence to dispute that the employment caused the aggravation.

The Tribunal then went on to consider whether the employment was 'the major or most significant factor'. Chief Commissioner Carey said:

'In conclusion the determination as to whether the employment was the major or most significant contributing factor requires an assessment of the level of contribution of the employment relative to the other contributing factors and a conclusion or otherwise that the employment was the major or most significant factor. This does not call for a mathematical calculation but rather an impression based upon all the evidence. [Commissioner’s emphasis]'

Chief Commissioner Carey noted that there was no evidence that recreational, social, domestic or employment activities had caused symptoms in the past. Also, the condition would not have become symptomatic without some external contribution. The overall impression on the facts and medical evidence was that the condition would not have resulted without the work contribution and therefore the work duties were the major or most significant contributing factor causing that aggravation, exacerbation or deterioration. The worker was entitled to compensation.

Therefore, the requirement that the injury 'arise out of and in the course of employment' imports an element of causation, to be determined on the facts and balance of medical evidence. The requirement of 'the major or most significant contributing factor' requires an assessment of the degree of contribution by all the factors, based on overall impression of the evidence.
What exclusionary provisions apply to psychological injuries?

Compensation is not payable in respect of a psychological condition which arises from:

(a) reasonable administrative action (section 25(1A));
(b) injuries attributable to serious and wilful misconduct (section 25(2)(a));
(c) injuries that are intentionally self-inflicted (section 25(2)(a)(ii)); or
(d) diseases that the worker wilfully and falsely represented himself as not having previously suffered (section 25(2)(c)).

(a) reasonable administrative action

Section 25(1A) states:

'Compensation is not payable under this Act in respect of a disease which is an illness of the mind or a disorder of the mind and which arises substantially from -

(a) 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; or
(b) 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; or
(c) reasonable administrative action taken in a reasonable manner by an employer in connection with a worker's employment; or
(d) the failure of an employer to take action of a type referred to in paragraph (a), (b) or (c) in relation to a worker in connection with the worker's employment if there are reasonable grounds for not taking that action; or
(e) reasonable action taken by an employer under this Act in a reasonable manner affecting a worker.'

This provision is broadly described as containing defences for reasonable administrative action taken by the employer. The stress must arise wholly or predominantly from the administrative action, and if a worker can show that they suffer an illness or disorder of the mind caused by stress due to the inability to cope with the requirements of the work itself, then it does not arise from administrative action: Abrahams, Adrian v St Virgil's College [1998] TASSC 53.

(b) serious and wilful misconduct

Compensation is not payable in respect of an injury that is attributable to serious and wilful misconduct, unless the injury results in the death or serious and permanent incapacity of the worker (section 25(2)(a)(i)).
(c) self-inflicted injuries

Compensation is not payable in respect of an intentional self-inflicted injury (section 25(2)(a)(ii)).

Section 25 (3) of the Act states that an employer may still be liable in certain cases where the worker acts, without instructions and against the law, if the act was done for the purposes of, or in connection with, the employer's trade or business.

(d) wilful and false representation as to disease

Compensation is not payable, pursuant to section 25(2)(c) of the Act, in respect of a disease if the worker, at time of entering employment, wilfully and falsely represented himself or herself, in writing, as not having previously suffered from a disease.

How are secondary psychological injuries treated?

The treatment of secondary psychological injuries is determined by section 80A, which was introduced by the Workers Rehabilitation and Compensation Amendment Act 2000 and applied from 1 July 2001. This section provides:

'For the purposes of this Division, a claim for compensation is a claim for compensation by a worker against an employer in respect of an injury for which the worker has not previously made a claim for compensation against that or any other employer.'

Part VII, Division 1 of the Act deals with payments of compensation and allows liability for an injury to be disputed by the employer. The effect of section 80A is that employers can only dispute liability for an injury if the claim is 'in respect of an injury for which the worker has not previously made a claim for compensation'. This means that employers can dispute liability for secondary injuries, so long as the worker has not previously made a claim in respect of that injury. Prior to the application of section 80A, the question was whether the nature of the claim had substantially changed, so that it was a 'fresh' claim for which liability could be challenged, or whether it arose out of the primary injury. The question now is whether the claim is in respect of an injury for which the worker has not previously made a claim for compensation, against that or any other employer: Thornton v Apollo Nominees Pty Ltd [2003] TASSC 134 ('Thornton').

Previously, secondary psychological injuries were compensable if they arose out of the primary physical claim. This required the secondary condition to be a continuation of the primary claim, which is a question of fact and degree: Swan v Miller [2001] TASSC 15 ('Swan'). When the secondary psychological claim substantially changed the nature of the claim, it was considered to be a fresh claim, for which liability could be challenged and assessed under the relevant provisions of the Act: State of Tasmania v Cook [2000] TASSC 82 ('Cook').

Therefore, the position used to be that an employer was liable to pay compensation for a secondary psychological injury when it arose out of the primary physical injury, and the primary physical injury was still present and
causing incapacity (Swan); or where it substantially changed the nature of the claim and formed a fresh claim, and it satisfied the requirements of section 25.

417 The rationale behind this can be seen in Justice Crawford's reasoning in *Tubemakers of Australia v Adrian Kurz* [1998] TASSC 4 (*Tubemakers*). Justice Crawford held that depression caused by the effects of a shoulder injury was the same claim. Incapacity due to depression arising from the shoulder injury was regarded as incapacity arising from the shoulder injury, and the right to compensation vested at the time of the original injury. So long as the original physical injury continues to be part of the cause of the incapacity, liability to pay compensation is not affected.

418 This decision was followed by Justice Blow in *Swan*, where an additional diagnosis of depression following a compensable back injury was not a fresh claim but arose out of the primary injury. In *Cook*, the primary claim was for a lower back injury. Compensation for partial incapacity due to the back injury, and later, symptoms of depression resulting from the back injury, was paid as constituting the same claim. The medical certificates described a general condition of depression associated with the effects of the physical injury. However, a claim for total incapacity due to an 'acute adjustment disorder' substantially changed the nature of the claim and constituted a fresh claim. The claim was now dependent on the secondary psychological condition, as the back injury was largely recovered, and it was for total rather than partial incapacity, thus ending the process of rehabilitation. It therefore was substantially changed so as to constitute a fresh claim, and liability could be challenged.

419 In *Thornton*, the worker suffered serious injuries to his knees and developed symptoms of depression due to his incapacity. The Court applied the amended legislation so that section 80A applied, in allowing the appeal and overturning the primary judge's decision so that the Tribunal's determination applied. The Court found that there was no evidence before the Tribunal that the depression suffered by the worker was a new condition unrelated to the original claim for compensation. The result was that the psychological condition was either caused as a result of the original incident or the ongoing effects of the physical injury. It was a claim in respect of the original injury insofar as it arose out of, or was in relation to such injury. Therefore the worker had previously made a claim in respect of that injury and liability had already arisen.

420 It is unclear whether there is great difference between the two tests - the original test of whether the nature of the claim is substantially changed, and the new test of whether the worker has made a claim in respect of that injury. Given the Court's interpretation in *Thornton* of an 'injury for which the worker has not previously made a claim', using language such as 'arose out of' and 'in relation to', it appears the two tests require the same considerations and cover the same circumstances.

421 There is not as yet any judicial consideration of *Thornton*, and so the test for determining whether the claim is 'in respect of' an injury for which the worker has not previously made a claim is unclear. It appears from the case that so long as the secondary injury arises out of or in relation to the original injury, it will be compensable as part of that injury.
What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?

There is no legislative test for determining whether a compensation entitlement exists specifically in relation to secondary psychological injuries. However s 80A provides that Part VII of the Act, which deals with payment of compensation including disputing liability for a claim, applies in relation to claims 'in respect of an injury for which the worker has not previously made a claim for compensation against that or any other employer.' Therefore, if the claim is in respect of an injury for which the worker has previously made a claim and liability was accepted, the employer is also liable for the secondary claim as part of the original claim so long as section 25(1) is satisfied.

The secondary injury, if considered to be a separate claim, must therefore arise out of and in the course of employment, and the employment must contribute to a substantial degree in order for a compensation entitlement to arise.

Are there any exclusionary provisions for secondary psychological conditions?

The exclusionary provisions discussed above similarly apply in relation to secondary psychological injuries.

A specific exclusion for permanent impairment compensation in respect of secondary psychological injuries is in section 72(2). Section 72(2) states:

'In assessing the degree of impairment of an injury -
(a) regard is not to be had to any psychiatric or psychological Injury, impairment or symptoms arising as a consequence of, or secondary to, the physical injury; ... '

This section was noted as an area possibly requiring reform during the recent investigation into Tasmania's worker's compensation scheme. It was included to avoid workers with relatively minor conditions increasing their total impairment assessment scores by exploiting the degree of psychological impairment and allowing common law thresholds to be reached. There are arguments that since secondary physical injuries are included in the assessment, it is inconsistent to exclude psychological conditions, and because there is increasing recognition of the connection between mind and body. There is a desire to include serious secondary psychological injuries but to prevent exploitation of subjectivity in assessment.

---

What legislation is in force and what supporting instruments such as regulations affect those laws?

427 The Accident Compensation Act 1985 (Act) creates the workers' compensation scheme in Victoria. Its purpose is, among other things, to make provision for effective rehabilitation of injured workers and to provide adequate and just compensation to injured workers. The Act establishes the Victorian WorkCover Authority, which administers the workers' compensation and OH&S legislation, and provides for payment of compensation.

428 The Act was introduced on 21 August 1985, and there has since been two workers compensation systems working in Victoria. Workers injured prior to 21 August 1985 continue to receive compensation pursuant to the Workers Compensation Act 1958, while those injured after this date will receive compensation pursuant to the 1985 Act.

429 The legislation is supported by the Accident Compensation Regulations 2001. Other legislation includes the Accident Compensation (WorkCover Insurance) Act 1993, which provides for compulsory WorkCover insurance for employers.

430 For the present purposes, our commentary is on the 1985 Act.

How are psychological injuries defined in the legislation?

431 Section 5 of the Act states:

'(1) ...

'injury' means any physical or mental injury and, without limiting the generality of that definition, includes—

(a) industrial deafness;

(b) a disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment);

(c) a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease;

...

(1A) For the purposes of the definition of 'injury', the employment of a worker shall be taken to include any travelling or other circumstances referred to in section 83 other than sub-section (1)(a).'
Section 5(1) also states:

'disease' includes—

(a) any physical or mental ailment, disorder, defect or morbid condition whether of sudden or gradual development; and

(b) the aggravation, acceleration, exacerbation or recurrence of any pre-existing disease.'

A psychological injury that is:

- a 'mental injury'; or
- a 'mental ailment, disorder, defect or morbid condition' that is 'contracted by the worker in the course of the worker's employment'; or
- the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing mental injury or disease,
- is an injury under the Act and may be compensable.

How have courts in each jurisdiction interpreted those definitions?

There is limited discussion by the courts on the extent of the meaning of 'injury'. The onus is on the worker to show that there is an 'injury' as defined in the Act. This will require sufficient medical evidence to show some kind of mental injury or disease. Specific diagnosis is not necessarily required, so long as medical opinion shows some form of abnormality. For example, a diagnosis by all treating psychiatrists in Wilson v State of Victoria [2005] VCC 344 of post-traumatic stress disorder was not required, as it was clear to Judge Millane that the worker was suffering from a psychiatric injury given the symptoms suffered by the worker and described by the experts.

Kennedy Cleaning Services Pty Ltd v Petkoska (2000) 200 CLR 286 said an 'injury' is 'a sudden or identifiable physiological change', or 'sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state'. In Linfox Transport (Aust) Pty Ltd & Anor v Toohey [2004] VSCA 233, this interpretation of 'injury' was accepted and held to apply to the current legislation. In Linfox, the worker's argument that a change to normal functioning of the leg or sexual organs is sufficient to be an 'injury' was rejected. The change to normal functioning was an impairment that resulted from the initial injury to the lower back, and were not injuries by themselves.

If there is a dispute as to whether the worker suffers from an 'injury' as defined in section 5(1), the County Court (which includes the Magistrate's Court), may refer the question to a Medical Panel for an opinion. If one party requests, the County Court must refer the question to a Medical Panel. A Medical Panel can, among other questions, provide an opinion on the nature of a worker's medical condition relevant to an injury or alleged injury, and the opinion must be accepted by the Court as the answer to that question. This means that where the existence of a psychological injury or disease is disputed by a party, the decision will be made by a Medical Panel rather than by the courts.
Usually, the issue of whether a worker suffers from an 'injury' will be disputed on the basis of employment contribution. For a disease to be an 'injury' it must be contracted in the course of employment. Where there is medical evidence of symptoms of a psychological condition, the employer often argues that the condition was not contracted in the course of employment.

Have there been, over time, changes from the interpretation of psychological injuries?

Following the Accident Compensation (WorkCover) Act 1992, the employment contribution requirement for a disease, or the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease was amended from a 'contributing factor'. This amendment remains in the current legislation, in section 82(2C) (extracted below).

Aside from this amendment, there is little evidence of significant changes in the interpretation of psychological injuries.

What are the legislative tests to determine whether a psychological injury exists?

(a) employment

The injury in respect of which compensation is payable must arise 'out of or in the course of any employment' (section 82(1) Accident Compensation Act 1985).

An 'injury' must arise out of or in the course of employment for entitlement to compensation to arise. Section 82(1) states:

'If there is caused to a worker an injury arising out of or in the course of any employment, the worker shall be entitled to compensation in accordance with this Act.'

Before WorkCover amendments, which commenced on 1 December 1992, in order to gain compensation for 'injury' a worker had only to prove that the injury arose out of, or in the course of, employment (ie there was no need for a causal relationship between the nature of the employment and the occurrence of the injury). If, however, a worker contracted a disease he or she had to be able to establish some causal connection between the contraction or aggravation of the disease and the employment. The determination of this issue was especially relevant to the journey provisions. These provisions ensured that workers were entitled to compensation where they sustained an injury travelling to and from work. During such trips workers may be incapacitated by a disease which is unconnected with their employment. In these cases, therefore, any requirement on a worker to establish a causal connection between the employment and the disease would be fatal to their claim.

Section 83 states:

'(1) An injury to a worker is deemed to arise out of or in the course of employment for the purposes of section 82(1) and 82(2) if the injury occurs:

(a) while the worker on any working day that the worker attended at the place of
employment having been present at the place of employment is temporarily absent on that day during any authorised recess and does not during that absence voluntarily subject himself of herself to any abnormal risk of injury;

(b) while the worker is, having regard to the nature of the worker's employment or any specific task which may require the worker to travel, travelling for the purposes of the worker's employment;

(c) while the worker is in attendance at any school for the purposes of any trade, technical or other training which the worker is required to attend by the terms of his or her employment or as an apprentice or which the worker is expected to attend by the employer; and

(d) while the worker is in attendance at any place for the purpose of obtaining a medical certificate, receiving medical, surgical or hospital advice, attention or treatment, receiving a personal and household service or an occupation rehabilitation service or receiving a payment of compensation in connection with any injury for which the worker is entitled to receive compensation or for the purpose of submitting to a medical examination required by or under this Act.'

444 Subsection (2) states:

'For the purposes of this section:

(a) 'place of employment' where there is no fixed place of employment includes the whole area, scope or ambit of employment;

(b) 'travelling for the purposes of a worker's employment' does not include travelling to and from the worker's place of employment or the places referred to in subsections (1)(c) and (1)(d);

(c) an injury incurred while 'travelling for the purposes of a worker's employment' is deemed not to have arisen out of or in the course of any employment if the injury occurred during or after any substantial interruption of or substantial deviation from the worker's journey made for a reason unconnected with his or her employment;

(d) an injury is deemed to arise out of or in the course of employment even though at the time that the injury happened the worker was:

(i) acting in contravention of any regulation (whether by or under an Act or otherwise) applicable to the work; or

(ii) acting without instructions from the employer— if the act was done by the worker for the purposes of and in connection with the employer's trade or business.'
From 1 December 1992 to 2 December 2003 entitlement to compensation under the Accident Compensation Act 1985 depended on the injury arising out of or in the course of any employment, but only if the worker's employment was a significant contributing factor (s 82(1)) (see 37-758). Clearly, this requirement narrowed the field of entitlement. It was removed when amendments were made by the Accident Compensation and Transport Accident Acts (Amended) Act 2003, commencing on 3 December 2003. The 2003 amending Act removed the reference to employment being a significant contributing factor, except in the case of heart attack and stroke injuries, diseases caught in the course of employment, and continuing injuries and diseases.

Under section 82(2), if the injury 'results in or materially contributes to the death of the worker', the worker's dependants are entitled to compensation.

Section 82(2C) states:

'Compensation is not payable in respect of the following injuries unless the worker's employment was a significant contributing factor to the injury-

...  
(b) a disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment);

(c) a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.'

This means that in relation to injuries that are diseases or the recurrence, aggravation, acceleration, exacerbation or deterioration of an injury or disease, it must arise out of or in the course of employment, and the employment must be a 'significant contributing factor'.

Section 5(1B) states:

'In determining for the purposes of this Act whether a worker's employment was a 'significant contributing factor' to an injury—

(a) the duration of the worker's current employment; and

(b) the nature of the work performed; and

(c) the particular tasks of the employment; and

(d) the probable development of the injury occurring if that employment had not taken place; and

(e) the existence of any hereditary risks; and

(f) the life-style of the worker; and

(g) the activities of the worker outside the workplace—

must be taken into account.'

In Ericsson (Australia) Pty Ltd v Popovski [2000] VSCA 52, the worker claimed that she suffered from a morbid grief reaction, or a post-traumatic stress disorder as a result of her mistaken belief that she had, through working with a 'Kester' solder, suffered from lead poisoning which had led to the death of her child. This claim was rejected by the magistrate at first instance. The magistrate found that the plaintiff had sustained an injury, a morbid grief
reaction to the death of her son, with associated moderately severe depression. He concluded that the injury arose in the course of the employment, but was not satisfied that the employment was a significant contributing factor, as required by section 82(1). The worker argued that since the Magistrate found that the worker would probably not have suffered the injury without the employment, it should follow that the employment was a significant contributing factor.

The Magistrate at first instance stated:

'...the use of the words 'contributing factor' recognises that an injury may be caused by more than one factor. The inclusion of 'significant' means that where there is more than one factor involved and one of them is the worker's employment then its importance needs to be gauged. That is, whether it is a significant contributing factor or not. There may be more than one factor which is significant and one factor may be more significant than another but the question remains whether the worker's employment is a significant contributing factor to the causation of his or her injury. It may be of lesser significance than another but nevertheless satisfies the description of 'significant' ...

I do not consider that the plaintiff's employment with the defendant was a significant contributing factor to her injury. The employment was responsible for two things - her use of solder and her reading of a warning on a packet. The evidence does not establish the employment caused the death of her son. ... The link between the employment and her injury is tenuous and falls short of constituting a significant contributing factor.'

Justice Brooking, in affirming the Magistrate's decision, stated:

'Whether the employment was a significant contributing factor was a question of degree, requiring an evaluation. ...

I do not think it correct to say, either as a proposition of general application or as one confined to the facts of this case, that a finding that the injury would not have been caused to the worker if the employment had not taken place necessitates a finding of 'significant contributing factor.'

This confirms that despite a positive result using a 'but-for' test, it does not necessarily follow that the employment was a significant contributing factor. What is required is an evaluation of the contributing factors and assessment of whether the employment is 'significant'.

What exclusionary provisions apply to psychological injuries?

There are many exclusionary provisions that apply to injuries generally under the Act, and specifically in relation to psychological injuries. These include:

(a) illness or disorder of the mind caused by stress: section 82(2A);
(b) self-inflicted injuries: section 82(3);
(c) serious and wilful misconduct: section 82(4); or
(d) failure to disclose or false disclosure: section 82(7).
(a) Illness or disorder of the mind caused by stress

Section 82(2A) provides:

'Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from—

(a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or

(b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or

(c) an expectation of the taking of such action or making of such a decision.'

In State of Victoria v Blythman [1999] VSC 498 (Blythman), the worker was a police officer who claimed compensation for mental stress brought on by 'unjustified... victimising intervention of his superiors' during five episodes, which included allegations of bribery, impropriety and collusion to pervert justice. Section 82(2A) was argued by the employer and rejected by the Magistrate.

Justice Nathan of the Supreme Court agreed with the Magistrate that:

'Any investigations carried out by the defendant, any interviews carried out by the defendant, with the plaintiff does not come within the concept of disciplinary action as alluded to and referred to in part (a) [of section 82(2A)].'

His Honour continued:

'To summarise, in sub-part(a), stress related to discipline, dismissal or retrenchment; in sub-part(b) stress related to lack of promotion or transfer etc.; and sub-part(c) stress related to the expectation that one of the events defined in parts (a) and (b) might befall the worker.'

In relation to paragraph (c) of section 82(2A), he held that:

'The word 'expectation' in the sub-section must be interpreted subjectively. It is the expectation of the worker whether or not one of the defined events might occur, which must be ascertained. If the worker had that expectation, and that expectation itself induced, or predominantly did so, the stress, then the employer would be excused from the obligation to pay compensation if the resultant stress was incapacitating.

... The proper construction of s.82A(2)(a)-(c) obligated the police service to establish that Blythman's stress arose either wholly or predominantly because of the expectation that one or all of the types of events details in parts (a) and (b) might confront him. It did not do so.'

In Blythman the worker suffered stress from episodes that occurred at work, and he went on sick leave due to this stress. While on leave, he was informed that interviews and investigations would occur when he returned to work. Accordingly, the stress did not occur because of the expectation of action to be taken when he returned, but the stress had already occurred before the worker would have had the excluded expectation. Therefore the section did not apply.
(b) self-inflicted injuries

Compensation is not payable where it is proved that the worker's injury was deliberately self-inflicted, whether or not intended. However, this does not necessarily mean that suicide is not compensable.

(c) serious and wilful misconduct

If it is proved that the injury to the worker was attributable to the worker's serious and wilful misconduct (including being under the influence of intoxicating liquor or drug within the meaning of the Road Safety Act 1986) compensation is not payable (subsections 82(4) and (4A)).

'Serious and wilful misconduct' is defined to include: committing an offence under section 318 (1) of Crimes Act in relation to driving a car; committing an offence in respect of driving a motor vehicle under section 49(1)9a), (c), (d), or (e) or section 56(7) of the Road Safety Act 1986; and committing an offence in respect of driving a motor vehicle under section 49(1)(b), (f) or (g) if the blood alcohol level was 0.24 or more.

Note that where the injury results in death or serious and permanent disablement the disentitlement does not apply (section 82(5)).

(d) failure to disclose or false and misleading disclosure

On 29 June 1998 subsections (7) – (9) were added to section 82 of the Accident Compensation Act 1985. These provisions operate in certain circumstances to deny compensation. If the worker had a pre-existing injury or disease and was aware of it before commencing the employment, section 82(7)(a) will operate to preclude him or her from compensation. The employer must, in writing, have requested disclosure of a pre-existing condition. If the worker fails to make the disclosure he or she will have made a false or misleading disclosure pursuant to section 82(7)(c).

B. Secondary Psychological Injuries

How are secondary psychological injuries treated?

Secondary psychological injuries are treated the same as primary injuries so long as they are causally related to the employment (ie the primary injury).

Secondary injuries are often considered in the context of section 135, which governs actions for common law damages in respect of a 'serious injury'. Where there are multiple injuries that impair separate body functions, they cannot be aggregated to satisfy the definition of 'serious injury'. If however, the impairments to different body functions result from one and the same injury, they may be aggregated together (see To Ha Lu v. Mediterranean Shoes Pty. Ltd. & Ors (unreported decision of the Victorian Court of Appeal, Winneke P, Buchanan and Chernov JJA, handed down 4 May 2000)). In Richards and Transport Accident Commission v. Wylie [2000] VSCA 50, a worker had to prove that there was a physical or an organic basis which was not only enough to trigger a psychological reaction, but also sufficient to continue and propagate
the continuing symptoms which in turn resulted in a genuine psychological response to a real injury.

463 In *Linfox v Toohery* [2004] VSCA 233 a worker suffered an injury to his lower back in course of his employment. The worker developed later symptoms of sexual dysfunction, stress and anxiety. The Court considered whether they were separate injuries or secondary consequences of the first injury. The Court held that loss of function to right leg and sexual organs were not separate injuries as they did not involve sudden physiological change. Therefore the impairments arose from original injury and were compensable as part of that.

**What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?**

464 To determine liability in respect of a secondary psychological condition, the following questions arise:

- does the worker suffer from a psychological injury as defined by section 5 of the Act;
- whether the worker can establish that it is a ‘secondary psychological injury’ to the original work related injury (physical injury) (which is compensable in accordance with the Act – compensable injury);
- if so, whether the psychological condition was 'substantially contributed to' by the compensable injury (that is, it was caused by the injuries for which the employer was responsible and not by other matters for which the employer was not liable), pursuant to section 82 of the Act; and
- if so, whether that contribution was excluded, pursuant to section 82 (2A) of the Act.

**Are there any exclusionary provisions for secondary psychological conditions?**

465 The same exclusionary provisions as above apply.

466 In addition to above, pursuant to section 91, secondary psychological conditions are not entitled to receive permanent impairment compensation.

467 Section 91 of the Act, assessing degree of impairment, states:

'(2) In assessing a degree of impairment under subs(1), regard must not be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury.'
A. Psychological Injuries Generally - Legislation And Interpretation

What legislation is in force and what supporting instruments such as regulations affect those laws?

468 The primary piece of legislation is the *Workers’ Compensation and Injury Management Act 1981* (Act). This Act amended and consolidated the law in relation to workers’ compensation in Western Australia, providing for compensation, management and rehabilitation of employment-related injuries, dispute resolution, and the establishment of the Workcover Authority. Prior to 2004, it was known as the *Workers Compensation and Rehabilitation Act 1981*.

469 The Act is supported by the *Workers’ Compensation and Injury Management Regulations 1982*. These prescribe the form for notice under the Act, and deal with other issues such as costs and procedural requirements for example, for medical assessments. Until 2004, the Regulations were called the *Workers’ Compensation and Rehabilitation Regulations 1982*.

470 Other legislation includes the *Workers’ Compensation and Injury Management (Acts of Terrorism) Act 2001* which deals with the liability of employers in relation to acts of terrorism, and has associated regulations. Also, the *Workers’ Compensation and Injury Management (Common Law Proceedings) Act 2004* covers the award of damages to workers under the common law.

How are psychological injuries defined in the legislation?

471 Section s 5(1) states:

*i injury means -

(a) a personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions;

(b) a disease because of which an injury occurs under section 32 or 33;

(c) a disease contracted by the worker in the course of his employment, at or away from his place of employment and to which the employment was a contributing factor and contributed to a significant degree;

(d) the recurrence, aggravation or acceleration of any pre-existing disease where the employment was a contributing factor to that recurrence, aggravation or acceleration and contributed to a significant degree; or

(e) a loss of function that occurs in the circumstances mentioned in section 49,

but does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in subsection (4) unless the matter
Section 5(1) also states:

'disease includes any physical or mental ailment, disorder, defect or morbid condition whether of sudden or gradual development.'

Subsections (a), (c) and (d) of the definition of 'injury' are relevant to psychological injuries. A psychological injury is a 'disease' under the Act, and hence will be an injury within the meaning of paragraph (c) provided the required connection with employment is present. Similarly, the recurrence, aggravation or acceleration of a pre-existing psychological disease will be an injury under paragraph (d), provided the employment contribution is sufficient.

The terms 'psychological' and 'psychiatric' are not defined in the Act.

**How have courts in each jurisdiction interpreted those definitions?**

The question of whether a worker suffers from a 'disease', being a mental ailment, disorder, defect or morbid condition, generally turns on the medical evidence. If there is clear evidence of mental symptoms, it is likely to fall within the broad definition of 'disease'. Where there is conflicting medical opinion, questions regarding the nature or extent of the injury are referred to a medical assessment panel for review. This panel determines what condition, if any, the worker is suffering from and the extent of that condition. This determination is binding on the courts and review officers, who then consider whether the employment contribution is satisfied and the condition is an 'injury' under the Act.

In *State of Western Australia v Sucy Mathai* WASC (unreported, 4 Dec 1987) (*Mathai*) the Full Court noted that 'disease' is given an expanded meaning by section 5(1). The majority upheld the Workers' Compensation Board's finding that the respondent's 'abnormal degree of insecurity and anxiety' was a morbid condition, established by evidence of the symptoms, and was therefore a 'disease' within the meaning of section 5(1). Chief Justice Burt said:

'It was an autogenous condition of the mind which manifested itself in symptoms which rendered the respondent incapable of working because she was incapable of accommodating herself to the conditions of the workplace. The existence of the condition and that it was a morbid condition is established by the symptoms because as one cannot conceive of the mind apart from its functioning, (one) cannot conceive of it as being disordered or diseased apart from its manifestly disordered functioning'; see *Federal Broom Co. Pty. Ltd. v Semlitch* (1964) 110 CLR 626, at p. 637 per Windeyer J.

On the facts of this case the behaviour of the respondent since 1980 clearly manifested a disordered functioning of her mind and I think that the Board was correct in holding that she had a 'disease' within the meaning of the Act.'
If there is evidence of 'disordered functioning of the mind', the worker is suffering from a 'disease' under the Act, regardless of specific diagnosis. This means that evidence of psychological symptoms may be sufficient to establish the presence of a 'disease' regardless of the actual diagnosis.

Note that the employer appellant in Mathai did not adduce any psychiatric evidence to contradict the worker, and therefore this case could be confined to its facts. Nevertheless, it demonstrates the breadth of the term 'disease' and the willingness of courts to allow undefined conditions to constitute a 'disease' under the Act. This aspect of the decision has not been subsequently reviewed, and hence the test for establishing a 'disease' remains focussed on evidence of symptoms showing a 'disordered functioning of the mind'.

In Kanowna Belle Goldmines v Feierabend [2003] WASCA 246 (Feierabend) it was confirmed that workers can show they have a psychological injury arising from a 'personal injury by accident' within paragraph (a) of the definition of 'injury' in section 5(1). The worker must show that the psychological injury was materially contributed to by a personal injury by accident within the meaning of paragraph (a) of the definition of 'injury'.

In Feierabend, the worker suffered from an injury to his right knee in the course of his employment, and for which liability was accepted and compensation paid as a personal injury by accident arising out of or in the course of employment. The worker then claimed that he developed depression as a result of the pain. Causation was the primary issue in the case, however the employer argued that since the worker was claiming for depression, being a 'disease', then it must be a fresh claim assessed under paragraphs (c) or (d) of the definition of 'injury' in section 5(1). Justice Parker said:

'It does not necessarily follow, however, that this is the only way in which a disease, being a mental ailment, disorder, defect or morbid condition or a recurrence, aggravation or acceleration of such a disease can be claimed pursuant to the Act. ... The effect of the use of the disjunctive is to indicate that each of the paragraphs (a) - (e) are intended to have separate and independent operation; they are to be read disjunctively. On that reading, if an incapacity for work of an employee is shown to 'result from' a personal injury by accident within the meaning of par (a), in the sense that the personal injury by accident is a material contributing cause [of the psychiatric condition] as indicated in these reasons, then that disability would be compensable by virtue of par (a), notwithstanding that it was also a disease as defined in s 5.'

Have there been, over time, changes from the interpretation of psychological injuries?

Until 14 November 2005, the Act provided compensation in respect of a 'disability' rather than an injury. The Workers' Compensation Reform Act 2004 merely changed terminology and the term 'injury' has the same definition as 'disability', covering injuries by accident and injuries by disease. Older case law therefore refers to the definition of 'disability' in section 5(1) of the Act. However the same tests apply for establishing injuries under the amended Act.

The legislature has only refined the employment contribution test following Mathai, but did not legislate to change the Court's interpretation of 'disease'.

98
This has resulted in a heavier onus on workers to show the employment connection in relation to stress claims, however the 'disease' element remains relatively easy to establish.

**What are the legislative tests to determine whether a psychological injury exists?**

**(a) employment**

483 A disease must be contracted by a worker in the course of employment at or away from the place of employment.

484 A psychological injury will not be an 'injury' within the meaning of s 5(1) unless the employment contribution has been established. Causation must be determined on its own facts, using a commonsense evaluation of the causal chain (see *Feierabend*).

485 For a psychological injury that results from a personal injury by accident under paragraph (a), the personal injury by accident must materially contribute to the psychological disease (*Feierabend*), and the personal injury by accident must arise out of or in the course of the employment, or whilst the worker is acting under the employer's instructions. The worker must show:

- a personal injury by accident arising out of or in the course of employment, or whilst the worker is acting under the employer's instructions; and

- the personal injury by accident was a material contributing cause of the psychological condition.

486 In *Benn v Education Department of WA* (unreported, CM 134/03), the Magistrate said that a personal injury by accident can be established by showing a physiological change of a sudden or unexpected nature, which has occurred in the course of employment or arisen while the worker was acting under the employer's instructions. Whether the personal injury by accident is a material contributing cause of the psychological condition will be determined as a matter of fact in light of the circumstances of the particular case when assessed by a commonsense evaluation of the causal chain (see *Feierabend*).

487 A psychological disease will have been contracted in the course of employment if it was contracted during the performance of the actual work that the worker is employed to do, or while doing activities that are incidental or ancillary to that work, that is, that are reasonably required in order for the worker to carry out their work: *Sealcorp Holdings v Riddle* (WASC unreported, 26 May 1995) ("Riddle").

488 Section 19(1) states:

'Without limiting the generality of section 18, a worker shall be treated as having suffered personal injury by accident arising out of or in the course of the worker's employment if the injury occurs -

(a) during the worker's attendance at a place for educational purposes if -
(i) the attendance is required by the worker's terms of employment or apprenticeship; or

(ii) the attendance is for the purpose of, or in connection with, the worker's employment with the employer and the employer agrees to the attendance;

(b) during the attendance at a place for treatment or attendance of a kind referred to in clause 17 of Schedule 1; or

(c) during the attendance at a place for the purpose of receiving payment of compensation to which the worker is entitled under this Act.'

489 Section 19(2) of the Act, referred to as journey provisions, states:

'A worker shall not be treated as having suffered personal injury by accident arising out of or in the course of the worker's employment if the worker suffers an injury -

(a) during a journey -

(i) between a place of residence of the worker and the worker's place of employment;

(ii) between a place of residence of the worker and a place mentioned in subsection (1); or

(iii) if the worker has more than one place of residence, between those places;

or

(b) during a journey arising out of or in the course of the worker's employment if the injury is incurred during, or after, any substantial interruption of, or substantial deviation from, the journey, made for any reason unconnected with the worker's employment or attendance mentioned in subsection (1).'

(b) material contribution

490 In the 1980's there was considerable alarm amongst employers following the decision in *Mathai*. This case was decided after the legislation was amended to include diseases of gradual onset, allowing stress claims to be more readily covered by the Act. The employer's appeal to the Supreme Court against the award of compensation for total incapacity for an 'abnormal degree of insecurity and anxiety' was dismissed. It was held that although domestic factors had caused this disease, the employment contributed to a recognisable degree (the test at the time) to the aggravation or acceleration of it, because adverse work reports given to the worker led to a 'mental breakdown'.

491 This led to legislative reforms imposing a stricter test for establishing liability, so that employment must contribute to a disease or aggravation of a disease to a significant degree, rather than to a recognisable degree. Further, exclusions for diseases caused by stress were imposed to limit the occasions when work-related stress can cause a compensable injury under the Act.

492 Section 5(1) states:

'injury means - …
The disease must therefore be contracted in the course of employment at or away from the place of employment; and the employment must be a significant contributing factor.

In relation to injuries that are diseases or the recurrence, aggravation or acceleration of a pre-existing disease, section 5(5) states:

'In determining whether the employment contributed, or contributed to a significant degree, to the contraction, recurrence, aggravation or acceleration of a disease for purposes of the definitions of 'injury' and 'relevant employment', the following shall be taken into account -

(a) the duration of the employment;
(b) the nature of, and particular tasks involved in, the employment;
(c) the likelihood of the contraction, recurrence, aggravation or acceleration of the disease occurring despite the employment;
(d) the existence of any hereditary factors in relation to the contraction, recurrence, aggravation or acceleration of the disease;
(e) matters affecting the worker's health generally; and
(f) activities of the worker not related to employment.'

The Court in Mokta v Metro Meat International Ltd [2005] WASCA 143 (Mokta) recently discussed the causation requirements for the contraction, recurrence, aggravation or acceleration of diseases. The facts of Mokta are complicated, however in short, the worker argued that the employment did not contribute to a significant degree to her neck and left upper limb injury so she could advance a common law claim.

The Court considered the case of Mathai, which was decided under the old test of contribution to a 'recognised degree', the Second Reading Speech for the 1993 amendment that changed the test to 'significant' contribution, and case law from other state compensation schemes that use the term 'significant'. The Court held that the word 'significant' means 'not insignificant', that is, the contribution must be material and not negligible.

Following Mokta, for employment to contribute to a psychological injury to a significant degree, the employment must be not insignificant, so that it is a material contributor to the injury.

What exclusionary provisions apply to psychological injuries?

Exclusionary provisions include:

(a) serious and wilful misconduct (section 22);
(b) wilful and false representation (section 79); or
(c) diseases caused by stress (sections 5(1) and 5(4)).

(a) serious and wilful misconduct

Section 22 of the Act provides that if it is proved that the disability of a worker is attributable to his or her voluntary consumption of alcoholic liquor or a drug addiction which impairs the proper functioning of his or her faculties, or failure, without reasonable excuse to use protective equipment, clothing or accessories provided or other serious wilful misconduct, any compensation claimed shall be disallowed unless the injury results in death or serious and permanent impairment.

The employer bears the onus of proving the worker's serious and wilful misconduct. Disobedience of an order by an employer prima facie constitutes misconduct (see Rowe v Reynolds & Anor (1910 12 WALR 75). If misconduct was deliberate, not merely a thoughtless act, then it will be held to be wilful. For misconduct to be serious, it must have a real tendency to increase either or both the likelihood of injury being caused or the extent of the injury should it be caused (see Richards v Faulls Pty Ltd (1971) WAR 129).

Whether or not a conduct amounts to 'serious and wilful misconduct' is a question of fact. To establish that the worker's injury is attributable to his or her serious and wilful misconduct does not require the employer to prove that the misconduct was the sole cause of the injury. It is enough to prove that the injury would not have occurred without the misconduct and was an actual result of it (see Richards v Faulls (above)).

In Riddle the worker was injured while trying to exit from a broken lift. The employer argued in the Supreme Court on appeal from a Board decision in favour of the worker that the worker engaged in serious and wilful misconduct when he exited the lift while it was stopped between floors. The Supreme Court upheld the Board's decision and found that although the action was unwise, there was nothing in the worker's conduct that amounted to serious and wilful misconduct under section 22 of the Act. There was evidence that the worker feared for his safety, and that considerable thought went into the action that was ultimately taken.

In Stoddart v Gates WASC (unreported, 18 September 1996), the worker failed to stop the truck he was driving at a railway crossing and collided with a train. He was convicted of an offence of absolute liability in South Australia for the failure to stop, and there was ample evidence that he was negligent. However, the Court considered that the failure to stop in the circumstances did not of itself amount to serious and wilful misconduct. Justice Pidgeon said:

'The courts, as I see it, have not attempted to define further the meaning of these words 'serious and wilful misconduct'. They are simple words. They are words with plain meaning, and it is a matter of determining, on the facts of each case, whether the conduct complained of comes within that ambit.'

The Court said the worker was not ignoring safe working standards imposed by his employer. His omission was in failing to stop the truck once he had heard the warning whistle from the train, which would have required a prompt reaction. There was no evidence that he had a state of mind that was aware of the risk and that he deliberately ignored it.
These cases indicate that more than negligence or risk-taking is required in order to establish serious or wilful misconduct. It would appear that conduct in the nature of intentionally ignoring mandatory directions is required for there to be serious or wilful misconduct.

(b) wilful and false representation

Section 79 of the Act provides that where it is proved that the worker has at the time of seeking employment wilfully and falsely represented himself as not having previously suffered from the injury, the worker may be disallowed any compensation.

(c) diseases caused by stress

The definition of 'injury' in section 5 of the Act provides that it does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in subsection (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer. Section 5(4) of the Act states:

'For the purposes of the definition of 'injury', the matters are as follows -

(a) the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment;

(b) the worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and

(c) the worker's expectation of -

(i) a matter; or

(ii) a decision by the employer in relation to a matter,

referred to in paragraph (a) or (b).'

This means that if the psychological injury is caused by stress resulting wholly or predominantly from these matters, then unless the employer's actions were unreasonable and harsh, the psychological injury will not be an injury under the Act and there is no liability to pay compensation.

It is clear that this exclusion applies to diseases that are claimed as injuries under paragraphs (c) or (d) of the definition of 'injury' in section 5(1) of the Act, ie, a disease or the aggravation of a pre-existing disease. However its application to a psychological injury that is materially contributed to by a personal injury by accident under paragraph (a) is unclear.

It would appear from the drafting of the section that the exclusions apply to all the categories of injury. It was argued by the employer appellant in Feierabend that s 5(4) of the Act would apply to all diseases for which a claim is made under the Act. The Court in that case however declined to comment on the application of s 5(4) of the Act to a disease that was materially contributed to by a personal injury by accident, and referred the matter to a review officer to determine whether there was a material contribution.
B. Secondary Psychological Injuries

How are secondary psychological injuries treated?

510 A worker suffering from a secondary psychological injury is unlikely to be able to prove the necessary employment contribution to the secondary injury if it is treated as a fresh claim under subsection 5(1) (c) or (d) of the definition of 'injury'. Therefore, the courts have allowed workers to claim for a secondary injury, that was materially contributed to by a personal injury by accident within the meaning of paragraph (a) (for example in Feierabend).

511 Feierabend involved a worker who suffered from a knee injury for which liability was accepted, and compensation paid, as a personal injury by accident in the course of employment. The worker later claimed that as a result of the knee injury, he developed depression. The employer argued in the Court of Appeal that to be compensable, the worker's secondary psychiatric condition must come within the scope of paragraph (c) or (d) of the definition of 'disability' (it is now 'injury'), and not be a disease caused by stress as excluded in section 5(4) of the Act.

512 The Court noted that this approach requires the incapacity of the worker to be approached as a fresh disability, which would give rise to a new liability in the employer to pay compensation. Justice Parker, having made the observations set out at paragraph 3.6 above, continued:

For these reasons it appears to me open to the respondent in this case, if he can do so, to demonstrate that his psychiatric condition is an aspect of his [injury] resulting from his 21 March 1997 injury, pursuant to par (a) of the definition of [injury]. For the reasons indicated, this will require that the respondent satisfy the review officer that the injury to his right knee in March 1997 was a material contributing cause of his psychiatric condition."

513 This means that the test for establishing whether a secondary condition will be an 'injury' under the Act is whether it was materially contributed to by a personal injury by accident arising out of or in the course of employment.

514 In the context of permanent impairment, psychological injuries are referred to in the Act in section 146 and Schedule 2. Section 146 of the Act states:

'In this Part -
...
secondary condition means a condition, whether psychological, psychiatric or sexual, that, although it may result from the injury or injuries concerned, arises as a secondary, or less direct, consequence of that injury or those injuries.'

What are the legislative tests to determine if a compensation entitlement exists in relation to secondary psychological injuries?

515 Section 18 of the Act states:

'If an injury of a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with Schedule 1.'
The question of whether liability to pay compensation arises in relation to a secondary injury depends on whether it 'results from' the employment, and consequently from the primary injury that occurred in the course of employment. The question to ask was stated in *Cole v P&O Ports Ltd* [2002] WASCA 157 (*Cole*) as whether the incapacity from the secondary injury resulted from or was caused by the primary physical injury sustained in the course of employment.

The Court in *Feierabend* rejected the claim that causation is a question of whether the primary injury was a direct or proximate cause, so that the secondary condition was a direct consequence of the physical injury. Instead, the courts confirmed the approach of the NSW Court of Appeal led by President Kirby in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452, who said:

'Whether death or incapacity results from a relevant work injury is a question of fact. ... What is required is a commonsense evaluation of the causal chain.'

The Western Australia decision in *Leggett v Argyle Diamonds Pty Ltd* [2000] WASCA 182 confirmed this approach, and cases including *Feierabend* and *Cole* have since followed.

In *Cole*, the worker suffered a knee injury in the course of employment, for which liability was accepted and compensation paid. As part of treatment for the knee injury, the worker was instructed to ride a bicycle. The worker suffered a fall from the bicycle, injuring his shoulder and was subsequently incapacitated for work due to this shoulder injury. The worker argued that the secondary shoulder condition resulted from the knee injury, because it was in the course of treatment for the knee injury that the secondary injury occurred. However the majority of the Court of Appeal refused leave to appeal from the Magistrate's denial of the claim. Justices Murray and Wheeler agreed with Magistrate Packingham and stated:

'The true question was simply whether the incapacity following the fall from the bicycle and the injury to the shoulder of the applicant resulted from or was caused by the disability in the form of the knee injury sustained in the course of the applicant's employment in February 2000. His worship [the Magistrate] said:

The causal connection to be examined is not that between the primary injury and the secondary injury, but between the primary injury and incapacity…'

The majority concluded that the incapacity for which the claim was made resulted only from the fall from the bicycle and the shoulder injury then received. It did not result from the injury to the worker's knee sustained at work months earlier. Justices Murray and Wheeler stated:

'This was a case, in our view, where slavish adherence to the 'but for' test would produce error.'

In *Feierabend* the Court held that the review officer applied an incorrect test of causation, using the notion of a direct or proximate cause. Instead, Justice Parker stated:

'Thus, where there is more than one possible cause of an incapacity it is sufficient for the purposes of the Act that the [injury] resulting from the work injury be a material contributing cause. That issue is to be determined as a matter of fact in light of the circumstances of the particular case when those
circumstances are assessed by a process of commonsense evaluation of the causal chain. It follows, of course, that there may be more than one cause contributing to an incapacity.'

520 Thus the work injury must be a material contributing cause of the incapacity when that incapacity is due to a secondary injury for a liability to pay compensation to arise.

Are there any exclusionary provisions for secondary psychological conditions?

521 The exclusionary provisions that apply in relation to primary psychological injuries similarly apply in relation to secondary psychological conditions.

522 Pursuant to section 146C of the Act, permanent impairment is not payable in respect of secondary psychological conditions. Section 146C of the Act states:

'(1) This section applies to an evaluation of a worker's degree of permanent whole of person impairment for the purposes of Part IV Division 2 Subdivision 3.

... 

(6) In evaluating the degree of permanent whole of person impairment of the worker, any secondary condition is to be disregarded.'
<table>
<thead>
<tr>
<th><strong>ATTACHMENT 1- TRENDS TABLE</strong></th>
<th><strong>ACT/ CTH/ NSW</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legislation</strong></td>
<td><strong>Australian Capital Territory</strong></td>
</tr>
<tr>
<td><strong>Definition of psychological injury</strong></td>
<td>Broad definition – mental injury (including stress) – section 4. Disease is defined as including any physical or mental ailment ….</td>
</tr>
<tr>
<td><strong>Courts interpretation of psychological injury</strong></td>
<td><strong>Zickar</strong> applies - stands for the proposition that a sudden physiological change leads to a personal injury.</td>
</tr>
<tr>
<td><strong>Changes in interpretation of psychological injury</strong></td>
<td>No substantial changes.</td>
</tr>
<tr>
<td><strong>Legislative test the psychological injury exists</strong></td>
<td>Compensation is payable in relation to a personal injury, if it arises out of or in the course of employment (section 30(1)). In respect of a disease, the injury is taken to have arisen out of or in the course of employment only if the employment substantially contributes to the injury (section 30(2)).</td>
</tr>
<tr>
<td><strong>Test to determine employment contribution to psychological injury</strong></td>
<td>Substantial contribution.</td>
</tr>
<tr>
<td><strong>Exclusionary provisions to psychological injuries</strong></td>
<td>Compensation is not payable if the condition arises as a result of:</td>
</tr>
<tr>
<td></td>
<td>(1) reasonable action taken or proposed to be taken by the employer in relation to any of the following:</td>
</tr>
<tr>
<td></td>
<td>• transfer</td>
</tr>
<tr>
<td></td>
<td>• demotion</td>
</tr>
<tr>
<td></td>
<td>• promotion</td>
</tr>
<tr>
<td></td>
<td>• performance</td>
</tr>
<tr>
<td></td>
<td>• discipline</td>
</tr>
<tr>
<td></td>
<td>• retrenchment</td>
</tr>
<tr>
<td></td>
<td>• dismissal</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Commonwealth</td>
</tr>
<tr>
<td>------------------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>(2) wilful and false representation; or</td>
<td></td>
</tr>
<tr>
<td>(3) intentionally self inflicted injury.</td>
<td></td>
</tr>
<tr>
<td><strong>Secondary psychological injuries – how are they treated?</strong></td>
<td>Compensable.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Legislative test to determine entitlement to secondary psychological injuries</strong></td>
<td>There must be a physical injury (work related) for a psychological injury to be compensable. Same tests as above, in relation to substantial contribution.</td>
</tr>
<tr>
<td><strong>Exclusionary provisions for secondary psychological injuries</strong></td>
<td>Same as above.</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Queensland</td>
</tr>
<tr>
<td>--------------------</td>
<td>------------</td>
</tr>
<tr>
<td><strong>Legislation</strong></td>
<td>Work Health Act 1986</td>
</tr>
<tr>
<td><strong>Definition of psychological injury</strong></td>
<td>Similar to Cwlth. Injury is defined to include mental injury and also a disease – section 3.</td>
</tr>
<tr>
<td><strong>Courts interpretation of psychological injury</strong></td>
<td>‘Physical injury’ means ‘physical hurt or harm or damage’; this connotes disturbance of the physiological state of the body - see Accident Compensation Commission v McIntosh [1991] 2 VR 253 at 256-7 per Murphy J. Physiological change is simply change to the functioning of the human body; compensable ‘physical injury’ embraces sudden and physiological change to which the employment was a contributing factor - see Kellaway v Broken Hill South Ltd (1944) 44 SR (NSW) 210 per Jordan CJ at 212 and Oates v Earl Fitzwilliam’s Collieries Coy [1939] 2 All ER 498 at 502.</td>
</tr>
<tr>
<td><strong>Changes in interpretation of psychological injury</strong></td>
<td>No significant changes.</td>
</tr>
<tr>
<td><strong>Legislative test the psychological injury exists</strong></td>
<td>The psychological injury must arise out of or in the course of employment – section 3.</td>
</tr>
<tr>
<td><strong>Test to determine employment contribution to psychological injury</strong></td>
<td>Material contribution.</td>
</tr>
<tr>
<td><strong>Exclusionary provisions to psychological injuries</strong></td>
<td>Compensation not payable if the injuries are due to: reasonable disciplinary action; failure to obtain promotion, transfer or benefit;</td>
</tr>
<tr>
<td>Secondary psychological injuries – how are they treated?</td>
<td>Northern Territory</td>
</tr>
<tr>
<td>---------------------------------------------------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>reasonable administrative action taken in connection with the employer's employment; deliberately self inflicted; or serious and wilful misconduct.</td>
<td>way employer; • the workers expectation or perception of reasonable management action; • action by an insurer in connection with the workers application for compensation; • intentionally self inflicted; or • serious and wilful misconduct.</td>
</tr>
</tbody>
</table>

|---------------------------------------------------------|--------------|--------------|--------------|

| Legislative test to determine entitlement to secondary psychological injuries | If psychiatric injury attributable to the original injury as a sequela without any intervening acts then it is likely to be compensable. | There must be an psychological injury, which is attributable to the original injury. Original injury being a significant cause of the secondary injury. | So long the employee's original injury made a material contribution (sufficient to be work related) and none of the exclusionary provisions apply, the secondary condition should be compensable. |

<p>| Exclusionary provisions for secondary psychological injuries | Same as above. | Same as above. | Same as above. |</p>
<table>
<thead>
<tr>
<th></th>
<th>South Australia</th>
<th>Tasmania</th>
<th>Victoria</th>
<th>Western Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition of psychological injury</strong></td>
<td>Disability means any physical or mental injury including a disease – section 3.</td>
<td>Injury is only defined as including a disease – section 3. Disease is defined as any ailment ...</td>
<td>Injury means mental injury and includes a disease – section 5.</td>
<td>Injury means disease and disease includes any physical or mental ailment – section 5.</td>
</tr>
<tr>
<td><strong>Courts interpretation of psychological injury</strong></td>
<td>Zickar applies.</td>
<td>Unable to function normally in society.</td>
<td>Zickar applies - sudden or identifiable physiological change is an 'injury'.</td>
<td>Disordered functioning of the mind – Federal Broom v Semlitch.</td>
</tr>
<tr>
<td><strong>Changes in interpretation of psychological injury</strong></td>
<td>No significant changes.</td>
<td>Legislation has been amended to include &quot;illness of mind or disorder&quot; – no current cases on this amendment.</td>
<td>No significant changes.</td>
<td>No substantial changes.</td>
</tr>
<tr>
<td><strong>Legislative test the psychological injury exists</strong></td>
<td>A disability is compensable if it 'arises from employment'.</td>
<td>For a disease (being an injury) to be compensable, it must have arisen out of and in the course of employment – section 25. It is the only jurisdiction to retain the conjunction 'and'.</td>
<td>The psychological injury must arise out of or in the course of employment- section 82(1).</td>
<td>The psychological injury must arise out of or in the course of employment.</td>
</tr>
<tr>
<td><strong>Test to determine employment contribution to psychological injury</strong></td>
<td>Substantial cause.</td>
<td>Substantial degree – major or most significant factor.</td>
<td>Significant Contributing factor – section 82(2C) retained this element in respect of disease contracted in the course of employment.</td>
<td>Significant degree – section 5(5).</td>
</tr>
<tr>
<td><strong>Exclusionary provisions to psychological injuries</strong></td>
<td>Psychiatric disabilities are not compensable if the disability arose wholly or predominantly from: reasonable action taken in a reasonable way by employer to transfer, demote, discipline, counsel, retrench or dismiss the worker; a decision of the employer, based on reasonable grounds, not to award or provide a promotion; Compensation not payable in respect of a disease 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 compensation is not payable in respect of stress in the event the employer has: reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; A decision of the employer, on reasonable grounds, not to award or to</td>
<td>Compensation not payable in respect of stress in the event the employer has: willful and false representation serious and wilful misconduct Fraud and malingering disease caused dismissal, retrenchment, transfer ... etc worker not being promoted employers decision in relation to promotion, transfer</td>
<td>Compensation not payable if the injuries are due to: willful and false representation serious and wilful misconduct Fraud and malingering disease caused dismissal, retrenchment, transfer ... etc worker not being promoted employers decision in relation to promotion, transfer</td>
<td></td>
</tr>
<tr>
<td>South Australia</td>
<td>Tasmania</td>
<td>Victoria</td>
<td>Western Australia</td>
<td></td>
</tr>
<tr>
<td>--------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>-------------------</td>
<td></td>
</tr>
<tr>
<td>transfer or benefit in connection with employment;</td>
<td>provide a promotion, transfer or benefit in connection with a worker's employment;</td>
<td>provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or</td>
<td>etc.</td>
<td></td>
</tr>
<tr>
<td>• reasonable administrative action taken in connection with the employer's employment;</td>
<td>• reasonable administrative action take in a reasonable manner by an employer in connection with a worker's employment;</td>
<td>An expectation of the taking of such action or making of such a decision</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• reasonable action taken in a reasonable manner under the Act;</td>
<td>• the failure of an employer to take action of a type referred to in para (a), (b) or (c) in relation to a worker in connection with the worker's employment if there are reasonable grounds for not taking that action;</td>
<td>Also due to the following:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• misconduct; or</td>
<td>• reasonable action taken by an employer under the Act in a reasonable manner affecting a worker;</td>
<td>Self inflicted injuries;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• self inflicted.</td>
<td>• serious wilful misconduct;</td>
<td>Serious and wilful misconduct; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• intentional self inflicted injury; or</td>
<td>Failure to disclose or false disclosure</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• wilful and false representation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislative test to determine entitlement to secondary psychological injuries</td>
<td>There is a section specifically dealing with secondary disability or disease – section 32(2). Secondary arises from employment if it arises out of employment, or in the course of employment and the employment contributed to that disability.</td>
<td>There must be a psychological disease, which is attributable to the original injury caused by an accident. Original injury must contribute to the secondary injury to a substantial degree.</td>
<td>The test is whether the secondary condition was materially contributed to by a personal injury by accident arising out of or in the course of employment.</td>
<td></td>
</tr>
<tr>
<td>Exclusionary provisions for secondary psychological injuries</td>
<td>Same as above</td>
<td>Same as above</td>
<td>Same as above.</td>
<td></td>
</tr>
</tbody>
</table>
ATTACHMENT 2 – ABOUT THE AUTHORS

Professor Dennis Pearce

Professor Dennis Pearce is Australia’s foremost authority on the interpretation of legislation and one of the leading authorities on Commonwealth administrative law. Dennis has worked in Government in legislative drafting. His distinguished career as an academic based at ANU was interrupted by a substantial period as Commonwealth Ombudsman.

He has written Australia’s leading textbooks on Statutory Interpretation, Delegated Legislation and the Administrative Appeals Tribunal, and is editor of Butterworths Australian Administrative Law Service. His texts on administrative law and statutory interpretation are widely used and quoted reference works.

Dennis has considerable practical experience in conducting investigations, and making decisions and determinations as well as in advising those conducting investigations and making decisions on procedural fairness.

Dennis practises in the government industry. His practice concentrates on statutory interpretation and issues associated with parliament and the making of legislation, administrative law and intellectual property law. He has provided numerous advices to Phillips Fox government clients and private clients dealing with government.

Dennis has conducted a number of significant inquiries for Commonwealth agencies, including the Departments of Transport; Veterans’ Affairs; the Civil Aviation Safety Authority; Therapeutic Goods Administration. He has trained as a mediator.

Dennis was formerly Dean of the ANU Law Faculty and from 1988 to 1991 was the Commonwealth and Defence Force Ombudsman.

Qualifications

LLB University of Adelaide, Adelaide, 1960
LLM Australian National University, Canberra, 1968
PhD Australian National University, Canberra, 1979
Admission details

Barrister & Solicitor, Supreme Court of South Australia, Adelaide, 1963
Barrister & Solicitor High Court of Australia, 1963
Barrister & Solicitor of the Supreme Court ACT, 1961
Solicitor of the Supreme Court of NSW, 1991

Memberships

- Executive Member (and former National President) Australian Institute of Administrative Law
- Study of Parliament Group

Publications & presentations

Publications


Australian Administrative Law Service (Editor since 1979)


Administrative Appeals Tribunal (2003)

Presentations (selected)


‘Success at Court – Does the Client Win? (with Robin Creyke and John McMillan):


‘Conference Summary’ Tenth Australian Institute of Administrative Law Conference, 2000
Madhu Dubey

Madhu is a Senior Associate with Phillips Fox Canberra and specialises in workers' compensation law.

Madhu advises insurers, government agencies and departments on a variety of issues including risk management and workers' compensation. Areas of practice include litigation, workers' compensation law and administrative law.

Madhu has been involved in providing advice at a Federal Government level to Comcare, Military Rehabilitation and Compensation Commission for a number of years and more recently the Department of Defence. This advice has included all aspects of workers' compensation claims management; the primary determination stage, reviewable decision, ultimate Administrative Appeals Tribunal applications and general future conduct of a claim.

Madhu has litigated extensively in the Federal Administrative Appeals Tribunal and Federal Court. Madhu was also seconded to the Canberra office of the Department of Veterans' Affairs to assist the Director of Military Rehabilitation and Compensation in the management of safety, rehabilitation and compensation issues throughout Australia.

Qualifications

Bachelor of Commerce, Flinders University.

Bachelor of Law (LLB), University of Western Sydney

Graduate Diploma in Legal Practice, College of Law (Sydney).

Admission details

Supreme Court of New South Wales, January 2002

Supreme Court of the Australian Capital Territory, February 2002

High Court of Australia, February 2002
Memberships

- ACT Law Society

Publications & presentations

Madhu contributes to Compensation Snapshot, a firm publication dealing with recent developments in Workers Compensation and Administrative Appeals Tribunal.