Beyond slips, trips, and falls

The emerging importance of psychosocial risk management
The mental wellbeing of staff in all organisations is now a key concern for their employers. Rebecca Michalak looks at the growing emphasis on psychosocial risk management in the modern workplace.

In 1835, a butcher’s servant suffered a broken thigh, a dislocated shoulder and various other injuries when about four hundredweight of mutton fell on him from an overloaded transport wagon drawn by four horses.

The result was a landmark common law case (Priestely v Fowler, 1837) that arguably formed the origins of Australian occupational health and safety (OHS) law.

In delivering his opinion on the case, Lord Abinger made a number of key points, including that the master/servant relationship “bound the master directly to provide for the safety of his servant to the best of his judgment, information, and belief”.

Fast forward to 1937, when Wilsons and Clyde Coal Company v English [1937] UKHL 2 saw the introduction of the concept of duty of care’, and the emergence of statute law based on ‘legislate, police and punish’. This approach then passed through the Robens reform era (1972-1992) to become the basis of modern OHS, characterised by joint employer/employee duty of care and due diligence principles, supported by statute and common law provisions.

Given that its foundations were formed during the Industrial Revolution, a time in which terrible trauma occurred on a daily basis in factories and elsewhere, and safety practices were primitive – such as using canaries to gauge toxic gas levels in mineshafts – it is not surprising that interpretations of OHS law to date have been singularly focused on physical safety.

However, the OHS law domain is now facing a significant transition – a shift away from the century-plus focus on slips, trips and falls toward the legislated requirement to preserve both physical and psychological safety within the workplace.

As one former OHS inspector observes: “If we look at now where all the emerging issues are, and the issues that the inspectorate should be starting to focus on, they’re more the psychosocial issues around work intensification and increased workloads, and basically some of the stressful factors associated with intimidation, bullying and harassment, and performance management, which is really making a big impact in a lot of areas.”

It begs the question, what does the term ‘psychological safety’ even mean? What constitutes a psychosocial risk factor? What are the consequences of psychologically unsafe workplaces? And how do organisations ensure their workplaces are psychologically safe?

The psychological side of workplace safety: Minding minds at work

Section 19 (Primary duty of care) of the Work Health and Safety Act 2011 (Qld) (the Act) says:

19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking. [p33]

In short, the general duty imposed on employers requires them to establish and maintain a working environment that is safe and without risks to health. In Australia, the definition of occupational health follows that co-adopted by the International Labour Organisation (ILO) and the World Health Organization (WHO) in 1950, and revised in 1995, which includes the promotion and maintenance of the highest degree of physical, mental, and social wellbeing of workers. In line with this, an employer’s statutory general duties cover both physical and mental health as well as safety, and thus a variety of psychosocial risks fall under the rubric of the OHS legislation.

What constitutes a psychosocial risk factor?

Psychosocial risk factors can be broadly defined as factors that may affect workers’ psychological response to their work and workplace conditions.

Studies have identified a number of core psychosocial risk factors that typically lead to distress and can have a negative impact on employee psychological and physical health. In doing so, they may result in a psychological or psychiatric injury, and lead to workers’ compensation claims. These claims may include a primary claim for mental stress, and secondary claims for physical injuries associated with specific psychosocial stressors (for example, overwork and RSI-style claims).
Psychosocial risk factors can be classified into three categories: 1) job context, 2) job content, and 3) individual differences. Table one, below, provides examples (note, not an exhaustive list) for each of these categories.

### Consequences of psychologically unsafe workplaces

The consequences of failing to establish and maintain a 'psychologically safe' workplace are multi-fold. These include statutory fines, possible imprisonment, and common law prosecution by injured workers. Cases of the latter are often complex, and may include not only OSH law but also integrate aspects of equal employment opportunity (EEO) and anti-discrimination law as well.

Secondary consequences include productivity costs (particularly in terms of presenteeism and absenteeism), damage to organisational branding from customer and employer points of view, and professional indemnity issues, given that distressed employees are likely to make errors in client work.

The legal consequences in particular can be significant. A notable successful multi-law prosecution is the now infamous Naidu multi-million common law and vicarious liability case (see Naidu v Group 4 Securitas & Anor [2005] NSWSC 618 and Naidu v Group 4 Securitas Pty Ltd & Anor [2006] NSWSC 144), which set a range of new precedents for awarded damages, including exemplary damage.

Following this was the media-driven 2007 exposure of Telstra’s cut-throat corporate culture as it pertained to the suicide cases of Sally Sandic and Leon Dousett, the $37m Fraser-Kirk David Jones sexual harassment scandal (with sexual harassment a known job context psychosocial risk factor), and the $9m Pacific Brands intimidation and bullying claim. The Taylor (Taylor v Q-Comp WC/2011/370) case is a more recent example of a successful workers’ compensation claim for mental stress following bullying behaviour, which led to the development of an adjustment disorder and depressed mood. The ruling accepted that Taylor suffered a psychiatric or psychological injury which arose out of or in the course of her employment and for which her employment was a significant contributing factor.

In addition to attracting ongoing negative media attention across Australia, the Fraser-Kirk David Jones case highlights a number of key points on the potential consequences of failing to provide a psychologically safe workplace. First, while settled for a fraction of the original claim amount ($850,000 versus $37m), it nonetheless forced the resignation of the perpetrator, Mark McInnes. The day he stood down, David Jones shares plummeted $81m in share market value, evidence of how harassing conduct can have a sizeable impact on an organisation’s bottom line.

Second, the case provides an example of the potential liability for the leadership of an organisation in situations in which they have been made aware of the occurrence of such behaviour, through a complaint or other means (that is, they know that a psychosocial risk exists), but fail to take action to monitor and rectify the hazard.

The new section 26 within the harmonised OHS laws implemented in 2012 deems that if a corporation has a duty or obligation under the Act, an ‘officer’ of that corporation must exercise due diligence to ensure that the body complies with that duty or obligation. An officer is defined as any senior executive or manager who makes—or participates in making—decisions that affect the whole, or a substantial part, of a business or undertaking. This would include, for example, partners, directors and the C-suite of any law firm, plus or minus divisional heads depending on their decision-making capacity.

Due diligence includes but is not limited to 1) taking reasonable steps to ensure that the organisation has appropriate processes for receiving and considering information regarding incidents, hazards and risk, and responding in a timely way to that information, and 2) that the organisation has available for use, and uses, appropriate resources and processes to enable hazards associated with the operations of the business or undertaking of the body to be identified and risks associated with those hazards to be eliminated or minimised.

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**Table one: psychosocial risk factors**

<table>
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<tr>
<th>Job content</th>
<th>Job context</th>
<th>Individual differences</th>
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<tbody>
<tr>
<td>• High demand (for example, high workloads, tight time pressures, high physical/cognitive and emotional demands, intense concentration for long periods)</td>
<td>• Poor interpersonal relationships, including conflicts with peers and supervisors, poor leadership practices</td>
<td>• Low self-esteem and self-efficacy</td>
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<td>• Monotonous work</td>
<td>• Bullying and harassment (national definition: “repeated, unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety”)</td>
<td>• Personality traits, such as type ‘A’ (including achievement striving, impatience, and irritability), neuroticism, pessimism, perfectionism, negative affectivity, hardness, and locus of control</td>
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<tr>
<td>• Work with few possibilities to learn new things or to develop knowledge and skills</td>
<td>• Violence, or threats of violence</td>
<td>• Coping abilities and resilience</td>
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<td>• Fragmented or meaningless work</td>
<td>• Low control/decision latitude (skills discretion and decision authority)</td>
<td>• Emotion differences</td>
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<td></td>
<td>• Lack of organisational support</td>
<td>• Gender</td>
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<td></td>
<td>• Effort-reward imbalances</td>
<td>• Age</td>
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<td></td>
<td>• (In)justice – whether it be distributive, procedural or interactional in nature</td>
<td>• Work-life interface/cross-over</td>
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<td></td>
<td>• Conflicting demands, including role conflict and/or ambiguity</td>
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Failure to fulfil these due diligence requirements comes with severe penalties. These include fines for organisations of up to $3,000,000 for a Category 1 reckless negligence case, and fines for each officer up to $600,000 and or five years’ imprisonment.

In legal specifically, the presence of psychosocial risk factors such as high job demand (for example, extreme working hours), poor leadership styles including autocratic and laissez-faire, bullying, intimidating, aggressive, and competitive behaviour, low decision latitude (stemming from hierarchical structures that foster micromanagement), and the lack of a supportive work environment, may lead to potential claims.

The absence of a documented risk management plan that monitors and addresses these well-known psychosocial risks, evidence that these risks have been reported by employees or that management is aware (or should reasonably be aware) that they exist, and subsequent failure to act to reduce and or rectify these hazards places officers of organisations in precarious personal liability positions.

Recall the words of the judge in Priestley v Fowler – that there is a legal obligation that “the master directly to provide for the safety of his servant to the best of his judgment, information, and belief”.

In light of this, it is unsurprising that many boards now place OHS as a standing agenda item at the executive level, and are working to introduce systems that both capture and cover off their due diligence responsibilities.

Psychosocial risk management – a tiered approach

As mentioned already, the general duty of employers is now accepted to include a requirement for employers to implement systematic OHS risk management strategies and processes. While employers may be less than familiar with psychosocial risks, the overarching adage of ‘spot the hazard, assess the risk, make the changes,’ still applies.

There are three different levels of risk management that organisations can use to help prevent, reduce, and effectively manage the impact of psychosocial risks. These are:

1. **Primary prevention** – Aims to identify and remove/reduce risks prior to them leading to symptoms/problems. This includes, for example, continual monitoring of workload demands and appropriate employee resourcing to prevent any requirement for excessive working hours.

2. **Secondary prevention** – Also called ‘rescue management’, this is an early intervention approach applied as soon as an issue has been identified to attempt to minimise negative consequences, as well as avert any catastrophe that a failure to act might lead to. For example, if there are early, informal reports of bullying or harassing behaviour, remedial action to address this psychosocial risk should be undertaken before it negatively impacts any specific employee.

3. **Tertiary prevention** – Aimed at ending or resolving the problem situation, and effectively dealing with (that is, fully resolving) its negative effects. For example, where an employee lodges formal complaint of sexual harassment and suffers associated distress, the organisation provides the person making the report with all necessary means to assist them with dealing with and recovery from the stressful effects of the incident.

Primary prevention is the most effective strategy for organisations quite simply because prevention is better than cure. However, all three levels of prevention are both useful and important, so the best approach is to develop and implement an integrated risk management plan that includes tactics for all three levels of prevention. The plan should include, as necessary, risk management strategies which are universal (address all employees in the organisation), targeted (address specific sub-groups of employees who are identified as being ‘at risk’) and indicated (for specific ‘at risk’ individuals).

Once developed, implementation of the plan should occur in a way that maximises workforce participation and involvement. This includes fostering a prevention-based, safety-oriented culture, with an emphasis on both awareness and action to ensure that the employer meets their legislative requirements for both physical and psychological safety at work.

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**Note**

1. NRCOHSR. 2008. OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia