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## **BULLYING AND PSYCHIATRIC INJURY; RECENT AND PROPOSED DEVELOPMENTS IN THE LAW**

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### **Introduction**

1 My paper covers:

- 1.1 Amendments to the *Fair Work Act 2009* (Cth) to allow the Fair Work Commission (FWC) to deal with bullying claims;
- 1.2 Recent court decisions on claims for damages for psychiatric illness;
- 1.3 The nature of a recognisable psychiatric illness.

### **Fair Work Act 2009 (Cth)**

- 2 On 28 June 2013 the *Fair Work Act 2009* (Cth) was amended to incorporate, among other changes, express provisions addressing bullying in the workplace.
- 3 These provisions will come into operation on 1 January 2014. They are found in a new Part 6-4 B – Workers’ Bullied at Work (sections 789FA to 789FL).

### *Bullying*

- 4 A worker is bullied at work if one or more individuals repeatedly behave unreasonably towards the worker, or a group of workers of which the worker is a member, and that behaviour creates a risk to health and safety: s789FD. Reasonable management action carried out in a reasonable manner is not bullying: s789FD.

*Criteria for and orders that can be made*

- 5 If the Fair Work Commission is satisfied that :
  - 5.1 The worker has been bullied at work; and
  - 5.2 There is a risk the worker will continue to be bullied at work;then it may make an order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work: s789FF.
- 6 The FWC is required to take into account a number of matters including any procedure available to the worker to resolve grievances or disputes and any outcomes of that procedure: s789FF(2).
- 7 A person to whom an order applies must not contravene a term of the order: s789FG. This is a civil remedy provision: s539(2).
- 8 A person affected by the contravention, industrial association or an inspector may apply to the Federal Court, Federal Circuit Court or an eligible State or Territory Court for orders in relation to the contravention including the maximum penalty: s539. The maximum penalty is sixty penalty units which equates to \$10,200 for an individual and \$51,000 for a company: ss12 and 546 *Fair Work Act* and s4AA *Crimes Act 1914* (Cth).
- 9 The Federal Court or the Federal Circuit Court may make any order that it considers appropriate if the Court is satisfied that a person has contravened a civil remedy provision: s545(1). The orders that the Court may make include injunction or an order awarding compensation for loss that a person has suffered because of the contravention: s545(2).
- 10 The Act does not appear to create an action for compensation or damages for bullying. The remedy of compensation may be made where an order of the FWC has not been complied with.

*Who can apply*

- 11 A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order: s789FC.
- 12 A worker is an individual who performs work in any capacity, including as an employee, a contractor, subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer, but does not include a member of the Defence Force: s789FC(2) and the *Work Health and Safety Act 2011* (Cth).

*Respondent*

- 13 Remedies are only available if, when the bullying conduct occurs, the worker is at work in a “constitutionally-covered business”. A “constitutionally-covered business” is a business or undertaking by a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory, or the business or undertaking is conducted principally in a Territory or Commonwealth place: s789FD(3).
- 14 A person who is involved in a contravention of a civil remedy provision is taken to have contravened it: s550.

**Recent cases on liability to pay damages**

*Introduction*

- 15 In recent years claims for damages for deliberately or negligently inflicted psychiatric illness have succeeded against employers, a company in control of a work place, and schools. In these cases standard issues that will arise are whether:
  - 15.1 The plaintiff is suffering from a recognised psychiatric illness;
  - 15.2 A duty of care was owed to the plaintiff;
  - 15.3 The duty of care was breached; and
  - 15.4 A breach of duty caused the psychiatric injury.

- 16 It is important to start with the recognition that not every adverse mental state constitutes damage for the purposes of the law of tort. Damages are not recoverable for adverse feelings or moods, or for depressive symptoms that fall short of a recognised psychiatric illness. They are not an injury. Only recognised psychiatric illness is an injury capable of supporting a claim for damages. It is therefore important to understand the nature of a recognised psychiatric illness.
- 17 A duty to exercise reasonable care is well established in the cases of employer and employee and school and pupil. In other cases it is necessary to rely on general principles about when a duty of care arises. To the extent that risks in a workplace are within the control of a defendant who is not the worker's employer it is likely there will be little if any difficulty establishing that a duty of care was owed to worker by the defendant.
- 18 Even in cases where a well established duty of care arises it will still be necessary to show that in all the circumstances of the case the risk of a plaintiff suffering a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful. Usually this test of reasonable foreseeability is an essential requirement for the conclusion that the defendant owed a duty of care.

*Liability principles*

- 19 The common law rules for determining liability for negligence were summarised by Gummow J in *Roads & Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 [18] as follows:

“First, the proper resolution of an action in negligence depends on the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; and does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt*”.

- 20 These principles must now be considered in the context of the provisions of the *Civil Liability Act 2002* (WA). The Act does not control the issue of when a duty of care arises. The existence of a duty of care is determined by considering reasonable foreseeability and the “salient features” of the relationship between the plaintiff and the defendant: *Kuhl v Zurich Financial Services* [2011] HCA 11; (2011) 243 CLR 361, 371 [20].
- 21 I will not address in detail the principles that determine when a duty of care arises. In most of the cases that I will discuss in this paper there was no doubt that a duty of care arose. These were claims by employee against employer, worker against the principal who controlled a workplace, and pupil against school.
- 22 Two important cases that pre-date the *Civil Liability Act 2002* continue to be relevant in discussions of liability principles in recent cases. They are *Tame v New South Wales* (2002) 211 CLR 317 and *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; [2005] HCA 15. Both concerned psychiatric illness that occurred before 2002.
- 23 *Tame* is authority for the following:
- 23.1 It is not necessary for the plaintiff to prove that he or she suffered a “nervous shock”;
- 23.2 The central question for determining liability in tort for psychiatric injury is whether in all the circumstances the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable;
- 23.3 It is not necessary to show that a person of “normal fortitude” might have suffered psychiatric injury;
- 23.4 Emotional distress, falling short of recognisable psychiatric illness, will not ground a cause of action for damages. Emotional distress, falling short of psychiatric illness sufficient to ground a cause of action for damages, may include distress,

alarm, fear, anxiety, annoyance, despondency, fright, nervousness, grief, worry, mortification, shock, humiliation and indignity.

24 **Koehler** supports these propositions:

24.1 The central enquiry is whether, in all the circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful: 57 [33];

24.2 In the case of psychiatric injury the relevant duty of care is engaged if psychiatric injury to the particular employee is reasonably foreseeable. That invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned: 57[35];

24.3 The matters that might make psychiatric injury reasonably foreseeable include, but are not limited to, nature and extent of work being done, signs from the employee concerned, and uncharacteristic, frequent or prolonged absences. Other relevant matters may require a deeper knowledge of causes of psychiatric injury than matters that may be identified as common general knowledge: 54[24];

24.4 It may be accepted that as a matter of general knowledge some recognisable psychiatric illnesses may be triggered by stress. It does not follow however that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work: 57 [34].

25 The “central question” is relevant to both issues of duty of care and breach of duty. In the well-established cases where the nature of the relationship gives rise to a duty of care foreseeability of psychiatric injury controls the issue of whether that duty has been breached.

26 It may be that signs from the employee that the risk of psychiatric injury has appeared are distinct from psychological disturbance such as stress: *Nationwide News Pty Ltd v Naidu*

(2007) 71 NSWLR 471; [2007] NSWCA 377 at 476 [15] per Spigelman CJ. In other words the appearance of a psychological disturbance such as stress might not be sufficient to alert the defendant that there is a risk of psychiatric injury.

- 27 In both *Tame* and *Koehler* the plaintiffs' claims failed.
- 28 In *Tame* the plaintiff developed a psychotic depressive illness after she became obsessed with a mistake made by a police officer in a report on a traffic accident that she had a blood alcohol level of 0.14%.
- 29 The police officer did not owe a duty to take reasonable care to avoid psychiatric injury to the driver. It was not reasonably foreseeable that a person in her position would sustain a recognisable psychiatric injury or illness as a result of the erroneous recording of her blood alcohol level in the accident report.
- 30 In *Koehler* the plaintiff developed a major depressive illness as well as a complex fibromyalgia syndrome. She worked as a part time merchandising representative. She was allocated duties that she considered she could not perform within the time allocated. She complained orally and in writing on many occasions that she had too big an area, too many stores and very little time and suggested ways to solve the problem. She did not complain that the difficulties she was experiencing were affecting her health.
- 31 Her claim for damages failed. Her employer owed her a duty of care but did not breach that duty. There was no reason to suspect that by performing her contract of employment she was at risk of psychiatric injury.

#### *Civil Liability Act 2002*

- 32 For injuries that occurred after 1 December 2003 these principles must be applied in the context of the provisions of the *Civil Liability Act 2002* (WA). The Act does not control the principles for determining when a duty of care arises but it governs questions of breach of duty and causation.

33 Section 5B of that Act sets out restrictions on the ability of an injured person to recover damages:

“5B. General principles

- (1) A person is not liable for harm caused by that person’s fault in failing to take precautions against a risk of harm unless –
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.
  
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) –
  - (a) the probability that the harm would occur if care were not taken;
  - (b) the likely seriousness of the harm;
  - (c) the burden of taking precautions to avoid the risk of harm;
  - (d) the social utility of the activity that creates the risk of harm.”

34 In addition to showing that a risk of injury was foreseeable it must also be shown to be “not insignificant”.

35 In addition the court must determine whether a reasonable person in the defendant’s position would have taken precautions against a risk of harm. In making that determination the court must consider a number of factors that resemble the common law factors identified in *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40, 47-48.

36 It is not sufficient for a plaintiff to show that there was a foreseeable risk of psychiatric injury. In *Hegarty v Queensland Ambulance Service* [2007] QCA 366 in the course of his reasons for decision Keane JA made the following observations:

- “(a) In a negligent infliction of psychiatric injury case, the risk of injury may be less apparent than in cases of physical injury.
- (b) Whether a risk is perceptible at all may in the end depend upon the vagaries and ambiguities of human expression and comprehension.
- (c) 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.

- (d) The private and personal nature of psychological illness, and the consequential difficulties which attend the discharge of an employer's duty in this respect, must be acknowledged as important considerations.
- (e) The dignity of employees, and their entitlement to be free of harassment and intimidation, are also relevant to the content of the duty that might be asserted by a plaintiff.
- (f) Issues of some complexity arise in relation to when and how intervention by an employer to prevent mental illness should occur, and the likelihood that such intervention would be successful in ameliorating an employee's problems."

37 The *Civil Liability Act* by s5C sets out a test of causation of loss in tort:

"5C. General principles

- (1) A determination that the fault of a person (the "**tortfeasor**") caused particular harm comprises the following elements –
  - (a) that the fault was a necessary condition of the occurrence of the harm ("**factual causation**"); and
  - (b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused ("**scope of liability**").
- (2) In determining in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) –
  - (a) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor; and
  - (b) whether and why the harm should be left to lie where it fell.
- (3) It is relevant to the determination of factual causation to determine what the person who suffered harm (the "**injured person**") would have done if the tortfeasor had not been at fault –
  - (a) subject to paragraph (b), the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault; and
  - (b) evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible."

27 It has not yet been suggested that the statutory test of causation differs from the common law test: cf *Strong v Woolworths Limited* [2012] HCA 5; (2012) 86 ALJR 267.

28 The plaintiff bears the onus of proving, on the balance probabilities, any fact relevant to the issue of causation: s5D.

29 Accordingly a defendant will not be liable for injury for failing to take precautions against a risk unless:

29.1 The risk was foreseeable;

29.2 The risk was not insignificant;

29.3 A reasonable person in the defendant's position would have taken those precautions: s5B(1); and

29.4 The defendant's fault was a necessary condition of the occurrence of the harm and it is appropriate for the scope of the defendant's liability to extend to the harm so caused: s5C(1).

30 Bullying cases should be distinguished from cases where a plaintiff has alleged psychiatric injury resulting from over-work, albeit work that the employee agreed to do: eg. *Koehler v Cerebos*; *Taylor v Haileybury* [2013] VSC 58 (22 February 2013).

*Recent cases*

*Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377.

31 This case was decided before the *Civil Liability Act 2002* (NSW) came into force. It is a useful example of bullying that might be sufficient to support a successful claim for damages. It was a claim against a party other than the plaintiff's employer.

32 A security guard, who was employed by ISS Security Pty Ltd worked at premises operated by Nationwide News. He was awarded damages for psychiatric injury caused by bullying behaviour by an officer of Nationwide News.

33 There was a substantial body of evidence of racial vilification and personal abuse. The plaintiff was exposed to conduct that was prolonged, abusive, intimidating and physically threatening.

34 There were insults including "black boy", "black c\*\*\*\*", "monkey face", "curry muncher", "boofhead", "poofter" and "hopeless" that were frequent enough to be

characterised as systematic and accurately described as bullying or harassment. In addition the officer of Nationwide News made verbal threats that the plaintiff would be transferred from his job, would not get work anywhere in New South Wales in the security industry and threats of an actual physical abuse.

35 The plaintiff suffered from a mix of Post-Traumatic Stress Disorder, depression and anxiety.

36 Spigelman CJ considered that any person could reasonably foresee that the conduct engaged in by the officer carried with it the risk of psychological or psychiatric harm. In addition the plaintiff exhibited signs of such harm to the officer. He was observed to cry and to be scared. He was observed by others in the work place to change over a period of time from a happy person to one who appeared depressed.

37 Nationwide News was held vicariously liable for the tortious misconduct of its officer.

38 In addition the officer was in the circumstances the “mind and will” of Nationwide News and his conduct constituted a breach of the duty of care owed by Nationwide News to the plaintiff.

*Willett v State of Victoria* [2013] VSCA 76 (12 April 2013).

39 The plaintiff suffered from a persistent major depressive disorder. She had been a Detective Senior Constable in the Victorian Police Force. She was subjected to episodes of bullying and harassment which led to the development of a chronic depressive disorder.

40 A jury awarded her damages of \$106,000 for pain and suffering and loss of enjoyment of life. The award was increased on appeal to \$250,000. All of the medical evidence accepted that the conduct she experienced was a significant contributing factor to her mental disturbance.

- 41 The conduct to which she was exposed included allocation of the worst desk in the office, being placed last on a roster below the order reflecting her rank, being accused of having “f\*\*\*ed the boss to get her job”, being asked by her direct supervisor if she would voluntarily relinquish her job so that he could get rid of her being called the “black widow” when she walked into the room, being spoken about to others in disparaging terms, being socially ostracised, and being asked to do menial jobs that were not consistent with her seniority.
- 42 The statutory framework within which the case was decided was not set out by the Court. *Swan v Monash Law Book Cooperative* [2013] VSC 326 (26 June 2013)
- 43 The plaintiff recovered \$300,000 as damages for pain and suffering and loss of enjoyment of life.
- 44 She suffered from major depressive disorder and a generalised anxiety disorder with features of traumatisation after she was bullied, harassed and intimidated by a fellow employee at the workplace. She was a part-time assistant in a bookshop. The conduct was by the part-time manager.
- 45 The manager was found to have engaged in an established pattern of workplace bullying that would be expected by a reasonable person to humiliate, intimidate, undermine or threaten the plaintiff. There were incidents of occupational violence that were intermittently reinforced with an expectation that the violence might be repeated, there was episodic conduct that subjected the plaintiff to stress and emotional distress, humiliation and belittling conduct, intimidation and aggressive managerial direction. There was a restricted and confined workplace environment so that the conduct imposed substantial and significant emotional stress and distress on the plaintiff.
- 46 The part-time manager’s conduct included making a threat of dismissal (which he had no right to make), throwing a book at the plaintiff, slamming the receiver of a phone into its

cradle, throwing work on his desk, ignoring her suggestions on furniture arrangements, making sarcastic comments, failing to explain but insisting upon his preferred arrangements with books and abusively dismissed her suggestions, making offensive remarks about staff who were not Anglo-Australians, using offensive language in the plaintiff's presence, making rude, demeaning, hostile or sarcastic statements and regularly speaking in a loud voice and angry tone with an expression and demeanour consistent with such a mood, constantly observing and correcting on insignificant or irrelevant matters, obscuring the plaintiff's vision of the counter and effectively corralling her into a confined office space by placement of a bookshelf, working out and using the plaintiff's personal password to a computer without the plaintiff's consent, failing to explain instructions that he gave, refusing to allow the plaintiff to carry out a number of tasks at the bookstore, giving the plaintiff meaningless tasks, and controlling her receipt of wages.

47 The board of the employer became aware of the manager's conduct in March 2003 and that it might cause harm to the plaintiff. Subsequently it did nothing to avoid the risk of further bullying behaviour. It did not clearly define staff responsibilities. It did not have a policy or procedure in place for dealing with complaints of inappropriate behaviour. It gave no warning or direction to the manager about his dealings with the plaintiff. It did not investigate what was occurring in the book room. It did not arrange for or conduct a risk assessment. It did not have a safe return to work procedure.

***Guorgi v Pipemakers Australia Pty Ltd*** [2013] QSC 198 (9 August 2013)

48 The plaintiff, of Egyptian heritage, was subjected to bullying in the workplace. His claim for damages based on alleged development of Post-Traumatic Stress Disorder was rejected.

- 49 The plaintiff found a mock toilet roll at the workplace with the words “Arab Bullshit Bowl”. When he returned to the factory to identify who was responsible for it he saw two workers wearing Ku Klux Klan like masks.
- 50 The trial judge held that the toilet roll and accompanying words were directed to the plaintiff and words uttered by the fellow worker (“You’re black. We’re white and we’re better, you are not”) were directed to the plaintiff and made reference to his ethnicity. He held that the making of such grossly offensive remarks can constitute bullying and harassment.
- 51 The trial judge found that the plaintiff was not a credible or reliable witness. The plaintiff admitted that he was not an entirely honest person and was prepared to say anything, whether true or not, to assist his case. He had made false claims to the tax office and false statements about education or qualifications in his resume.
- 52 The trial judge held that the plaintiff had not established that it was reasonably foreseeable that he could develop psychiatric injury as a consequence of any failure on the part of the defendant to exercise reasonable care. Important facts that underlay that conclusion were that the plaintiff actively participated in joking and banter with racist overtones, there was no evidence that the defendant was ever informed that its failure to ensure that racist jokes and banter ceased was placing the plaintiff at risk of psychiatric harm, and the incident that occurred was very different from anything that had previously taken place on the factory floor.
- 53 In addition, the trial judge was not satisfied that the plaintiff suffered Post-Traumatic Stress Disorder or that, as alleged by the plaintiff, he developed alcohol dependence as a consequence of the incident at the factory. There was evidence, and the trial judge found, that the plaintiff had alcohol abuse problems before the incident.

***Oyston v St Patrick's College*** [2013] NSWCA 135 (27 May 2013)

- 54 The plaintiff recovered damages for psychiatric injury that she suffered after she was bullied by other students when she was a year 9 pupil at the defendant school. The plaintiff alleged that from 2003 she was subjected to name calling on a daily basis, as well as physical bullying that included being pushed in the corridor three or four times a week and, on one occasion, being struck on the head by a plastic coke bottle. In 2004, in year 9, she became depressed and suicidal and intermittently cut her wrists with a razorblade. She experience panic attacks. In mid-2004 she was assaulted by other girls.
- 55 The trial judge held that the defendant in the exercise of reasonable care was required to take reasonable steps to ensure that the plaintiff was protected from bullying, including taking reasonable steps to ascertain the identity of the perpetrators and to take such action as was reasonable to prevent repetition by those persons of bullying conduct. In February 2004 the defendant was aware that the plaintiff was vulnerable in that she suffered from anxiety and panic attacks and it should have been clear to the defendant that she was likely to be susceptible to psychological harm caused by bullying conduct. The risk of psychological harm to the appellant was both foreseeable and not insignificant within the meaning of s5B of the *Civil Liability Act 2002* (NSW).
- 56 The trial judge accepted that, while at the College, the appellant came to suffer from an adjustment disorder from which she had recovered by 2007. One expert witness for the College regarded the plaintiff's symptoms as revealing a major depressive disorder which had resolved by 2008, although she continued to have ongoing problems such as being afraid of the dark, having nightmares, and being sensitive to criticism.
- 57 In New South Wales the *Civil Liability Act 2002* s.16 (which became operative on 1 October 2012) restricts the level of general damages to a maximum prescribed amount, currently \$535,000. The maximum may only be awarded in the most extreme case. In a

later decision the Court of Appeal increased the award of general damages to 25% of the most extreme case which by a conversion table resulted in an award of \$34,775: *Oyston v St Patrick's College (No 2)* [2013] NSWCA 310 (23 September 2013).

### **Recognisable psychiatric injury**

- 58 A condition that is recognised by the profession of psychiatry as a psychiatric illness will qualify as a recognised psychiatric illness and an injury capable of supporting a claim for damages in tort: eg. *Tame v New South Wales*. It should be distinguished from emotional distress that may include stress, distress, alarm, fear, anxiety, annoyance, embarrassment, despondency, fright, nervousness, grief, sorrow, worry, mortification, shock, humiliation and indignity.
- 59 The presence of a recognisable psychiatric illness is invariably established by reference to diagnostic criteria applied by psychiatrists. A common reference work is the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, published in 2000 by the American Psychiatric Association, Washington DC. This is usually referred to by the shorthand description DSM-IV-TR.
- 60 The DSM-IV-TR describes numerous psychiatric conditions and lists and describes diagnostic criteria. Features in the evidence in a particular case can be checked off against diagnostic criteria to determine whether the plaintiff is suffering from a recognised psychiatric illness.
- 61 Psychiatric illnesses that are found in the decided cases on alleged workplace bullying, and described in the DSM-IV-TR, include Adjustment Disorder, Major Depressive Disorder, and Post-Traumatic Stress Disorder.
- 62 In May 2013 the American Psychiatric Association released a Fifth Edition, the DSM-V, to supersede the DSM-IV-TR.



- 63 A recent example from the District Court of Western Australia where the DSM-IV-TR was applied is *Ward v Metlife Insurance Ltd* [2012] WADC 166.
- 64 An alternative guide, that does not appear to be used in the decided cases, is the Tenth Revision of the International Statistical Classification of Diseases and Related Health Problems issued by the World Health Organisation and known in shorthand form as the ICD-10.

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