

By Bree Knoester



The journalist's burden

Reporting news and risking psychiatric injury

News journalists,¹ along with emergency services personnel, often witness first-hand the tragedies and disasters they report. Their task is to view, dissect and edit the newsworthy events for the reader or viewer.

It has been said of news journalists that: *'an unwritten code among journalists holds that no assignment, no matter how brutal, can defy one's capacity to take a photograph, gather facts and produce a story... it is part of the code that the journalist then proceeds to the next assignment without acknowledging or treating the emotional toll of the tragic event.'*²

There are few occupations where an inherent requirement of the role is to seek out and witness the most difficult or confronting events and for one's employer to encourage one to do so. Without journalists attending and reporting the events, we would be less able to appreciate and witness the issues and tragedies that take place both in national and international arenas.

But what is the psychological toll on news journalists undertaking such work? The courts commonly deal with claims brought by workers suffering psychiatric injury and yet, until recently, no Australian³ or international court has been required to address questions involving the scope of a duty of care owed to a news journalist, or whether the risk of a news journalist suffering from a recognisable psychiatric injury is reasonably foreseeable.⁴

This article reviews the concept of reasonable foreseeability as it is applied in the context of workplace psychiatric injuries. It specifically examines the requirements imposed on workers by the High Court decision of *Koehler v Cerebos*⁵ – a case dealing with allegations of *excessive workload*. The article then explores and compares the approach of the courts in cases involving emergency services officers where the very *nature of the work* causes injury and the allegations relate to a lack of responsiveness or inadequate support. Should the risk to news journalists of suffering psychiatric injury be likened to that facing emergency services personnel such as police and ambulance officers?

REASONABLE FORESEEABILITY OF PSYCHIATRIC INJURY – CHALLENGES IN PRACTICE

Common law claims for psychiatric injury suffered in the workplace are often the most complex and difficult matters for personal injury practitioners. Many cases involve allegations of overwork, personality conflicts, vulnerability, lack of support or follow-up from management or unpleasant or distressing interactions in the course of employment.

In almost all circumstances, practitioners must balance the needs of vulnerable workers who frequently present with significant mental ill-health, often impeding their ability to give clear instructions, with the need to ensure that the worker will be able to establish:

- that the scope and duty of care owed by the employer to the worker extended to cover the activities or conduct said to cause the injury;
- that it was reasonably foreseeable that the worker could suffer a recognisable psychiatric injury as a result of the activities or conduct said to cause the injury;
- how precisely a reasonable employer should have responded to the risk of the worker suffering a

recognisable psychiatric injury;

- that the employer's response was *not* that of a reasonable employer – and accordingly the employer had breached its duty of care to the worker; and
- whether the breach by the employer was a cause of the recognisable psychiatric injury (including consideration of how a reasonable employer's response would have avoided the injury).

In Victorian courts recently, several common law claims for psychiatric injury suffered in the workplace have been successfully defended on the basis (in addition to other grounds) that the worker failed to establish that the risk of suffering a recognisable psychiatric injury was reasonably foreseeable.⁶

REASONABLE FORESEEABILITY OF PSYCHIATRIC INJURY AND *KOEHLER* – THE STARTING POINT

In *Koehler*, the High Court emphasised that in order to succeed, an injured worker must prove that the employer ought reasonably to have foreseen that the worker was at risk of suffering psychiatric injury as a result of the performance of work duties (which Ms Koehler alleged were excessive), stating:

*'[T]he central inquiry remains whether, in all the circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful.'*⁷

As a result of the decision in *Koehler* and in order to prove that the risk of a worker suffering a recognisable psychiatric injury was reasonably foreseeable, practitioners must ensure that, at an early stage, instructions are sought on:

- the precise nature of the worker's duties, including what documentation governed the worker's terms and scope of employment;
- what signs the worker exhibited, such as change in demeanour, personality and behaviour which would have alerted the employer to the risk;⁸
- what complaints of actual symptoms or illness were made to the employer;⁹
- whether there was any sign of a psychiatric vulnerability;
- whether any requests for help or assistance were made and whether the requests suggested a possibility of vulnerability to psychiatric injury;
- whether the worker continued to agree to undertake his or her duties;
- in the case of overwork or excessive work – whether the workload can be measured against any external standards, such as industry practices.

A distinguishing feature in *Koehler* was the relatively prosaic nature of the worker's duties as a marketing representative, which must bear upon the foreseeability of a psychiatric injury, and also that her allegations related to excessive work demands as opposed to the inherent nature of her work. But how have courts addressed foreseeability where a psychiatrically injured worker's duties – the very nature of the work – involved witnessing and being involved in traumatic events, such as accidents, disasters and death?

>>

How have courts addressed foreseeability where a psychiatrically injured worker's duties – the very nature of the work – involved witnessing and being involved in traumatic events?

REASONABLE FORESEEABILITY OF PSYCHIATRIC INJURY – EMERGENCY SERVICES LITIGATION

In cases involving emergency services personnel, such as police and ambulance workers, the courts have been more prepared to find that the risk of a worker suffering psychiatric injury was reasonably foreseeable in circumstances given the *nature* of the work – as opposed to cases such as *Koehler* where the negligent conduct centres around allegations of increased work or difficulties performing the work.

In *State of New South Wales v Burton* [2005],¹⁰ Mr Burton, a marksman in the Tactical Response Group of the New South Wales (NSW) Police Force, suffered post-traumatic stress disorder after being fired upon during a siege in the course of his employment. The NSW Court of Appeal found that in circumstances where the police had instituted a peer support program, critical incident stress management and a training program, it had identified particular events as involving a risk of psychiatric harm to those officers involved. One of those events included where shots had been fired – as had occurred during the siege.

In *State of New South Wales v Fahy* [2006],¹¹ Ms Fahy, a police officer, suffered post-traumatic stress disorder following her attendance at an armed robbery at which she assisted a doctor treating a person suffering serious injuries while also undertaking her operational police duties. Ms Fahy alleged that the state was negligent in its failure to counsel and support her following the event. The state placed reliance on *Koehler*, emphasising that she had managed stressful situations previously in her police career without manifesting an inability to cope.¹² At intermediate appeal, Chief Justice Spigelman disagreed, stating:

“In my opinion, the kind of traumatic incident involved in the present case is not comparable to the circumstances considered by the High Court in *Koehler v Cerebos*. There the issue was whether or not it was reasonably foreseeable that the plaintiff would suffer psychiatric injury by reason of an excessive workload. Exposure to human suffering of the character involved in the present case is of a completely different order.”¹³

Upon appeal to the High Court, Ms Fahy was unsuccessful on grounds related to breach. Although the finding of reasonable foreseeability was undisturbed, Chief Justice Gleeson commented that:

“the factors that may cause stress, and the circumstances in which an individual might suffer stress-related injury, are so various that to single out any occupation and treat it as intrinsically dangerous in this respect is unwarranted. There are circumstances, for example, in which caring for children might be at least as stressful as law enforcement.”¹⁴

In around May 1992, the Queensland Ambulance Service (QAS) developed a program known as Priority One to reduce the incidence of stress-related illness in its workforce. Priority One involved (1) critical incident debriefing; (2) peer support; (3) a telephone counselling service; and (4) attendance upon a psychologist.¹⁵ In *Hegarty v Queensland Ambulance Service*,¹⁶ Mr Hegarty, an ambulance officer, alleged he suffered from post-traumatic stress disorder and obsessive compulsive disorder as a consequence of his 15-year employment with the QAS. Although Mr Hegarty was ultimately unsuccessful in establishing causation, it was accepted by the QAS and the court that there was a foreseeable risk that regular exposure to ‘vivid human tragedy of scenes of accident and illness could cause psychological stress, and possibly psychiatric injury to ambulance officers’. Indeed, the QAS’ recognition of this risk was evidenced by the introduction of Priority One. The critical issue upon appeal was at what point the QAS should have intervened, if at all, and whether such intervention would have prevented Mr Hegarty’s psychiatric injury.

In *State of New South Wales v Doherty*,¹⁷ Mr Doherty notified his employer of a diagnosis of post-traumatic stress disorder, suffered as a result of multiple traumatic incidents experienced as a crime scene investigator attached to forensic services,¹⁸ and was returned to work. As such, the employer was aware of Mr Doherty’s pre-existing condition and vulnerability. The Court of Appeal held that the employer should have foreseen a significant risk of psychological injury to officers involved in crime scene investigation and:

‘it should have been foreseen that this psychological injury could be very serious indeed; and that a reasonable response required a high standard of monitoring such officers, which took into account that some of them would be likely to be seeking to disregard or minimise any symptoms in order to fulfil their commitments’¹⁹

The Court of Appeal found that in light of the reasonably foreseeable risk, the state ought to have had a better system of monitoring, including follow-up.²⁰

JOURNALISTS AND PSYCHIATRIC INJURY – A RECOGNISED RISK?

The cases dealing with psychiatric injury in the workplace demonstrate that while the nature of the work and the industry in which the injured worker is employed is relevant to the question of reasonable foreseeability, it is not wholly determinative. The question remains whether it was reasonably foreseeable that a particular employee would suffer psychiatric injury.

Industry and employee-specific initiatives that address the risk of mental health issues are a good start for injured

workers seeking to establish foreseeability.²¹ What, then, can be said of news journalists and their media-employers? Is there a known risk of psychiatric injury within that industry?

In 1992, *Australian Studies in Journalism* published an article exploring the risk to news journalists of psychiatric injury. Relying upon anecdotal evidence obtained via interview, the author, Nick Place, described the psychological effects on journalists covering trauma. He further noted:

'In recent years, police, ambulance and fire-fighting services have established comprehensive and, in some cases, compulsory counselling services to help their workers deal with the post-trauma emotional reactions they experience after being involved in, or witnessing, shocking situations. The media, also a regular presence at crime or major accident scenes, receive no such aid.'²²

Mr Place canvassed the adoption of a peer support program akin to that in the police force as a way of addressing the risk of news journalists suffering from the psychological side-effects of their work.²³

In 1993, psychologist and now Managing Director of the Dart Centre Asia Pacific, Cait McMahon, undertook a pilot study on trauma experienced by journalists covering disaster. She found that:

- Journalists experienced significant levels of intrusive images and thoughts at the time of reporting on a traumatic story and significant levels of avoidance as a means of dealing with trauma stories;
- 35 per cent of trauma-reporting journalists who experienced intrusive thoughts or feelings about a traumatic incident at the time of covering the story continued to experience long-term intrusiveness of the event;
- Up to 43 per cent of the trauma-reporting group recounted depression symptoms at the time of the traumatic incident and continued to experience these symptoms on a long-term basis.

Ms McMahon found that not only do journalists report quite serious traumata at the time of covering stories of a critical nature, it also seemed that they continued to experience residual effects afterwards, with some of the symptoms falling into the categories of post-traumatic stress and acute stress disorders.²⁴

In 1999, the Dart Centre for Journalism and Trauma was established. Its purpose was to disseminate information to journalists and media outlets on the issues and risks around reporting on traumatic events – and, specifically, the risk of psychiatric injury. The Dart Centre continues its work today and is based at Columbia University, New York. In Australia, journalists and media outlets are able to access resources, training and guidance, specifically on the risks of news journalists suffering psychological injury and ways to address these risks, from the Dart Centre Asia Pacific office located in Melbourne.

In 1999, former Executive Director of the Dart Centre, Roger Simpson, published his study on traumatic stress among journalists in which he concluded that journalists

have a wide exposure to traumatic events and there was a relatively high incidence of traumatic stress among newsroom staff. Forty-six per cent of respondents said there was no information or training provided by employers to prepare workers covering traumatic events. Twenty-eight per cent of respondents did not feel well-prepared to cover traumatic events. Almost 60 per cent of respondents said they were aware of psychological reactions in other journalists who covered traumatic events, describing anger, hostility, depression, headaches, stomach problems, crying, repetitive stories, excessive smoking and drinking, overly loud speech and mood swings. Seeking re-assignment, feigning or suffering illness and substance abuse were also considered likely responses to traumatic stress.²⁵

In Australia, in 1999, Queensland academic, Philip Castle, published his research findings in the *Asia Pacific Media Educator*. He recommended the implementation of a peer support scheme akin to Priority One, and noted the absence of industry initiatives to address the known risk of news journalists suffering from psychiatric injury.²⁶

In January 2000, Dr Elana Newman, Professor of Psychology at the University of Tulsa, surveyed over 800 photo-journalists. She found that:

- nearly all respondents reported being at the scene of at least one event in which people were hurt or killed;
- respondents considered trauma exposure a routine part of the job; and
- the majority suffered from trauma-related symptomatology, with 6.7 per cent meeting the criteria for post-traumatic stress disorder.²⁷

Dr Newman concluded that given the high level of exposure to traumatic events, media industries must promote organisational initiatives such as peer support programs as well as provide information and training.

In 2002, South Australian academic, Professor Kerry Green, presented his research at the Journalism Education Conference in which he drew parallels between the work of emergency service workers and news journalists in terms of their exposure to traumatic events and the psychiatric effect of such events. Professor Green encouraged media outlets to implement peer support programs.²⁸

Also in 2002, the *PANPA Bulletin* published mental health recommendations directed at media management in light of journalists travelling to Bali to cover the Bali terrorist bombings – counselling, monitoring, peer support and self-help were suggested as ways of addressing the risk of psychiatric injury from such work.²⁹

Internationally, since around 2002, media outlets have started to engage in-house or external experts to train workers on the risk of psychiatric injury, including how to recognise such risks in others as well as in oneself. Many have implemented programs designed to reduce the risk of injury.³⁰

In light of the research undertaken over the past 20 years, it seems clear that, as a general proposition, news journalists who report on traumatic events are at risk of suffering from psychiatric injury by reason of the nature of the work they undertake.

>>

The recommendations in the published literature – that media outlets seriously consider risk management programs such as training, peer/social support and self-recognition of symptoms – are no longer novel or recent. In response to these recommendations many organisations, including the BBC and ABC, have implemented risk-management programs and trauma awareness training. Any implementation or consideration by media outlets of such recommendations will have or has a twofold effect: it demonstrates a responsiveness on the part of the media outlet to the risk which will be relevant, in litigation, to the question of whether there is a breach of duty; but, also, as in the cases referred to above, it demonstrates recognition of the foreseeability of risk of psychiatric injury in a general sense.

Given the prevalence of research on news journalists and risk of psychiatric injury, it is surprising that Australian courts and workers' compensation schemes have often not had to consider issues of foreseeability of injury and breach of duty in the context of common law proceedings brought by a psychiatrically injured news journalist against his or her media-outlet employer.

The material available on the risk of news journalists suffering psychiatric injury is extensive. In the face of such extensive material, it is tempting to conclude that the occupation of a news journalist is intrinsically dangerous from a psychiatric perspective. However, the task for the psychiatrically injured news journalist remains that of establishing that the risk of *he or she* sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.

In undertaking this task, practitioners should have regard *both* to the knowledge of the risk in a general sense – looking to the literature and research – as well as the particular knowledge possessed by the media-outlet employer. Practitioners ought to examine:

- the precise nature of the injured news journalist's work, including frequency of exposure to traumatic events;
- the 'stigma' of complaining or refusing assignments within the media industry;
- the published literature on the industry and risk of psychiatric injury when covering certain events;
- the local and international awareness of the risk of news journalists suffering psychiatric injury;
- whether the media-outlet employer was conscious of the local and international awareness of the risk of news journalists suffering psychiatric injury; and
- any consideration or implementation by the media-outlet employer of initiatives designed to address the risk.

CONCLUSION – A GOOD FIRST STEP

The work of news journalists, like that of the emergency services, involves exposure to events not usually witnessed by the majority of the community. It seems clear, therefore, that exposure to and coverage of traumatic events by news journalists can lead to stress, and in some cases, psychiatric injury. As such, similarities can be drawn between cases involving the emergency services and how courts in those cases have addressed reasonable foreseeability. This

exercise will be a good, first step in preparing common law proceedings for a psychiatrically injured news journalist. Practitioners must then turn their attention to the responsiveness of the employer to the risk, the likely effect of intervention by the employer, and whether such intervention would have likely avoided the injury.

Although cases involving journalists are more likely to involve allegations relating to a failure to provide adequate support or follow up after traumatic news coverage rather than overwork, reliance and emphasis by employers on *Koehler* will continue. Arguments highlighting the injured journalist's ability to cope in the past or over many years with similar events; the difficulty in perceiving the risk in a particular individual; the difficulties in identifying psychiatric injury as opposed to physical injury; the absence of clear complaints or the 'playing down' of symptoms or signs of psychiatric injury must all be considered and addressed in order to deal with questions of breach of duty and causation. ■

Notes: 1 Such term includes photo-journalists and photographers. 2 Kerry Green, 'Methodology Considerations' presented at the Journalism Education Conference in Hong Kong, 2002. Accessible at <http://www.canberra.edu.au/schools/professional_communication/tnr/Research/Green2002.htm> (quoting Roger Simpson and William Cote). 3 A judgment is currently reserved in the Supreme Court of Victoria. 4 ABC interview with Bruce Shapiro, Director of the Dart Center for Journalism and Trauma at Columbia University in New York. Accessed 6 May 2013 at <<http://www.abc.net.au/pm/content/2012/s3636143.htm>>. 5 *Koehler v Cerebos* [2005] 222 CLR 44. 6 See *Brown v Maurice Blackburn Cashman* [2012] VCC 647, *Taylor v Haileybury* [2013] VSC 58, *Hardy v Mikropul Australia Pty Ltd* [2010] VSC 42. 7 *Koehler* at [33]. 8 *Ibid* at [50]. 9 *Ibid* at [41]. 10 *State of New South Wales v Burton* [2005] NSWCA 12. 11 *State of New South Wales v Fahy* [2006] NSWCA 64. 12 *Ibid* at [11]. 13 *Ibid* at [12]. 14 *Fahy v State of New South Wales* [2007] 232 CLR 456 at [5]. 15 *Hegarty v Queensland Ambulance Service* [2007] QCA 366 at [1]. 16 *Hegarty v Queensland Ambulance Service* [2007] QCA 366. 17 *State of New South Wales v Doherty* [2011] NSWCA 225. 18 *Hegarty* at [23]. 19 *Hegarty* at [69]. 20 See *Hegarty* at [54], [75-85] for a useful discussion on causation and the evidence which entitled the court to find that intervention would have allowed the plaintiff to keep working. 21 For example, consider the evidence of Priority One in *Hegarty*; a Major Incidents Policy, counselling program, peer support program and critical incident stress training program in *Burton*; and a peer support program, welfare committee and psychometric testing in *Doherty*. 22 Nic Place, 'Journalists and trauma: The need for counselling' (1992) 1 *Australian Studies in Journalism*, at p113-58. 23 *Ibid*. 24 Cait McMahon, 'Covering Disaster: A Pilot Study into Secondary Trauma for Print Media Journalists Reporting on Disaster', (2001) 16(2) *Australian Journal of Emergency Management*, at p52-6. 25 Roger Simpson, James Boggs, 'An Exploratory Study of Traumatic Stress Among Newspaper Journalists', (1999)1(1) *Journalism Communication Monographs (Australia)*. 26 Philip Castle, 'Journalism and Trauma: Proposals for Change', (1999) *Asia Pacific Media Educator*, July-December, Issue No. 7. 27 Elana Newman, Roger Simpson, David Handschuh, 'Trauma Exposure and Post Traumatic Stress Disorder Among Photojournalists', (2003) 10(2) *The Visual Communication Quarterly*, at p4-13. 28 Kerry Green, see note 2 above. 29 Cratis Hippocrates, 'How to Help Traumatized Staff', *PANPA Bulletin* (December 2002) Issue 221. 30 For example, the work of the BBC and other European media outlets.

Bree Knoester is a barrister at Owen Dixon Chambers West, Melbourne. PHONE (03) 9225 6762
EMAIL breeknoster@vicbar.com.au.