SUPREME COURT OF QUEENSLAND

CITATION:	*Muckermann v Skilled Group Limited & Anor* [2013] QSC 51
PARTIES:	**Lawrence Muckermann** **(Plaintiff)** **V** **Skilled Group Limited (ACN 005 585 81)** **(First Defendant)** **And** **Vinidex Pty Ltd (ACN 000 664 942)** **(Second Defendant)**
FILE NO:	S446 of 2011
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	6 March 2013
DELIVERED AT:	Mackay
HEARING DATE:	8 November 2012
JUDGE:	North J
ORDER:	**1. Declare that the injury described in question 41 of the Notice of Claim for Damages as a psyche-major depressive disorder was assessed under s 179 of the *Workers' Compensation and Rehabilitation Act 2003.*** **2. The parties to the application are to make (and exchange) submissions in writing concerning costs within 14 days.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – EFFECT OF INACCURACY, DELAY OR FAILURE TO GIVE NOTICE – GENERALLY – where plaintiff sues employer for damages for negligence and breach of contract – where employee suffered psychiatric illness – where notice of claim for damages required by *Workers' Compensation and Rehabilitation Act* 2003 a statement of specific date and time of injury– where pleadings allege subsequent harassment and intimidation by employer – whether subsequent alleged harassment should be considered a separate 'event' within the meaning of the statute — whether

'injury' had been assessed

LEGISLATION: *Workers' Compensation and Rehabilitation Act* 2003
Workers' Compensation and Rehabilitation Regulation 2003

CASES: *Andersen v Aged Care Employers Self Insurance* [2011] QSC 101
Bell v Australia Meat Holdings Pty Ltd [2003] QCA 209
Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364
Bonser v Melnacis [2002] 1 Qd R 1
Francis v Emijay Pty Ltd [2006] 2 Qd R 5
Glenco Manufacturing Pty Ltd v Ferrari [2005] QSC 5; [2005] 2 Qd R 129
Gorry v Australia Meat Holdings Pty Ltd [2008] 1 Qd R 354
Hamling v Australia Meat Holdings Pty Ltd (No 2*)* [2007] 1 QdR 315
Hawthorne v Thiess Contractors Pty Ltd [2001] QCA 223; [2002] 2 Qd R 157
Kennedy Cleaning Services Pty Ltd v Petkoska (2000) 200 CLR 286
Phipps v Australian Leisure and Hospitality Group Ltd [2007] 2 QdR 555
Roberts v Australia and New Zealand Banking Group Ltd [2005] QCA 470; [2006] 1 Qd R 482
Sayers v Hanson t/a Allguard Security Services [2011] QSC 70
Watkin v GRM International Pty Ltd [2006] QCA 382
Watters v WorkCover Queensland [2001] QSC 331
Zickar v MGH Plastic Industries Pty Ltd (1996) 187 CLR 310

COUNSEL: Mr J Greggery for the Applicant/Plaintiff

Mr K Holyoak for the Respondent/First Defendant

SOLICITORS: Connolly Suthers Lawyers for the Applicant/Plaintiff

Bruce Thomas Lawyers for the Respondent/First Defendant

[1] The Plaintiff applies seeking a declaration:[1]

> "That the injury described in question 41 of the notice of claim for damages as a psych-major (sic) depressive disorder was assessed under section 179 of the *Workers' Compensation and Rehabilitation Act* 2003."[2]

[2] In understanding why this declaration is sought it is helpful to retrace some of the procedural steps[3] that have occurred so far. The Plaintiff commenced these proceedings for damages for personal injuries alleged to have been sustained as a result of the negligence of the First and Second Defendant. The Plaintiff alleges he was employed by the First Defendant to work at the Second Defendant's premises as a labourer or process operator and he alleges against both defendants that over a period of time between July 2007 and December 2007 he sustained physical injuries which have caused him pain and suffering

[1] Application filed 25 October 2012.
[2] Hereafter "WCRA". In the reasons below I refer to Reprint 3 which was in force at the time the plaintiff alleges he sustained his psychiatric illness. When I refer to the Workers' Compensation and Rehabilitation Regulation 2003 ("WCRR"). I refer to Reprint 2C which was relevantly in force.
[3] Or "miss steps".

and consequential loss including economic loss. He further pleads that as a consequence of his injuries he was placed on light duties with the First Defendant and that whilst on light duties during a period in 2008 he was subjected to constant and persistent bullying and harassing behaviour. The statement of claim alleges against the first defendant that as a result of that conduct he suffered a personal injury in the nature of a psychiatric injury.[4] The First Defendant has alleged as part of its defence to the statement of claim that "the Plaintiff has not complied with the provisions of the WCRA and is not entitled to commence proceedings against the First Defendant in respect of the alleged psychiatric injury resulting from alleged bullying and harassment".[5]

[3] But for the issue raised by the first defendant one might have concluded that the Plaintiff commenced these proceedings for damages conventionally following apparent compliance with the provisions of Parts 5 and 6 of Chapter 5 of the WCRA. Exhibited to the material before me[6] is a copy of a Notice Claim for Damages on behalf of the Plaintiff pursuant to s 275 of the WCRA. In that Notice the Plaintiff gave details of the event resulting in the injury for which he claimed. In respect of the psychiatric injury the Plaintiff in the Notice claimed[7]:

> "(c) As a consequence of injuries suffered by the Claimant during the period July 2007 to 5 December 2007 and 5 December 2007 to 7 December 2007, the Claimant was placed on light duties. While on light duties during the period from January 2008 to May 2008 the Claimant was subjected to consistent and persistent bullying and harassing behaviour which included:
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> i. Being required to sit alone in the conference room;
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> ii. Aggressively told to return to the conference room if the Claimant left the room;
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> iii. Controlling the air temperature in the conference room from very hot to very cold;
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> iv. Refusing to adjust the temperature in the conference room;
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> v. Regularly requiring the conference door to be opened or after requiring the door to be closed for no reason;
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> vi. Requiring the Claimant to sit in the conference room and not perform any duties;
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> vii. Refusing to permit the Claimant to bring his own reading material;
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> viii. Refusing to permit the Claimant to bring his own writing material;
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> ix. Requiring the Claimant to move to a smaller room than the conference room;
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> x. Not permitting the Claimant to speak to other employees;

[4] See paragraph 8 of the statement of claim filed with the claim on 24 June 2011.
[5] Defence of the First Defendant filed with notice of intention to defend 12 July 2011, para 9(d).
[6] "EJC11" to the affidavit of Esetia Jane Cox filed 25 October 2012.
[7] See "EJC13" to the affidavit Esetia Jane Cox filed 25 October 2012 at p 66.

xi. Requiring the Claimant to perform menial and repetitive tasks;

xii. Required the Claimant to move his chair further and further back from the computer desk until he was against the opposite wall;

xiii. Generally adopting an overbearing and bullying manner towards the Claimant. ("the bullying behaviour")

As a consequence of the bullying behaviour, the Claimant suffered a personal injury to his psyche namely severe major depression."

[4] In answer to the question in the notice asking the Plaintiff to provide full particulars of any negligence alleged against the employer the Plaintiff claimed[8]:-

"(x) failed to discharge it (sic) duty to protect the Claimant from the bullying behaviour;

(xii) failed to ensure mechanisms and procedures to detect, report and correct bullying behaviour were in place;

(xiii) failed to take action to stop the bullying behaviour."

[5] Further I note that in question 41 to the notice where the Plaintiff was asked to provide particulars of all injuries alleged to have been sustained he particularised the injury to his "Psyche" as "Major depressive disorder".[9] WorkCover deemed the notice compliant under s 281 of the WCRA on 3 December 2010.[10]

[6] There is no record of the Plaintiff having made an application for compensation under the WCRA specifying a psychiatric injury. His original application for compensation specified a physical injury, tennis elbow.[11] Subsequent to the acceptance of the claim for compensation in respect of the tennis elbow it came to the attention of officers within WorkCover who were managing the claim that the Plaintiff might be developing or might have sustained a psychiatric condition,[12] and, as will be seen, WorkCover[13] accepted that the plaintiff had suffered a psychiatric illness.

[7] Ultimately a decision was made by WorkCover to refer to a medical assessment tribunal the question of "whether the worker has an ongoing incapacity from the accepted injury, the extent of the incapacity and assessment of nature and degree of permanent impairment".[14] The accepted injury was described as "major agitated depression" in the referral dated 11 May 2009.[15] It is significant that the medical assessment tribunal was not required to inquire into the "events" that may have caused the injury.[16] That is not surprising. The

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8 See "EJC13" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 63.
9 See "EJC13" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 54.
10 See "EJC17" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 85-86.
11 The documentation is a little confusing but it is worthwhile comparing the application for compensation, Exhibit "EJC1" to the affidavit of E J Cox filed 25 October 2012 with Exhibit "BRT2" to the first of the affidavits of Bruce Richard Thomas filed by leave on 8 November 2012.
12 See for example Exhibit "EJC6" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p5 and also Exhibit "BRT5" to the affidavit of Bruce Richard Thomas filed on 8 November 2012 at p40.
13 See the correspondence referred to in para [11] below.
14 This was a reference mentioned in s 500(1)(e) (see s 505) not s 500(1)(c) (compare s 503) because WorkCover accepted the matters referred to in s 258(1)(a) all that was needed was an assessment of the injury, s 258 (1)(b).
15 See Exhibit "EJC8" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 18-22.
16 Consider s 31 WCRA.

tribunal is a specialist medical tribunal. Its function is not to deliberate upon nor make findings upon "events."[17] In any event, as will be seen, the injury having been previously accepted by WorkCover the only question for the tribunal was the extent of the incapacity and assessment of the nature and degree of permanent impairment.[18]

[8] At this juncture it might also be noted that WorkCover was not obliged to accept that the plaintiff had sustained an injury[19] and might have referred to a medical assessment tribunal the question of whether the plaintiff had sustained an injury within s 32 of the WCRA. In the circumstance that the plaintiff had not lodged an application for compensation for psychiatric injury[20] s 500(1)(c) empowered WorkCover to refer the question to the tribunal.[21]

[9] A General Medical Assessment Tribunal – Psychiatric considered the referral and concluded the plaintiff was suffering from a "Major Depressive Disorder in partial remission". It assessed a degree of permanent impairment at five per cent.[22]

[10] The Notice of Assessment did not issue until 21 October 2009. The document dealt with three separate injuries. It described the psychiatric injury as "secondary Major Depressive Disorder" stating the degree of permanent impairment at five per cent in accordance with the assessment of the tribunal and made an offer of lump sum compensation.[23]

[11] The insertion of the word "secondary" in the Notice of Assessment is not explained. It does not appear in the decision of the Medical Assessment Tribunal. It is not found within the description of the injury in the referral to the tribunal. It is not found in the communication by WorkCover to the Plaintiff when WorkCover gave notice in May 2008 that it had accepted his tennis elbow claim and that it had determined to include his injury described as "Major Agitated Depression" as part of his workers' compensation claim as it related to the original work-related injury.[24]

[12] The referral of 11 May 2009[25] was made under Part 10 of Chapter 3 of the WCRA. Chapter 3 of the Act concerns "Compensation" which includes weekly benefits and lump sum compensation for permanent impairment. Part 10 of Chapter 3 concerns "Entitlement to compensation for permanent impairment". By s 178(1) WorkCover was entitled to "ask for an assessment to decide if [the] worker [had] sustained a degree of permanent impairment from injury." To facilitate that s 179 provides:

"**179 Assessment of permanent impairment**

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17 For example, while a medical tribunal may have referred to it the assessment of the worker's injury or impairment under Part 3 of Chapter 11 (see s 500 ff) decisions by an insurer to decline an application for compensation, for example upon grounds that it was not work related, are reviewable by the Authority and appealed thereafter to the relevant court or commission under Chapter 13. In other words disputes about the facts of the "events" are resolved under Chapter 13 of the WCRA ultimately before courts or commissions.

18 See s 178 and s 179 WCRA referred to below and the referral at Part C, Exhibit "EJC8 " to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 19.

19 See para [7] above.

20 See s 237(1)(d) WCRA.

21 See s 258(1)(a)(ii) and s 503 WCRA.

22 See Medical Assessment Tribunal decision dated 13 July 2009 Exhbit "EJC9" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 27.

23 See Exhibit "EJC11" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p 43.

24 See Exhibit "BRT8" to the first affidavit of Bruce Richard Thomas filed by leave on 8 November 2012 at p 157.

25 See para [7] above.

(1) An insurer may decide, or a worker may ask the insurer, to have the worker's injury assessed to decide if the worker's injury has resulted in a degree of permanent impairment.

(2) The insurer must have the degree of permanent impairment assessed—

(a) for industrial deafness—by an audiologist; or

(b) for a psychiatric or psychological injury—by a medical assessment tribunal; or

(c) for another injury—by a doctor.

(3) The degree of permanent impairment must be assessed in the way prescribed under a regulation and a report must be given to the insurer stating—

(a) the matters taken into account, and the weight given to the matters, in deciding the degree of permanent impairment; and

(b) any other information prescribed under a regulation."

Because the injury was psychiatric the assessment had to be made by a medical assessment tribunal (s 179(2)(b)).[26]

[13] Once the medical assessment tribunal made its assessment s 185 obliged WorkCover to give the plaintiff a notice of assessment[27] in the approved form and s 185(3) required (relevantly):

"**185 Insurer to give notice of assessment of permanent Impairment**

(3) The notice must state—

(a) whether the worker has sustained permanent impairment from the injury; and

(b) if the worker has sustained permanent impairment—

(i) the degree of permanent impairment attributable to the injury; and

(ii) the WRI calculated for the injury; and

[26] The referral, para [7] above, plainly was one contemplated by s 505 of the WCRA.

[27] See para [9] above.

(iii) the amount of lump sum compensation under section 180 to which the worker is entitled for the injury; and

…"

While s 185 does not expressly state how WorkCover (or an insurer) might describe the injury assessed by the tribunal it might be noted that it does not expressly authorise WorkCover (or the insurer) to describe the injury differently from the description used by the tribunal especially if it be a consequence that the different description might have ramifications for a worker different from those than might have been the case were the tribunal's description to have been followed.[28]

[14] At the heart of the dispute joined on the pleadings but not particularised or stated with precision in the defence of the first defendant is the circumstance that the plaintiff's injury has been variously described. WorkCover when it accepted the injury described it as "major agitated depression" and referred that to the tribunal. The tribunal described that as a "major depressive disorder in partial remission". In the notice of assessment issued by WorkCover it was described as "secondary major depressive disorder". The notice of claim[29] described the injury to the "psyche" as "major depressive disorder".

[15] In *Bell v Australia Meat Holdings Pty Ltd*[30] Davies JA said of a similar situation that arose under the materially indistinguishable predecessor of the WCRA:[31]

> "The learned primary judge in making the declaration, answered the question to which I have just referred, by concluding that the injury the subject of the notice of claim was a quite different injury from that referred to in the notice of assessment. However, his Honour concluded also, contrary to the appellant's contentions, that the notice of claim complied with s 280 notwithstanding that.
>
> Perhaps somewhat surprisingly his Honour reached his conclusion that the injuries specified in each of the notices were different injuries notwithstanding that the respondent persistently asserted, and still asserts, that the injury the subject of his notice of claim and the injury the subject of the notice of assessment is the same injury. These assertions were made in the respondent's solicitor's letters of 3 September 2002, 23 September 2002 and 17 October 2002 and the respondent seeks to advance this contention in his notice of contention in respect of which he sought and has been granted, an extension of time.
>
> The term "injury" is defined in s 34 of the Act as a "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury". It is plain that in that subsection "personal injury" is used in its ordinary meaning of damage to the body.

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[28] See further para [22] below and the observations by Holmes J in *Watters v WorkCover Queensland* [2001] QSC 331. It is also relevant to keep in mind the judgment of Cullinane J in *Gorry v Australia Meat Holdings Pty Ltd* [2008] 1 Qd R 354 at [30] ff.

[29] Deemed compliant by WorkCover, see para [5] above.

[30] [2003] QCA 209.

[31] [2003] QCA at p 3-6.

In s 34(2) there is an immaterial exception to the requirement in that definition that the employment be a significant contributing factor to the injury. And then in s 34(3) injury is said to include, amongst other things, an aggravation of a personal injury or of a disease.

Notwithstanding his Honour's conclusion to the contrary I do not think that there is any reason to reject the respondent's consistent contention that the injury described by him in his notice of claim is the same injury as that which had been assessed and notified in the notice of assessment. It is, in each case, the personal injury which the respondent suffered to his lower spine at the date and time to which I have referred.

It is not suggested by the appellant that the respondent suffered more than one injury and, of course, the respondent has contended to the contrary. Moreover the descriptions "aggravation of pre-existing degenerative disease of the lumbosacral spine" in the notice of assessment and "multi level disk injuries" in the "lower back" in the notice of claim are not by any means necessarily inconsistent. They both describe injuries to the lower spine which, possibly on both views, aggravated a pre-existing degenerative condition.

The descriptions of injury in the notices differ in two respects. The first is that the description in the notice of assessment is more specific than that in the notice of claim. However, the very generality of the second description should not prevent a conclusion, accepted and even advanced by its author, that it is of the same injury as that described in the earlier notice of assessment.

The second difference between the two descriptions is in their assessment of the seriousness of the injury and of its consequences including its permanent consequences. It seems unlikely that the respondent would accept that it caused only mild aggravation of pre-existing degenerative disease and it is plain that he asserts, contrary to the appellant's assessment, that it has caused a permanent disability of 10 per cent. He may also contend that to describe it merely as an aggravation of a pre-existing degenerative disease is to understate its seriousness.

However these differences cannot, in my opinion, justify the conclusion that the respective descriptions are of different injuries. Rather they are descriptions of the same injury in different ways; and it is unsurprising, I think, that the respondent describes it in an apparently more serious way than the appellant.

Once it is seen, as I think it is, that the injury referred to in the two notices are the same injury, the question in issue between the parties in my opinion resolves. That is because, if the injuries are the same, the notice of claim is, as his Honour held, a notice of claim in compliance with s 280 of the Act. The only basis upon which the Appellant has contended that the notice of claim did not comply with s 280 depended on the conclusion that the injury to which it referred was an injury different from that which has been assessed."

(Emphasis added)

I have formed the same view in this case. The descriptions of the injury to the plaintiff's *psyche* are descriptions of the same injury with the consequence that the declaration sought by the plaintiff might be granted. But the submission made by counsel for the first defendant was more subtle than the foregoing might suggest and out of respect it should be addressed.

[16] In his written outline of submissions counsel for the first defendant identified the "issue" as that pleaded in the defence of the first defendant.[32] He then elaborated:

> "2. The issue arises through a combination of section 237(1)(a)(i), section 258 and section 295 of the *Workers Compensation and Rehabilitation Act 2003*, as it stood from June 2007 to May 2008 ("WCRA")
>
> 3. The Plaintiff's entitlement to seek damages is tied to "the injury" to which the notice of assessment relates."
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> (Footnotes omitted)

[17] Assuming the assertion in the second of the paragraphs the elaboration in the first is directed to the well established proposition that the only workers who are entitled to seek damages from an employer are those described in s 237(1) of the WCRA.[33]

[18] At this point it might be noted that the only respect in which it was asserted the plaintiff had not complied with s 295 was in respect of s 295(a) which directs attention to the entitlement conditions of s 237. In this particular the issue was whether the plaintiff had received "a notice of assessment from [WorkCover] for the injury".[34]

[19] The object of the first defendant's plea was the contention that if the plaintiff did not have a notice of assessment for the *psyche* injury pleaded by the plaintiff then the first defendant had a defence for that injury and the plaintiff could not seek or recover damages for it.

[20] In his outline counsel developed his submission:

> "5. Paragraph 8 of the Statement of Claim of the Plaintiff pleads that during the period of January 2008 to May 2008, whilst on light duties, the Plaintiff was "subjected to consistent and persistent bullying and harassing behaviour". No particular of the negligence or breach of contract squarely addresses this allegation in paragraph 10 of the Statement of Claim. It was particularised in response to a Request for Further and Better particulars dated 3 August 2011. It is also particularised in a letter of 1 September 2011 from the Plaintiff's former solicitors to the First Defendant's solicitors.
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> 6. The Notice of Claim for damages describes a "psyche" injury for which a Notice of Assessment had been received of a "major depressive disorder" with a permanent impairment of 5%. In answer to paragraph 52, mention is

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[32] Refer para [2] above.

[33] *Hawthorne v Thiess Contractors Pty Ltd* [2001] QCA 223 at [6], [16] and [37] - [39]; [2002] 2 Qd R 157 at 159, 162 and 166-167; *Glenco Manufacturing Pty Ltd v Ferrari* [2005] QSC 5 at [3], [6]; [2005] 2 Qd R 129 at 130-131; *Roberts v Australia and New Zealand Banking Group Ltd* [2005] QCA 470 at [19]; [2006] 1 Qd R 482 at 489; *Watkin v GRM International Pty Ltd* [2006] QCA 382 at [15] and [19]-[23]; [2007] 1 Qd R 389 at 393-394.

[34] See s 237(1)(a)(i) and in the context of s 237(1)(d) see s 258(1)(b).

made of "bullying behaviour". The "bullying behaviour" is described and defined in answer to question 38.

7. Thus it is clear that the Plaintiff seeks to allege that "injury" resulting from the "bullying behaviour" described in the NOC and now in the pleadings, is that which has been the subject of assessment in the Notice of Assessment. The relevant Notice of Assessment is that of the Medical Assessment Tribunal ("MAT") dated 21 October 2009. The date of the range of injury is 5 December 2007 to 7 December 2007 and the injury is described as "secondary major depressive disorder" with a permanent impairment attributable to the injury of 5% which also comprises the WRI for the psychiatric

8. To understand what was assessed, the reference to the MAT, and the material which the MAT had before it, which generated the Notice of Assessment, has to be considered. This is exhibited to the Affidavit of Thomas. Also the reasons given by the MAT. This is also exhibited to the Affidavit of Thomas. At page 2 exhibit "BRT10", the information which "has been taken into consideration during the decision making process" by the MAT is listed.

9. Importantly the initial assessment reviewed by Doctor Beryl Buckley dated 3 April 2008 is not listed as one of those documents and it was not before the MAT.

10. When the documents before the MAT, upon which it made its decision and from which the NOA was issued, are considered, there is no, or no sufficient, reference to what is now pleaded as the "bullying behaviour" or have been listed in the NOC as the "bullying behaviour" to describe the "injury".

11. It is submitted that the conclusion can be safely drawn that the "injury" now sought to be pursued is a different injury from that which was assessed."

(Footnotes omitted)

After referring to some of the medical records and opinions that were available to WorkCover and the tribunal counsel submitted:

"13. It is, with respect, clear that the assessment of a "secondary" psychiatric injury in the NOC was an assessment of an injury which was primarily provoked by ongoing pain from the epicondylitis and the Plaintiff's demoralisation regarding his slow recovery in the context of him being unsuited for the work duties he was given as light duties and his "sense" or "feeling" of lack of support or marginalisation which generated a psychiatric injury. It does not describe an "injury" caused by separate and distinct events comprising "bullying behaviour".

14. There was not anything before, or sufficiently before, the MAT for it to have assessed, and it did not assess, a psychiatric injury caused by "bullying behaviour".

15. The view that WorkCover Queensland has not accepted or assessed a claim for psychiatric injury caused by bullying and harassment by the first Defendant's employees is supported by the fact that:

(a) Claims for "primary" psychiatric injuries are treated differentially by the *Workers Compensation and Rehabilitation Act* in comparison to other injuries – see the provisions of s.32(5).

(b) A Decision in respect of such an injury requires consideration of:

(i) whether the injury resulted from "management action" – clearly in this case the Plaintiff's **current** allegation is that it did result from management action.

(ii) Whether such management action was "reasonable management action" that was "taken in a reasonable way".

(c) A review of the WorkCover Queensland file demonstrates that:

(i) The Plaintiff did not put material before WorkCover Queensland indicating the need to consider an application for compensation for an injury caused by management action of the First Defendant

(ii) WorkCover Queensland has not investigated such issues.

(iii) WorkCover Queensland has not issued any decision considering such factors.

(d) It is submitted that it is clear that no decision to accept an injury under s.32(5) of the Act has been made by WorkCover Queensland in respect of the injury now alleged in the Statement of Claim."

[21] Two observations might be made. The attribution of the term "secondary" major depressive disorder to the medical assessment tribunal by counsel for the first defendant is not accurate. The addition of the word "secondary" was made by an unknown WorkCover officer in circumstances that have not been explained.[35] The tribunal assessed a "major depressive disorder in partial remission". The notice of assessment was prepared by WorkCover, under s 185 of the WCRA which obliges the insurer, not the tribunal, to prepare and give the notice.[36]

[22] In this context it is worth recalling the observations of Holmes J in *Watters v WorkCover Queensland*[37]. Her Honour said:

> "There is a good deal of authority to the effect that the injuries which may be the subject of a notice of claim are limited to those which have been assessed…"

and further in this context:[38]

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[35] See paras [10] and [11] above.
[36] See para [13] above.
[37] [2001] QSC 331 at [13].

> "it is the medical practitioner's assessment which is relevant under s 197, not the view of a WorkCover officer who formally gives the result of an assessment."

[23] The second matter is that while much of the medical opinion evidence before the tribunal may have suggested that the plaintiff's *psyche* injury may have been attributed by doctors to the pain and suffering of the unresolved physical injury (hence "secondary") the medical evidence did record indications that the plaintiff may have complained that conduct at work contributed to his unhappiness.[39]

[24] The assumption by the unknown WorkCover officer who authored the notice of assessment that the plaintiff's *psyche* illness was "secondary" to the pain and suffering and the decision to author the notice in terms differing from the assessment recorded by the medical assessment tribunal is the first cause of the confusion that has resulted in the application before me. Further the assumption in the submissions made on behalf of the first defendant that the medical assessment tribunal must have concluded or acted upon the assumption that the plaintiff's *psyche* injury was "secondary" to the pain and suffering from the physical injury and not attributable or partially attributable to some other cause goes too far. I have already noted that some of the medical evidence before the tribunal suggests other factors may have been causative. The tribunal had power to examine and question the plaintiff.[40] It was not necessarily limited to the opinions or information of a hearsay nature contained in the reports of others. While the tribunal's statement preliminary to its "decision" makes reference to "work-related aspects"[41] the reference to the tribunal only required of it an assessment of the extent of the incapacity and the nature and degree of permanent impairment.[42] The question of whether an injury had been sustained would have required a different referral[43]. Strictly speaking the question of causation, what matters or "events" contributed to the suffering of the psychiatric illness, or even if the asserted illness was work related was not referred to the tribunal and as it transpired the tribunal's "decision" was limited to the matters referred to it.[44]

[25] The object of the WCRA of maintaining a balance between providing fair and appropriate benefits to injured workers and ensuring reasonable cost levels for employers has frequently been noted by the courts in this State.[45] So has the object of providing protection to employers' interests in relation to claims for damages.[46] The object of ensuring that injured workers are treated fairly by insurers should not be forgotten.[47]

[26] When one is confronted with the complications that Chapter 5 may give rise to it is necessary to keep firmly in mind some basic propositions. The WCRA imposes a legal liability upon an employer for compensation for injury sustained by an employed worker.[48]

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[38] [2001] QSC 331 at [17].
[39] See the reports referred to in paras 12(d) and (e) of the outline of counsel for the first defendant. In particular the report of Dr P.J. Brassey of 11 November 2008 (at p.1) and also the report of Dr Greig Richardson of 2 May 2008 (at p.6).
[40] Section 510 of the WCRA.
[41] See Exhibit "EJC9" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p.26.
[42] Recall paras [7] and [8] above.
[43] Recall para [8] above.
[44] See Exhibit "EJC9" to the affidavit of Esetia Jane Cox filed 25 October 2012 at p.27.
[45] See s 5(4)(a) of WCRA.
[46] Section 5(4)(c)of WCRA.
[47] Section 5(4)(b) of WCRA.
[48] Section 46(1) WCRA.

But "compensation" is a defined term[49] being the benefits payable under Chapters 3 and 4. Section 46(2) WCRA makes it clear that the WCRA does not impose any legal liability for damages though Chapter 5 "regulates" access to damages. The legal liability of an employer for damages (if any) for which an employer is obliged to insure[50] under a policy to the extent of "accident insurance"[51] is a legal liability that may arise "independently of the Act",[52] for example breach of an implied term of the contract of employment, a breach of the duty of care of an employer owes an employee or a breach of statutory duty (if any) relating to safety. Consequently while the provisions of Chapter 5 WCRA may be "substantive"[53] their purpose is to "regulate" access consistent with the objects of the Act.[54] Those objects include those of Part 5 of Chapter 5 which is to "facilitate the just and expeditious resolution of the real issues in a claim for damages".[55] The liability for damages is established at trial. It is trite to say[56] that a judgment for damages for personal injury in this context requires proof of a breach of the duty of care,[57] causation of damage (injury) as a consequence of that breach and an assessment of the nature and extent of the damage so far as that can be done in monetary terms. This can be contrasted with the liability for compensation imposed by the WCRA which is imposed when a worker sustains an injury.[58] Consequently if a worker has sustained a "personal injury arising out of or in the course of employment"[59] then providing the employment is a "significant contributing factor"[60] compensation benefits will be payable. Plainly the issue of injury as defined (which is at the forefront of any application for compensation and its assessment, whether by a doctor[61] or at a tribunal,[62]) is relevant to the determination of the entitlement to compensation benefits. The assessment of permanent impairment that s 179 concerns establishes whether a worker is entitled to a payment of a lump sum as compensation for permanent impairment.[63] The notice of assessment that s 185 obliges the insurer to give is a document that evidences the degree of permanent impairment in accordance with the WCRA and the WCRR and identifies the lump sum payment (if any) the worker is entitled to. But the notice of assessment has a second function as a part of the regulation of access to damages, (mention has been made of s 237(1)(a)(i), s 237(1)(d) and s 258(1)(b)). It is noteworthy that these sections refer to assessment of the injury, the term defined by s 32, but in this case because WorkCover had satisfied itself that the plaintiff had sustained an injury (see s 258(1)(a)(ii)) the issue for the purpose of the "gateway" that Chapter 5 "regulates" was the assessment of permanent impairment. Thus far these general observations have focussed on an "injury". The concept of "event" defined by s 31 finds its explicit work in the context of

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[49] Section 9 WCRA and is quite distinct from "damages"; *Francis v Emijay Pty Ltd* [2006] 2 QdR 5, [27] – [28] at 14.

[50] Section 48(1)(b) WCRA.

[51] Section 8 WCRA.

[52] Section 10 WCRA.

[53] Section 235(2) WCRA.

[54] It is not necessary for me to discuss the cases. Consider *Bonser v Melnacis* [2002] 1 QdR 1 at [41] noting the inclusion of "effectively" in light of *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 and the application of the reasoning of the High Court in *Hamling v Australia Meat Holdings Pty Ltd* (No 2*)* [2007] 1 QdR 315 and *Phipps v Australian Leisure and Hospitality Group Ltd* [2007] 2 QdR 555.

[55] See s 273 WCRA noting that the notice of claim for damages (s 275) and the insurer's response (s 278) are found within that part.

[56] But the circumstance of this dispute concerning the WCRA shows it should not be forgotten.

[57] Not overlooking the other causes of action I mentioned.

[58] See s 108 WCRA.

[59] In which context cases such as *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286 and *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 are instructive.

[60] See s 32(1) WCRA.

[61] See for example s 135 WCRA.

[62] See s 500 in Part 3 of Chapter 11 WCRA

[63] See Part 10 of Chapter 3 WCRA.

this matter not as a part of any assessment of injury or impairment but in the context of the plaintiff seeking damages.[64] Section 111 WCRR expressly refers to the "event". It requires that the notice of claim for damages which an injured worker must prepare and sign as part of the pre court procedures mandated by Part 5 of Chapter 5[65] contain an elaboration of the facts and matters relating to the "event".[66] It is not surprising that the issue of "event" arises in the context of the claim for damages. The identification and consideration of an "event" is important in the consideration of matters such as whether a breach of the duty of care has occurred and also of causation of loss and damage. In other words, in the context of the WCRA the issue of "event" has significance in the context of the pre-court procedures and the requirement of Parts 5 and 6 of Chapter 5 of the Act that the parties attempt to settle claims for damages. I have not overlooked that an application for compensation requires of an injured worker information demonstrating that the injury arose out of or in the course of employment and that in the consideration of a claim for damages the nature and extent of personal injury will be relevant. So that while for both "compensation" claims and "damages" claims issues concerning both injury and event may have to be considered in general terms injury is the focus of a compensation claim and event has a much greater significance in the damages claim than it does in a compensation claim.

[27] The first occasion that the plaintiff was required by WorkCover to give it any detail of the "event" that precipitated his *psyche* "injury" was in the notice of claim. The plaintiff was required in that notice to give full particulars of the "event" including the date, time and place of the "event" and a description of the facts of the circumstances surrounding the "event".[67] The plaintiff's notice was deemed compliant by WorkCover. The consequence is that by the time WorkCover (and the employer should it have concerned itself) attended the compulsory conference to attempt to settle the claim for damages[68] the *psyche* injury had been assessed by the tribunal and a notice of assessment had issued. Further the plaintiff had by his notice of claim fully detailed how he asserted his *psyche* injury was caused and WorkCover (and the employer) had an opportunity to investigate the plaintiff's allegations.[69] The power to refer the question of the plaintiff's "injury" to a tribunal[70] should not be forgotten and it might also be noted that WorkCover had power to request the plaintiff to submit to a medical examination before the conference.[71] When the foregoing[72] is considered in light of the fact that the case pleaded by the plaintiff in his statement of claim is consistent with that detailed in the notice of claim the position adopted by the first defendant is very unattractive.

[28] In argument counsel for the first defendant relied upon *Sayers v Hanson t/a Allguard Security Services*[73] which came before the court on an application by the defendant to strike out some paragraphs of the plaintiff's statement of claim. In his reasons the Chief Justice summarised the facts[74]:

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[64] Recall Chapter 5 Part 2 Division 1, s 237 WCRA.
[65] See s 275 WCRA.
[66] Recall para [3] above.
[67] See s 111(1)(b) of the WCRR.
[68] See s 289 WCRA.
[69] See s 278(2), s 281(2) and s 389(3) WCRA.
[70] Recall para [8].
[71] See s 282 WCRA.
[72] Recalling [19] above.
[73] [2011] QSC 70.
[74] [2011] QSC 70 at [2] – [3].

"[2] The plaintiff sues for damages for negligence and breach of contract in respect of personal injuries and consequent loss sustained in the course of his employment by the defendant. Employed as a security guard, he discovered a body which had fallen from a high-rise building, and suffered a consequent psychiatric illness (para 4). In paras 5-7 of the pleading, he alleges that not having returned to work, he was subjected to harassment and intimidation by the defendant about when he would be returning to work. In para 8, the plaintiff attributes his psychiatric illness to both the discovery of the body (para 4), and the subsequent harassment and intimidation (paras 5-7). If paras 5, 6 and 7 are struck out, there will need to be minor amendment to para 8.

[3] On 10 October 2007 the plaintiff lodged with WorkCover Queensland an application for compensation under the *Workers' Compensation and Rehabilitation Act* 2003. In that application he nominated 7 October 2007 at 2.55 am as the time his injury happened. Asked if the injury happened "over a period of time", he answered "no". Asked "how your injury happened", he said: "while on duty find (sic) body that fell off 27th floor I was traumatised." He received a notice of assessment dated 27 October 2009, specifying 7 October 2007 as the "date of injury". The plaintiff served a notice of claim for damages under s 275 of the Act on 3 December 2009. In that notice he again nominated 7 October 2007 at 2.55 am as the time of the "event", and described the "details of the event resulting in the injury", referring to discovery of the fallen body, but not to the subsequent alleged harassment."

[29] It is plain that the facts in *Sayers* are distinguishable from those before me. In *Sayers* the plaintiff consistently detailed the circumstances he said caused his psychiatric illness. In both his application for compensation and his notice of claim for damages he referred to "finding a body" making no mention of the subsequently pleaded claim of "harassment and intimidation". It is unsurprising that in the circumstances the Chief Justice said:[75]

"[6] Under s 237(1)(a)(i), the plaintiff's entitlement to seek damages depends on his having received a notice of assessment for "the injury". The plaintiff received a notice of assessment for an injury specified, in that notice, as having occurred at 2.55 am on 7 October 2007. Now obviously that was the designation of the "event" (s 31(1)) which resulted in the injury, being the psychiatric illness. The challenged paragraphs of the amended statement of claim, alleging subsequent harassment, should be taken as alleging a further event or events which allegedly led to exacerbation of the originally sustained condition. The notice of assessment should be read as relating to the injury resulting from the event on 7 October 2007, not an injury resulting from the subsequent alleged harassment, while accepting that the injury suffered as a result of the event on 7 October 2007 persisted and perhaps developed over time after that date.

[7] The plaintiff's entitlement to seek damages is tied to "the injury" to which the notice of assessment relates (s 258(1)(b)). The precedent notice of claim for damages under s 275 must include particulars of the date and time of the

[75] [2011] QSC 70 at [6] – [8].

relevant "event" and the circumstances surrounding that event (s 111(1)(b)(i) and (ii) *Workers' Compensation and Rehabilitation Regulation* 2003). Unless a complying notice has previously been given, a claimant may not start a proceeding in the court (s 295). As mentioned, in his notice of claim for damages, the plaintiff (then claimant) referred only to the event which occurred on 7 October 2007, referring to the discovery of the fallen body, and not to the subsequent alleged harassment.

[8] The combination of s 237(1)(a)(i), s 258(1)(b) and s 295 operates in the circumstances of this case to limit the plaintiff's allowable claim for damages in court to any injury suffered consequent upon the discovery of the body on 7 October 2007, excluding any consequences of any subsequent alleged harassment, which would amount to a separate and distinct "event" or events."

In his reasons at [8] the Chief Justice expressly referred to s 295 in the context of the description of the "event" s 111 of WCRR requires in a notice of claim.[76] I do not consider that *Sayers* binds me to find for the first defendant in the circumstances before me.

[30] In *Andersen v Aged Care Employers Self Insurance*[77] Dalton J said of the WCRA in the context of the facts before her[78]:

"[22] Unless a worker can bring themselves within the provisions of s 237 of the *WCRA*, they cannot claim damages. Here ACES says, because its notice of assessment states the date of Ms Andersen's injury was 23 August 2007, only in relation to an injury of that date has she been assessed. In respect of an injury occurring on that date only, is she within s 237(1)(a)(i) and may make a claim for damages. Further, it says Ms Andersen claims in relation to two injuries. I reject these contentions of ACES. They rest on a confusion between the concepts of injury and event as 9 defined by the *WCRA;* they also mistake the role of an insurer which issues a notice of assessment.

[23] The *WCRA* defines "event" as, "anything that results in injury" – s 31(1); "injury" as, "personal injury arising out of, or in the course of, employment" – s 32(1), and "impairment" as, "loss of efficient use of any part of a worker's body" – s 37. An injury is not the means by which damage is inflicted, but is the effect on the person of the worker of an event, as can be readily seen when the schedules to the *WCR Regulation* are perused. In common parlance one might speak of being injured by lifting a heavy load. But in terms of the *WCRA* definitions, lifting the heavy load is the event, the injury is what results from that, say a back strain.

[24] Ms Andersen's application for compensation was for one injury within the meaning of the *WCRA.* That injury was described by her as "L5/S1 prolapsed disc" and ACES accepted it as a "strain of lower back with

[76] See para [27] above and fn 66. In breach of s 295(b) the plaintiff sought in his action to prosecute a claim for damages upon a factual basis inconsistent with the facts he notified.
[77] [2011] QSC 101.
[78] [2011] QSC 101 at [22] – [24].

aggravation of pre-existing degeneration of the lumbosacral disc", in accordance with the description of its doctor, Dr McPhee. Ms Andersen's statement of 11 September 2007 was manifestly about one injury, as defined, see the underlined parts extracted above. It described one set of symptoms: pain in her lower back and down her right leg, first temporarily, and then more permanently. It described her attendance on her doctor for that injury when the pain from it persisted, and the doctor's diagnosis of it. The statement says that Ms Andersen did not know what had caused her injury, but suggested two events within the meaning of the *WCRA* – on 22 and 23 August 2007 – as possibilities. Dr Martin thought the earlier event the likely cause; Dr McPhee, the later. The point is, both of them assessed one injury, and this is evident from the underlined parts of their reports, above.

[31] Speaking of the role to be performed by the insurer in issuing a notice of assessment following an assessment by a doctor under s 179(2)(c) her Honour said:[79]

> "[28] Under s 179(1) of the *WCRA*, it was the injury complained of by Ms Andersen which was to be assessed by ACES to decide if it had resulted in permanent impairment. Under s 179(2) a doctor (here, Dr Martin) was to assess the degree of any permanent impairment. Once it had received an assessment from the doctor, ACES was to issue a notice of assessment which was to state, *inter alia*, whether, and to what degree, Ms Andersen had sustained a permanent impairment by reason of her back injury – s 185(1) and (3) of the *WCRA*. Under these provisions of the *WCRA*, ACES' task in issuing a notice of assessment was to assess injury and impairment, not to make findings about what events caused the injury or the date those events might have occurred.1 ACES was not entitled to allocate a date as the date of the event causing injury when the claimant did not assert it;2 the factual material before it did not justify it,3 and where that date contradicted the view of the doctor (Dr Martin) who had assessed the degree of permanent impairment on its behalf."

The same can be said in the context of an assessment by a medical tribunal under s 179(2)(b).

[32] The circumstances in this case are unusual. The plaintiff did not make an application for compensation in respect of his *psyche* injury. WorkCover accepted the injury without asking of the plaintiff for any information about the cause of the injury. It deemed a notice of claim compliant which described the "event". The injury assessed is plainly the same injury referred to in the notice of assessment, the notice of claim and the statement of claim. WorkCover and the plaintiff may have been at cross purposes about the plaintiff's attribution of the cause of his *psyche* injury but that was, on the view I take, of WorkCover's making. Further in the context of litigation about a claim for damages for personal injury where the cause of and the nature or extent of the suffering of a psychiatric illness is an issue the ultimate findings by a trial judge will depend upon facts found about events and opinions accepted. Accounts sworn to by an ill plaintiff (as may have been variously told to others over a number of years), things observed or experienced by witnesses and the opinion of doctors all have to be evaluated. Depending upon particular

[79] *Andersen v Aged Care Employers Self Insurance* [2011] QSC 101 at [28].

circumstances a plaintiff's illness may be in remission or may be acute at the time of trial, the symptoms may have waxed and waned over the years before trial and with that the ill plaintiff may have given varying accounts. The question of "event" as defined by WCRA in this context is usually more subtle and illusive than in the context of a physical injury. To set up as a defence against the plaintiff's claim that the psychiatric injury was caused by alleged bullying and harassing behaviour the possibility that a notice of assessment (authored by an employee of WorkCover in the circumstances I have described) ambiguously suggests another cause finds no support within the WCRA. So to do in the unusual circumstances applying here offends against the objects of the Act.[80]

[33] If a declaration is made the first defendant is not deprived of any defence upon the merits. It may be that the plaintiff has made inconsistent contradictory statements attributing different causes to his *psyche* illness. To adopt the term of the WCRA he may have spoken inconsistently about "events"[81]. If so the defendant may have significant grounds to contest causation and perhaps breach at any trial. In the context of a future trial the first defendant did not make any submission that the plaintiff's conduct prejudiced it at any trial upon the merits nor that it would suffer prejudice in its defence upon the merits if I were to make the declaration sought.

[34] In argument before me counsel for the defendant raised a preliminary issue as to whether it is appropriate to entertain an application for declaratory relief at an interlocutory hearing.[82] No submission was made in argument that there was a need for a trial in any material aspect of any facts. In the circumstances of the application I sought from and obtained an undertaking from the plaintiff through his counsel that the plaintiff would not seek to amend his statement of claim to allege any other cause for his psychiatric illness.[83] In the premises of the undertaking and in the absence of the suggestion that there was a need for the trial of any facts the application is not premature and has a utility, indeed if I had been persuaded by the submissions made on behalf of the first defendant then it might have been open to the first defendant to apply to strike out parts of the statement of claim consistent with the approach taken by the Chief Justice in *Sayers v Hanson t/a Allguard Security Services.*[84] In the circumstances I am persuaded that the plaintiff is entitled to the declaration he has sought.

[35] I therefore propose to make a declaration sought by the plaintiff, and in the absence of any indication that costs should not follow the event to order that the first defendant pay the costs of and incidental to the application.

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[80] Recall s 5(4)(d) and s 273 WCRA.

[81] Or it may be that doctors have inconsistently interpreted his accounts.

[82] In this respect I have not overlooked the discussion by members of the Court of Appeal in the context of a dispute under the legislative predecessor of the WCRA in *Wilkinson v Stevensam Pty Ltd & Ors* [2006] QCA 88.

[83] For example he has elected in this action not to allege that his *psyche* illness was "secondary" to (that is caused by) the pain and suffering of his physical injury. This achieves a measure of justice. It confines the plaintiff to the case he set up in his notice of claim. It protects the first defendant from vexation and the second defendant who was not a party to this application.

[84] [2011] QSC 70 at [1], [5] and [14].