Claims for Occupational Stress, Bullying and Harassment: An Overview

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Introduction

Defendant disease practitioners commonly handle two related, but distinct, types of claim concerning stressors in the workplace: work-related stress claims and claims for harassment and bullying. These claims can be brought by one of three methods: firstly, under the common law; secondly, under the Protection from Harassment Act 1997; and, finally, in the Employment Tribunal under discrimination legislation or for unfair dismissal.

In this article we present an overview over both types of claim. We are unconcerned with the position in employment law. The focus is exclusively on the position under the common law.

Stress Claims

What exactly does a claimant have to prove when they allege they have suffered harm as a result of stress at work to succeed with a claim? This requires, firstly, an understanding of what stress is and the setting out of some preliminary matters.

What is stress?

According to the HSE, stress is ‘the adverse reaction people have to excessive pressure or other types of demand placed on them at work’. Stress is not an illness, it is a state. The HSE is of the view that well-designed, organised and managed work is good for us, but when insufficient attention to job design, work organisation and management has taken place, it can result in work-related stress.
If stress becomes too excessive and prolonged, mental and physical illness may develop. When this happens, a claim may be possible.

It is vital to be clear on what can and cannot be claimed for. An individual cannot claim for mere ‘stress’: it is not actionable in the same way that other unpleasant but normal human emotions are not actionable. A recognised psychiatric illness must be proven, achieved by expert psychiatric evidence which has assessed the claimant as suffering from one of the conditions in the diagnostic manuals, such as the DSM-V (published by the American Association of Psychiatrists) or the ICD-10 (published by the World Health Organisation).

Preliminary matters

Liability for psychiatric injury caused by occupational stress was first established in Walker v Northumberland County Council; an individual who suffered psychiatric injury as a result of being exposed to excessively stressful working conditions by his employer could recover damages. It was held the ordinary principles of negligence – duty, breach, causation and damages – apply, however the risk of psychiatric injury arising from the breach of duty must be reasonably foreseeable.

Given that ordinary negligence principles apply, it might be thought that the law on primary and secondary victims, which limits the scope of those who are entitled to claim for psychiatric injury, applies also. However, the courts have confirmed that the ordinary principles of employers’ liability apply to a claim for psychiatric injury arising from employment.

Elements of the claim

How do the ordinary principles of negligence apply to a claim for psychiatric injury caused by occupational stress? The Court of Appeal provided 16 helpful practical propositions in Hatton v Sutherland at [43], as follows:

1. There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer’s liability apply (para 20).
2. The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).
3. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29).
(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para 24).

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee (para 26). Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health (paras 27 and 28). Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers (para 29).

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (para 31).

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk (para 32).

(9) The size and scope of the employer’s operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para 33).

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this (para 34).

(11) 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 (paras 17 and 33).

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job (para 34).

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (para 33).

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35).
(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).

(16) 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 (para 42).

This guidance was largely approved by the House of Lords in Barber v Somerset County Council, although it was noted it does not have anything like statutory force, and is generally followed by the courts.5

What points of importance emerge from the guidance in respect of each element of the cause of action?

Duty of care

There is unlikely to be any difficulty in establishing a duty of care since all employers owe a common law duty to take reasonable care for the safety of their employees, including providing them with a safe place of work.6

Foreseeability of injury

The key issue in most occupational stress claims is whether psychiatric harm to the particular employee was reasonably foreseeable. The question is not whether it was foreseeable in a person of ‘ordinary fortitude’; instead it is whether an injury to the health of a particular employee attributable to stress at work is foreseeable.

Whether an injury is foreseeable depends upon the characteristics of the employee and the nature and requirements of the employment. The Court of Appeal’s judgment indicates the following factors must be considered: the nature and extent of the work done by the particular employee, any signs from the employee themselves, whether the employer is aware of a particular vulnerability (otherwise an employer is entitled to assume an employee is up to the job); whether further disclosure or explanation has been given by the employee following the expiry of a GP’s certificate of sickness (otherwise the employer may assume the employee is implying he is fit to return to his normal work), and, ultimately, whether indications to the employer were plain enough for any reasonable employer to realise that they should act.

Breach of duty

As to what an employer should do when there is a foreseeable risk of injury, the Court of Appeal noted that every case was individual and depended on the facts. Nevertheless, a court should consider what an employer could and should have done, such as offering a sabbatical, transferring
the employee to other work, and giving extra help while arranging treatment or counselling. The size of the employer’s operation is relevant to what is expected. Moreover, an employer should only take steps which are likely to do some good, up to and including dismissal and demotion; there is no breach where an employer allows a willing employee to continue work.

Of particular note is the Court of Appeal’s suggestion that an employer who offers a confidential advice service, with referral to counselling or treatment services, is unlikely to breach their duty. Subsequent courts have not agreed with this approach. In Daw v Intel Corp, the Court of Appeal observed that offering such services was not a ‘panacea by which employers can discharge their duty of care in all cases’.7 And in Dickins v O2 plc, the Court of Appeal refused to accept that offering counselling was enough when the employee was already in counselling through her GP but had nevertheless expressed that she was ‘at the end of her tether’. In these circumstances it was held that managerial intervention was necessary.8 Accordingly, offering a counselling service by no means necessarily discharges the duty of care.

_Causation_

With respect to causation, it is clear from the Court of Appeal’s judgment that it must be established that the particular breach of duty, as opposed to occupational stress itself, caused the harm. There will frequently be other causes for psychiatric injury which cannot be said to be related to the breach of duty. Multiple possible causes notwithstanding, it must be remembered that the breach of duty need not be the whole cause of the injury, so long as it is a material (not de minimis) cause.9

As part of the Court’s guidance it was suggested that where there are multiple causes for the injury, the ordinary principles of apportionment apply. The Court of Appeal said that a ‘sensible attempt’ should be made to apportion liability, seemingly supporting a broad approach. These remarks were obiter and, moreover, the House of Lords expressly declined to approve this advice (at [63]) in the subsequent appeal. Furthermore, in Dickins the Court of Appeal was critical of the apportionment approach and doubted whether psychiatric injury was divisible. Smith LJ said obiter at [46] that her view was that, where the breach has made a material contribution but it is not scientifically possible to say how much that contribution is, and the injury is indivisible, it would be inappropriate to apportion damages. Since the advice of both courts was obiter it is unclear exactly what approach will be adopted in the lower courts. Given that there is no binding authority, defendants should continue to argue that damage should be apportioned according to the respective causes.

_Avoiding foreseeability?_

It is clear that of all the onerous requirements a claimant has to satisfy, foresight of psychiatric injury is the lynchpin of any claim. It is therefore unsurprising that claimants have sought to avoid this requirement.

Two attempted methods to achieve this are relying on the duties in the Management of Health and Safety at Work Regulations 1999 to carry out risk assessments and identify protective control
measures, and relying on the duties relating to working time pursuant to the Working Time Regulations 1998.

In *Mullen v Accenture Services Ltd* the employee argued that it was not necessary to establish foreseeability where there was a breach of the 1999 Regulations. The argument was decisively rejected, the judge holding at [43] that it would drive a ‘coach and horses’ through the ‘careful enunciation’ of the law in *Hatton*: foreseeability was a prerequisite for a successful claim.

In *Sayers v Cambridgeshire CC* a similar argument in respect of a breach of the 1998 Regulations was also rejected. It was held that the ‘general law of foreseeability in Tort applies’. Moreover, there was no cause of action attaching to a breach of the 1998 Regulations.

Accordingly, it is not possible to avoid the need to show that psychiatric harm was reasonably foreseeable.

**Recent developments**

Much of the case law establishing the requirements of a claim for psychiatric injury induced by occupational stress is now at least five years old. How are more recent cases applying the law? In short, the answer appears to be vigorously.

In *Mullen*, a 2010 case in the High Court, the requirements enounced in *Hatton* were robustly applied. The claimant, who had a history of psychological vulnerability (albeit unknown to the employer), alleged he had suffered psychiatric injury as a result of extreme stress at work. Although the court accepted that the claimant had suffered illness as a result of stress at work, it held there was no reason why the defendant employer ought to have reasonably foreseen that, as a consequence of his work, the claimant was at a real risk of suffering imminent harm to his health. There was no evidence to suggest that the defendant knew the claimant was particularly vulnerable to stress induced illness and, significantly, there was no evidence of anyone else suffering similar illness. There was no real risk of a break down which the defendant ought to have foreseen and which it ought properly to have averted. Of course, as noted above, it also held that a breach of the 1999 Regulations did not negate the need to demonstrate reasonable foreseeability. The Hatton guidance was strictly followed.

Similarly, in *King v Medical Services International*, a 2012 case in the High Court, the claim failed for the want of reasonable foreseeability. A manager who was perceived as robust and being used to speaking her mind was unable to establish her mental breakdown was reasonably foreseeable. There was no evidence that anyone foresaw her injury to health and no record of her having mentioned that problems at work were causing her stress to her doctors before the breakdown. The absence of reasonable grounds for foreseeing injury to health was fatal to her claim.

Finally, the *Hatton* guidance was recently rigidly applied by the High Court in *McDade v Critchlow* (2014). It was held that a firm of solicitors and three of its partners were not liable for damages for
personal injury and consequential loss of earnings arising out of an employee’s development of paranoid schizophrenia allegedly caused by stress in the work place. The factual basis of the claim had simply not been made out; there was no breach of duty. In any event the threshold that the claimant had to establish to trigger a duty, namely that the indications of impending harm to health arising from stress at work had to plain enough for them to realise that they should do something about it, was not made out. In the absence of foreseeability, the claim failed. *Hatton* was strictly applied.

**Conclusions on Stress Claims**

It is notoriously difficult for claimants to succeed with a claim for psychiatric injury caused by work-related stress. Foreseeability of harm, breach and causation are all difficult to prove and the courts have shown no willingness to relax the requirements. Expert evidence will often be needed to verify the existence of a psychiatric condition and its cause. Claims should be vigorously defended.

**Harassment and Bullying Claims**

As with stress claims, in determining what exactly a claimant has to prove when they allege they have been bullied or harassed at work, it is necessary to first set out some preliminary matters.

**Preliminary matters**

Where it is alleged that bullying or harassment has resulted in a recognised psychiatric condition, it is open to the individual to bring a claim under the common law according to the same principles identified above. They will not be discussed further here. It is also open to the individual to bring a claim under the Protection from Harassment Act 1997. Moreover, and unlike a common law claim, a claim can be brought under the 1997 Act for mere anxiety caused by any harassment, in addition to financial loss caused by any harassment: section 3(2) of the 1997 Act.

**The 1997 Act**

The 1997 Act creates the tort of harassment. Under section 1 of the Act, persons are prevented from pursuing a course of conduct which they know, or ought to know, amounts to harassment of another. Accordingly, the elements of a claim are, as confirmed by Longmore LJ in *Allen v London Borough of Southwark*:

1. there must be a course of conduct;
2. that course of conduct must amount to harassment of another; and
3. the supposed harasser must know or ought to know that conduct amounts to harassment.\(^\text{13}\)

It is necessary to examine each of these elements.

**A ‘course of conduct’**
The first element in making a successful claim is for the claimant to prove there was a ‘course of conduct’. This is defined in relation to a single person in section 7(3) of the Act as conduct on at least two occasions in relation to that person. A claim for harassment cannot be founded upon a single event, as confirmed by the Court of Appeal in Conn v Sunderland City Council. However, conduct on at least two occasions is not alone sufficient. There must be a ‘course’ of conduct. This was interpreted in Pratt v DPP as requiring the incidents to be connected in type and context. In addition, it should not be assumed that two incidents will necessarily give rise to a course of conduct. The essence of bullying and harassment is persistence. Therefore, while conduct on at least two occasions is a necessary condition, it is not necessarily sufficient. The persistence of harassment was emphasised in Lau v DPP where it was accepted that the fewer the occasions and the wider they are in spread the less likely it is that a finding of a course of conduct can reasonably be made. Moreover, since a person must pursue a course of conduct, two random acts by two different people, at different times, with no connection between them, cannot amount to a course of conduct: Dowson v Chief Constable of Northumbria.

‘Harassment’

Assuming that there is a course of conduct, the conduct must amount to harassment. What is harassment? The term is not directly defined in the 1997 Act. However, the Act does provide some definition of the term in section 7(2), which provides that ‘harassment’ includes causing a person ‘alarm or distress’. In Thomas v Newsgroup News Papers, the Master of the Rolls Lord Phillips said that ‘harassment’ is a word which has a meaning which is generally understood. He said that it described ‘conduct targeted at an individual which is calculated produce [alarm or distress] and which is oppressive or unreasonable’. Therefore harassment appears to have three components:

1) conduct targeted at the claimant;  
2) which is calculated to cause alarm or distress; and  
3) is oppressive and unreasonable.

However, those three components alone are not enough. The conduct must have an element of real seriousness. Indeed it must have a severity that would sustain criminal liability; conduct which is irritating, annoying or which gives a measure of upset, or which is unattractive or unreasonable is insufficient: Majrowski v Guy’s and St Thomas’s NHS Trust. Therefore to ‘cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability. The reason for this high threshold is simple: it will be remembered that a course of conduct amounting harassment is also a criminal offence. This was emphasised by Gage LJ in Conn, where he said at [12] that the ‘touchstone’ for recognising what was or was not harassment was whether the conduct was of such gravity as to justify the sanctions of the criminal law. Similarly, in Dawson, Coulson J said at [51] that the conduct must be ‘capable of constituting a criminal offence’.
The nature of the conduct can be affected by the kind of workplace. Behaviour that might not be regarded as harassment on the factory floor or in an army barracks might well be harassment in a hospital ward: Conn.

The conduct does not need to be physical, speech can be conduct: section 7(4) of the 1997 Act. For example, in Conn, a threat to give the claimant ‘a good hiding’ was sufficient to amount to harassment, while threatening to smash windows was not. It is also imperative that alarm or distress is not merely caused but calculated to be caused in order to amount to harassment.23

Knowledge

The final component of a harassment claim is that the alleged harasser must know or ought to know that the course of conduct in question amounts to harassment. Section 1(2) provides that an alleged harasser ought to know that their conduct amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of another. That is to say the test is an objective one: would a reasonable bystander regard the behaviour as harassment. It is not a subjective test that asks if the alleged harasser themselves saw the conduct as harassment.

How have these rules been applied in recent cases?

Recent cases

In Veakins v Kier Islington Ltd one of the defendant’s supervisors had, over a two month period, humiliated and embarrassed the claimant in the presence of others in addition to victimising and demoralising her.24 The supervisor had sought private information about the claimant from her colleagues to make her work life more difficult. In addition, when the claimant wrote her concerns in a letter to the supervisor, the letter was torn up without reading.

At first instance the claim failed, the judge holding that a sensible prosecuting authority would not bring a prosecution. However, on appeal that approach was held to be incorrect. The Court of Appeal said the approach, following Majrowski, was to focus on whether the conduct was oppressive and unacceptable, albeit the court must keep in mind that it must be of an order to sustain criminal liability. Applying that test, the conduct plainly was harassment. The appeal was allowed and the case remitted for a determination on damages.

In Iqbal v Manson a solicitor alleged that his former firm had harassed him through the content of three letters.25 The first questioned his integrity, asking if he could act impartially for a certain client. The second letter said that the claimant had been dismissed by the defendant for reckless conduct and accused him of having a personal vendetta against the defendant which involved ‘poaching clients’. The third letter accused the claimant of misleading the law society and the general public. On appeal, the Court of Appeal accepted that the letters arguably were capable of being described as oppressive and unacceptable, and therefore as harassment. Moreover, the course of conduct as a
whole had to be considered; each individual instance did not have to amount to harassment. It therefore reinstated the claimant’s action (which had been struck out) and allowed it to proceed. In *King v Medical Services International*, the claimant employee worked as an executive manager at a hospital. She brought a claim alleging harassment by the chief executive officer, relying on a series of incidents as having the cumulative effective of causing her harassment. This included an occasion where it was insisted that the claimant attend a staff party and an occasion where the chief executive officer allegedly required her to draft a response on his behalf to the claimant’s own complaint. The claim was dismissed. Requiring the claimant to attend a party came close to harassment and requiring the claimant to write the letter could be described as bullying. However, looking at the instances overall, it could not be said that the claimant had been harassed or bullied. The claim failed. This is an excellent example of the need not merely to show two occasions of potentially unacceptable conduct, but the need to show genuine harassment.

Most recently, in *Saha v Imperial College*, a post-doctoral student alleged her supervisor had harassed her. She alleged that a critical appraisal of her work and a range of emails discussing her unexplained absences as well as requiring her to notify the supervisor when she was in the laboratory, which were also generally malicious and aggressive, amounted to harassment. Further, she alleged that refusing to fund her to attend a conference and surreptitiously watching her work also amounted to harassment. The High Court dismissed the claim, holding that a number of the alleged incidents were unproven and those that were did not involve harassment. At most, they involved the supervisor treating the claimant in an abrupt, peremptory and at times vexed manner. They did not involve aggressive, bullying or threatening behaviour. Although some of the supervisor’s conduct could be criticised, and may have amounted to harassment if it persisted, the supervisor had taken on board the criticisms of his behaviour and had desisted. The claim failed.

**Conclusions on Harassment and Bullying Claims**

Claims for harassment and bullying under the Act are difficult to prove. Although such claims are easier to succeed with compared to claims for psychiatric injury in that there is no need to prove foresight of psychiatric injury, or psychiatric injury at all, and there is a six year limitation period, they are difficult in that the threshold for a course of conduct amounting to harassment is high, indeed requiring criminal conduct. In each claim defendant practitioners must question if the behaviour would sustain criminal liability. If it would not, the claim should be vigorously resisted.

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6 *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57.

7 [2007] ICR 1318 [45].
8 [2008] EWCA Civ 1144

9 *Bonnington Castings v Wardlaw* [1956] AC 613.


12 (QBD, 21 February 2014).
13 [2008] EWCA Civ 1478
14 [2007] EWCA Civ 1492.

15 [2001] EWHC 483 (Admin). It must be remembered that the 1997 Act creates concurrent criminal liability. Therefore many of the criminal harassment cases are of interpretative assistance.

16 See *Merelie v Newcastle Primary Care Trust* [2004] EWHC 2554 (QB).
17 (QBD, 22 February 2000) [15].
19 [2001] EWCA Civ 1233 [30].

21 [2007] 1 AC 224.
22 Ibid [30].

23 See Majrowski in the Court of Appeal: [2005] EWCA Civ 251 [82].

27 See section 11(1A) and section 2 of the Limitation Act 1980. There is, however, no discretion to dis-apply the limitation period in claims under the 1997 Act.