

## STIGMATISATION AND THE SOCIAL CONSTRUCTION OF BULLYING IN AUSTRALIAN ADMINISTRATIVE LAW: YOU CAN'T MAKE AN OMELETTE WITHOUT CRACKING AN EGG

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### I INTRODUCTION

In the same way that medicine, science, the media and many other social institutions shape how individuals experience and interpret everyday life in contemporary western societies, the criminal justice system broadly – and its laws and experts specifically – presents a unique social environment, imbued with normative processes and procedures that sociologically reflect broader systemic mores, beliefs and assumptions. In Australia, the social interactions occurring within courtrooms and administrative tribunals are bound, guided and ultimately determined by the legislation used to resolve disputes arising from workplace injuries. In New South Wales ('NSW'), one type of workplace dispute with growing demand for legal intervention is workplace bullying. Legal intervention may include a claim lodged with the Fair Work Commission under the *Fair Work Act 2009* (Cth) ('*FW Act*'), where compensation is not accessible, or a potentially costly common law negligence action.<sup>1</sup> Worth and Squelch note the apparent failure of the *FW Act* to address workplace bullying, discouraging employees from making bullying claims.<sup>2</sup> The unfortunate result is that bullied workers in Australia may locate the only option for effective legal redress in workers' compensation systems, which carry their own potential stigma in addition to the stigma associated with bullying. Despite an apparent increase in bullying-related injury claims, and due to the under-reporting of bullying incidents, it is difficult to measure the extent of workplace bullying. What can be measured is the growth and significance of workplace psychological injury, although comparable statistics are unavailable before 2004. The Australian

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1 Nadia Stojanova, 'The Regulation of Workplace Bullying in Victoria: Is Legislation Required?' (2014) 24 *Labour and Industry* 146, 147.

2 Rodney Worth and Joan Squelch, 'Stop the Bullying: The Anti-Bullying Provisions in the *Fair Work Act* and Restoring the Employment Relationship' (2015) 38 *University of New South Wales Law Journal* 1015, 1044.

Safety and Compensation Council's 2004–05 workers' compensation statistics indicate that 5.9 per cent of all new claims resulted from an injury to 'psychological systems'.<sup>3</sup> In 2012–13, Safe Work Australia provided a more thorough definition, categorising 'mental disorders' as diseases and identifying them as the cause of 5.9 per cent of all 'serious claims' for workplace injuries,<sup>4</sup> where 'serious' is defined as absence from work for one week or more.<sup>5</sup>

Despite its growth, workplace bullying suffers from definitional ambiguity.<sup>6</sup> For instance, definitions of bullying tend to include highly subjective and vague terminology, citing 'offensive or negative' behaviour;<sup>7</sup> 'repetitive, systematic behaviour' and 'unwelcome and unreasonable behaviour';<sup>8</sup> 'repeated behaviour that a reasonable person would consider offensive';<sup>9</sup> or 'inappropriate interpersonal behaviours that workers are subjected to by virtue of their employment'<sup>10</sup> where employees feel powerlessness to prevent or terminate undesirable behaviour.<sup>11</sup> The fact that bullying may consist of more than one incident over a period of time, such as six months,<sup>12</sup> or may stem from a single event,<sup>13</sup> highlights the ongoing relativity of each definitional component. This relativity is replicated in psychological research – '[b]ullying is a complex, dynamic social behavior that involves intent to harm, repetition, and power imbalance'.<sup>14</sup>

The potential for definitional ambiguity to result in postmodern relativism has not gone unnoticed, even if it is not sociologically labelled as such in academic literature. Indeed, as early as 1990, ambiguous labelling of behaviours

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- 3 Australian Safety and Compensation Council, *Compendium of Workers' Compensation Statistics Australia 2004–05* (Report, May 2007) 18.
  - 4 Safe Work Australia, *Australian Workers' Compensation Statistics, 2012–13* (Report, December 2014) 16.
  - 5 Ibid 3.
  - 6 Joan Squelch and Robert Guthrie, 'Workplace Health and Safety: Managing the Risk of Workplace Bullying' (2012) 14 *Legal Issues in Business* 9, 10–11.
  - 7 Reiner Rugulies et al, 'Bullying at Work and Onset of a Major Depressive Episode among Danish Female Eldercare Workers' (2012) 38 *Scandinavian Journal of Work, Environment & Health* 218, 220.
  - 8 Squelch and Guthrie, above n 6, 11.
  - 9 Claire Mayhew et al, 'Measuring the Extent of Impact from Occupational Violence and Bullying on Traumatized Workers' (2004) 16 *Employee Responsibilities and Rights Journal* 117, 131.
  - 10 Lyn Turney, 'Mental Health and Workplace Bullying: The Role of Power, Professions and "On the Job" Training' in Lou Morrow, Irene Verins and Eileen Willis (eds), *Mental Health and Work: Issues and Perspectives* (Auseinet, 2002) 135, 136.
  - 11 Morten Birkeland Nielsen et al, 'Longitudinal Relationships between Workplace Bullying and Psychological Distress' (2012) 38 *Scandinavian Journal of Work, Environmental & Health* 38, 38.
  - 12 Rebecca Law et al, 'Psychosocial Safety Climate as a Lead Indicator of Workplace Bullying and Harassment, Job Resources, Psychological Health and Employee Engagement' (2011) 43 *Accident Analysis and Prevention* 1782, 1783.
  - 13 This occurred in *Inspector Maddaford v M A Coleman Joinery (NSW) Pty Ltd* [2004] NSWCMC 42 (Unreported, Chief Industrial Magistrate Miller, 5 May 2004). Chief Industrial Magistrate Miller remarked on a single incident of violent employee 'initiation' by observing that 'an initiation ... is a polite term for bullying': at 4–5, quoted in *WorkCover Authority (NSW) v Coleman* (2004) 138 IR 21, 29 [14] (The Court).
  - 14 Caroline B R Evans, Mark W Fraser and Katie L Cotter, 'The Effectiveness of School-Based Bullying Prevention Programs: A Systematic Review' (2014) 19 *Aggression and Violent Behavior* 532, 540.

contributing toward psychological injury emerged.<sup>15</sup> Lack of a clear definition has been further exacerbated by the critical review of research describing varied social contexts and behavioural interpretations.<sup>16</sup> The result is an ill-defined concept of bullying, ‘a widely accepted way of naming the array of lower-level aggression experienced at work, including some unreasonable work practices and inappropriate behaviours’.<sup>17</sup> What remains concerning is that this ambiguous concept has mobilised a considerable and diverse legal response: ‘[c]ommunity intolerance of, and repugnance to, bullying of any type have no doubt engendered an environment where those who are its victims are increasingly prepared to stand up and utilise any available legal means to stop it’.<sup>18</sup> This, for example, may include lodging a workers’ compensation claim and thereby self-labelling as a victim of bullying. When an individual self-labels as a victim of bullying, he or she risks social devaluation and negative health consequences.<sup>19</sup> Vie, Glasø and Einarsen confirm, however, that self-labelling does not increase the risk of negative health consequences if the bullying experience is ‘intense’.<sup>20</sup> Thus, ambiguous and ‘borderline’ behaviour, described erroneously as bullying, may have serious implications for the mental health of individuals who may unwittingly ascribe to the consequences of the ‘victim of bullying’ label. We therefore argue that current legal conceptions of bullying remain too vague in meaning and application to achieve consistent application in legal and other social contexts, resulting in a legal response to bullying which may promote damaging misinterpretations of negative social behaviour, perpetuating stigma.

In this article, we make two major contributions to extant academic knowledge and legal practice. First, we qualitatively and discursively analyse references to bullying made in the 118 arbitrated dispute cases where the Workers Compensation Commission (‘WCC’), the highest administrative review instrument of the NSW workers’ compensation (‘NSW WC’) system, documented psychological injury allegedly caused by workplace bullying. We reveal how social constructions of workplace bullying were negotiated and influenced by discursive manipulations of medical and legal discourse. We thus demonstrate how the a priori, normative and culturally-relative use of evidence by stakeholders with inequitable power and social status makes explicit the ubiquitous and often inconsistent use, definition and labelling of ‘bullying’

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15 Peter S Barth, ‘Workers’ Compensation for Mental Stress Cases’ (1990) 8 *Behavioral Sciences and the Law* 349.

16 See, eg, Matthew Alexander et al, ‘“He Just Didn’t Seem to Understand the Banter”: Bullying or Simply Establishing Social Cohesion?’ (2012) 33 *Tourism Management* 1245; Wendy Bloisi and Helge Hoel, ‘Abusive Work Practices and Bullying among Chefs: A Review of the Literature’ (2008) 27 *International Journal of Hospitality Management* 649; William Martin and Helen LaVan, ‘Workplace Bullying: A Review of Litigated Cases’ (2010) 22 *Employee Responsibilities and Rights Journal* 175.

17 Mayhew et al, above n 9, 118.

18 Suzanne Le Mire and Rosemary Owens, ‘A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession’ (2014) 37 *University of New South Wales Law Journal* 1030, 1049.

19 Tina Lokke Vie, Lars Glasø and Ståle Einarsen, ‘Health Outcomes and Self-Labeling as a Victim of Workplace Bullying’ (2011) 70 *Journal of Psychosomatic Research* 37, 41.

20 Ibid 42.

applied in administrative case law. Secondly, by conducting a critical qualitative content analysis, we qualitatively demonstrate *how* the use of medico-legal discourse and evidence by the NSW WC system may contribute to the construction of bullying as a stigmatic social label. Our findings further an understanding of the potential role played by Australian legal institutions in conferring or refuting notions of ‘normative behaviour’, and implore readers to critically reflect upon how discourse and social status may affect legal construction, and the application of labels conferring deviancy such as ‘bully’.

## II LITERATURE REVIEW AND SOCIAL THEORY

### A The Social Construction of Mental Illness

A long and well-established history of the role labelling plays in social constructions of ‘normalcy’ or ‘deviancy’ informs histories of medicine and criminology. Stemming from the classical sociological theory of Durkheim and Merton, sociologists have long articulated the normative role institutionalised conceptualisations of deviance play in continuing the social order. The construction of mental illness or health, the conferral of associated labels, and institutional management are not only historically contingent but, moreover, have far-reaching socio-economic implications.<sup>21</sup> In Australia, national governmental statistics have estimated \$20 billion as the annual loss in employee productivity and labour participation from mental illness.<sup>22</sup> Indeed, mental illness is a widespread socio-psychological condition with great economic implications globally.

Despite growing prevalence, how mental illnesses – or psychological ‘disorders’ – come to be defined continues to vary considerably by time and place. Even when restricted to a single nation, such as Australia, significant variation manifests in experience and treatment, with responses to mental illness displaying gender biases, geographical difference<sup>23</sup> and varied capacity for professional treatment relative to population size.<sup>24</sup> Most western definitions of mental illness are informed by the Diagnostic and Statistical Manual of Mental Disorders produced by the American Psychiatric Association.<sup>25</sup> In Australia,

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21 See generally Angela T Ragusa and Andrew Crowther, ‘Australian Mental Health Nursing: The Challenge of Working in Rural and Remote Communities’ in Angela T Ragusa (ed), *Rural Lifestyles, Community Well-Being and Social Change: Lessons from Country Australia for Global Citizens* (Bentham Science, 2014) 253, 256.

22 Australian Bureau of Statistics, *Australian Social Trends* (Report No 4102, March 2009) 13.

23 See generally Stephanie J Johnston and Angela T Ragusa, ‘The Impact of Rurality on Depression in Australia: Socio-Cultural Reflections for Social Change’ in Angela T Ragusa (ed), *Rural Lifestyles, Community Well-Being and Social Change: Lessons from Country Australia for Global Citizens* (Bentham Science, 2014) 206.

24 Australian Institute of Health and Welfare, *Rural, Regional and Remote Health: A Guide to Remoteness Classifications* (Statistical Report No 4, March 2004).

25 Allan V Horwitz and Jerome C Wakefield, *The Loss of Sadness: How Psychiatry Transformed Normal Sorrow into Depressive Disorder* (Oxford University Press, 2007) vii–ix.

mental illness is generally defined as a ‘clinically recognisable set of symptoms or behaviours associated with distress and with interference with personal functions’.<sup>26</sup> Hence, what constitutes the definition of mental illness remains largely determined by psychiatry and communicated by government and professional bodies.

## B Workplace Bullying and Stigmatisation

The recent association of workplace bullying with psychological injury in legal environments, such as WCC disputes, offers a unique opportunity to examine *what* discourse is used to construct and apply ‘deviant’ social labels – ‘bully’, as perpetrator, and ‘bullied’, as victim – and with what legal consequences. The labelling and legal acceptance of workplace bullying, despite definitional ambiguity, is a recent social phenomenon with academic acknowledgment emerging in the 1990s.<sup>27</sup> Initially associated with educational institutions, the most recent research has stemmed from cyberbullying and increasing violence arising from workplace interactions,<sup>28</sup> and is often restricted to the analysis of individual experiences of bullying<sup>29</sup> – at the expense of robust academic examination of the potential structural and/or social causes and implications of workplace bullying.

Medico-legal designation or rejection of the diagnosis and label ‘psychological injury’ arising from workplace bullying may have long-term mental health implications, with the stigmatisation of psychological illness long noted. According to the Mental Health Foundation of Australia (Victoria):

It is an undisputed fact that individuals who experience mental health issues are often faced with discrimination that results from misconceptions of their illness. As a result, many people who would benefit from mental health services often do not seek treatment for fear that they will be viewed in a negative way. The World Health Organization agrees and says that in the 400 million people worldwide who are affected by mental illness, about twenty percent reach out for treatment. ... David Satcher, US Attorney General writes, ‘Stigma was expected to abate with increased knowledge of mental illness, but just the opposite occurred: stigma in some ways intensified over the past 40 years even though understanding improved. Knowledge of mental illness appears by itself insufficient to dispel stigma’.<sup>30</sup>

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26 Australian Bureau of Statistics, above n 22, 13.

27 Jon D Bible, ‘The Jerk at Work: Workplace Bullying and the Law’s Inability To Combat It’ (2002) 38(1) *Employee Relations Law Journal* 32, 32; see also Jon Gice, ‘Taking the Emotion out of Workers Compensation Stress Claims’ (1993) 46 *Society of Chartered Property and Casualty Underwriters Journal* 98.

28 Jon-Chao Hong et al, ‘Positive Affect Predicting Worker Psychological Response to Cyber-Bullying in the High-Tech Industry in Northern Taiwan’ (2014) 30 *Computers in Human Behavior* 307; Paul E Spector, Zhiqing E Zhou and Xin Xuan Che, ‘Nurse Exposure to Physical and Nonphysical Violence, Bullying, and Sexual Harassment: A Quantitative Review’ (2014) 51 *International Journal of Nursing Studies* 72.

29 Gayle Brewer and Emma Whiteside, ‘Workplace Bullying and Stress within the Prison Service’ (2012) 4 *Journal of Aggression, Conflict and Peace Research* 76, 77.

30 Mental Health Foundation of Australia (Victoria), *Fight Stigma: Stamping out the Stigma of Mental Illness* (2015) <<http://www.mentalhealthvic.org.au/index.php?id=112>>.

Arising from the sociological theory of Goffman, 'stigma' was originally conceptualised as 'an attribute that is deeply discrediting', which alters how individuals interact and are socially perceived 'from a whole and usual person to a tainted, discounted one'.<sup>31</sup>

Since the 1960s, multidisciplinary reconceptualisation of stigma has helped advance how we think and apply ideas about social stigma. A key limitation of Goffman's early theorising was positing stigma as a trait possessed solely by individuals, much like psychological conceptualisations of personality traits. More recently, an attempt has been made to surpass individualistic notions of 'normalcy' or 'deviance'. Anthropologists at Harvard University and Oxford University, for instance, have noted that stigma thwarts individuals' ability to meet normative social obligations, leading to situations where 'stigma decays the ability to hold on to what matters most to ordinary people in a local world, such as wealth, relationships and life chances', and note that this is poorly addressed by '[t]he present focus on legislation to prevent formal, institutionalised consequences of stigma [which] is admirable, but [which] does not create large social change'.<sup>32</sup>

A review of historical and contemporary applications of stigma and its relevance in applied research, by researchers at Columbia University and the New York State Psychiatric Institute, offers two key insights which tend to mirror critiques of bullying. First, stigma suffers from definitional ambiguity and variability in application. Hence, the role and power of non-stigmatised experts to confer the label 'stigma' risks perpetuating stereotypes arising from un-evidenced assumptions.<sup>33</sup> Secondly, stigma is more commonly conceived as a 'micro' rather than a 'macro' or systemic issue, with individuals labelled as having social-psychological problems. Subsequently, how broader sociological factors – namely culture, status, discrimination and power – emerge through social processes and converge to construct stigmatised subjects tends to remain covert.<sup>34</sup> Akin to the reliance on politics and power relations among 'labour, capital and state'<sup>35</sup> by medical and scientific experts trying to define what constitutes occupational hazards, definitions of stigmatised behaviour associated with bullying remain reliant upon ideas expressed by powerful and influential experts. Thus, reconceptualisation of stigma to incorporate systemic elements permits the role of inequity in constructions of illness and health, derived from classic labelling theory,<sup>36</sup> to take priority. In so doing, interactions among individuals in relationships of power-imbalance acting in specific sociohistorical

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31 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, 1963) 3.

32 Arthur Kleinman and Rachel Hall-Clifford, 'Stigma: A Social, Cultural and Moral Process' (2009) 63 *Journal of Epidemiology and Community Health* 418, 418.

33 Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 *Annual Review of Sociology* 363, 365–6.

34 Ibid 366.

35 Pamela Kinnear, 'The Politics of Coal Dust: Industrial Campaigns for the Regulation of Dust Disease in Australian Coal Mining, 1939–49' (2001) 80 *Labour History* 65, 79.

36 Thomas J Scheff, *Being Mentally Ill: A Sociological Theory* (Aldine Publishing, 1966) 80–3, 92–7.

contexts take centre stage. It is through this conceptual lens that our analysis of the social construction of bullying in WCC arbitrated dispute cases commences.

### III RESEARCH METHODS

#### A Sampling Methods

Research sampling commenced using a whole population sampling frame by collecting all (n = 3754) cases published by the WCC between 1 January 2002 and 31 December 2014.<sup>37</sup> All 3754 cases were downloaded from a publicly-accessible website and electronically reviewed to identify the total number (n = 543) of psychological injury claims. The 543 psychological injury claims were first electronically searched for appearance of the word ‘bullying’. This yielded 131 cases. All 131 were closely read to discern where and how ‘bullying’ was used. Cases were removed from the sample if ‘bullying’ was only used as a passing reference to case law and not as part of a workplace bullying claim made by either a medico-legal expert or the claimant. This process resulted in a final sample of n = 118 cases. All cases in the final sample (n = 118) were given an ID code and de-identified because, while the cases are publicly available, they contain personal details of individuals affected by, or implicated in the cause of, mental illness. It was therefore considered ethically important to remove references which might lead to the identification of individuals involved.

#### B Data Analysis Methods

Data analysis followed a mixed-method approach using quantitative and qualitative content analysis.<sup>38</sup> All cases were analysed quantitatively by searching for the key word ‘bullying’ to permit identification of key trends and demographic data. Given a predominant limitation of quantitative content analysis is restriction to keyword searches, a qualitative content analysis (‘QCA’) was the second analysis conducted. The QCA permitted deeper insights to be gained about how language was used in specific social contexts to reveal, shape and/or reproduce deeper knowledge and social meaning.<sup>39</sup> A value of QCA, therefore, is its capacity to perceive WCC cases not only as legal documents, but moreover, as ‘social products’, or in other words, creations that come into existence because of the social norms, processes and environments surrounding their production.<sup>40</sup> QCA also engenders identification of social change over time, particularly social processes communicated in written form, and provides greater

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37 Mary Alison Durand and Tracey Chantler, *Principles of Social Research* (Open University Press, 2<sup>nd</sup> ed, 2014) ch 12.

38 Ji Young Cho and Eun-Hee Lee, ‘Reducing Confusion about Grounded Theory and Qualitative Content Analysis: Similarities and Differences’ (2014) 19 *Qualitative Report* 1, 15.

39 Moretti et al, 2011 420 C Seale and F Tonkiss, ‘Content and Comparative Keyword Analysis’ in C Seale (ed), *Researching Society and Culture* (Sage, 3<sup>rd</sup> ed, 2012) 459.

40 Cho and Lee, above n 38, 16.

reliability than other social science methods, such as field research.<sup>41</sup> Nevertheless, findings remain limited to recorded communication, a restriction shared by much social research reliant on secondary data.<sup>42</sup>

Once the cases were read independently by the research team, a pilot code book was created to capture which key stakeholders introduced and used the term ‘bullying’ and the context in which it was discussed. This process continued for three rounds until a final coding scheme was agreed to suitably capture: (1) who was making bullying claims; (2) the presence of agreement or disagreement about bullying claims; and (3) the presence of the specific stigmatic label ‘eggshell psyche’, which emerged as a serendipitous finding in the dataset. Quantitative value labels were assigned, all cases coded and analysed descriptively.

The QCA utilised findings from the quantitative content analysis to conduct an in-depth discursive analysis of key cases. Discursive analysis is a qualitative technique informed by linguistic deconstruction where statements and text are read and re-read to identify key meaning-generating elements<sup>43</sup> such as terms, examples and experiences used in the cases to discuss social activities associated with workplace ‘bullying’. Methodologically, various types of discursive analysis are possible. In the present study, a sociological analysis was chosen based upon the ontological standpoint that discourse is a social product imparted with meaning construction, linked to a complex social reality and replete with power relationships that may reflect dominant, hegemonic assumptions. Textual analysis seeks to make explicit that which is stated, and is thus useful for quantitatively documenting trends such as how frequently the term ‘bullying’ appears in cases. What largely differentiates a sociological approach from semiotic textual analysis, however, is that it theorises discourse as a social product with a capacity to reflect the social conditions under which it was produced. It thereby contributes to the identification of systemic (dis)advantages reflected in discourse – as the critical social theory of Foucault and Bourdieu expound.<sup>44</sup> From this process, two major emergent themes from workplace bullying discourse were identified: (1) the disputed bullying claim; and (2) eggshell stigma.

## IV RESEARCH FINDINGS

Analysis of the 543 WCC arbitrated dispute cases where psychological injury was documented by the WCC revealed 118 cases with allegations or claims of workplace bullying. Although the types of evidence provided, and by whom, to

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41 Earl Babbie, *The Practice of Social Research* (Cengage Learning, 12th ed, 2010).

42 Ibid.

43 Bryan S R Grimwood et al, ‘Responsibility in Tourism: A Discursive Analysis’ (2015) 50 *Annals of Tourism Research* 22, 26.

44 Jorge Ruiz Ruiz, ‘Sociological Discourse Analysis: Methods and Logic’ (2009) 10(2) *Forum: Qualitative Social Research* art 26.

substantiate bullying claims varied among cases, two distinct trends emerged. First, the label of bullying was predominately applied by the worker. Secondly, the arbitrator's use of the 'eggshell psyche' principle, beyond its potentially stigmatising label, consistently arose.

### **A Trend 1: The Worker's Perception of Workplace Bullying**

In all cases mentioning bullying, 87 per cent (n = 103) revealed it was the employee (or the employee's legal representative) who was credited with the initiation or use of the term. In 35 per cent (n = 42) of cases, the employee-applied label of bullying failed to be supported by any 'expert', legal or medical. This is surprising, given that the employee and employer typically both provide expert medical opinions in their evidence. While each of the examined cases contained attributes unique to the individual work environments under examination, employees' perspectives about what constituted the negative behaviours that could be defined as bullying were consistent and differed from all medico-legal experts, including the impartial arbitrators. In-depth qualitative analysis of three cases is offered as illustration, with cases identified by the number assigned to them in the sampling process.

#### **1 Workplace Bullying: Perception Disparity – Case Example ID 1**

*Alleged Injury:* 'The injury arose as a consequence of harassment and bullying by her supervisor over an 18 month period up to 1 August 2002'.

*Discussion:* There was evidence of, and 'substantiated allegations that [the employer] barred statistical reporting access for [the employee] ... that [the employer] and management favoured [another employee] and was not treating others in the same way, that [the employer] referred to [another employee] as his star employee and that there had been a breakdown in communications'. Despite these allegations, in this case example, the arbitrator's reasons reflected indecision among the parties as to the circumstances of injury: 'I am asked to also determine whether the employment was a substantial contributing factor to the injury', concluding that 'the statement of facts prepared by the parties discloses that virtually nothing is agreed'. The arbitrator relied on *Townsend v Commissioner of Police*<sup>45</sup> to confirm that an employee cannot claim for injury due to the misperception of non-existent workplace events. Likewise, although the arbitrator found that 'the documentary evidence supplied does not confirm [the employer's] claim', discrepancy over the veracity of evidence supplied by the employer and the employee proved insufficient to confirm bullying occurred.

The employer claimed that their behaviour was 'at all times reasonable' and disputed the claim of harassment despite the arbitrator noting that 'the medical opinion agrees on the diagnosis in this case. An adjustment disorder is a condition which is reactive to the situation in which a person finds themselves'. The employee 'described her work situation as the cause of her condition' and

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45 (1992) 25 NSWCCR 9.

the experts agreed that '[n]o other potential cause has been identified'. In concluding, the arbitrator stated that the employer 'at most ... was seeking to monitor [the employee]'s performance' and, despite the use of purposeful intent to define bullying in academic literature, the arbitrator stated that 'it is unnecessary for me to determine whether it was [the employer's] intention to discriminate against [the employee]'. Only the employee was left with the impression that her experiences constituted workplace bullying.

## **2 Workplace Bullying: Perception Disparity – Case Example ID 21**

*Alleged Injury:* 'From May 2007 until November 2007 [the employee] alleges that she suffered a psychological injury as a result of ongoing harassment and intimidation and undermining by [her manager]'.

*Discussion:* The second case example, which illustrates the discrepancy between an employee and all others' perceptions about the presence of workplace bullying, uses discourse characteristic of academic literature defining bullying. Specifically, this case example describes negative, inappropriate, purposive behaviour executed by a direct line supervisor, 'Manager 1', against the employee, leaving her with a sense of powerlessness. The employee 'felt [Manager 1's] actions were deliberately antagonistic, bullying and undermining'. Many workplace activities are discussed in the case, including Manager 1 'purchasing and distributing new [b]usiness cards with a new title and a new organisation chart the effect of which appeared to eliminate the position of [Chief Information Officer] which was [the employee's] role', and sending a group email informing the employee that 'her security had been changed and that she no longer had her security access levels'. These activities resulted in the employee 'dread[ing] going to work ... feeling anxious and ... teary [which] ... began to affect her personal life'. The employee 'complain[ed] that her interactions with [Manager 1] which she perceived as being bullying and intimidating and the lack of support by [Manager 1's supervisor, Manager 2] led to weight loss, anxiety and insomnia as well as affecting her ability to concentrate'. Yet, although '[t]he physiological effect was more than mere emotional upset and constituted a psychological injury', the arbitrator stated that '[a]t most [the employee] could be found to have suffered from a "psychiatric condition". The nature of the condition was not accompanied by treatment, incapacity nor was there a diagnosis in accordance with [the Diagnostic and Statistical Manual of Mental Disorders]'.

There were many reasons offered for this decision. First, the employer 'submitted that there was no evidence of a psychological injury, no incapacity, no physiological change'. Whereas the 'business card incident' was perceived by the employee as 'deliberately antagonistic, bullying and undermining', the managers expressed 'different views'. Due to 'the limited evidence available', the arbitrator rejected the suggestion that Manager 1 'adopted the new title in a deliberate attempt to sideline or bully' the employee. Similarly, divergent opinion over document collaboration and sharing led the arbitrator to 'accept that [the employee] was anxious about documentation being prepared and distributed without any consultation from her and which may also have contained some

inaccuracies ... [and to] accept [that the employee] may have been distressed and anxious about how [the] document came into existence and the lack of consultation'. However, the arbitrator concluded that '[t]he communication issues appear to be on both sides and there was no evidence the employer deliberately ignored [the employee's] request for meetings'.

As each allegation was rejected, what was repeated was the employee's perceived lack of power. For example: 'this made [the employee] feel that her authority and her position were being eroded. She couldn't understand how [Manager 1] could be in breach of processes and not held accountable'. Such perceptions were addressed when Manager 2 admitted 'that [Manager 1] should have discussed the purchase of ... computer equipment from a different provider with [the employee]', which deflects the perceived importance of the events. The arbitrator accepted 'that the purchase of the equipment was not as serious as [the employee] contends', yet noted that differential standards may be in play: 'nevertheless in her mind there was a perception that [Manager 1] was being held to different standards than what would be expected of other staff in the organisation. I can accept that [the employee] may have felt an undermining of her authority and that she was not being supported by [Manager 2]'. Nevertheless, the additional example, the removal of the employee's security access, was asserted by Manager 2 to not constitute 'unreasonable' behaviour by Manager 1, even though he subsequently 'agreed that [the employee's] physical access be partly reinstated', claiming that 'she was not targeted in this [organisational review] process'. The arbitrator confirmed that '[t]his appears to be another example of lack of communication between [Manager 1] and [the employee]'. The arbitrator then asserted that '[the employee] was entitled to be consulted or at least informed about this prior to it occurring and this did not happen ... it was the fact that there was no communication about this which caused the distress and anxiety, particularly given the prior incidents already referred to'.

The case continued to illustrate examples of negative behaviour, such as Manager 1 being 'formally issued with a reprimand for not properly communicating this change to [the employee]'. The arbitrator noted that '[t]he reprimand is clearly evidence of a fairly serious lack of procedure and supports [the employee's] complaints. It is not difficult to accept [her] distress and anxiety about this'. The arbitrator stated that Manager 1's 'behaviour can be seen to be intimidating and undermining' and believed that 'the evidence of [Manager 2] generally corroborates [the employee's] version of the major events which she states contributed to her psychological condition'. This was supported by 'the medical evidence, [which] in the main supports [the employee's] claim that her injury was caused by the nature and conditions of her employment'.

What is noteworthy for the present sociological analysis, however, is how the evidence was not used by the arbitrator to support the employee's view that she was bullied, but rather, to demonstrate that a pre-existing psychological injury was exacerbated through the course of her employment. As the arbitrator stated: 'It is not disputed that [the employee] suffers from a psychological injury caused by events in the workplace'. Here, the arbitrator noted the employee's

psychologist's 'clinical impression was [the employee] had symptoms consistent with [a]nxiety caused by work related stress due to the undermining of her integrity in the workplace', and quoted the psychologist's statement that '[s]he has been the subject of negative behaviour designed to erode her self esteem, create havoc and destruction'. Similarly, although the arbitrator cited the psychiatrist's report, which suggested 'that her current difficulties stem from an interpersonal situation at work', these workplace-induced conditions were not held to constitute workplace bullying. Rather, they were proffered as illustrative of psychological disorders, with the arbitrator concluding that '[the psychiatrist] doesn't provide a diagnosis but records [the employee] as reporting expressed symptoms of depression and anxiety'.

While an additional medical expert diagnosed 'a depressive illness and a discrete anxiety disorder' and other expert evidence lent 'support to the psychological injury being caused by the nature and conditions of her employment', with some 'attributing her "difficulties" to an interpersonal situation', her diagnoses were not universally agreed. Nevertheless, rather than attribute legitimacy to the employee's assessment of workplace bullying, the arbitrator ultimately adopted a decision that can be argued to reflect stigmatisation: no employee with a psychological injury can correctly assess if they were bullied because, even though the employee 'complains [of] her interactions with [Manager 1] which she perceived as being bullying', it must be shown that 'psychological injury arose by reason of an accurate perception of actual events in the workplace'.

Having a psychological injury, it would seem, stigmatises the capacity of 'actual events' to be correctly perceived by the employee to judge if workplace bullying occurred. While the law appears to place the burden of providing sufficient evidence of bullying on each individual's interpretation of every social interaction under examination, capacity to 'accurately' perceive was differential. In this case, the evidence failed to support the employee's perception and allegation of Manager 1's workplace bullying, which was largely reduced by the arbitrator to stress and anxiety produced by a biological disorder of the employee. With neither clarity nor agreement about what legally constitutes bullying, this case was resolved by reliance on case law. The arbitrator quoted *Department of Corrective Services v Bowditch*,<sup>46</sup> where Roche DP set out a summary of the law from *Stewart v NSW Police Service*:

To succeed in this Court, the applicant must prove that the conduct complained of constituted 'injury' within the meaning of the [*Workers Compensation Act 1987* (NSW)]. Where, as here, a psychiatric injury is alleged the applicant must prove either:

(i) that the nervous system was so affected that a physiological effect was induced, not a mere emotional impulse: *Yates v South Kirkby Collieries Ltd* [1910] 2 KB 538; *Austin v Director-General of Education* (1994) 10 NSWCCR 373; *Thazine-Aye v WorkCover Authority (NSW)* (1995) 12 NSWCCR 304; *Zinc Corporation Ltd v Scarce* (1995) 12 NSWCCR 566, or

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46 [2007] NSWCCPD 244 (Unreported, Roche DP, 12 December 2007) [52].

(ii) the aggravation, acceleration, exacerbation or deterioration of a pre-existing psychiatric condition: *Austin's case*.

Frustration and emotional upset do not constitute injury: *Thazine-Aye's case*; nor, semble, where [sic] a mere 'anxiety state': *Zinc Corporation case* per Meagher JA at 575B. A 'straight litigation neurosis' is not compensable: *Karathanos v Industrial Welding Co Ltd* [1973] 47 WCR (NSW) 79 at 80. A misperception of actual events, due to the irrational thinking of the worker leading to a psychiatric illness is not compensable: *Townsend v Commissioner of Police* [see now (1992) 25 NSWCCR 9].<sup>47</sup>

Sociologically, the legitimacy of what constituted psychiatric injury arising from social interactions in this Australian workplace relied on key criteria that prioritised biological manifestations of mental illness, de-legitimated emotions, and drew upon non-specific generalisations and stigmatisations about the employees' capacity to think rationally and perceive events in a manner exhibiting belief that there exists some empirically 'real' state of normalcy and social agreement regarding perceptions of social behaviour: (1) 'the nervous system was so affected that a physiological effect was induced, not a mere emotional impulse'; (2) 'the aggravation, acceleration, exacerbation or deterioration of a pre-existing psychiatric condition ... Frustration and emotional upset do not constitute injury'; and, most notably, (3) '[a] misperception of actual events, due to the irrational thinking of the worker leading to a psychiatric illness is not compensable'.

### 3 Workplace Bullying: Perception Disparity – Case Example ID 64

*Alleged Injury:* '[The employee] alleges that she was bullied, harassed and intimidated on a number of occasions. [The employee] alleges that this behaviour continued through 2010 and into 2011'.

*Discussion:* The final in-depth qualitative analysis offered to demonstrate divergent social perception between employees and 'all others' regarding experience of workplace bullying in Australia is case example ID 64. As in case examples ID 1 and 21, this case example's allegation of bullying is reported by the arbitrator: '[The employee] alleged that she was bullied, harassed and intimidated on a number of occasions', with incidences occurring over a period of time. As a result, the employee alleged 'that she suffered injury described as "depression" on account of harassment and bullying on site'. The employee also stated the 'supervisor verbally assaulted, bullied, intimidated, threatened and harassed me, this was repeated over several months. I have been continually targeted by [management]. This has both been in writing and verbal complaints to my Manager'. The arbitrator stated that '[a]fter investigation of each complaint there was no credibility to their claims nor were their claims proven. However as a result of the identified safety non-conformances Hazard reports were completed and documented on the incident register'. Medical opinion was offered by the employee which stated that 'she would have great difficulty managing a return to

47 (1998) 17 NSWCCR 202, 206–7 [6] (Neilson J), quoting *Kirby v Trustees of the Society of St Vincent de Paul (NSW)* (Unreported, Compensation Court of New South Wales, Neilson J, 11 April 1997) 4.

work with [the company] given the nature of her psychological injury and the precipitating circumstances. She would be far better off seeking a return to work elsewhere'. Alternative medical opinion believed that '[the employee] is fully fit for pre-injury employment without restriction', and it was this doctor's report the arbitrator extensively quoted to describe the social interactions that produced the disputed perception regarding 'fitness for work' and psychological injury:

She [the employee] considers herself to be unwell. She said that she is a nervous wreck. She told me that she is fed up with being mistreated. ...

As far as I could tell, she began being upset when she was removed from the work site following her breach of protocol. She was subsequently subjected to a number of complaints which were investigated by her employer. She believed that she was being set up to be performance managed. She took an industrial stand against this and stopped work.

In my opinion, her grievances at work have been inappropriately medicalised. She made it clear that it was her industrial rather than medical circumstances that precluded her from working. At interview, there was no external evidence of psychiatric illness.

There are many disputed conditions in this case, including whether workplace bullying occurred and the lack of cooperation with conciliatory efforts, such as 'directions for the attendance of various people were not complied with and also directions for the supply of information/documents were not done or done late'. These are formally noted on record by the arbitrator who made a final recommendation to resolve the dispute 'even though liability is disputed'. The case ended with the respondent being

ordered to have [the employee] assessed for a Return to Work Plan and [to] pay for the services of the said rehabilitation provider nominated by [the employee] to assist in consultation with [the employee] and her nominated treating doctor for the preparation of a Return to Work Plan. The respondent is to locate and provide suitable duties for [the employee] within its business in accordance with the WorkCover hierarchy.

What this case contributes to the analysis is further demonstration of how the legal system avoids engagement with disputes regarding claims of workplace bullying by sidestepping the issue entirely. This employee's perception that workplace interactions with her male supervisor and co-worker constituted bullying were deemed by the arbitrator as lacking credibility and ability to be 'proven', although no evidence was offered about what criteria to assess or means to arrive at such decisions were made. Instead, the arbitrator weighed evidence of psychiatric injury between opposing expert opinions, resolving the dispute by merely referring it back to other experts to resolve – namely the insurer, employer and doctors. The statement provided by the doctor, who refuted the employee's psychological injury and accredited it to the 'medicalisation' of an industrial action, is weighted heavily and there is dispute regarding whether the claim is legitimate due to its contested liability. Given this, the outcome recommended by the arbitrator – further review by medical experts and employer accommodation – fails to address key issues raised in this case. Moreover, it is indicative of the systemic limitations encountered when a quasi-legal system is used to arbitrate workplace disagreements that may not be medical within an overly-medicalised system.

(a) *Descriptive Analysis of Variation in Perceived Workplace Bullying*

Table 1 documents the total percentage of bullying allegations made across all cases, demonstrating who asserted that the bullying occurred and the percentage of cases where employee and expert disagreement emerged regarding whether or not bullying existed.

Table 1: Allegations of 'Bullying' in WCC Arbitrations 2002–14

| Bullying Claimant Category                  | Cases Bullying Alleged (%) | Cases Disagreeing w/Worker's Allegation of 'Bullying' (%) |
|---------------------------------------------|----------------------------|-----------------------------------------------------------|
| Employee or Employee's Legal Representative | 87                         | N/A                                                       |
| Employer                                    | 3                          | 93                                                        |
| Arbitrator                                  | 17                         | 74                                                        |
| Employee's General Practitioner             | 22                         | 69                                                        |
| Employee's Psychologist                     | 18                         | 69                                                        |
| Employee's Psychiatrist                     | 22                         | 71                                                        |
| Employee's Legal Doctor                     | 3                          | 86                                                        |
| Employer's Insurance Psychiatrist           | 2                          | 87                                                        |
| Other Medical Expert                        | 13                         | 81                                                        |

In just 8 per cent ( $n = 8$ ) of 103 cases did employers or others in the workplace agree with the employee's appraisal that bullying had occurred. These findings are sociologically relevant, as bullying is an action typically perpetrated by more powerful, dominant actors upon those with less socio-economic agency.<sup>48</sup> Difference in perception was also exhibited between employees and medical experts. As Table 1 reveals, although 87 per cent of employees believed they had experienced workplace bullying, just 22 per cent of their own general practitioners ('GPs'), 22 per cent of their psychiatrists and 18 per cent of their psychologists identified that bullying had occurred. The percentage of employers' insurance psychiatrists and doctors agreeing with employees' perceived bullying was even lower – two per cent and three per cent respectively. In total, there were 53 cases (45 per cent of the sample) where employees believed they had been bullied, yet their perceptions failed to be confirmed by their own GP, psychiatrist or psychologist. In 9 of the 15 cases where employees did not express being bullied, their own medical experts – their GP, psychiatrist and/or psychologist – expressed otherwise, labelling the workplace behaviours encountered as bullying. Hence, such findings demonstrate that great discrepancy exists between lived experiences and medical opinion about workplace bullying.

48 Ståle Einarsen, 'Harassment and Bullying at Work: A Review of the Scandinavian Approach' (2000) 5 *Aggression and Violent Behaviour* 381.

Alongside employee and medical expert comparisons, perceptions also varied by the type of medical expert. In no cases where bullying was alleged by at least one medical expert to have occurred, did all medical experts agree that the behaviour displayed resulted from exposure to bullying. For example, in only three cases did employees' GPs, psychologists and psychiatrists agree that bullying was experienced. Among the 39 cases where arbitrators noted that an employee's psychologist or psychiatrist diagnosed bullying as having occurred, there were just eight instances where those psychologists and psychiatrists were in agreement. Disparity of expert opinion was even greater between insurers' and employees' psychiatrists. In the 26 out of 118 cases where employees' psychiatrists labelled the workplace experience as exposure to bullying, just one employer's insurance psychiatrist concurred. This trend was replicated among GPs – employees' GPs labelled the workplace behaviour as bullying in 27 cases, in contrast with employers' legal doctors who noted bullying in four instances. Such trends evidence the disputed nature of bullying in the workplace, and the complexity of obtaining an agreed definition or 'diagnosis'. In-depth qualitative analysis makes apparent specific conditions under which these power-imbalanced interactions occurred, through examination of the social construction of stigma.

The disputed definition and disagreement emerging among and between employees and experts about what kinds of (anti)social activity constitute bullying are arguably impacted by the stigma and cost associated with providing a positive diagnosis for bullying. Application of critical analysis identified how medico-legal discourse and evidence was used in the NSW WC system, to further knowledge about the construction and application of bullying as a stigmatic social label. In the present study, the label 'bullying' was predominantly bestowed by employees upon their employers. This was due to both the presence of an identified individual 'employer' as perpetrator and the nature of the NSW WC system, which requires an employer to carry the workplace injury insurance risk regardless of the individual actions of its employees. Historically, employees have been a disempowered social group with little legitimate individual recourse, as the history of unions and collective bargaining attests.<sup>49</sup> Hence, it is unsurprising that employees construed employer actions as bullying. Given the stigma associated with the term 'bully', it is equally unsurprising that employers resisted or rejected this negative social label. Sociologically, however, our research reveals a tendency for those with greater social power, capital and status – namely medical experts – to disagree with employees' perceived victimhood. In 45 per cent of cases, all medical experts rejected claims of bullying, despite employees self-identifying as having been bullied. In only 7 per cent (4 of 53) cases where employees and medical experts disagreed as to whether bullying occurred did the arbitrator concur with the employee and adjudicate that bullying was present irrespective of medical evidence.

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49 Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 167.

## B Trend 2: Workplace Bullying, the ‘Eggshell Psyche’ Principle, and Stigma

The inconsistent use, definition and label of ‘bullying’ applied and upheld in administrative case law remains problematic. To further examine the role stigma may play in the legal assessment of bullying, we next consider the ‘eggshell psyche’ principle which serendipitously emerged in our QCA. The elaboration of the ‘eggshell psyche’ principle is most commonly attributed to Spigelman CJ in *State Transit Authority (NSW) v Chemler*.<sup>50</sup> It owes its heritage to the legal principle of the ‘eggshell skull’, where ‘[i]n this area of law, as in negligence, the *talem qualem* principle is applicable ie employers take their employees as they find them’.<sup>51</sup>

Nineteen (16 per cent) of the 118 cases were resolved with the arbitrator making a finding that bullying had occurred. Of these cases, 11 (58 per cent) made reference to *Chemler*. Six of those cases included an extended quote paragraph, repeating the paragraph in its entirety. This paragraph involved the application of *Chemler* in the WCC case *Attorney-General’s Department v K*.<sup>52</sup> The paragraph was used to justify a decision relating to the circumstances of injury, with a typical application, including the phrase, ‘I have accepted that the harassment, bullying and humiliation occurred in the workplace. They were actual events and were perceived by [the employee] as creating an offensive and hostile environment’.<sup>53</sup> *Chemler*, in this context, was used to justify a decision where an issue arose as to the employee’s perception of events. As long as something can be proven to have occurred, for example repeated racial slurs and comments as was the case in *Chemler*,<sup>54</sup> compensation may be awarded.

All but one reference to *Chemler* in these 11 cases made a direct mention of the ‘eggshell psyche’ principle, despite not one case referencing the injured employee’s vulnerability or susceptibility to injury. References to individual employees and their psychological experiences were inferred, and then only in terms of perception. For example, ‘[c]ounsel submits that in accordance with the decision in [*Chemler*] different perceptions of real events did not prevent a worker from bringing a claim for a primary psychological injury’.<sup>55</sup> ‘Different’ does not imply the level of susceptibility assumed by an ‘eggshell psyche’. The use of the phrase in the sampled cases is thus misleading, potentially creating a stigmatising vision of the injured employee as possessing an ‘eggshell psyche’ and to be ‘taken as found’ by a potentially unwitting employer. The eggshell concept thus minimises employer responsibility and shifts blame to the injured employee, despite the issue being largely about ‘different’ interpretations of actual events – as the following three exemplars demonstrate.

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50 (2007) 5 DDCR 286 (‘*Chemler*’).

51 Ibid 293 [40].

52 (2010) 8 DDCR 120.

53 Case Example ID 49.

54 Ibid.

55 Case Example ID 112.

## 1 Workplace Bullying: Perception Disparity – Case Example ID 14

*Alleged injury:* ‘On 3 January 2007, [the employee] claims to have suffered a psychological injury. ... [The employee] said he felt he was being bullied and harassed by certain staff’.

*Discussion:* In this case example, *Chemler* was raised by the employer’s counsel to challenge the bullying claim on the grounds that the employee’s injury arose from perception of events neither proven nor corroborated. In other words, these were not actual events:

The Respondent’s Counsel submitted that, even if [the employee] had suffered a psychological injury, there is no evidence, other than that of [himself], to support his contention that he was harassed or bullied. He merely has a perception that his loss of his car key was due to the action of co-workers or that he was called a ‘dog’ or whistled at as if calling a dog.

The arbitrator also quoted Spigelman CJ in *Chemler*: ‘it cannot be said that this is a case in which there was erroneous perception not based upon conduct in the workplace’.<sup>56</sup> The arbitrator then continued to interpret the evidence in terms of the decision in *Chemler*:

This purposeful action by a co-worker is unlikely to have been an isolated event and [the employee’s] perception of co-worker involvement in other incidents is likely to be well founded. The incident involving the car key has a similar characteristic to that of the removed pay slip (although I believe the flat battery and food poisoning claims may be a bit far fetched, although the suspicions were prompted by other events for which there was justification). ... Accordingly, if [the employee] had developed perceptions, even if erroneous, I consider there are sufficient instances that are clearly related to actual conduct in the workplace.

The arbitrator was concerned, therefore, not with any particular susceptibility on the part of the employee to injury or misperception, but the actual presence of events. The events may be ‘a bit far fetched’, but their likely presence is enough to pass the *Chemler* test.

## 2 Workplace Bullying: Perception Disparity – Case Example ID 15

*Alleged injury:* ‘The evidence refers to the terms “bullying”, “harassment” and “intimidation” as a description of a stressful working environment’.

*Discussion:* In this case, *Chemler* was again raised in the context of misperception. After first examining Chief Justice Spigelman’s and Acting Justice of Appeal Bryson’s position in *Chemler*, the arbitrator noted ‘[t]he relevance of misperception was dealt with by Spigelman CJ and Bryson AJA in [*Chemler*]. In that Decision [Basten JA made] the following comments in relation to misperception’:

The appellant’s contention that a misperception, or indeed a perception, cannot give rise to an injury ‘arising out of or in the course of employment’, must be a contention that the accepted psychological state of the respondent did not arise out of or in the course of that employment. For there to be the relevant connection with the employment, it was argued that the events perceived must be ‘real’ and not ‘imagined’ ...

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<sup>56</sup> (2007) 5 DDCR 286, 294 [47].

If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognizable injury followed, it was open to the Commission to conclude that causation was established.<sup>57</sup>

Without any specific analysis of the facts of case example ID 15, the arbitrator used the authority of *Chemler* to reject the employer's 'misconception defence', noting in the final paragraph that '[t]he Respondent has failed to establish a proper misconception defence pursuant to the Decision in [*Chemler*]'. This conclusion appears illogical, given that *Chemler* approaches misconception as a cause of injury, not something that may be used to 'defend' a claim. Thus, the use of *Chemler* appears to be indicative of an arbitrator more concerned with the justification of a decision than any robust exploration of the implications of case law.

### 3 Workplace Bullying: Perception Disparity – Case Example ID 112

*Alleged injury:* The employee claimed 'lump sum compensation due to a primary psychological injury sustained as a consequence of overwork, lack of the provision of suitable duties, bullying, harassment and being pressured into performing work unauthorised by his doctor during the course of his employment'.

*Discussion:* In this case example, a more direct approach to misconception is located, with the arbitrator using the authority of *Chemler* to justify a link between misconception, actual events and compensable injury:

The report of [the physiotherapist] recorded [the employee's] history of his disaffection with his employer and the dispute with the insurer. The Royal Prince Alfred Pain Management Assessment supports a finding of both a primary and secondary psychological condition. Counsel submits that in accordance with the decision in [*Chemler*], different perceptions of real events did not prevent a worker from bringing a claim for a primary psychological injury. [The employee] perceived that real events gave rise to a sense of grievance and this was consistent with a primary psychological injury.

While the primary evidence for the employee's misconception appears to be drawn from a practitioner not trained in psychological medicine, there is a clear correlation between actual, or at least probable, events and misperception. Again, no mention is made of the employee's supposed 'eggshell psyche'; rather, a sustained and corroborated misperception provides the basis for the arbitrator to conclude that they were 'satisfied that the events raised by [the employee] did in fact occur and were not imaginary'.

The very real, and disturbing conclusion from these cases, is that the potentially emotive 'eggshell psyche' principle is not actually applied in the context of an 'eggshell psyche' assessment. Rather, it is used to introduce the broader justification for the compensation calculation that a misperception is a valid cause of compensable injury when some actual event led, however 'far fetched' the connection might be, to a psychological injury.

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57 Ibid 297 [67], 298 [69].

## V CONCLUSIONS

With workplace bullying identified as an increasing social problem according to national<sup>58</sup> and global statistics,<sup>59</sup> the legal profession is positioned as a vital component in attempts to manage its aftermath, as injured employees continue to seek redress and compensation through the legal system. Although an equal employer–employee relationship was assumed, arising from contract law,<sup>60</sup> unions, employment relations and industrial action reveal a long history of struggle and inequity.<sup>61</sup> In Australia, the administrative legal environment of the WCC is a common destination for those in workplaces affected by bullying due in part to the failure of the *FW Act* in resolving workplace bullying issues.<sup>62</sup> The heightened role that expert opinion exerts in defining and legitimating disease,<sup>63</sup> however, makes it increasingly likely that psychological injury may be a social product affected by stakeholders with varying degrees of power and authority.

The present QCA examined a complete sample (n = 118) of WCC psychological injury cases where workplace bullying was claimed, to explore if and how stigma associated with this injury type was affected by employee and expert perception and evidence. Findings revealed that a formal diagnosis of workplace bullying was infrequently upheld and commonly disputed by medico-legal experts and WCC arbitrators, despite the majority of claims being decided in the employee's favour. The greatest disparity emerged between employees on the one hand and their employers and insurance companies' medical experts on the other. This is an understandable disparity, given the adversarial nature of the WCC. While 87 per cent of employees claimed they experienced workplace bullying, only eight per cent of employers, two per cent of employers' insurance psychiatrists and three per cent of employers' insurance doctors endorsed that claim. Given that 'bully' is a stigmatised social label, it is unsurprising that members of the social groups with greater power, authority and status had their opinions legally upheld, rather than employees with less socio-economic agency.

The complexity of defining workplace bullying further complicated the process of arbitrating varied social perceptions. For instance, in 45 per cent of cases where employees perceived that workplace bullying had occurred, this perception of events failed to be supported by one or more employee-nominated treating medical experts. In contrast, in 60 per cent of the 15 cases where

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58 Safe Work Australia, above n 4.

59 Al-Karim Samnani, 'The Early Stages of Workplace Bullying and How It Becomes Prolonged: The Role of Culture in Predicting Target Responses' (2013) 113 *Journal of Business Ethics* 119.

60 Greg Patmore, 'A Voice for Whom? Employee Representation and Labour Legislation in Australia' (2006) 29(1) *University of New South Wales Law Journal* 21.

61 See generally Michael Barry and Marco Michelotti, 'Market Power Constrained: Union and Non-Union Collective Bargaining Outcomes in the Australia Resources Sector' (2009) 20 *Labour and Industry* 25; Alejandro Donado and Klaus Wälde, 'How Trade Unions Increase Welfare' (2012) 122 *Economic Journal* 990.

62 Worth and Squelch, above n 2, 1044.

63 Katherine J Rosich and Janet R Hankin, 'Executive Summary: What Do We Know? Key Findings from 50 Years of Medical Sociology' (2010) 51 *Journal of Health and Social Behavior* S1, S4.

employees' accounts of events did not identify workplace bullying, at least one of the employees' nominated treating medical experts *did* label the workplace behaviour as bullying. Such findings highlight disparity among professional opinion and those with 'lived experiences' about what constitutes workplace bullying. Not one case manifested agreement among all stakeholders that bullying did or did not occur. Furthermore, as a whole, the sample clearly demonstrates a tendency for WCC arbitrators to reject claims of workplace bullying, despite the often favourable outcome of workers' compensation claims for the individual. QCA of arbitrators' statements evidences agreement that, while claimants were successful in 89 per cent (105 of 118) of cases, the arbitrators determined that workplace bullying occurred in just 17 per cent (20 of 118) of cases.

The presentation of in-depth qualitative examples demonstrates how evidence is differentially presented and used to create disparate perceptions of social interactions on two accounts: first, in definitions of bullying; and secondly, in the construction of the perceived fragility of Australian employees who are metaphorically presented as eggs ready to 'crack'. Coupled with persistent changes in Australian labour law and regulation,<sup>64</sup> our findings contribute additional evidence of the increased role that employers' insurance companies and social context play, not only in risk determination,<sup>65</sup> but, moreover, in the negotiated construction of psychological injury. To date, there has been much research carried out on the topic of bullying, and case law has developed to create a library of bullying-focused resources. The definition of bullying, however, remains ambiguous and its application is inconsistent.

The present research shows that the label 'bullying' is applied to describe a range of experiences, and is used indiscriminately by key stakeholders in the WCC. This indiscriminate use has several consequences. First, the use of the word 'bullying' is often dismissed by WCC arbitrators as a simple indicator of injury without addressing the emotive connotations implied, which typically require a 'victim' and 'bully'. These terms are not socially neutral – each carry significant social stigma. Second, the legal 'eggshell psyche' principle, applied to cases where misperception is involved in an injurious situation, is applied by arbitrators in the context of an analysis of actual or imagined events. This again overlooks the emotive implications of the phrase. Finally, the WCC's approach to bullying dismisses the emotive and potentially traumatising connotations of the term 'bullying' for both alleged victim and perpetrator, portraying the injured employee as a passive receptacle of experience.

Injury resulting from bullying is given the context of the 'eggshell skull', where any robust analysis of the seriousness of workplace behaviour is relegated to the domain of the individual's pre-existing susceptibility to injury and the employer's inability to defend against people who, so the implication goes, are

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64 See generally David Sadler and Bob Fagan, 'Australian Trade Unions and the Politics of Scale: Reconstructing the Spatiality of Industrial Relations' (2004) 80 *Economic Geography* 23.

65 See generally Tim Bartley and Marc Schneiberg, 'Rationality and Institutional Contingency: The Varying Politics of Economic Regulation in the Fire Insurance Industry' (2002) 45 *Sociological Perspectives* 47.

already ‘damaged’ and seek compensation by claiming the most innocuous workplace activities are ‘bullying’. Such a situation creates an inevitable perpetuation of stigma, with employees using the word ‘bullying’ to access the compensation system oblivious to the potentially negative connotations of allowing claims of bullying to remain effectively unresolved. Workplace bullying is a costly social problem with ongoing mental health implications for both individuals and organisations. Until NSW’s legal and administrative functions can adequately define and manage the aftermath of bullying, they remain at best ineffective in halting, and at worst actively collaborating in, the perpetuation of stigma attached to workplace bullying and resulting psychological injury.