**BULLYING / HARASSMENT**

**&**

**PSYCHIATRIC INJURY CLAIMS**


**2017 YEAR IN REVIEW**

**OLIVER T LESAGE - BARRISTER**

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1. The WorkSafe Victoria Guidance Note provides a definition of workplace bullying in the following terms:[1]

> "*Workplace bullying is repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety.*
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> *Within this definition 'unreasonable behaviour' means behaviour that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten;*
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> *'behaviour' includes actions of individuals or a group, and may involve using a system of work as a means of victimising, humiliating, undermining or threatening;*
> *'risk to health and safety' includes risk to the mental or physical health of the employee*."

[1] WorkSafe, *Your Guide to Workplace bullying – prevention and response*, (October 2012), p2 <https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0010/211006/ISBN-Workplace-bullying-prevention-response-2012-10.pdf>.

2. This definition recognises the relationship between conduct and the risk to health and safety, including to the risk of a psychiatric or psychological injury, and the definition has been adopted in previous decisions.[2]

**WorkCover**

3. An injured worker will typically start their litigation journey via a WorkCover claim. The worker shall be entitled to compensation if there is caused to a worker an injury arising out of or in the course of any employment.[3]

4. The case of *Clarke v National Mutual Life Insurance Ltd & Ors*,[4] provides an insight into principles of a "mental injury" in the context of bullying/harassment in this jurisdiction.

5. The *Clarke* decision concerned judicial review of the opinion of the Medical Panel. Cavanough J said this:[5]

> "*For a mental injury to "arise out of or in the course of any employment", it may be necessary that there be "real", as distinct from "imagined", events or circumstances at work which contribute to the worker's injury.*[6]
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> *However, as was held by the New South Wales Court of Appeal in State Transit Authority of New South Wales v Chemler,*[7] *the "egg shell psyche" principle may apply. Hence a misperception by the worker of the relevant events or circumstances will not necessarily disqualify him or her.*
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> *… As Basten JA said in State Transit Authority of New South Wales v Chemler,*[8] *in contrast to discrimination law, the proper focus in this context is the consequence of conduct on the claimant and not, even in*

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[2] See *Brown v Maurice Blackburn Cashman* (2013) 45 VR 22, 26 [14]; *Swan v Monash Law Book Co-operative* [2013] VSC 326, [150]; *Johnson v Box Hill Institute of TAFE* [2014] VSC 626, [211]; See also 'bullying' under *Fair Work Act* 2009 (Cth), s789FD(1).
[3] *Work Injury Rehabilitation and Compensation Act* 2013 (Vic), s 39(1).
[4] [2013] VSC 536.
[5] *Clarke v National Mutual Life Insurance Ltd & Ors* [2013] VSC 536, [56].
[6] Citing *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249, [32]-[56] per Spigelman CJ, [67]-[69] per Basten JA and [70] per Bryson AJA.
[7] Ibid.
[8] [2007] NSWCA 249 [69].

*a limited sense, the motivation, intention or other mental state of the co-worker or supervisor*."

6. In relation to defences, an employer will typically plead that there is no entitlement to compensation pursuant to s40 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 ("the WIRCA"). That is, that the injury is a mental injury caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer.

7. Section 40(7) of the WIRCA explains that "management action" includes (amongst other matters): appraisal; counselling; suspension or stand-down; disciplinary action; transfer of employment; demotion, redeployment or retrenchment; dismissal; training; and, investigation.

8. Causation is a question of fact to which the defendant has the evidentiary onus of establishing that the 'management action' was taken on reasonable grounds and in a reasonable manner, and if so, the worker has the legal onus of demonstrating that his/her condition did not arise wholly or predominantly from such action.

9. The case of *Krygsman-Yeates v State of Victoria* 4 November 2011,[9] explains that whether the employer took 'management action' on 'reasonable grounds' and in a 'reasonable manner' is to be assessed objectively after considering all the circumstances leading up to it being taken and the manner in which it is taken in a global context taking into account:

    - that the management action and the manner in which it is taken should not be irrational, absurd or ridiculous but moderate and fair; and
    - the judgement is whether the action taken was done "reasonably" not whether it could have been done more reasonably or in a different way more acceptable to the court; and
    - the action and the manner in which it is taken may be reasonable even if particular steps involved are not; and,
    - the action and the manner in which it is taken should be assessed at the time it is taken without the benefit of hindsight, taking into account the attributes and circumstances including the emotional state of the worker.

[9] See also *Beattie v Victoria* [1999] VCC 33.

*Jones v Gippsland Trucks* [2017] VMC 22 (1 December 2017)

10. The worker, an accounts clerk, submitted a claim for a psychiatric injury being an adjustment mood disorder with anxiety and depression occurring as a result of bullying/harassment in the workplace. There was no dispute that she suffered from the injury.

11. The worker's claim was rejected on grounds that the bullying/harassment did not occur and/or that compensation was not payable by virtue of the operation of s40(1) of the WIRCA.

12. The worker alleged that the conduct included:

- being sworn at;
- verbally abused;
- undermined and humiliated by her co-workers;
- that she was not provided with appropriate or adequate training for a planned future promotion; and
- that she received lack of support from senior management and co-workers.

13. Magistrate Garnett did not find the worker to be a credible witness. She was said to have embellished to further her cause. Notwithstanding the adverse findings on credit, Garnett found that the events at work over a period of time caused the worker to become frustrated, anxious and depressed resulting in her incapacity for work.

14. Her mental condition arose because:

- she became increasingly frustrated with the delay in the retirement of a colleague, which would have resulted in her being promoted;
- she believed that a colleague had been disrespectful to her in relation to an annual leave issue;
- she believed that the defendant employer generally failed to support her with her various disputes; and
- she felt disillusioned, disappointed and betrayed by the comments of her work colleagues to the investigator.

15. Accordingly, Magistrate Garnett found that the worker sustained a 'mental injury', which arose in the course of her employment with the defendant, but that it did not occur because of alleged bullying/harassment.

16. Magistrate Garnett held that the actions of management in attempting to resolve various conflicts fell within the definition of 'management action' under s40(7). However, given the findings in relation to her frustration, disillusionment and beliefs, her 'mental condition' was seen not to have been caused wholly or predominantly by the management actions of her relevant co-workers and/or management.

17. In the alternative, Magistrate Garnett did not consider her managers actions to be management action taken on reasonable grounds and in a reasonable manner, as various emails showed the workers frustration and upset, and responsibility was delegated to a colleague who was part of the problem. This action was said to have contributed to the worsening of the worker's fragile condition.

18. The worker was entitled to compensation.

**Serious Injury Applications**

19. The injured worker may progress to the stage of applying for leave to sue for common law damages for pain and suffering and economic loss under s326 of the WIRCA.[10]

20. For psychiatric injuries, the worker must bring the application pursuant to clause (c) of the definition of "serious injury" to be found in s325(1) of the WIRCA. There, "serious injury" is defined as meaning permanent severe mental or permanent severe behavioural disturbance or disorder. The word 'severe' is of stronger force to the word 'serious'.[11]

21. The psychiatric impairment must satisfy the "narrative test". That is, the consequences in relation to pain and suffering and loss of earning capacity must, when judged by comparison with other cases, in the range of possible mental or behavioural disturbances or disorders, be fairly described as being more than serious to the extent of being severe.[12]

[10] Or if prior to 1 July 2014 - *Accident Compensation Act* 1985 (Vic), s134AB.
[11] *Mobilio v Balliotis* [1998] 3 VR 833.
[12] WIRCA, s 325.

22. The weight to be attached to the worker's account of the pain experience will depend upon an assessment of the worker's credibility.[13] In a case involving psychiatric injury, the worker's credit is critical when there can be no real objective evidence to demonstrate the extent and nature of injury.[14]

*Eroglu v Australian Leisure and Hospitality Group Ltd* [2017] VCC 1674 (17 November 2017)

23. There was no dispute that the worker suffered a psychiatric injury during the course of her employment as a result of bullying/harassment while working as a bistro supervisor at the Sands Hotel.

24. The general consensus among doctors was that the worker was unfit for work on psychiatric grounds, having received a history from her that she was helpless, homebound and sedentary. That was until facebook material was provided to doctors, who changed their views dramatically and considered there was no work-related psychiatric incapacity.

25. The worker was cross-examined at length about numerous facebook entries and pictures relating to:

- a trip to Frankston beach;
- attending a child's birthday party;
- wearing Easter bunny ears at Easter;
- a trip to Moomba;
- various family celebrations;
- attending a concert at Rod Laver arena;
- roller skating;
- a trip to Bali; and
- a trip to the zoo.

26. Counsel for the defendant submitted that neither of the treators "would lightly express the opinion the plaintiff was deliberately attempting to deceive or feigning an illness". Whereas, counsel for the worker submitted that the facebook material could be explained as the family's attempts to try to socialise the worker.

[13] *Haden Engineering Pty Ltd v McKinnon* [2010] VSCA 69.
[14] *Jayatilake v Toyota Motor Corporation Australia Ltd* [2008] VSCA 167.

27. In Bourke J's view, the worker's facebook activities were inconsistent with her evidence of a significant level of psychiatric incapacity. Bourke J did not accept that the worker was simply posing for "happy snaps". Nor was it accepted that the facebook page was being used as a means of encouraging the worker to be more active. Rather, it was held that the workers level of activity and enjoyment shown in the photographs strongly contrasted with the picture of the helpless and homebound woman painted by her to medical examiners.

*Williamson v Energy Australia Services Pty Ltd* [2017] VCC 737 (13 June 2017)

28. The worker was responsible for inventory control and described himself as being "very disorganised". About a month into his job, he was subjected to criticisms from co-workers and tradesmen who would often call him "hopeless", "useless", "a piece of sh*t" and a "fat f*ck".

29. The worker complained to management who took no action. Rather, his manager told him that "we would all work together on the culture." The worker asked his manager where he stood, and the managers response was "up the creek without a paddle".

30. The worker began to experience sleep disturbance, headaches, stress and feelings of depression and irritability. His GP certified that he was unfit for work.

31. It was common ground that the worker suffered a psychiatric injury, being an "adjustment disorder with mixed anxiety and depressed mood". However, medical records showed that he was suffering from pre-existing stress and depression prior to his employment with symptoms relevant to his claimed injury such as mood swings, weight gain, irritability, and decreased energy.

32. The difference between the worker's pre-morbid psychological state and his presentation after his experiences with the employer were held to be much less marked than a comparison between a man of jovial temperament before, and one afflicted with a series of negative psychological features afterwards.

33. In addition, the suggestion that the worker was living the life of a recluse was rejected, as video surveillance showed him attending his sons' karate club. Accordingly, the worker's psychological injury did not meet the requisite description of "severe".

**Common Law**

34. Having passed through the serious injury gateway, the worker now has an opportunity to sue for common law damages.

35. Common law claims involving bullying frequently involve disputes in respect of reasonable foreseeability. The High Court outlined principles governing the assessment of reasonable foreseeability in *Koehler v Cerebos*:[15]

- The risk must not be farfetched or fanciful.
- The duty of care is owed to the particular employee with knowledge of their workload which is why it is significant to consider the nature and extent of work being done and any signs of the risk of psychiatric injury.
- The principle of 'normal fortitude' is not applicable when assessing the liability of employers.
- The duty of care is determined at the time the contract is entered into.
- The employer cannot be bound by information he or she later acquires about the vulnerability of a particular employee.

36. In *Koehler*, the worker was a salesperson. She raised concerns about the large territory that she was expected to cover. The employer failed to investigate the nature of the complaints and offered no assistance. The worker suffered a mental breakdown.

37. The High Court held that, although the employee had made complaints to the employer about her workload, those complaints did not put the employer on notice of her imminent psychiatric injury. That harm was not reasonably foreseeable and so a duty of care did not arise. The High Court found that the employee had agreed and was willing to try the work. There was no reason for the employer to suspect a risk of psychiatric injury, such as prolonged absences or health complaints.

[15] [2005] HCA 15.

38. In *Wearne v State of Victoria*,[16] Dixon J analysed the nature and content of a duty of care in a case involving bullying and whether there was a breach of the employer's duty. Dixon J referred to *New South Wales v Mannall*,[17] a case involving allegations of bullying, where the New South Wales Court of Appeal said *Koehler*: [18]

> "*... was a case where a reasonable person in the position of the employer would not have foreseen the risk of psychiatric injury to the employee. In the present case there was the evidence of actual notice of the foreseeability of mental breakdown; and there was much more than a psychiatric breakdown stemming from the inevitable parameters of the contract of employment...*"

39. In *Taylor v Haileybury*,[19] Beach J made a number of observations in relation to the risk of psychiatric injury. He noted that risk may be uncertain, and the steps taken to ameliorate it debatable as to their likely efficacy. He said complexities may arise as to when and how intervention by an employer to prevent mental illness should occur, and whether such intervention may successfully reduce the employee's workplace problems.[20]

40. In *Box Hill Institute of TAFE v Johnson*,[21] Forrest J referred to the following principles in determining the content of the employer's duty of care in respect of psychiatric injury:

> "*Where a proceeding is grounded in psychiatric injury arising out of the carrying out of work duties, careful analysis of the content of the duty of care is required before questions of breach are considered. Reasonable foreseeability of psychiatric injury to the particular employee alone is not sufficient to enliven the duty of care. Other relevant considerations as to whether a duty of care is enlivened include:*
>
> - *the contract of employment and obligations arising from it; and*

[16] [2017] VSC 25.
[17] [2005] NSWCA 367.
[18] *(Supra)* at paragraph [126].
[19] [2013] VSC 58.
[20] *(Supra)* at paragraph [116].
[21] [2014] VSC 626.

- *evident signs of an employee's inability to carry out work activities associated with the risk of psychiatric injury.*

*Absent those evident signs 'warning of the possibility of psychiatric injury', the employer is entitled to assume that the employee is capable of performing his or her job*."[22]

*Osmond v Highway Traffic Control Pty Ltd* [2017] VCC 1449 (27 October 2017)

41. The worker, a traffic controller, alleged that a co-worker made inappropriate sexual contact with her, made personal remarks, and acted in an inappropriate and sexual manner while they were working in the "middle of nowhere".

42. The co-worker denied all allegations. The co-worker provided the worker with his work telephone number, and private mobile telephone number. He offered for her to stay in his caravan, which contained two separate sleeping compartments, so that she would not have to drive the long-distance home. He said he had offered this to many other employees, including female employees. He said he always wore a singlet but denied purposefully leaving his shirt undone as a sexual gesture.

43. The worker claimed that the defendant was vicariously liable, as it failed to properly investigate the allegations. The worker alleged that she was inappropriately treated by senior management. In particular as to the nature and type of the work duties she was allocated after she made her complaint. She also said that despite being told that her complaint was confidential, it was leaked throughout the workplace. It was alleged that each of these failures constituted a breach of the employer's duty and caused the worker to suffer a major depressive disorder.

44. The employer said that if the co-worker was acting inappropriately, then he was acting outside the scope of his employment and it was not vicariously liable. The employer also claimed the psychological injury to the worker was not reasonably foreseeable in the circumstances.

[22] *(Supra)* at paragraph [406].

45. The credibility of the worker was put in issue. It was highlighted that she had failed to give evidence of her prior psychological difficulties, and had "downplayed" the severity of a previous back injury. The worker claimed to have told her husband and sister about the sexual assaults, but neither were called to give evidence at trial giving rise to an adverse inference.

46. O'Neill J had reservations about the worker's credibility. The worker was described as not regularly responding to questions in cross-examination in a straightforward and forthright manner. It was concluded that, at least in part, the distress she exhibited and the complete aversion to even the mention the co-worker's name, was an attempt to emphasise her condition.

47. The employer submitted that the higher Briginshaw standard of proof should apply given the gravity of the criminal allegations.[23] O'Neill J was not satisfied that a higher standard of proof was required and concluded that the co-worker touched the worker inappropriately and had made offers and comments that had a sexual connotation.

48. In relation to vicarious liability, O'Neill found that the conduct was an unprovoked and non-consensual sexual assault. While the employment gave the opportunity for the sexual conduct, it was otherwise unconnected with the co-worker's tasks and obligations. Accordingly, the employer was not vicariously liable.

49. In relation to the post-complaint circumstances, the employer gave evidence that her work was allocated in a manner to prevent contact with the co-worker together with the Easter break "slow down" imposed by union officials. O'Neill J generally accepted that the worker was not singled out, and that there was no breach in relation to the post-complaint work.

50. In relation to the handling of the complaint, there was evidence of a meeting that was arranged "speedily" post-complaint. The complaint was characterised by the employer as a "misunderstanding". The worker thought the meeting would be confidential, but she was later approached by another colleague who asked whether "she liked it". Others refused to work with her.

[23] See s140(2) of the *Evidence Act* 2008 (Vic).

51. Evidence was provided by a bullying expert in relation to: appropriate steps for the employer to convey to its employees the existence of a sexual harassment policy; whether the investigation undertaken after the complaint was appropriate; and, what assistance ought to have been provided to the worker while her allegations were being investigated.

52. The expert said it was important for the company to have a comprehensive sexual harassment policy, and that it be referred to in any initial training induction program and training manual to ensure an appropriate culture was engendered within the organisation.

53. The expert was critical of the investigation carried out by the employer, which was not independent and did not document witness interviews or circulate its findings to the parties. The expert referred to a lack of support provided to the worker during the investigation, and that she should not have been expected to attend a meeting where the perpetrator was present.

54. O'Neill J found that it must have been obvious to the employer that the worker's complaints could be truthful, and the possibility that she could suffer psychological injury as a result. It was held that once the employer was on notice of the worker's allegations, it owed her a duty to take reasonable care in investigating those allegations. O'Neill J said [at 131]:

> "*It was not a duty which required a standard of perfection. It was not a duty to act as a judge or jury and determine one way or another who was right and who was wrong on every issue. Nor was it a duty to be examined with the convenience of litigious hindsight. It was a duty to act reasonably in the circumstances, given what it knew of the allegations of the sexual conduct*."

55. There were several shortcomings in the investigation process. The investigation was not brought to any conclusion and, so far as the worker was concerned, was left unresolved. The employer ought to have ensured the complaint was kept confidential and should have taken better steps to provide support to the worker, including ensuring that she received adequate medical and psychological treatment, and availing her of a support person.

56. However, while there were some deficiencies in the investigation, they were not such as to constitute a breach of the employer's duty of care. The worker's claim was dismissed.

57. The worker, a DHS case manager, claimed to have suffered a psychiatric injury via:

- exposure to workplace bullying/harassment by her supervisor; and
- negligent supervision by management, who knew of her pre-existing psychological fragility and its cause, and of her susceptibility to suffer psychiatric harm.

58. The worker's tasks and work practices changed over time, and she experienced stressors transitioning to a new office location. She took stress leave prior to the alleged bullying. She began to feel overwhelmed at work and unsupported. At one point her job was 're-classified'. She was not encouraged to apply. This process effectively led to her colleagues being promoted around her, and the worker lodged a formal grievance. She was seconded which was a positive experience, but then she felt stressed about returning to the Department. In short, the Department knew that she was vulnerable to a psychiatric injury.

59. On her return from secondment, the worker struggled with new procedures and writing standards. Her supervisor began to criticise her work. The worker asked to move teams. The worker reported her concerns to management. Her performance continued to suffer. She began to feel anxious and depressed. The worker walked out of a meeting because she felt that she was 'not being heard', and friction began to develop between her and her supervisor. Dixon J concluded that the Department had at this point lost sight of the goal of creating a safe workplace environment.

60. The worker continued to work with various episodes of leave. She was criticised by her supervisor for:

- offering general advice to clients who were attending Court;
- failing to record her whereabouts on a whiteboard; and
- Her use of commas in reports.

61. The worker was left out of celebrations and conversations surrounding the supervisor becoming a grandmother. The worker's report writing continued to be an escalating source of friction. The worker interpreted this as the supervisor picking on her. The supervisor made

extensive corrections to reports that were identical to ones that had already been approved. The worker felt that the starting point was that she was always wrong.

62. Email correspondence from the Department provided evidence of its knowledge of a probable WorkCover claim, as the workers psychological vulnerability was described as ‘extreme’.

63. The worker inquired about using a service called ‘Kids Undercover’ to provide temporary caravan accommodation for one of her juvenile clients who was at risk of becoming homeless. She was met with what she perceived to be a very hostile and negative response from her supervisor which asked numerous questions. This left her feeling “devastated”. Whereas, the supervisor gave evidence that she was following protocols. Dixon J described the supervisors approach as aggressive interrogatories coupled with a frustrated demeanour.

64. The supervisor confronted the worker about a breach of client confidentiality. The worker provided evidence that she was chastised in front of colleagues in a loud and angry voice. The worker eventually suffered a mental breakdown and lodged a WorkCover claim.

65. Dixon J was not persuaded that the supervisors conduct fell within the definition of bullying, humiliation and/or harassment of the worker. The supervisor’s criticisms in respect of the report writing were not without basis and she had a duty to press for compliance with the Department’s expected practices. Whilst there was tension and conflict, the supervisor’s behaviour was not unreasonable in the relevant sense as it was expected by her employer and did not go so far as to contribute to a pattern of workplace bullying. Rather, the persistent report writing dispute was seen as one aspect of a broader interpersonal conflict.

66. Dixon J was satisfied that the supervisor gave feedback in the open plan office in a manner that caused embarrassment and humiliation to the worker and that contributed to her anxiety and stress. That said, Dixon J was not persuaded that the supervisor repeatedly engaged in unreasonable behaviour.

67. Dixon J accepted that the supervisor adopted a somewhat rigid approach to her role that became impractical in certain circumstances. The supervisor became frustrated at times. Those interactions, however, were not a pattern of repeated unreasonable conduct on her part and did not constitute workplace bullying.

68. The episodes of isolation were explained as interpersonal conflict between colleagues as opposed to instances of bullying.

69. In relation to the employer's duty of care, Dixon J was satisfied that the Department's duty to take care to ameliorate the risk of psychiatric injury in the course of her employment, particularly in the manner of supervision of her duties and her exposure to stress and anxiety through work tasks and interactions was enlivened. There was nothing in the terms of her employment that precluded that duty of care from arising. The content of the duty was to prevent the worker from suffering a psychological injury by taking such steps as were able to be taken in the circumstances. Those steps included but were not limited to:

- Moving the worker to the supervision of a different team leader;
- Developing and implementing an appropriate policy for receiving and appropriately handling complaints of bullying and serious interpersonal conflict;
- Finding a suitable alternative position for the worker that avoided the stressors affecting her;
- Changing the worker's working conditions;
- Adopting more pro-active solutions in respect of educating supervisors with the necessary skills to appropriately manage persons such as the worker; and,
- Adopting more pro-active solutions including counselling, training and professional development to assist the worker with work place change, report writing, acceptance of feedback and managing work stress.

70. It followed from the existence and scope of the duty that there was a reasonably foreseeable risk of injury to the worker.

71. In summary, Dixon J was satisfied that the defendant breached its duty of care by failing to take one or more of the following actions:

- Undertaken a formal investigation;
- Provide formal counselling;
- Provide the supervisor with training on how to deal with the worker's mental health concerns;
- Put in place a formal early intervention plan for occupational stress;

- Arrange formal mediation; and
- Move the worker to a different team.

72. The worker was entitled to damages flowing from these breaches.

**Insights**

73. In relation to WorkCover matters, the concept of reasonable management action continues to be applied flexibly. While the employer will not be held to the standard of perfection, the defence can be overcome where an employer has lacked sophistication in addressing the specific issues of bullying or has made silly errors in implementing actions. Conduct may attract s40 of the WIRCA, but it is still necessary for the employer to establish that the conduct caused the mental injury. The focus is on the worker's experience and beliefs and this should be reflected in pleadings and submissions when seeking to satisfy s39 of the WIRCA.

74. In relation to serious injury claims, credibility evidence continues to be critical in establishing the narrative test for serious injury that must meet the higher threshold of 'severe'. The presentation of a worker's case will hit obstacles when there is a perceived disconnect with his or her story relevant to psychiatric impairment. Tools such as supplementary affidavits and further reports from treating doctors may assist in salvaging credit. Medical evidence pre and post injury is vital to demonstrate a marked difference in psychiatric impairment to satisfy the test for serious injury.

75. In relation to common law claims, while the watermark post *Koehler* has arguably receded in respect of reasonable foreseeability, workers continue to face challenges in establishing negligence. Shortcomings in bullying investigations while being persuasive do not provide a basis for a *prima facie* breach. Co-workers who 'go rogue' can be harmful to a worker's case as the employer may not be held to be vicariously liable. It may be that the workplace conduct is repetitive and involves toxic interpersonal conflict that is permitted to fester, but this general state of affairs may not fall within the definition of bullying when each allegation is examined in isolation. Conduct that fails to land within the scope of bullying, however, does not prevent the employer from taking active measures to prevent a risk of psychiatric injury. Particularly when it is on notice of a vulnerable worker and reasonable steps are available. Any failures in this respect will attract negligence.

Date: March 2018

**O T Lesage**

Barrister
Owen Dixon Chambers West