



Photo by Lana Vshivkoff.

Employer's

failure to treat employee's post-traumatic stress disorder

POST-TRAUMATIC STRESS DISORDER (PTSD)¹

PTSD is an anxiety disorder which develops after exposure to an event involving actual or threatened death or serious injury to one's self or to another.

Traumatic events causing the disorder can include military combat, assault, hostage situations, natural disasters, car accidents, the diagnosis of a life threatening illness, sexual abuse, and witnessing domestic or community violence.

A person's response usually includes fear, helplessness, and reliving the event through flashback episodes and nightmares. These symptoms are often triggered by exposure to things reminiscent of the trauma.

The person is often emotionally numb



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to the outside world, with diminished interest in previous activities and estrangement from other people.

Symptoms usually begin within three months of the traumatic event, but there can be a delay of months or even years.

TREATMENTS FOR PTSD

Treatment usually involves critical incident stress debriefing,² cognitive behavioural therapy, medication and group treatment.

The purpose of critical incident stress debriefing, held 24 to 72 hours after the incident, is to provide information about normal responses to the relevant trauma.

It is also used to help identify individuals who may require follow-up counselling. There has been considerable debate among experts about the effectiveness of critical incident stress debriefing in ameliorating symptoms.³

Cognitive behavioural treatment involves treatment by a psychiatrist or psychologist to help the person gain control of ►

their fears and to cope with anxiety.¹ Medication may be used to reduce anxiety, depression and insomnia.

THE 'AVOIDANCE FACTOR'

In the weeks and months following the incident a person will often appear normal at work and may not seek help for symptoms not apparent in the workplace. This is called the 'avoidance factor'.

Workplace culture will often militate against any show of weakness, such as feelings of stress and anxiety. A competent psychologist will recognise a person's withdrawal from discussion about the incident, or 'emotional numbness', as evidence that they may require active monitoring and follow-up.

A psychologically injured worker is often too tired to ask for help.

ACTIVE FOLLOW-UP BY THE EMPLOYER

A follow-up typically involves a phone call by the psychologist retained by the employer to establish if there are persisting problems. At this time, it will be made clear to the person that they are welcome to attend an individual counselling session.

A letter with written information may also be provided. Further follow-up calls should be made after six months and again after 12 months.

CAUSE OF ACTION BASED ON A FAILURE TO TREAT

In most PTSD cases, it will be difficult to pursue action against an employer in negligence. These cases typically involve police officers, members of the armed services, members of emergency services, prison officers, or others whose day-to-day work necessarily involves exposure to traumatic events.

There are cases where the negligence of the employer caused the traumatic incident itself, such as the Voyager collision, but they are unusual.

In circumstances where there is no negligence on the part of the employer in relation to the traumatic event itself, there may be negligence in the employer's provision of post-event care.

RECENT CASES

There are several cases decided in recent years which provide an established framework for these claims. They have had varying outcomes for plaintiffs, depending on the expert evidence or lack of it. Expert evidence is sometimes the source of

strong disagreement, but the cause of action has been repeatedly affirmed.

HOWELL v SRA

In *Howell v SRA of New South Wales*, the plaintiff was employed as an assistant station master at Albury. He was called to inspect the scene of an accident where a woman had suicided by lying on a railway line in front of an approaching train.

The plaintiff developed PTSD. He brought proceedings against the employer based on an allegation of negligence in sending him to the scene, failing to keep him away from the deceased's remains, and failing to provide pre- and post-trauma counselling.

At first instance, the plaintiff succeeded before Abadee J on the basis of the employer's failure to provide post-trauma counselling. This judgment was the subject of appeals by both parties.

The Court of Appeal⁵ upheld the decision of Abadee J on the issue of liability, but ordered a new trial on the question of damages. It did so because it was unable to determine whether the assessment of damages had been made on the basis of the development of PTSD itself, or on the basis of the increased impact of the condition because of the lack of counselling.

Negligence of the Psychologist

The Court of Appeal's judgment is important in that it discusses the conduct of the psychologist retained by the employer to provide the plaintiff with debriefing and counselling.

The plaintiff failed to keep two appointments with the psychologist in the weeks following the incident. The psychologist made no further contact with the plaintiff.

Abadee J held that the psychologist should have recognised the possibility that the appointments were not kept because of the 'avoidance factor' associated with PTSD.

The Court of Appeal upheld this finding. Clarke JA said that 'having regard to the avoidance factor, it seems to me that non-attendance at appointments was the very kind of thing likely to happen and it was simply not good enough to do nothing'.⁶

The Court of Appeal also upheld the finding of Abadee J that the employer was responsible for the negligence of the psychologist it retained.

Newman J reheard the case on the question of damages.⁷ He had to determine whether or not proper treatment administered immediately after the event would have prevented or lessened the condition, had that treatment been provided.

Expert Evidence About the Impact of the Lack of Treatment

Professor McFarlane gave evidence that the plaintiff should have received cognitive behavioural treatment. His evidence was that such programs were available at the time of the accident in 1992 and were well known.

A program would help the person to manage their anxiety

Expert evidence is critical in establishing the impact of the failure to treat.

and would normally involve two sessions a week for six weeks.

The professor said there was a 70% chance that treatment would have resulted in the plaintiff being relatively symptom-free. His evidence was that the sooner treatment begins, the better the chance that secondary morbidities will be prevented.

Newman J accepted this evidence and damages worth \$613,293.90 were awarded.

NSW v SEEDSMAN

In *New South Wales v Seedsman*,⁸ the Court of Appeal dealt with a case involving a police officer suffering PTSD as a result of her exposure during the course of her work to crimes committed against children.

The court upheld the trial judge's decision that a reasonable employer would have foreseen the possibility that police officers attached to a unit dedicated to investigating crimes of physical violence against children would be likely to be

subjected to prolonged stress and, as a result, suffer from psychiatric disorders.

Employer Had No Policy

It was common ground that at the relevant time the police force had not taken any special steps in terms of training officers or monitoring the stresses imposed on individuals.

Expert Evidence About What the Employer Could Have Done

A psychologist provided evidence that there were a number of measures an employer should have implemented, including training, counselling, regular case management, debriefing sessions, and other forms of support.

The trial judge said: 'The expert evidence is sufficient to convince me that if the measures had been introduced, more probably than not she would not have suffered the psychiatric disorder resulting from stress.'⁹

The Court of Appeal held that it was open to the trial judge to make this finding.

NSW v COFFEY

In *State of NSW v Coffey*,¹⁰ the Court of Appeal dealt with a case involving a plaintiff who worked as a caretaker/manager at a block of housing commission flats from 1988 to 1996. ▶

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The distinction between the cause of PTSD, which is usually not actionable, and the failure to adequately treat it, which may be actionable, must be carefully considered.

During this time he was subjected to various threats from tenants and also witnessed a number of murders and suicides. He asked for security screens for his counter and for legal support, but got none. When he left, he was suffering from PTSD.

It was accepted that the defendant could have provided a grille over the counter and systematic counselling, but it did not do so. It did provide one counselling session. The plaintiff did not ask for further therapy.

Expert Evidence

Expert evidence was presented that training and counselling should have been provided. Expert evidence also showed that the lack of trauma counselling significantly contributed to the plaintiff's PTSD.

Citing *Bankstown Foundry v Braistina*,¹¹ the court held that the mere fact that the employer had a counselling service, which the plaintiff could access at will, did not absolve it from taking reasonable steps to ensure that a safe system of work was in place.

It added that 'a psychologically injured worker often either does not know of his condition or else is too tired to ask for it'.¹²

PIONEER CONSTRUCTION v MILLSOM¹³

In this case, the court held that there was no evidence to support the conclusion that the failure to provide counselling caused or contributed to the injury.

HIND v ATTORNEY-GENERAL (TASMANIA)¹⁴

In dealing with an application to extend time to institute proceedings, Cox J held that a police officer made out a *prima facie* case for PTSD based on an absence of counselling or treatment, which exacerbated the condition.

At the subsequent trial, Wright J dismissed the plaintiff's claim, saying he was unable to conclude that the plaintiff was traumatised by stress or that there was a breach by the employer in failing to make counselling available to him. This was especially so given there was no evidence that the plaintiff had actively sought such assistance and was refused it.¹⁵

STEPS FOR A SUCCESSFUL CLAIM BASED ON THE FAILURE TO TREAT

Expert evidence is critical in establishing the impact of the failure to treat. A psychiatrist and a psychologist should be retained, if they are not already treating the plaintiff. It is usually the psychologist who is involved in the debriefing and the cognitive behavioural therapy.

Expert evidence is also required to establish the usual practices adopted in similar organisations, and the practices adopted by competent psychiatrists or psychologists. Psychiatrists and psychologists working in this field are usually well qualified to give evidence about practices elsewhere in Australia.

The distinction between the cause of PTSD, which is usually not actionable, and the failure to adequately treat it, which may be actionable, must be carefully considered. The presentation of the case at trial needs to make this distinction clear at the outset of proceedings.

Discovery is vital. The employer will usually have a policy in place to deal with critical incidents. If there is no such policy, the case is stronger. Where there is a policy, it should be provided to the plaintiff's experts for comment. It may be inadequate, or if it is adequate, there may have been a departure from it in practice.

Care must be taken when establishing the plaintiff's history to determine what scope there may be for the defendant to raise other stresses in the plaintiff's life that cloud the causation issue. **PL**

Endnotes: **1** The definitions in this section of the paper are taken from the *Diagnostic and Statistical Manual of Mental Disorders* (4th Edition), American Psychiatric Association. **2** See for a thorough discussion of critical incident stress intervention Dr I Freckleton, *Journal of Law and Medicine* vol 6, 105-13. **3** See for example *Biological Psychiatry* (2003) 53(9) 817-26. **4** See for a more detailed description of this Professor McFarlane's evidence in *Howell v SRA of NSW* (1998) BC 9807759. **5** Judgment of Clarke, Cole JA, and Cohen AJA, 19th December 1996, BC 9606180. **6** at p 8. **7** Judgment of 7 May 1998, BC 9807759. **8** 12 May 2000, BC 200002477. **9** para 25. **10** 8th December 2002, [2002] NSWCA 361, Meagher JA, Heydon JA, and Ipp JA. **11** (1986) 160 CLR 301. **12** para 13. **13** 28 August 2002, BC 200204909. **14** 29 September 1995, BC 9506654. **15** [1999] TASSC133.