

Mental Health in the Workplace (1) – ‘Stress’ Claims and Workplace Standards and the European Framework Directive on Health and Safety at Work

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This is first of two articles that will address mental health issues at work.² It is written in the context of the case³ brought by the European Commission against the UK government alleging that the standard of care prescribed by the Health and Safety at Work Act 1974 falls below that required by the European Framework Directive on the introduction of measures to encourage improvements in the safety and health of workers at work.⁴

It will be argued that such alleged divergences between the UK and Europe are not clear cut, and, in the context of mental health, given the more nebulous nature of mental ill health and its causes, such divergences might be negligible.

I. THE STRUCTURE OF HEALTH AND SAFETY LAW IN THE WORKPLACE

1.1 Common law liability

At common law, injuries to mental health and physical health respectively, have been regarded differently.⁵ Work place injury is compensatable (*inter alia*) under the law of employers' liability,

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² The second, and forthcoming, article will consider the treatment of mental health of workers and the Disability Discrimination Act 1995. Publication is planned for the next issue of the JMHL

³ Case C-127/05. The case is pending before the European Court of Justice. It is anticipated it will be heard this year.

⁴ Directive 89/391/EEC.

⁵ See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

which is a species of negligence and constrained by the usual limiting factors.⁶ The structure of the common law consists of an employer's 'personal' duty towards employees. This means that the employer cannot avoid responsibility by authorising another party to take on this duty; it is 'non-delegable'.⁷ Generally the obligation is to provide competent fellow workers; a safe place of work in terms of both premises and equipment; and a safe system of work.⁸ The standard of care is that of the reasonable employer,⁹ although there is a form of strict liability in terms of vicarious liability which means that however careful the employer has been, it will be liable for the negligence of its employees.

1.2 The Health and Safety at Work Act 1974

There are UK statutes which overlay the common law position such as a number of 'independent' statutes¹⁰ and the Health and Safety at Work Act 1974. The latter was introduced after the Robens Committee Report of 1972 which was the result of concern about the prevalence of industrial injuries and the need to rationalise the former piecemeal approach to health and safety legislation.¹¹ Sections 2 – 8 contain the duties of an employer. Section 2 covers the general duty to provide safe working conditions for employees, and the qualification that this is subject to what is 'reasonably practicable'. Section 2 also refers to the more specific areas where the duty arises: machinery; handling, storage and transport; information, instruction, training and supervision; and the place of work and the working environment (which is particularly applicable to mental injury in the form of so-called 'stress claims'). Section 2(2)(e) states that the employer must provide: "The provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work."

Section 3 imposes a duty in respect of non-employees, so that the obligation is to conduct the undertaking in such a way that non-employees are not exposed to risks to their health and safety. Section 7 imposes a duty on employees to look after their own health and safety. The duties do not depend upon actual harm, but upon the risk of harm.¹² Both physical and mental health are covered by the Act.¹³ By virtue of section 15 of the Act, the Secretary of State is empowered to make regulations to deal with specific aspects of health and safety.¹⁴ The Act imposes criminal liability only¹⁵ but an action for damages will lie for breach of health and safety regulations made pursuant to section 15 unless the regulations exclude liability.¹⁶

6 See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

7 *Wilsons & Clyde Coal v English* [1938] AC 57.

8 *Ibid.*

9 *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110.

10 For example, generally applicable statutes such as *The Employers' Liability (Defective Equipment) Act 1969* (this provides for employers' liability in respect of defective equipment regardless of the employer's own reasonable care) and *The Employers' Liability (Compulsory Insurance) Act 1969*. There are also a

number of specialist statutes such as the *Mines and Quarries Act 1954*.

11 *The Committee on Safety and Health at Work 1970–72* (Cmnd 5034) (*The Robens Committee*).

12 *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853.

13 Section 47(6).

14 e.g. *The Control of Substances Hazardous to Health Regulations 1988* SI 1988/1657.

15 Section 47(1)(a) states there is no civil liability; Section 33 imposes criminal penalties

16 Section 47(2).

1.3 The European Framework Directive

Article 137 (formerly Article 118) of the Treaty of Rome (as amended) states that the Community shall support the activities of Member States to protect workers' health and safety. Emanating from this is the general directive on health and safety known as the European Framework Directive.¹⁷ In many ways the Directive reflects the employer's non-delegable common law personal obligation in as much as the employer cannot avoid the obligation by appointing external persons to carry out the obligation to 'ensure the safety and health of workers' (Article 5). The Directive applies to a wider category of 'workers' than those who satisfy the definition of 'employee' (Article 3). The main obligations are as follows:

Article 6.....

1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including the prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means.....
2. The employer shall implement the measures..... on the basis of the following general principles of prevention:
 - (a) avoiding risks;
 - (b) evaluating the risks which cannot be avoided;
 - (c) combating the risk at source;
 - (d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
 - (e) adapting to technical progress;
 - (f) replacing the dangerous by the non-dangerous or the less dangerous;
 - (g) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment;
 - (h) giving collective protective measures priority over individual protective measures;
 - (i) giving appropriate instructions to workers;

.....

Article 7 states that the employer must provide protective and preventive services through the appointment of competent persons. If there are no competent persons within the organization, the employer must enlist competent external services or persons, and these persons must have the necessary capabilities and the necessary means to provide such services. Article 9 requires the employer to assess, respond to, and monitor the response to risks; including reporting of accidents. Workers must be provided with information about safety and health risks and the required

¹⁷ 89/391/EEC.

protective and preventive measures (Article 10). The employer must provide for consultation with and participation by workers (Article 11) and provide adequate safety training to workers (Article 12). The Directive also imposes obligations on workers such as making proper use of equipment and protective clothing and informing employers of health and safety risks (Article 13). There are a number of more specific 'daughter' Directives¹⁸ emanating from the Framework Directive which have been absorbed into UK law via regulations.

The European standard is therefore that of the competent person, unconstrained by consideration of cost, time or inconvenience.

1.4 Regulations

The Framework Directive was to be transposed into domestic law by 31 December 1992. Much of the content was already in force by virtue of the Health and Safety at Work Act 1974. However, the Management of Health and Safety at Work Regulations were issued in 1992 to deal with risk assessments. They were reissued in 1999, slightly revised, and with the addition of reference to the Directive's 'principles of prevention'.¹⁹ These Regulations require employers to carry out risk assessments and effectively to carry out the obligations outlined above as stated in the Framework Directive.²⁰ Civil liability for breach of these regulations is specifically excluded.²¹

1.5 The link between UK statute and private law actions and the enforcement of the European Directive

It is trite law to say that not all statutory obligations give rise to private law actions. As we have seen, under section 47(1)(a) the Health and Safety at Work Act there can be no reliance on the Act in bringing a civil claim in respect of sections 2 – 8 of the Act. However, a civil claim can be brought in respect of failure to comply with regulations made under the Act.²² In *Bailey v Command Security Services Ltd*²³ a failure to carry out a proper risk assessment in breach of the Management of Health and Safety at Work Regulations 1992 which do not give rise to civil liability, was, nevertheless, used to show that there had been common law negligence. In consequence even if there is no breach of statutory duty simply because the common law requirements have not been satisfied, civil liability can still arise through the imposition of the same standard of care as required by the relevant statutory provisions.

European Directives are instructions to member states to implement terms of the European Treaty, but the precise way in which states choose to implement a Directive is left to the state concerned.²⁴ An individual in a member state can rely directly on a Directive if it is sufficiently clear and unconditional.²⁵ This direct effect is 'vertical' only i.e. it can only be enforced against the state or

18 Directives 89/654; Directive 89/655; Directive 89/656; Directive 90/269; Directive 90/270; Directive 90/394.

19 Management of Health and Safety at Work Regulations 1999, SI 1999/3242.

20 Regulations made under the daughter Directives are: the Workplace (Health, Safety and Welfare) Regulations 1992; the Provision and Use of Work Equipment Regulations 1992; the Personal protective Equipment at Work Regulations 1992; the Health and Safety (Display Screen Equipment) Regulations 1992; the Manual Handling Operations Regulations 1992 (these all make up what is often referred to as the 'six pack').

21 Management of Health and Safety at Work Regulations 1999, Reg 22(1).

22 Section 47(2).

23 [2001] WL 1535385.

24 Article 249 (3) EC.

25 *Van Duyn v Home Office* [1974] ECR 1337. In theory the member state should have transposed the Directive into national law so that reliance on the Directive itself should be unnecessary, but it might not have been transposed, or only partially or inadequately transposed.

an emanation of the state that provides a public service.²⁶ However, Directives can also have indirect effect inasmuch as they can be used by national courts as an aid to interpretation of the relevant national law, and even legislation not specifically enacted to comply with European law.²⁷ Indirect effect means that cases would not be restricted to action against state enterprises.²⁸ This means that it would be possible for the UK health and safety regulatory framework to be interpreted in the light of the Framework Directive or for the Directive to be relied upon directly against a public service employer. It has been argued that some of the provisions of the Directive are sufficiently precise to be directly enforceable, such as a failure to take into consideration a worker's capabilities, to adapt work to an individual worker, or adequately to train a worker (Articles 6(2)(d), and Article 12).²⁹

There is a requirement under European law that there be an effective remedy for breach of European law.³⁰ The Health and Safety at Work Act and the 1999 Regulations do not admit of a civil remedy. Whilst many physical injuries are covered by the 'six pack' Regulations³¹ which do give rise to a civil law right, the situation with regard to mental injuries, as we will see, is uncertain, and employees have to rely upon the common law, and in particular, on the principles in *Sutherland v Hatton*³² (discussed below). There is no divergence from Europe here as long as one or more of three situations pertains (discussed below): the Framework Directive does not apply to mental injury; it applies in a different way so as not to demand the standard of the competent person; there is little difference between UK standards and the European standard.

It must be said, however, that if European law treats mental injuries in the same way as physical injuries, then the question arises as to whether there is an effective remedy when the 'reasonably practicable' test is applied. In *Cross v Highlands & Islands Enterprise* the Scottish Outer House held that the Framework Directive is concerned with general health and safety improvement and that there was no intention to confer an individual (private law) right of action in respect of any breaches.³³ We will re-visit this case later on in this article.

2. MENTAL HEALTH IN THE WORKPLACE

2.1 The common law – negligence liability

For the purposes of employment law, injuries to mental health can be divided into two categories: those induced by trauma and those induced by the wider working environment, but more

26 *Marshall v Southampton and South West Area Health Authority (No 1)* [1986] ECR 723; *Foster v British Gas plc and others* [1990] ECR 1-3313; *Doughty v Rolls Royce plc* [1992] 1 CMLR 1045.

27 See *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1337 and *Marleasing SA v La Comercial Internacional de Alimentación* [1990] ECR 1-4135. Note however, *Hawkes v London Borough of Southwark* (1998 20 February unreported) where, in the context of the Manual Handling Operations Regulations 1992, the Court of Appeal interpreted 'reasonably practicable' in accordance with pre-European Community law.

28 *Webb v EMO Air Cargo (K) Ltd (No 2)* [1995] 4 All ER 577.

29 *J Hendy & M Ford Munkman on Employer's Liability* 13th Edition (London, Butterworths, 2001) p 299.

30 Article 249 EC.

31 These are Regulations made under the daughter Directives are: the Workplace (Health, Safety and Welfare) Regulations 1992; the Provision and Use of Work Equipment Regulations 1992; the Personal protective Equipment at Work Regulations 1992; the Health and Safety (Display Screen Equipment) Regulations 1992; the Manual Handling Operations Regulations 1992 (these all make up what is often referred to as the 'six pack').

32 [2002] WL 45314.

33 [2001] SLT 1060 at 1088.

commonly described as 'stress' claims. Trauma-induced injuries are less problematic at common law (but not necessarily fair or coherent) because of the limiting factors set down in non-employment tort law.³⁴ The key case in the employment context is *White v Chief Constable of South Yorkshire Police*.³⁵ For our purposes, the main element of the decision was whether mental injury caused by employers' liability can be treated differently from cases of ordinary negligence. The Court of Appeal³⁶ had held that the distinction between primary and secondary victims³⁷ did not apply when there is a pre-existing duty of care as in the case of the employer/employee relationship. The House of Lords disagreed; thus, if the employee is not a primary victim s/he must be a secondary victim and in consequence must have a close tie of love and affection with a primary victim, a condition that would not be satisfied simply by being work colleagues.

The 'stress' cases present a much more open-ended picture at common law. The first case was *Petch v Commissioner Customs & Excise*³⁸ and, although the claimant was unsuccessful, the general foreseeability test applied therein was applied in *Walker v Northumberland County Council*.³⁹ Mr Walker suffered a nervous breakdown following a significant increase in his workload about which he had complained. When he returned to work after taking a period of sick leave caused by the stress of his work, there had been no steps taken to alleviate his workload and he suffered a relapse and took ill-health retirement. The judge held that the first breakdown was unforeseeable for two reasons. First, the employing authority had no previous experience of workers becoming ill through overwork. Secondly, there was nothing in the personality of Mr Walker to alert them to the possibility of this happening to him. The second breakdown was, for fairly obvious reasons, held to be foreseeable and Mr Walker was successful.

Since *Walker*, stress cases have been examined by the higher courts. In *Sutherland v Hatton*⁴⁰ a set of general principles were set out by the Court of Appeal. The case concerned a number of conjoined appeals, and only one claimant succeeded. One of the unsuccessful claimants appealed to the House of Lords where his appeal was upheld (*Barber v Somerset County Council*⁴¹). However, the House of Lords endorsed the main principles set out by the Court of Appeal.⁴² These can be summarised as follows:

1. For the purposes of employers' liability there is a difference between physical and mental injury, as risk of mental injury occurring depends upon differences in approaches to, and prioritising of, work (paras 5 and 23).
2. Foreseeability is the gateway to recovery as without this there is no breach of duty even if occupational stress has caused the mental injury (paras 23 and 24).
3. Facts relevant to foreseeability include the nature and extent of the work done by the employee

34 Principally in the House of Lords decisions of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Page v Smith* [1995] 2 WLR 644.

35 [1999] 2 AC 455.

36 *Frost v Chief Constable of South Yorkshire Police* [1997] 1 All ER 540.

37 Primary victims are those who are either injured or foreseeably at risk of being injured or reasonably believe themselves to be (*Page v Smith* [1995] 2 WLR 644) and secondary victims are present at the traumatic event or its immediate aftermath and have a close tie of love and affection with one or more primary victims (*Alcock v*

Chief Constable of South Yorkshire Police [1992] 1 AC 310).

38 [1993] ICR 789.

39 [1995] 1 All ER 737.

40 [2002] WL 45314. This case was considered in detail by Edward Myers in 'Claiming Damages for Work Place Stress' in *JMHL* December 2002, pp 283 - 292.

41 [2004] 1 WLR 1089.

42 The basis of the majority decision to uphold the appeal was that the Court of Appeal had insufficient reason to set aside the trial judge's findings.

and overt signs from the employee or complaints or warnings from others. These indications must be plain to a reasonable employer (para 5).

4. There is no intrinsically stressful work, and employers are entitled to assume that the employee can withstand the normal pressures of the job, unless they know of some particular problem or vulnerability (para 29).

5. The employer can only take steps that are ‘reasonable’ (defined by the usual negligence standard of care considerations such as the magnitude of the risk of harm occurring, the gravity of the harm and the costs and practicability of preventing it). These steps will depend on the employer’s undertaking, including its size, resources and demands that would be made on other employees (paras 32 and 33).

6. If the only reasonable step that can be taken is dismissal, the employer will not be in breach if he allows a willing employee to stay in the job (para 34).

7. An employer who offers a confidential advice service, with referral to counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).

A related and important question concerns how far an employee can consent to pressure at work. In *Smith v Baker*⁴³ the House of Lords rejected the argument that an employee could assume the risk of the employer’s negligence. In other words, it is no defence if the risk should reasonably be guarded against. *Johnstone v Bloomsbury*⁴⁴ concerned the excessive hours worked by a junior doctor, which were covered by an express term in the contract. The employee’s claim was based upon the implied contractual term that an employer will care for its employees’ health and safety, and that this should override any conflicting express term. The case was only before the Court of Appeal on an interlocutory application and the issue was never fully litigated. By a majority, the court held that in principle it was possible to argue that an employee was not always bound by the express terms in his employment contract, but it turned on the judgment of Lord Browne-Wilkinson who made that finding on the basis of the particular wording of the contract, which gave a certain amount of discretion to the employer, and that discretion would have to be exercised reasonably in the light of the implied term. The implication is that if the term had not been open to use of discretion then the majority decision would have endorsed the primacy of the express term. This emphasises the unsatisfactory relationship between duties under contractual terms and tort as it is well established that the defence of *volenti non fit injuria*⁴⁵ – in other words, the plaintiff has voluntarily assumed the risk of injury, is rarely applicable in employers’ liability cases of negligence⁴⁶ and is never available as a defence in actions for breach of statutory duty.⁴⁷ It is highly likely that the contractual approach conflicts with more stringent statutory standards, both UK and European, because they are about making workplaces safe and not about allowing workers to agree to work in unsafe conditions. Commendable as this may be, it is by no means clear what is meant by ‘unsafe’ in the context of mental health. Furthermore, European law itself provides for workers to consent to working conditions that might be less than optimal.⁴⁸

43 [1891] AC 325.

44 [1991] 2 All ER 293.

45 In other words, the defence that the plaintiff has voluntarily assumed the risk of injury.

46 *Bowater v Rowley Regis Corporation* [1944] KB 476.

47 *Wheeler v New Merton Boardmills Ltd* [1933] 2 KB 669.

48 *Working Time Directive 2003/88/EC*, in Article 17, permits certain derogations from e.g. Article 6 which sets a maximum working week of 48 hours.

3. THE CHALLENGE FROM EUROPE

3.1 'Reasonably practicable'

The essence of the challenge from the European Commission is that section 2(1) of the 1974 Act which states that it is the duty of every employer to ensure the health, safety and welfare of all his employees at work so far as is 'reasonably practicable' is incompatible with the Directive. There is liability under the Directive for all aspects of health and safety and the only exception is under Article 5(4) which states: "This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care". The Commission's view is that the 'reasonably practicable' qualification in UK legislation does not fit in to this exclusion.⁴⁹ No doubt its argument will be that it effectively permits an employer to escape responsibility if he can prove that the sacrifice involved in taking further measures, whether in money, time or trouble, is excessive in some way, and not just in the very exceptional situations envisaged by Article 5(4).

First, one needs to look at what 'reasonably practicable' means.⁵⁰ 'Practicable' means that the preventative measures must be possible in the light of current knowledge and invention.⁵¹ It is a very stringent test, therefore, and means that the employer must take all available steps without regard to cost, time and inconvenience. It is the qualification made by the word 'reasonably' that potentially conflicts with the standard envisaged by the Directive. This implies that, although a measure might be possible, it is not reasonable to expect an employer to implement such a measure in terms of cost (either of materials or time or other forms of expense such as loss of production). The phrase 'reasonably practicable' was examined by the Court of Appeal in *Edwards v National Coal Board*⁵² and it is clear that it does not mean the same as 'the employer took all reasonable care.'⁵³ In *Edwards* it was stated:

*"Reasonably practicable" is a narrower term than "physically possible", and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.*⁵⁴

There has been some doubt as to whether the *Edwards* gross disproportion test was endorsed by the House of Lords in *Marshall v Gotham Co Ltd*⁵⁵ but the leading authority on employers' liability cogently argues that it was so endorsed.⁵⁶ In *Taylor v City of Glasgow* it was said that the difference between reasonable practicability and the common law duty of care is that in the former case,

49 Case C-127/05 (pleas in law and main arguments).

50 The qualification applies in other jurisdictions too, see for example Australia's Occupational Health and Safety and Welfare Regulations 1995.

51 *Schwalb v Fass (H) & Son* [1946] 175 LT 345.

52 [1949] 1 KB 704, CA.

53 However the standard may be the same when there is a

risk of death or serious injury: *Read v Lyons* [1947] AC 156 at 173; *Wright v Dunlop Rubber Co & ICI Ltd* (1972) 13 KIR 255.

54 *Op cit* at 712.

55 [1954] AC 360

56 See *J Hendy and M Ford Munkman on Employer's Liability* 13th Edition (London Butterworths 2001) p 249.

precautions must be taken to make a workplace safe as opposed to guard against reasonably foreseeable risks.⁵⁷

The UK courts have taken a fairly broad brush approach to risk assessment in the case of physical injuries. In *Furness v Midland Bank plc*⁵⁸ the claimant appealed against the dismissal of her claim brought under the Workplace (Health, Safety and Welfare) Regulations⁵⁹ for damages for personal injuries arising from an accident at work in which she had slipped on water on an internal flight of stairs and fallen. The allegation was that the employer had shown no evidence of having a system for dealing with spillages and, as such, had failed in its statutory duty to take reasonable precautions to keep the stairs free from water. Her appeal was dismissed on the basis that, whilst it would have been reasonably practicable for the employer to have issued its employees with an instruction to watch out for water spillages, the infrequency of spillages and the fact that the premises were used by employees only, meant its failure to do so did not put it in breach of Reg. 12(3). This can be contrasted with *Ward v Tesco Stores*⁶⁰ where the risk of spillage was significant and obvious. Furthermore, UK cases have treated regulations made pursuant to the Directive such as the Manual Handling Operations Regulations⁶¹ as imposing a general duty only. For example, in *Taylor v City of Glasgow* it was said: “[The Framework Directive] is not expressed with reference to an individual task. The obligation is one intended to be carried out in respect of the employer’s undertaking generally and in advance of any particular operation.”⁶² In a very helpful review of the area⁶³ Hendy has concluded that the standard of the ‘reasonably practicable’ test is below that of the European Directive, but, given the gross disproportionality test set out in *Edwards* it is not a crude cost/benefit standard.⁶⁴

However, if we are persuaded by the two statements in *Taylor v City of Glasgow* that first, there is an obligation under the reasonably practicable test to make the workplace ‘safe’, but secondly, under the European Directive, this relates to the generality of the employer’s undertaking or parts of the undertaking rather than each individual task, then the standard can, arguably, be regarded as very similar. Further, it is arguable that the Directive itself envisages a more pragmatic approach as one of the principles of prevention, states that measures should be implemented to replace the dangerous by the non-dangerous or *the less dangerous* (Article 6(2)(f); emphasis added).

3.2 The Directive and mental health

In *Cross v Highlands and Islands Enterprise*⁶⁵ the judge concluded that the Directive was not intended to apply to mental health. In support of this, he referred to the European Commission’s General Framework for Action in the Field of Safety, Hygiene and Health at Work⁶⁶ and its opening paragraph which stated that: “The objective of the Commission’s policy in the field of safety and

57 [2002] SC 364, at 378.

58 [2000] WL 1720378.

59 SI 1992/3004.

60 [1976] 1 WLR 810.

61 SI 1992/2793.

62 [2002] SC 363 at 374. See also *Koonul v Thameslink Healthcare Services* [2000] PIQR P123 where the generality of the risk assessment exercises was stressed, as opposed to looking at each and every task, and *Postle v Norfolk and Norwich NHS Healthcare Trust* [2000] 12 CL 283.

63 J Hendy, “Industrial Accident Claims: Reasonable Practicability” [2001] JPIL Issue 3, 209.

64 The cost/benefit test referred to is often described as the ‘Learned Hand’ test as set out by Hand J in the case of *United States v Carroll Towing Co* (1947) 159 F 2ds 169. It does not incorporate the concept of proportionality in terms of risk and preventative measures, nor the need for a balancing exercise between the size of the risk and the gravity of the likely damage.

65 [2001] SLT 1060.

66 1994–2000 (COM (93)560).

health at work over the last thirty years has been to reduce to a minimum both work accidents and occupational diseases".⁶⁷ The first reference to 'stress' was in a resolution of the European Parliament of 6 May 1994 which urged the Commission to investigate, as a priority, measures in the field of stress, both physical and mental. In *Cross*, the judge concluded that the reference to 'accidents' and 'diseases' could not include mental health problems, and that this was borne out by the resolution of the European Parliament which post-dated the Directive. However, the Object of the Directive states that "...it contains general principles concerning the prevention of occupational risks..." (Article 1) and this expression is repeated at various points throughout, so arguably the wording of the Directive itself is wide enough to cover mental health. In addition, Article 6(2)(g) refers to the development of an overall prevention policy which covers (*inter alia*) "social relationships and the influence of factors related to the working environment", which suggests that regard should be had to risks over and above those of a physical nature. A similar argument can be made in respect of Article 6(2)(d) which requires adaptation of work to the individual "in particular, to alleviating monotonous work" which suggests that there is more than the physical element of work under consideration. The fact that 'stress' can cause physical injury is another factor that supports the view that a demarcation between the two aspects of injury is not appropriate.⁶⁸ Furthermore, an argument can be made that, as the Directive was not intended to replace any domestic law if that law was more generous,⁶⁹ and as the Health and Safety at Work Act specifically applies to both physical and mental health, then this should be read in conjunction with the Directive so that mental health is within its ambit. Indeed, it is arguable that the Health and Safety Executive has implicitly endorsed this, for example by issuing an improvement notice against the West Dorset General Hospitals NHS Trust following stress-related claims by staff.⁷⁰

At the time of both the Robens Report in 1972 and the European Directive in 1989 the risk to health in the workplace would have been considered primarily in terms of heavy industry and manufacturing. Since then, however, there have been significant changes. There has been a move away from manufacturing towards service industries and the huge increase in the use of computers.⁷¹ There has also been a large increase in the number of small employers⁷² and an increase in atypical work patterns such as homeworkers.⁷³ Privatisation has also affected the scale of undertakings. Thus the changes since 1990 make the large scale health and safety issues and solutions which informed this legislation increasingly inappropriate, whilst at the same time the new types of work arguably bring with them new forms of ill health.⁷⁴ The Commission Communication of 11 March 2002 highlights the need for legislation to adapt in a number of areas including the prevention of social and emotional problems (stress, harassment at work, depression, anxiety and addiction). It is clear that future European health and safety legislation will encompass

67 [2001] SLT 1060 at 1087.

68 See the link between work related upper limb disorder and psychological factors, for example, S Tyrer, Editorial, *Journal of Psychosomatic Research* (1994) Vol 38 No 6, p 493.

69 Article 1(3), and see *Stark v Post Office* [2000] ICR 1013.

70 http://www.dh.gov.uk/PolicyAndGuidance/HumanResourcesAndTraining/ModelEmployer/OccupationalHealth/OccupationalHealthArticle/fs/en?CONTENT_ID=4063966&chk=ueKTN%2B

71 J McClean et al "Till Death Do Us Part: Changing work relationships in the 1990s" (1994) 1 *Trends in Organizational Behaviour* 111-136.

72 *Health and Safety Executive Health and Safety in Small Firms* (HMSO, London 1995).

73 S Fredman "Labour Law in Flux: The Changing Composition of the Workforce" [1997] Vol 26 337.

74 Apart from mental health risks there have been ergonomic changes such as the prolonged use of telephones and computer screens which can adversely affect physical health, see *Alexander v Midland Bank* (1999 27 July, unreported).

mental health.⁷⁵ Future legislation will therefore explicitly refer to mental health and the same issues will arise with regard to the standard of care imposed.

4. MENTAL HEALTH UNDER A EUROPEAN REGIME – WHAT STANDARD OF CARE?

4.1 The reasonable employer under common law

The standard is that as outlined under the *Sutherland v Hatton* principles. Is it possible to argue that the differences between physical and mental health mean that, effectively statutory liability should not demand a higher standard than this? There are two potential key differences between physical and mental injury. First, the risk of mental injury depends upon the psychological differences between individual workers. Although there can be some deviation in terms of physical resilience,⁷⁶ generally speaking it is possible to point to fairly standard risks of someone being physically injured. It might be thought at first glance that cases such as *Paris v Stepney*⁷⁷ do not support this view; on the contrary, the physical disability was obvious to the employer. The other important plank of the reasonable employer test is that much of the onus falls on the *employee* to alert the employer to the risk to his or her mental health. Although the Court of Appeal regarded the nature and extent of the work done as relevant to the foreseeability of injury, the other key factor was that there should be clear indications of risk from the employee, and, further, it was stated that a reasonable employer is entitled to assume that the employee can withstand the normal pressures of the job *unless he knows of some particular problem or vulnerability*. This does not give the employer carte blanche to overload an employee with work; if this happens then the employee does not have to show any special vulnerability. However, if the workload is ‘normal’ then the onus falls on the employee to demonstrate this vulnerability. A ‘normal’ workload should be able to be established by fairly objective means, albeit that there would have to be job-specific (as opposed to employee-specific) criteria employed. It is instructive that of the four appeals heard by the Court of Appeal in *Sutherland v Hatton* the only one that succeeded was the case of an administrator who, it was shown, had been required to work grossly excessive hours over the 37 hours per week required by her contract of employment.⁷⁸ There are other objective markers that can be used to measure the risk of stress-related injury, such as evidence of workers not taking meal breaks, and explicit changes in job content, management structures and methods of working.⁷⁹

However, we need to contemplate the possibility that, either we accommodate the argument that the Framework Directive applies to mental health, or a new European Directive is enacted in accordance with the Community strategy on health and safety at work.⁸⁰ In either case we have to ascertain whether European standards will be higher than those under UK law. If the UK loses the case currently brought by the Commission, the reasonable practicability test will be replaced by the

75 Community strategy on health and safety at work (2002–2006) (COM(2002) 118).

76 The ‘egg shell skull’ is well-recognised, but there has to be foreseeability of some injury even if the extent of it is unforeseen (*Bourhill v Young* [1943] AC 92; *Hewett v Alf Brown’s Transport Ltd* [1992] ICR 530).

77 [1951] AC 367: there was a duty to provide goggles to a one-eyed worker because of the gravity of a potential

injury to his good eye.

78 [2002] WL 45314, para 61.

79 Under *Cresswell v Inland Revenue* [1984] 2 All ER 713 an employee is under a duty to adapt to new methods of working but adequate training must be given.

80 Community strategy on health and safety at work (2002–2006) (COM(2002) 118).

competent person standard. If not, then it is probably safe to assume that the standard would not fall below reasonable practicability.

Although the common law standard implies risk assessment, it is in the statutory provisions that it becomes explicit and requires the workplace to be made safe. However, it is arguable that the less demanding common law standard is appropriate in the context of mental health, if only because it will be less clear as to *precisely* what the employer must do to prevent mental health problems developing as a result of the working environment i.e. because of the variability of employees' responses to stress. On this test the courts might well stress foreseeability of injury (even though we are not applying the negligence test). In any event, foreseeability has a particular pertinence to the reasonably practicable test.

4.2. Mental health and the 'reasonably practicable' test

As we have seen, this allows an employer to argue that preventative measures must not be grossly disproportionate to the risk of, and gravity of, the harm concerned. How much higher is this standard than that of the reasonable employer? The key word is 'grossly'. Preventative measures in mental health are more likely to be about job training, reporting opportunities (effectively incorporated into employment law by the statutory requirement to have a grievance procedure policy⁸¹) and, if there is some indication of a potential problem thereafter, appropriate monitoring. These are not likely to be onerous. Cases have succeeded under the 'reasonable employer' test on the basis that employees who have been off sick with stress-related illness did not have their situation effectively managed thereafter⁸² or where some fairly simple instructions would have removed some key stressors from the employee.⁸³ It might be argued that the 'management' of such a case could be onerous if it required the employer to take on extra staff. This might be regarded as grossly disproportionate as long as the job the employee was doing did not impose excessive work demands.

Arguably employers should have nothing to fear from the imposition of higher standards because these standards do not require employers to continue to employ workers who are not sufficiently robust to carry out the essentials of the jobs concerned. Certainly the common law acknowledges this⁸⁴ as does the law of unfair dismissal.⁸⁵

The approach of the UK courts to *generalised* risk assessment would not require risk assessment of individuals' approaches to their work to be part of any assessment.⁸⁶ The improvement notice issued to West Dorset General Hospitals NHS Trust by the Health and Safety Executive was because it did not have a work related stress policy or a risk assessment of work related stressors

81 Section 1 Employment Rights Act 1996, *Employment Act 2002 Schedule 2 and Goold (WA) (Pearmak) Ltd v McConnell* [1995] IRLR 516, EAT.

82 See *Unwin v West Sussex County Council* [2001] WL 825227; *Witham v Hastings & Rother NHS Trust* [2001] WL 1346938; *Young v The Post Office* [2002] EWCA Civ 661.

83 *Rowntree v Commissioner of Police of the Metropolis* [2001] WL 1346941.

84 *Sutherland v Hatton* [2002] WL 45314, para 34.

85 Dismissal for lack of capability is a potentially fair dismissal under section 98(2)(a) Employment Rights Act 1996.

86 See above, for example, the case of *Taylor v City of Glasgow* [2002] SC 364.

and not because of individual cases.⁸⁷ Where gross disproportion might arise is in the provision of in-house counselling services,⁸⁸ particularly as such services are available externally and a small employer could use these if necessary.

4.3 Mental health and the ‘competent person’ test

As we have seen, the European ‘competent person’ is someone unconstrained by consideration of cost, time or inconvenience. If this is the relevant test then it might be useful to consider whether some of the provisions of the Framework Directive might have direct or indirect effect in a mental health context. Hendy and Ford have argued that Article 6(2)(d) of the Directive is sufficiently precise to be directly enforceable⁸⁹. It is arguable however that this only applies to physical injury. Article 6(2)(d) states that one of the principles of prevention is for employers to adapt work to the individual. Not only is this not precise, but in the mental health context it could be said that it is *impracticable* to do this, not *reasonably impracticable*. The advantage of the above argument that practicability rather than reasonable practicability is key, is that the European standard of the competent person will be much easier to satisfy. If it is impracticable then it is not within the scope of the competent person’s ability. Similarly Article 6(2)(g), which states that employers should develop a coherent overall prevention policy covering technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment, is too vague to be enforceable, and gives rise to the same problems as Article (2)(d).

Unlike the case of physical health, therefore, preventative measures in the case of mental health, will usually be of a general nature only, such as risk assessments and the monitoring of those known to be at risk. A future European Directive on mental health in the workplace might be more precise and informative, although arguably the nature of mental health and workplace ‘stress’ might mean that, as at present, the imposition of ‘higher standards’ results in a situation where the employer who implements reasonably practicable measures, and the competent person, are the same characters in the context of mental injury because they are both constrained by individual psychologies and therefore by what is practicable.

87 http://www.dh.gov.uk/PolicyAndGuidance/HumanResourcesAndTraining/ModelEmployer/OccupationalHealth/OccupationalHealthArticle/fs/en?CONTENT_ID=4063966&chk=ueKTN%2B

88 *Sutherland v Hatton* made it clear that, at common law, there was no obligation to provide such services, [2002] WL 45314, paras 17 and 33.

89 *Op cit*

Casenotes

Executive Action and Convention Compliance? A Risk Unrecognised by the House

Kris Gledhill¹

R (MH) v (1) Secretary of State for Health (2) Mental Health Review Tribunal
House of Lords, 20 October 2005
[2005] UKHL 60, [2005] Mental Health Law Reports 302

The House of Lords' interest in the impact of the Human Rights Act 1998 on mental health matters, evidenced by the number of cases it has heard², has continued with the case of MH. The two central issues arising were:

1. Whether automatic reviews of the lawfulness of detention by a court (in practice the Mental Health Review Tribunal) are required in relation to s2 detentions where the patient lacks capacity to apply for a Tribunal.
2. Whether a review is required pending the outcome of an application to displace a nearest relative (which extends the period of the s2 detention).

The House, in a judgment given by Baroness Hale, held that the statutory scheme was compatible with the requirements of the Convention, and in so doing overturned two declarations of incompatibility granted by the Court of Appeal, and restored the first instance decision of Silber J.

Facts

MH, an adult with severe learning disabilities, had lived with her mother, who, it was said, refused assistance from the authorities which might have been to MH's benefit. On 31 January 2003, following concerns about MH's behaviour, which was said to be escalating, and her mother's

1 Barrister; p/t legal member of the Mental Health Review Tribunal; Editor of the Mental Health Law Reports.

2 R (B) v Ashworth Hospital Authority [2005] Mental Health Law Reports 47; R (IH) v Nottinghamshire Healthcare NHS Trust [2004] Mental Health Law Reports 51; R (Munjaz) v Mersey Care NHS Trust [2005] Mental Health Law Reports 276; R v (1) Tower Hamlets Health Care NHS Trust and (2) Snazell ex p Von Brandenburg [2004] Mental Health Law Reports

44; Ward v Commissioner of Police of the Metropolis and another [2005] Mental Health Law Reports 128; see also Anderson, Doherty and Reid v The Scottish Ministers and the Advocate-General for Scotland [2001] Mental Health Law Report 192 (Privy Council – considering the Mental Health (Public Safety and Appeals) (Scotland) Act 1999), and cases relating to criminal matters, R v Antoine [2000] Mental Health Law Reports 28, R v Drew [2003] Mental Health Law Reports 282, and R v H [2003] Mental Health Law Reports 209.