"Stress"
- Claims for Psychiatric Injury in the Workplace

1. General Principles

1.1 The 16 point guidance in **Hatton v Sutherland [2002] ICR 613** remains a very useful starting point when considering the ground rules for establishing liability. (approved by the HL in **Barber v Somerset [2004] 1 WLR 1089** and reaffirmed by the CA in **Hartman v South Essex Mental Health Trust [2005] EWCA Civ 6**).

1.2 That guidance is of particular use in cases of stress caused by excessive workload. It is of limited application in relation to jobs which are traumatic and cases where an employee has been subjected to a disciplinary procedure or to bullying.

1.3 The dividing line between a normal but unpleasant state of mind or emotion and a recognised psychiatric illness or disorder is not always easy to draw. Psychiatric textbooks tell us that, with a physical disease or disability, the doctor can presuppose a perfect or 'normal' state of bodily health and then point to the ways in which his patient's condition falls short of this. There is probably no such thing as a state of perfect mental health.

1.4 The two most commonly used tools to classify mental disorders are the American Diagnostic and Statistical Manual of Mental Disorder, the DSM–IV (1994) and the World Health Organisation's ICD-10 Classification of Mental and Behavioural Disorders (1992).

2. Excessive workload

2.1 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. The ordinary principles of employer's liability apply. Hence liability depends on establishing:

- the breach of a duty of care by the acts or ommissions of the employer
- that the injury to the employee's health was a foreseeable consequence of those acts or omissions; foreseeability is relevant both to whether the there has been a breach of duty and to whether the damage is too "remote" to be recoverable
- that the injury to health was caused by the employer's acts or omissions

When is harm to health foreseeable?

Hatton:

> "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…. 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."

When will the employer be taken to have foreseen the risk of injury?

Un-communicated mental health problems

2.2 In **Bonser v RJB [2004] IRLR 164** the CA reversed the Judge's finding that it was foreseeable the Claimant would suffer a nervous break down. She had 5 months off with depression in a previous employment. She had started this job with a reference stating that she "would not be particularly good in a highly stressful environment but she is good at dealing with IT users, training and communication". The Judge had found that severe pressures were put on the her team and it should have been apparent she could not cope as she broke down in tears in front of her line manager and said she could not cope and thought her holiday was under threat. But her employer was not aware of her pre-existing emotional vulnerability.

2.3 In **Sayers v Cambridgeshire CC [2007] IRLR 29**, two of the Claimant's fellow employees were aware she was taking anti-depressants. The High Court held this could not be equated with knowledge by the employers. Knowledge which is not communicated to higher management cannot be knowledge, actual or imputed, of the employers for the purpose of determining whether the indications were plain enough for the employers to realise that they should do something about it.

2.4 At no stage were the employers made aware that the claimant had a history of depressive symptoms which made her vulnerable to a recurrence of depressive episode or that, during the course of her employment, she had been treated for depressive symptoms. There was nothing unusual in her absences from work and the claimant had deliberately avoided any references being made in her medical certificates to illnesses being caused by depression or symptoms of psychiatric illness.

Occupational health records

2.5 In **Hartman**, the Court of Appeal said it was not right to attribute to the employer knowledge of confidential information which the employee had disclosed to the company's physician. Hence, where the employee had disclosed an earlier nervous break down in a health screening questionnaire, but the employer's Occupational Health Department had passed her fit for work, the employer would not be deemed to be aware of her history. The judgment cites a passage from a British Medical Association publication on medical ethics which emphasises that information should only properly be passed to the employer with the employee's consent.

Complaints and breaking down in tears

2.6 **Intel Corporation v Daw [2007] IRLR 355**

The Claimant had suffered two long periods of post natal depression which she was quite open about, but had fully recovered. Two connected elements led to her subsequent stress and break down: (i) reporting lines in her job were confused and

there was a problem of priorities between the demands made on her by different managers; (ii) she was provided with insufficient assistance and had to work excessive hours. She had complained about both these problems. Her manager found her in tears and asked her to write down her problems. Her written response included reference to the fact she couldn't sustain the level of work she was doing, she was "*stressed out evidenced by [her] violent mood swings – bad sign.... been here before twice…demoralising me and I want out*". Her appraisals had referred to mood swings. Management failed to act on her written response, and had, in particular, promised her assistance which did not materialise. They were found liable.

Liability where there is no complaint of threat to health and no previous psychiatric illness

2.7 In **Hone v Six Continents Retail [2006] IRLR 49**, the judge had concluded that the fact that the employee had been asking for an assistant manager from early on in the employment, that he had complained about excessive hours and that he was very tired, and that he had put in returns showing that he was working 90 hours a week on a seven-day week basis, were sufficiently plain indications of impending harm for a reasonable employer to realise that they should do something about it. The employee's claim to be working 90 hours a week, which was not made for any financial benefit and was dismissed by the employers as "nonsense", indicated either that he was working hours greatly in excess of anything that could reasonably have been expected of him, or that he was making irrational claims and, in effect, making a cry for help. All those matters, taken in conjunction with the fact that, as the employers knew, the Working Time Regulations impose a requirement of no more than 48 hours per week without consent, which the claimant had refused to give, were sufficient to justify the judge's conclusion.

2.8 Contrast **Sayers v Cambridgeshire CC [2007] IRLR 29**, in which the judge rejected a contention that a breach of obligation under Working Time Regulations

to take all reasonable steps to ensure 48 hour limit is complied with gives rise to common law cause of action for breach of statutory duty.

What has to be foreseen?

(i) psychiatric injury…

2.9 **Rorrison v West Lothian College and another** [2000] SCLR 245 (Outer House of the Court of Session):

Many if not all employees are liable to suffer those emotions, and others mentioned in the present case such as stress, anxiety, loss of confidence and low mood. To suffer such emotions from time to time, not least because of problems at work, is a normal part of human experience. It is only if they are liable to be suffered to such a pathological degree as to constitute a psychiatric disorder that a duty of care to protect against them can arise.

(ii) to this particular individual…

(iii) the particular type of injury suffered by the claimant as a possible consequence of the conduct…

2.10 **Pratley v Surrey County Council** [2003] IRLR 794 where the judge found that the system of working imposed upon the claimant involved a foreseeable risk of injury to her in the long term, but not a foreseeable risk of imminent injury, her claim failed. Mance LJ said at 800 –

> 'There is a potentially relevant distinction between a risk of psychiatric injury arising from continuing overload in the future, and a risk of collapse in the short term arising from disappointment of a "cherished idea" developed as a result of a conversation about possible problems if there was continuing work overload over a further period. The harm in each case is psychiatric injury, but not only does it occur by quite different mechanisms, more importantly it occurs at quite different times. It follows that the judge was right to consider whether the risk of imminent collapse was foreseeable, which he held was not.'

This suggests proof that the defendants foresaw or ought to have foreseen the particular type of injury suffered by the claimant as a possible consequence of the conduct complained of is a prerequisite to a finding of liability.

What is the duty once risk is foreseen?

(i) to identify and take steps which can reasonably be taken and which will make a difference

2.11 In **Hatton** (para 43) , Hale LJ stated that the courts were likely to require expert evidence on the question of which steps may do some good.

2.12 Once on notice – the duty is Therefore to assess the problem; are there measures the employer can take? will those measures address the problem? Courts are often not very specific about what should be done but often focus on the fact the employer has ignored the employees concerns and/or failed to hold a meeting about them. The fact there is no money to deal with the problem and everyone is overstretched may not be sufficient answer.

> "It was argued that the school as a whole was facing such severe problems (with all the teachers stressed and overworked, no budget for more staff, and the Ofsted inspection looming) that there was nothing that the school could have done to help Mr Barber other than advising him to resign, or in the last resort terminating his employment. I would not accept that. At the very least the senior management team should have taken the initiative in making sympathetic inquiries about Mr Barber when he returned to work, and making some reduction in his workload to ease his return. Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might by itself have made a real difference. In any event Mr Barber's condition should have been monitored, and if it did not improve, some more drastic action would have had to be taken. Supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff." **Barber** par 68, Lord Walker

(ii) Dealing appropriately with return to work

2.13 In **Young v Post Office [2002] IRLR 660** the Claimant returned after nervous break down and 4 month absence caused by work related stress.

Employers were in breach of their duty of care in failing to ensure that the agreed arrangements made for the claimant's return to work were carried through, with the result that, within seven weeks of returning to work, the claimant again found himself under stress. Despite arrangements made to ensure that the claimant could return to work at his own pace, two weeks after his return he had been sent on a week-long residential course and within seven weeks he was back doing the same job which had originally caused him to suffer stress. He suffered a recurrence of his psychiatric illness. Promises that he would be visited regularly by members of management and that his capacity for work would be assessed were not kept.

(iii) Is there ever a duty to dismiss?

2.14 Whilst there may be circumstances in which it is appropriate to dismiss an employee to prevent harm to health, such cases are likely to be very rare. There is some conflict in the case law about this. In **Hatton**, Hale LJ said:

> 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).

In **Barber**, Lord Rodger said

> There may be cases where there is no alternative but for the employee to leave the job. An employee may be in a position where the only way of avoiding continuing damage to his health is to leave the employment, or take a reduced role and reduced salary. In rare cases the employee is entitled to continue working at high pressure, even though he risks damaging his health, but in a normal case, the employer owes him a duty not to continue to employ him (par 29).

(iv) Providing a confidential counselling service

2.15 CA in **Hatton** said that an employer will rarely be found liable where it has provided the employee with a confidential counselling service. However, rather

than providing a defence, this is one of the factors relevant to foreseeability and breach of duty: **Hartman** par 60-61.

2.16 The emphasis put on confidential counselling services by the Court of Appeal has been qualified in **Intel Corporation v Daw [2007] IRLR 355**. The Claimant suffered a nervous breakdown and chronic depression caused by a confused reporting line and excessive demands placed on her by managers. She had not used a confidential counselling service. The Court of Appeal held that the guidance given in **Hatton** was not a panacea by which employers discharge their duty. The Claimant pointed out the serious management failings which were causing her stress. The consequences of management failings were not avoided by the provision of counsellors.

3. Mishandled disciplinary procedures

3.1 **Gogay v Hertfordshire [2000] IRLR 703** paves the way for such claims, relying on three possible causes of action: negligence; breach of the trust and confidence term; and, breach of the "health and safety" term – an implied term that all employers will take reasonable care for the safety of their employees.

3.2 However, foreseeability of psychiatric injury in the particular individual is still a key factor in liability. In **Gogay** it was found that the Claimant's injury was foreseeable but no guidance was given. In **Croft v Broadstairs & St Peters Town Council [2003] EWCA Civ 676** a town clerk received a totally unjustified warning letter, whilst off sick. The Council said they would withdraw it but then sent a further letter affirming it and she suffered a nervous breakdown. The Court of Appeal overturned the judge's decision in her favour, placing particular emphasis on the Council's lack of awareness of her vulnerable personality. They said:

> "That left the council in the position of employers who were entitled to expect ordinary robustness in the claimant in an employment context, including disciplinary matters, in which she had certainly never been involved before."

3.3 In **Deadman v Bristol CC [2007] EWCA Civ 822** a female employee accused the Claimant of acting in a manner that amounted to sexual harassment. In an ensuing formal investigation, the Council failed to follow its procedures correctly (in breach of contract) convening a hearing panel with two instead of three members. The staff committee overturned the decision on this basis but left a letter saying they would proceed with the investigation on his desk whilst he was away. The judge found no breach of the duty of care but that Council's breaches of contract had foreseeably caused Claimant's psychiatric injury. An appeal was allowed partly on the basis the Claimant's illness was not foreseeable. Court of Appeal said that there were no implied terms of the contract that the Council would deal with complaints "sensitively".

4. Traumatic events

4.1 Jobs which are inherently traumatic require special consideration (despite suggestions to the contrary in **Hatton**). In **Melville v Home Office**[1], the CA distinguished a **Hatton** type workplace stress situation in which the employer could not to have foreseen the risk of injury arising from the work place, and therefore needed to be aware of vulnerability in the employee, from one where they had in fact foreseen the risk. In the latter case, the issue was whether they had taken steps to prevent it. This suggests where an employer is aware of a general risk to all employees, for example from past experience, it is important for the employer to ensure it has procedures in place and that those procedures are carried out.

5. Bullying

[1] one of the combined cases in **Hartman;** the facts concern a prison employee who had to deal with the aftermath of suicides

5.1 Cases involving sustained bullying are particularly likely to give rise to psychiatric injury. The essential requirements for establishing liability are the same: breach of duty, foreseeability, and causation.

Meaning of bullying

5.2 In bullying cases the courts are anxious only to find liability where the relevant acts can properly be described as bullying. The courts have warned against the loose and general use of the term "bullying". In **Barlow v Broxborne [2003] All ER (D) 208**, the court found that being sworn at by a superior and receiving numerous letters threatening disciplinary action did not amount to "bullying" albeit the employee complained of a culture of abuse. The employee failed to establish liability. On the other hand, in **Green v DB Group Services UK Ltd [2006] IRLR 764,** the High Court said:

> "The question is whether his behaviour amounted to bullying within the ordinary meaning of that term. Bullying can take many forms. As I have already observed, and as was acknowledged by the claimant, the incidents upon which she relies when viewed individually are not of major significance. It is their cumulative effect that is of importance. His behaviour to her was domineering, disrespectful, dismissive, confrontatory, and designed to undermine and belittle her in the view of others. I am satisfied that such a course of conduct pursued over a considerable period amounted to bullying within the ordinary meaning of the term."

Foreseeability

5.3 Foreseeability may not be such a difficult obstacle in establishing liability in bullying cases as in cases of excessive workload. The courts may be willing to find that the employer's conduct is such that it will expose any employee of reasonable fortitude to risk of psychiatric illness, even where there is no known psychiatric vulnerability. However, the courts will still look at the particular nature of the acts of bullying and at whether injury was a foreseeable consequence of those acts and will still have regard to the particular sensibilities of the employee.

5.4 For example, in **Banks v. Ablex Ltd [2005] IRLR 357** the claim involved alleged harassment of the claimant by another employee (Briggs) on one occasion when he shouted, swore and finger pointed at her and a catalogue of rudeness and unfriendliness, behaviour not to be expected from grown-up colleagues in the workplace, but not behaviour so "calculated to infringe her legal right to personal safety" that an intention to do so should be imputed to Briggs.

5.5 The employers were not in breach of their duty of care to the claimant in respect of the moderately severe depressive disorder which she suffered. They did not know Briggs was likely to behanve in this way towards her. The employer's knowledge of the claimant was of a woman of strong character, not easily upset, a person who gave as good as she got when it came to the deployment of "industrial language".

The basis of liability

5.6 Liability in bullying cases can be on two alternative bases: primary and vicarious.

(i) Vicarious liability for acts of employees

5.7 The issue is whether the wrong is " "so closely connected" with what the employer authorised or expected of the employee in the performance of his employment that it would be fair and just to conclude that the employer was vicariously liable for the damage sustained": **Mattis v Pollock [2003] IRLR 603.**

5.8 An employer's liability is not confined to responsibility for acts done by an employee in the course of his employment. An employer's liability goes further. He is liable for the *wrongs of his employee committed in the course of employment*. Reasons of policy so dictate. The employee's wrong is imputed to the employer: **Majrowski v Guy's and St Thomas' NHS Trust [2006] ICR 1199** para 15.

5.9 In **Majrowski**, the employee was a clinical audit co-ordinator. He alleged that he was bullied, intimidated and harassed by his departmental manager because he was gay. He maintained that she was excessively critical of and strict about his time-keeping and his work; that she isolated him by refusing to talk to him and treated him differently and unfavourably compared to other staff; that she was rude and abusive to him in front of other staff; and that she imposed unrealistic targets for his performance, threatening him with disciplinary action if he did not achieve them. The employer was vicariously liable for those acts.

(ii) *Primary liability – a recent case*

5.10 **Green v DB Group Services UK Ltd [2006] IRLR 764 (High Court)** involved a "relentless campaign of mean and spiteful behaviour" by four women who worked in close proximity to the claimant, and, separately, behaviour by a male co-worker "domineering, disrespectful, dismissive, confrontationary, and designed to undermine and belittle her in the view of others". The incidents "when viewed individually are not of major significance. It is their cumulative effect that is of importance." The High Court held that the bank was both directly and vicariously liable,

On direct liability:

The test applied was:

(i) Did the managers and/or members of the HR department know or ought they reasonably to have known that the claimant was being subjected to the conduct complained of?

(ii) Did they know or ought they reasonably to have known that such conduct might cause the claimant psychiatric injury?

(iii) Could they, by the exercise of reasonable care, have taken steps which would have avoided such injury?

On vicarious liability:

The questions to be determined, are:

(i) Has the claimant established that the conduct complained of took place and, if so, did it amount to bullying or harassment in the ordinary connotation of those terms? In addressing this question, it is the cumulative effect of the conduct which has to be considered rather than the individual incidents relied on.

(ii) Did those involved in the victimisation or bullying know, or ought they reasonably to have known, that their conduct might cause the claimant harm?

(iii) By the exercise of reasonable care, could they have taken steps which would have avoided that harm?

(iv) Were their actions so connected with their employment as to render the defendants vicariously liable for them?

Much of the male co-worker's behaviour related directly to her work. As to the 3 women, their behaviour directly affected the working environment and some aspects of the behaviour involved work that one or other of the women was required to undertake in the course of her employment The group of women did not work with the Claimant, but there was a close connection between their employment and the behaviour.

On foreseeability by the perpetrators:

> "those involved ought reasonably to have known that such a sustained campaign designed to undermine the claimant's confidence and to undermine her in the eyes of those with whom she had to have contact in the course of her work, was likely to cause anxiety and depression, and that such anxiety and depression could be sufficiently serious to amount to a psychiatric illness… the bullying gave rise to a foreseeable risk of psychiatric injury. Such behaviour when pursued relentlessly on a daily basis has a cumulative effect. It is designed to make the working environment intolerable for the victim. The stress that it creates goes far beyond that normally to be expected in the work place. It is in my judgment plainly foreseeable that some individuals will not be able to withstand such stress and will in consequence suffer some degree of psychiatric injury."

On breach of duty by the employer:

Bullying was a long standing problem in the department and was raised by Claimant at her first appraisal. Management knew or ought to have known what was going on. A reasonable and responsible employer would have intervened. Instead "managers collectively closed their eyes to what was going on, no doubt

in the hope the problem would go away". HR department found guilty of a "culpable want of care".

6. Causation

Causation as a medical issue

6.1 The medical evidence would need to show that the relevant injury was caused by the alleged breaches of duty. In many cases there are a number of possible causes of an employee's psychiatric illness which means that particular care must be taken in instructing the medical expert. Possible causes include:

(i) employer's actions or failure to act which are a breach of the duty of care;

(ii) employer's actions which are not a breach of the duty of care;

- particularly important in cases involving mishandled disciplinary procedures: would the employee have suffered an psychiatric reaction simply as a result of being accused of misconduct?
- often an issue in cases where it is alleged a single act by the employer pushes the employee over the edge

(iii) other non work-related factors;

- it is important to be alert to other potential causes, such as relationship issues and background psychiatric illness and psychiatric vulnerability unrelated to work.

Apportionment

6.2 Where the injury was caused partly by negligent and partly non negligent causes, damages will be apportioned accordingly.

6.3 Many stress-related illnesses are likely to have a complex aetiology with several different causes. In principle a wrongdoer should pay only for that proportion of the harm suffered for which he by his wrongdoing is responsible. **Hatton** para 36

6.4 *It is different if the harm is truly indivisible*: a tortfeasor who has made a material contribution is liable for the whole, although he may be able to seek contribution

from other joint or concurrent tortfeasors who have also contributed to the injury. See **Hatton** para 38. Qualified by the fact the tortfeasor may not be liable for the whole if the defendants can show *the extent to which* some other factor also contributed

6.5 However, in the view of Hale LJ,

> "if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly". **Hatton** para 41

7. Practicalities of litigating "stress" claims

- The quality and content of medical evidence is particularly important, given the complex issues of causation, diagnosis and prognosis.

- If you are for a Defendant, treat this like any other personal injury claim. You will expect to see a medical report at an early stage.

- If you are for a claimant, before instructing the medical expert, you need to be clear which acts and events appear to have caused or contributed to his/her condition. The expert needs to be referred to these specifically.

- The expert often needs to identify steps which should have been taken which would or may have made a difference to the Claimant's condition.

- Medical experts must have had sight of all historical medical records, otherwise their opinions may be of limited value.

- The normal pre-action protocol for personal injury applies.

- These claims tend to be extremely complex and result in lengthy trials. The Court of Appeal has indicated that the parties should be attempting to resolve these claims through mediation: **Vahidi v Fairstead House School Trust Ltd [2005] EWCA Civ 765**.

8. Employment tribunal claims for psychiatric injury

8.1 Often personal injury (stress, depression etc) is alleged to be caused by the employee's dismissal or the events leading up to it. We are concerned with the situation where the dismissal gives rise to a claim for unfair dismissal and/or

discrimination. The main basis of compensation in an unfair dismissal claims is the compensatory award under s.123[2] Employment Rights Act 1996.

8.2 **Dunnachie v Hull City Council [2004] ICR 1052 (HL)**: the background to Dunnachie is that in 2001 Lord Hoffman[3] had triggered a spate of claims for non economic loss by his observations about the scope of s.123 ERA.

8.3 In summary the effect of the House of Lords' decision is as follows:

(i) Claims for *non economic* loss including *pride or injury to feelings* and *personal (psychiatric) injury* cannot be included in the compensatory award. Loss in s.123 ERA does not include non pecuniary loss.

(ii) However, there appears to be no bar on a claim under s.123 for *economic* loss consequent on personal injury caused by the unfair dismissal. It is arguable you can take account of whether the employer caused the injury in deciding the "just and equitable" compensatory award: **Edwards v Hanson School [2001] IRLR 733**.

(iii) Tribunals can still make awards for injury to feelings and personal injury in *discrimination* cases. It is worth noting that where an employee has suffered psychiatric injury and has a claim based on or including discrimination, the hurdles to establishing liability are much lower than in a civil claim for negligence etc; the only issue is causation: **Laing v Essa 2004 EWCA Civ 02** (IDS Brief 751).

---

[2] under which the employee shall receive:

> "such amount as the tribunal considers just and equitable having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

[3] In **Johnson v Unisys [2001] ICR 480**

(iv) It follows that it is still potentially negligent for a solicitor to fail to pursue a personal injury claim in the tribunal in a discrimination case, even where the same claim could be brought in the civil courts: **Sheriff v Klyne Tugs [1999] ICR**.

9. Claims in the civil courts arising out of dismissal

9.1 It is not possible to claim damages for personal injury arising out of the "manner of dismissal": **Johnson v Unisys [2001] ICR 480**. However, this exclusion has a narrow interpretation.

9.2 In **Eastwood v Magnox [2004] ICR 1064**, The House of Lords held that an employee **<u>can</u>** recover common law damages in respect of loss occasioned by reason of the manner of the process up to but not including the dismissal itself. The House held therefore that financial loss flowing from a suspension or indeed from psychiatric harm arising out of treatment pre-dismissal were actionable and recoverable outside the Employment Tribunal. In essence an employee can bring a claim for breach of contract arising from the steps preparatory to dismissal.

9.3 In a constructive dismissal case the distinction is between "loss flowing from antecedent breaches of the trust and confidence term [for which the employee can claim] and loss flowing from the employee's acceptance of the breaches [for which the employee cannot claim]" (Lord Steyn).

9.4 Whilst the legal boundary between matters within and without the "Johnson exclusion" is reasonably clear, there will be extremely complex medical issues as to when the particular psychiatric injury was caused.

PETER LINSTEAD
TANFIELD CHAMBERS
4th November 2007
plinstead@tanfieldchambers.co.uk

APPENDIX

The Hatton guidance (Hatton v Sutherland [2002] ICR 613)

(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).