Submission No 56

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

Organisation:

Name: Mr John Ellard

Telephone: (02) 9969 8268

Date Received: 3/05/2005

Subject:

Summary

WHAT IS A PSYCHIATRIC INJURY?

John Ellard

March 2004

In 2002, the High Court published a judgment [1] concerning the issues surrounding the legal consequences of an act which causes psychiatric injury. My understanding is that there has been a long sequence of judgments in the British, American and Australian jurisdictions dealing with what was once known as "nervous shock", a medical term which appeared in the second half of the 19th century [2].

The related history is much older. For millennia there have been descriptions of paralysis, blindness and other major disabilities which the authors did not attribute to the usual mechanisms causing such results. Let us call these disorders manifestations of "hysteria". It was a word that served us well for a long time, even though it has been expunged from more recent systems of classification. Until the mid 19th century hysteria was attributed to bodily mechanisms. For example, Egyptian and Greco-Roman medicine attributed hysteria to wanderings of the uterus about the body, and the remedies involved manoeuvres designed to coax or menace the errant organ back to its proper place.

Closer to the notion that psychological stress may have adverse effects is what William Harvey wrote in the 17th century [3]. Not only did he describe the circulation of the blood but in his most carefully reasoned and constructed book "De Motu Cordis" he wrote: "For every passion of the mind which troubles men's spirits, either with grief, joy, hope or anxiety, and gets access to the heart, there makes it to change from its natural constitution, by a distemperature, pulsation and the rest thus infecting all the nourishment and weakning the strength, it not at all to seem wonderful if it afterwards beget diverse sorts of incurable diseases in the members and in the body, seeing the whole body in that case as afflicted by the corruption of the nourishment, and defect of the native warmth". Here we have psychological stress producing bodily disease.

The term "nervous shock" covered a wide range of phenomena. My understanding of what it meant in the law is that "Nervous shock is an injury caused by the impact on the mind, through the senses of external events" [3].

This brings us to the meaning of words. Consider a man being pursued by a lion – his anxiety is tremendous. It may be argued that this is a natural consequence of the circumstances and therefore not an abnormality at all. Not to be anxious would be

abnormal. There is no injury. But consider a man who stepped on a jump mine in Vietnam. First he was propelled about two metres vertically, losing his legs, genitalia and perhaps an arm in the process. Then the mine exploded downwards, killing his mates who were close to him. Consider his state of mind from then on. I have had to do this -- it was unbearable for me. That state of mind is a natural consequence of what happened: to say that therefore there is no psychiatric injury is gross nonsense.

Some fundamental difficulties

Decades ago pulmonary tuberculosis was an endemic disease: there were mass radiological surveys endeavouring to identify those so afflicted so that they could be treated. Professor J C Scadding observed that some who had the radiological appearances of pulmonary tuberculosis did not have that infection and speculated as to whether they had a disease at all. Being a wise man he realised that he could not answer that question unless he could define a "disease". Being honest, he realised that he could not do so.

Most attempts at definition are circular. Disease is an absence of health and health is an absence of disease. There have been some brave attempts. It was suggested that anyone in a condition which threatened to shorten their life, or diminish their ability to procreate, was in a state of disease. Then a wit pointed out that a Catholic priest who rode a motorbike was in exactly this category.

The search for a definition of disease goes on – there is an extensive literature. It is for this reason that questions such as "Is alcoholism a disease?" cannot be answered, for there is no accepted definition.

One cannot evade the difficulty by using synonyms, such as "disorder" as in DSM-IV.

On the other hand there is common sense. Few would argue that cancer of the bowel and stroke are not diseases even if we do not know exactly what the word means.

An additional problem is that many of the conditions to be considered are not categorical but dimensional. The readings of the systolic and diastolic blood pressure which equip one with a diagnosis of essential hypertension changes as more and better

outcome studies are done. There are many more examples in general medicine: the problem is not confined to psychiatry.

There have been many cases which have slowly clarified some of the issues. Some of them are worth mentioning. In 1901 a carelessly driven horse van ran into the bar of a public house frightening the barmaid so much that she had a miscarriage. There was no impact and she was not injured physically; she recovered damages nevertheless [4].

A more memorable case embodying the same principle occurred in 1957, when a circus elephant overturned a booth containing two midgets. The wife was injured physically but her husband was not: once more damages were obtained [5]. The High Court judgment lays to rest many of the issues raised over the years.

A large problem

In the army of psychiatrists and psychologists there are battalions of the tidy-minded. They are engaged in an endless pursuit of precisely defined categories, and to achieve this pursue measuring instruments which give consistent results when applied to the same population. If a number of trained scorers get much the same result when measuring a specified variable they are triumphant, for they have achieved a high level of reliability of measurement.

There is a problem. I assert that a good estimation of the amount of psychiatric injury can be achieved by ascertaining the circumference of the patient's head with a tape measure. Careful application of my technique produces very consistent results – they have a high level of reliability. Unfortunately they have no validity at all. They are worse than useless, for they may be grossly misleading.

In psychiatry the pursuit of reliability involves much use of questionnaires. Here one submits the patient to batteries of leading questions which embody the researchers' hypotheses about the issue being investigated. Not only are the subjects interrogated in a carefully structured and limited area, but there is no way in which they can speak of other things which concern them. The researchers have excluded all material which from their point of view is irrelevant. Even worse, the questions may be administered not by the researcher, but by a lay interviewer, by telephone or even by a computer with no human involved.

One outcome study demonstrates what can happen [6]. Four brief screening measures for depression were administered to 197 patients receiving palliative care for advanced cancer. The research showed that such measures have some use but that for diagnostic purposes they did not approach the validity of a single item interview which asked, in effect, "Are you depressed?".

If we put aside for a moment the question of a strict definition, it is easy to show that psychiatric injury is common and in some situations inevitable.

In the Second World War experience in North Africa showed that after 180 or even 140 days in combat most men were ineffective, their effectiveness wearing off after the first 90 days of combat [7]. Within 10 days of D-Day, the psychiatric problems were such that in the 21st Army Group 10-20% of casualties were psychiatric cases of "exhaustion". If soldiers were kept in combat they became quite ineffective [8].

Changes in the law

The Motor Accidents Compensation Act 1999 provides an example of how far the pursuit of what is believed to be precision can produce labyrinthine error. To confine our attention to psychiatric injury – there called "Mental and Behavioural Disorders Impairment" - the Act sets out the principles which governed its constitution. Section 5(1)e refers to the need "to keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities". The aim was to save money.

The general guidelines for all injuries are based on the American Medical Association Guides to the Evaluation of Permanent Impairment (4th edition, 3rd printing) 1995. When the authors of the AMA 4 Guides contemplated psychiatric impairment they backed off, the reasons being given on page 30 of the Guide.

"The use of percentages implies a certainty that does not exist, and the percentages are likely to be used inflexibly by adjudicators, who are then less likely to take into account the many factors that influence mental and behavioural impairment. Also because not data exist that show the reliability of the impairment percentages, it would be difficult for Guides' users to defend their use in administrative hearing".

The tidy-minded were not defeated. They went right ahead. Numbers were given to the person's performance in six activities, and then an arithmetic process was provided for reducing these scores to one number. One wonders what the authors of the AMA Guide would have thought of that. Since both physical pain and psychological pain are not reliably assessable they do not rate a mention in the local guidelines. The pain and suffering of depression is a common cause of suicide but I agree that it is difficult to give a number to the suffering of a particular individual. Ignoring it is one solution.

The final problem

The "impairment" must be attributable to a recognisable psychiatric condition. This stipulation is usually met in this country by turning to the most used compendium of psychiatric diagnoses – the 4th revised edition of the Diagnostic and Statistical Manual of Mental Disorder (DSM-IV-TR).

Psychiatrists need a list of descriptions like this to simplify communication. It is absolutely essential that those using such lists be aware of their limitations. The Introduction to DSM-IV is quite clear. "The diagnostic categories, criteria and textural descriptions are meant to be employed by individuals with appropriate clinical training and experience in diagnosis. It is important that DSM-IV not be applied mechanically by untrained individuals. The specific diagnostic criteria included in DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion".

There is also a precise and clear statement about the use of DSM-IV in forensic settings. "When DSM-IV categories, criteria and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or understood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder", "mental disability", "mental disease" or "mental defect".

This did not deter those who devised the guidelines to the NSW Act. Guideline 7.19 states "The impairment must be attributed to a recognised psychiatric condition". It

would have been interesting if in their search for objectivity and precision they had stated exactly what they meant.

We have a choice between pseudo-science and pragmatism. At [6] on page 1354 in Tame, the Chief Justice, in discussing some of the subtleties of the law makes a particular decision and then states: "The distinction is not based on science or logic; it is pragmatic, and none the worse for that". If I may be permitted to say so, these are very wise words which go to the heart of the matter.

The administration of the law is essentially pragmatic. For example, to the best of my knowledge in no Court of Appeal does an even number of judges finally consider a particular matter. In this way we can be sure that the Court will come to a decision and that the issue cannot remain deadlocked forever. This is not because the judges do not understand the issues before them but because human affairs are extraordinarily complicated and one cannot always draw a line dividing their issues into two neat categories.

My argument is that psychiatric assessments in this area should not be done by rigid categorisation and adding numbers and that judgments should be made by judicial officers, not committees and computers.

It will be the duty of the psychiatrist to explain to the Court what is wrong with the injured person using and explaining such technical terms as are helpful. There will be areas of uncertainty: careful cross examination should clarify them as much as can be done and the Court be able to produce the best possible judgment. It all depends on how far you want to go to save money.

Conclusion

Even though the Harvard Institute of Jurisprudence once described the law as a weapon of the ruling classes I have always leaned towards the system that we have as offering the best hope of producing fair and reasonable outcomes to disagreements in our society. It is an improvement on settling disputes by combat between armed champions.

But now in the Motor Accidents Compensation Act of 1999 we have in this State a law based firmly on two foundations which were known to be inappropriate before they were used in this context. Worse, the Act turns its back on the existence of pain and suffering. Anyone with the slightest knowledge of the human condition can see the absurdity of such an assertion.

For the sake of those trapped within this disaster, and for the reputation of the law and those who make it, I hope that is not too late to start again and get it right next time. Saving money is a proper goal but one must be careful about what is sacrificed in the process.

As the Chief Justice of the High Court pointed out, pragmatism is the name of the game, and it is pointless to assume that there are precise and universally accepted categories of such things as "a recognisable psychiatric illness". It is my firm view that in this context what is a "recognisable psychiatric illness" is a determination to be made in a particular case by a judicial officer who has heard the relevant evidence and heard it examined. One day there may be universally accepted categories of such things but I do not think that it will be in our lifetime.

References

1. Tame v New South Wales. Annetts v Australian Stations Pty Ltd [2002] HCA 35.
2. Erichsen JE. On concussion of the spine: nervous shock and other obscure injuries of the nervous system in their clinical and medico-legal aspects. London: Longmans, Green and Co., 1882.
3. Harvey W. Exercitatio anatomica de motu cordis et sanguinis in animalibus (1628). Trans. Geoffrey Keynes. Birmingham: Classics of Medicine Library, 1978; 94.
4. Dulieu v White (1901) 2 K.B. 669.
5. Behrens v Bertram Mills Circus Ltd (1957) 2 Q.B.1.
6. Chochinov HM, Wilson KG, Ennis M, Lander S. "Are you depressed?" Screening for depression in the terminally ill. Am J Psychiatry 1997; 154: 674-676.
7. Ursano RJ, Holloway HC. Military psychiatry. In: Kaplan HI, Sadock BJ. Comprehensive textbook of psychiatry. 4th ed. Baltimore: Williams and Wilkins, 1985: 1902.

8. Ahrenfeldt RH. Psychiatry in the British Army in the Second World War. London: Routledge and Kegan Paul; 1958. 173.