

When is negligence negligence?

Peter Jenkins provides a legal update on access to workplace counselling and the employer's duty of care

The issue of employee access to workplace counselling was firmly back in the media spotlight recently. Steven Heaven, a former prison officer, received a six-figure payout from the Ministry of Justice, for trauma experienced as part of his normal work activity. He was employed at Grendon, a category 'B' prison for adult male prisoners. He was placed on a wing composed entirely of sex offenders. As part of his work, but without receiving any prior specialist training or support, he was required to join the prisoners' therapeutic community meetings, five mornings a week. Here, he was required to listen with a degree of empathy to their recounting previous histories, including crimes of violence and sexual assault. In June 2007, he was diagnosed as suffering from post-traumatic stress disorder and brought a case in October of that year for compensation against his employer. After a court case lasting three years, the case was settled out of court, with Heaven receiving substantial damages.

According to Steven Heaven, 'I knew it would be an extremely difficult case, but I decided I had to fight their decision and make a stand. It was awful having to hear the prisoners' descriptions and I'll never be able to forget what I heard.'¹ Ciaran McCabe, senior solicitor at Moore Blatch Resolve, has commented that 'what employers must learn from this case is that they must provide adequate provision of training for their employees to undertake the tasks expected of them. They need to ensure their employees are suitably qualified to undertake the tasks they are expected to do and to provide adequate support for their employees, for example by providing access to regular counselling, as should have been available in this case'².

Law and workplace stress

This case illustrates the emerging, powerful body of case law, which focuses on the role of counselling in the workplace. While this case was settled out of court, it is still significant. It conveys an important message about the key issue of vicarious traumatisation of professional staff. In addition, it shows the way in which workplace counselling is now seen as an essential employee support strategy, rather than being an optional 'extra', reserved for more enlightened employers.

The law currently perceives 'workplace stress' in terms of a number of different categories, with

various overlapping routes for employees to bring legal action, for any alleged harm suffered at work. The law covers the field of stress at work via health and safety legislation. Discrimination law, now consolidated under the Equality Act 2010, places a proactive duty on employers to implement policies and practices. These are required to protect employees from unlawful discrimination on the protected grounds of race, gender, sexual orientation, gender reassignment, age, religious beliefs, disability, marriage, civil partnership, pregnancy and maternity. Harassment provides additional grounds for legal action by affected staff, and is subject to statutory definition under the same Act. Previous case law has confirmed the vicarious liability of employers for acts of harassment carried out by its staff in the course of their employment, even if not known to the employer. Furthermore, the contract of employment carries an implied duty of trust of confidence, and breach of this duty may give rise to successful action by an employee for stress-related injuries. Finally, employer liability for psychiatric injury, caused by breach of duty of care, has been tested and comprehensively restated in the Hatton appeal case.

Workplace counselling is now seen as an essential employee support strategy, rather than being an optional 'extra', reserved for more enlightened employers

Suing for 'workplace stress'

Under personal injury litigation, employees seek to bring a civil action for damages, for breach of employer duty of care. Under the law of negligence, an employee needs to establish that:

- he, or she, was owed a duty by their employer to take reasonable care
- there was breach of that duty by the employer
- the employee suffered foreseeable harm as a result.

Peter Jenkins is a senior lecturer in counselling at the University of Salford and author of *Counselling, Psychotherapy and the Law* (Sage, 2007). He contributed a chapter on stress and the law to *Organisational stress management: a strategic approach* (Palgrave MacMillan, 2010). P.Jenkins1@salford.ac.uk



Figure 1: Causal model of litigation for 'workplace stress'

The harm may be physical or psychological in nature. If alleging *psychological* harm, then the employee needs to establish that this harm amounted to a *psychiatric injury*, capable of being diagnosed by current diagnostic manuals, such as the DSM IV or ICD 10. Examples of a psychiatric injury could include post-traumatic stress disorder (PTSD), clinical depression, or generalised anxiety disorder, amongst others. Simple anxiety or worry, arising from the work setting, is not sufficient to qualify as a psychiatric condition, hence the inadequacy of 'workplace stress' as a qualifying factor for compensation in this regard.

The key case which opened the door to successful legal action for 'workplace stress' was the well-known case brought by John Walker against his former employer, Northumberland Social Services Department. John Walker worked as an area social services officer from 1970 to 1987. There was a high volume of work, often concerning problematic and stressful child protection cases. With no previous history of mental problems, Mr Walker suffered a 'nervous breakdown', in 1986, and again after his return to work in 1987. He then brought a successful legal civil case against his employers. In 1996, two years after winning the court case, Walker reached an out-of-court settlement with his former employer for a compensation payment of £175,000 (Walker v Northumberland CC [1995]).

Opening the floodgates?

The Walker case was quickly followed by other successful cases, where employer liability for psychiatric injury, caused by breach of duty of care, was established. Within the legal profession and the media, there was growing concern that the effect of the case would be to 'open the floodgates', contributing to the rapid growth of a 'compensation culture'. This stance overlooked the apparent key message of the Walker case that the claimant, in effect, had to suffer, not simply *one* instance of

psychiatric harm, but, more probably, had to experience a *second* one as well. An employer could reasonably assume that an employee would be sufficiently robust to cope with the normal day-to-day pressures of work. Therefore, a stress-induced psychiatric illness would not normally be expected to occur as a result of work.

However, the Walker case illustrated the weakness of a naturalistic, or causal, model of workplace stress, as seen from a legal perspective (see figure 1).

This (somewhat simplistic) model fails to recognise firstly, that the crucial intervening factor required for successful litigation is *breach of employer duty of care*, and, secondly, that the breach must be seen to *cause* the psychiatric injury, via what is referred to as proving 'the test of causation'. It is entirely possible to establish breach of duty of care, as for example in the major class action brought by former servicemen and women against the Ministry of Defence. However, breach of duty of care can be shown *without* establishing that the breach actually *caused* the alleged psychiatric injuries incurred by the claimants (Multiple Claimants v MOD [2003]).

A more accurate representation would need to include these essential factors, as in figure 2.

Employer liability as set out in Hatton

In 2002, the Court of Appeal heard four conjoined cases, relating to awards made for 'workplace stress'. This is more properly defined, in legal terms, as *claims for psychiatric injury, caused by breach of employer duty of care*. Only one of the cases was upheld, and the other three were dismissed, in what was initially taken to be a radical restatement of the law on employer duty of care. However, read more carefully, the findings and rationale by the then Lady Justice Hale, can be seen as a careful, point-by-point restatement of the law as applied in the original Walker case, with some additional refinements. The Court of Appeal judgement is now the essential reference for considering cases seeking to establish employer liability for workplace stress.

Where an employee has already had time off for ill health, or is seen to be vulnerable, due to pre-existing mental health problems (which are known to the employer), then the employer needs to anticipate future adverse stress levels, by providing, for instance,

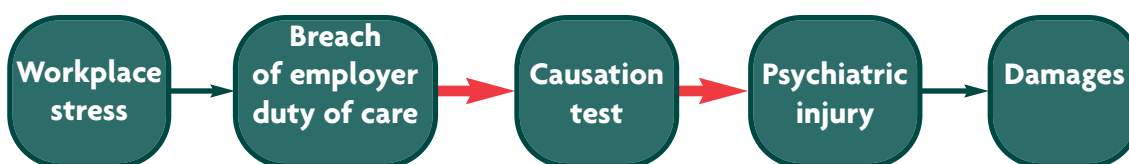


Figure 2: Duty of care model of litigation for 'workplace stress'

a phased return to work, or additional training, support, supervision, or mentoring. Providing access to a confidential counselling service for employees will also demonstrate the fulfilment of the duty of care by a reasonable employer and reduce their potential liability.

The court, in a sense, drew a line that carefully demarcated employer liability with regard to the burgeoning 'compensation culture'. Not all workplace stress is available for compensation; 'some things are no one's fault', according to the judge. Furthermore, the claim, advanced by the Health and Safety Executive and others, that some occupations are inherently stressful, or, at least, more stressful than others, was decisively rejected. The key factor remains that of establishing breach of employer duty of care, and, more difficult still, that the breach *caused* the alleged psychiatric injury.

Case law after Hatton

Subsequent case law has provided essential qualifying detail to the key elements of the Hatton judgement. Merely providing access, or referral, to an employee counselling service is not sufficient to protect employers, where management has clearly failed to carry out reasonable steps to protect staff from undue workplace stress (*Intel v Daw* [2007]; *Dickins v O2 plc* [2008]). Significantly, a claim may now succeed *without* a 'first absence' occurring due to ill-health. The earlier Walker case, as with many others, required a 'second absence', in order to demonstrate breach of employer duty of care. This change is shown in the Connor case (see box).

The Connor case for workplace stress

Erica Connor was the head teacher of a primary school, where she subsequently experienced a great deal of conflict with two school governors, who campaigned publicly against her alleged 'Islamophobia'. The Local Education Authority sought to introduce mediation and an independent enquiry, rather than respond promptly to her developing risk of emotional ill health, due to the levels of stress caused by this situation. In 2005, Ms Connor was signed off work by her GP for stress and depression, later diagnosed by a psychiatrist as severe depression, with symptoms of post-traumatic stress disorder. She then brought a successful case against her employer, alleging breach of duty of trust and confidence as an employer, breach of statutory duty, breach of the Protection From Harassment Act 1997, and negligence. The case for negligence alone was proven, and she was awarded £388,000 in damages (*Connor v. Surrey CC* [2009]).

The law perceives 'workplace stress' in terms of a number of different categories, with various overlapping routes for employees to bring legal action, for any alleged harm suffered at work. The law covers the field of stress at work via health and safety legislation, which places statutory duties on employers. Discrimination and equality law place a proactive duty on employers to implement policies and practices which protect employees from unlawful discrimination and harassment on specific protected grounds. Employer liability for psychiatric injury, caused by breach of duty of care, has been tested and comprehensively restated in the Hatton appeal.

Exposure to trauma

The case brought by Steven Heaven illustrates the heavily traumatic nature of some professional work, and the need for effective training, supervision and personal support of employees, via counselling. It is ironic that this case was resolved in the same month that it was announced that Dominic West, star of the *The Wire*, was to lead in a two-part drama about Fred West, the serial killer. This will centre on the close working relationship which developed between Fred West and Janet Leach, who was brought in to act as an 'appropriate adult' during a number of gruelling police interviews. Ironically, Janet Leach, as with Steven Heaven, claimed to have experienced severely damaging psychological effects as a direct result of this. She then brought a court case against the police for breach of duty of care, in failing to provide counselling for vicarious trauma (*Leach v CC Gloucestershire Constabulary* [1999]). Her case failed, the court found, because she was *not* an employee, but simply a *volunteer*. Access to counselling may fast be becoming a right for employees, but it has yet to become a right enforceable outside the workplace. ■

References

- 1 Moore Blatch Solicitors
<http://www.mooreblatchresolve.com/News/Prison-Warden-Wins-Six-Figure-Payout-in-Landmark-Case.shtml>
Accessed 18/2/11
- 2 The People Bulletin
http://www.apbusinesscontacts.com/the_people_bulletin-pb_5/prisonofficer.aspx Accessed 18/2/11

Legal references

- Connor v Surrey County Council* [2009] (Unreported)
Dickins v O2 plc [2008] EWCA Civ 1144
Hatton v Sutherland [2002] 2 All ER 1
Intel Corporation Ltd v Tracy Ann Daw [2007] EWCA Civ 70
Leach v Chief Constable Gloucestershire Constabulary [1999] 1 All ER
Walker v Northumberland County Council [1995] 1 All ER 73