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Liability for Stress-related Injury

Guest Lecture delivered at University of Salford
By Emeritus Professor Brenda Barrett
Middlesex University
Objectives are to -

- Define stress
- Note incidence of work-related stress
- Review the development of liability for psychiatric injury
- Consider particular factors relevant to negligence
- Trace the development of employer’s liability
- Note alternative claims
What is Stress?

• “We define work-related stress as ‘the adverse reaction people have to excessive pressures or other types of demand placed on them’.”

• *Tackling work-related stress – A manager’s guide to improving and maintain employee health and well-being.* HSE 2001
What are the adverse effects?

- Anxiety
- Ill-health
  - Psychiatric Injury e.g. depression
  - Physical injury e.g. high blood pressure, heart disease, ulcers, thyroid disorders. R.S.I.? (see Mughal v Reuters [1993])
Mental health and physical well being linked

• Stress and depression are just as likely to cause a heart attack as being fat or having high cholesterol – Harvard Medical School

*The Times, 28\textsuperscript{th} September 2005*
Incidence of work-related stress

- http://www.hse.gov.uk/stress
  - about half a million people in the UK experience work-related stress at a level they believe is making them ill;
  - up to 5 million people in the UK feel "very" or "extremely" stressed by their work; and
  - a total of 12.8 million working days were lost to stress, depression and anxiety in 2003/4
How accurate are these figures?

- They represent work people’s self-diagnosis;
- One person’s stress is another person’s challenge

Both civil litigation and focus of HSE clearly indicate it is now considered unacceptable for work to cause stress
For what is a defendant liable?

- Criminally, under the Health and Safety at Work Act 1974
  - Creating the risk of personal injury

- Civilly
  - In negligence having caused personal injury
  - For breach of contract?
  - Under the Protection from Harassment Act 1997 causing anxiety
When suing in tort of negligence

• Claimant must prove:
  – D owed C a duty of care
  – D broke that duty by negligent conduct
  – D’s breach caused
  – Damage to C

• *Most personal injury claims brought in negligence*
Origins of liability for psychiatric injury

- Nervous Shock following traumatic event
  - Initially evidenced in physical form typically miscarriage See *Dulieu v White* [1901]
  - Later PTSD etc See *McLoughlin v O’Brien* [1983]
  - Liability for psychiatric illness refined in *Alcock v CC of S.Yorks Police* [1991] and *Page v Smith* [1996]
Nervous Shock Continued

• Claimant must either
  – Have ties of love and affection with the victim etc
  or
  – Be personally at risk of physical injury

• Not exclusively employer’s liability (many transport cases)
Distinguish

- Illness caused by single traumatic event from
- Illness caused by ongoing stressful circumstances
- Employer’s liability today typically for the latter
Walker v Northumberland CC [1995]

- First clear case of employer’s liability for stress
- Duty of care accepted
- Conscientious employee: heavy work load
- Employer liable for foreseeable 2nd illness
- Employer’s limited resources no defence
Colman J in QBD

• I therefore consider that before the 1986 illness it was not reasonably foreseeable to the Council that the workload to which Mr W was exposed gave rise to a material risk of mental illness ...

• I have no doubt that it ought to have been foreseen .. That if Mr W was again exposed to the same workload ... there was a risk that he would again succumb to mental illness and that such illness would be likely to end his career ...
Subsequent developments in negligence litigation

- From 1995 many claims filed
- A number of employees succeeded in County Courts
- Then employers appealed to Court of Appeal – a group of appeals heard together – in *Hatton v Sutherland*
Appeals to Court of Appeal

- **Hatton v. Sutherland**
  Employer won appeal – teacher divorce etc

- **Barber v. Somerset County Council**
  Employer won appeal – teacher school re-structuring

- **Jones v. Sandwell MBC**
  cc decision upheld – 2 jobs rolled together

- **Bishop v. Baker Refractories Ltd**
  Employer won appeal – inflexible employee
Hale LJ’s 16 propositions

• Duty of care confirmed (1)
• Threshold – foreseeability (2)
• Foreseeability depends on what e’r knows
  - demands of jobs
  - signs from worker (5)
• E’r failed to take reasonable steps (8)
  - size of organisation (9)
  - would action help? (10)
  - has e’r advisory service? (11)
  - e’r does not have to dismiss (12)
Hale’s propositions cont.d

- Breach caused illness (14)
- Damage may be apportioned (15)
- Pre-existing disorders to be taken into account (16)
Controversial propositions

• Size of organisation material – See *Walker v Northumberland*

• Rely on what employee says – See *Young v Post Office*

• No duty to dismiss
  See *Coxall v Goodyear*
Foreseeability – other factors

• Case law – NB *Hartman v South Essex Mental Health and Community Care NHS Trust* – vulnerability of long service e’ee

• Published reports e.g. *Self-reported work-related illness in 2003/04* – vulnerability of 50 year olds

• HSE *Management Standards*
• Risk assessment for stress required under reg 3 of Management of Health & Safety at Work Regulations

• Guidelines identify stress factors:
  - DEMANDS – workload
  - CONTROL – of work by e’ee
  - SUPPORT – by e’r
  - RELATIONSHIPS – harmony at work
  - ROLE – clear to e’ee

• CHANGE – how handled
HSE role cont’d

• E’r should consult with ee’s to get to know
  Have way to help the vulnerable

• Compliance would reduce likelihood of civil
  liability

• Failure to comply
  - evidence against e’r
  - possibly independent action for breach of
    statutory duty
Causation of stress per Hale LJ

- Claimant must show er’s breach of duty caused or materially contributed to the “harm”
- [The “harm” must be recognised form of ill-health]
- Claimant in difficulties if cause is “vulnerability” of which er’s unaware
- Sufficient er’s negligent a “material contribution” *Bonnington Castings Ltd v Wardlaw* [1956]
- Apportionment if more than one cause
Are Hale’s propositions correct

- *Barber v. Somerset County Council* was appealed
  - HL restored CC judgment BUT
  - The propositions were tacitly accepted by all AND
  - Expressly approved by Lord Scott BUT
  - Lord Walker emphasised each case depended on its facts
Subsequent cases:

- **Hartman v South Essex Mental Health and Community Care NHS Trust [2005]**
  - 6 appeals to CA
  - In 5 the issue was foreseeability
  - All 50+, long service, vulnerable
  - 4 employers provided counselling
  - 3 cases decided in favour of employer
Breakdown of *Hartman*

- **Hartman**
  - foreseeable:
    1. Application form; 
    2. client’s accident; 
    3. complaints of overwork

- **Best v Staffordshire University**
  - not foreseeable, e’r not on notice of problem

- **Wheeldon v HSBC Bank Ltd**
  - E’r on notice and failed to discuss situation
Hartman Cont.d

• *Green v Grimsby & Scunthorpe Newspapers Ltd*
  – Employee complained but in circumstances breakdown not foreseeable

• *Moore v Welwyn Components Ltd*
  – 25 years service, depression at age 55 partly due to disposition but as bullying e’r 100% liable

• *Melville v The Home Office*
  – Prison officer ill after prisoner suicide. Foreseeable though part of the job
Evidential problems for claimant

• Proving employer was negligent
  – Establishing foreseeable
  – Knew claimant’s susceptibility
  – Showing situation “avoidable”

• Proving ill-health caused by the negligence
  – Was the claimant vulnerable by temperament or personal circumstances?
Establishing Liability by another route?

- Contract
  - Wrongful termination?
  - Breach of contract
- Unfair dismissal
- Unlawful discrimination
- Harassment
Contract in common law courts

• Breach of duty of trust and confidence
  [Malik v BBCI]
  – No help where wrongful termination
  – Duty may be relevant if contract not terminated Gogay v Herts CC [2002] (HC)
    cf Eastwood v Magnox (etc) [2004] (HL)
Claiming in Employment Tribunal

• Unfair dismissal
  *Dunnachie v Kingston* [2004] confirmed
  ET only empowered to compensate for economic loss + statutory cap

• Discrimination – a statutory tort – compensation for personal injury may be possible where harassment: see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999]
Protection from Harassment Act

- Majrowski v Guy’s and St Thomas’s NHS Trust [2005]
  - Claim against e’r for e’ee’s breach of statutory duty in employment
  - Claimant need not be employee
  - Covers anxiety
  - Harassment need not be foreseeable
  - Relates to course of conduct
  - Just and reasonable to impose employer’s liability
Conclusions

• Claims for negligence may decline:
  – *Hatton* increases burden of proof
  – Employers may respond to HSE and assess
  – Alternative claims

• Population may learn from Government campaigns for healthy living