# Psychiatric Injury in Employment

Elizabeth Coppins*

## I: INTRODUCTION

The issue of an employer's liability for the work-induced stress of an employee is crucial to an understanding of the present-day employment context in New Zealand. This area of the law was previously dominated by New Zealand's Accident Compensation scheme. The recent Accident Rehabilitation and Compensation Insurance Act 1992, together with the Health and Safety in Employment Act 1992 and the Employment Contracts Act 1991, have shifted most of the liability for work-related mental injury claims from the state to employers.

This paper will divide employer liability for psychiatric injury of employees into three categories. The first relates to claims involving stress resulting from the pressure of work. The second concerns the liability of an employer for the condition known as "post-traumatic stress disorder". The last relates to the psychiatric injury occasioned by inadequate guidance in the employment sphere.

Employer liability for the injury of an employee has been dominated by statutory intervention in New Zealand for more than a century. The Workers' Compensation statutes were valuable in providing rehabilitative assistance for most "diseases".[1] However, no assistance was available for stress as a result of the

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1 See infra at Part III of the text.

pressure of work or as a result of inadequate employment guidance. Fortunately, there was cover for post-traumatic stress disorders.

The concept of statutory compensation in the employment context was carried over into s 67(1) of the Accident Compensation Act 1972. Compensation was available for any stress-related injury which was an "accident" as defined by the 1972 Act. This trend of state compensation, under which no question of fault-based liability arose, was continued by the Accident Compensation Act 1982. Furthermore, judicial dicta in the early 1990's resolved rising controversy over stress-related claims. It was established that cover under the 1982 Act extended to pure mental injury.

This judicial development led to the introduction of the Accident Rehabilitation and Compensation Insurance Act 1992 which specifically excludes pure mental injury claims through the operation of ss 4 and 8. In addition, s 7(4) excludes cover for any employment-related personal injury that is consequent on nonphysical stress. Arguably then, the liability of the employer for a stress-related illness occasioned by the immediate employment context falls beyond the ambit of the 1992 Act. In this way claims by employees are covered by the common law provided that the bar against an action for damages does not apply.

As a result, the Accident Rehabilitation and Compensation Insurance Act 1992 creates a curious state of law in New Zealand. For the first time in over a century the liability of an employer for mental injuries in the work environment is governed by the common law category of negligence. Within this area the common law duty incumbent on an employer to provide a safe system of work arises. Operating in conjunction with this duty are the Health and Safety in Employment Act 1992 and the Employment Contracts Act 1991, which also cover the liability of an employer for psychiatric injuries occasioned by the employment environment.

## II: THE THREE CATEGORIES

> [T]he stress of modern civilisation is a factor in the causation of insanity.[2]

This was observed as long ago as 1898. In modern society, advances in medical knowledge and changes in human behaviour have led to an increasing awareness of stress-related ill health.[3] It is now understood that stress, imposed on

2 Thomas, "The Stress of Modern Civilisation as a Factor in the Causation of Insanity" (1898) 31 JAMA 1403, as cited in Mendelson "Occupational Stress: An Overview" (1990) 6 J Occup Health Safety - Aust NZ 175.

3 Barrett, "Work-Induced Stress" (1995) 24 ILJ 343, 343.

the human body, may cause a wide variety of disorders,[4] for example: somatic, psychosomatic, and psychiatric injury.

Furthermore, the risk of substantial mental injury in the employment environment is now recognised. The National Institute of Occupational Health and Safety in the United States has listed psychological disorders among the ten most serious occupational risks.[5]

Occupational mental injuries have generally been categorised as either accidents or disease.[6] The author suggests that the continued use of this classification is questionable given that a stress-induced condition can often be categorised as either a disease or an accident depending on the definitions used. Accordingly, an alternative three-stage categorisation is proposed: mental injury as a result of the pressure of work; involvement in traumatic events; and mental injury as a result of inadequate employment guidance.

## 1. Stress as a Result of the Pressure of Work

This category of cases involves the long-term subjection of an employee to mental stress due to the seemingly insurmountable pressure of work. Although mental stress may lead to both physical and mental injury, this analysis will focus on the latter.

The English Health and Safety Executive defines employment stress as the "reaction people have to excessive pressures or the types of demands placed on them. It arises when they worry they cannot cope".[7]

The effects of gradual cumulative stress can be subdivided into three areas:

(i) Affective disturbances such as irritability or anxiety;
(ii) Behavioural manifestations in the form of substance abuse, alcoholism, smoking, or abnormal eating habits; and
(iii) Psychiatric disorders including generalised anxiety disorders, nervous breakdowns, depressive disorders, manic episodes, mood disorders, or schizophrenia.[8]

The pressure of work leading to mental injury can be attributed to a number of causative factors. The most common of these is a health-endangering and excessive workload. In addition, a multitude of factors intrinsic to the job which

4 Mendelson, supra at note 2, at 175.
5 Adams, "Preventive Law Trends and Compensation Payments for Stress Disabled Workers" in Quick, Bhagat and Dalton (eds), *Work Stress: Health Care Systems in the Workplace* (1987) 235.
6 For an example of classification of mental injury as disease see Mendelson, supra at note 2, at 179; compared to classification of mental injury as accidents see for example *ACC v E* [1992] 2 NZLR 426; *AB v ARCIC* (1996) 2 BACR 336.
7 English Health and Safety Executive, *Stress at Work - a Guide for Employers* as cited in Manji, "Occupational Stress" [1996] 146 New LJ 330, 330.
8 Mendelson, supra at note 2, at 178.

may lead to psychiatric harm have been recognised.[9]

According to Alan Sprince, Lecturer in Law at the University of Liverpool:[10]

> The sudden escalation of competition and pressure has created a highly charged atmosphere in which employees work longer hours, take on more tasks and responsibilities and suffer more stress as a result.

The Department of Labour maintains that stress creates fatigue, which leads to health and safety problems.[11] Factors pertaining to the individual which impact upon stress include age, physical and mental wellbeing, exercise, nutrition and sound social relationships.[12] Notably though, stress is unpredictable in its effects. No two people are the same; some people thrive on stress.[13]

## 2. Post-Traumatic Stress Disorder

That distressing incidents can cause long-term psychiatric damage is not a new idea. Debate over such injury was set in motion, both within the legal and medical professions, in response to railway accidents in the 1800s. Later, studies were conducted on the victims of "shell shock" and other incidents of war.[14]

There are some interesting literary historical accounts of the impact of trauma. Samuel Pepys' description of his reaction to witnessing the Great Fire of London in 1666, and Charles Dickens' account of his problems in readjustment after witnessing a train accident in which ten people were killed and forty-nine injured, are among these. Some interpret these as post-traumatic stress disorder ("PTSD").[15]

PTSD is a psychiatric injury which generally manifests itself after involvement in a single traumatic event. Traditionally, but crudely, the term "nervous shock" has been used by the judiciary and academics alike to denote the psychiatric response of a trauma victim. Recently though, judges have critically analysed the term "nervous shock" concluding that it is a "misleading and inaccurate expression"[16] which has "gone out of fashion".[17]

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9 See Macfie, "Stress, Fatigue and Shiftwork - OSH Draft Guidelines" (1996) 3 ELB 46 citing Department of Labour, *Stress, Fatigue and Shiftwork: Their Impact on Health and Safety in the Workplace* (Draft Occupational Safety and Health Guidelines, 16 February 1996); also Sheikh, "Pressure of Work" (1995) 92 Gazette 18, 19.

10 Sprince, "Recovering Damages for Occupational Stress: *Walker v Northumberland County Council*" [1995] XVII Liverpool LR 189, 193.

11 Macfie, supra at note 9.

12 Ibid.

13 "Work Stress and Pay Out" [1996] 146 New LJ 1211.

14 Freckelton, "The Chameleon's Challenge: Post-Traumatic Stress Disorder and the Law" (1994) 19 Alt LJ 258, 258.

15 Ibid, 259.

16 *Attia v British Gas plc* [1987] 3 All ER 455, as cited in Barrett, supra at note 3, at 344.

17 *Page v Smith* [1994] 4 All ER 522 at 549 per Hoffman LJ, as cited in supra at note 3, at 344.

Another common, but outdated term, pertaining to this particular context of psychiatric injury is "traumatic neurosis".[18] The term PTSD is more accurate[19] and shall be used from now on.

Traumatic events in the employment sphere can be divided into two categories:

(i) Extremely violent events such as bank robberies, shootings, hostage-taking, and riot control; and
(ii) Acutely depressing occurrences such as confrontations with the victims of serious traffic accidents, fires, earthquakes and other catastrophes, or intervention in cases of serious domestic abuse.[20]

Most cases involve life-threatening situations, but this is not a determining factor in the evaluation of PTSD. It has been demonstrated that psychological harm can result from involvement in traumatic episodes which do not result in threats to life.[21]

The presence of PTSD remains difficult to assess and there has been fear of false and exaggerated claims.[22] The specific criteria for diagnosis of the disorder have therefore become vital to the prospects of recovery in civil actions and compensation claims. The most authoritative medical source of information on PTSD is the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, currently in its fourth edition as of 1994 ("DSM-IV"). The DSM-IV is commonly used.[23]

According to the DSM-IV there are six key criteria for the diagnosis of PTSD.[24] The criteria are considerably rigid. Nonetheless, when used in both the medical and legal contexts, such a strict formula might eliminate false-positive and false-negative diagnoses. Mullany and Handford have critically examined the legal problems of causation posed by PTSD noting that "the aetiological facts of PTSD have not yet been fully determined".[25] Therefore, the use of PTSD in the legal setting should be carefully supervised. Accountability of those who contribute from other disciplines to the legal process is required in order to exclude those whose evidence is inexpert and unreliable, and to protect decision makers

18 Carlier and Gersons, "Trauma at Work: Post-Traumatic Stress Disorder - An Occupational Health Hazard" (1994) 10 J Occup and Safety - Aust NZ 264.

19 Ibid.

20 Ibid.

21 Carlier and Gersons, "Post-traumatic Stress Disorder: The History of a Recent Concept" in (1992) 161 Br J Psychiatry 742, 745 as cited in Carlier and Gersons, supra at note 18. See *Pugh v The London, Brighton & South Coast Railway Co* [1896] 2 QB 248.

22 Supra at note 3, at 344.

23 Supra at note 14, at 258.

24 Cited in Freckelton, supra at note 14, at 259-260.

25 Mullany and Handford, *Tort Liability For Psychiatric Damage* (1993) 38.

from evidence that they are in an inadequate position to evaluate.[26]

### 3. Inadequate Employment Guidance

It has been shown that psychiatric injury can result from an employer's neglect in taking all practicable steps in the training, instruction, preparation, and supervision of an employee. Mental injury can result where the employee has been given few skills to cope with an alien employment environment.

Psychiatric injury may result from one or more of the following four employment situations:

(i) Where the employee has not been warned of the potentially adverse conditions of a new post and has not been provided with a description of the circumstances rendering it difficult to cope;
(ii) Where there has been no preparation on how to deal with and know what techniques to use in the new environment;
(iii) Where an employee has been posted to a foreign country and no information on the new culture has been offered; and/or
(iv) Where the employer has taken few steps to relieve the various stresses faced by the employee or offer any other protection from the immediate employment environment.[27]

An employer should be aware of any circumstances which mean psychiatric injury may occur in the workplace. The author suggests that in most situations reasonable steps should be taken to avoid or at least minimise any potential harm to the employee. This would require general common sense preparation, training, and advice. The employer could conduct a course of lectures in order to educate the employee and provide the requisite knowledge needed to cope with the new employment context. After the work has actually been undertaken by the employee it would be wise for the employer to monitor progress and provide general guidance, control, and direction.

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26 For judicial dicta on the dangers of liberal use of psychiatric diagnoses in the legal arena, including PTSD, see *R v MacKenney and Pinfold* (1983) 76 Cr App R 271; *Peisley v R* (1990) 54 A Crim R 42; *Gregory Hood v Crimes Compensation Tribunal* (Victorian Administrative Appeals Tribunal, 24 March 1994); and *Linda Williams v Crimes Compensation Tribunal* (Victorian Administrative Appeals Tribunal, 29 March 1994).

27 *Gillespie v Commonwealth of Australia* (1991) 105 FLR 196.

## III: AN EMPLOYER'S LIABILITY UNDER COMPENSATION LEGISLATION IN NEW ZEALAND

The earliest recorded system of accident compensation in English law is in the dooms laws of Ethelbert (AD 600)[28] where there were certain prescribed "bots" for personal injury: twelve shillings for the loss of an ear, fifty shillings for the loss of an eye, four shillings for a middle finger, and so on. Most modern compensation systems derive from the industrial revolution where rapid mechanisation meant a much higher risk of injury to workers. Until the 1880s the only remedy available in England and New Zealand to workers who suffered injury by accident in the course of employment was a common law action against the employer. If such an action was based on the negligence of a fellow worker or supervisor it was invariably defeated by the common employment rule.[29]

### 1. The Past Régime: Workers and Accident Compensation Legislation - 1882 to 1992

#### *(a) 1882 - 1972*

The liability of employers in New Zealand changed with the introduction of the Employers' Liability Act 1882 ("ELA"). Liability under the Act was imposed on an employer for accidents causing injury or death brought about by defects in works, plant, or machinery, due to the negligence of the employer, or fellow supervisory servants. In practice, proof of negligence was a difficult matter and the costs of an action under the ELA were considerable.[30] Moreover, any value the ELA did possess was destroyed by *Griffiths v Earl of Dudley* which held that workmen could contract out of the ELA.[31]

The ELA was amended in 1891 and 1892, consolidated in 1908, and ultimately repealed by the Workers' Compensation Act 1908. That Act provided for compensation without proof of negligence. By the time the Workers' Compensation Act 1956 was enacted, cover for industrial diseases had been gradually extended until compensation became payable in respect of most diseases contracted in the course of employment.

Provision for mental injury was made in the First Schedule of the 1956 Act which covered "total and incurable loss of mental powers involving inability to

28 Windeyer *Legal Offence* (2nd ed 1957) 17-18.

29 Irvine (ed), *Macdonald's Law Relating to Workers' Compensation in New Zealand* (4th ed 1968), 1.

30 Ibid.

31 (1882) 9 QBD 357, a decision which related specifically to the UK equivalent of the New Zealand Act and was thus applicable here.

work". Nonetheless, the Workers' Compensation statutes did not extend to mental injury that was not caused by some physical injury[32] except in cases of "traumatic neurasthenia" or what today is known as PTSD: [33]

> The condition follows an accident, often in a railway train, in which injury has been sustained, or succeeds a shock of concussion from which the patient may apparently not have suffered in his body.

*Macdonald's Law Relating to Workers' Compensation in New Zealand,* referring to the Workers' Compensation Act 1956, states that "a breakdown from overwork is not an accident".[34] The issue of inadequate employment guidance and subsequent mental injury was not addressed by the Workers' Compensation legislation. In conclusion, the early legislation only extended to one of the three categories of mental injury, namely PTSD.

*(b) 1972 - 1992*

In 1972 the New Zealand legislature adopted a fresh approach to the problem of victims suffering from personal injury by accident with the introduction of the Accident Compensation Act 1972 ("ACA 1972"). The all encompassing approach of the ACA 1972 was based on the *Report of the Royal Commission on Compensation for Personal Injury in New Zealand* ("Woodhouse Report")[35] which envisaged comprehensive compensation for every person in New Zealand. This reform came to be regarded not simply as a unique system for a small country in the southern hemisphere, but as a prototype that could be a model for reform elsewhere.[36]

In passing the ACA 1972 tort liability and workers' compensation for personal injury were abolished as separate means of redress and replaced by a comprehensive plan. This included compensation for mental injury. Reading ss 2 and 105B together, "personal injury by accident" included the "physical and mental consequences of any such injury" as well as "mental or nervous shock". In relation to work injuries, s 67(1) required that any disease, which encompassed mental injury, had to result from the "nature" of the employment.

In *Re Dodd*[37] a school teacher resigned from his position on medical advice. It

32 See supra at note 29.

33 *Bearne v White* (1976) 6 NZWCC 38 at 40 as cited in Irvine, supra at note 29, at 296. See also *Yates v South Kirkby Collieries Ltd* [1910] 2 QB 538 where a collier heard a cry and on investigation found a badly injured workmate who had been knocked down by a fallen timber prop and some coal. The collier assisted with the injured man who died fifteen minutes later. The collier was so affected by the events that he was unable to return to work. This was held to be a personal injury by accident within the Workers' Compensation Act 1906 (UK).

34 Supra at note 29, at 130.

35 (1967).

36 Ison, *Accident Compensation: A Commentary on the New Zealand Scheme* (1980) 13.

37 Accident Compensation Appeal Authority, 25 August 1980, No 53/80, Blair J.

was common ground that his resignation resulted from a stress-related illness. The Accident Compensation Appeal Authority had to consider whether Dodd's illness was "due to the nature of his employment".[38] Justice Blair accepted that Dodd was subjected to stress by his employment but thought that there was evidence that Dodd's personality made him predisposed to stress:[39]

> That school teaching has stresses and tensions is undeniable. However, the evidence has failed to satisfy me that the profession has any particular claims in this respect. Almost every occupation, particularly those carrying responsibility, has its stresses .... But in my opinion ... s 67(1) is not designed to provide compensation for persons who suffer a mental breakdown merely because the work that they are doing is beyond their capacity. The evidence must go further and show that the employment is of a kind that exposes the worker to a special risk of contracting or aggravating the disease.

Of the three categories of mental injury then, the ACA 1972 covered the first two, namely stress as a result of the pressure of work and PTSD, although *Re Dodd* illustrated that the test for the former was very strict. Like its predecessor, the ACA 1972 did not specifically address mental injury as a result of inadequate employment guidance.

The Accident Compensation Act 1982 ("ACA 1982") introduced almost identical provisions for pure mental injury. Cover under the ACA 1982 continued to apply to mental injury caused by the pressure of work and PTSD, but not for stress-related illnesses as a result of inadequate job preparation.

The extent of cover under the ACA 1982 for mental injury resulting from the pressure of work attracted great controversy. In *Leitch v Accident Compensation Corporation*[40] a psychiatric prison nurse had lodged a compensation claim under s 28 of the ACA 1982[41] for occupational stress/anxiety/depression. It was held that while being a psychiatric nurse in a prison was a stressful occupation, the extreme stress felt by the appellant was due to his inability to cope rather than the particular nature of the occupation. As a result, compensation was denied.

In *Accident Compensation Corporation v F*[42] the respondent's wife underwent gynaecological surgery. As a result, sexual relations between the respondent and his wife became impossible. The respondent's claim for compensation was that he had sustained a psychological reaction and mental suffering from his wife's disability.

Although this case did not concern a work injury, the Court interpreted the meaning of "personal injury by accident" in s 2(1)(a)(i) of the ACA 1982 to exclude mental injury from cover unless consequent on physical injury to the claimant. Justice Holland asserted that:[43]

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38 Section 67(1).

39 Supra at note 37, at 11-12.

40 [1990] NZAR 26.

41 Formerly s 67 under the ACA 1972.

42 [1991] 1 NZLR 234.

43 Ibid, 241.

> [W]here as here there has been no physical injury to the respondent, even by the merest physical touch, he cannot be said to have suffered personal injury by accident so as to allow his mental illness to be compensatable. In other words, the mental consequences must be parasitic on a contemporaneous or earlier physical injury to the claimant.

This judgment was heavily criticised and later overturned by the Court of Appeal in *Accident Compensation Corporation v E.*[44] In this case E's employer sent her on a management course which was strict, time consuming, and required considerable concentration. After attending the course for four days she suffered a psychiatric breakdown and was admitted to hospital. Subsequently E received psychiatric treatment for depressive symptoms, her standard of work gradually declined, and she was persuaded to leave her employment.

In the High Court Greig J took a different approach from that of Holland J in *ACC v F.* He held that a "personal injury by accident" would include an injury that was nothing more than mental consequences without any physical injury or trauma whatsoever.[45] The Court of Appeal upheld Justice Greig's decision:[46]

> We see no other construction than that mental consequences of the accident are included in the term personal injury by accident whether or not there is also physical injury .... It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight also is sustained. Further it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.

In *Kennedy v Accident Compensation Corporation*[47] the appellant claimed "personal injury by accident" as a result of being threatened with a double-barrelled shotgun during a robbery at his workplace. On review, the appellant's claim was declined due to insufficient medical evidence, however the door was left open for the appellant to return to the Corporation if stress was proved to exist.

On appeal, the Corporation submitted that even if evidence of mental injury was obtained subsequently, this would be insufficient to constitute "personal injury by accident" given that no physical injury was sustained in the hold-up. In dismissing the appeal, the Appeal Authority held that there was nothing in the ACA 1982 which limited the injury by accident to physical injury. The approach in *ACC v E*[48] was preferred to that of Holland J in *ACC v F.*[49]

The issue in *Hudson v Accident Compensation Corporation*[50] was whether the appellant suffered from an occupational disease in the course of his employment as a traffic officer. The claimant's duties at work included prosecuting in various

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44 [1992] 2 NZLR 426.

45 [1991] 2 NZLR 228.

46 Supra at note 44, at 433-434 per Gault J.

47 [1992] NZAR 107.

48 The Court of Appeal ruling had not yet been made.

49 Supra at note 42.

50 *Hudson v ACC*, 30 March 1992, No 261/92, BH Blackwood.

District Courts as well as actioning infringement notices and public complaints. Hudson lodged a claim stating that he had suffered a breakdown because of his excessive workload.

The Appeal Authority held that the gradual accumulation of stress in Hudson's workplace meant his mental injury arose from the nature of the employment, entitling him to cover under s 28 of the ACA 1982.

Finally, in *Clarkin v Accident Compensation Corporation*[51] a police officer made a claim for work-related stress under s 28 of the ACA 1982. Clarkin had joined the police force in 1979 but left in 1988 due to hypertension and depression. As the appellant's work was found to be a substantial cause of his stress, the Appeal Authority granted him cover under s 28.[52]

## 2. The Present Régime: The Accident Rehabilitation and Compensation Insurance Act 1992

In the early 1990s, the National Government responded to the development of the law under the ACA 1982 by making changes in relation to mental injury claims. The Government's position was embodied in a 1991 booklet entitled *Accident Compensation: A Fairer Scheme*.[53] It said:[54]

> Stress claims are a major cause of escalating costs in those overseas workers' compensation schemes that compensate for stress. The present scheme does not include stress cover and the Working Party considered that this should not change. Grounds for this conclusion were not only the high cost, but also that stress is the result of a number of interrelated factors.
>
> The Working Party also recommended that physical injury should be present before mental injury is covered. Although this may give an appearance of arbitrariness, this requirement was seen as necessary in order to avoid stress claims entered "through the back door". The Government supports this view ....
>
> STRESS AND MENTAL INJURY WILL NOT BE COVERED UNLESS PHYSICAL INJURY IS PRESENT.

51 *Clarkin v ACC*, 12 November 1993, No 104/94, PJ Cartwright.

52 It seems that the Accident Compensation Appeal Authority has been sympathetic toward stress-related injury claims. A recent example is *McHardy v Accident Compensation Corporation*, 2 February 1995, No 34/95, B H Blackwood. The claim was made by a solicitor who suffered stress-related mental injury as a result of the refusal of a bank loan. McHardy initially applied for cover under s 28 of the ACA 1982 asserting that his injury was an occupational disease. The claim was flatly declined. McHardy later asserted that his mental injury was a "personal injury by accident" as encompassed by s 2. The Appeal Authority held in McHardy's favour stating that the identifiable triggering event was the bank's communication of the refusal of the loan in May 1990. In the High Court, (1996) 1 BACR 198, Robertson J held that a depressive illness resulting from bad fortune could not be a "personal injury by accident" within the ACA 1982.

53 Birch, (1991).

54 Ibid, 32.

The Government's view attracted strong criticism. For example, Black, Harrop, and Hughes in *Income Support Law and Practice* said:[55]

> The Minister's claim that stress cover was not included under the 1982 scheme was demonstrably inaccurate. Stress-based claims had long been recognised as potentially constituting occupational injury under the predecessor to the current section 7 ....

The Court of Appeal in *ACC v E* had already foreshadowed the inconsistency of such an approach: [56]

> It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight also is sustained. Further, it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.

Nonetheless, the Accident Rehabilitation and Compensation Insurance Act 1992 ("ARCIA"), was enacted to exclude claims for pure mental injury. According to Stephen Todd and John Black this arose as: [57]

> [The government concluded that] the courts had taken too wide an interpretation of the 1982 legislation and had extended coverage too far. The costs of the scheme were seen to be escalating out of control, leading to an urgent need to set clear limits and to reverse some of the recent judicial decisions.

This conclusion was assisted by the Accident Compensation Corporation's warnings to the Select Committee of a potential claim cost explosion and stress claim epidemic, potentially leading to bankruptcy of the scheme.[58] New Zealand statistics were not provided to support this assertion.

As a result, the definition of "personal injury" in *ACC v F* was adopted in section 4(1) of ARCIA: [59]

> [D]eath of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries.

Cover under the ARCIA now extends to personal injury only if it results from of one of the four situations outlined in s 8(2): an accident (as defined); gradual

55 Black, Harrop, and Hughes, *Income Support Law and Practice* (1995) para 6007.7.

56 Supra at note 44, at 434 per Gault J.

57 Todd and Black "Accident Compensation and the Barring of Actions for Damages" [1993] Tort Law Review 197, 199.

58 Accident Compensation Corporation, *Accident Rehabilitation and Compensation Insurance Bill: Briefing Notes* (1991) 15.

59 "Mental injury" is defined in s 3 of the ARCIA as "a clinically significant behavioural, psychological or cognitive dysfunction".

process, disease or infection arising out of employment (as defined); medical misadventure (as defined); or treatment for personal injury.

In addition, s 7(4) excludes cover for employment-related personal injury involving nonphysical stress.[60] In *AB v ARCIC*[61] an undercover policeman sought compensation under s 7 on the ground of personal injury, in the form of PTSD, arising from employment. The claimant had taken part in a covert operation involving major drug trafficking. While engaged in undercover operations the officer was compelled to use cannabis to preserve his cover. After leaving the police force he experienced cannabis dependency, serious bouts of depression, persistent irritability, bouts of aggression, tension, fatigue, and mental malaise. He was diagnosed by a psychiatrist, a Dr Cliff, as suffering from PTSD. Dr Cliff, together with another psychiatrist, made it clear that physical injury is an inevitable and integral part of PTSD. He concluded that the appellant suffered a personal injury in the course of his employment by way of mental and physical stress. Consequently, Judge Ongley said: [62]

> It must be that, in this field, personal injury can be compounded of effects of physical and mental stress. It could hardly have been intended that in a case of personal injury through physical stress a claimant should be barred because of some element of non-physical stress contributing to the injury.

In the opinion of Judge Ongley, s 7(4) was intended to exclude only mental injury that is not the result of a physical injury, as well as personal injury that is related solely to nonphysical stress: [63]

> Subsection (4) should perhaps be read to exclude only that personal injury which is so linked to non-physical stress that it could not be reasonably said to be a consequence of physical stress.

Accordingly, the Court allowed the appeal to the extent that the cannabis addiction suffered by the appellant was a gradual process injury in the unusual circumstances of the case.

An example of a situation where cover under s 7 was denied for lack of physical injury is *Gill v ARCIC*[64] which involved another claim by a policeman for "stress related mental injury while employed in NZ Police". Judge Middleton confirmed that: [65]

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60 As nonphysical stress conditions in employment may incriminate employers, this provision appears to be in breach of the International Labour Organisation Convention No 42, to which New Zealand is a ratifying party. See Rennie, *Brooker's Accident Compensation in New Zealand* (1992) para 7.09.

61 (1996) 2 BACR 336.

62 Ibid, 339.

63 Ibid.

64 (1995) 1 BACR 151.

65 Ibid, 154.

Section 7(4) of the 1992 Act precludes a claim for cover related to non-physical stress arising out of and in the course of employment.

To conclude, victims of all three categories of mental injury have the potential to maintain a common law action in New Zealand, as long as the bar to common law damages in s 14(1) of the ARCIA does not apply, on the basis that, either:

(a) The mental injury is not "clinically significant behavioural, psychological, or cognitive dysfunction" as the result of a sexual offence listed in the First Schedule of ARCIA; [66] or
(b) Even if the mental injury was encompassed by s 3 -

(i) it might not be the outcome of a physical injury as required by s 4; or
(ii) the mental injury may have preceded the accident - for instance in the case where a victim suffers PTSD after seeing a negligently driven train approaching just before it crashes.

Some might argue that PTSD could be considered an *indirect* result of a primary victim's personal injury, bringing s 14 into effect. Yet this could be defended by asserting that the damages claimed by the person suffering from PTSD were not a result of the primary victim's personal injuries, but a result of the defendant's negligent conduct in causing the accident.[67] Even where PTSD is sustained in anticipation of an accident in which no one is injured, a claim could succeed on the basis of *Pugh v The London, Brighton & South Coast Railway Co.*[68]

Therefore, the operation of the ARCIA creates a curious state of law in New Zealand. For the first time in over a century, the liability of an employer for mental injuries in the work environment is largely governed by the common law category of negligence: [69]

The argument over the identification of, and weight to be accorded to, the various factors arguably bearing upon the existence of any duty to take care not to cause psychiatric injury once again will be the subject of debate before the New Zealand courts.

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66 See ss 3 and 8(3)(a). For more discussion on this point see Tobin, "Trauma and Compensation" [1995] NZLJ 248, 253; "Recent Developments in Accident Compensation: The Consequences of Mental Injury" in Manning, Tobin, and Hodge *Legal Update Series: Tort, Accident Compensation and Employment* (1994), 11; Todd and Black, supra at note 57, 228; and Miller, "Accident Victims: Niggardly Approach Likely to Lead to Upsurge in Damages Claims" (1993) 406 Law Talk 25, 26.

67 A similar argument is used in the area of exemplary damages. See for instance *McDonnell v Wellington AHB*, noted [1994] BCL 20.

68 Supra at note 18, approved by the NZCA in *ACC v E* [1991] 2 NZLR 228. See also *Cochrane v ACC* [1994] NZAR 6, where Greig J held that a mental injury may in itself constitute personal injury by accident.

69 Supra at note 57, at 211.

## IV: THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992

Those parts of s 2(1) of the Health and Safety in Employment Act 1992 ("HSIEA") relevant to the following discussion, include:

> "Harm" means illness, injury, or both ...
>
> "Hazard" means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm ...
>
> "Safe" — (a) In relation to a person, means not exposed to any hazards; and (b) In every other case, means free from hazards ....

The HSIEA encompasses an employee's mental injury[70] occasioned by his or her employment environment.[71] This is evident through the operation of the word "harm" which includes psychiatric breakdowns.[72] The words "hazard" and "safe" have corresponding meanings since "safe" means free from "hazard", and because "hazard" embraces a potential cause or source of "harm".

That the legislature intended the HSIEA to include mental injury is clear in Regulation 4 of the HSIEA (Prescribed Matters) Regulations [SR 1993/40]. Regulation 4 sets out a "Form of Page of Register of Accidents and Serious Harm and Notification of Circumstances of Accident or Serious Harm". Listed under category 8, "Mechanism of Accident/Serious Harm", is "mental stress" and listed under category 11, "Nature of Injury or Disease", is "mental disorder".

In s 6 there is a statutory duty similar to the common law duty of care not to cause the employee psychiatric damage[73] by reason of the volume of, or character of, the employee's work:

> Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to - (a) Provide and maintain for employees a safe working environment ....

The HSIEA imposes duties on employers to ensure effective procedures exist to identify,[74] eliminate,[75] isolate,[76] and minimise[77] any hazard where it is practical

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70 "Mental Injury" in this context encompasses all three categories of mental harm as outlined in Part II of this article.

71 Hughes, "Damages for Work-Related Stress" [1995] ELB 21, 22.

72 Bartlett, Hodge, Muir, Toogood, and Wilson, *Employment Contracts* (1991) para HS2.14.04.

73 Ibid, para HS6.08.

74 Section 7.

75 Section 8.

76 Section 9.

77 Section 10.

to do so. The employment environment should be examined in order to identify areas which could lead to mental injury. As it would be impractical to eliminate or isolate such injuries, an employer's duty will extend to minimisation.[78] This might involve, for example, the training of bank tellers to help them effectively cope with armed robbery, or safety and first aid courses for electricians and other tradespeople as preparation for the psychological effects of witnessing disturbing injuries to fellow workers.[79]

If employers do not take steps to minimise hazards capable of causing mental injury, prosecutions under the HSIEA are likely to increase. Alternatively, rather than waiting for a hazard to ripen into harm and then prosecuting, the Department of Labour may enter the employer's premises and issue improvement or prohibition notices.[80]

To avoid liability for mental injury, an employer could undertake pre-employment testing. Nevertheless, this is problematic in light of recent legislation[81] such as the Human Rights Act 1993, which has the effect of prohibiting testing on the ground of physical disability or impairment.[82] A possible solution would be to obtain the informed consent of employees and then monitor the employee's health in relation to exposure to a hazard such as "mental harm".[83]

The Privacy Act 1993 may usefully supplement the Human Rights Act as Dr Paul Roth suggests:[84]

> [F]or example, the Privacy Commissioner has suggested that where it would be difficult to prove that an employer intended to discriminate, "it may be possible to show nevertheless that the employer did not have a proper purpose to ask particular questions, and so be caught under the Privacy Act".

The three main categories of mental injury fall within the ambit of the HSIEA. The third category, psychiatric damage occasioned by inadequate employment preparation, training, and supervision, finds provision in s 13. This section requires employers to take all practicable steps to train and supervise employees in order to avoid "harm" which, as previously discussed, includes mental injury.

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78 Supra at note 72 at para HS10.06.

79 Under s 12(b) of the HSIEA an employer must provide such information in a way which is easily understandable in regard to identified hazards the employee is likely to be exposed to whilst working and the steps the employee should take to minimise the harm. See Sherriff, "Ensuring Compliance and Best Practise in Health and Safety in Your Organisation" in *10th Annual Industrial Relations Conference Papers* (1996) 3-4.

80 Supra at note 72, at para HS16.4.01.

81 Supra at note 71, at 23. See also Roth, "The Impact of Recent Human Rights Legislation on Pre-Employment Health Screening" [1995] ELB 87.

82 Section 22. The prohibition on pre-employment health screening has been criticised by employers: see Burton, "From the Employers' Perspective" [1995] ELB 37.

83 Sherriff, supra at note 79, at 19.

84 As cited in Hughes, "Mental Health and Employment Law: Current Developments" [1996] MLH 19, 20.

## V: THE EMPLOYMENT CONTRACTS ACT 1991

There are a number of possible consequences for an employer, flowing from an employee's mental injury, under the Employment Contracts Act 1991 ("ECA").[85]

(i) The employee could take privileged industrial action under s 71 of the ECA which justifies strike action on the grounds of health or safety. To date, this argument has not met with success.[86] It appears that action will not be justified until after the mental injury has occurred.

(ii) Prior to the stress resulting in a breakdown that destroys his or her career, the worker could claim he or she has been subject to an unjustified disadvantage. A personal grievance claim under s 27(1)(b) of the ECA could be taken.

(iii) The employee faced with excessive stress could seek a compliance order under s 55 of the ECA on the grounds that the implied term to provide a safe workplace has been breached. The Employment Tribunal could order that the employer comply with this term under s (1)(a)(i). The Tribunal could also order compliance in regard to personal grievances under Part III of the ECA, as governed by s (1)(a)(ii).

(iv) Under s 27 a constructive dismissal claim could be pursued by the worker if resignation is forced as a result of the employer's neglect in attending to the employee's requests for relief. This approach was endorsed in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officer IUOW Inc.*[87] In considering a constructive dismissal claim a court must look at whether:[88]

> [T]he employer's conduct [was] sufficiently serious to entitle the employee to leave .... If the employee continues to accept the heavy workload demands and stressful situation after making the complaint, the employee may lose the right to treat himself as discharged, and will be regarded as having elected to affirm the contract. The employer may be required to distribute some of the employee's work to other colleagues.

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85 Supra at note 72, at para HS16.4.01.

86 See *Weddel NZ Ltd v NZ Freezing etc Clerical IUOW* [1990] 3 NZILR 551, where stress resulting from perceived lack of job security did not come within the definition of "health" in s 237 of the Labour Relations Act 1987. It is relevant to note that Castle J did say, at 555, that he "might perhaps have thought otherwise if there had been strong medical evidence". He then qualified this by asserting that "to hold that stress brought about by uncertainty of what is going to happen with jobs ... could justify strike action would be creating a dangerous precedent".

87 [1994] 1 ERNZ 168.

88 Sheikh, supra at note 9, at 19.

(v) Finally, an unjustifiable dismissal claim, under s 27(1)(a), could be made by a worker dismissed for cause in the event that he or she refused to continue with the extra work.

In any claim taken under s 27 compensation can be awarded under s 40(1)(c)(i) for humiliation, loss of dignity, and injury to feelings.[89] These factors could be equated to incapacitating stress in some circumstances.

Issues of causation and remoteness may qualify awards. For example, in *Hemopo v South Pacific Tyres Ltd*[90] a large compensation claim was based on the mental shock of a dismissal which reactivated the mental trauma suffered by the claimant following his wife's earlier death. The Court held that the employer was not responsible for the revived mental trauma caused by a pre-existing event. Yet, where there is no instance of reactivation of an event outside the employer's control, the employer must take the claimant as he or she is found, based on the "eggshell personality" rule.[91] It is not open to an employer to argue that a particular employee's mental health was unusually poor and that other employees would have been more resilient.[92]

Section 14(3)(c) of the ARCIA precludes compensatory awards for personal injury in proceedings relating directly or indirectly to a personal grievance arising out of a contract of employment.[93] Section 40(1)(c)(i) of the ECA will not apply unless it can be shown that there was no personal injury by accident within the meaning of the ARCIA.[94] As most claims for mental injury are not covered by the ARCIA it is likely that the statutory bar will not apply.

## VI: LIABILITY OF THE EMPLOYER AT COMMON LAW

From the preceding analysis, it has been shown that a victim of mental injury

89 See *Tawhiwhirangi v AG* [1994] 1 ERNZ 459; and *James and Co Ltd v Hughes* [1995] 2 ERNZ 432, 446.

90 [1992] 1 ERNZ 111.

91 Hughes, supra at note 84, at 22.

92 *James and Co Ltd v Hughes*, supra at note 89; and *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 371 citing *Wellington and Taranaki Shop Employees Etc IUOW v Pacemaker Transport Wellington Ltd* [1989] 2 NZILR 762 at 769, dealing with s 227(a) of the Labour Relations Act 1987 (equivalent to s 40(1)(c) of the ECA).

93 *Northern Distribution Union v Sheridee Holdings Ltd (t/a New World Titirangi)* [1991] 2 ERNZ 675 (dealing with s 227 of the Labour Relations Act 1987, the equivalent of s 40 of the ECA and s 27 of the ACA 1982, equivalent to s 14 of the ARCIA); *Jennings v University of Otago* [1995] 1 ERNZ 229.

94 *Reeves v Pyne Gould Guiness Ltd*, CEC, 19 July 1996, CEC 22/96, Palmer J.

not occasioned by any physical harm is not precluded from pursuing either a common law or statutory remedy as such a claim falls beyond the ambit of the ARCIA.

Although an employee has the option of pursuing a statutory remedy under either the HSIEA or the ECA, a common law remedy is more likely to be sought due to the potential magnitude of a damages award. On the other hand, employees who are likely to suffer psychiatric injury, or who have suffered mental incapacitation which has not yet reached harmful proportions, would be advised to pursue those options available under the HSIEA or the ECA. What is clear, is that regardless of the extent of the harm suffered, if at fault, employers may be held to account.

### 1. Stress as a Result of the Pressure of Work

It is accepted that employers are under a general duty of care with regard to the physical health and safety of employees so as not to expose them to the risk of injury.[95] It is less accepted that an employer has a duty to protect an employee's mental health.

In *Johnstone v Bloomsbury Health Authority*[96] the English Court of Appeal considered the claim of a doctor who alleged that, as a result of working in excess of eighty-eight hours per week, the Health Authority had failed to take reasonable care for his safety, breaching an implied duty in his contract of employment. The doctor alleged that the deprivation of sleep damaged his health causing him to suffer from stress and depression. The question for the Court was whether his claim should be struck out on the basis of abuse of process because the plaintiff's contract provided that he work those hours.

The Court of Appeal dismissed the defendant's appeal against the judge's refusal to strike out. Lord Justice Stuart-Smith accepted that the Health Authority had a duty to provide a safe system of work and to take reasonable care for the safety of its employees. He stated that the contract requiring the plaintiff to work up to eighty-eight hours per week had to be performed in light of other contractual terms such as the duty to take care of the doctor's safety.[97]

In *Petch v Customs and Excise Commissioners*[98] a civil servant, who had started work with the Civil Service in 1961, had risen to the rank of assistant secretary by 1973. In 1974 the defendant suffered a mental breakdown but returned to work in 1975 after taking leave. He was transferred to the Department

95 See, for example, *Wilson and Clyde Coal Co Ltd v English* [1938] AC 57; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180; *Thomas v Bristol Aerospace Co* [1954] 1 WLR 694; and *Charlton v Forrest Printing Ink Co Ltd* [1980] IRLR 330.

96 [1992] QB 293.

97 Dr Johnstone has since accepted £5000 plus costs from the Council in settlement of this claim. See Manji, supra at note 7, at 331.

98 [1993] ICR 789.

of Health and Social Security, but in 1983 fell ill again and retired on medical grounds in 1986. He claimed that his two breakdowns had been caused by the pressure of work.

Lord Justice Dillon stated the test concerning the first breakdown:[99]

> [U]nless senior management in the defendants' department were aware or ought to have been aware that the plaintiff was showing signs of impending breakdown, or were aware or ought to have been aware that his workload carried a real risk that he would have a breakdown, then the defendants were not negligent in failing to avert the breakdown of October 1974.

The Court found the plaintiff to be a manic depressive who did not show signs of impending breakdown. In relation to the second breakdown, the Court found that the duty of care included taking reasonable care to ensure the duties allocated did not bring about a repetition of the mental breakdown. On the facts, the Court found that the defendants had done their utmost to dissuade the plaintiff from going back to work and hence the appeal was dismissed on grounds of causation.

The first successful common law negligence claim by an employee for mental injury occasioned by the employment environment is found in the English case of *Walker v Northumberland County Council.*[100] The plaintiff was employed by the defendant local authority from 1970 to 1986 as a social worker in an area that had a high proportion of child abuse problems which were growing rapidly. No increase in staff was made to balance the increase in Walker's workload. In 1986 he suffered a nervous breakdown because of the stress and pressures of work and as a result he was absent from work for three months. Before Walker returned he discussed his position with his superior who agreed that assistance would be provided to lessen the burden of his responsibilities.

However, upon Walker's return to work, only very limited assistance was given to him. He found that he had to clear the accumulated backlog of paperwork that had built up during his absence while the pending child abuse cases in his area were increasing at a considerable rate. Six months later Walker suffered a second mental breakdown and was forced to stop work permanently. In February 1988 he was dismissed by the Council on the grounds of permanent ill health.

Walker brought an action against the local authority, claiming damages for breach of its duty of care to take reasonable steps to avoid exposing him to a health-endangering workload. The Court found that where it was reasonably foreseeable that an employee might suffer a nervous breakdown due to workload stresses and pressures, the employer was under a duty of care not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform.

On the facts before the Court the first breakdown was not reasonably foreseeable but the second breakdown was. The Council should have provided

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99 Ibid, 796-797.
100 [1995] 1 All ER 737.

additional assistance to reduce the plaintiff's workload even at the expense of disruption of other social work. In choosing to continue to employ Walker without providing effective help, Colman J found that the Northumberland County Council had acted unreasonably and in breach of its duty of care. Damages were assessed at £200,000.[101]

In essence, Colman J saw it as incumbent on the Council not merely to have taken reasonable steps to protect Walker from physical harm but also from sources of mental harm. Justice Colman also rejected the defendant's argument that the test to be applied to a public sector employer exercising statutory budgetary responsibilities should be the *Wednesbury* unreasonableness test.[102] He accepted that this was an employers' liability case and that the duty of care as set out above applied. This was the subject of an appeal by the defendants but has since been settled.[103]

However, as Lesley Dolding, lecturer in law at the University of Exeter, and Richard Mullender, lecturer in law at the University of Newcastle-upon-Tyne, assert: [104]

> [I]t may be objected that aspirational expectations of the sort we have identified Colman J as having entertained are elementally unfair in that they impose upon potential defendants obligations that are not clearly articulated prior to a case being resolved in a plaintiff's favour and which, hence, savour of retroactive law-making.

Nonetheless, incremental advances are a driving force in the development of the law of negligence. As a result this expansion may be justified, particularly in New Zealand. For example, a 1994 survey of 5,000 people in sixteen countries by the Harris Research Organisation found that office workers in New Zealand are subject to greater work-related stress than comparable workers in all but three of the other countries surveyed, work being a major cause of stress to sixty-five percent of those workers.[105] The Department of Labour has also recognised the risk of stress in the New Zealand employment environment in its draft Occupational Safety and Health guidelines.[106]

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101 The decision of Colman J in *Walker* was endorsed by the English "Law Commission's Consultation Paper on Tortious Liability for Psychiatric Illnesses, Including Post Traumatic Stress Disorder" as cited in Scoggins, "A Tort Too Far: The Law Commission's Consultation Paper on Tortious Liability for Psychiatric Illnesses, Including Post Traumatic Stress Disorder" (1995) 92 Gazette 10, 10. As to the figure of £200,000 see Conn, "Warning: Work Can Damage Your Health" [1995] Sol J (Eng) 576.

102 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

103 The case settled for £175,000 according to Manji, "Occupational Stress Update" [1996] 146 New LJ 1516.

104 Dolding and Mullender, "Law, Labour and Mental Harm" (1996) 59 Mod LR 296, 301.

105 *Sunday Star Times*, 13 November 1994, as cited in Hughes supra at note 71, at 21.

106 Supra at note 9.

107 Supra at note 71, at 22.

Employers are no longer able to assume that employees are resilient.[107] Even if an employee is more susceptible than others to mental injury, the employer's duty of care remains in force and is arguably heightened by analogy with *Paris v Stepney Borough Council.*[108] This point is made clear by the Accident Compensation Appeal Authority in *Clarkin v ACC*:[109]

> Although Dr Bowen believed these problems had been exaggerated by the appellant's own personality type and his own family circumstances, this aspect is ... protected by what is known as the "egg shell skull" principle. A person with an "egg shell skull" ... or one peculiarly susceptible to injury is entitled to compensation ... even though a less susceptible person would have suffered no ill effects.

Consequently, *Walker* will not always mean that an employer is only liable after a breakdown has occurred, and then only for further breakdowns.[110] The real issue in a case involving mental injury is whether the risk was reasonably foreseeable on the particular facts, not whether there has already been one.[111]

A number of common mechanisms could show that a breakdown was reasonably foreseeable in a particular case. For example, internal notification by a worker that his or her workload is having health-endangering consequences, notification of reasons for taking sick leave, risk assessments provided for the purpose of implementing a management plan under the HSIEA, and the publicised results of increasingly common employee surveys could all lead to a finding of reasonable foreseeability.[112]

The principle in *Walker* can be extended by analogy to severe depressive disorders. Mere grief or anxiety is not enough.[113] In *Bradley v London Fire and Civil Defence Authority*[114] the ordinary meaning of "injury" in terms of the *Firemen's Pension Scheme Order 1992* was held to be an impairment of a person's physical or mental condition. A fire-fighter had suffered from a stress-related illness with depressive symptoms for some time prior to his retirement. The Crown Court concluded that his was an "injury" for the purposes of the 1992 Order.

As discussed in Part IV of this paper, pre-employment testing by an employer is problematic. Furthermore, dismissal of an employee after the first breakdown may be ruled out by the Human Rights Act 1993 which prohibits discrimination on

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108 [1951] AC 367.

109 Supra at note 51, at 10. See also the Australian case of *Re Frank v Comcare* (1996) 41 ALD 597.

110 Supra at note 71, at 22.

111 Ibid.

112 Ibid.

113 *Hinz v Berry* [1970] 2 QB 40; *McLoughlin v O'Brien* [1983] 1 AC 410.

114 [1995] IRLR 46.

115 Section 21(h)(iii) of the Human Rights Act 1993.

the basis of disability, which is defined to include psychiatric illness.[115]

## 2. Post-Traumatic Stress Disorder

The first common law case concerning PTSD resulted from an unlucky horse-drawn buggy ride in May 1886.[116] James and Mary Coultas, through the negligence of a level crossing gatekeeper, were allowed to proceed across a railway line when a train was approaching. A collision was avoided, but the near miss caused Mrs Coultas to suffer "nervous shock". The Privy Council held that her psychiatric injuries were too remote:[117]

> Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances ... be considered a consequence which, in the ordinary course of things, would flow from negligence of the gatekeeper.

Medical and legal understandings of PTSD have come some distance since *Coultas* with legal developments "marching with medicine but in the rear and limping a little".[118] Psychiatric injury as a valid head of damage received the approval of the House of Lords in *Page v Smith.*[119] An employer will be liable for psychiatric injury caused to an employee under the "rescuer" exception to the "nervous shock" or PTSD cases. In *Mount Isa Mines v Pusey*[120] two employees were severely electrocuted and burned due to inadequate switchboard training. The plaintiff ran to their assistance and suffered from nervous shock as a result of witnessing their horrific injuries. It was held in this case that psychiatric injury was foreseeable despite the fact that the plaintiff was not personally acquainted with the victims.

In *Robertson and Rough v Forth Road Bridge Joint Board*[121] two men witnessed the death of a fellow worker who was swept by gale force winds from

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116 *Victorian Railways Commissioner v Coultas* (1888) App Cases 222.

117 Ibid, 255.

118 *Mount Isa Mines v Pusey* [1970] CLR 383 at 395 per Windeyer J.

119 [1996] AC 155. See also *Page v Smith (No 2)* [1996] 1 WLR 644 where the English Court of Appeal found sufficient causation. Note *McLoughlin v O'Brien*, supra at note 113, at 431; and *Alcock v Constable of South Yorkshire Police* [1992] 1 AC 310 cited with approval in *Kingi v Partridge*, noted in [1993] BCL 1596; [1994] NZRLR 161 but note also that Cooke P in *Mouat v Clark Boyce* [1992] 2 NZLR 559, 569 implied that the rigidity of *Alcock* may not necessarily need to be followed in New Zealand for policy reasons. Claims for "nervous shock" have been allowed to proceed in *Boe v Hammond*, High Court Wellington, 26 May 1995, M 3/95; Master Thomson, in *McDonnell v Wellington AHB* supra at note 68; and in *P v A-G* [1996] 3 NZLR 733 where Anderson J said that in order to succeed in a claim for nervous shock the plaintiff had to show a temporal and geographical proximity to a traumatic, dangerous or fatal accident to a spouse or child.

120 Supra at note 118.

121 [1995] IRLR 251.

the back of a van and over the edge of a bridge they were working on. They claimed damages from their employer for the PTSD they allegedly suffered as a result of witnessing the accident. It was held that the general duty of care owed by an employer to an employee did not extend to psychiatric injuries brought about by seeing a fellow employee injured or killed. Where employees were merely bystanders, that is, they were not acting in the course of their employment, it is assumed they will possess enough fortitude to endure the shock.

This proposition was recently confirmed by the English Court of Appeal in *Frost v Chief Constable of South Yorkshire Police*.[122] This case concerned the claims of five police officers for damages for psychiatric injury following their involvement in the Hillsborough Stadium Disaster in April 1989. The officers claimed that there had been a breach of the duty of care owed to them by the Chief Constable to avoid exposing them to unnecessary risk of physical or psychiatric injury either in their capacity as officers or as rescuers.

The Court of Appeal held that a duty of care was owed to both rescuers and employees and that it was a question of fact whether a person was a rescuer. If involving an employee, the standard of care and degree of proximity required would vary depending on the type of job and the resilience the particular employee might be expected to show. A duty of care existed solely by reason of the master and servant relationship, making it unnecessary to distinguish between primary and secondary victims. In comparison, those who witnessed an accident, but were not rescuers or employees, needed to meet more stringent tests in order to qualify for damages.[123]

### 3. Inadequate Employment Guidance

In *Gillespie v Commonwealth of Australia*[124] the plaintiff, an "ambitious" diplomat, was sent to the Diplomatic Mission in Caracas, Venezuela. He claimed that his nervous breakdown resulted from the negligence of the Commonwealth in posting him to Venezuela (where living conditions were harsh) without informing him of the conditions he was likely to face and not relieving him of various stresses.

In considering whether or not the Commonwealth had discharged its duty to take reasonable care for the safety of the plaintiff, regard had to be made to whether it was reasonably foreseeable that the plaintiff might be subject to some sort of "psychological decompensation", beyond the difficulties and stresses to which most officers would ordinarily be prone, in the circumstances which prevailed in Caracas at the time of the plaintiff's service.

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122 [1996] TLR 617.

123 *McFarlane v E E Caledonia* [1994] 2 All ER 1. For an analysis of these tests see *McLoughlin*, supra at note 119; *Alcock*, supra at note 119; and *Page*, supra at note 119.

124 Supra at note 27.

The discharge of the employer's duty to take reasonable care for the safety of its employees required that any officer posted to Caracas be given some preparation beyond that which was appropriate to a less stressful post. It was unreasonable to withhold from the plaintiff information that this was a new post with difficulties as great, if not greater, than any other Australian diplomatic post. However, in view of the remoteness of the possibility that an officer would be subject to such an extreme reaction as that of the plaintiff, reasonableness did not require the defendant to give more than the most general warning and a description of the circumstances which would render it difficult to cope with the conditions. As the plaintiff was ambitious, such a warning or description was unlikely to have deterred him from applying for or accepting the post in Caracas. Causation was therefore not established.

Although the employer escaped liability, the Court made it clear that in appropriate circumstances, an employer may certainly be held liable for the inadequate preparation, training, and supervision of an employee. Even if a common law action was not successful, an employee still has a strong chance of making a claim under the HSIEA.

## VII: CONCLUSION

Recent common law negligence cases pertaining to mental injury suffered as a result of work-induced stress have expanded the law relating to pure mental injury in favour of the employee. From this development, and from the operation of the ARCIA, it is likely that work-related claims for such injury will now find an avenue of redress in New Zealand courts.

A survey, and guidelines from the Department of Labour, have highlighted the high rate of stress in the current employment context in New Zealand. Employers should be aware of the risk that workers might be exposed to traumatic and stressful environments. It appears that an employer is no longer able to rely on an employee's resilience and must therefore carefully examine the health of the organisation. Failure to do so could have serious consequences under both the HSIEA and the ECA.

On the other hand, the recent expansion of the law is of great value to employees. Employers have a duty to provide a safe system of work to prevent the risks of physical injury. Similarly, the mental health of workers should be protected. Without acknowledging the seriousness of mental injury claims the law is in danger of overlooking the reality that a psychiatric condition may be equally, if not more, disabling than a physical injury.