Introduction

As a legal issue, stress is said to be the number one “emerging risk” for employers of the 21st century.

“We live in an age of acceleration. Whatever the formula was for business success a few years ago, it won’t work today. Today there needs to be more and more work crammed into less and less time. There are fewer people doing more and doing it faster in less space with less support and with tighter tolerances and higher quality requirements than ever before. The average manager or knowledge worker is so busy today that there is simply not a spare moment for anything. There isn’t time to plan, only do. There is no time for analysis, invention, training, strategic thinking, contemplation, or lunch.”


Trend data reveals a dramatic rise in employee stress compensation claims and pay outs since the mid 1990s. In New South Wales, major stress claims (ie. those that required more than 5 days off work) rose from 473 claims in the period 1991 to 1992 to 1,738 claims in 1995 to 1996. In the same period, pay outs for stress claim rose from 54 million to 29.4 million (source: WorkCover New South Wales 1997). Given that these figures only represent compensable stress claim, they may be viewed as the tip of the iceberg.

Stress, broadly speaking, covers any mental or physical demand or pressure made on a person. The experience of stress is an adaptive response that can be positive or negative. The “right” amount of stress can improve performance of employees. Negative consequences of stress in the workplace include poor performance, misconduct, low morale, absenteeism, resignations and psychiatric illness.

This paper examines the legal consequences of stress in the workplace, by:

- examining causes of action that may be used by stressed employees; and
- focusing on legal claims arising out of common work related cause of stress.

I also examine:

- legal issues for employers in managing employees suffering stress related illnesses; and
- strategies for employers to minimise the risk of stress in the workplace.
2 Legal claims which may be made by stressed employees

2.1 Equal opportunity

Commonwealth and State equal opportunity laws prohibit a range of conduct including sexual harassment, discrimination and victimisation.

**Sexual harassment** occurs where a person:

- makes an unwelcome sexual advance;
- makes an unwelcome request for sexual favours;
- engages in any other unwelcome conduct of a sexual nature;

in relation to another person in circumstances in which a reasonable person having regard to all the circumstances, would have anticipated that the person would be offended, humiliated or intimidated.

**Discrimination** on the basis of a number of prohibited grounds is prohibited in all States and Territories. The grounds vary from State to State but generally include: sex, sexual preference, pregnancy, marital status, family responsibilities, age, disability or impairment, race, religious beliefs, political beliefs, industrial activity, trans-sexuality.

**Victimisation** occurs when a person is treated detrimentally as a result of raising or giving evidence in relation to an equal opportunity complaint.

An employer may be vicariously liable for the unlawful acts of its employees and agents, unless it can show it took reasonable steps or reasonable precautions to prevent the unlawful conduct occurring. In addition, it may be liable if it is found to have caused, instructed, induced, aided or permitted another person to breach the Act.

Employees who have suffered, sexual harassment, discrimination or victimisation commonly suffer anxiety, pain and suffering at work and often take leave. Such leave is often referred to as “stress leave”.

2.2 Occupational health & safety claims

The common law imposes general obligations on employees to provide a safe working environment for their employees. The various Commonwealth and State occupational health & safety legislation codifies this common law duty and imposes obligations on employers to ensure the health, safety and welfare both of employees and others who may be exposed to risk to health and safety. The legislation sets out penalties to be imposed when these obligations have not been met.

In summary the legislation provides that an employer has a duty to provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.

An employer may be in breach of those duties if the employer fails:

- to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health; and
- to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health.
There are also obligations on individual employees who may be held criminally responsible for their bullying or harassing actions in the workplace.

In March 2001 the Victorian WorkCover Authority released a proposed code of practice for the prevention of workplace bullying, expected to commence in early 2002. Its purpose is expressed to be to guide employees to pro-actively implement preventative measures. The code has been developed under the Victorian *Occupational Health and Safety Act*. The WorkCover Authority has taken a view that although traditionally bullying has been addressed by discrimination, unfair dismissal, criminal laws, the best pro-active and preventative approach is to bring bullying under the Occupational Health and Safety regime as a workplace hazard. The code of practice is intended as a guide for employers and is not binding. However, a code of practice is admissible evidence for any prosecution under the OH&S Act or regulations, and failure to observe the code may prove the offence.

### 2.3 Negligence

An employer may bring a tortious claim against their employer for negligence. In simple terms, the employee must be able to show that the injury was foreseeable and ought to have been prevented.

### 2.4 Criminal law

When bullying involves physical assaults or threats, it becomes a criminal matter. Bullies can be charged with aiding and abetting, assault, common assault, assault occasioning bodily harm, grievous bodily harm, stalking.

### 2.5 Workers compensation

If workplace conduct has been a significant contributing factor to a workplace injury, then an employee may submit a claim for workers compensation under the relevant legislation. Workers compensation legislation can be used for physiological or psychiatric injuries such as that arising from stress.

There are some circumstances where compensation is limited: For example, section 82(2A) of the *Accident Compensation Act* 1985 (Vic) limits the compensation payable for a workplace injury as follows:

> “Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from:

- (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or
- (b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
- (c) an expectation of the taking of such action or making such a decision.”

### 2.6 Unfair dismissal or “constructive dismissal” claims

Constructive dismissal claims may arise when a victim of bullying leaves a company and argues the reason they left the company was because of the bullying or harassing conduct which the employer allowed to occur.
To bring a claim, employees must be able to show the termination of employment was at the initiative of the employer. This means that the action of the employer must be the principal contributing factor which led to the termination of the employment relationship. In the case of a victim of bullying or harassment, an employee will argue that their resignation was forced and not voluntary, and that the employer’s failure to prevent stressful or intolerable work environment was a principal cause behind the termination of the employment contract.

2.7 Surveillance and privacy claims

Although we have not seen any claims to date, unions are being pro-active in arguing that in particular work environments (such as call centres), employees who are subject to extensive surveillance or performance monitoring experience more stress in their work.

New laws are also entering this domain:

- There is now legislation in Victoria, New South Wales and Western Australia which regulates the type and extent of worker surveillance.
- There is also a new regime of privacy law (including the Federal Privacy Amendment (Private Sector) Act 2000 to commence on 21 December 2001) which impose obligations about the collection, use, disclosure and storage of certain personal information.

In future we may see employees using these new avenues of redress for complaints about surveillance and monitoring, particularly if they are perceived as creating a stressful working environment.

3 Key work-related causes of stress

There are a wide range of reasons for stress in the 21st century. Tom De Marco outlined a number of those in the quotation at the start of this paper. General work and social trends demonstrate the following:

- There are less working age people to do the work.
- People are working longer hours.
- People are taking shorter or no breaks.
- With information technology and globalisation, there are more time and travel pressures.
- Work increasingly spills into family time.
- There is high competition for jobs and business.
- There is an increased numbers of dual income families causing the need to juggle work and family responsibilities (children and elder care).
- There is a decrease in leisure time and people are having less sleep.

There are a range of non-work related factors that may cause employees to experience stress at work. While employees may not be able to control those factors, there are factors in a person’s working environment that have been identified as inducing stress, including bullying; harassment; juggling work and family responsibilities; excessive work
demands; and stressful jobs per se. These factors have given rise to the types of claims identified above.

3.1 Bullying

Bullying is defined in the Victorian WorkCover Authority Issues Paper: Code of Practice for Prevention of Workplace Bullying, March 2001 as “Aggressive behaviour that intimidates, humiliates or undermines a person or a group repeated over time”.

Bullying can involve hostile, verbal or non-verbal behaviour or interfering actions and also acts of omission, typically involving withholding resources – such as time, information, support or equipment - in order to guarantee failure. Bullying is closely associated with workplace violence. Aggressive bullying behaviour can escalate into threats, physical violence and intimidation. Contrary to popular belief, bullying is not predominantly a male or a physical problem. Studies have shown that men and women are equally as likely to bully others.

Few jurisdictions have law explicitly banning bullying at work (Sweden is the exception). Most victims of bullying either take no legal action or try to bring their case under some other law.

Bullying complaints often result in unfair dismissal claims, discrimination claims, workers’ compensation claims, breach of occupational health and safety laws, negligence claims. Section 17(1) of the Tasmanian Anti-Discrimination Act 1998 makes specific reference to bullying behaviour that “offends, humiliates, intimidates, insults or ridicules”.

Some successful claims against employers and their workers have resulted in large payouts where the complainants proves that the abuse has resulted in stress causing either a psychological or psychiatric illness. Australian courts have awarded sums up to $500,000 for bullying conduct.

State of NSW v Jeffrey [2000] NSWCA 171 (Supreme Court of NSW, Court of Appeal, 1 September 2000)

Mr Jeffrey (the plaintiff) was employed by the Police and Community Youth Clubs NSW Limited (PCYC) in their head office in Parramatta from about November 1991. Sergeant Spiteri was in charge of the group of 6.

Soon after joining the Parramatta office problems developed between Mr Jeffrey and Sergeant Spiteri. The court found that Sergeant Spiteri “commenced to assert his authority over the plaintiff in a hostile and harassing way.”

The harassment took the following forms:

- Regularly finding fault with Mr Jeffrey’s work when it was inappropriate to do so;
- Engaging in vulgar abuse of Mr Jeffrey;
- Making threatening remarks, “frequently asserting that he would have the plaintiff sacked, so that he and his family would ‘end up in the gutter’; and
- Publicly making disparaging and humiliating remarks about the plaintiff’s relationship with his wife.

The court found that the bullying had resulted in Mr Jeffrey losing his happy and outgoing demeanour to become stressed and anxious.
Mr Jeffrey was initially reluctant to make a complaint through fear of Sergeant Spiteri. The Court found that although there was a formal mechanism for making complaints of this nature in the police force, no equivalent existed within the PCYC. When Mr Jeffrey finally made a complaint through the area’s police zone commander in January 1994, Sergeant Spiteri’s reaction was to threaten him in a private conversation. The Plaintiff’s complaint was followed up by the Internal Affairs Division of the Police Force.

Sergeant Spiteri left the Parramatta office in April 1994 and did not return.

After Sergeant Spiteri left, a number of incidents occurred, which Mr Jeffrey attributes to, but could not prove were committed by, Sergeant Spiteri. These incidents were: receiving anonymous threatening phone calls; a brick thrown at Mr Jeffrey’s house; and Mr Jeffrey’s car being deliberately damaged. The Court states that “[a]lthough he could not prove that the Sergeant or persons acting on his behalf were responsible for these incidents, they added to his psychological problems.”

The evidence was that despite the removal of Sergeant Spiteri from the workplace, Mr Jeffrey continued to suffer the effects of the stress caused by his conduct. Mr Jeffrey has subsequently endured an unsatisfactory employment record.

At trial it was found that the State of New South Wales was liable in negligence for its failure to act on suspicions and or complaints to prevent the harassment or abuse. The trial judge also found that there was a failure to prevent an environment in which harassment and abuse existed. This was largely based on the fact that the State conducted and had the care, control and management of the Police Service, and the finding that the police ran the work environment.

The trial judge, however, found that the PCYC was not liable for the harassment.

The trial judge awarded Mr Jeffrey $35,000 in general damages and an amount for future economic loss. It should be noted that the Trial Judge set the latter amount low because of his assessment that Mr Jeffrey had good prospects of fully recovering from the situation. However, in other situations an award for future economic loss may be significant.

The Court of Appeal upheld the Trial Judge’s decision in its entirety.


In the case of *Airlie v Australia Wide Computer Repairs* the NSW Industrial Relations Commission considered that the applicant was constructively dismissed from her employment and had left due to the “bullying, blatant rudeness and abuse” by her colleague.

Ms Airlie was employed as an Operations Manager by Australia Wide repairs from 5 January 1998 to 30 July 1998. She gave evidence that she complained that after moving her desk a colleague abused her saying: “One, two ... seven f***ing desks in here and she has to sit at that one”. Ms Airlie’s former manager at Australia Wide Computer Repairs subsequently asked her and the co-worker to attend a counselling session with an external mediator. But Ms Airlie was not prepared to enter into mediation until her colleague changed his aggressive attitude. She said she resigned “rather than face the humiliation of being sacked”. Her former boss then surveyed 10 employees asking questions about the incident such as: “Do you think Margaret [the applicant] did a good job in the response centre?” and “Do you think Ron would have sacked Margaret if she had not resigned?”

At the hearing the former manager argued that he had offered professional mediation and that Ms Airlie had chosen to ignore that offer and resigned instead. The Commissioner
disagreed with these arguments and considered that Ms Airlie was justified in seeking that the colleague change his basic behaviour prior to agreeing to enter into a mediation with him. He considered that she had been constructively dismissed, as she was faced with no alternative but to resign.

3.2 Equal Opportunity

Elliot v Nanda and the Commonwealth (2001) FCA 418 (Federal Court of Australia 11 April 2001)

Ms Elliot brought a claim of sexual harassment against her employer, Dr Nanda and the Commonwealth Employment Service (CES). She alleged that she was subject to sexual harassment by Dr Nanda which included the following conduct:

- sexually explicit comments and statements to her;
- grabbing and or brushing against her breasts;
- patting her bottom;
- trying to kiss her;
- talking about raping her;
- massaging her shoulders; and
- requiring her to sew a button on his trousers while he was still wearing them.

This conduct was ongoing over the period of her employment at the medical centre from September 1995 to February 1996 when she resigned. At the time of her commencement of employment she was 17 years of age.

Ms Elliot succeeded in her claim. Dr Nanda and the CES were jointly ordered to pay a sum of $15,100 damages with Dr Nanda being ordered to pay an additional sum of $5,000 as aggravated damages.

Emily Groves v Benlor Real Estate Pty Ltd PR904336 (Australian Industrial Relations Commission 18 May 2001).

Ms Groves was employed as a Sales Consultant from March to November 2000 by Benlor, a family owned business in the real estate industry. Ms Groves alleges she was subject to unwelcome sexual harassment by the father of the family, including inappropriate remarks of a sexual nature, patting her bottom, touching her breasts and one occasion putting his hands into the waist band of her trouser pants and pulling the top of her g-string, as well as other touching. Ms Groves decided to put up with the conduct, however, matters came to a head on 13 November 2000 when she voiced her complaints to the Respondent. It was at this meeting that her complaints and concerns were trivialised by the brothers and it was determined there was no need to investigate her complaint. Ms Grove left the meeting in disgust at their attitude and did not return to work in what she described as a poor work environment full of sexual harassment.

In this case, the Commission found that the termination of Ms Groves’ employment was at the initiative of the Respondent. The Respondent initiated the termination by the failure to investigate and stop the sexual harassment thus placing Ms Groves in an unacceptable work environment and forcing her to take the decision that sexual harassment could no longer be tolerated in any circumstances. It was found reinstatement was not satisfactory remedy in the matter given the attitude of the Respondent about the sexual harassment. The Respondents were ordered to pay the sum of $19,440.00 as compensation in lieu of reinstatement.
3.3 Juggling work and family responsibilities

The following cases demonstrate that employers have an obligation to take steps to manage and assist employees handle the stresses caused by juggling work and family.

**Shou v State of Victoria** (Victorian Civil and Administrative Tribunal, April 2000):

This complaint involved a long-term employee, Ms Shou, worked as a Hansard sub-editor in the Victorian State Parliament. For a period of almost two years, she and the Department discussed and negotiated more flexibility in her work. Her youngest child was frequently ill with asthma and chest infections and suffering separation anxiety. After much discussion, it was agreed that the best result in order to not to lose an experienced editor was to install a modem and fax in her home. The arrangement was that Ms Shou would continue to work full-time but some of those days would be from home. A costing of installing the equipment was completed and the IT department was informed that it would be happening, however, 11 weeks later after the arrangements were agreed, the equipment still had not been installed. Ms Shou resigned and lodged a complaint of indirect discrimination on the ground of her carer status. Amongst other things, the Department attempted to argue that Ms Shou had chosen to be a parent and had therefore brought this situation upon herself – an argument found to be irrelevant by the Tribunal. Ms Shou was awarded $161,307.40 for loss of earnings, loss of superannuation and loss of the opportunity of promotion to Chief Editor.

**Bogle v Metropolitan Health Service Board** (2000) EOC 93-069 (Equal Opportunity Tribunal, WA, January 2000)

Ms Bogle was employed as a Charge Nurse at a dental clinic. She requested a return to work part-time or job shared in her position following a period of adoption leave. Her employer refused stating that she was required to work full-time as a Charge Nurse or part-time in a non-supervisory position. The Tribunal found the management’s initial response that the position could not be job shared was a knee-jerk reaction based primarily on the fact that it had always been a full-time position, and an intuitive feeling that a job shared position was not in the best interest of the organisation. The Tribunal found indirect sex discrimination had occurred on the ground of Ms Bogle’s family responsibilities. The dental clinic was ordered to pay $12,600.00 in damages. The Tribunal also ordered that the clinic give her job back in a job shared arrangement for at least a 12 month trial period.

3.4 “Stressful” work

Employees who are exposed to traumatic or stressful incidents in the workplace over time without adequate counselling or provision by their employer, may now be able to recover damages if they develop injuries from those stressful events.

**State of New South Wales v Seedsman** [2000] NSWCA 119 (Supreme Court of NSW, Court of Appeal, 12 May 2000)

Ms Seedsman serve in the New South Wales police service for 15 years in the child mistreatment unit. During this time she was involved in hundreds of cases of child abuse and sexual and other physical assaults. She later was diagnosed with post-stress disorder.

The District Court held that the employee had not been provided with formal training, supervision, or monitoring to counteract the stress of exposure to that kind of work and that she had suffered a workplace injury.
On appeal, the Court held that the original judge had correctly identified stress as the catalyst for psychiatric illness and was justified in concluding that an employee would develop a psychiatric illness as a result of this stress.

The Court held that:

"Employers owe employees a duty to provide a safe system of work which includes a duty to take reasonable precautions against a risk of mental or psychiatric injury as well as bodily injury. The State of New South Wales ought to have known the risk of an employee developing a psychiatric disorder as a consequence of being exposed to repeated traumatic experiences."

Ms Seedsman was awarded $26,000 in damages.

The Court considered that had there been some form of support or counselling provided by the employer, the damages would have been reduced or might not have occurred at all. Ms Seedsman had only three months training in total which had occurred when she had commenced employment in that position when she was 22 years of age.

3.5 Excessive workload, work demands, monitoring

Sinnott v FJ Trousers Pty Ltd [2000] VSC 124 (Supreme Court of Victoria, 10 April 2000)

In another case, Victorian computer operator Byran Sinnott claimed that he suffered severe mental illness. Mr Sinnott brought an action against FJ Trousers claiming that his illness was caused by excessive stresses and tensions during the course of his employment. He claimed that his employer had permitted him to work excessively long hours, failed to meet the numerous requests he made for technical support and did not respond to complaints about his workload. Mr Sinnott also claimed that he was required to perform duties which were beyond his training and qualifications.

The Supreme Court of Victoria rejected the employer’s application to have the matter dismissed on the grounds that it did not disclose a recognised cause of action. The Court accepted that an employer’s duty of care extends to protecting employees from foreseeable risk of psychiatric injury. This means that an employee can recover damages in negligence for mental illness in the absence of a physical injury or isolated incident.

4 Managing employees on stress leave

Employers must also ensure they properly manage employees suffering from a stress related illness, whether they are at work or absent on sick leave.

In handling this situation, an employer must balance the following obligations:

- not to discriminate against an employee on the basis of a disability or impairment;
- as far as practicable, ensure the employer provides the employee a work environment that is safe and without risk to health;
- comply with all relevant award and contractual obligations;
- not breach any workers compensation obligations;
- ensure that any termination of employment is lawful.

The statutory unfair dismissal laws and equal opportunity laws mean that an employer must ensure any termination does not occur in a manner that is harsh, unjust or
unreasonable, or for a prohibited reason. For example, a person’s employment must not be terminated on the basis of: a physical or mental impairment (unless the reason relates to the inherent requirements to the job); or a temporary absence for illness or injury.

In Emmersen v Housing Industry Association Ltd [1999] FCA 500, the Federal Court held that the termination of Mr Emmersen’s employment was unlawful because the Court accepted that one of the reasons for termination was the employee’s temporary absence on stress leave. The Court was also critical of the unreasonable demands on the employee and treatment of the employee during a period when he was absent on medically-certified stress leave.

5 Strategies for employers to identify and minimise the risk of stress in the workplace.

(a) Macro indicators

Although it is difficult to assess each individual employee’s stress level, high levels of absenteeism and staff turnover can be effective indicators of a stress problem. Periodic surveys investigating employee perceptions of the workplace may also be an effective measurement tool.

(b) Structure and organisation of work duties

Stressful work environments can be created by the nature of the jobs. Obvious stressful environments include those in which the job involves the management of trauma, grief and/or emergencies, such as police and nurses. Other stressful environments may not be so obvious. Those jobs that involve constant interruptions (eg clerical positions), having to deal with the public (eg sales assistants), or where the environment may be changing and difficult to control (eg teachers) are also hot spots for stress claims.

The structure and organisation of work duties, if not well defined, can cause stress in a workplace. Long hours, lack of job security, limited access to training and limited career paths may all induce stress. Strategies to counter or minimise the effects of these factors need to be considered.

(c) Organisational responses to stress

Employers need to become aware of stress-inducing factors in the workplace. Are there opportunities for workers, who are suffering stress, to seek help through mechanisms such as Employee Assistance Programs? Is the organisation a partner in managing the stress for individual employees? Is rehabilitation available for those who have suffered stress?

(d) Preventing bullying and sexual harassment/discrimination

All employers should have clear policies on equal opportunity. Similarly, a comprehensive written policy that outlines the organisation’s position on bullying sends clear message to employees that bullying will not be tolerated. Defining the unacceptable behaviour is crucial as many employees do not recognise the behaviours which constitute bullying or harassment. The policies must be consistently enforced for all employees, regardless of their level within management. The policy will be ineffective if employees cannot trust that it will be enforced.

Organisations must also train all staff in policies and reinforce this training at regular intervals.
Finally organisations must ensure the workplace is monitored and all complaints and issues of bullying, harassment or discrimination are responded to promptly and appropriately.

(c) Managing requests for flexible work

To ensure that requests for flexible working arrangements are handled appropriately, without discrimination and in a way that minimises stress to employees, employers should have a clear and consistent process for handling such requests, respond promptly to requests and train managers to ensure they understand the organisation’s obligations.

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