

Psychiatric vs physical injury in Victoria

By Geraldine Collins

Victims of accidents who suffer psychiatric injuries in compensable circumstances are treated differently in comparison with those with physical injuries.

In Victoria, we are witnessing a groundswell of discontent from the Transport Accident Commission (TAC), as it expresses its 'concern' at the increase in 'pure' psychiatric claims 'getting through'.

While providing statistical data demonstrating an increase in these numbers, the TAC has not (apparently) excluded the (proportionally) significant increase due to the claims arising from the Kerang (5 June 2007) and Mildura (18 February 2006) disasters, for which it is liable.

A 'transport accident injury' means physical or mental injury and includes nervous shock suffered by a person who was directly involved in the transport accident, or who witnessed it or its immediate aftermath.

The TAC's concerns relate to the decision of the Victorian Civil and Administrative Tribunal in *Solity v TAC* (7 May 2007).

Mrs Solity's son was killed when he walked into the path of a train. Mrs Solity accepted the advice of the police and did not view his body.

The TAC accepted that Mrs Solity suffered from one or more psychological conditions caused by her son's death, but denied that any fell within the definition of 'injury'. The TAC stated that 'witnessing' must include viewing the body at the accident scene, in the morgue or at the hospital. It denied the claim and Mrs Solity successfully sought review of the decision.

The Tribunal found that her injuries were not too remote as to be not

directly caused by the driving of the train.

This decision undoubtedly means that more people injured in such circumstances are now entitled to lodge a TAC claim and seek entitlements under the *Transport Accident Act*.

The Hanks Review has meanwhile generated recent amendments to the *Accident Compensation Act*.

Some of the amendments are to be applauded (for example, psychiatric injuries are now compensated at the same monetary rate as physical injuries under s98C claims). However, a person suffering a psychiatric injury must have suffered a 30 per cent whole person 'non secondary' impairment (AMA 4th ed) before any s98C payment is made, compared with those suffering a physical injury.

The s98C entitlement is a 'no-fault' benefit. Why should an injured worker face a different threshold for the recovery of compensation, depending on the type of injury suffered?

The amendments also further restrict the criteria for accepting a claim for psychiatric injury. The gateway is being incrementally squeezed shut. Previously, a claim for 'an illness or disorder of the mind caused by stress' could not be accepted if the stress arose from, or predominantly from, 'reasonable action taken in a reasonable manner' of the employer to do (or not) various listed activities.

The amended Act now excludes the requirement for the condition to be caused by the 'stress' and if the action is, *inter alia*, 'management action taken on reasonable grounds'. The action itself arguably need not be reasonable, but only the manner in which it is performed. The amendments are in their infancy, so their impacts have yet



to be seen.

WorkSafe's inconsistent approach is further highlighted by the campaigns on awareness of workplace harassment and bullying. While seeking to minimise these activities and their potentially tragic psychiatric consequences, it seems that the amendments will now seek to exclude certain psychiatric claims, and to treat those accepted completely differently from those of a physical nature.

In order to access non-financial compensation in a *Wrongs Act* claim, a whole person impairment greater than 5 per cent must be established for physical injuries, or greater than 10 per cent 'non secondary' for psychiatric injuries (AMA 4th ed). Again, there is a clear statutory distinction between physical and psychiatric injuries, for no discernible reason.

We practitioners have all seen accident victims have their lives turned upside down by their injuries. We must ensure that we are diligent in our efforts to represent those who are least able to speak for themselves. ■

Geraldine Collins is the Alliance's Victorian branch director and president, and a principal at Maurice Blackburn in Melbourne. **PHONE** (03) 3910 2966
EMAIL gcollins@mauriceblackburn.com.au