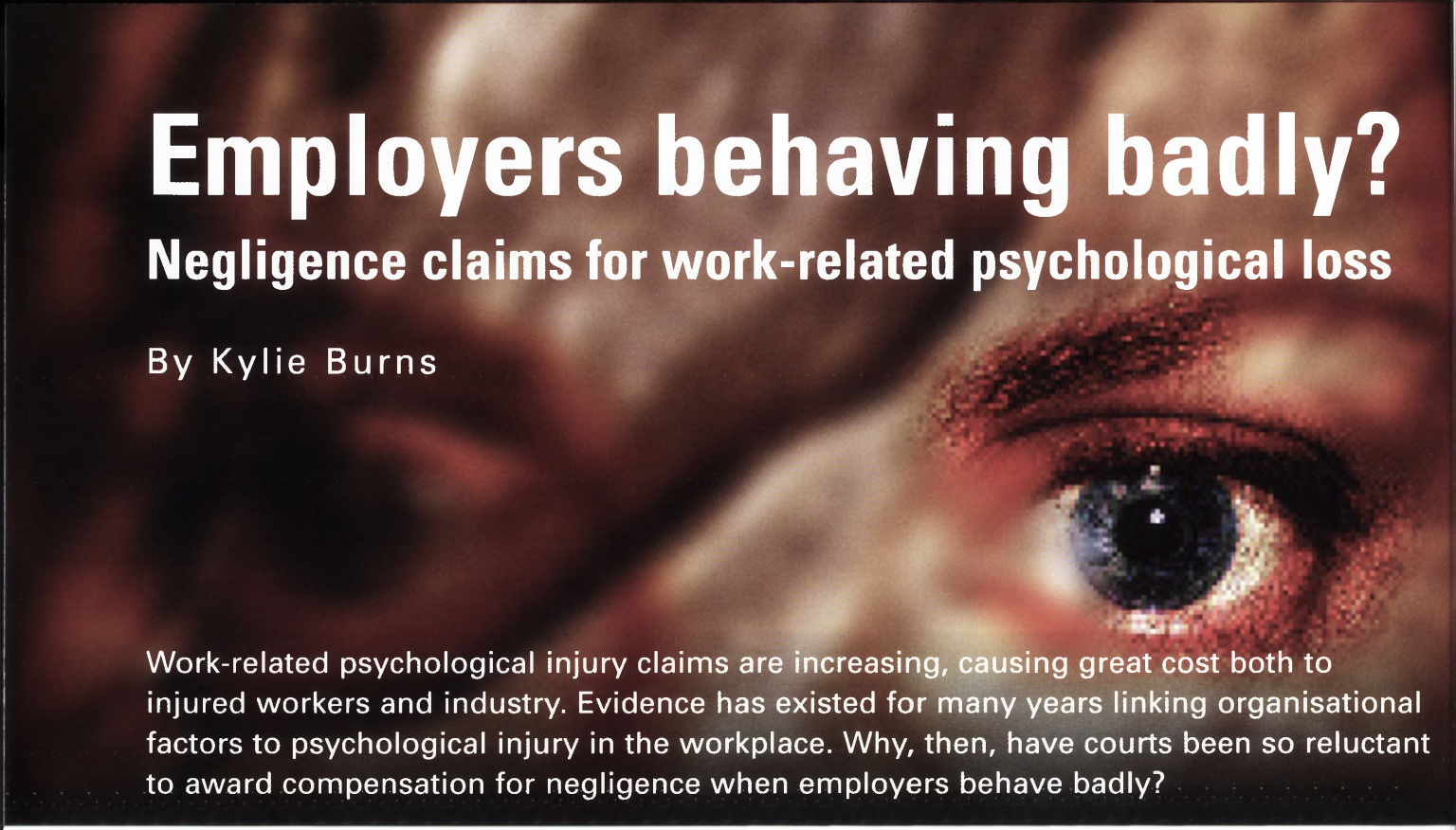

Employers behaving badly?

Negligence claims for work-related psychological loss

By Kylie Burns

Work-related psychological injury claims are increasing, causing great cost both to injured workers and industry. Evidence has existed for many years linking organisational factors to psychological injury in the workplace. Why, then, have courts been so reluctant to award compensation for negligence when employers behave badly?

Workplace-related diseases and injuries have significantly reduced in Australia over the last ten years. However, the rate of work-related psychological injury claims continues to grow.[1] The average cost of these claims is also very high. In 2003-2004, for example, 7% of work injury and disease claims against the Australian government were psychological injury claims.[2] However, these claims accounted for 27% of the total costs of all claims.[3] Both the rising incidence and costs of psychological injury claims make them a significant concern for Australian WorkCover authorities. Psychological claims are generally recoverable under state WorkCover statutory compensation schemes, but may be subject to limitations – particularly in relation to minimum impairment requirements, capping, and restrictions on recovery where the psychological loss is caused by reasonable management action.

Psychological loss claims may also be pursued in common-law actions.[4] These actions are traditionally brought in negligence, but also often include concurrent claims for breach of contract and breach of statutory duties under workplace health and safety legislation. Recent Australian cases, particularly *Koehler v Cerebos (Australia) Ltd*,[5] present significant barriers for plaintiffs who bring a negligence action. The cases also demonstrate that Australian courts have little understanding of contemporary research relating to the nature, significance, cost and causes of workplace-related psychological injuries.

PSYCHOLOGICAL INJURIES IN THE WORKPLACE

Psychological injuries in the workplace manifest in a whole range of recognised psychiatric disorders including depression, anxiety disorders and post-traumatic stress disorder. Research over the past 20 years links workplace stress to psychological injuries of employees.[6] Epidemiological and biological evidence shows the connection of workplace stress to both physical and psychological disorders.[7] However, not every employee suffering stress will suffer an injury.

Psychological injuries in the workplace are caused by a complex interplay of both individual and organisational (or psycho-social) factors.[8] Recent Australian caselaw, particularly *Koehler v Cerebos*, tends to focus predominantly on factors relating to individual employees, usually requiring them to exhibit explicit signs of susceptibility to injury. This focus minimises or ignores the very important role that organisational factors play in the development of an employee's psychological injury. In addition, courts often perceive injuries to be caused by individual susceptibility rather than by general working conditions. As evidenced in *Koehler,* courts also tend to treat psychological injuries caused by poor working conditions as idiosyncratic cases, unforeseeable by the average employer. These perceptions are clearly wrong, given the findings of a very large body of research in both medical and occupational health and safety disciplines. They also conflict with very detailed information found on Australian workplace health and safety and WorkCover websites. These websites provide employers with information relating to prevalence and causes of employee psychological injuries, and detail employers' responsibilities in relation to the provision of acceptable psycho-social working conditions.[9]

The UK's Health and Safety Executive (HSE) has developed a set of evidence- and research-based standards that detail the organisational factors in a workplace that may contribute to poor employee psychological health.[10] These standards assist employers in the UK to carry out risk assessment and risk management to ensure compliance with occupational health and safety legislation. The standards are based around a number of key areas: demands, control, support, relationships at work, role and change.[11]

'Demands' relates to the connection between injuries and issues such as excessive workload, poor work patterns (for example, excessive work intensity), and poor work environment.

'Control' relates to the extent that employees can control their work – lack of control may contribute to psychological injury.

'Support' relates to support by management including encouragement, provision of resources and support from colleagues and management. Poor support may contribute to poor psychological employee health.

'Relationships at work' deals with the promotion of positive and healthy work practices among employees and between employees and clients. It also involves dealing with unacceptable behaviours such as bullying and harassment. Poor inter-personal working relationships and bullying and harassment may contribute to employees' psychological injuries.

'Role' relates to the extent to which employees understand their own role and do not have conflicting roles. Poor understanding of role or multiple role conflicts may contribute to poor employee psychological health.

'Change' relates to how organisations manage and communicate change in the workplace. Poor management of change and poor communication may also contribute to poor employee psychological health.

International and Australian research also stresses the large costs to both injured people and organisations from workplace-related psychological injuries.[12] These costs include loss of income and medical costs for an injured person, and organisational costs such as loss of productivity and staff turnover. A survey of employees in the UK in 2004/2005 estimated that around 500,000 employees in Britain believed that work stress was making them ill that year, and that this resulted in 12.8 million working days lost per year.[13] In Australia, mental disorder claims result in the highest median number of days off work for injured employees of any category of workplace injury claim.[14]

EMPLOYEE PSYCHOLOGICAL INJURY IN THE AUSTRALIAN HIGH COURT

The Australian High Court recently considered employee psychological injury claims in *Koehler v Cerebos (Australia) Limited*, the last in a series of cases where the Court has re-examined the law of psychological loss negligence in Australia.[15]

Nuha Koehler (Koehler) was employed full-time as a sales representative for Cerebos (Australia) Limited (Cerebos) between November 1994 and 1996.[16] She had received an award from Cerebos for being the most successful sales representative in 1995. In March 1996, she was retrenched by Cerebos following the loss of a major client. The decision to retrench her was explained on a last-in-first-out basis. However, she was immediately offered re-engagement as >>

a part-time merchandiser with the company for three days a week. She accepted this offer, particularly because Cerebos indicated that it expected business would improve and that she could be re-employed as a full-time representative within six months. Her move to a part-time merchandiser position involved a loss of status, salary and the loss of an assistant. On 4 April 1996 she was provided with brief written terms of employment, which she signed. The terms specified hours per week (24), days per week (Monday-Wednesday) and salary and allowance structure. However, her specific duties or the sales territory that she would be expected to cover were not explicitly defined.

When she started her part-time duties as a merchandiser in late April 1996, her supervisor explained that her new territory listing would be similar to that which she had serviced as a full-time sales representative with a merchandiser assistant. She immediately complained that the territory and number of stores could not be serviced on the part-time basis on which she was now employed. Her supervisor asked her to try for one month and she agreed to do so. Over the next six months, Koehler complained on many occasions both orally and in writing that the area of her territory and the number of stores were too large and could not be serviced properly. She complained that she had very little time and sometimes worked more than her allotted eight hours a day. She also suggested ways to reduce her workload, including reducing the number of stores, assistance from other staff or increasing her employment hours. Cerebos ignored these suggestions and took no other action to reduce Koehler's workload. During this time, Cerebos had also not appointed another sales representative to assist Koehler. Cerebos was aware that she was carrying out sales as well as merchandising functions in the territory, and it was profiting from her sales efforts. Koehler was also asked from time to time to assist other sales representatives in their territories as well as servicing her own. In October 1996, she suffered many physical aches and pains which she initially related to the physical demands of her job, such as moving cartons. However, these were eventually diagnosed as psychiatric illnesses including fibromyalgia syndrome, anxiety and depression.

Koehler brought an action against Cerebos in negligence, breach of statutory duty and breach of contract. At trial in the Western Australian District Court,[17] Commissioner Greaves found that, on the evidence, Koehler had an excessive workload very similar to a full-time employee. He found that Cerebos had breached its employer's duty of care. The risk of injury to Koehler was clearly foreseeable and required no special expertise apart from knowledge of the industry and the plaintiff's workload. Cerebos took no precautions to respond to this risk, such as increasing her hours or providing her with assistance at negligible cost and inconvenience. On appeal, the full court of the Western Australian Court of Appeal[18] disagreed with the Commisioner's findings on breach in relation to the foreseeability of the risk of psychiatric injury. The full court held that in the absence of external signs of distress or injury from Koehler, Cerebos could not have foreseen the risk of psychiatric injury, and accordingly had not breached its duty of care. The court dismissed her complaints to Cerebos of excessive workload as more of an industrial issue than an alert of the possibility of injury.[19]

Koehler's appeal to the High Court of Australia[20] was dismissed unanimously, with Justices McHugh, Gummow, Hayne and Heydon delivering a joint judgment and Justice Callinan delivering a separate but similar judgment. The judgments appear to narrow significantly the circumstances in which employees can recover psychological loss. The decision heralds a much harsher approach to psychologically injured employees than that taken by the High Court to non-employees in cases such as *Annetts v Australia Stations Pty Ltd*[21] and *Gifford v Strang Patrick Stevedoring Pty Ltd.*[22] Key points in the joint judgment include:

- The duty of care of employers to employees in relation to psychological loss does not automatically flow from the employer's duty to provide a safe system of work or safe workplace. The scope or content of the duty must also be carefully considered [19]. The content of the duty of care must be considered in the light of contractual obligations of the parties under the employment contract, equitable obligations, and any relevant statutory obligations including industrial instruments and anti-discrimination legislation [21]. These matters were not considered in detail by the lower courts in *Koehler*.
- In Australia, unlike the UK, examination of duty of care requires more than an examination of whether psychological harm to the plaintiff was foreseeable in the circumstances [23]. Factors identified in *Hatton v Sutherland*[23] by the English Court of Appeal that may be relevant to foreseeability include nature and extent of work, signs from the employee including express warnings or other signs such as absences, but these are not a 'comprehensive statement of relevant and applicable considerations' [24]. The contractual position between parties, including the implied duty of trust and confidence, also needs to be examined [24] to give content to the duty of care. Contractual issues will be very important in these categories of cases.[24]
- Koehler's claims in both contract and breach of statutory duty were not argued by any of the parties as being different to the negligence claims, and so were not explored by the High Court. However, the joint judgment raises the issue that both contractual and statutory issues should be argued more fully by parties and considered by courts in these cases [26]. Contractual issues, including construction of express and implied terms in relation to duties of employers and employees, may be important in future cases [38].
- The psychological injury to Koehler was not foreseeable because she agreed by contract to perform the relevant duties and this was inconsistent with her fear that there would be dangers to her health [28]. In addition, the relevant duty of care requires that an employer be able to foresee a psychiatric injury to the *particular* employee, requiring a focus on that individual, their work and symptoms exhibited by them [35]. It is too large a step to say that all employers must recognise that all employees are at risk of psychiatric injury [34]. Koehler's complaints did

> not indicate any vulnerability to psychiatric injury or any danger of psychiatric injury such that the employer should foresee a risk of harm.

Justice Callinan's judgment is dismissive of the argument that it would be foreseeable that workplace stress would cause psychological harm to employees. He finds that it is far-fetched and fanciful that Koehler could suffer any psychiatric injury in the circumstances during her part-time position over six months [55]. A reasonable employer could not be expected to have foreseen a risk of psychiatric injury. In relation to excessive workload claims, Justice Callinan, similar to the joint judgment, places the claim strictly within a contractual context [57]. Complaining employees can simply refuse to do the work or resign. In a comment that is reflective perhaps of the excessive workloads of judges and lawyers, and the ethos of individual responsibility, he says [57]:

> 'Every responsible position makes its demands upon the person occupying it. As Lord Scott of Foscote succinctly put it in his dissenting speech in *Barber v Somerset County Council*, "Pressure and stress are part of the system of work under which [people] carry out their daily duties. But they are all adults. They choose their profession. They can, and sometimes do, complain about it to their employers."'

PSYCHOLOGICAL CLAIMS POST-KOEHLER?

At first, the news for plaintiffs post-*Koehler* seems all bad. The High Court focused on the individual responsibility of employees to notify their employers at the outset of employment of the potential for psychiatric harm to them before a duty of care or breach of duty will arise. This is so even though the employee may have far less reason to know how particular organisational factors will impact upon their health, than would an employer who has workplace health and safety obligations. Employers also have greater access to knowledge in relation to safety in the workplace. Symptoms of particular illnesses such as depression may by nature militate against employee disclosure. Little in the case recognises that poor organisational factors, completely within the employer's control, have the potential to cause psychological injury to any employee, not just vulnerable ones. *Koehler* manifested many psycho-social factors that contribute to psychological injury, such as those identified in the UK HSE standards. The demands on her were excessive in terms of workload intensity, a factor distinct from mere actual hours of work. A part-time employee may have very excessive workload intensity even though they do not work every day. Koehler also had no control over her territory or number of stores, conflicting roles, lacked support from management or any response to her complaints. She also suffered from a poorly managed change process when the company needed to downsize its staff complement. Her position was reduced without reference to her previous performance and in a way that contradicted previous signals from Cerebos that her performance was outstanding. Little in the case signals to employers that they must be sure to take reasonable steps to control organisational factors that may cause employees psychological injury. The content of the duty of care set out by the court in *Koehler* focuses on the circumstances of each individual employee rather than recognising that some organisational factors may raise a risk of psychological injury to any employee.

The case stresses the primacy of employment contracts and suggests that excessive workload cases will be very difficult to sustain in negligence, particularly where an employee has contractually agreed to do the work. In *Koehler*, much appears to have rested on the plaintiff's supposed verbal contractual agreement to accept the high workload in her new territory. The High Court assumes this even though technically the contract of employment seems completely formed prior to this verbal 'agreement' when the formal written agreement was made. The written employment agreement made no mention of the tasks required or the territory required to be serviced.[25] Little is made by the High Court of the plaintiff's poor bargaining position, or that she appears to have agreed to her reduced position and high workload because of a promise by Cerebos to return her to a full-time position in the future. The agreement to try and work the new territory is most plausibly explained not by an employee who sees no danger to her health as suggested by the High Court, but by an employee who is hoping for the future return of her previous position.

However, all is not lost and some future claims may be sustainable if carefully argued and evidenced. There are already several post-*Koehler* claims in the NSW Court of Appeal where plaintiffs have been successful. In *State of* >>

New South Wales v Mannall,[26] a plaintiff employed as a team leader was allowed recovery following an extended period of workplace upheaval, co-worker verbal abuse and lack of management support. This was because there was actual knowledge by her supervisor that she was at risk of injury. In *State of New South Wales v Burton*[27] a breach of duty was found to a tactical response police officer who developed a psychological injury after being fired on a during a siege.[28] The Court of Appeal found such duties were clearly of the kind that give rise to a foreseeable risk, particularly when an employer has actual knowledge of the risk. Similarly in *State of New South Wales v Fahy*,[29] a police officer who developed a psychological injury after she was left alone at the scene of a crime with a severely injured person, recovered damages. The Court of Appeal expressly distinguished the case from *Koehler* on the basis that direct experience of human suffering greatly differs from excessive workload.

The High Court has clearly indicated that claims in contract, implied contract such as an implied duty of trust and confidence, and actions for breach of statutory duty should be carefully distinguished from negligence claims. Such claims may lead to greater success. Negligence cases will be weak when they are argued only on the basis that employers should have foreseen a general risk of psychiatric injury to employees from overwork. Cases will be stronger when the facts can be argued to emphasise actual knowledge by the employer of the risk of harm, or signs of imminent harm given by an individual employee. Cases may also be stronger when the nature of the work itself can be argued to specifically give rise to particular risks, or when issues such as bullying and harassment arise. Evidence of industry-accepted workplace health and safety obligations of employers for psychological loss, as provided by government documents such as workplace health and safety and WorkCover documents, may also assist cases. These documents may help to overcome the High Court's outdated assumptions and lend support to the argument that reasonable employers ought to know of risks of psychological injury to employees from poor work environments. ■

Notes: **1** The Office of the Australian Safety and Compensation Council, *Compendium of Workers' Compensation Statistics Australia 2002-2003,* Commonwealth of Australia, ACT, 2006, p15, available at http://www.ascc.gov.au/ascc/AboutUs/Publications/StatReports/CompendiumofWorkersCompensationStatisticsAustralia2002to2003.htm. **2** Australian Government – Comcare, *Stress and Psychological Injury Portal,* available at http://www.comcare.gov.au/psychological-injury-portal/costs.html (15 September 2006). **3** *Ibid.* **4** Where common-law claims are still available under state workers' compensation legislation. **5** (2005) 222 CLR 44. **6** Colin J Mackay, Rosanna Cousins, Peter J Kelly, Steve Lee and Ron McCaig, 'Management Standards and work-related stress in the UK: Policy background and science' (2004) 18(2) *Work and Stress* 91, 96-101. **7** *Ibid,* 97-8. **8** *Ibid.* **9** See, for example, the Comcare *Stress Psychological Injury Portal* at note 2 above, WorkSafe/WorkCover Victoria *Occupational Stress* at http://www.workcover.vic.gov.au/vwa/home.nsf/pages/so_occupational_stress (15 September), ACT Government *Stress and Occupational Injuries Toolkit* at http://www.psm.act.gov.au/stress.htm. See also Western Australian WorkSafe *Stress at Work* at http://www.worksafe.wa.gov.au/newsite/worksafe/pages/strahazd0001.html (15 September 2006) and Western Australian WorkCover site at http://www.workcover.wa.gov.au/PublicationsResearch/Research.htm (15 September), which includes links to extensive research reports on psychological injury caused by stress. **10** See discussion in Mackay et al above at note 6 and also in Rosanna Cousins, Colin Mackay, Simon Clarke, Chris Kelly, Peter Kelly and Ron McCaig, 'Management Standards and work-related stress in the UK: Practical Development' (2004) 18(2) *Work and Stress* 113. **11** *Ibid,* Cousins et al, at 116-23. **12** See discussion in Australian Government Comcare, *Working Well: An Organisational Approach to Preventing Psychological Injury,* Commonwealth of Australia ACT, 2005 at 7-8. This report is also available at http://www.comcare.gov.au/psychological-injury-portal/index.html (15 September 2006). **13** See the discussion of this survey (SWI04/05) at Health and Safety Executive, *Stress-related and psychological disorders* at http://www.hse.gov.uk/statistics/causdis/stress.htm. **14** The Office of the Australian Safety and Compensation Council, *Compendium of Workers' Compensation Statistics Australia 2002-2003,* above note 1 at 15-16. Mental disorder claims also consistently have close to the highest median direct cost per claim, being second only to cancer claims in 2001/2002 and 2002/2003. **15** These include *Tame and State of New South Wales; Annetts v Australia Stations Pty Ltd* (2002) 211 CLR 317 and *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. **16** See statement of facts in the judgment of Callinan J at [44]-[45] and McHugh, Gummow, Hayne and Heydon JJ at [6]-[13]. **17** *Koehler v Cerebos (Aust) Ltd* [2002] WADC 108; [2002] 30 SR (WA) 258. **18** *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322. **19** At [75]. **20** *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44. **21** (2002) 211 CLR 317. **22** (2003) 214 CLR 269. **23** [2002] 2 All ER (D) 53. **24** See, for example, the discussion at [29] – [31] about the primacy of the parties' contract and the freedom to contract to do excessive amounts of work. **25** The High Court does note that the plaintiff herself did not raise issues regarding the interpretation of the contract or implied terms. **26** [2005] NSWCA 362. **27** [2006] NSWCA 12. **28** The matter was remitted to the District Court on the issue of causation. **29** [2006] NSWCA 64. This case has recently been given special leave to appeal to the High Court.

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