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BRINGING PSYCHIATRIC CLAIMS: FORESEEABILITY, CAUSATION, AND DAMAGE

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21 November 2012

Limits of recoverability

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Categories of victim

- Physical and psychiatric injury
- Participation in event where risk of physical harm: *Page v Smith* [1995] 2 All ER 455 (HL)
- Witness to shocking event, no physical risk: *Bourhill v Young* [1943] AC 92

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- Involuntary participant in a shocking event: *Dooley v Cammel Laird* [1951] 1 Lloyd's Rep 271

- Rescuer: *Chadwick v BRB* [1967] 2 All ER 945

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- Stress at work: *Walker v Northumberland CC* [1995] 1 All ER 737

- Harassment: *Majrowski v St Guy's and St Thomas' NHS Trust* [2006] UKHL 34

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Other cases

- Battery; sexual abuse
- Local Authority Care Claims/HRA
- *Wilkinson v Downton* [1897] 2 QB 57
- Shock caused by damage to property

Recent Cases

- *Monk v PC Harrington* [2009] PIQR 2009
- *Connor v Surrey CC* [2010] EWCA Civ 286
- *Buck v Norfolk & Waveney Mental Health Foundation Trust* [2012] Med LR 266
- *Taylor v Novo* (Unreported)

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Monk

A working platform fell 60 feet and hit two men working below. One died shortly afterwards at the scene, the other had a badly broken leg.

C (self-employed) heard about the accident on the radio, made way to the scene, crawled under the platform to lend assistance. C was first aider.

C suffered PTSD and associated depression.

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Monk

Negligence for the collapse of the working platform was admitted.

C was a rescuer, but his own physical safety was not at risk, and he had no reasonable ground to think he was at such risk.

C had no reasonable ground for believing his own acts had caused or contributed to the accident.

C was a secondary victim, witnessed the aftermath, but did not have close ties of love and affection to the victims.

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Buck v *Norfolk*

No oral evidence. The facts were agreed.

C was a bus driver. A patient threw himself under his bus and died instantly. C suffered severe PTSD.

D's argument that C was a secondary victim was rejected. J held that he was a primary victim and the fact that he suffered psychiatric rather than physical injuries is not the point.

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Taylor v Novo

C's mother suffered an injury at work on 27.2.08. She collapsed on 19.3.08 and died.

C was with her mother at time of collapse, applied CPR, and phoned for ambulance.

C suffered PTSD.

C was a secondary victim, but was not present at the time of the accident.

Can she recover?

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Taylor v Novo

- D says too long after the accident
- C says that the relevant incident is the collapse and not the original accident
- Judge found that D's negligence caused two traumatic and sudden incidents. To argue that there were 'separate events' was artificial. The second event was sudden and horrifying; "*the fact that the second event would not have occurred but for the first adds nothing*."

Foreseeability

Hale LJ in *Hatton v Sutherland* [2002] 2 All ER 1:

"*it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health*" (para 27)

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Trigger

"*in view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health the indications must be plain enough for any reasonable employer to realise that he should do something about it*." (para 31)

Smith LJ

- "*The indication of impending illness must be clear before an employer has a duty to do something about it.*"
- By a specific date the Claimant was "*palpably under extreme stress*", "*about to crack up*".

Dickins v O2 [2008] EWCA Civ 1144

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History and character

- History of complaints
- Nature of complaints:
  - overwork
  - asking for assistance
  - asking to move jobs
  - tears
- Character of employee:
  - stoic
  - conscientious
  - reliable
  - hardworking

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Nature of work

- No occupations which are intrinsically dangerous to mental health
- Intellectually/emotionally demanding jobs will carry greater risk (perhaps)
- Demands upon employee (in comparison to others?)
- Signs that other doing or having done this job suffered stress

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Nature of Claimant

- Particular problem or characteristics
- Pre-existing vulnerability
- Existing history of stress at work

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History and the trigger

- History of complaints / breaches of duty do not become actionable ***until there is an impending threat to health***

Mullen

Mullen v Accenture Services Ltd [2010] EWHC 2336 (QB)

While J accepted C suffered psychiatric illness as a result of stress at work, he did not accept that D knew he was susceptible to stress-induced illness.

C's breakdown came as a "*complete surprise*".

No-one else in the same department suffered a similar illness.

"*If I had known he was on the verge of a breakdown, I would have done something.*"

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Mullen

Evidence of long work hours, forgetfulness, refusing to take breaks, reliance on snack foods, evidence that was driven to tears or point of tears: "*falls far short of the required threshold*".

Breach of Duty

- What to do when have impending harm to the Claimant?
- Is it already too late?
- Would have suffered injury in any event?
- Steps it is alleged the Defendant should have taken which would have made a difference?

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Hatton

- Take employee at face value
- Not required to make searching inquiries of employee or medical advisers
- Steps which are reasonable in the circumstances, having considered risk of harm, gravity, costs, practicability.

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Examples

- Referral to occupational health or GP
- Time off work: holiday, leave, sabbatical
- Reasonable adjustments before or after return to work
- Counselling
- Grievance procedures

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- *Hatton*: an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services is unlikely to be found in breach of duty

- *Daw v Intel* [2007] 2 All ER 126: such services not a panacea; problems of which complaint made could only be dealt with by management intervention

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- *Dickins v O2*: advice or counselling service desirable as circumstances in which an employee would not discuss problems with managers or line managers. Service allows a forum for discussion and advice without disclosure. However, if issues discussed with managers, the availability of such services is not relevant.
- Counselling not enough because Claimant already having/had counselling.

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Connor

The issue in this case was that D should have been protected from acromonious disputes with the governing body of the school.

This issue lay within the domain of public law i.e. that the existing governing body ought to be replaced using powers under education legislation.

The court could deploy public law powers to fulfil a pre-existing duty of care.

In the circumstances of this case, given the breakdown in relations at the school, D had an obligation to intervene.

Management Regulations

The Regulations are a key factor in assessing what risks an employer should known about and best practice.

The duty to carry out a ‘suitable and sufficient’ risk assessment under reg 3 extends to the risk of stress arising out of the work activity.

Employers are under a duty to appoint a competent person to assist them in compliance (reg 7). Regs 8, 10, 13 and 14 may also need to be considered, depending on the circumstances.

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Management Regulations

Employers must keep up to date with the latest guidance and best practice e.g.:

- www.hse.gov.uk/stress/index.htm
- HSE Management Standards

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Sayers

Whilst these documents show an increased awareness, both generally and by the Council, of the risks of work-related stress, they do not, in my judgment, alter the fact that the question which needs to be answered is whether, in the particular circumstances the risk of psychiatric illness to Mrs Sayers was or should have been reasonably foreseeable to the Council.

Sayers

Whilst I accept that a general awareness of the risks of work-related stress may make it more likely that the risk to an individual is foreseeable, I do not consider that the existence of that general awareness by the Council can, in itself, make psychiatric illness due to overwork foreseeable in a particular individual.

Ramsey J in *Sayers v Cambridgeshire CC* [2007] IRLR 29 (para 151)

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Causation

- Pre-actionable history, consists of (a) complaints and interaction with employer, and (b) personal/medical/stress-related history
- Actionable period, where there is an impending threat to health
- Post-actionable period, condition and prognosis, concurrent and recurrent stressors, ‘spiral’

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“But for”

- History
- Concurrent causes of ‘stress’: physical illness (IBS), relationship breakdown, bereavement
- The straw that broke the camel’s back

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Material Contribution

- *Dickins v O2*: failure to refer to occupational health "*tipped [her] over the edge from suffering stress into complete breakdown*."
- Not possible to say that the Claimant would have suffered a breakdown even had the tort not taken place.

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In the context of causation, the two words “but for” are shorthand. They encapsulate a principle understood by lawyers, but applied literally, or as if the two words embody the entire principle, the words can mislead. They may convey the impression that the claimant's claim for damages for personal injuries must fail unless he can prove that the defendant's negligence was the only, or the single, or even, chronologically the last cause of his injuries.

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The authorities demonstrate that such an impression would be incorrect. The claimant is required to establish a causal link between the negligence of the defendant and his injuries, or, in short, that his injuries were indeed consequent on the negligence. Although, on its own it is not enough for him to show that the defendant created an increased risk of injury, the necessary causal link would be established if, as a matter of inference from the evidence, the defendant's negligence made a material contribution to the claimant's injuries.

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Clough

As Lord Rodger explained and demonstrated in Fairchild , there was "nothing new" in Lord Reid's comment in Bonnington that what was required was for the plaintiff to make it appear at least "that, on a balance of probabilities, a breach of duty caused, or materially contributed to, his injury". Lord Rodger observed that there was ample authority for the proposition in English and Scots law, both before and after Lord Reid had, in effect, treated it as so elementary that it required no support from authority.

Sir Igor Judge in *Clough v First Choice Holidays & Flights Ltd* [2006] EWCA Civ 15; [2006] P.I.Q.R. P22

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Hatton

It is still necessary to show that the particular breach of duty caused the harm. It is not enough to show that occupational stress caused the harm. Where there are several different possible causes, as will often be the case with stress-related illness of any kind, the claimant may have difficulty in proving that the employer's fault was one of them. This will be a particular problem if the main cause was a vulnerable personality which the employer knew nothing about. However, the employee does not have to show that the breach of duty was the whole cause of his ill health: it is enough to show that it made a material contribution.

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Bailey v MoD

If the evidence demonstrates on balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. Hotson exemplifies such a situation. If the evidence demonstrates that "but for" the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the but for test is modified, and the claimant will succeed.

Waller LJ in *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052

Dickins v O2

Smith LJ*: In a case which has had to be decided on the basis that the tort has made a material contribution but it is not scientifically possible to say how much that contribution is (apart from the assessment that it was more than de minimis) and where the injury to which that has led is indivisible, it will be inappropriate simply to apportion the damages across the board. It may well be appropriate to bear in mind that the claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a reduction in some heads of damage for future risks of non-tortious loss. But my provisional view is that there should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play.*

Thaine v LSE

ET upheld C's complaint of sex discrimination which had been a material cause of her ill health. However, other factors unconnected with her work contributed to her dismissal for ill-health reasons including: depressive illness, mother's ill health, break up of relationship. Her compensation was reduced by 60%. Sex discrimination by employer only caused 40% of her injury on assessment.

C appealed and the EAT dismissed her appeal: the extent of D's contribution was limited to that contribution arising from D's breach.

Thaine v London School of Economics [2010] ICR 1422

Thaine v LSE

Keith J explained that the "*test for causation when more than one event causes the harm is to ask whether the conduct for which the defendant is liable materially contributed to the harm. In this case, the tribunal found that it did, and therefore the LSE was liable to the claimant. But the extent of its liability is another matter entirely. It is liable only to the extent of that contribution. It may be difficult to quantify the extent of the contribution, but that is the task which the tribunal is required to undertake. It did that in this case by saying that the unlawful discrimination to which the claimant was subjected at work was 40% responsible for her ill health, and by therefore discounting her award by 60%. At the end of the day, we think that the weight of authority supports the approach taken in the tribunal in this case*."

Egg shell skull

Smith v Leech Brain & Co (1962) 2 QB 404 per Lord Parker CJ

The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely the burn. What, in that particular case, is the amount of damage which he suffers as a result of that burn depends upon the characteristics and constitution of the victim.

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Is this right?

If the claimant has an eggshell skull provided he can show that an unsafe system of work materially contributed to his injury the fact that the particular type of injury was unforeseeable is irrelevant: *Hughes v The Lord Advocate* [1963] AC 837

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Loss and Damage

Hatton: the assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event.

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- Pre-existing history
- Pre-existing illness
- Acceleration
- Exacerbation
- Apportionment of future loss
- Causation of decline
- Risk

THANK YOU