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Stress Arising from Overwork…
What you need to know in 2017

The Insurance Institute of Manchester

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Roddy Macleod
Partner
0161 233 7391
Roddy.macleod@weightmans.com

Learning Objectives

- Understand the law
- Discover what are the important hurdles to get over to establish liability
- Identify the evidence you need

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Stress… Well what is it?

- "Stress" is not a psychiatric injury but a little difficulty for a GP or Psychiatrist to apply a label.

- Thompsons Summary of Law in Stress at Work – July 2017… "reaction to excessive pressure".

- Recognised Psychiatric Injury. American Diagnostic & Statistical Manual – DSM. International Classification of Diseases and Recorded Health Disorders – ICD
- eg adjustment disorder, moderate depressive condition

Stress… Well what is it?

- Fit Note:
  - work related stress
  - Anxiousness
  - Depression
  - Malaise
  - Fatigue

2017 HSE Work Related Stress, Depression and Anxiety Statistics

- 526,000 workers suffer from work related stress, depression or anxiety.
- 12.5 million days lost
- 49% of all days lost for a work related reason
- Cause:
  - Workload 44%
  - Lack of Support 14%
  - Violence/Bullying 13%
  - Changes 8%
  - Other 21%

- Lawyers – third most stressful profession
- 3010 out of 100,000 report stress

Stevenson/Farmer Report – Thriving at Work (October 2017)

- 15% of people at work have signs of an existing mental health problems
- £33-42 billion: Cost to Employers – absenteeism*, presenteeism* and staff turnover
- £24-27 billion: Cost to government – benefits, tax, NHS
- £74-99 billion: cost to economy of poor mental health: output, cost to employers/self employed and NHS

- *Presenteeism – costs £17-26 billion
- *Absence – costs £8 billion

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The Law

- Statute
  - eg Management of Health & Safety at Work Regulations 1999
  - October 2013 – Enterprise & Regulatory Reform Act 2013 – cannot seek compensation for breach but can rely on breaches of statutory duty as evidence of negligence.
- Negligence
- Employee has to prove:
  - Duty of Care
  - Breach of Duty of Care
  - Foreseeability
  - Causation

Helpful Guidance

- HSE!
- Management Standards
- Tackling Stress Work Book – 16 March 2017 (WBK1, 57 pages)
- Examples of Risk Assessments
- HSE will provide training
- Stevenson/Farmer Review – October 2017

Work Related Stress

- High workload
- Low workload
- Lack of control
- Too much guidance
- Role uncertainty
- Lack of Support

Work Related Stress

- Inadequate Training
- Promoted above capabilities
- Worries re job security
- Abuse from colleagues/bullying & harassment
- Bad work culture
- Bad management
- Change

Duty of Care

- What is reasonable… depends;
  - Foreseeability of harm
  - The magnitude of the risk of that harm occurring
  - Gravity of the harm
  - Cost and practicability of preventing it
  - and the justification for running the risk…

  ****HOURS****

Consider

- Sabbatical
- Transfer to other work
- Redistribute the work
- Extra help
- Treatment/counselling
- Buddy
- Mentor
- Dismissal

  - How reasonable is it?

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What does this mean?

- No magic number of hours
  - See Garrod v North Devon PCT 28.04.2016 – 30 hours
- Working Time Regulations
  - 48
  - See Paterson v Surrey Police: High Court 07.11.2008

Foreseeability

- Knew or ought to have known the employee was developing a psychiatric illness
- One absence cases
- Multiple absence cases

Garrett v London Borough of Camden [2001] EWCA 395

- Simon Brown LJ:

> "Many, alas, suffer breakdowns and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simply overworking, the tensions of difficult relationships, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. Unless, however, there was a real risk of breakdown which the claimant's employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability."

The Question… Is harm to this employee reasonably foreseeable?

- Individual signs are the most important
- Questions for the Judge to answer
- Sayers v Cambridge (2006) = a good example

How to avoid a successful compensation claim/get your employee back to work

- Keep records of the hours worked
- Produce, implement and communicate a mental health at work plan
- Develop mental awareness amongst employees
- Encourage open conversations about mental health and the support available

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How to avoid a successful compensation claim/get your employee back to work

- Promote effective people management through line managers
- Conduct regular appraisals and keep them safe
- Have a confidential counselling service
- Use your Occupational Health provider properly
- Manage the return to work

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So you have received a stress claim…

- Read it carefully
- Decide if you are going to investigate it or use your solicitor
- Speak to claimant's solicitors – try and fill any gaps
- Establish point of contact with employer
- Preserve documents
  - Three months, six months, three years, six years

Breach of Duty of Care

- Duty of care
- Breach – most time consuming issue
- Measurement of overwork
- Records?

Records…

- Full personnel file
- Clock in and out
- Swipe records
- Log in and out details
- Email/Electronic records
- Statements
- All medical records
- Occupational Health records

Records…

- Grievance papers
- DWP records
- Sick records
- Holiday record
- Appraisals
- 1:1s
- Claimant's diary

Electronic Disclosure

- Part and parcel of your disclosure obligation
- Can be key
- Can be costly and time consuming
- Can be sensitive

Foreeseeability

- Employer has to know or ought to have known employee was developing a psychiatric injury
- Must be plain enough for a reasonable employer to realise
- One absence cases

Evidence

- Statements

- Records
  - 1:1s
  - Appraisal
  - Performance Review
  - GP records
  - Other medical records
  - Email Inbox
  - DWP Records

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Returns to Work

- Key area of liability eg Walker v Northumberland (1995) 1 ALL ER 737
- Keep your promises
- Joined up approach
  - Employee, Manager, HR and OH
- Importance of Instruction to OH

Quantum

- Do not forget it!
- Evidence re:
  - Continuity of employment
  - Promotion
  - Rehabilitation
  - Alternative work
- Get your documents and statements

QUESTIONS

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Index

- Medical Matters
- Legal Matters – The history behind workplace stress claims
- Types of claim
- What must the Claimant prove? Foreseeability/Breach/Causation
- Reducing Risks
- Avoiding Claims
- The Future?

Appendix 1 & 2

- Appendix One – Investigation Guide
- Appendix Two – Hatton – 16 Practical Propositions

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Medical Matters

- **Definition**: Stress is an anxiety response to life and the events of life. It is the body's inability to cope with demands put upon it at a point in time.

- **Symptoms**: Healthy tension can be performance improving. However, once a peak is reached then performance will reduce and be replaced by fatigue, exhaustion, ill health and distress. The physical symptoms can include allergy, loss of hair, high or low blood pressure, migraine, peptic ulcers and skin disease. The emotional symptoms include anxiety, abnormal eating habits, panic attacks, phobias, irritability and abnormal depressive illness.

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Medical Matters

- **Causes**: There are countless numbers of "stressors" of which work may be one. Others include financial problems, domestic relationships and bereavement.

- Stress can of course arise as a consequence of bullying or harassment at work. Where this occurs as a result of discrimination, sex, race etc, then it presents the opportunity for a potential Claimant to chose their jurisdiction and bring a claim for psychiatric injury before the Employment Tribunal. The advantage is that within this jurisdiction, if the facts are proved the Tribunal is only concerned with causation and not foreseeability. See later

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Medical Matters

- **Treatment**: This can range from a few days holiday, to counselling, psychotherapy and drug regime.

- Prolonged stress can lead to physical ill health and more chronic and severe psychiatric illnesses.

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Legal Matters – The history behind workplace stress claims

- At one time in our legal history employment law was purely about contracts in which the employee was clearly the weaker party. Going back to the beginnings of the industrial revolution employers could argue effectively that the economic bargain between employee and employer meant that the employee accepted the risks associated with his job in return for his pay even if such risks resulted in loss of limb or his death.

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Legal Matters – The history behind workplace stress claims

- Gradually Parliament has intervened to impose upon the employer an obligation to consider the welfare of the employee: setting standards of health and safety within the workplace. In this regard the employee can now expect his workplace to be a safe environment in which his risk of suffering from a physical injury will be low. Further in the event of such injury he will likely have a claim for damages against his employer should the employer be found to have disregarded his duty to provide a safe system and/or place of work.

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Legal Matters – The history behind workplace stress claims

- Largely work place legislation has been bound up with the need to maintain the workforce in good physical health and capable of employment. In particular a society not dependent on welfare benefits. However little attention has been paid to issues of mental health which can affect performance adversely leading to a nervous breakdown and long term absence from work.

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Legal Matters – the history behind workplace stress claims

Indeed the law has been slow to recognise the notion of mental distress in the context of contractual relationships generally and in particular that work may cause employees to suffer stress leading to psychiatric harm. At least it is not that the law does not recognise the fact of an injury rather it is a case of being unwilling, as a matter of law, to burden employers with the cost of having to make compensation for such harm. There is a fear about the impact on the wider economy of opening the floodgates in respect of stress injury claims particularly as guarding against such injuries is not a simple matter for employers. The factors giving rise to stress are not necessarily obvious and there is a risk that increased legislation prescribing how employers should do business will place the economy in a straitjacket causing greater universal harm.

Legal Matters – the history behind workplace stress claims

- However by the early 1990's the legal landscape began to change:

- In Johnstone v Bloomsbury Health Authority (1990) it was held that whilst the Claimant's contract may require him to work 88 hours a week it was foreseeable that for him to do so would cause him injury.

Legal Matters – the history behind workplace stress claims

- In Petch v Customs & Excise Commissioners (1993) it was held that the employer did owe a duty to take reasonable care that his duties should not damage his health and that this duty extended to mental as well as physical heath. Nevertheless his workload was not excessive and P was showing no signs of an impending breakdown. These principles were reviewed in the landmark case of…

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Legal Matters – the history behind workplace stress claims

- Walker v Northumberland County Council (1995) 1 ALL ER 737 this case involved an area social services officer who due to pressures of work had a nervous breakdown. He made it clear to his employer on his return to work that his workload would have to be reduced for him to be able to cope. It was agreed that a principal field officer would be seconded to assist him but this did not happen. Instead Mr Walker was left to face a backlog of work that had accumulated during his absence and his stress symptoms returned. He had a second breakdown and was dismissed from his post on grounds of permanent ill health. The Court found that in respect of the second breakdown, the employer was liable for failing to provide a safe system of work and take reasonable steps to protect this employee from the foreseeable risk of harm arising from the volume of work he was expected to cope with.

Legal Matters – the history behind workplace stress claims

- However in **Hatton v Sutherland February 2002** the Court of Appeal overturned 3 out of 4 cases which at first instance had found in favour of the Claimant. This case set down the important principles governing this area of law stating that the ordinary principles of liability in negligence apply namely:

- Foreseeability
- Breach of duty
- Causation
- Harm

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Legal Matters – the history behind workplace stress claims

- Notably the Court of Appeal firmly shifted the burden onto an employee to be in charge of his own mental wellbeing and take action to deal with stress in the workplace by requiring him to complain and bring the problem to the employer's attention. This is exemplified by point 11 of the 16 practical propositions set out in the summary to the judgment, which says that "*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*" this though now has to be read in light of Daw v Intel [2007].

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Legal Matters – the history behind workplace stress claims

- One of the 4 claims, *Barber v Somerset County Council* was appealed to the House of Lords in a judgment delivered in April 04 they took the unusual step of examining the findings of facts made by the County Court Judge. They concluded that whilst the issue of the breach of the Local Authority's duty of care to B was borderline, nevertheless there was sufficient evidence that these employers were aware of his psychiatric vulnerability following the initial period of absence and, it was reasonable for them to have taken steps to help him. Therefore the House of Lords reinstated the original award on the facts of the case. More importantly, they unanimously upheld the guidelines and principles in *Hatton* confirming them as giving useful guidance but did not possess "anything like statutory force".

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Legal Matters – the history behind workplace stress claims

- Yet despite the obstacles in the way of a Claimant succeeding post *Hatton* in Maurice Young v The Post Office (30 April 2002) he did. Mr Young was trying to manage 4 people and a new computer system (about which he had not had any training) when he had a breakdown and was off for 4 months. When he returned to work only, 80% recovered, instead of a reduced workload the Claimant was faced with having to go on a 1 week residential training course, expected to cover for a new workshop manager and continue in his capacity of "acting" manager. In these circumstances it was found plainly foreseeable that the Claimant would suffer a recurrence of his mental health problems.

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Legal Matters – the history behind workplace stress claims

- In Maureen Pratley v Surrey County Council CA (27 July 2003) the Claimant had hidden the fact that she was working excessive overtime hours firstly by failing to record her time and/or take time off in lieu. Secondly when she took 2 weeks off sick she asked her doctor not to record "stress" as the reason on her medical certificate but to identify the problem as "neuralgia" which he did. Subsequently the Claimant discussed with her employer that she was overloaded with work and it was agreed that a stacking system for new work would be implemented. Following this interview the Claimant went on holiday for 3 weeks. On her return she found that the stacking system had not been implemented. She subsequently suffered a breakdown resulting in her having to give up her job. The Court found that whilst at times her workload could be high that knowledge was not in itself sufficient to give rise to a foreseeable risk of injury. P had concealed the true state of her health. Further failed to consult the confidential counselling service available.

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Legal Matters – the history behind workplace stress claims

- In Croft v Broadstairs & St Peter's Town Council **(15 April 2003)** the Court considered the circumstances in which the Defendant may be imputed to have knowledge of the Claimant's vulnerability. In this case Mrs Croft had been having counselling privately which was a fact known to another of the Council's employees. The question was whether this employee had on balance imparted this knowledge to the employer or whether the employer should be assumed to have such knowledge. If so then the employer would have been on notice of Mrs Croft's vulnerability. Accordingly it may have been foreseen that sending a disciplinary warning letter to Mrs Croft whilst she was off sick (albeit officially with bronchitis) may result in her breakdown and attempted suicide.

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Legal Matters – the history behind workplace stress claims

- As it happened the Court of Appeal refused to find that the employer had any knowledge of the Claimant's pre-existing vulnerability. Rather it was held that the employer was entitled to expect ordinary robustness of a Claimant in the employment context including disciplinary matters. Importantly on the evidence of the psychiatrist it was clear that a person of ordinary robustness (which was the image of herself the Claimant presented to the Council) would not have been foreseeably likely to suffer a nervous breakdown as a result of a reprimand as to her conduct.

Legal Matters – the history behind workplace stress claims

- In Foumeny v University of Leeds (16 April 2003) the Court of Appeal dismissed a claim brought by a head of an academic department that he had been subject to treatment deliberately designed to undermine and harass him causing a psychiatric injury. Plans to merge the department into a unitary school were the subject of dispute between the head and his employers but the Court did not in this case consider that the employer had failed in its duty to take reasonable steps to prevent a psychiatric injury occurring.

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Legal Matters – the history behind workplace stress claims

- Post *Barber* there followed **Higham v Havering Primary Care Trust and Anor (14 July 2004) QBD** Mr Higham, alleged that he suffered stress as a result of bullying, harassment and victimisation which had arisen from alleged alteration of his work duties. He was employed in the medical stores of a hospital. H fell into dispute with his employer concerning changes to his working practice and performance. He was referred to occupational health where a doctor referred to him as being fit for work. He subsequently refused to undertake a particular work duty and went off with a mental health breakdown.

Legal Matters – the history behind workplace stress claims

- The Court held there had been no intention by anyone to bully, harass or victimise. There is no evidence to suggest that H had shown signs of impending mental health breakdown, nor, that the duties that he was required to perform could possibly lead him to cause him psychiatric harm

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Legal Matters – The history behind workplace stress claims

- In V v A School Trust Limited (12.8.2004) QBD V, female, alleged that she had suffered severe clinical depression on two occasions because of significant changes within the primary school that she worked, both with regard to method of working and her position.

- The Court held that the first period of absence was not foreseeable, but the second period was. However, there was no breach of duty. The pressure arose of a legitimate requirement of change in teaching style and V did receive support on her return to work. V was simply unable to cope with the changes to her method of teaching and therefore the second period of depressive illness did not arise out of any breach of duty on the part of the employer.

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Legal Matters – The history behind workplace stress claims

- In Hartman v South Essex NHS CA [2005] 6 this is one of a collection of six stress at work cases. It reconfirmed the guidance given in the Court of Appeal in Barber v Somerset 2002. Interestingly it is suggested that it would only be in exceptional circumstances that a person working part time would be able to succeed in a claim caused by stress at work.[This has not been followed!] More importantly disclosures to occupational health were confidential and the employer was not fixed with knowledge of this.

- Vahidi v Fairstead CA (9.6.05) an example of a case where the Claimant lost on the basis that the teacher's employer had taken sufficient steps to support her. The Court of Appeal obiter also suggested that litigants should mediate stress claims rather than litigate them. This advice does not seem to have been followed!

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Legal Matters – The history behind workplace stress claims

- In Hone v Six Continents **(29.06.05),** the Court of Appeal bucked the trend on foreseeability and agreed with the first instance Judge that a licensed house manager who worked more than 48 hours per week and complained of being tired established foreseeability. Contrast this with the case of **Harding v The Pub Company CA 2005** where the Claimant failed.

- In **Garrod v North Devon PCT [2006] EWHC 850** the High Court held that where an employer failed to replace staff who had been sick or on leave with the result that a vulnerable employee was subjected to excessive work the employer was liable to pay damages. The Claimant worked 30 hours a week. It was a three absence case.

Legal Matters – The history behind workplace stress claims

- In Sayers v Cambridgeshire CC **(21.7.06)** the High Court held psychiatric injury was not reasonably foreseeable to the employer. Furthermore there was no cause of action for breach of statutory duty in respect of the working time regulations. It was significant that the Claimant concealed the true nature of his illness when absent.

- In Hiles v South Gloucestershire **PCT High Court (20.12.06),** the Claimant broke down in tears at a review meeting because of her workload. It was held this was a sign the Claimant was under stress and it was beginning to affect her. Liability was established.

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Legal Matters – The history behind workplace stress claims

- Daw v Intel CA (7.2.07). In this case whilst the Claimant did not readily complain about her volume of work or take time off in the context of her 14 written and verbal representations about lack of resources and the hours worked, liability was established. The Claimant could also not be criticised for failing to use the available internal counselling services. These were not a panacea by which employers could discharge their duty of care in all case.

- Dickins v O2 Plc CA (16.10.08). Here liability was established for not sending the Claimant home and not making an immediate referral to occupational health. The case though is most important in relation to causation. The Court of Appeal suggested that the injury was not divisible and so the employer should have been responsible for the whole injury. They would not therefore have allowed the 50% reduction as had been allowed at first instance had this point been before them on appeal – see BAE Systems v Konczak [2017] EWCA 1188 – if the harm is divisible may be possible to apportion and for completeness – Thaine v LSE [2010] ICR 1422

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Legal Matters – The history behind workplace stress claims

- Paterson v Surrey Police High Court (7.11.08). An example of stress not being reasonably foreseeable and that the illness was not due to a breach of duty of the employer. The case also contains useful discussion regarding their being no magic in the 48 hour working time directive figure.

- Connor v Surrey County Council High Court (19.3.09). Here liability was established by a head teacher. Unfounded claims of racism and Islamophobia were made by a parent and governor. It was held injury was foreseeable and the employer was also in breach of duty for not intervening earlier. They had not supported the Claimant sufficiently. This decision was upheld by the Court of Appeal on 18 3 2010.

- **Mullen v Accenture Services Ltd [2010] HC 2336**
- The Hatton guidance was applied. Claimant had a history of psychological vulnerability which was not known to the employer. It was accepted stress was caused by work but it was held not foreseeable. It also confirmed breach of the Management of Health & Safety at Work Regulations would not in itself entitle the employee to compensation.

- **King v Medical Services International [2012] HC 970**
- The claimant who was seen as robust and someone who spoke her mind did not establish her absence was foreseeable.

- **McDade v Critchlow QBD 21.02.2014**
- An employee's paranoid schizophrenia was not made out to be caused by stress in the work place and it was not foreseeable.

- *Bailey v Devon Partnership NHS Trust* Queen's Bench Division District Registry (11/07/2014) – A claim by a Consultant Child Psychiatrist for damages for personal injury caused by occupational stress was dismissed. Whilst her employer was in breach of its duty under the Management of Health and Safety at Work Regulations 1999 reg.3 to undertake a risk assessment and as a result failed to implement its own policy for the assessment of stress, a more thorough investigation would not have identified any imminent risk to the claimant's health.

- *Daniel v Secretary of State for the Department of Health* [2014] EWHC 2578 (QB) – The court dismissed an employee's claim for damages for psychiatric injury arising out of occupational stress, where there were neither indications nor complaints of impending harm to her health arising from stress at work. The psychiatric injury was not foreseeable and no duty of care arose. She claimed that her psychiatric condition was brought about by bullying and/or overwork.

- *Brown v Richmond upon Thames LBC* [2012] EWCA Civ 1384 – The appellant employee appealed against a decision in his claim for damages resulting from the negligence of his employer. The claimant had retired on the grounds of ill-health after a lack of investment in his department and the loss of staff led to incidents of work-related stress. The case was remitted for further judicial consideration of the impact of his marital breakdown on the level of damages.

- *MacLennan v Hartford Europe Ltd* [2012] EWHC 346 (QB) – The court rejected a claim for damages by an employee who alleged that she had sustained chronic fatigue syndrome as a result of workplace stress. There was no proven causal link between stress and chronic fatigue syndrome, and the employee had established no evidential basis for either causation or foreseeability.

- *Easton v B&Q Plc* [2015] EWHC 880 (QB) – An employee's damages claim for psychiatric illness and consequential loss caused by work-related stress had to be rejected as the employer could not have foreseen the illness. The stress was brought on by pressure to accept an offer of a temporary post at another branch.

- *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188 – The Court of Appeal revisited the issue of apportioning a claim where there were multiple cases and considered the issue of divisible and indivisible injuries. The claimant had a history of stress and problems at work prior to sexist comments by her manager. The court said that where there were multiple causes a sensible attempt should be made to apportion liability. This case emphasises the importance of getting your expert medical evidence right ie get your expert to deal with the completing causes otherwise, as here the injury was held to be indivisible.

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Legal Matters – The history behind workplace stress claims

- Overall whilst the Courts have accepted in principle that Claimants may recover damages for psychiatric injuries induced by workplace stress the approach taken in each individual case is cautious. Liability is not straightforward. Indeed if anything the so-called judicial pendulum has swung back from the direction taken in **Walker**. However the modern employer (unlike his forebears) has to think about the risk that he will have to pay compensation for psychiatric injury as well as physical injury. The concept of his duty to provide a safe work environment has been inescapably changed over the last decades. Therefore shying away from consideration of the factors at work that may cause such injuries is no longer an option.

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Types of Claim

Broadly the types of claim may be summarised as fitting into the following categories:

- The overwork claim
- The silent sufferer claim
- The harassment claim
- The failed rehabilitation

Walker was a classic case of a breakdown caused by overwork. Following *Hatton* initially it was thought a claimant alleging workload would face an uphill task.

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Types of Claim

The Working Time regulations are if you like the mental health and safety equivalent to insisting on guard rails round dangerous machinery. If an employer breaks the law then he may also be fined.

Given the need to establish knowledge (the employer knew or ought to have known of the imminent risk of ill health) the silent sufferer will have difficulties in establishing a claim (as Mrs Pratley found to her cost). Employees may be understandably reticent in coming forward with their problems. Hence the importance of confidential advice & counselling.

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Types of Claim

Discrimination, bullying and harassment at work may all be considered “stressors”. A court will have every sympathy with a claimant who proves that he/she is the victim of harassment. The cause of bullying and harassment may in turn be linked to issues of race and sex discrimination

Cases such as **Walker** and **Young** are testimony to what can go wrong when attempting to rehabilitate the employee back into the workplace. The focus must be on what is reasonable. There is no point inventing a return to work plan which is neither viable, nor in the long term economic.

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What must the Claimant prove?

To succeed the Claimant must prove:

- A foreseeable risk of imminent (mental) ill health
- Awareness on the part of the employer
- An unreasonable act or omission, in light of the employer's knowledge of the Claimant's vulnerability, causing a breakdown.

The Employer needs to consider whether:

- There was a foreseeable impending risk to health.
- Steps could have been taken which would have prevented a breakdown.
- Whether the Claimant's work caused or materially contributed to his psychological ill health

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What must the Claimant prove?

Foreseeability:

Foreseeability of harm is the acid test. Indications of impending harm to health arising from stress at work must have been plain enough for any reasonable employer to realise that they should have done something about it.

In contrast to the general principle that the Defendant is bound to take his victim as he finds him, accepting the so called egg-shell skull principle, in the context of workplace stress claims the employer must be aware of the Claimant's unusual sensitivity for the injury to be considered foreseeable.

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What must the Claimant prove?

Whether the Claimant has passed the 'threshold' test on foreseeability depends on the inter-relationship between the individual and his work. Applying the guidelines provided in *Hatton* the following should be taken into account:

- No occupation can be regarded as intrinsically stressful.
- An employer is entitled to accept that an employee has reasonable fortitude and is up to the normal pressures of the job, unless there is evidence to the contrary.
- An employer is entitled to take at face value what he is told by his employee about his health.

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What must the Claimant prove?

- In respect of the demands of the work look at the:
  - Nature and extent of work.
  - Intellectual and emotional demands of the job.
  - Whether there is evidence of a colleague suffering stress.
  - Whether there is evidence of abnormal absenteeism.
  - Whether there was an unusual level of complaints.

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What must the Claimant prove?

Breach of Duty: in looking at the employer's duty to reduce or negate a risk of stress consider whether:

- There were reasonable steps that could have been taken which are commensurate with the size and scope of Defendant's operation.

- If those steps been taken, would they have done any good? (This is a question for a medical consultant).

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What must the Claimant prove?

Causation: to what extent did the Claimant's work cause or contribute to his psychological ill health/breakdown?

In awarding damages the Court will:

(a) make an apportionment, if the stress has been caused by one or more 'stressors' unless the harm is truly indivisible, and

(b) discount damages taking into account any pre-existing disorder or vulnerability and the chance the Claimant would have succumbed to a stress-related disorder in any event.

Here the relevant cases are Court of Appeal authority of

- Dickins v O2 Plc [2008]. And
- *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA 1188

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Reducing Risks

Claimants generally struggle to establish requisite knowledge of their vulnerability on the part of the employer. They may not have any insight themselves on this point. Frequently Claimants will not complain about their workload or will hide their difficulties through fear of dismissal on ill health grounds, loss of an opportunity of promotion and/or a strong determination to battle on and win through despite being aware of impending signs of ill health.

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Reducing Risks

Indeed despite being able to recite a history of absences these may all have been attributed to minor physical ailments as opposed to work place induced stress. Accordingly against a Claimant without a disclosed history of psychiatric illness Defendants may escape liability Having argued (perhaps not entirely hand on heart) that there were no plain signs indicating a risk of imminent harm and nothing prompting suspicion that the Claimant was other than ordinarily robust.

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Reducing Risks

With 12.5 million days lost per year in absenteeism, stress at work is an important issue for employers and employees alike. Perhaps the move away from manufacturing to the service industries has changed our requirements in the workplace from physical to mental fitness. In any event, stress, the employers' obligations and the methods to reduce risk have come very much to the fore in recent years.

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Reducing Risks

The Health & Safety Executive (HSE) worked with companies to develop standards of good management practice which will provide a yardstick against which employers can gauge their performance in tackling a range of key stressors. In short, the standards provide guidance as to how an employer can assess stress in their organisation, identify any "hot spots" and having done so, target investigation and their resources to tackle workplace "stressors".

Reducing Risks

- The management standards were not without criticism. **The standards were launched on the 3 November 2004.** This followed a successful pilot.

- At the heart of the HSE Management Standards is the risk assessment. The employer is encouraged to undertake an analysis of their workforce to assess whether any problems exist from particular stressors.

Reducing Risks

- In short, the focus is on six areas; demands, control, support, relationships, role and change.

- Download free of charge from the HSE – Tackling Work Related Stress using the management standards approach – 16.03.2017 WBK1

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More Practical Steps…

- Ensure appropriate stress, bullying/harassment and equal opportunity policies are in place.
- Educate – particularly Middle and Senior Management.

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Reducing Risks

- Monitor – do you have tools in place to be able to monitor the level of your employee's workload at any point in time? Do regular appraisals; keep records of hours worked.

- Monitor – do you have your own Occupational Health Unit? If so, are they on the look out for signs that an employee may be under stress and/or trends in sickness and absenteeism? Are employees aware of the services that the Occupational Health Unit provides? What is the relationship between the Occupational Health Unit and the employee in terms of the provision of information?

Provide a confidential advice/counselling service.

Weightmans

Avoiding Claims

It goes without saying that by the time a claim is brought the employer/employee relationship has usually broken down irretrievably. The employee may have been off sick for a long period and have been dismissed on grounds of permanent ill health and incapacity. A union may be involved along with lawyers. Accordingly apart from a risk of having to pay compensation a good many workers will be involved in the forensic investigation process that goes with defending a claim. Time spent defending claims has a cost in terms of disruption caused to normal business and the unsettling effect on other workers. This is to say nothing of the cost to the employee and his or her family.

Avoiding Claims

It is clearly better to take the approach of being pro active in terms of looking after the mental health of employees on a day to day basis so as to avoid the risk of claims than to be placed in a position of defending a claim.

It is obvious that some types of workplace behaviour need to be discouraged. The steps required to minimise the risk of a stress claim may range from banning sexy wall posters to spot checking the contents and volume of email traffic. Policies, protocols and training need to be drafted with the intention of encouraging a positive work place culture where all employees feel valued and integrated. Away days and team meetings are useful and are occasional informal parties.

Weightmans

Avoiding Claims

Appraisal interviews too provide an opportunity to explore with employees any issues affecting their performance or about which they are unhappy.

Simple solutions to maintaining a happy workforce include the provision of opportunities for staff to air their views through newsletters and for managers to explain changes face to face. Indeed it has become fashionable for some large organisations to operate the practice of job-shadowing so that managers get to see at grass root level the problems faced by the workforce on a day by day basis.

Weightmans

Avoiding Claims

A substantial number of stress claims turn upon the content of formal and informal conversations when the Claimant made comments about how he or she was feeling and possibly their health. Witnesses will be required to give a detailed account of their relationship with the Claimant, what was said and the nature of the Claimant's complaints/comments. It is therefore worth ensuring that managers are aware of the potential significance of the notes they make or indeed fail to make.

Weightmans

Avoiding Claims

It can be difficult to separate out the causes of stress and the employer needs to be alert to issues such as financial, relationship or other problems. Whilst an employer does not want to be accused of probing into private matters or of snooping it is important to respond to obvious changes in demeanour, appearance and apparent isolation of any individual.

Weightmans

Avoiding Claims

Office gossip may indicate that someone is having difficulties and as in the case of **Croft** friendships out of work sometimes lead to employees having knowledge about private matters affecting another employee's mental health. Although in **Croft** the employer escaped liability good practice in terms of managing risk suggests that a prudent employer should not be insensitive to external issues affecting the employee. For instance knowing an employee has just suffered bereavement is not a good moment to place on his desk a job, which has to be done to a tight deadline likely to interfere with his attendance at the funeral.

Weightmans

Avoiding Claims

Absenteeism should not be ignored. This may be difficult to monitor in a large organisation but this is probably one of the key early warning signs of problems brewing but at a stage where they are still capable of being resolved.

Stress can often arise when individuals cannot cope with the changes in their pattern of work or introduction of new technology. Accordingly consideration needs to be given to providing "induction" training and support.

Avoiding Claims

Other ‘stressors’ include factors intrinsic to the job:

- the person’s role within the organisation and relationships with others
- unclear objectives
- aggressive management or communication styles
- inadequate rewards
- too much work
- too little work
- competing deadlines

Avoiding Claims

- unrealistic expectations
- too many meetings
- too many interruptions
- inadequate heating, lighting and ventilation
- equipment breakdowns
- inability to control the pace of work because of competing and excessive demands
- Loss of job satisfaction through lack of development training or opportunities for advancement.

Weightmans

Avoiding Claims

To summarise you need to:

- Consider carefully and implement the HSE management standards and whether the methodology recommended is suitable for your organisation.
- Keep records e.g. appraisals and hours worked documentation.
- Investigate what steps, if any, could be taken to reduce the risk of stress and whether those changes are realistic and reasonable for the size of the operation and the extent of the risk.

Weightmans

Avoiding Claims

- Investigate whether there is evidence of colleagues suffering from stress. Is there evidence of an unusual history of absenteeism, a substantial number of complaints concerning workload, harassment or a change in technology/organisation?

- Ensure managers aware of psychological ill health take steps to deal with the issue by offering the employee confidential counselling, looking at their workload, addressing issues of discrimination, bullying and harassment, providing time off, referring the employee to occupational health.

- Ensure managers investigate the causes of absenteeism and monitor any apparent patterns developing in particular individuals or teams.

Avoiding Claims

- Ensure managers act upon the knowledge they have about an employee's state of mind whether this is gained informally or formally.

Weightmans

The Future?

- The Courts have been concerned about the economic impact of opening the floodgates on stress claims for employers. Rather less consideration seems to have been given to the incentive aspects of compensation toward reducing stress within the workplace, recovering the value of days of lost work and collateral saving to be derived from reducing the burden on GP and the mental health services.

Weightmans

The Future?

- Similarly the Courts appear to have been concerned that employers will be reluctant to take on people who already have a significant psychiatric history or acknowledged vulnerability to stress related disorders if the standard of care expected of them is set too high. Somewhat contradictorily the Courts seem not to have emphasised their powers under the Disability Discrimination Act to address such issues. Overall the judiciary have been reluctant to go too far along the path of over protecting the employee.

Weightmans

Appendix 1

Investigation

As a rule such claims require very detailed forensic investigation. Consider:

- Obtain the entirety of the Claimant's medical records to include any separate records held by mental health units/psychiatric clinics.
- Obtain the Claimant's occupational health records.
- Secure all documentation relating to the major allegation of breach, i.e. harassment or bullying at the hands of colleagues, overwork etc. This may include a substantial number of personal notes, e-mail, minutes of meetings where concerns or complaints were raised.
- Ensure all relevant email accounts are preserved

Weightmans

Appendix 1

Investigation

- Who said what to whom? – a substantial number of stress claims turn upon content of formal and informal conversations when the Claimant made comments about how he or she was feeling and possibly their health. Witnesses will be required to give a detailed account of their relationship with the Claimant, what was said and nature of the Claimant's complaints/ comments

- Explore whether there is evidence of any external 'stressors' – financial, relationship or other problems.

- Obtain copy of the employer's risk assessments. If they do not have a specific risk assessment on stress, then there may be a useful comment in the Health & Safety policy, Bullying/Harassment policies.

Weightmans

Appendix 1

Investigation

- Obtain detailed evidence from Claimant's; line managers and occupational health.
- Stress can often arise when individuals cannot cope with the changing working environment/new technology – investigate what training and support was given.
- Investigate what steps, if any, the employer could have taken to reduce the risk of stress. Were those changes realistic and reasonable for the size of the operation and the extent of the risk?

Weightmans

Appendix 1

Investigation

- Investigate whether there is evidence of colleagues suffering from stress. Is there evidence of an unusual history of absenteeism, substantial number of complaints concerning workload, harassment or a change in technology/ organisation?

- Were Claimant's managers aware of his/her psychological ill health prior to commencement of absence/breakdown – what did they observe for themselves and what did the Claimant tell them?

Weightmans

Appendix 1

Investigation

- Medical expert:- Take care in obtaining a detailed and informed psychiatric report and ask the expert to deal with the following issues:-

  (a) Is or was the Claimant suffering from a recognised psychiatric disorder?

  (b) Did the Claimant's work cause or contribute to the disorder, if so to what extent?

  (c) What is the prognosis for the future and can the condition be treated, if so how and what are the prospects for success?

Weightmans

Appendix 1

Investigation

(d) Ask the expert to consider whether any steps that the Defendants could have taken, would have done any good and, if so, to what extent.

(e) Given the Claimant's history of psychological ill health/vulnerability (if there is any) is it inevitable that he/she would have had a breakdown in any event and, if so, when?

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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 for employer's liability apply.

2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: 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).

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows that there is some particular problem or vulnerability.

4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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

a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the job 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?

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

b) Signs from the employee of impending harm to health. 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?

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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.

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.

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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

9) The size and scope of the employer's operation, its resources and the demands that it faces are relevant in deciding what it is reasonable. These include the interest of other employees and the need to treat them fairly, for example, in any redistribution of duties.

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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.

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 but see Daw v Intel [2007].

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.

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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.

14) The Claimant must show that the 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.

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 wrong doing, unless the harm is truly indivisible. It is for the Defendant to raise the question of apportionment but see Dickins v O2 Plc [2008].

Weightmans

Appendix 2
Hatton – 16 Practical Propositions

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.