WORKPLACE PSYCHIATRIC INJURY CLAIMS -
The complexities of overlapping State and Federal statutory regimes.

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INTRODUCTION

THE SCREAM:

Munch made a diary entry in January 1892 which is widely associated with the creation of *The Scream*:

> *"I was walking along the road with two*
> *friends.*
> *The sun was setting.*
> *I felt a breath of melancholy –*
> *Suddenly the sky turned blood-red.*
> *I stopped, and leaned against the railing,*
> *deathly tired –*
> *Looking out across the flaming clouds that*
> *hung like blood and a sword*
> *over the blue-black fjord and town.*
> *My friends walked on – I stood there,*
> *trembling with fear.*
> *And I sensed a great, infinite scream pass through nature."*
> (Munch, 1892)

1. The common law was once the primary forum for seeking redress and compensation for psychiatric injuries in employment. Historically, the common law principles for recovery of general damages arising from treatment during employment have been very narrow. For example, general damages have never been available for "*mere disappointment and distress*" resulting from a breach of contract[1]. Such damages are only available for physical injury (including psychiatric injury) arising from the treatment[2].

[1] *Addis v Gramophone Co* [1909] UKHL 1; [1909] AC 488 has long been cited as authority against recovery of damages for the manner of dismissal. That restriction would not apply where there is physical injury. (*Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344 at 362, 381, 405.)

[2] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 362, 381, 405. That decision and principle has been cited in more recent decisions including *Goldman Sachs JBWere*

2. In the context of such narrow common law remedies, a range of more generous legislative remedies developed, including unfair dismissal type provisions at both the state and federal levels. This was said to account for the difference between employment and other commercial contracts, the former said to reflect an imbalance of bargaining power by comparison to standard commercial contracts. Workers compensation was part of this historical development of legislative remedies, being specifically aimed at protecting the interests of employees, in circumstances where they were not in a position to compel employers to agree to pay damages if they were injured at work.

3. Today, it is the case that,

> "*Workers' compensation laws … recognise claims for work-induced psychological injuries, defined as psychological or psychiatric disorders, [7] and occupational health and safety laws do impose obligations on employers to take precautions against hazards to psychological health caused by work practices. [8] Discrimination statutes have also provided an avenue for redress of some kinds of psychiatric harm, when it has been induced by bullying, racial vilification or sexual harassment. [9]*[3]" [Footnotes omitted.]

The *Fair Work Act 2009 (Cth)* ("FWA") must be added to that list of potential claims[4]. That is, there is now a complex regime of legislation at the state and federal levels, providing alternatives for recovery of damages arising from injuries occurring at work. Of this legislation, workers compensation legislation[5] remains the primary method of recovering such damages for

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Services Pty Limited v Nikolich [2007] FCAFC 120 as per Chief Justice Black at paragraphs [71] and [72].

[3] Riley J; "Mental Health and Employment: Issues for Lawyers" (2007) UNSWLRS 38; citing two cases as examples: *Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784 (not overturned on appeal *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62; [2007] FCAFC 120) and *Koehler v Cerebos (Australia) Ltd* (2005) 222.

[4] Until fairly recent amendment, the *Competition and Consumer Act 2010 (Cth)* ("CCA") also provided a potential remedy where an employee suffered psychiatric damage arising from misleading and deceptive conduct in employment: see sub-sections 137C and 137E of Schedule 2 of the CCA, which preclude recovery of loss or damage for breaches of the provisions concerning misleading conduct to the extent that such loss or damage results from personal injury. The CCA was formerly the *Trade Practices Act 1974 (Cth).*

[5] Including the *Workers Compensation Act 1987 (NSW)* ("WCA") and the *Workplace Injury Management and Workers Compensation Act 1998 (NSW)* ("WIMA").

workers[6]. However, workers compensation legislation as we now know it in New South Wales, is a product of tort law reform (commencing in 2002[7]) in New South Wales and represents a proscribed process for awarding damages aimed both at minimising insurance costs and maximising rehabilitation (where that can occur). Those reforms have certainly resulted in lower insurance costs, largely consistent with the lower damages awarded under workers compensation. This has meant that employees injured at work do not receive anything like the actual damages suffered. As such it is not always the best method of recovery and/or must be pursued alongside other claims.

4. In order to make proper use of legislation allowing other claims, it is important to understand the complex interplay between workers compensation legislation and those other laws to ensure damages are maximised. Failure to do so can at best reduce damages and at worst, preclude workers compensation damages.

5. This paper looks at:

   a. the types of claims that may be run alongside a workers compensation claim for psychiatric impairment;

   b. How to go about running other claims available to employees with a psychiatric injury in the context of the workers compensation regime; and

   c. the issues raised for practitioners in dealing with clients with serious psychiatric disabilities.

NSW WORKERS COMPENSATION LEGISLATION

6. As noted above, the workers compensation regime provides the primary method of recovery of damages arising from injury at work. As such, the

[6] This paper focuses on workers compensation legislation in New South Wales.
[7] When the Federal, State and Territory Governments commissioned the Negligence Review Panel, which was Chaired by the Hon Justice David Ipp. Those Terms of Reference were announced by the Commonwealth Government on 2 July 2002 and required the Panel 'to report to Ministers on terms 3 (d), 3(f) 4 and 5 by 30 August 2002 and on the remainder of terms by 30 September 2002. Panel for the Review of the Law of Negligence Review of the Law of Negligence: Final Report (2002) (known as the "Ipp Report").

WCA has been designed to "cover the field" with respect to recovery of damages for personal injury incurred at work.

7. Section 150B of the WCA states,

> ***150B Claims to which Division applies***
>
> ***(1) This Division applies only to a claim for damages against a worker's employer in respect of an injury that was caused by:***
>
> ***(a) the negligence or other tort (including breach of statutory duty) of the worker's employer, or***
>
> *(b)* ***a breach of contract by the worker's employer.***
>
> *(2)* ***Subsection (1) (a) applies even if damages resulting from the negligence or other tort are claimed in an action for breach of <u>contract or other action</u>.***
>
> *(3) A reference in this Division to a worker's employer includes a reference to:*
>
> *(a) a person who is vicariously liable for the acts of the employer, and*
> *(b) a person for whose acts the employer is vicariously liable.*
>
> [Emphasis added]

8. While this certainly means that "other actions" brought under state legislation would be precluded, the state workers compensation regime cannot operate to preclude claims under federal legislation, due to the operation of section 109 of the Constitution, which states,

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

9. Thus the effect of this legislation would appear to be

a. any claim, including those in tort or contract, for damages for personal injury arising from employment must be determined in accordance with the WCA and the WIMA and

b. where other claims are brought, but not precluded (due to the operation of section 109 of the Constitution), the workers compensation regime will apply to the extent of the inconsistency and may result in failure to recover under that regime (as discussed further below).

In relation to the latter issue, this means that where certain steps must be taken under the workers compensation regime of legislation before other steps may be taken in other jurisdictions (such as the discrimination jurisdictions), it is important to ensure compliance with that regime before commencing action under federal legislation.

10. An example of this is section 318A of the WIMA, which prevents a person seeking workers compensation from bringing in any other claims for work injury damages before commencing a claim in the workers' compensation jurisdiction. That section states,

> *318A Mediation of claim before commencement of court proceedings*
>
> *(1)* ***A claimant must refer a claim for work injury damages for mediation under this Division before the claimant can commence court proceedings for recovery of those work injury damages****. The claim cannot be referred for mediation until at least 28 days after the pre-filing statement has been served on the defendant under Division 3.*
>
> *(2) The claimant need not refer a claim for work injury damages for mediation if the defendant has failed to respond to the claimant's pre-filing statement as required under Division 3 within 42 days after it is served on the defendant.*
>
> *Note. A defence can still be filed in the 28–42 day period. A defence can be filed after 42 days but such a defence cannot dispute liability. A defence filed after 42 days can deal with such matters as quantum of damages or contributory negligence.*

(3) The defendant may decline to participate in mediation of the claim if the defendant wholly disputes liability in respect of the claim, but in any other case the defendant cannot decline to participate in mediation.

(4) Court proceedings for recovery of work injury damages cannot be commenced while the claim is the subject of mediation in the Commission.

(5) A claim is referred for mediation by being referred to the Registrar for mediation by a mediator. The Registrar is to give directions as to which mediator is to mediate on a particular claim referred for mediation.

(6) The Rules may make provision for or with respect to mediation under this Division.

11. However, even though federal legislation will prevail over state legislation, allowing recovery under those federal laws, such action may impact negatively upon recovery under the WCA. That is, while the state WCA will not preclude recovery under federal legislation, the converse is not true. Claims brought under federal legislation may reduce or prevent recovery of damages available under the WCA.

12. In this context, it is important to ensure that a client employee does not forfeit their rights to workers compensation in favour of an alternative claim that may leave them worse off than if they had pursued their workers compensation claim alone. Having said that, the workers compensation regime often leaves employees with a significant deficit between what they would have earned and what they in fact recover under the scheme, unless they have over fifteen per cent (15%) whole body impairment ("WBI"). Even then they cannot claim general damages, which are otherwise available under discrimination and trade practices legislation.

13. Obtaining a medical assessment of over fifteen per cent whole body impairment with a psychological injury alone is very difficult indeed[8]. However, where there is expert evidence showing such a level of impairment the issue becomes how best to maximise an applicant's claim while ensuring that they first receive all possible compensation under the

[8] Noting Section 376 of the WCA provides the power to issue guidelines with regard to maximum whole body impairment.

workers compensation legislation (for reasons addressed further below). Of course, in such cases and under the workers compensation regime, clients may sue for the difference between the compensation payable under the workers compensation regime and, in addition, possibly be awarded general damages for pain and suffering which is capped and paid in accordance with a sliding scale. Those general damages are very small compared to awards for general damages that were awarded before tort law reform and are capped. In addition, the regime regulates and restricts the legal costs recoverable in such actions[9]. This is not the case with discrimination or trade practices claims.

Section 151A of the WCA – Effect of settlement of related matters

14. Section 151A of the WCA prohibits recovery of further compensation under the WCA in circumstances where damages have already been recovered in the following terms,

> ***151A Effect of recovery of damages on compensation***
>
> ***(1) If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then (except to the extent that subsection (2), (3) or (4) covers the case):***
>
> ***(a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and***
>
> *(b) the amount of any weekly payments of compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and*
>
> *(c) the person ceases to be entitled to participate in any injury management program provided for under this Act or the 1998 Act.*

[9] For example, Regulation 102 provides that the maximum amount of costs recoverable in a work in injury damages claim are in accordance with Schedule 7, although that amount does not apply on a practitioner client basis – as per Regulation 103.

15. There is case law dealing with the question of recovery of workers compensation where a discrimination claim had been settled. In that case[10], a single judge of the Compensation Court determined that the recovery of damages for a discrimination complaint prohibited the recovery of worker's compensation in respect of a psychiatric injury that was pleaded as being attributable to the discriminatory conduct, stating,

> *48 The analysis of the Anti-Discrimination Act above and the comments referred to in the Najdovska decision indicate that it would be a very rare situation for the relief sought under the Workers Compensation Act and under the Anti-Discrimination Act to coincide, in the sense of arising out of the same circumstances. However, I am of the view that in this situation they do. The range of damages sought in the Anti-Discrimination action is broader but this is the same as occurs in any action against an employer at common law. Damages for loss of dignity and injury to feelings do not occur in the compensation area; however, if such matters factually are proved to cause a psychological injury such is claimable and is claimed in the current compensation proceedings. Similarly past and future economic loss is claimed in each set of proceedings. Thus the conduct of the respondent referred to in s 113 of the Anti-Discrimination Act is the same conduct of the respondent for which workers compensation benefits are sought. It follows that for the purposes of s 151B, the applicant has recovered damages in respect of the injury for which compensation is sought in the present proceedings.*

16. *Adams v Fletcher International Exports Pty Ltd* [2008] NSWCA 238 ("*Adams*") is the leading case in relation to the operation of section 151A(1) in the context of settlements[11]. In that case, the employee worked as a meat worker from 1988 until his dismissal in 2003, at which time he brought unfair dismissal proceedings in the then Australian Industrial Relations Commission. Those proceedings were settled, by a deed of release. The recitations of that deed described how the worker had sustained injuries during his employment including, an injury to his left hand and wrist. Under the deed the employer agreed to pay $2,500 in respect of general and other damages. A cheque for that amount was sent to the worker with a letter dated 17 January 2005, acknowledging receipt of the signed deed and stating, *"[w]e enclose a cheque made payable to you in the sum of $2500 being in respect of the agreed work injury damages*". The employee then brought workers

[10] *Burns v Gladesville Bowling Club Pty Limited* [2000] NSWCC 53 (31 August 2000) ("*Burns*").

[11] Noting 151A(5) is the subject of High Court authority in *New South Wales v Taylor* [2001] HCA 15; 204 CLR 461; 178 ALR 32; 75 ALJR 652 (15 March 2001).

compensation proceedings (i.e. after the unfair dismissal claim) seeking damages for the injury to the left hand and wrist, were held to be barred by section 151A(1)(a).

17. On appeal, Handley AJA[12] held that the deed itself could not have affected the worker's rights to compensation due to the operation of section 234 of WIMA[13]. Thus, the difficulty for the employee arose "*not from the deed as such, but from his acceptance of the payment of $2500*[14]". It was further noted that "*damages*" in section 149 includes "*any form of monetary compensation*" (s 149(a)) and "*any amount paid under a compromise or settlement of a claim for damages*" (s 149(b)). In that context, Handley AJA said that it could not be denied that the $2,500 was monetary compensation within paragraph (a), adding[15] that the remaining question was then whether the payment of $2,500 damages, was "in respect of an injury". In this context, his Honour held, "[*t]he character of the payment is governed by the deed and the letter of 17 January 2005 which accompanied the cheque*". In that case,

> *"The amount of $2500 was also paid in respect of other claims, but this cannot matter. The deed and the letter, construed on their face, or in light of the surrounding circumstances, establish that the payment was made 'in respect of' the injury to the worker's left hand and wrist. Accordingly he ceased to be entitled to compensation 'in respect of the injury concerned', that is the injury to his left hand and wrist.*[16]*"* [Emphasis added.]

18. Thus, in later cases, such as *Rail Corporation New South Wales v Hunt* [2009] NSWWCCPD 114 (15 September 2009) ("*Hunt*"), determinations have followed Adams and determined whether any payment made was made "in respect of" the relevant injury. *Hunt* considered a claim for workers compensation, made in circumstances where the Administrative Decisions Tribunal had awarded Ms Hunt $20,000.00 on 24 July 2007 in respect of three incidents of sexual harassment. However, prior to judgment being handed down, in or about April 2007, the parties executed a Deed of Release in which Ms Hunt agreed to release RailCorp from all claims she had against it arising out of or incidental to or associated with her employment with it, but excluding any workers compensation claims. In that context, Deputy President Roche held that while the employee had been awarded damages by way of a decision in relation to her discrimination claim, the damages were only in respect of three proven

[12] Allsop P and Giles JA agreeing.

[13] Which states simply "No contracting out
This Act and the 1987 Act apply despite any contract to the contrary."

[14] *Adams* at paragraph [17].

[15] *Adams* at paragraph [24].

[16] *Adams* at paragraph [27].

incidents and thus her workers compensation claim remained compensable, subject to application of the relevant provisions of the WCA, in respect of the other matters.

19. In *Barnett v Country Rugby League of NSW Inc* [2010] NSWWCCPD 73 (12 July 2010), it was held that a deed settling an employee's claim of discrimination before the Federal Circuit Court for payment of redundancy and the transfer of a car was not the recovery of damages within the meaning of section 151A. That is, the test involved giving proper meaning to the words "damages" and "recover" in s 151A and so involved a determination as to the nature of the payment made.

Federal Workers Compensation

20. In *Daghlian v Australian Postal Corporation* [2003] FCA 759 (23 July 2003) ("*Daghlian*"), the applicant, formerly an employee of the Australian Postal Corporation (`Australia Post'), sought relief against alleged unlawful disability discrimination carried out by her former employer, Australia Post (pursuant to s 46PO of the *Human Rights And Equal Opportunity Commission Act 1986*) as well as workers compensation under the federal scheme. It was common ground that Australia Post was a `public authority of the Commonwealth' within s 4 of the *DDA*. The Applicant claimed that Australia Post discriminated against her by banning stools at the retail counters of its post offices. She sought:

    a. reinstatement of her former employment as a postal officer at the Manly Post Office with a suitable stool to alleviate long periods of standing;

    b. reimbursement of lost income for the period from 27 February 2001, when her employment was terminated, to the date of the reinstatement of her employment, and

    c. reinstatement of annual leave and long service leave credits used by her since 27 February 2001.

    d. Additionally or alternatively, the applicant sought orders in relation to economic loss, general damages arising from hurt and suffering, particularly in relation to her psychiatric condition, and an apology.

21. In this context, Australia Post argued the *Safety, Rehabilitation and Compensation Act, 1988 (Cth); (the Compensation Act)* prevented the

Applicant from bringing the discrimination claim (even though she had never made a claim in respect of the injury cause by her employment. In that circumstance, Justice Conti of the Federal Court stated,

> *97 As to the aggravation of the applicant's back condition which occurred in 1991, apparently sustained in the course of her employment (see [6] above), Australia Post contended that if the incident gave rise to her present disability, the Safety, Rehabilitation and Compensation Act, 1988 (Cth), (the Compensation Act) would operate to exclude any action for damages, in the circumstances described in s 44(1) thereof reading as follows:*
>
> > *`(1) Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:*
> >
> > *(a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or*
> > *(b) the loss of, or damage to, property used by an employee resulting from such an injury;*
> >
> > *whether that injury, loss or damage occurred before or after the commencement of this section.'*
>
> *The defence of Australia Post did not raise any plea based upon s 44 of the Compensation Act, nor adduced any evidence in relation thereto.*
>
> ***98 I would not characterise the present proceedings brought by the applicant as `an action or other proceeding for damages... against... a Commonwealth authority... in respect of an injury... in the course of... her employment...', but as proceedings for unlawful conduct by reason of the operation of the DD Act. No determination has been made, nor has ever been sought, in relation to the applicant's injury, pursuant to ss 24, 25 or 27 of the Compensation Act (Telstra Corporation Ltd v Flynn [2002] NSWCA 315; (2002) 55 NSWLR 303).***

22. Despite the characterisation of the proceedings as being "proceedings for unlawful conduct by reason of the DDA", it is unclear to me what function the following sentence plays in the judgment (i.e. noting that no determination had been made under the SRCA) and whether it indicates Justice Conti's answer may be different if such determinations had been made.

23. I am aware of only one judgment in the federal workers compensation jurisdiction that has directly addressed whether damages received under federal discrimination legislation precludes payments under section 48 (i.e. compensation not payable where damages recovered) of the SRCA, being *Perry and Australian Postal Commission* [2004] AATA 873 (20 August 2004). In that case, Member Carstairs of the Administrative Appeals Tribunal of Australia was required to determine whether a payment made by way of settlement to an applicant after a mediation of a federal discrimination complaint precluded a further application under section 48 of SRCA. The relevant portion of the case states,

> *25. The Tribunal accepts the respondent's submission that there is a common background of facts between the HREOC complaint and the compensation claim that makes the consideration of the issue more difficult.* ***Nevertheless s48(1) of the Act requires that the injury be one in respect of which compensation is payable under this Act. When the HREOC complaint and the compensation claim are examined in the context of all the written material and the oral evidence, it is clear that the required identity between the two is absent. To come within the provisions of the Disability Discrimination Act 1992 (the DD Act) the applicant had to satisfy s5 of the DD Act, which covers the circumstances where a person is discriminated against on the ground of disability and is treated less favourably than others without disability. Section 15 of the DD Act prohibits discrimination in employment and s12(5) extends s15 to Commonwealth employees. Part 4 of the DD Act refers to the functions of HREOC in relation to complaints: Note to s67 of the DD Act. The HREOC complaint was concerned with the applicant's perceptions of discriminatory treatment in relation to her foot condition, which she never claimed was work-related****.*
>
> *26.* ***The applicant's compensation claim related to stress arising from her perceived treatment in the workplace. This was clearly***

separate from the concerns that she had as a person with a foot disability in her workplace, where she held the belief that she was being treated in a manner different from that accorded to persons without disability, and to others in her workplace with the same disability as she had. The distinction between the compensation claim and the HREOC complaint is reflected in the remedies she sought in regard to the HREOC complaint: she wanted an apology and the discriminatory conduct to cease; she wanted a second pair of safety shoes; and she wanted penalty rates paid to her (for a period that was not covered by her compensation claim). It was clear from a letter sent by HREOC to the respondent (exhibit R5) that HREOC considered that the applicant had an arguable case.

27. The Tribunal was satisfied that the HREOC complaint referred to the applicant's perceived treatment in the workplace as a result of disability arising from her foot condition, and that this disability was separate and distinct from the injury that she claimed in the compensation claim: Re Frank and Comcare (1996) 41 ALD 597. The HREOC claim was not a claim for stress, even though it could fairly be said that the issues raised in relation to the alleged discriminatory treatment stressed or distressed her.

28. ***In these circumstances s48(1) of the Act is not satisfied as the settlement was not in respect of an injury…being an injury…in respect of which compensation is payable under this Act****.*

29. This disposes of the preliminary issue, without the need to deal with the question of whether the $1000 HREOC settlement is properly to be classed as damages. Despite the wide definition of damages, it is likely that the Act contemplated a payment in discharge of a legal right rather than merely a payment for hurt feelings or some other kind of making-good. This interpretation is pointed to in the definition of damages since it refers to a compromise or settlement of a claim for damages, whether or not legal proceedings have been instituted. There is no definition of damages in either the DD Act or HREOC Act and the reference to orders for damages in s46PO(4) of the HREOC Act does not assist as there is no equivalent provision in the sections of the HREOC Act dealing with the Commission's powers to conciliate matters.

30. A complaint of a breach of the DD Act may give rise to a legal right to compensatory damages or it may not. HREOC can broker

settlements involving the payment of money, but that payment need not correspond to any legal entitlement or claim for such. The HREOC website sets out the following:

A substantial proportion of complaints under the DDA are resolved by the parties deciding to settle the matter by conciliation, with the assistance of the Commission but without the Commission or the courts having to formally decide that unlawful discrimination has occurred or what the remedy should be.[1]

31. In this case, Mr Barclay's evidence was clear that he offered the settlement to ensure that the working relationship would continue and Mr Barclay appears to have taken pains to ensure that the settlement was not based upon conclusions about legal rights. ***A payment under such a settlement need not be exclusively or at all attributable to a disease or injury whether or not covered by the definition of injury in the Act and the Tribunal accepts Mr Barclay's evidence that it was not.***

32. Finally, it should be noted that under the HREOC Act, s46PH(1) provides:

The President may terminate a complaint on any of the following grounds:
...
(e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
...
(g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority; ...

There was no evidence that the respondent put forward any submission to HREOC on the basis that what the applicant sought was compensable elsewhere.

24. Both *Daghlian* and *Perry* appear to support an interpretation of federal discrimination legislation as being a claim different in nature from those available under the SRCA; the former pertaining to unlawful discrimination in employment, the latter to personal injuries in employment. However, that distinction becomes more problematic where the discriminatory treatment

also gives rise to personal injury, being, in part, the circumstances of our case, noting all treatment not considered discrimination will be bullying and thus separately compensable under the SRCA. The difference in the nature of the remedies appears to have been the determinative factor in the above cases, although the way in which the settlement monies paid in the discrimination matter were attributed also appears to be a key consideration in the *Perry* decision.

25. In *Frank and Comcare* [1996] AATA 632 (15 May 1996), Senior Member Burton did not need to decide whether a lump sum settlement in relation to a complaint made to the Australian Human Rights Commission was compensation for the same work related injury because she determined that the injury did not give rise to damages under the SRCA, stating,

> *28. The applicant's claim to the Human Rights Commission was the subject of a lot of negotiations with the Department. In November 1994 conciliation in relation to the Human Rights Commission complaint took place and the Department attempted to settle all outstanding matters by bringing the applicant's claim against Comcare into the settlement negotiations. A settlement was offered whereby the applicant was to forego her right to pursue her claim against Comcare. The applicant resisted this demand and a settlement was negotiated whereby the applicant was to receive a lump sum of $10,000 to compensate her for any damage she suffered from the alleged discrimination. She was however, required to resign her employment with the Department. She resigned on 29 January 1995, believing she had another job to go to, and that nothing stood in her way to pursue her compensation claim (the subject of this hearing). Her alternative employment arrangements fell through, and she heard for the first time at this hearing that Comcare foreshadowed that her damages award would operate to preclude her receiving compensation for her claimed incapacity pursuant to s.48 of the Act. The applicant had received no previous advice to that effect prior to settling her Human Rights Commission claim, having represented herself towards the end of the negotiations.*
>
> *29. It would be unfortunate if in the circumstances outlined above the applicant was precluded by s.48 of the Act from receiving any entitlement otherwise due to her for a compensable injury. However, without going into the question of whether or not s.48 applies to such sums as that which was settled upon the applicant, or whether the*

sum was paid in compensation for physical damage or for hurt feelings, I do not accept that part of the respondent's concession that the applicant's incapacity was materially contributed to by the aggravation to leg muscle stiffness from the long drive to her place of work.

26. I note that in a more recent decision in relation to federal discrimination legislation in the Federal Magistrate's Court, a Federal Magistrate has appeared to take the opposite approach to Justice Conti in *Daghlian*, although Lucev FM was not required to determine the issue directly on point for the reasons immediately following. In *Mansell v Centrelink* [2008] FMCA 127 (6 February 2008), Lucev FM disallowed an amendment to include a claim of indirect discrimination (alongside a claim for direct discrimination) under the *Disability Discrimination Act 1992 (Cth) ("*DDA") which had been pleaded in the original points of claim, abandoned on the first day of hearing and then subsequently sought to be reinstated after evidence in chief had been led. That amendment also sought to include a claim of negligence in relation to which Lucev FM had this to say,

> *With respect to the negligence issues they entail an entirely different claim and an entirely different set of issues, and further evidence would, the Court suspects, have to be led from the Applicant in relation to that and be responded to by the Respondent. That assumes, of course, that the Court can deal with a negligence claim at common law in respect of the Applicant.* ***The Court does no more than note that there are limitations imposed, subject to section 45 of the Safety, Rehabilitation and Compensation Act, 1988 (Cth), by section 44 of that Act on an employee with respect to a claim in respect of an injury sustained by an employee, in the course of his or her employment****. That is a preliminary issue, which would have to be dealt with if the application to amend the points of claim or substituted points of claim were to be granted. It also exposes, with respect, how little proper consideration has been given to the proposed substituted points of claim.*

27. As the above précis on the law with regard to this issue shows, this remains an issue not yet persuasively determined.

OTHER TYPES OF CLAIMS THAT MAY BE RUN ALONGSIDE A WORKERS COMPENSTION CLAIM

28. A person suffering from a psychiatric injury caused by their employment may bring a number of different claims including:

    a. common law claims "work injury damages" claim (only if over 15% whole body impairment)[17];

    b. federal discrimination claims; and

    c. Claims under the FWA, including: adverse actions; discrimination and unlawful terminations.

    I deal with claims under the FWA first and note the best option is a discrimination claim if the facts allow it for the reasons set out below. Having said that, the newer bullying provisions of the FWA provide important rights that potentially prevent harm from occurring in the first instance.

CLAIMS UNDER THE FAIR WORK ACT

29. In general, anyone with a significant psychiatric injury is not going to find the FWA very useful, not least because costs are not generally awarded. Such claims can be useful for those with transient psychiatric injuries if reinstatement (as opposed to re-employment) is sought (as opposed to compensation for the injury) and the relevant employer is a very large organisation allowing reinstatement to a different position located away from the area and persons causing the injury. In addition, the bullying provisions of the FWA can be useful for stopping psychiatric injuries from happening, but otherwise do not provide a useful remedy because they do not provide any rights to damages. Having said that the FWA provides a lower cost avenue for compensation and fairly immediate conciliation on a number of bases, set out below.

    a. Adverse action[18] taken by an employer against an employee:

        i. because the other person:

            1. has a workplace right[19]; or

[17] Governed primarily by workers compensation legislation and which I do not address in detail in this paper.
[18] Section 340 FWA.
[19] Section 341 sets out the meaning of a workplace right.

2. has, or has not, exercised a workplace right; or

3. proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

4. to prevent the exercise of a workplace right by the other person; or

b. Unlawful dismissal[20] for one or more of the following reasons:

   i. temporary absence from work because of illness or injury of a kind prescribed by the regulations;
   ii. trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
   iii. non-membership of a trade union;
   iv. seeking office as, or acting or having acted in the capacity of, a representative of employees;
   v. the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
   vi. race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
   vii. absence from work during maternity leave or other parental leave;
   viii. temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances;

c. Discrimination "because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin"[21];

[20] Section 772 FWA.
[21] Section 351 FWA.

d. Coercion (not to exercise a workplace right)[22];

e. Misrepresentations (about a workplace right)[23].

30. Further in relation to adverse action claims, it is to be noted that more recently the Federal Court in *CFMEU v Hail Creek P/L* (2016) FCA 199 ("*Hail Creek*") held in favour of an employee (a drill rig operator) who alleged his employer had taken adverse action against him when it stood him down in 2013 after he exercised a workplace right[24]. In that case, the worker had received significant common law damages for an injury received at work, but the worker had recovered from that injury and was certified fit for work. The Employer refused to accept the certificate, despite the worker's certificate for fitness being upheld by the Queensland Court of Appeal in separate proceedings. In that circumstance, Justice Reeve rejected the evidence given by the employer as to the reason for the decision (under a Reg 46 of the CMSH Regulations) because it was incorrect at law and a "hasty pretext" for a hasty decision made to remove the employee[25], stating,

> *"In all the circumstances, I think this rationale is likely to have been a pretext for a hasty decision made by [Hail Creek] to remove [the drill rig operator] with the knowledge from [Hail Creek's] email that he posed a possible future cost risk to Hail Creek Coal's operations, specifically with respect to its insurance premiums*."

31. Justice Reeves further held that the employer breached section 50 of the FWA when it ceased paying him, rejecting the employer's claims employee was not entitled to be paid under the relevant Agreement because he was unable to perform the role he was employed to perform. It is reported that this decision is to go to appeal, no doubt on the basis that *Barclay*[26] has been wrongly applied.

STATE DISCRIMINATION CLAIMS

[22] Section 343 FWA – see for example *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd & Anor* [2011] FMCA 58 (11 February 2011) - on appeal.
[23] Section 345 FWA – no successful cases as yet.
[24] Being to successfully pursue a common law claim for damages for injuries arising at work in the District Court of Queensland in which he was awarded $637,000 in damages.
[25] *Hail Creek* at paragraph [35].
[26] *Board of Bendigo Regional Institute and Further Education v Barclay* [2012] HCA 32; (2012) 86 ALJR 1044.

32. State discrimination claims are not a preferred forum for a claim giving rise to significant psychiatric injury, because:

    a. it is also (in general) a no costs jurisdiction;

    b. damages are capped at $100,000.00; and

    c. there is a twelve-month limitation period (rather than a minimum of six year limitation in the federal jurisdiction[27]).

    For the reasons set out in this paper, in order to protect a client's workers compensation rights in circumstances of over 15% whole body impairment, one will have to wait until that matter gets to mediation which also makes compliance with the limitation period with respect to state discrimination law difficult. That is because the process is such that the discrimination claim is likely to proceed to litigation before any mediation of the workers compensation claim. Specifically, because the Federal discrimination provisions do not require complaints to be made within a twelve (12) month period, there is greater leeway to attend to the workers compensation claim prior to the discrimination claim.

FEDERAL DISCRIMINATION CLAIMS

33. The better claim for persons with significant psychiatric injury from work is a discrimination claim under federal discrimination law, which is made up of the following legislation.

    a. Australian Human Rights Commission Act 1986 (Cth) ("AHRCA");

    b. Age Discrimination Act 2004 (Cth) ("ADA");

    c. Disability Discrimination Act 1992 (Cth) ("DDA");

    d. Racial Discrimination Act 1975 (Cth) ("RDA"); and

    e. Sex Discrimination Act 1984 (Cth) ("SDA").

34. In order for a Court to have jurisdiction under section 46PO of the AHRCA, an applicant must have made a complaint to the AHRC and that complaint must have been terminated by the President in accordance with the

[27] *Kujundzic v MAS National & Ors* [2013] FMCA 8 (11 January 2013).

AHRCA. It take about three months for the AHRC to mediate a complaint and make a determination as to whether it will terminate the complaint (with one of the ground being mediation has been unsuccessful) and then a party has 60 days to decide whether to commence the complaint.

35. It is the case that the factual matrices of many discrimination claims (particular those concerning harassment) are likely to give rise to significant serious psychiatric injuries. For example, in cases such as *Lee v Smith & Ors* [2007] FMCA 59 (23 March 2007) significant general damages were awarded[28] for a case concerning serious sexual harassment (including a rape) said to have occurred over a significant period of time while Ms Lee worked for the Department of Defence.

36. Importantly, recent decisions of the Full Court of the Federal Court, including more recently the *Oracle*[29] decision, mean that the type of compensation available under such claims align with pre-tort reform damages. That is, significant general damages are available.

37. In *Oracle*, the Court at first instance awarded only $18,000.00 in circumstances where sexual harassment had been proven. As Justice Kenny put it,

> *"The appeal is from a judgment of a single judge of the Court delivered on 20 February 2013, in which his Honour declared that the second respondent (Mr Randol Tucker) had engaged in conduct contrary to 28B(2) of the Sex Discrimination Act 1984 (Cth) ("SDA") by sexually harassing the appellant (Ms Rebecca Richardson) between April and November 2008, while both were employees of the first respondent, Oracle Corporation Australia Pty Ltd ("Oracle"). His Honour declared that Oracle was vicariously liable for Mr Tucker's unlawful conduct, pursuant to s 106 of the SDA and ordered that Oracle pay Ms Richardson $18,000 by way of damages as compensation.*[30]*"*

38. This was a case in which the Judge at first instance accepted the Applicant had suffered psychological injury including adjustment disorder and that

[28] See *Lee v Smith & Ors (No.2)* [2007] FMCA 1092 (6 July 2007) a decision of Connolly FM awarding $100,000.00 in general damages plus around $340,000.00 in past and future economic loss and medical expenses.

[29] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (15 July 2014) decision of Kenny, Besanko and Perram JJ.

[30] *Oracle* paragraph 2.

injury was "not insignificant" (as per paragraph 244 of judgment at first instance). However, that injury did not interfere with the Applicant's ability to work at the time of the hearing.

39. In these circumstances, the Full Court Awarded overturned the award of $18,000 and instead awarded $100,000.00 in general damages[31], as well as $30,000 for loss of opportunity of increased wages with Oracle if the Applicant had remained employed.

40. In doing so Justice Kenny noted:

> "*the authorities establish that the court may be guided, at the assessment stage, by the general principles governing the assessment of damages in tort: see Hall v A & A Sheiban Pty Ltd(1989) 20 FCR 217 ("Hall v A &A Sheiban") at 238-239 (Lockhart J), 256-257 (Wilcox J); and 281 (French J) and Qantas Airways Ltd v Gama (2008) 247 ALR 273 ("Qantas Airways Ltd v Gama") at 303 [94] (French and Jacobson JJ). In the latter case, French and Jacobson JJ stated (at 303 [94]) in respect of s 46PO(4) (in its current form):*
>
> > *"The damages which can be awarded under s 46PO(4) ... are damages "by way of compensation for any loss or damage suffered because of the conduct of the respondent". Such damages are entirely compensatory. In many cases, as in damages awarded under s 82 of the Trade Practices Act 1974 (Cth) the appropriate measure will be analogous to the tortious. That may not be in every case. Ultimately, it is the words of the statute that set the criterion for any award."*

41. The Respondent on the appeal in *Oracle* argued that the history of awards of general damages for such injuries was between $12,000 and $20,000[32] and so there had been no error of the Court. The Full Court of the Federal Court agreed with that history but determined,

> *"community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment not life than ever before[33]."*

[31] *Oracle* at paragraph [81] as per Kenny J and paragraph 119 of the joint judgment of Besanko J and Perram J.
[32] *Oracle* at paragraphs [78]-[79].
[33] *Oracle* at paragraphs [96] as per Kenny J, with whom Besanko and Perram JJ agreed at paragraph [119].

42. Justice Kenny quoted *Willett v Victoria* [2013] VSCA 76 ("*Willett v Victoria*"), in which the Supreme Court of Victoria replaced a finding of damages in the amount of $108,000, with $250,000.00, in respect of damages awarded to Ms Willett as compensation for her pain and suffering and loss of enjoyment of life caused by her former employer (Victorian Police) in exposing her to bullying and harassment in her workplace. Justice Kenny stated (at paragraph 100),

> *"Ms Willett's injuries were serious. At the time of the trial, she was undergoing treatment in a psychiatric hospital following an attempted suicide: Willett v Victoria at [13]. Tate and Priest JJA summarised her condition (at [48]) as follows: The upshot of Dr Shan's evidence was thus that Willett suffered from an ongoing and persistent major depressive disorder, which, while varying in severity from mild to moderate, affected her in an invasive way on a daily basis requiring significant doses of anti-depressant and associated medication and which rendered her permanently incapacitated for her pre-injury work as a police officer. Ms Willett was able to work, although in another occupation: Willett v Victoria at [50]. Tate and Priest JJA observed (at [50]), "[t]he negligence of the respondent had thus ... deprived [her] of the career she had chosen, in which she was proficient, and which she found fulfilling. In these circumstances, their Honours held (at [61]) that the jury verdict was "so small as to be unreasonable; so inadequate that no jury could reasonably have awarded them and out of all proportion to the severity of the circumstances of the case". In reaching this conclusion, Tate and Priest JJA endorsed the statements in Amaca Pty Ltd v King that society places a greater value on the loss of enjoyment of life and the experience of pain and suffering than previously and that awards of damages for injury of this kind had increased: see Willett v Victoria at[79]-[80*].[34]"

43. Justice Kenny then noted[6].

> *"More recently, in Swan v Monash Law Book Co-operative [2013] VSC 326 ("Swan v Monash Law Book Co-operative"), a trial judge again had occasion to assess damages suffered for pain and suffering caused by the defendant's negligence in exposing the victim, Ms Swan, to an unsafe workplace in which she was subject to bullying,*

[34] *Oracle* at paragraphs [100] as per Kenny J, with whom Besanko and Perram JJ agreed at paragraph [119].

harassing, and intimidating conduct. This conduct caused Ms Swan to suffer a mental 'breakdown': Swan v Monash Law Book Co-operative at [16]. Dixon J found (at [246]) that Ms Swan's injuries were "extremely onerous and deleterious" and continued (at [246]-[248]):

> *In addition to the primary symptoms of her Adjustment Disorder/Depressive condition, continuing anxiety and depression, that have been described by the medical witnesses, the plaintiff has somatic symptoms including temporomandibular joint dysfunction with bruxism and tinnitus, chronic insomnia, pain, including migraine and headache, anxiety, a disabling sensitivity to antidepressants, high blood pressure, and debilitating rashes and skin irritations that have all required separate diagnosis, and continue to require separate ongoing management and treatment. ... ... I am satisfied that the plaintiff remains substantially compromised in most aspects of her life, which has been reduced to one of isolation and disconnection from her family and friends and from the world around her. The plaintiff has surrendered her personal independence, lost her confidence, and lost her capacity to take interest in and derive pleasure from the stimulus in life. This has been a substantial loss of enjoyment of life, with much pain and suffering, both mental and physical. His Honour awarded Ms Swan $300,000, as damages for pain and suffering and enjoyment of life. In so doing, his Honour referred (at [261] to [263]) to Willett v Victoria and Amaca Pty Ltd v King, observing (at [261]) that "once liability has been determined, the starting point for the assessment of damages for pain and suffering and loss of enjoyment of life must be that it was common ground that the plaintiff had suffered a serious mental disturbance of which the respondent's conduct was a cause".*[35]'

44. Justice Kenny also referred to *Nikolich v Goldman Sachs JBWere Services Pty Limited* [2006] FCA 784 ("*Nikolich*") (being a case in which I was junior to Kylie Nomchong SC) noting Mr Nikolich had received around $80,000.00 in general damages (in circumstances not dissimilar to the Applicant in *Oracle*) and the decision of the Full Court in *Walker v Citigroup Global Markets*

[35] *Oracle* at paragraphs [101] as per Kenny J, with whom Besanko and Perram JJ agreed at paragraph [119].

Australia Pty Ltd (2006) 233 ALR 687 ("*Walker v Citigroup*"), which increased the general damages awarded from $5,000.00 to $100,000.00.

45. In general this case, provides considerable support for increased claims for significant general damages where there is any medical evidence of psychiatric injury arising from discrimination. I note that Justice Kenny referenced articles and the book written by Ms Ronalds (and Ms Raper junior counsel in the Oracle case) in this decision, which are to the effect that low amounts of general damages are generally in cases of discrimination. While true in the past, this decision makes that assessment or historical interest only.

46. What this now means is that discrimination claims, including claims for general damages without significant injuries but supported by medical evidence will be much increased, from nominal damages of around $2,000 to $5,000.00 to upwards of not less than $20,000.00 to $40,000.00. Cases supported by expert medical opinion of psychiatric injury caused by the discriminatory treatment, but not ongoing, are likely to be awarded upwards of $100,000.00. Awards in relation to ongoing injuries are likely to be significant and in line with personal injury awards[36]. Having said that there appears to remain some intransigence on the part of some in the Federal Circuit Court in applying this decision[37].

DEALING WITH CLIENTS WITH A PSYCHIATRIC ILLNESS

47. Any lawyer who has ever worked with people who have a psychiatric illness know two things:

    a. The process of giving advice and obtaining instructions is more often than not much more difficult and

    b. The litigation process itself can have additional adverse consequences for clients' injuries.

Obtaining Instructions and Giving Advice

48. If there is any golden rule in dealing with such clients, it is that obtaining instructions and explaining an advice will always take much longer than

[36] As per (and see also) *Qantas Airways Ltd v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 and of the type of order seen in cases such as *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377; (2007) 71 NSWLR 471.

[37] See for example Pop v Taylor [2015] FCCA 1720.

most other clients. Of course, current legislation and regulations concerning the legal profession and the ways in which courts should run are quite properly aimed at the timely, efficient and effective disposition of justice (e.g. section 37M of the Federal Court Act). However, what will result in the timely, efficient and effective disposition of justice in these cases will be different from other cases and will change depending upon the trajectory of the particular illness and the particular client. Often, more time than usual is needed to prepare a case. This is an adjustment to litigation required by the injury. In that regard, those participating in the legal process are bound by the *Disability Discrimination Act 1992 (Cth),* which requires that reasonable accommodation be provided to those with disabilities. This has implications for all aspects of managing such claims including when to commence action (noting limitation periods may provide some flexibility) and any timetables set by the Court. In this context, it can be useful to ask for expert opinion covering such issues as the effect of the injury on your client's ability to:

a. providing instructions;

b. understand advice;

c. give evidence about the matter; and

d. the likely effect of the litigation on the injury itself.

49. It (perhaps) goes without saying that written advices are crucial to the process of providing legal advice but, of course, an advice is only as good as the instructions received. The best starting place for any such litigation is obtaining from the client (or assisting them to obtain) a clear diagnosis, a treatment plan and a prognosis. These are not just important in relation to providing legal advice as to prospects of success and quantum of damage but are also crucial to understanding how best to deal with such clients when seeking useful instructions.

50. The way in which (or indeed whether) legal practitioners educate themselves with regard to the nature and extent of a client's illness will fundamentally affect the quality of the instructions received. If practitioners do not take steps to understand the illness with which they are dealing, when they deal with such clients, they risk exacerbating the illness itself either directly or inadvertently by not ensure litigation processes are managed around the illness rather than the other way around. Such an approach further potentially risks breaches of relevant occupational health

and safety legislation (see sections 17, 18, 19 and 27 of the *Work Health and Safety Act 2011 (NSW)* ("WHSA")).

Litigation Re-perpetration of harm

51. Asking someone with a psychiatric injury such as depression, anxiety or post traumatic stress disorder to relive the events giving rise to the litigation, which is what lawyers do every time they ask clients to give a statement or approve points of claim, without having a treatment plan in place also risks further exacerbating the injury. Thus any treatment plan must take account of and be responsive to the increased involvement of the client at various times during the litigation process (e.g. settling statements of claim, affidavits and providing evidence under cross-examination).

52. Importantly, where there is medical evidence about the impact of litigation on the particular illness it is possible to seek further damages. That occurred in the *Nikolich*[38] case, which concerned a claim of bullying[39] brought by a former investment advisor employed by Goldman Sachs in Canberra. Mr Nikolich's claim was made under the common law in breach of contract, the *Workplace Relations Act 1996 (Cth)*[40], the *Trade Practice Act 1974 (Cth)* and concerned a complaint of bullying against his former supervisor. In that case, the majority of the psychiatric injury arising was caused by the mismanagement of the complaint (including the fact that and the fact that nothing was done to protect Mr Nikolich from the alleged perpetrator during the investigation. As Justice Wilcox put it,

> *281 The issues concerning harassment, directly related to Mr Sutherland's conduct, overlap other issues of health and safety, raised also by the conduct of Ms Jowett, Mr Heath and others. I agree with the description of the situation offered in the applicant's submissions:*
>
> > *The failure to provide a secure and safe workplace left the Applicant festering in an environment of harassment and intimidation for an extremely lengthy period of time. No doubt that was exacerbated by the fact that no one in the*

[38] *Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784.

[39] Brought in New South Wales but under ACT law and thus was unaffected by tort law reform.

[40] Now the *Fair Work Act 2009 (Cth)* ("FWA").

Respondent's management team or Human Resources area took any steps to intervene to determine the veracity of the Applicant's complaint, other than by asking Mr Sutherland himself. The onset of the Applicant's psychological symptoms and the development of those symptoms over time occurred as a direct result of the Respondent's breach in this regard.'

53. In *Nikolich*, Justice Wilcox held,

> *339 There is a further complication. It will be open to the respondent to appeal against this judgment. That is its right and I do not seek to inhibit exercise of that right. However, in calculating damages, I have to take account of the possibility of such an appeal, with a consequential further delay, probably of about six months, in resolution of the case and, therefore, the date at which it is realistic to expect that Mr* ***Nikolich*** *will feel able seriously to search for work.* ***I refer again to the medical reports that suggest a lack of resolution of his grievance has hindered the applicant's ability to recover and thus be fit for work. I think I should allow for the possibility that recovery will be further delayed by an appeal by adding a further $50,000 to my assessment of damages for loss of future income, but adding a proviso to my orders that this is not to be payable if the respondent does not file a notice of appeal and satisfies the judgment within 28 days****.*
>
> *340 The course I propose is unusual. I emphasise that it is not taken to inhibit an appeal, or to punish the respondent for an unsuccessful appeal (if that is what it should turn out to be), but merely to prevent Mr Nikolich being compensated on a basis that turns out to be false.*

54. On appeal in *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62, Chief Justice Black held, *78 His Honour took into account the possibility that there might be an appeal with consequential further delay, which he assessed to be probably about six months. He allowed for this possibility by adding a further $50,000 to his assessment of damages for loss of future income. The course his Honour took, which he recognised was unusual, was to add a proviso to his orders that the further $50,000 was not to be payable if GSJBW did not file a notice of appeal and satisfied the judgment within 28 days. Thus, the order actually made by his Honour was for judgment for the full amount of general damages assessed with the proviso that, if no notice of appeal was filed and the lesser sum of $465,869 was paid to Mr* ***Nikolich*** *within 28 days, that payment should be taken as full*

payment of the judgment sum. 79 A notice of appeal having been filed, the proviso to his Honour's order had no operation. The parties were nevertheless in agreement that the proviso should be set aside. ***His Honour, a judge of very great experience, fashioned his order in the way he considered best calculated to do justice to both parties in the particular circumstances of the case. He made it clear that it was not his intention to frustrate GSJBW's right of appeal but that he was recognising the reality in these cases that recovery is often assisted by the resolution of the underlying controversy between the parties.*** *80 Both parties submitted that his Honour's order ought to be varied by deleting the proviso. The appellant offered no argument as to why the proviso was erroneous in principle and the respondent offered no argument in defence of it. Since the filing of the notice of appeal meant that the proviso had no effect in reducing the amount otherwise payable, questions about it are necessarily hypothetical and I am not persuaded that, on appeal, any order should be made setting it aside. It would be inappropriate in the present circumstances to express any view as to the correctness or otherwise of the approach taken by his Honour.*[41]"

LITIGATION CHEAT SHEET

55. Assuming a person is entitled to recover workers compensation payments the following steps provide a useful framework for deciding how best to conduct the litigation.

    a. Get the person medically assessed by an expert as a priority. Obvious matters such as diagnosis and prognosis ought be covered, but also make sure that any such issues peculiar to each regime are addressed at the earliest point, including:

        i. the degree of whole body impairment[42] (necessary for determining the trajectory of any workers compensation claim);

        ii. expert opinion in relation to causation and/or reasonable adjustment in any discrimination claim; and

[41] *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62, as per Chief Justice Black (Marshall J in the majority paragraph [167]; Jessop J in dissent from paragraph [168]).

[42] Noting a finding that there is more than 15% whole body impairment has a very significant impact on recovery under workers compensation legislation.

iii. the likely impact of the litigation and any appeal on the diagnosis/prognosis.

b. Conference with and consult the client's treating doctors to ensure the litigation is handled in a way that minimises harm.

c. Make sure if there are more than one set of lawyers involved (i.e. the workers compensation and other claim are being handled separately) that there are no settlement discussions/offers without ensuring such offers do not undercut/undermine the total claim.

d. Make sure you have a management protocol for dealing with vicarious trauma that is regular and systematic.

Dealing with Vicarious Trauma

56. There is now significant research about the high prevalence of depression in the legal profession[43]. In that research the number conflict as to the extent of depression, however, it is clear that vicarious trauma, dealing with difficult cases concerning trauma to clients is a key reason for the occurrence of depression. At a recent CPD for the NSW Bar Associate Ms Emily Keen (employed by Rape and Domestic Violence Services) made it clear that there is no research showing any particular persons are predisposed to vicarious trauma. The only clear determining factor is exposure to trauma material. In the context of the WHSA, this represents a risk that must be addressed in accordance with that act.

SUMMARY

57. Maximising the claims of those with psychiatric injuries will often mean commencing action alongside a workers compensation claim. It also means keeping them, and ourselves, mentally well. This is a challenge, given litigation is inherently stressful and uncertain. Such challenges are best met starting with a focus on what the client wants and needs (both of which may be quite different), proceeding with an analysis of how the different types of

[43] 2014 Survey by Urbis P/L of New South Wales Barristers on behalf of the NSW Bar Association and presented by Arthur Moses SC at the CPD "Dealing with difficult cases: vicarious trauma at the bar" held on 8 March 2016. See also the 2009 report – conducted by Brain & Mind Research Institute of the University of Sydney in relation to law students, solicitors and barristers found at: https://www.lawsociety.com.au/about/YoungLawyers/MentalHealth/Statistics/index.htm

legal options available may each address those wants and needs and then designing a strategy to manage the requirements inherent different sets of litigation. This may require co-ordination between different legal teams.

58. Managing clients' psychiatric illness is also key to both minimising the harm to clients arising from litigation, as well as our own compliance with obligations under the WHSA. Further, we have obligations to ourselves and our staff in dealing with vicarious trauma.

59. It is uniquely challenging to represent clients with psychiatric injuries. Following the doctor's oath of "first do no harm" is certainly a challenge for lawyers trying to manage litigation, made possible by ensuring proper steps are made to come to grips with both the law and people involved.