New Zealand Journal of Employment Relations 35(2):88-96

Commentary - Occupational Stress and Workers' Compensation: Getting out of the kitchen?

NADINE MCDONNELL[*]

Introduction

Most people accept that employers should compensate workers for work-related injury and disease. Workers' compensation law defines a work-related injury as an "injury arising out of and in the course or employment". The rule seems clear – if there is evidence that someone has suffered a work-related injury, they should be compensated for this harm or loss by their employer. However, workers' compensation has never been straightforward.

When it started a hundred years ago workers' compensation provided compensation for workmen who suffered physical injuries in work place accidents. Psychological injury, occupational diseases and conditions that arose over time were simply not accepted as work-related. Over the years since coverage has been expanded to include psychological injuries as well as occupational disease but the need to prove that the injury is somehow caused by the employment remains. Before workers receive workers' compensation, they must prove that the injury or disease is work-related. As Arthur Larson rightly pointed out forty years ago, the problem of obtaining workers' compensation was always easier when the injury was 'physical':

> "[H]ow could it be real when. . . it was purely mental?
>
> This poignant judicial cry out of the past … contains the clue to almost all of the trouble that has attended the development of workmen's compensation law related to mental and nervous injuries. This equation of "mental" with "unreal", or imaginary, or phoney, is so ingrained that it has achieved a firm place in our idiomatic language. Who has not at some time, in dismissing a physical complaint of some suffering friend or relative, airily waved the complaint aside by saying, "Oh, it's all in his head?"" (Larson, 1970, at 1234)

Proof is also more difficult when the condition arises over time instead of at one specific moment. Quite simply it is easier to show that an injury is work-related when it happens in an instant, like a car accident, rather than over several days or months. Many claims for occupational stress present difficulties for workers' compensation because they lack a clear physical component and often arise over time.

Another problem is that the relationship between stress and injury is not well understood. Stress is associated many different types of work - with tedious and repetitive work, physically demanding and risky work, work with difficult and abusive co-workers or supervisors, work dealing with the public and work in isolation, work

[*] Dr Nadine McDonnell is a Senior Research Fellow in the Centre for Occupational Health and Safety Research, AUT and is a Senior Lecturer at the University of Auckland.

occasioned by dangerous or violent incidents and so on. And it is not at all clear how much stress is too much stress. Different workers react differently to similar stressors. Some workers may thrive while others get sick. All of these factors make it difficult to prove that the worker's injury or illness was work-related. Even if a link between the work stress and the injury is proven, the stress may be seen as an acceptable aspect of the job and the problem is not the job but the worker. Some believe that when the worker accepts a stressful job and the pay that goes with it, they accept the stress and if the stress is too much and they get sick, then they should find another job. As the saying goes, "if you can't stand the heat, get out of the kitchen".

The basic rule is that workers should be compensated for work-related injuries and diseases, but this rule is hard to apply when the injury and its cause are related to occupational stress. Below I discuss how 'personal injury' is defined by workers' compensation schemes and examine how this definition determines which claims are accepted as work-related injury or disease. As discussed below, the problem is that occupational stress is seen as an illness arising over time and therefore rarely meets the strict criteria imposed by workers' compensation agencies covering work-related injury.

Personal injury - this and not that

Workers' compensation is shaped by dichotomies – the duality of this and not that. The obvious duality shaping workers' compensation is that of work and non-work. Workers' compensation covers *work-related* injuries and does not cover non-work injuries. While many people feel as though they are working all of the time, if they count the hours, they will discover that they only work for 25 to 30 percent of their time. Any injury that occurs while they are not working, in the sense that they are not being paid to do what they are doing when hurt, is not covered by workers' compensation. This means that for most people if they are hurt doing something while at home, playing sports, or driving they cannot rely on workers' compensation to pay for their medical care or lost wages. For most workers, (although not those working in New Zealand)), workers' compensation is the only income insurance they have. If they are seriously injured and cannot work most workers face financial ruin, losing their savings and at times their homes, unless the disabling condition can be shown to be work-related. This has meant that in many jurisdictions, (again except New Zealand), workers have a strong motivation to prove that their injury was work-related. Moreover, in order to have their claim accepted, the worker must establish that their injury was a personal injury and that it arose out of and in the course of their employment. That is, the requirement is that the injury must be *a personal injury*.

The term 'personal injury' denotes the next set of dualities – that of personal injury versus property damage and that of injury versus disease. Injury is hurt or harm and personal injury is hurt or harm to the person, but does not include damage or harm to their property. When workers' compensation schemes were first established in the early part of the 20th Century, they generally covered physical injuries caused by accident. Damaged clothing or tools were not covered, although modern workers' compensation schemes will pay for damaged eyeglasses, dentures and prostheses. When first enacted, workers' compensation was to compensate injured workmen (initially the scheme did not cover women or women's work) for strains, sprains, cuts, bruises and broken bones caused by work-related accidents. Compensation covered physical, not mental, injury

(and death) caused by accidents that happened on the job. As stated above, the objective of workmen's compensation (as it was called for many years) was to provide compensation to workmen injured at work or if they were killed at work, to pay compensation to their widows. Workers' compensation was never intended to cover all misfortunes of life. The scheme was designed as a means to compensate workers who suffered personal injuries which happened during and because of work.

In most jurisdictions under workers' compensation schemes personal injury is now defined as including *mental* as well as physical injury as well as illness suffered as the consequence of identified diseases. For example, in British Columbia personal injury is defined by policy as "…any physiological change arising from some cause, for example, a limitation in movement of the back or restriction in the use of a limb." This definition resembles that offered in *Larson's Workers' Compensation* which defines 'personal injury' as including:

> "… any harmful change in the body. It need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse …" (Larson, 1984, at Chapter 42.00)

In New Zealand the Accident Compensation Act 2001 provides a long and rather complex definition for personal injury. The definition demonstrates some of the challenges drafters face when trying to offer a precise definition. The definition offered by Section 26 distinguishes between physical and mental injury and limits coverage for a mental injury to those injuries which are the result of a physical injury or are the result of a sex crime or a work-related mental injury as defined under the Act. Non-work mental injuries, which are not a consequence of a physical injury, are covered by the ACC scheme only if they are the result of a sex crime as defined by scheme. Despite the wider contemporary definition of 'personal injury', the traditional notion of personal injury as physical harm to the worker's person caused by traumatic accident continues to influence compensation decisions.

An understanding of what is meant by 'personal injury' also requires an appreciation of the other 'twosomes', that is injury' and disease and accident and disease, as outlined in table 1. These two dualities taken with the further twosome of cause and effect underpin the definition of personal injury in most compensation schemes. First, with respect to cause and effect, the duality of injury and disease represents the *consequence or effect* of some event, while the duality of accident and disease is concerned with *the cause*. Here confusion seems inevitable as the word 'disease' is used to refer to both the cause and effect – the word refers to both the illness and the process, which causes the sickness. A disease is an unhealthy condition of the body (or part of it) or the mind but it is not an injury.

Table 1: Duality of Terms

Cause	Effect
Accident - specific event - identifiable trauma - internal to the body	**Injury** (mental or physical injury) - strain, sprain, bruise, break, cut
Disease - process over time - uncertain trigger - internal to the body	**Disease** (mental or physical illness)

In British Columbia 'injury' is defined as a harmful physiological change in the body or mind arising from some cause, but not a condition which is also a disease (WorkSafeBC, 2011, at Paragraph C3-12:00). Under most workers' compensation legislation, including the New Zealand Accident Compensation Act, injury is distinguished from disease. This fits with the ordinary understanding of the words. People who are injured are not generally thought of as sick, at least not initially. This distinction is maintained by workers' compensation organisation's rules, which state that any sickness or disease suffered by a worker is not to be treated as a personal injury unless the specific disease is recognized as a condition that is to be treated as a personal injury. And the distinction between what is seen as an injury and what is a disease depends on its *cause*, whether the condition was caused by an accident or whether it was caused by a disease or disease like process. Basically, an injury is harm caused by an accident while a disease is harm caused by a disease.

The distinction between injury and disease thus turns on the distinction between accident and disease and thus the definition of an accident. The *Oxford Dictionaries* defines accident as: "an unfortunate incident that happens unexpectedly;…an event that happens by chance and is without apparent cause deliberate cause"[1]. This definition is similar to that set out in Larson's Workers' Compensation which defines 'by accident' as "…an unlooked for mishap or an untoward event which is not expected or designed" (Larson, 1984, at Chapter 37.00). The key is that an accident is an event (or series of events) and not a process. While the idea that an 'accident' is unexpected is important, this does not necessarily distinguish accident from disease because no one really expects to get sick.

Another quality of an accident is suggested by the British Columbian definition of 'personal injury' as physiological change "for some reason". Both accidents and diseases are unexpected and unwanted events, but an accident, unlike a disease, is assumed to involve some element of human agency. An accident is unexpected but a human mishap involves some element of human action or failure to act. Disease is mysterious and at times, beyond human understanding. There may be no reason why one person gets sick while another does not. So where the mishap cannot be attributed to any human activity or agency (in the sense that no person could reasonably bear any responsibility for the harm),

[1] See http://www.oxforddictionaries.com/definition/accident?view=uk

then it might as well be assumed that the cause was natural and where human health is concerned, the cause must be a disease. In this way a disease is an Act of God, like a hurricane; a storm is not thought of as an accident. Similarly becoming ill is not usually thought of as the result of an accident, but if some human act is identified as the cause of the sickness, then the disease is accidental. And because accidents are felt to be result or consequence of human activity, they should be prevented. This sentiment underlies the belief that employers should take steps to safeguard their workers. Where such measures fail to protect the worker from those events which are within human control, then the worker should be compensated. But what responsibility should employers have for controlling diseases, when the unexpected and unwanted events are beyond human control? In a perfect world, all accidents would be avoided but diseases would only be contained. In this sense, aging can be seen as the quintessential disease. Very few accidents are as debilitating as old age but aging like many diseases is a process, not one event, and very little is understood about the process. In New Zealand the Accident Compensation Act, 2001 treats aging is a natural event and any mishap "substantially due to aging" is not considered to be a personal injury for the purposes of compensation. The distinction between accident and disease thus rest on the view that an accident is a discrete unfortunate but explicable event while a disease involves a poorly understood process.

This distinction means that accidents are easier to identify and explain than diseases. Furthermore, for the purposes of workers' compensation this means that it is easier to prove that an accident arose out of and in the course of employment, than it is to prove that a disease is caused by work. More precisely, an accident is an event, or series of events, which happened in a certain place and at a specified time and as result of some human act or omission. An accident can be witnessed, documented and proven to have happened in a certain place at a certain time. In contrast, there can be no first hand evidence that a disease, a poorly understood process possibly manifesting over decades and involving multiple workplaces and employers, arose out of and in the course of employment. The ease by which an accident can be explained is often reflected in the ease with which the resulting injury is proven to be compensable. It is simply much simpler to show that an accident is work-related than it is to prove that a disease is due to the worker's work activities or environment. In contrast, it can take years of expensive epidemiological research to demonstrate that an illness is due to the nature of certain employment. Diseases must be recognized by the compensation system as related to employment, as industrial or occupational diseases, before most workers can expect any compensation for them. The burden of providing evidence linking the injury or disease to the employment is often born by the individual worker in the sense that the worker absent the proof, the worker will not receive workers' compensation. But the proof of a causal relationship between a disease and a work activity (or environment) cannot be made on a case by case basis.

At the same time, the ease with which an accident is determined to be work-related does not mean that the distinction between an injury and disease (as the harm or effect) is clear cut for the purposes of workers' compensation. A worker pricked by a tainted needle might get a disease by accident and for the purposes of workers' compensation would have a personal injury whereas another worker who injured their back lifting a patient and was found to have an underlying back condition may be deemed to have a disease (ie degenerative disc disease). The injury or disease as an effect, requires an investigation of its cause and will be covered by the compensation scheme as 'personal injury' only if the cause can be determined as an 'accident'. Where the cause is

determined to be a disease or disease like process, then further inquiry is needed in order to find out if the disease has been recognized as an occupational disease.

In most jurisdictions in order for a worker to have a claim for occupational disease accepted, they must prove three things. First, they must prove that they suffer from a specific illness (i.e. that an appropriate medical expert has diagnose the worker as suffering from a certain disease). Second, the worker must establish that the diagnosed illness is an *occupational* disease (i.e. an illness which epidemiological evidence has been accepted by the compensation authorities as proving the disease is one which can be caused by work-related activities or conditions). Third, that the worker must prove that the activities or conditions at their particular work were similar to those which have been accepted as causing their condition and thus were likely to have caused their illness.

Given that workers' compensation is established primarily for work-related injuries, the seeming bias towards accident and against disease makes sense. That is, employers should only have to compensate workers for conditions that can be shown to be work-related. An injury caused by an accident on the job can bee seen by all concerned as work-related. A disease, however, cannot be so easily linked to a particular job. It took years of study and a lot of epidemiological evidence to persuade governments and employers to accept that some diseases could be caused by employment activities and conditions. For example it took many years to establish that the work environment was a significant cause of respiratory diseases rather than smoking or other urban pollutants. And while the list of industrial or occupational diseases continues to grow, the bias against claims for conditions that arise over time and as a result of a gradual process remains because the scheme is for work-related injury and disease.

Thus, it is important to understand that the categories which structure workers' compensation rules are shaped by the dualities of work and non-work, physical and mental, and injury and disease and are set against the backdrop of assumptions about accidents and diseases. It is this conceptual and complicated milieu that provides the context in which occupational stress claims are considered and helps explain why occupational stress presents workers' compensation with such difficulties.

Classifying Claims

A further duality – namely, mental and physical – is used to classify workers' compensation claims. Mental and physical as cause (trauma) and effect (injury) describe the four basic kinds of compensation claims. Every claim can be placed in one of these four categories, as outlined in table 2.

Table 2: Duality of Mental and Physical Injury

Cause / Effect	Physical injury	Mental injury
Physical trauma	Physical / Physical	Physical / Mental
Mental trauma	Mental / Physical	Mental / Mental

The first category is that of claims for physical trauma causing physical injury. An example of a physical/physical claim is when a worker breaks his thumb while hammering a nail. If the worker was hammering as part of his job, then the evidence to establish a workers' compensation claim is easy to find; that is, *the injury* is the broken thumb and *the cause* is the hammering. While physical injury involves harm or hurt to the body, physical *trauma* involves force, such as gravity, and its effect on the body. Physical trauma can be observed and incidents involving physical trauma and resulting in physical injury can be witnessed. All that is needed to establish the compensability of the injury is evidence that hammer blow which broke the thumb occurred while the worker was working and as a result of their work activities.

The second category is that of physical/mental claims in which physical trauma is caused by emotional or mental injury. Mental injury is not usually defined in compensation legislation but is described in most jurisdictions as involving significant psychological illness. Transient upset, such as humiliation, embarrassment or anger would not qualify as mental injury. In both New Zealand and British Columbia a diagnosis using the American Psychiatric *Diagnostic and Statistical Manual of Mental Disorders* is required before compensation is considered. Before a physical/mental claim is accepted the evidence needs to support a conclusion that the physical trauma and, in most cases the resulting physical injury, arose out of and in the course of employment and the medical evidence needs to link the claimant's mental injury to this physical trauma and the consequence of the compensable physical injury. For example, a worker who suffered a disabling injury and who subsequently became depressed would likely be compensated for the depression if the evidence supported a conclusion that the depression was caused by the physical injury.

The third category of claims is mental/physical claims where mental or psychological stimulus results in a physical injury. Here the precipitating event may be a sudden noise, a gun shot, with physical consequences, such as a heart attack. The event is 'mental' in that there was no physical contact with the worker, but the effect of the mental stimulus was physical in that the worker suffered an injury. The evidence needed to establish the worker's claim for compensation would be medical evidence of a direct link between the mental stimulus and the physical injury. In particular, in this type of claim, expert medical evidence would be needed to explain why the stress of the psychological stimulus caused the physical harm. The difficulty is that if the cause and effect cannot be witnessed then no one is able to observe the mental stimulus causing physical harm. Also the mental stimulus or trauma must be an event. Heart-related conditions may be accepted as compensable but only if the medical evidence also establishes that they were directly caused by a specific work-related event rather than by a gradual onset of heart disease. The condition must fit the requirements of *an injury* as opposed to a disease. In most jurisdictions it is difficult to obtain sufficient medical evidence to do this and heart disease is rarely recognized as an occupational disease. With the exception of certain occupations, such as fire fighters, most workers who suffer a heart attack at work would be found to be suffering from a non-compensable disease. Also mental/physical claims would not include claims where the sudden noise caused someone to fall as in those claims the cause of the injury would be identified as *the fall*, not the noise (even though the noise was the cause of the fall).

The fourth category of claims is that of mental/mental claims where mental trauma or stimulus causes a mental injury. An example of a mental/mental claim would be the claim for mental injury suffered in a robbery. The claim could be significant if the worker was disabled, unable to return to work, because of their psychological reaction to the shock of the hold-up. In most jurisdictions mental injury caused by mental trauma or stimulus (mental/mental claims) is accepted, but only when the evidence supports a conclusion that the mental trauma was analogous to an accident and if the accident arose out of and in the course of employment. For example, Section 5.1 of the Workers' Compensation Act in British Columbia states that a worker is entitled to compensation for a mental stress only where three the injury is "…an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment". Similarly the New Zealand Accident Compensation Act Section 21B provides similar conditions for mental/mental claims. The event must be sudden and unexpected causing immediate mental harm, just like an accident.

For the purposes of workers' compensation, occupational stress claims are best described as claims involving mental trauma. They can be classified as mental/physical or mental/mental claims. In such claims the worker is alleging that they suffered a mental rather than physical trauma experience during work and because of that experience at work, it resulted in either physical or mental injury or both. Problems arise when the cause (mental trauma) and the effect (mental injury) resemble a disease. In particular, the more the cause is attributed to events that occurred over time and that the condition is a disease (as in mental illness rather than injury), then the less likely it is that the claim will be accepted.

'Occupational stress' refers to a cause of human injury or illness, not the condition itself. As discussed above, 'an occupational disease' is the term used to refer to those diseases that are recognized as being work-related. In contrast, occupational stress is the *cause* of injury or disease, not the effect, as with occupational disease. As the workers' compensation rules in both New Zealand and British Columbia demonstrate, the injury caused by occupational stress will only be accepted where the evidence establishes that the trauma was, in effect, an accident, that is, an unexpected, traumatic event resulting in immediate harm. Claims involving a process rather than an identifiable event are simply not accepted. While this reflects understanding of accidents and disease as cause and effect, when applied the rules seem quite harsh. But in the past workers' compensation rules were often harshly applied. For years, workers suffered illness and death as result of many different occupational diseases before the disease was recognized as an 'occupational disease'. What is needed is evidence that proves the link between occupational stress and mental and physical injury. However, the task of getting evidence linking stress to employment is compounded by difficulties in defining what is meant by 'occupational stress' and in understanding the link between stress and injury or disease. Complicating this relationship is the view that stress is a 'natural' part of many jobs and as such would be better covered through wages than workers' compensation. And with this view, of course, comes the sentiment that if the worker cannot stand the heat, then they should get out of the kitchen. This, however, suggests that the problem is stressed workers, not stressful work.

Some Concluding Thoughts

Most people believe that workers should be compensated for injury and ill health caused by their work. For over a century workers' compensation has provided compensation to workers who suffered physical injury caused by an accident which arose out of and in the course of their employment. Over the years workers' compensation coverage has expanded to include mental injury and occupational diseases as well as injuries arising over time seemingly caused by a disease like process but there remains a bias towards physical injury caused by accidents. This, of course, is the root of the problem with many forms of occupational stress. Occupational stress is not easily accepted as compensable first, because it manifests as mental, not physical injury, and second because its cause is often mental rather than physical trauma which has occurred over time rather than as the result of one incident or event. There is a level of institutional resistance to providing workers' compensation for occupational stress claims first because they are mental claims but this resistance increases if the cause is also shown to be stress (ie mental trauma) which has occurred over time. And so while people believe that workers deserve compensation for work related injury, they may also accept that workers suffering from occupational stress which has arisen over time should simply find a new and less personally stressful job.

Occupational stress, however, is not simply the worker's problem. Stress related injury and illness is calculated to cost employers and the economy a great deal of money every year. In the United States it is estimated that stress-related absenteeism costs the economy hundreds of billion dollars a year in absenteeism, reduced productivity and medical expenses (French 1998). There is a need for investigation of both stressed worker and stressful work. Every form of work presents some level of stress and the question should be, when does stress become unacceptable? There also needs to be a better understanding of the different kinds of stress which workers experience and the reasons why some workers get ill while others do not. At the same time there should be a discussion as to how best to compensate workers suffering injury or illness as a result of occupational stress. Still it may well be that workers' compensation is not the appropriate vehicle for compensation for occupational stress. This then leads to the question that if not workers' compensation, then what? Should there be a return to tort for occupational stress? If occupational stress arising over time is not covered by workers' compensation, perhaps workers should have the right to sue their employers for intentionally inflicted emotional harm under the rules of tort. Stressed workers might well leave the kitchen but why should they do so without their pound of flesh?

References

Larson, A. (1970). Mental and Nervous Injury in Workmen's Compensation. Vanderbilt *Law Review*, 23(6), 32.

Larson, A. (1984). *Workers' Compensation Law: Cases, Materials & Text* (First ed.). New York: M. Bender.

WorkSafeBC. (2011). *Rehabilitation Services and Claims Manual Volume II (Vol. II).* Richmond BC: Work Safe BC (formerly known as the Workers Compensation Board of BC).