



# Socially Constructed Hierarchies of Impairments: The Case of Australian and Irish Workers' Access to Compensation for Injuries

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## Abstract

**Objectives:** Socially constructed hierarchies of impairment complicate the general disadvantage experienced by workers with disabilities. Workers with a range of abilities categorized as a “disability” are likely to experience less favourable treatment at work and have their rights to work discounted by laws and institutions, as compared to workers without disabilities. Value judgments in workplace culture and local law mean that the extent of disadvantage experienced by workers with disabilities additionally will depend upon the type of impairment they have. Rather than focusing upon the extent and severity of the impairment and how society turns an impairment into a recognized disability, this article aims to critically analyse the social hierarchy of physical versus mental impairment. **Methods:** Using legal doctrinal research methods, this paper analysis how Australian and Irish workers' compensation and negligence laws regard workers with mental injuries and impairments as less deserving of compensation and protection than like workers who have physical and sensory injuries or impairments. **Results:** This research finds that workers who acquire and manifest mental injuries and impairments at work are less able to obtain compensation and protection than workers who have developed physical and sensory injuries of equal or lesser severity. Organizational cultures and governmental laws and policies that treat workers less favourably because they have mental injuries and impairments perpetuates unfair and artificial hierarchies of disability attributes. **Conclusions:** We conclude that these “sanist” attitudes undermine equal access to compensation for workplace injury as prohibited by the United Nations Convention on the Rights of Persons with Disabilities.

**Keywords** Workers compensation · Mental disability · Discrimination · Hierarchy of impairments

## Introduction

The modern social model of disability, as illuminated by the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”),<sup>1</sup> explains that disability is largely “created” by attitudinal and environmental barriers based on individual ability, diversity, and difference [1–3]. Many people experience temporary and episodic injuries, some of

which become lasting impairments, and those impairments may become legally recognized “disabilities” when they interact with discriminatory barriers in society. A person who cannot walk may be “disabled” under the law when steps are presented instead of a ramp [4]; a person who is deaf is disabled when movies and websites do not offer captioning [5]; a person with ADHD is disabled when their cognitive processing manner of social intercourse is subject to sanction [6–8]. While all people with impairments may experience certain disabling barriers in society, longstanding implicit and explicit attitudes (i.e., cognitions and perceptions associated with particular physical versus mental behaviours) towards certain human abilities and traits are associated with a relatively stable value-driven hierarchy of impairments [9–11].

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<sup>1</sup> Adopted by General Assembly resolution A/RES/61/611 in 2006) ATS 2008 ATS 12 (Entered into force generally 3 May 2008); signed by Ireland in March 2007.

There are many ways of socially and legally constructing differing abilities as perceived impairments [12]. One means is to adopt the approach in the CRPD of dividing impairments by general reference to physical, sensory, intellectual, and mental impairment.<sup>2</sup> The CRPD recognises that all impairment categories are equal and that persons with disabilities are entitled to the “equal enjoyment of all human rights” [13]. Distinctions between impairment categories can amount to disability discrimination under the CRPD. CRPD article 2 explains that a “distinction, exclusion or restriction on the basis of disability” may be disability discrimination [13].

To ascertain the impact of disability on the treatment of individuals with disabilities, comparator tests often are employed [5]. Comparator tests generally compare the treatment of persons with disabilities with those without disabilities. Article 2 of the CRPD, however, constructs a wider comparator test, which considers how a person with a disability is treated against “others.” [13]. Considering that the general purposes of the CRPD, as stated in article 3, include “non-discrimination” and “respect for difference,” we contend that the CRPD defines disability discrimination to include distinctions between people with impairments and without impairments, as well as different treatment between people with different impairment categories [13].

In many situations the overriding and prevailing attitude towards the ability difference is one of indifference and neglect. Where this occurs, the ensuing barriers operate differently, but nonetheless are negatively associated with certain impairment categories [7, 12, 14, 15].<sup>3</sup> In other situations, attitudes towards persons with disabilities hinge on whether a person’s category and range (e.g., severity) of abilities is diagnosed as below some physical, sensory, mental, and intellectual construct of accepted “normality” [16–18].<sup>4</sup>

All else equal, where social attitudes about disability cause one impairment type or group to suffer disadvantage in law or otherwise relative to others, then in that situation an “impairment hierarchy” is created, which may amount to disability discrimination. We argue that impairment categories are perhaps most stigmatizing and discriminatory in circumstances where formal laws (and laws’ regulations and interpretations by courts) use impairment as a means or proxy to cause people experiencing a particular impairment to suffer an additional measurable disadvantage (e.g.,

less equal treatment) when compared to people experiencing other impairment categories in similar circumstances.

In this article, we posit and illustrate that disability hierarchies reflected in law are perhaps no starker than as between the general categories of physical/sensory impairments (i.e., obvious impairments) and mental/cognitive impairments (i.e., less obvious and often hidden impairments, which also may be associated with neurodiversity). To illustrate in an original and comparative manner that laws may create and foster impairment hierarchies, we analyse the operation of Australian and Irish laws that compensate employees who are injured at work [19].<sup>5</sup> After introducing the concept of impairment hierarchy in Part I of this article, we then analyse the operation of Australian and Irish workers’ compensation laws in Part II. Thereafter, in Part III, we consider impairment hierarchies in Australian and Irish common law remedies. We close with the future implications of our analysis for workplace law and practice.

## Hierarchy of Impairments

Historically, disabilities were constructed as earthly manifestations of divine punishment and thus the prefix “dis,” meaning something evil is used to turn moral ability into immoral disability [20]. As late as the last century, the construction of disabilities as something to be excluded was reinforced in so-called “Ugly Laws” [21]. Often, Ugly Laws criminalised disability, preventing the disabled object from damaging society by their visible, or even genetic, presence in it. While Ugly Laws have been repealed, attitudinal barriers in law and society continue to shape the social construction of persons with impairments as discounted, less worthy citizens [22, 23].

Even today, the nature and value of an individual’s disability rights are mitigated by one’s particular impairment categorization. Arguably, society as a whole has yet to become fully sensitized to and accepting the spectrum of human ability differences, particularly when caused by external societal factors (e.g., a workplace accident), rather than reflexively attributing such ability differences to laziness, carelessness, and even sinfulness [24]. Presently, many people with obvious physical and sensory impairments experience discrimination on the basis of their impairments, and indeed in some countries these individuals are tracked in governmental charity and welfare programs that deny them basic human rights [25–28]. Despite persistent significant inequalities, the fact that physical and sensory impairments are largely visible and obvious disabilities, some of which

<sup>2</sup> CRPD, art 1.

<sup>3</sup> For example, indifference may create barriers that operate differently depending if a person has an intellectual or sensory disability, or the combination of both.

<sup>4</sup> When disability intersects with other attributes, or where a person has multiple impairments, this further complicates how disadvantage is experienced and regulated.

<sup>5</sup> The employment relationship is one means of structuring remunerated work. For the purposes of this paper, we will focus on this form of structuring work relationships.

also are perceived as externally caused, tends to be associated with greater societal acceptance of these impairments as genuine and “worthy” of governmental support [9, 10]. From this flows recognition that society at least has some obligation in law to reduce the inequalities that flow from having such “worthy” human differences [29, 30].

As do people with physical and sensory disabilities, people with cognitive and mental health impairments experience overt and subtle discrimination in attitudes and in law. Yet, perhaps due to the perceived uncertainty of mental impairment, often it is acceptable to treat people who have a mental injury or impairment less favourably than people whose cognitive abilities fall within a socially constructed “normal” range [31, 32]. While impairment generally is associated with less favourable treatment in law, we argue that people with mental disabilities experience a particular type of engrained and stigmatizing attitudinal discrimination, typically as compared to those individuals with physical and sensory impairments.

There likely are myriad reasons for the embedded prejudice against people with mental impairments, particularly as compared to physical and sensory impairment categories, and others have written on this topic with this form of discrimination being labelled as “sanism” [33]. Thus, where it may be argued that there exists a degree of attitudinal acceptance that physical and sensory impairments are immutable, there exists a significantly contra view in society and law regarding the nature, certainty, and worthiness under law of mental health impairments.

The existence of mental health disabilities has been regarded as a choice and consequence of otherwise voluntary behaviour to engage in unacceptable social conduct, such as alcohol and drug abuse, the choice not to work, violence, and even to be homeless [34, 35]. The negative construction of mental impairment is based in social stigma as well as the significant consequences it poses for ability equality in everyday society [29, 30, 36]. The distinction between physical and sensory impairments on one hand, and mental health impairments on the other, is reflected in how laws have responded to the existence and perception of human difference [37].

The nature of physical and mental impairment prejudice is found in judicial expressions (e.g., case decisions) of compensation claims for mental impairment, as studied in this article comparatively in Australia and Ireland. Below, we examine courts’ justifications for a restrictive attitude towards mental impairment as an expression of that policy. These law and policy distinctions are numerous and varied. For purposes of analysis here, the categorisation may be described as linked to concerns around evidentiary proof, “floodgate” litigation fears, and the public interest.

Traditional scepticism of the legal validity of mental impairment, which made it difficult for claimants to prove

they experienced a mental injury, has given way somewhat recently<sup>6</sup> through acceptance of the legitimacy of diagnostic tools, such as by the Diagnostic Statistical Manual (“DSM”) and the International Classification of Mental and Behavioural Disorders (“ICD”).<sup>7</sup> Further, enduring concerns around evidentiary proof relate to the causative uncertainty of mental impairment and its manifestations. This argument also implicates that the causes of mental injury may relate to an individual’s personal life (outside work), factors that are not within the employer’s control and for which the employer would typically not be responsible.<sup>8</sup> Still, these criticisms ignore the same critique that may be made of physical injuries. Surprisingly, this has not led to the same scepticism of these injuries before the courts. It also undermines the legal principles of causation, which allows for apportioning of liability “as it falls.”

“Floodgate” fears additionally are associated with a discriminatory hierarchical impairment approach to damages in torts claims (civil liability cases such as negligence) for mental injuries and impairments. Courts refer to the fear of “unacceptable increase in claims”<sup>9</sup> and the “possibility of the courts being swamped with trivial and unmeritorious claims”<sup>10</sup> if a relaxation of rules in relation to mental impairment is permitted. These particular statements, although illustrative, concern “nervous shock” cases [38], with potential for large numbers of witnesses to traumatic events, and arguably are not directly relevant in cases of occupational mental impairment where the parties to the tort may fall within a well-established duty category of employer and employee.

Nonetheless, courts express the view that it is not in the public interest to allow recovery for mental health damages in tort, as to do so would delay workers’ recoveries [39], despite their being scant empirical evidence of this phenomenon [40]. Taken together, these law and policy reasons, in conjunction with the less favourable attitude towards mental impairments described above, contributes to an unequal application of laws as applied to claimants in occupational actions seeking compensation for mental injuries and related impairments.

The CRPD article 4, goes further than imposing a general duty to abolish discriminatory laws and requires

<sup>6</sup> *Sutherland v Hatton and other appeals* [2002] EWCA Civ 76 [5].

<sup>7</sup> The DSM developed by the American Psychiatric Association and first published in 1952 is now its 5th edition (published in May 2013). The ICD was developed by the World Health Organisation in 1990 and is in its 10th revision (the 11th revision is due in 2018).

<sup>8</sup> *Sutherland v Hatton and other appeals* [2002] EWCA Civ 76 [47].

<sup>9</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (Lord Hoffman).

<sup>10</sup> *Fletcher v Commissioner for Public Works in Ireland* [2003] 1 IR 465 (Keane CJ).

interventions to apply equally to people based upon their degree of impairment, rather than distinguishing between impairment categories [13]. The right to obtain support for workplace injuries may be found in CRPD article 27(1), where the convention talks of the right to work on equal basis of others, “including for those who acquire a disability during the course of employment ...” [13]. CRPD article 27(1)(e) goes further and entitles workers with disabilities injured at work to “assistance in finding, obtaining, maintaining and returning to employment.” [13]. The next section examines the basis for this conclusion, as derived from a comparative analysis of Australian and Irish law.

## Hierarchies of Impairments in Workers' Compensation Laws

### Injury Payments

This part analyses how Australian and Irish workers' compensation laws illustrate hierarchies of impairments, particularly as to distinctions between obvious physical and sensory impairments and less obvious mental disabilities. Whilst there are significant differences between the Australian and Irish approaches to compensating employees injured at work, the common legal histories of these jurisdictions makes for a useful comparison.

The United Kingdom's *Workmen's Compensation Act 1897* (UK) governed the Australian colonies, prior to federation in 1901, and the Irish colony, prior to the formation of the Irish Free State in 1922.<sup>11</sup> Australia developed its workers' compensation laws in the late nineteenth and early twentieth century.<sup>12</sup> South Australia was the first Australian state to adopt a no-fault workers' compensation scheme in 1900, and Victoria was the last state to do so in 1914 [41, 42]. Similar to Australia, Ireland introduced social welfare legislation to support employees injured at work during the twentieth century.<sup>13</sup> In both jurisdictions, studies show that workers are less likely to make claims for mental injuries caused at work when compared to physical injuries for a range of reasons, including fear from victimisation and stigma associated with workers with mental health injuries [43, 44].

As a general proposition, workers' compensation schemes have mechanisms to determine whether, and to what degree, a worker is sufficiently injured to entitle compensation. Using a medical rating system or standard assessment as a vehicle to determine whether a person is entitled to compensation and to determine quantum in itself, is not necessarily problematic. What usually is problematic and potentially discriminatory is when the *type* of impairment itself is a blanket or per se factor used to regulate entitlements. It is one matter to determine if a person is sufficiently impaired to qualify for compensation under the particular legal regime. It is quite another issue altogether to consider that physical and sensory injuries and impairments are innately more deserving of compensation than are mental injuries, even where the severity of the injury and its impact on the ability to work are comparable [9, 10].

Australia and Ireland have workers' compensation schemes that provide workers financial and rehabilitation support when they acquire injuries attributed to their work [45].<sup>14</sup> These schemes are a form of social insurance, primarily funded through employer and employee contributions [46]. While Australia and Ireland have such workers' compensation schemes, the Irish scheme provides more limited supports than their Australian equivalents.

One significant difference between the Australian and Irish workers' compensation schemes is in terms of the monetary support offered to workers. In Australia, workers' compensation is calculated on employees' pre-injury income and continues until the injury stabilises.<sup>15</sup> In contrast to this comparatively generous position, Irish compensation is limited to injury benefits for up to 26 weeks, at which time the employee may become entitled to “disablement benefits” depending on their condition.<sup>16</sup> Further, in Ireland the compensation payment is not related to the worker's normal salary.<sup>17</sup> The Irish scheme also does not interfere with a worker's right to sue in the event of employer liability for workplace injuries, where the Australian requires workers to first exhaust the relevant workers' compensation scheme prior to commencing litigation. The comparatively greater support in Australia for workers injured at work means that common law fault compensation (e.g., the result of judicial intervention) is more prevalent in Ireland than Australia.

While Irish law permits employees to seek workers' compensation and sue their employer simultaneously, in

<sup>11</sup> As amended by the *Workmen's Compensation Act 1900*, *Workmen's Compensation Act 1906*, *Workmen's Compensation Act 1934*, *Workmen's Compensation Act 1948* and *Workmen's Compensation Act 1955*.

<sup>12</sup> *Workmen's Compensation Act 1897* as amended by the *Workmen's Compensation Act 1906*, *Workmen's Compensation Act 1934*, *Workmen's Compensation (Amendment) Act 1948*.

<sup>13</sup> *Social Welfare (Occupational Injuries) Act 1966* (Ireland).

<sup>14</sup> In Australia, this is provided for on a federal, state, and mainland territory jurisdictional basis.

<sup>15</sup> In *Moore v Barton & Ors* [2014] VSC 78 an employee was injured in 1989 and was still receiving payments 29 years later.

<sup>16</sup> *Social Welfare Consolidation Act 2005* (Ireland) ss 74, 75.

<sup>17</sup> The current base payment is €193 per week. See further <http://www.welfare.ie/en/Pages/injurybenefit.aspx>.

Australia employees are forced to first claim under the relevant workers' compensation scheme. If the employee is accepted into the scheme, then the Australian employee receives compensation payments until their condition stabilises. When the condition stabilises, if they meet the lump sum criteria discussed below, they are offered a lump sum or may make the irrevocable decision to reject the lump sum offer and sue their employer for negligence.

Every jurisdiction in Australia has workers' compensation laws, consisting of the Commonwealth/Federal,<sup>18</sup> the state,<sup>19</sup> and the mainland territory jurisdictions.<sup>20</sup> Under these laws, a worker who is injured at work does not have to prove that their employer was at fault to be entitled to compensation. The entitlement to compensation arises where a worker has suffered a prescribed type of injury arising out of or during work [47]. As we argue next, however, there exists in Australian and Irish law a de facto hierarchy of disability attributes that are associated with workers who have developed mental injuries and cognitive impairments at work and who are relatively less able to gain access to the full benefits of the workers' compensation schemes, as compared to workers who experience physical and sensory injuries and impairments.

The Irish and Australian workers' compensation laws adopt methods to reduce the compensable status of mental impairments. In Ireland, the entitlement to obtain injury benefits does not on its face distinguish between mental health and other injuries. Providing the work has contributed to an employee's personal injuries, the employee is entitled to compensation.<sup>21</sup> However, in many Australian jurisdictions, discrimination between mental and other impairment categories is explicit. Provisions in the Queensland South Australian laws contain additional criteria for having incurred a harm regarded as a workplace injury if the impairment is "mental" in nature.<sup>22</sup> These additional barriers do not exist for workers who experience physical and sensory impairments. Accordingly, the existence of a mental impairment itself may trigger denial of or reduction in compensation rights.

Section 32 of the Queensland *Workers Compensation and Rehabilitation Act 2003* (Qld) defines when injuries are held to be "related" to work. This section contains different tests

depending on impairment category. Section 32(1) provides that work must be "a significant contributing factor to the injury." However, if the injury is a "psychiatric or psychological disorder," the link between work and the injury must satisfy an additional test in Section 32(2) of it being a "major significant contributing factor to the injury."<sup>23</sup>

The South Australian *Return to Work Act 2014* (SA) enables workers with non-mental related injuries to claim compensation whether their employer is the primary or a minor cause of the injury. If the worker has experienced a mental injury, then Section 71 of the *Return to Work Act* (SA) limits workers' capacity to sue employers who have engaged in negligence or breach of statutory duty. Section 71(2) explains that an employee is not entitled to an award of damages in respect of a "psychiatric injury ... unless the psychiatric injury is primarily caused by the negligence or other tort (including breach of statutory duty) of the worker's employer." This means that a worker whose employer is 49% contributory negligent for a physical injury is able to sue that employer, but if that worker has suffered a mental injury, then that worker has no right to file suit.

The workers' compensation schemes in New South Wales and South Australia Victoria exclude mental impairment claim where that claim is secondary to a primary physical injury.<sup>24</sup> This means a worker may require a few weeks off work for their physical impairment and receive support and protection. Yet, if that worker develops a secondary mental impairment, this secondary impairment is not regarded as a workplace injury and falls outside the protection and support afforded by workers' compensation laws. The fact that the secondary impairment has arisen as a direct consequence of the first injury is immaterial.

A number of workers' compensation laws expressly exclude workers from being able to claim compensation and benefit from return to work obligations upon their employers if the injury has arisen from reasonable management action. This limitation may apply to all forms of injuries<sup>25</sup>; however, most states only exclude workers from the schemes if they have experienced a mental injury. As a consequence, in Australian Capital Territory, New South Wales, Northern Territory and Western Australia, a worker who has experienced a physical injury flowing from reasonable management action may obtain support from the workers' compensation schemes. In contrast, a worker in those jurisdictions who has

<sup>18</sup> *Military Rehabilitation and Compensation Act 2004* (Cth); *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth).

<sup>19</sup> *Return to Work Act 2014* (SA); *Workers Compensation Act 1987* (NSW); *Workers' Compensation and Injury Management Act 1981* (WA); *Workers Compensation and Rehabilitation Act 2003* (Qld); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

<sup>20</sup> *Return to Work Act*; *Workers' Compensation Act 1951* (ACT).

<sup>21</sup> *Social Welfare Consolidation Act 2005* (Ireland) s 74.

<sup>22</sup> *Workers Compensation and Rehabilitation Act 2003* (Qld) s 32.

<sup>23</sup> *Workers Compensation and Rehabilitation Act 2003* (Qld) s 32(2).

<sup>24</sup> *Workers Compensation Act 1987* (NSW) ss 65A and 66; *Return to Work Act 2014* (SA) s 56; *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 56.

<sup>25</sup> See, for example, *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5A.

developed a mental impairment is excluded from financial and return to work support.<sup>26</sup>

Moreover, even if an employer directly or vicariously caused an employee's mental injuries or impairment, if the mental condition was caused by "reasonable management action," the employee may not recover compensation.<sup>27</sup> Arguably courts (in Australia and Ireland) evince a reluctance to disturb employer's managerial prerogative, and thus the notion of what is "reasonable" is to be read broadly. This places workers with mental impairments at a significant disadvantage when compared with workers who have physical and sensory workplace injuries.

## Disability Payments

Once a work injury is stabilised, providing the degree of permanent impairment is above a certain severity percentage, that employee will be offered a different range of entitlements in Australia and Ireland depending on whether they have a mental or other type of injury. Even where a worker has their injury accepted as genuine and arising from work, and has received support and compensation, workers with mental disabilities still experience less favourable treatment than workers with physical and sensory injuries when it comes to disability entitlements under workers' compensation schemes.

A significant difference between Australian and Irish disability entitlements is the requirement in Australia to decide whether to take the lump sum offer, or reject the offer and sue in the courts for fault negligence. If no lump sum offer is made in the notice of assessment, the employee is still able to commence common law proceedings.<sup>28</sup> The irrevocable decision is intended to provide employers with certainty about their liability and to prevent employees' "double dipping," in that they cannot take a lump sum payment and bring common law proceedings and pay back lump sum if they are successful.<sup>29</sup>

While the hierarchy of impairments is not reflected directly in access to Irish injury benefits, differentiation does occur when accessing "disablement benefits." Irish employees who have acquired a disability as part of their employment are entitled to disablement benefits.<sup>30</sup> While this entitlement prima facie applies equally to physical, sensory and mental impairments, in practice it is harder to obtain benefits for mental impairments. The difficulty for employees with mental impairments is establishing that their

personal injuries are sufficiently disabling to entitle them to compensation.

The *Social Welfare (Consolidated Occupational Injuries) Regulations 2007* (Ireland) Schedule 2 provides a list to determine the extent of physical and sensory injuries. When an employee has a mental injury, this must be determined on a case-by-case basis upon the relevant factual circumstances of the individual. This additional procedural hurdle is complicated by the requirement of proof that the employee would not have developed the mental disability from an existing predisposition or congenital defect. If it is shown that an employee would have developed the mental disability in any case, then the employee is not entitled to disablement benefits.<sup>31</sup> The exclusion in Section 75, combined with the subjective nature of the disablement benefit entitlement and existing disinclination against compensation for mental disabilities, means in practice it is harder for Irish employees to obtain disablement benefits for mental disabilities than it is for employees seeking benefits for physical or sensory disabilities.

Australian workers' compensation schemes are more explicit in their creation of a hierarchy of attributes and relegating mental impairments lower on this hierarchy. Where Irish workers' compensation laws provide less detail on mental impairments and create an additional procedural barrier, which in theory may result in non-discriminatory treatment, Australian workers' compensation laws expressly provide that mental impairments shall receive different treatment than physical and sensory ones.

In South Australia, a worker is entitled to a lump sum payment if their permanent impairment is over 5%, unless that worker has experienced a "psychiatric injury." In that situation the worker has no entitlement to lump sum compensation for economic or non-economic loss.<sup>32</sup> In contrast, although New South Wales, Queensland, and Victoria entitle workers who have experienced mental injuries to lump sum payments, they limit how this is available.<sup>33</sup> These jurisdictions limit the capacity of workers with mental impairments from receiving lump sum compensation by creating different "whole person" impairment percentage thresholds to accessing lump sum compensation. In New South Wales, the whole person impairment percentage is 10% for injuries, unless the claim is for either a psychological or psychiatric injury, where the percentage must be over 15% to obtain a lump sum permanent payout.<sup>34</sup>

Similar to New South Wales, in Victoria lump sum compensation is only available for workers experiencing mental

<sup>26</sup> *Workers' Compensation Act 1951* (ACT).

<sup>27</sup> *Comcare v Martin* [2016] HCA 43.

<sup>28</sup> *Workers Compensation and Rehabilitation Act 2003* (Qld) s 189.

<sup>29</sup> *S. Norton v Blight (No. 3)* [2016] SADC 17.

<sup>30</sup> *Social Welfare (Consolidation) Act 2005* (Ireland) s 75.

<sup>31</sup> *Social Welfare Consolidation Act 2005* (Ireland) s 75(4)(b)(i).

<sup>32</sup> *Return to Work Act 2014* (SA) ss 56(3), 58(3).

<sup>33</sup> *Workers Compensation Act 1987* (NSW) s 66.

<sup>34</sup> *Workers Compensation Act 1987* (NSW) s 66.

injuries when they are experiencing a greater degree of whole person impairment. Workers who are experiencing non-mental impairments are entitled to compensation where they have 10% impairment, whereas workers experiencing mental impairments only may access the same lump sum compensation if they have whole person impairment over 30%.<sup>35</sup>

In Queensland, lump sum compensation is available for impairments rated over 20%.<sup>36</sup> This applies equally for all types of impairments. Where the whole person impairment is above 30%, this creates an entitlement to additional lump sum compensation, providing the impairment is not “mental” in nature. The additional lump sum compensation that is associated with more substantial impairments is not available to workers who are experiencing psychiatric or psychological impairments. Those workers are compensated at the lower rate associated with 20% whole person impairment.

In sum, Australian workers’ compensation schemes expressly discriminate between workers who have mental injuries arising from their work and those who have acquired physical or sensory injuries. The unequal treatment of impairment categories arguably is contrary to the duty to abolish discriminatory laws found in CRPD article 4(1)(b) and reflects well established prejudice against mental disabilities [13].

### Common Law Redress for Individuals Injured at Work

In addition to claiming workers’ compensation, individuals who have suffered an injury at work may sue an employer using negligence (tort) principles at common law. In Australia, this may only arise if a lump sum is not accepted or offered. In Ireland, however, these actions are more common, due to the limited payments made under its social insurance schemes, as discussed above. This section describes the manner in which such actions are litigated in Ireland and Australia, highlighting differences in the treatment of claimants with mental impairments and those with physical impairments. These differences include procedural barriers in Ireland, and the manner in which common law principles are applied in both jurisdictions to discount injuries to mental health.

<sup>35</sup> *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 211, 212.

<sup>36</sup> *Workers Compensation and Rehabilitation Act 2003 (Qld)* ss 188, 192.

### Procedural Barriers for Litigants with Mental Impairments Bringing Claims

In Australia, an employee who has made the irrevocable decision to reject a lump sum payout is entitled to commence litigation in the courts without any special procedural steps. In contrast to Australia, Irish employees seeking to sue their employers must submit their claim in the first instance to a statutory body called the Personal Injuries Assessment Board (PIAB).<sup>37</sup> The PIAB was established in 2004 to respond to growing concerns of rising insurance costs and the high cost of litigation. Thus, this body was created and operates to, inter alia, reduce the numbers of workers who are injured at work from suing their employers to obtain compensation. Rather than impacting equally on all injury claims, arguably the PIAB processes reinforce a hierarchy of impairment attributes, which positions workers with mental impairments as less entitled to compensation than workers with physical and sensory impairments.

The PIAB process is “paper-based,” no witnesses are called and no evidence other than paper-based evidence is considered. The role of the PIAB is not to adjudicate on liability, but to assess the appropriate level of compensation based on the evidence. It is open to parties to refuse the jurisdiction of the PIAB<sup>38</sup> or at a later stage refuse to accept its assessment on compensation. In such cases the PIAB issues an authorisation for the case to proceed to court.<sup>39</sup>

All employment cases resulting in injury must be submitted in the first instance to the PIAB. However, while other injuries have reportedly been assessed by the PIAB, it appears that actions made up exclusively of mental injury have never been assessed by the PIAB.<sup>40</sup> This arises from the operation of two legislative provisions. The first states that the PIAB may refuse jurisdiction in cases where the injuries sustained consist “wholly or in part of psychological damage” whose “nature or extent” would be difficult to determine by the PIAB’s assessors.<sup>41</sup> There is no similar provision for physical impairments and, therefore, all physical impairment cases are dealt with in the first instance by the PIAB.

The second provision allows for discretion to refuse jurisdiction where there is an insufficient body of case law to

<sup>37</sup> <http://www.injuriesboard.ie>.

<sup>38</sup> *Personal Injuries Assessment Board Act 2003* (Ireland) ss 14(2), 15, 31.

<sup>39</sup> *Personal Injuries Assessment Board Act 2003* (Ireland) s 32.

<sup>40</sup> There is no reference to psychological injury claims in any of the PIAB’s annual reports. The PIAB has also confirmed in an email (dated 22/02/2017): “we generally would not assess a claim where the injury is wholly of a psychological nature”.

<sup>41</sup> *Personal Injuries Assessment Board Act 2003* (Ireland) s 17(1)(b)(ii)(II).

permit the PIAB to make an assessment.<sup>42</sup> Arguably, mental impairment actions may be included in this category. Notwithstanding this rationale, this places claimants with a mental impairment at a disadvantage when compared with their physically injured co-workers. Actions before the PIAB are cheaper,<sup>43</sup> faster,<sup>44</sup> and less onerous than those before the courts. There is no disadvantage in terms of compensation payable with awards by the PIAB being ‘on a par’ with those of the courts [48]. The fact that no actions for mental impairment have been accepted by the PIAB suggests that litigants with mental impairments potentially are being denied access to a forum that is less stressful and more accessible in terms of cost and time, than their colleagues with physical impairments [49].

### Judicial Distinctions Between Physical and Mental Impairments

In negligence actions a number of distinctions may be identified in the manner in which courts approach damages that flow from mental injuries, as compared to those that flow from physical and sensory injuries. These differences reflect a paternalistic model when dealing with physical injuries [50], with the employer vested with the responsibility of protecting the employee not only from workplace risks, but also from employees’ predilection to take risks at work.

When considering the comparable case law on mental impairments, however, the approach of the courts is akin to the contractual model. Thus, the courts view the parties as equal partners in an employment contract, where each is equally responsible for risks and risk avoidance.<sup>45</sup> This difference in treatment is discussed below in terms of the threshold requirements for injury and particular impairments, and the degree to which employees are held responsible for their own health and safety in the workplace.

### Threshold for Injury

Australian and Irish law provides that physical and mental injury is compensable. Where a worker suffers a mental

impairment without physical injury, the worker is only able to claim compensation where mental impairment meets the standard of a medically recognised psychiatric injury [51, 52]. This requirement requires more from plaintiffs claiming damages flowing from mental injuries, as compared with those claiming damages for physical and sensory injuries.

A plaintiff may recover for monetary damage that flows from a minor physical or sensory injury. However, plaintiffs who suffer damage that flows from mental disabilities only may seek compensation if those mental injuries rise to the status of a psychiatric illness [52, 53]. This restrictive attitude to mental injury actions is an historic one.<sup>46</sup> As stated by Lord Wensleydale in 1891: “mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.”<sup>47</sup>

In a gradual softening of this approach, recently damages were recoverable in actions classified as “nervous shock” actions, where claims for mental injury were upheld when the claimant feared physical injury to themselves<sup>48</sup> or others.<sup>49</sup> In addition, occupational injury actions have recognised the right to recover damages where the claimant suffers stress and has been bullied,<sup>50</sup> and in Ireland where the claimant develops a mental impairment caused by negligent exposure to environmental risks.<sup>51</sup>

Recently, in attempting to provide a principled framework for mental injury cases, the Irish courts have classified occupational mental injury actions into three kinds: nervous-shock actions, fear of disease actions, and stress-related injury actions.<sup>52</sup> This typology reflects the position in the Australian courts where actions for occupational mental injury have been recognised in nervous shock actions<sup>53</sup> and more recently for stress-related injury at work.<sup>54</sup> In actions for psychiatric injury, both jurisdictions have a central

<sup>42</sup> *Personal Injuries Assessment Board Act 2003* (Ireland) s 17(1)(b) (i).

<sup>43</sup> The fee for respondents is €600 and for claimants €45 working out at a delivery cost of 6.5% when other costs such as medical costs are included [44]. This can be compared with an estimated delivery cost of 46% of the overall award when a case is litigated before the courts (estimate based on the Motor Insurance Advisory Report 2004).

<sup>44</sup> In 2015, actions were resolved by PIAB in an average time of 7.1 months [44]; in comparison, litigants may wait years to reach a determination before the courts.

<sup>45</sup> This approach is reflected in the Irish decision of *McGrath v Trintech Technologies* [2005] IR 382 and the Australian decision of *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

<sup>46</sup> See Part II above for the rationale for the distinction between mental and physical impairments.

<sup>47</sup> *Lynch v Knight* (1891) 9 HLC 577, 598 (Lord Wensleydale).

<sup>48</sup> For Ireland see *Byrne v Southern and Western Ry Co* (February 1884) CA and for Australia see *Tame v New South Wales* [2002] 211 CLR 317.

<sup>49</sup> For Irish examples see *Mullally v Bus Éireann* [1992] ILRM 722 (HC), *Kelly v Hennessy* [1995] 3 IR 253 and in Australia *Giffard v Strang Patrick Stevedoring Pty. Ltd.* [2003] 214 CLR 269.

<sup>50</sup> In Ireland see *McGrath v Trintech Technologies* [2005] IR 382 and in Australia *Arnold v Midwest Radio Limited* (1998) Aust Torts Rep 81–472 for early examples of these types of cases.

<sup>51</sup> *Fletcher v Commissioners for Public Works* [2003] 1 IR 465.

<sup>52</sup> *McGrath v Trintech Technologies* [53] (Laffoy J).

<sup>53</sup> For examples see *New South Wales v Fahy* [2007] HCA 20, *Tame v New South Wales* [2002] 211 CLR 317.

<sup>54</sup> For examples see *Gillespie v Commonwealth* (1991) 104 ACTR 1, *Zammit v Queensland Corrective Services Commission* [1998] QSC 169, *Sinnott v FJ Trousers Pty Ltd* [2000] VSC 124, and *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.



control mechanism with the requirement that the mental impairment constitutes a medically recognised psychiatric illness before recovery is allowed.

In the Irish case of *Kelly v Hennessey*,<sup>55</sup> for instance, it was found that to recover for nervous shock a central requirement was that the illness was medically recognised.<sup>56</sup> Similarly in *McGrath v Trintech Technologies*,<sup>57</sup> in a case of stress-related injury, Justice Laffoy required proof that the mental impairment was a “recognisable psychiatric illness.”<sup>58</sup>

In Australia, this threshold requirement also is reflected in the case law. In *Koehler*, the High Court refers to the establishment of proof of a “recognised psychiatric illness,”<sup>59</sup> and in *S v New South Wales* where Judge Macfarlane stated that the exact nature of the illness was irrelevant so long as the injury was a “serious psychiatric disorder.”<sup>60</sup> By applying this standard, negligently caused mental harm falling short of a recognised psychiatric injury, such as grief, loss, severe upset, distress and loss, however damaging, are not recoverable. Meanwhile the slightest of physical impairments are actionable.

Courts in both jurisdictions have sought to justify this requirement on policy grounds rather than on the basis of legal and medical reasoning. They cite the need to set a limit on liability and restrict the number of claimants, and voice the view that mental injury is more readily feigned (in a manner presumably that physical injury is not).<sup>61</sup> A leading Australian review, the Ipp Report, went further in stating that with limited resources “it is more important to compensate people for physical harm than for pure mental harm” [52, 54]. In this statement, evidence of the impairment hierarchy is apparent.

### Litigants with Mental Impairments as Responsible for Their Own Wellbeing

Negligence principles are applied differently to cases of physical and sensory injuries compared to those involving mental injuries. Although there are differences in the approach of the Australian and Irish courts, both jurisdictions apply negligence principles in a manner that

differentiates between those with mental and physical impairments.

In Ireland, negligence actions for physical injuries are decided in a manner which reflects a paternalistic model of employment. This is evident in the Irish physical impairment case of *Barclay v An Post*,<sup>62</sup> where the court considered whether an employee who voluntarily opted for overtime that put him in danger of further injury may be compensated. Mr. Barclay had returned to work following a back injury and opted to take overtime on a delivery route, which carried a heightened risk of injuring his back. When a further back injury ensued, he successfully sued his employer for not *preventing him* from putting himself at risk to his back.

In her judgment Mrs. Justice McGuinness in finding for Mr. Barclay stated: “It should be part of the duty of care of higher management to ensure that line management executives such as inspectors bear in mind the welfare, health and safety of ordinary postmen.”<sup>63</sup> In response to the fact that Mr. Barclay had volunteered for the overtime, Mrs. Justice McGuinness cited with approval an extract from *McMahon and Binchy*, which states that voluntary assumption of risk is no longer a defence in employment cases.<sup>64</sup>

Conversely, when we examine cases of mental impairment, particularly in cases of stress-related injury, the view is that the employee is an equal partner with the employer in protecting against impairment, and in some situations the employer may abdicate all responsibility. Thus, in the Irish case of *McGrath v Trintech Technologies*,<sup>65</sup> Ms. Justice Laffoy adopted the principles laid down in the seminal case of stress-related injury in England and Wales, that of *Sutherland v Hatton*.<sup>66</sup> These form the guiding principles for stress-related injury actions in Ireland.

In essence, they restate traditional negligence principles and expand upon them to reflect the particular nature of mental injury cases. The principles contain a number of statements that demonstrate the onerous burden faced by litigants with mental impairments. In considering what would constitute reasonable steps by an employer once there is foreseeability of injury, Lady Justice Hale in keeping with traditional principles found that this is a matter to be decided based on the circumstances of the case, including the cost of eliminating the risk and the probability of the risk resulting in injury.<sup>67</sup>

Nonetheless, Lady Justice Hale goes on to state that in situations where the only options available to the employer

<sup>55</sup> [1995] 3 IR 253.

<sup>56</sup> *Kelly v Hennessey* [1995] 3 IR 253, 258 (Hamilton CJ).

<sup>57</sup> [2005] 4 IR 382.

<sup>58</sup> *McGrath v Trintech Technologies* [2005] IR 382 [103].

<sup>59</sup> *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 [14].

<sup>60</sup> *S v State of New South Wales* [2009] NSWCA 164 [52] (Macfarlane JA). This line of reasoning is consistent with the recommendations of the Australian Review of the Law of Negligence Final Report [50].

<sup>61</sup> *Tame v New South Wales* [2002] 211 CLR 317 [192].

<sup>62</sup> [1998] 2 ILRM 385.

<sup>63</sup> *Barclay v An Post* [1998] 2 ILRM 385, 399.

<sup>64</sup> *Barclay v An Post* [1998] 2 ILRM 385, 399.

<sup>65</sup> [2005] IR 382.

<sup>66</sup> [2002] EWCA Civ 76.

<sup>67</sup> *Sutherland v Hatton and other appeals* [2002] EWCA Civ 76 [34].

are to demote or dismiss the employee, the employer will not be in breach of its duty by doing nothing.<sup>68</sup> In outlining the relative responsibilities of employers and employees in such instances, she states: “it has to be for the employee to decide whether or not to carry on in the same employment and take the risk of a breakdown in his health or whether to leave that employment and look for work elsewhere before he becomes unemployable.”<sup>69</sup>

Essentially, this line of cases means that if an employee volunteers to undertake the risk, there is no ensuing liability for the employer in tort, a finding at odds with the approach in cases of physical injury, as described above. Raising the voluntary nature of the employee’s risk-taking as a defence for employers echoes the defence of voluntary assumption of risk. This defence has been abandoned in cases of occupational injury, at least in so far as physical injury is concerned.<sup>70</sup> To reintroduce it in cases of mental injury is arguably inconsistent and inappropriate, particularly as those at risk of a mental injury may be less likely in certain circumstances to appreciate that risk than a comparable employee at risk of a physical injury. Arguably, workers also are more likely to devote effort to monitoring their physical health and less likely to visit a social worker, psychologist, and psychiatrist for a check-up, and thus be less aware that they are at risk of a mental impairment or injury.

Even where there is no bullying or mobbing,<sup>71</sup> Australian laws and courts accept that workplaces may be stressful environments.<sup>72</sup> The right to recover for stress-related injury, however, is limited by the importance of contractual terms in determining an employee’s right to recover damages [53]. In the seminal High Court of Australia case of *Koehler v Cerebos (Australia) Ltd.*<sup>73</sup> (referenced above) an employee moved from a full-time position to a part-time one. The employee complained orally and in writing that she was overworked, fatigued and unable to cope. When the employee developed a psychiatric condition because of her overwork, the High Court of Australia unanimously held she was not entitled to compensation. The court determined that the employee had not identified that she was concerned

for her mental health and accordingly her employer was not liable [55].

It is probable that a different outcome would be reached if the injury was physical. For example, an employee who acquires physical injuries due to work fatigue, such as a night-shift casino employee who drives home in the pre-dawn hours, may obtain compensation if their employer does not help them manage and warn them of fatigue risks.<sup>74</sup> Further, work health and safety laws impose a proactive duty upon employers to manage their employees’ physical and psychological health [56].

More significantly, however, courts place the employee’s contractual responsibilities at the heart of any determination of liability. In *Koehler*, the employee was contracted to carry out the work, but she was incapable of doing so without injury to her health. The court held that requiring her to do this work could not lead to liability stating that “Insistence upon performance of a contract cannot be in breach of a duty of care.”<sup>75</sup>

While the common-law tort courts expect employers to identify and manage physical risks, courts exhibit a reluctance to require employers to adopt the same level of care for mental health issues. In the Australian case of *Hegarty v Queensland Ambulance Service*,<sup>76</sup> an ambulance officer developed a psychiatric disability after experiencing repeated traumatic events. When considering whether the employer had a duty of care to seek out and manage mental disabilities, the court observed:

... while an employer owes the same duty to exercise reasonable care for the mental health of an employee as it owes for the employee’s physical well-being, special difficulties may attend the proof of negligent infliction of psychiatric injury. In such cases, the risk of injury may be less apparent than in cases of physical injury. Whether a risk is perceptible at all may depend on the vagaries and ambiguities of human expression and comprehension. Whether a response to a perceived risk is reasonably necessary to ameliorate that risk is also likely to be attended with a greater degree of uncertainty; the taking of steps likely to reduce the risk of injury to mental health may be more debatable in terms of their likely efficacy than the mechanical alteration of the physical environment in which an employee works.<sup>77</sup>

<sup>68</sup> *Sutherland v Hatton and other appeals* [2002] EWCA Civ 76 [34].

<sup>69</sup> *Sutherland v Hatton and other appeals* [2002] EWCA Civ 76 [34].

<sup>70</sup> *Civil Liability Act 1961* (Ireland) s 34(1).

<sup>71</sup> For a discussion of the new bullying jurisdiction found in the *Fair Work Act 2009* (Cth) Part 6-4B see [51].

<sup>72</sup> See for a recent example *Wearne v State of Victoria* [2017] VSC 25 where the court awarded a state government employee, with known mental health issues, who suffered a “breakdown” after managers failed to properly consider her condition when they addressed a mounting conflict with a supervisor, \$210,000 damages for pain and suffering and loss of enjoyment of life and \$415,345 in pecuniary losses.

<sup>73</sup> *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

<sup>74</sup> *Fraser v Burswood Resort (Management) Ltd.* [2014] WASCA 130.

<sup>75</sup> *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 [29].

<sup>76</sup> [2007] QCA 366.

<sup>77</sup> *Ibid* [41] (Keane JA).

Applying this reasoning, the court held that the employer was not liable.<sup>78</sup> This highlights double-standards at play. On the one hand, the court accepts, as it is required to, a duty to protect against mental injury. On the other, this duty is couched in language of such uncertainty and obfuscation, that employees with mental impairment face greater barriers to recovery. This coupled with the supremacy of the contract in the Australian courts, and the onus placed on the employee to be vocal and aware of their susceptibility to mental harm, places Australian workers with mental impairments in a more onerous position than physically impaired workers. In Ireland, the position although different, is no less discriminatory.

## Conclusion

We posit that a hierarchy of impairment attributes exists in law and practice that regulate the compensation available to employees who are injured at work resulting in physical and sensory versus mental disabilities. Under Australian worker's compensation laws, physical injuries and impairments are regarded as more worthy of compensation than mental injuries or impairments. While Irish worker's compensation laws does not explicitly create a hierarchy of attributes, in practice these laws act to treat workers who experience mental injuries less favourably than workers with physical injuries.

This hierarchy of impairment attributes, which we illustrate via a comparative legal analysis, continues a tradition in law and practice that regards mental health injuries as less deserving than physical and sensory ones. The analysis of common law remedies further shows a judicial reluctance by Australian, British, and Irish judges to accept mental disabilities as worthy of equal treatment to physical injuries.

Historically, medical science did not enable fully scientific diagnoses of mental health, psychological and psychiatric conditions. While it might be difficult for an employer to determine if behaviour is related to volition or a mental disability, today there are medical experts and techniques available to help an employer determine the source of the conduct as well as professionals to identify accommodations and adjustments to minimise and negate negative operational impacts [57–59]. While it might be difficult for employers to determine if a medical disability is present in some situations, by design workers' compensation schemes and the courts have access to an array of medical experts to help them establish if such a condition exists.

The label of mental disability results in significant negative stigma and disempowerment [59–61].<sup>79</sup> Even when there may be challenges in establishing if a worker has a mental disability, once it is established that the worker does have a mental disability, there are no justifiable legal grounds for providing that worker less compensation solely on the basis of a mental disability, albeit as severe as other non-mental impairments. At least in the jurisdictions of Australia and Ireland that we examined in this article, to treat persons less favourably in worker's compensation law and practice on a blanket basis, because they have a mental health or cognitive impairment, perpetuates an unfair and artificial hierarchy of impairment, which is reinforced in disability law and practice and is arguably contrary to the UN Convention on the Rights of Persons with Disabilities. Future research and analysis is required to identify the nature and extent of such impairment hierarchies in other jurisdictions, and as affecting workers' and their employers.

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## Compliance with Ethical Standards

**Conflict of interest** Paul Harpur, Ursula Connolly and Peter Blanck declare that they have no conflict of interest.

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<sup>78</sup> Ibid [101].

<sup>79</sup> Once a person is diagnosed as having a mental illness, if the person refuses further treatment then the fact they are refusing “help” is used to suggest a mental impairment and lack of capacity.

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