

THE ELEPHANT IN THE ROOM

Dr Michael Epstein

Paradox –

It is government policy to improve mental health outcomes and reduce stigma
It is also government policy to discriminate against claimants with a psychiatric injury.

While researching my new book *The Guide to Civil Psychiatric Assessment* I was struck by the inequity between treatment of physical and psychiatric injuries in all jurisdictions in various ways and to varying degrees. This obvious inequity led me to exploring this paradox further.

This paper briefly examines the burden of mental illness, the state, national and international responses to mitigate the effects of mental illness and the financial burden it imposes on communities.

The paper then examines the systematic and widespread discrimination by governments against people with a psychiatric injury involved in:

- workers' compensation claims
- motor accident claims
- civil liability claims

Reasons for this discrimination are then discussed.

Mental Health awareness in the community

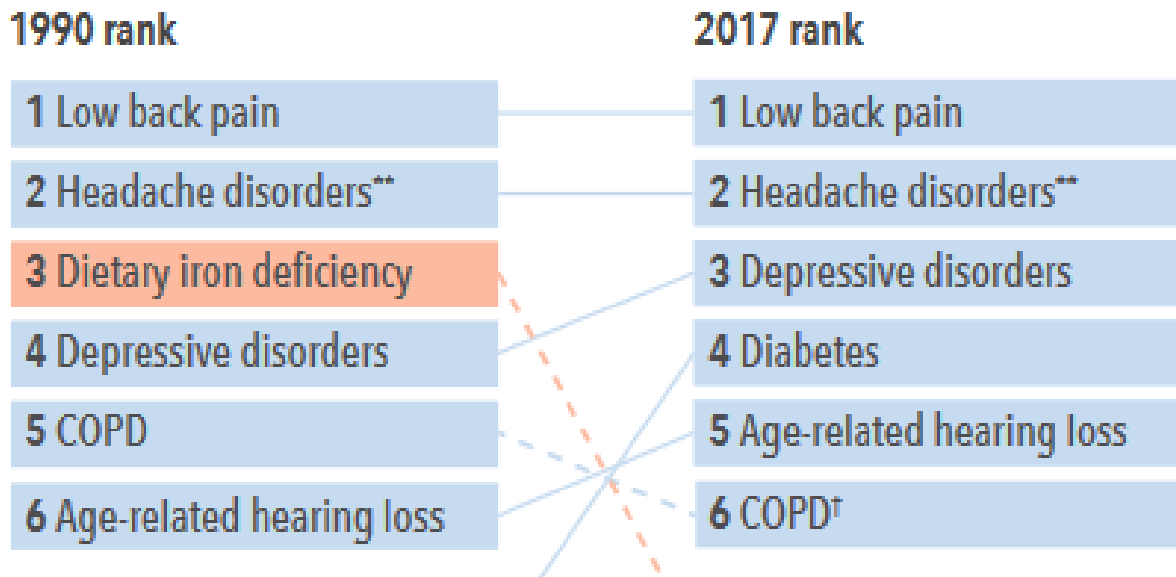
There is a widespread awareness burden of mental illness.

In Australia the total burden of disease is as follows

cancer	(18.5%)	
cardiovascular diseases	(14.6%)	
mental/substance use disorders	(12.1%)	(AIHW 2016.)

The World Health Organization - leading causes of disability

Global all-age YLDs



Mental Health and Occupational Disease

'job stress and other work-related psychosocial hazards are emerging as the leading contributors to the burden of occupational disease and injury.' (beyondblue).

The expanding government involvement in Mental health issues

There has been significant expansion of the mental health sector (although not necessarily in service provision), amongst other changes there are Mental Health Commissioners in:

- the Commonwealth,
- WA,
- NSW,
- Queensland
- Victoria.

There was a Mental Health Royal Commission in Victoria in 2019 and a Productivity Commission Draft Report on Mental Health released in October 2019.

Mental Health and Discrimination

Australian legislation against discrimination is consistent with international conventions that protect the rights of people with mental illness

The Australian Human Rights Commission notes that mental illnesses lie within the definition of disability in the Disability Discrimination Act. The provisions of the Act include:

- unlawful to discriminate against a person because of disability.
- disability discrimination
 - less favourable treatment
 - restricted opportunities because of disability

International and Local Entities to Counter Discrimination

The Victorian Equal Opportunity and Human Rights Commission promotes equal opportunity and helps address unlawful discrimination.

The Australian Human Rights Commission promotes human rights and deals with compliance and discrimination.

New Zealand ratified the UNCRPD (Committee on the Rights of Persons with Disabilities) in 2008.

NZ legislative framework (including the Bill of Rights Act, The Human Rights Act, and The Code of Health and Disability Services Consumers' Rights) designed to protect the human rights of people who experience mental distress.

United Nations General Assembly has adopted 'principles for the protection of persons with mental illness and the improvement of mental health care'.

World Health Organization provides information on mental health and human rights..

beyondblue

beyondblue is an Australian independent non-profit organisation working to address issues associated with depression, suicide, anxiety disorders and other related mental disorders.

This organisation states that with regard to discrimination:

- people with depression and anxiety, their family and friends, experience stigma and discrimination.
- different types of stigma associated with depression and anxiety.
 - personal stigma
 - perceived stigma
 - self-stigma
 - structural stigma - *the policies of private and governmental institutions that restrict the opportunities of people with depression and anxiety*

According to *beyondblue*

- - the greatest impact of stigma is on relationships and employment.

The Problem (the elephant in the room)

Despite all the above there is systematic and widespread discrimination by governments against

- workers with a psychiatric injury
- transport accident claimants with a psychiatric injury

- civil liability claimants

This is a worldwide phenomena. A clear example is the situation and the United States with regard to the Purple Heart.

The Purple Heart – what it is, what it does

The Purple Heart is awarded in the name of the President of the United States to any member of the Armed Forces of the United States who has been wounded or killed.

Purple Heart recipients receive significant military and civil benefits :

- special military pay for qualifying Purple Heart retirees
- VA medical care priority treatment for Purple Heart recipients
- VA co-payments
- education support
- 10-point federal hiring preference for Purple Heart recipients
- college tuition waivers for Purple Heart recipients
- Purple Heart scholarship programs
- Purple Heart license plates and ID cards

In 2009, the Pentagon decided **not to award** the Purple Heart to veterans with PTSD.

The explanation -

- The loss of a limb or any other combat wound is a permanent loss
- PTSD is a treatable disease and some may feign illness in order to receive medical treatment.

This view is widespread and probably explains the following set of beliefs with regard to psychiatric injury:

- the diagnosis relies only on the claimant's story
- there is poor diagnostic reliability
- these symptoms are easily faked
- these claimants already vulnerable and may exaggerate their symptoms
- psychiatric injury is easily treated
- claiming psychiatric injury is probably a cop-out from difficult situations
- these claims are rorting the system
- easing access to schemes for psychiatric injury would open the floodgates
- psychiatric injury claimants could bankrupt schemes

A Lawyer's Perspective: Legal Developments re Psychiatric Injury

- Psychiatric injuries are a problem from a policy perspective (for the reasons mentioned above)
- In England, Australia and elsewhere it has been thought necessary to discriminate against claimants with psychiatric injuries.

An Historical Perspective

The case of the Victorian Railway Commissioners v Coultas (Coultas) 1888 was seminal in determining a judicial and later a legislative response to claims of psychiatric injury.

On 8 May, 1886 Mr James Coultas, his wife, Mary Coultas and his wife's brother, John Wilson were driving home on a dark and wet night from Melbourne to Hawthorn in a buggy and came to the Swan Street level crossing of the Hawthorn Railway.

The gatekeeper opened the near gate, the buggy followed him to the down line. A train approached, the gatekeeper told Mr Coultas to go back. Instead Mr Coultas told the gatekeeper to open the far gate and he did so. James Coultas whipped his horse and the buggy lurched forward and was just missed by the train. As the train approached Mrs Coultas fainted and fell forward into her brother's arms. She was taken home and had a miscarriage followed by a severe and protracted illness.

At the ensuing jury trial, the jury found for the plaintiffs. Damages awarded were £342 (\$126,000 today) for James Coultas and £400 (equivalent to \$150,000 today) for Mary Coultas.

The case was taken to the Victorian Supreme Court on Appeal.

The full Court answered that the damages awarded were

- not too remote to be recovered
- the proof of impact was not necessary and
- that the female plaintiff could recover damages for physical and mental injuries from 'fright'

Judgement was awarded for the plaintiffs for the amount awarded.

The Victorian Railway Commissioners lodged an appeal with the Privy Council.

The Privy Council reversed the decision of the Supreme Court in March 1888.

The Privy Council found for the Victorian Railway Commissioners. The judgement briefly summarised was as follows:

1. *That no similar case is reported in any of the books.*
2. *That the rule of English law regulating damages recoverable for negligence is laid down in the case of Nottinghill is against the plaintiff's contention.*
3. *That Mrs Coultas's fright was caused by seeing the train approach, and thinking she and her husband were about to be killed, and that such fright and shock are not such a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper.*
4. *The fear of extending the law of liability for negligence beyond its present limits and of opening a wide field for imaginary claims.*

The reasoning behind the Privy Council's decision reflected social prejudices of the time about medico-legal consequences of railway collisions. In the 19th century the railways were the greatest source of injury and accidental death - in 1893 there were 47,729 people injured or killed on railroads in the United States. The great majority of those who used the railways, and who therefore were exposed to a proportionately greater

risk of injury, belonged to the poorer strata of society. Some judges suspected that many of the plaintiffs making claims against the railway companies were healthy people who were not motivated by genuine suffering, but by the hope of enrichment through compensation. This is in spite of the fact that already in the 1880s clinical research into psychological consequences of fright suggested that serious 'general functional disorders' or 'neuroses' often develop even after slight injuries.(Mendelson Danuta)

This decision cast a century long cloud over similar claims.

Concerns about the Legitimacy of Claims of Psychiatric Injury

There are understandable concerns about some claims of psychiatric injury. The following newspaper article is about a man who sued the state government over the prison death of his son from an ICE overdose. Guards noted his son acting erratically during a medical checkup and during a cavity search he swallowed a package containing the drug and died in hospital four days later. A Medical Panel determined the claimant psychiatric or psychological injury did not meet the threshold to pursue a claim. (In Victoria for a civil liability claim to proceed the plaintiff must reach the threshold of 5% or more regarding a physical injury and 10% or more for a psychological injury.)

Court documents stated that there was evidence that the plaintiff was involved with alcoholism and violence, the plaintiff had had a difficult childhood and had lost a limb in a bombing in Lebanon. Despite this the plaintiff stated he had neither psychological or ongoing distress from these incidents. When his son was sentenced to 3 ½ years for armed robbery, theft and violent offences the judge said "

"Your father (the claimant) was a violent alcoholic who physically abused you". The Supreme Court ordered that his case be reviewed after finding he was denied procedural fairness.

Dad sues over son's jail death

A MAN is suing the state government over the prison death of his son from an ice overdose

Youssef Bazouni claims he suffered psychiatric injury over the death of his son Billy Bazouni, 21, in Port Phillip Prison on July 6, 2016.

Guards noticed him acting erratically during a medical check-up, and during a cavity search he swallowed a package containing the drug. He died in hospital four days later.

ALEKS DEVIC

A medical panel determined Mr Bazouni's psychiatric or psychological injury did not meet the threshold to pursue a claim.

Court documents state there was evidence of alcoholism and violence, a difficult childhood and him losing a limb in a bombing in Lebanon.

But the panel said Mr Bazouni "surprisingly stated he had

neither psychological ... nor ongoing distress" from the incident.

When Billy was sentenced to 3½ years for armed robbery, theft and violence offences, the judge said: "You father was a violent alcoholic who physically abused you."

But the Supreme Court has ordered Youssef Bazouni's case be reviewed after finding he was denied procedural fairness.

The Burden of Mental Injury Claims

Despite these dubious cases nevertheless it is important to be aware of the data regarding the burden of mental injury claims.

- the number of work related stress claims has fallen relative to the increase in population
- the cost of stress claims is significantly more than the cost of other claims.
- since 2000/2001 the percentage increase in cost of stress claims has been the same as the percentage increase in average weekly earnings over this period.

Catastrophising the Burden of Psychiatric Injury

Despite there being good quality data about the cost of psychiatric injury nevertheless there is a good deal of spurious and misleading information that cannot be validated exaggerating the extent of the numbers involved and the cost to the community. It is understandable that for benevolent reasons different groups wish to raise public awareness of mental health issues and pressuring governments to provide more funding for mental health services. Unfortunately these exaggerated claims reinforce governments fear, unchanged from the Privy Council decision that:

The fear of extending the law of liability for negligence beyond its present limits and of opening a wide field for imaginary claims.

The following examples illustrate these concerns.

The Australian Human Rights Commission in May 2010 produced a document called *“Workers with Mental Illness: a Practical Guide for Managers.”*

This document asserted that *a total of 3.2 days per worker are lost each year through workplace stress.* (No data is provided to substantiate this claim).

This document also stated that *“Stress-related workers’ compensation claims have doubled in recent years, costing over \$10 billion each year.”*

However SafeWork Australia, an organisation that collates data from the states and territories reported that \$480 million was paid in workers’ compensation for work related mental disorders in 2012/2013 and that the total cost to the community was \$3.1b.

The actual numbers of stress claims have dropped between 2011 and 2017.

Medibank Private published “The Cost of Workplace Stress in Australia” in 2008. This table was presented.

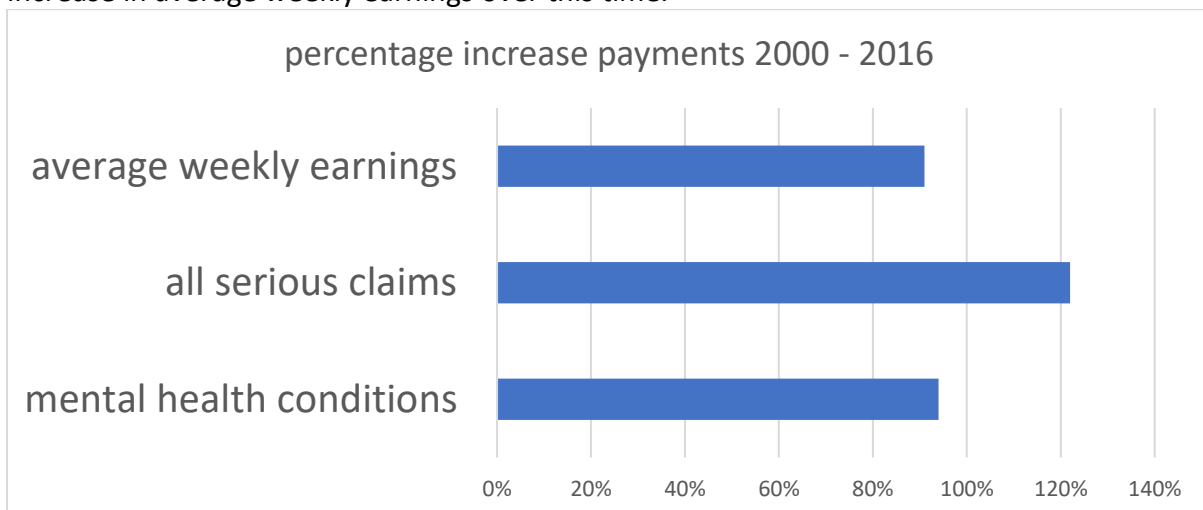
	Stress related 'presenteeism'	stress related absenteeism
Cost to Economy	\$6.9b	\$5.12b
Cost to Employers	\$6.63b	\$3.48b
Productivity loss	0.89%	0.47%
Days lost per worker per year	2.1	1.1

The assertion that there is 1.1 days 'stress' absenteeism/ year costing the economy \$5.12b is made with no references.

SafeWork Australia data gives a contrasting picture

overall cost of injury SafeWork Australia	cost workers' compensation	percentage cost	percentage claims	overall cost/claim
Mental stress 2012-2013	\$3.1b	5%	2%	\$292,770
all workers' compensation	\$61.77b	100%	100%	\$116,580

The graph below illustrates the percentage change in compensation between 2000/2001-2015/2016 paid for all workers compensation claims, mental health claims compared with increase in average weekly earnings over this time.



What does all this mean? It seems the factoids give a very different picture of the extent of mental health issues and the associated costs compared with the data.

Various Commonwealth, State and Territory Schemes and “Mental Stress Claims”

Each scheme provides extra barriers for people with “mental stress claims” as compared with those with a physical injury. This reflects the concern of all schemes that treating these injuries in the same way will lead to financial disaster.

Each scheme has its own particular barriers. There are three major benevolent schemes including workers compensation schemes transport/motor accident schemes and civil liability legislation.

Workers Compensation Schemes

Workers’ compensation schemes markedly different from other benevolent schemes. Workers compensation becomes the intersection of complex socio/politico/medico/legal factors. It is simplistic to regard workers compensation is simply a means for injured workers to receive appropriate treatment and payment for loss of earnings. Two examples illustrate the point.

In one year the number of stress claims in the Victoria police force dropped by 50%. A new superannuation scheme had commenced. The new scheme provided better benefits. The number of police officers applying for superannuation increased by 250% in the same year. One interpretation is that police officers chose to exit their employment via the superannuation route rather than by the workers compensation route.

In 1993 the number of Victorian ‘stress claims’ dropped from a decade long 5.2% of all claims to 2.5% of all claims after the Victorian government introduced amendments to the Accident Compensation Act rejecting claims due to reasonable management action

There are other significant differences between workers compensation schemes and other schemes. Workers compensation schemes are the only schemes with a constituency – unions.

Workers compensation schemes are usually managed by insurance companies (claims agents).

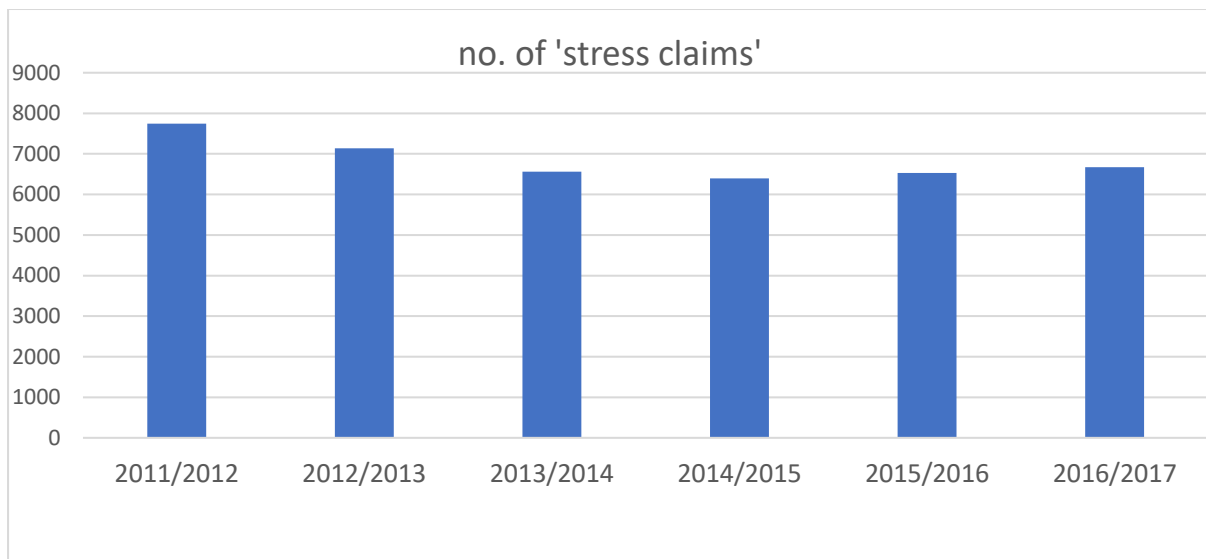
Workers compensation schemes are a constant challenge for governments to reduce cost of w/c schemes to remain competitive with other states. The most recent example is the review of the New South Wales workers compensation scheme released in December 2019 that found a significant deterioration in the financial performance of the scheme. Workers compensation schemes are the schemes that are most manipulated by governments in an endeavour to reduce costs.

Workers compensation schemes have a high rate of rejection of claims - in October 2015, 44.5% of mental health claims by Victorian police officers were rejected, as opposed to 4.7% of claims involving physical injuries (The Age, 2016).

Workers compensation schemes are notorious for the poor rate of return to work compared with equivalent non work injuries.

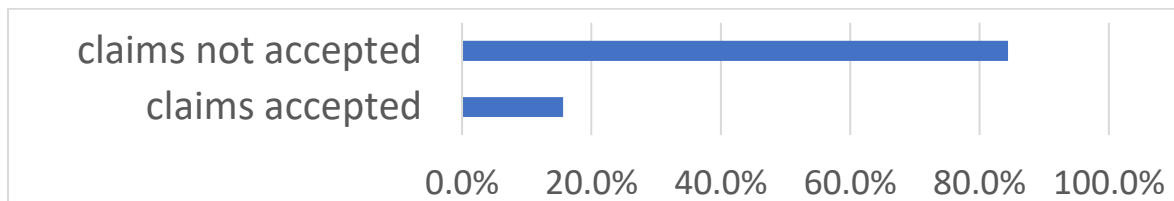
The duration of work disability is associated with psychosocial job factors independent of injury severity and physical workload. The impact of these risk factors changes significantly over the course of disability. *Am. J. Ind. Med.* 40:374–392, 2001.

SafeWork Australia has recorded the number of stress claims between 2011/2012 and 2016/2017. Over this period there was a drop in the number of stress claims. During this time the total Australian Workforce Numbers Increased by 4.3%. Fears of a blowout in stress claims are clearly unfounded.

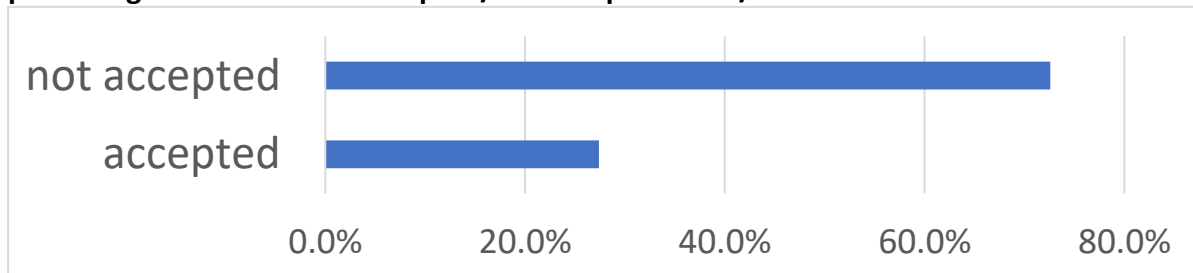


The discrimination is exemplified by examining the difference between the percentage of stress claims accepted compared with the percentage of all claims accepted..

Percentage of stress and other mental health claims accepted/not accepted 2016/2017



percentage of total claims accepted/not accepted 2016/2017



Claims agents

Claims agents have been a significant cause of issues to do with discrimination against people with psychiatric injuries.

The Victorian Ombudsman's report 2016 states that:

- many with a work-related mental injury experienced **highly adversarial behaviour** from agents.
- claimants with serious conditions are more likely to have their claims challenged by agents and rejected without a proper basis
 - in Victoria three quarters of decisions to terminate payments after 130 weeks were overturned by the courts
- Mental Health Council of Australia (MHCA 2014))
 - mental injury claimants in disputes with insurers
 - 'face barriers in engaging with a complicated, drawn-out, adversarial process'
 - 'this is daunting for consumers who worry that their illness is made worse'.
- Claims agents receive bonuses when workers 'return to work'.
- Claims agents appear to be involved in 'doctor shopping' – sending claimants to as many as five IMEs in order to elicit a diagnosis that helps the agent to reject the claim.
- Claims agents make use of covert surveillance – surveillances of little value regarding mental injury
- Privacy concerns
 - New Zealand Privacy Commissioner,
 - *'[claimants] have little choice in what they are required to provide if they are to get cover, or have a claim paid'.*
 - Medical notes may contain family or relationship information
 - Lack of privacy creates special disadvantages for mental injury claimants
 - Claims agents sometimes interfere with treatment
 - it is alleged that Claims agents apparently discourage some people from seeking help they need and are entitled to.

Workers' Compensation Legislation

Workers compensation law has been where most changes have been made.

In all jurisdictions there is no entitlement to compensation if the injury has arisen as reasonable management action.

For example:

Workplace Injury Rehabilitation and Compensation Act 2013 (No. 67 Of 2013) - Sect 40

(1) There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominantly by any one or more of the following—

(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;

(b) a decision of the worker's employer, on reasonable grounds, to take, or not to take, any management action;

(c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action;

This exclusion originated with ComCare but has been incorporated in the relevant Acts in **all** States and Territories, SeaCare and the *Military Rehabilitation and Compensation Act 2004* (MRCA)

This section was designed to prevent claims as a result of workers being disappointed at not receiving an expected benefit.

Most claims in this area have a long history of workplace issues causing mental health problems leading to a decline in work performance. The management action is often the final act in a long saga.

Jean is a 48 year old single woman who was assistant manager of a government department. Her manager was a chronic alcoholic and grossly dysfunctional manager nearing retirement. She did both her work and his work. She had repeatedly complained to senior management about his performance and his behaviour. The senior manager told her to cover for him until he retired and then 'you'll get his job'.

Her manager retired and his job given to another applicant. She was shattered. Senior management denied any deal. She could not continue having become 'burnt out'. Her claim was rejected - reasonable management action!

Since this clause was enacted it has been used repeatedly to deny benefits to workers, anecdotally I know of no cases where this decision has been upheld by a court or tribunal!

Psychiatric Injury as a result of a Physical Injury

Victoria was a pioneer in implementing reform of workers compensation with the passing of the Accident Compensation Act in 1985. For the first time a method of impairment assessment (the American Medical Association Guide to the Evaluation of

Permanent Impairment (AMA 2nd edition) was incorporated into the Act. Once the worker was deemed to have level of impairment of 30% or more of the worker was entitled to lifetime benefits. Over time this caused significant financial stress for the WorkCover authority. In particular there was concern about a worker who had a back injury being deemed to have an impairment of 15%, well below the threshold but the worker was sent to a psychiatrist who determine the level of psychiatric impairment was 15%. As a result the worker had a total impairment of 30% and began receiving lifetime benefits. This was called the “psych top-up”.

In 1996 the Victorian government introduced legislation allowing only psychiatric impairment to be considered if the psychiatric injury was not secondary to a physical injury. The Minister’s second reading speech gave 4 examples. One of these involved a worker whose hand had been caught in a machine. Surprisingly the Minister stated that the total psychiatric impairment from this injury would be counted! This is not the current situation. The trauma from the original injury would now be counted but the mental health issues arising from the physical injury would not be counted.

These amendments caused consternation and it was some years before there was general agreement about how this was to be determined. For example, the legislation stated that psychiatrists were not to consider any psychiatric impairment from a physical injury however in court proceedings psychiatrists were repeatedly asked to give the whole person impairment and then inform the court of that component of the impairment that was not secondary to physical injury. It was also thought that if there was a whole person impairment assessment then the subsidiary impairments should be combined as is done in other sections of the AMA guides and not simply added together. This was also not accepted by the courts.

The explanation given for the equity underlying these amendments was that AMA4 (that had been adopted in place of AMA 2) and later AMA5, included pain and suffering in assessing impairment from a physical injury. This was incorrect, Page 9 AMA 4 states *“impairment percents in chapters re various organ systems allow for associated pain”*. No mention of suffering or any psychological distress.

This concept has since been adopted by most states and territories not only for workers compensation claims and also for transport accident claims. In Victoria this is also become incorporated into the Wrongs Act 1958. Only that component of a psychiatric injury or stress claim that is not secondary to a physical injury can be considered when assessing whether or not a claimant reaches or exceeds threshold a civil liability to proceed. This concept is not present in some jurisdictions, the Commonwealth (ComCare), the Northern Territory and NSW SIRA regarding Motor Accidents.

There have been various names for this difference including:

- Pure and Consequential Mental Harm (South Australia WorkSafe and Motor Accidents, NSW Civil liability claims)
- Primary and Secondary Psychiatric Impairment (ACT, NSW, WA, Tasmania and Queensland).

Impairment secondary to a physical injury/ Impairment not secondary to a physical injury (Victoria WorkCover/TAC/ Wrongs Act claims).

This concept is a legal fact but a medical fiction, no psychiatrist in clinical practice make this distinction.

This causes significant difficulty in assessing claims.

For example:

- a physically injured motor accident claimant with PTSD mourning the loss of her husband in the accident.
- A claimant wakes during surgery for a physical injury, claims PTSD from waking up and experiencing the operation and being powerless to have the anaesthetist take action.
- multiple accidents, give impairment from each accident and separate out impairment secondary to a physical injury as opposed to impairment that is not secondary to a physical injury from each accident!

It Becomes More Complicated

The concept arose in Victoria where physical and psychiatric impairment combined gave some logic to avoiding the 'psych top-up' if the scores are combined.

However in the ACT, NSW, Queensland and South Australia physical and psychiatric impairments cannot be combined and so the whole rationale for introducing the concept falls over. The concept becomes an unashamed means of reducing compensation for psychiatric injury, especially in South Australia.

The New Zealand Variant

By contrast the New Zealand Accident Compensation Act (the ACA) (that covers all injuries in one scheme including work injuries, motor accidents, other accidents etc.) states that there is only cover for mental injuries if the mental injury is caused by:

- *physical injuries — s26(1)(c)*
 - *a sudden traumatic event at work (pure mental harm) — s21B,*
 - *consequence of criminal acts involving*
 - *actual or suspected sexual abuse*
 - *assault on a child*
 - *assault by a male on a female*
 - *female genital mutilation*
- *compelling Indecent act with an animal — s21,*

The New Zealand Accident Compensation Act does not cover for mental injuries:

- caused only by traumatic events that happen outside work,
- caused by stress or other gradual processes at work,

- if a mental health specialist identifies that the mental condition occurred before the accident or event,
- if the accident had only a limited effect (e.g., was a trigger or “final straw” after a series of stressful events),
- where a minor physical injury in traumatic circumstances was not a significant cause of the mental injury.

Class ranges for the GEPIC, the PIRS and the NZ AMA4 Handbook

Most jurisdictions provide a lump sum payment and ongoing benefits if claimants reach or exceed a certain threshold of impairment. The means of assessing this is the relevant American Medical Association Guides to the Evaluation of Permanent Impairment, in Victoria the 4th edition is still use but in all other jurisdictions AMA 5 is used (except for motor accident claims in the Northern Territory where AMA 6 is mandated). The chapter on mental and behavioural impairments in AMA 3/AMA 4/AMA 5 is unworkable. Each edition provides a table as follows:

Area or aspect Of functioning	Class 1: No impairment	Class 2: Mild impairment	Class 3: Moderate impairment	Class 4: Marked impairment	Class 5: Extreme impairment
Activities of daily living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all, useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social functioning					
Concentration					
Adaptation					

The table is to assess 4 areas of functioning

activities of daily living,
social functioning,
concentration, and
adaptation.

- only *concentration* is a measure of impairment, the other 3 measure disability
- There are no descriptors provided.
- These areas of function are not restricted to impairment arising only from psychiatric injury
- There are no percentage guides provided for different classes
- There is no method for combining the areas of functioning.

The explanation for the failure to provide percentages for each class was:

The use of percentages implies a certainty that does not exist, and the percentages are likely to be used inflexibly by adjudicators, who then are less likely to take into account the many factors that influence mental and behavioural impairment. Also, because no data exists that show the reliability of impairment percentages, it would be difficult for Guides users to defend their use in administrative hearings.
(AMA 4 p 301)

This decision made the AMA Guides unusable. As a result different jurisdictions had to develop their own method of determining psychiatric impairment. In Victoria the original guide, AMA 2 was substantially changed but incorporated into what is now called the Guide to the Evaluation of Psychiatric Impairment for Clinicians (GEPIC).

In most other states the table in AMA 5 has been adapted with the addition of percentages for each class and of descriptors. This originated in New South Wales and is called the Psychiatric Impairment Rating Scale (PIRS). It is part of the New South Wales Guide to the Evaluation of Permanent Impairment that has since been incorporated into the workers compensation schemes in Queensland, Western Australia and Tasmania.. In New Zealand the AMA 4 table has also been adapted but different percentages apply.

It is informative to review the different percentage ranges for each class with these different methods.

CLASSES	1	2	3	4	5
GEPIC	0-5%	10-20%	25-50%	55-75%	over 75%
PIRS	0-3%	4-10%	11-30%	31-60%	61-100%
NZ AMA4	0-9%	10-35%	36-60%	61-79%	80-100%

For example, Class 2 ranges from 4% to 35% according to the different method used. This is important because different jurisdictions use thresholds to determine whether or not benefits may be paid.

Impairment Guides and Thresholds

Impairment guides are a useful tool in restricting benefit for psychiatric injury. As discussed above impairment is only counted in Australia if it is not secondary to a physical injury, something of the contrary applies in New Zealand.

The Psychiatric Impairment Rating Scale (PIRS) is problematic.

1. There is the exclusion of certain diagnoses – somatoform disorders and adjustment disorders.
2. There is a significantly lower class range –
PIRS Class 2 4-10%
The threshold for serious injury in NSW is 11%
Compare with
 GEPIC Class 2 10-20%
 NZ AMA 4 Class 2 10-35%
3. The combining method for the PIRS means a claimant scoring Class 2 in all 6 functions can still not score higher than 6%!

Thresholds for Permanent Impairment

Some jurisdictions have the same threshold for physical and psychiatric injury and others have different thresholds. Some jurisdictions combine physical and psychiatric injury and some do not. The word “primary” has been used to replace the clumsy term “impairment not secondary to physical injury” and the term “pure mental harm”.

1. Jurisdictions with the same threshold for physical and psychiatric injury:

- (a) Jurisdictions where physical/psychiatric impairment combined
New Zealand 10% or more (some restrictions on psychiatric injury)
(AMA4 Class 2)
Northern Territory 5% or more (primary + secondary impairment)
(PIRS Class 2)
Western Australia 15% or more (only primary)
(PIRS Class 3)
- (b) Jurisdictions where physical/psychiatric impairment are not combined

Queensland 15% (only primary) (PIRS Class 3)

2. Jurisdictions with different threshold for physical and psychiatric injury:

- (a) Jurisdictions where physical/psychiatric impairment combined

ACT	physical 11% or more - psychiatric 15% or more (PIRS class 3 primary)
NSW	physical 11% or more - psychiatric 15% or more (PIRS class 3 primary)
Tasmania	physical 5 % or more - psychiatric 10 % or more (PIRS class 2 primary)
Victoria	physical 10 % or more - psychiatric 30 % or more (GEPIC class 3 primary)

(b) Jurisdictions where physical/psychiatric impairment not combined

South Australia physical 5 % or more -psychiatric 30 % or more
(GEPIC class 3 only primary)

In South Australia

if physical impairment is 5% or more then a lump sum is paid

If psychiatric impairment 30% or more no lump sum paid

Legislative Changes further Psychiatric Injury Claims

Most legislation states that work must have been a significant contributing factor employment must contribute to the injury in a way that is not insignificant, trivial or minimal.

A work injury does not have to be the only injury or the dominant injury.

There have been recent alterations in the relevant Acts in Queensland and South Australia with regard to psychiatric injury.

The South Australian Act states:

*If a physical injury arising out of or in the course of employment and the employment was **a** significant contributing cause of the injury*

*If the psychiatric injury arises out of or in the course of employment and the employment was **the** significant contributing cause of the injury. (My emphasis)*

The effect of the change in legislation in South Australia and Queensland is that, by contrast with a physical injury, a psychiatric injury has to be the dominant injury.

A recent Tribunal decision in South Australia stated: ‘

employment must have made a greater or more significant contribution to the occurrence of that injury than the contribution from any other contributing cause.

Recent changes in New South Wales include:

claimants receive benefits for 6 months.

payments then cease for:

sprains

a ‘minor’ psychiatric injury this is defined as an injury where the symptoms do not meet the DSM5 criteria for a recognised psychiatric illness (this seems reasonable however the definition also states:

or the diagnosis is an acute stress disorder or an adjustment disorder.

The exclusion of “acute stress disorder” makes no sense as DSM 5 states that the duration of the disturbance is three days to one month after the trauma exposure. Given that the symptoms of Acute Stress Disorder are substantially the same as Post Traumatic Stress Disorder and that for Post Traumatic Stress Disorder the duration of the disturbance is more than one month then it seems most unlikely that this exclusion would apply.

It is difficult to understand why the diagnostic term ‘adjustment disorder’ is excluded. It is a recognised diagnosis and very commonly used for claimants with a psychological injury. Exclusion of this diagnosis inevitably leads to a change to a diagnosis that is accepted.

The threshold for payment for non-economic loss is an impairment of more than 10% using the PIRS only counting ‘primary’ psychiatric impairment but not for somatoform disorders or pain.

Physical and psychiatric impairments are not combined.

Transport/Motor Accident Claims

WA, Queensland and the ACT have Compulsory Third Party (CTP) schemes. These are fault-based schemes. Fault has to be proved using the provisions of the relevant Civil Liability Act.

In some CTP schemes there is provision for no-fault funding of catastrophic injury through the National Injury Insurance Scheme.

No-fault third-party motor vehicle insurance arrangements (to varying degrees) are in New South Wales, Northern Territory, South Australia, Tasmania and Victoria. These states also allow for CTP when negligence can be proved.

CTP does not discriminate between physical and psychiatric injury (however the appropriate Civil Liability Act may with different impairment thresholds for physical and psychiatric injury.)

New South Wales (no-fault)

- Claimants receive benefits for 6 months.
 - payments then cease for:
 - sprains
 - a ‘minor’ psychiatric injury
 - symptoms do not meet the DSM5 criteria for a recognised psychiatric illness
 - or the diagnosis is an acute stress disorder or an adjustment disorder (see above)
- The threshold for payment for non-economic loss is impairment more than 10%

- PIRS used for determining only 'primary' psychiatric impairment
 - but not for somatoform disorders or for pain
- Physical and psychiatric impairments are not combined

South Australia (CTP)

- Psychiatric impairment must be from pure mental harm, so-called 'primary' psychiatric impairment.
- The claimant must have a physical injury or be the parent, spouse or child of a person killed, injured or endangered in the accident
- The threshold - median class 3 GEPIC (25% or more)
- Physical and psychiatric impairments cannot be combined.

Victoria

Permanent impairment

- Only non secondary impairment (so-called primary) counts
- The threshold for psychiatric injury is 30% or more using the GEPIC
- The threshold for physical injury is 10% or more.
- A legislative amendment (since rescinded) stated that to have a serious injury a person with a mental injury had to have treatment for 3 years without improvement to access common law damages.
- There is a so-called narrative test (for those who do not reach the impairment threshold of 30% for a psychiatric injury) but may make a common law claim if:
 - a physical injury is 'serious'
 - a psychiatric injury is 'severe'

Civil Liability Claims

Concerns about the rising cost of liability premiums lead to measures to reduce these premiums. one major change was that claimants had to exceed a certain threshold of impairment for the claim to proceed.

In Victoria:

the threshold for a physical injury is 5% or more impairment

the threshold for a psychiatric injury is 10% or more impairment

Examples of Physical Impairment AMA4/5

- 5% impairment – back
 - soft tissue injury persisting restrictions of movement no radiculopathy.
 - fracture of one transverse or spinous process.
- 5% impairment – leg
 - amputation of a big toe
 - patella fracture with significant displacement.
 - common to have multiple minor impairments (eg parts of knee) >5%

Commentary

This Paper has attempted to highlight the contrast between the heightened awareness of the costs of the community of mental health issues and the legislative response to discriminate against people with trauma related psychological injuries. This paper also notes the overstated cost to the community of mental health issues presumably in an endeavour to put pressure on governments to do more. Regrettably, like most good intentions, there have been unintended consequences, these have been to clampdown further on the areas where government expenditure is involved in funding psychological injury.

The paper has gone into some detail about the various impediments imposed upon people with psychological injuries in the different benevolent schemes and notes The Supplies in all jurisdictions in Australia and New Zealand.

Suggestions to reduce discrimination

- reduce government fears of the schemes being overwhelmed by mental health claims with education.
- eliminate the more egregious discrimination
 - a significant factor vs **the** significant contributing factor
 - different thresholds for physical and psychiatric impairment
- review primary vs. secondary psychiatric injury (a medical fiction)
 - Initially in States where physical/psychiatric impairment combined
 - In States eg NSW where psychiatric and physical impairments not combined
 - disadvantages claimants with psychiatric injury

The most extreme example of discrimination - Return to Work South Australia

- benefits for permanent impairment
 - physical impairment threshold 5% PLUS a lump sum payment
 - psychiatric impairment threshold 30% (only Pure Mental Harm) and NO lump sum payment!

Conclusion

- All governments fear psychiatric injuries will send them broke
- This fear is unfounded
- Actions include
 - rejecting claims for psychiatric injury arising out of management action
 - arbitrarily dividing psychiatric injury into 'primary' and 'secondary' and in NZ rejecting claims unless there is a physical injury except in specific circumstances
 - psychiatric impairment guides written to force claimants below thresholds
 - higher thresholds for permanent psychiatric injury
 - increasing the work impact from a psychiatric injury compared with a physical injury
- This discrimination should be highlighted

- The changes described would go some way to redressing discrimination