

EMPLOYERS' LIABILITIES FOR WORK-RELATED STRESS

Professor Alice Belcher, Department of Law, University of Dundee

1. INTRODUCTION

This article explores the forces that are currently shaping employers' liabilities in respect of work-related stress. It is argued that work-related stress is an area where regulation is tightening. Consequently, more will be expected of employers in order to fulfil their general duties under the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999¹ in respect of work-related stress. Thus, the law in this respect looks set to become more burdensome to employers. In contrast, the recent Court of Appeal decision in *Sutherland v Hatton*² has been seen as setting limits on employers' civil liability for work-related psychiatric illness. However, this article suggests that, because *Sutherland* is in certain respects based on the "state of the art", and this is itself still developing, the limits as expressed in *Sutherland* are not as certain as they may at first appear.

2. BACKGROUND

During the last decade stress at work has emerged as a key area for those concerned with health and safety issues. By the early 1990s two basic ideas about stress at work had been articulated. Firstly, three levels of intervention had been identified: "primary or job and organisational stressor reduction; secondary or stress management training and tertiary or health promotion, counselling and employee assistance programme activities."³ Secondly, the rather obvious idea that prevention is better than cure had been applied to stress-related illness. Cooper stated:

"Rather than focusing exclusively on what the organisation can provide for the employees to help them cope with stress more effectively, organisations would be well advised to consider what the organisation can do to eliminate or reduce workplace stressors."⁴

By the mid-nineteen nineties the Health and Safety Executive (HSE) had indicated that, insofar as workplace stress could make employees ill, it was covered by section 2(1) of the Health and Safety at Work Act 1974 and regulation 3(1)(a) of the Management of Health and Safety at Work

¹ SI 1999/3242. The Northern Ireland equivalent regulations are in the Management of Health and Safety at Work Regulations (NI) 2000, SI 2000/388. The Northern Ireland equivalent of the 1974 Act is the Health and Safety at Work (NI) Order 1978.

² [2002] 2 All ER 1, 2002 WL 45314 (CA).

³ Murphey, "Workplace Interventions for Stress Reduction and Prevention" in Cooper and Payne (eds.), *Causes and Consequences of Stress at Work* (1988).

⁴ Cooper, "Identifying Workplace Stress: Costs, Benefits and the Way Forward" in *European Conference on Stress at Work a Call for Action: Proceedings* (1993).

Regulations 1992⁵ (now 1999). Also, the landmark case of *Walker v Northumberland County Council*⁶ had established that employers have a duty of care to employees in respect of reasonably foreseeable psychological injury.

This article traces the development of employers' liabilities (both criminal and civil) for work-related stress. In section 3 the costs of stress are discussed in order to demonstrate their magnitude and significance. Criminal liabilities are discussed in section 4. The development of employers' criminal liabilities begins with the formal recognition of the application of the existing general health and safety duties to workplace stress. Further development has taken the form of consultation with a view to introducing more specific regulation. The article highlights the gap between the Health and Safety Commission's (HSC's) vision and the current practice of many employers. Employers have reached the stage of paying lip service to the idea of stress as a costly problem that they need to think about. However, the vision is that stress can be dealt with as part of a positive health culture at work, which means moving to the use of primary rather than secondary and tertiary interventions. In section 5 employers' civil liabilities are discussed. This analysis covers the groundbreaking cases and subsequent developments including the important Court of Appeal ruling in *Sutherland v Hatton*.⁷

3. THE COSTS OF STRESS AT WORK

The costs of stress at work are hard to quantify, but some attempts have been made to estimate the costs to industry. In this section three types of costs are described; human, operational, and litigation.

A. Human costs

The human costs of stress can be extreme and dramatic:

“One morning last August [*i.e.* in 1999], Sarah Howard sat behind her desk at Allstate Insurance Co.'s claims office on North Eagle Creek in Lexington, pointed a pistol at her head, and pulled the trigger. Her suicide note was addressed to Allstate management and included the words: Don't even think I am the only one you have pushed this far. You kill people in many ways.”⁸

It is not only in the U.S.A that stress has been blamed for dramatic events. For instance: three employees of the Registers of Scotland (a government agency) committed suicide within five days in November 1998. Conditions at the Registers of Scotland office in Edinburgh were criticised following the suicides, with an independent report revealing a workforce struggling to cope with high levels of stress, intimidation and poor relations with management.⁹ In *Walker* it was found that the plaintiff had: “in effect been severely mentally wounded.” It was said that in consequence he was rendered quite

⁵ SI 1992/2051.

⁶ [1995] ICR 702.

⁷ [2002] 2 All ER 1, 2002 WL 45314 (CA).

⁸ Reported in the *Lexington Herald* 3 June 2000.

⁹ *The Scotsman* 8 March 2000.

incapable of ever returning to the kind of social services work which for 20 years had been his career and indeed of taking on ever again work which involved the shouldering of significant responsibilities. These examples are included to illustrate that it is not only statistics on quantity that are important when evaluating the human costs of stress at work. In fact, if the human costs were only to be measured in money terms there would be some obvious double-counting in the three cost categories above. The human cost to Mr Walker in money terms has been measured in the damages he received which will be mentioned under heading C below. The examples indicate the quality of the human costs in terms of lives that can never be brought back or fully repaired.

Teaching is a profession where stress-related illness has been increasing and over the years 2000 and 2001, 200,000 teachers in England and Wales reported suffering stress due to an excessive workload.¹⁰ The human costs to teachers and their families are startling with the inquests into the deaths of three primary school teachers over the same period implicating stress and Ofsted inspections: Janet Watson (33) of Northwich (Cheshire), Jenny Knibb (47) of Exeter, and James Patton (29) of Birmingham. Also in 2000, Pamela Relf, a teacher of 36 years experience took her life after an Ofsted inspector criticised her teaching. She left a note saying "I am now finding the stress of my job too much. The pace of work and the long days are more than I can do." Stress has ended the lives of some teachers and the careers of others. Following the out of court settlement of her case in 1999, teacher Muriel Benson said: "I feel bereaved at the loss of my career."¹¹

B. Operational costs

In 1999 it was reported that stress had overtaken the common cold as the number one reason for sickness absence.¹² A CBI report in 1999 put the cost of stress-related employee absence at £530 per employee in small businesses, and up to £545 per employee in organisations of over 500 employees on average. This type of estimate is very difficult and results are usually sensitive to the underlying assumptions. Costs of stress related illness do not only fall on employers and some estimates are for the costs to the UK economy as a whole. For instance, the CBI estimate for 1996 was £3.7billion¹³ and for 1999 was £12billion. An Institute of Management report in 1996 suggested a cost of £7billion to industry, the NHS (presumably treatment costs) and taxpayers (presumably statutory sick pay).¹⁴ Two types of cost may be missing from these estimates: the loss of productivity and profitability resulting from low morale in a stressed workforce and the costs of accidents caused by over-stressed workers.

C. Litigation costs

Under this heading are included legal costs, damages awarded by the courts and damages paid in out of court settlements. The amounts associated with

¹⁰ BBC Online <<http://news6.thdo.bbc.co.uk>>.

¹¹ <www.successunlimited.co.uk>.

¹² *Absence, an audit of cost reduction methods*, (Gee publishing).

¹³ *The Scotsman* 4 October 1996.

¹⁴ <www.sodexho.co.uk>.

individual legal cases can be large. *Johnstone*, a junior doctor, settled for £5,600 compensation, but the associated legal costs were about £150,000. *Walker* received £175,000. In *Lancaster v Birmingham City Council*¹⁵ the employee developed a severe anxiety state with depression and was awarded a total of £67,041 which included sums for future wage loss and vulnerability on the labour market and pension loss. In an out-of-court settlement, Randy Ingram, the warden at a gypsy site, was paid £203,432 for prolonged stress after being shot at and physically and verbally abused by the occupants of the site.¹⁶ This was a record figure until May 2000 when a 45-year old Shropshire teacher accepted £300,000 compensation for a career wrecked by the bullying of a new headteacher.¹⁷

4. CRIMINAL LIABILITIES

A. The Application of General Health and Safety Duties to Stress at Work

Any discussion of the regulation of health and safety in the UK naturally begins with section 2(1) of the Health and Safety at Work Act 1974:

“It shall be the duty of every employer to ensure, as far as reasonably practicable, the health, safety and welfare at work of all his employees.”

This is a long-standing, and very broadly drafted duty, but it makes no specific reference to mental health. The Management of Health and Safety at Work Regulations 1992 (now 1999) introduced the concept of risk assessment into UK Health and Safety Law. Regulation 3(1) states:

“Every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work.”

Again there is no specific reference to mental health or stress at work. However, by 1994 “stress, both physical and mental” had been included in the European Commission’s fourth action programme on health and safety, and by 1995 the Health and Safety Executive (HSE) had published *Stress at Work: A guide for Employers*. In 1996 the European Commission published guidance on risk assessments at work in which psychological factors were described as “requiring risk assessment”.¹⁸ The HSE followed up its 1995 publication, which was intended for large employers, with *Help on Work-related Stress: A Short Guide*, published in 1998 and intended for smaller employers. Whilst following the guidance is not compulsory, both guides indicate that by doing so employers will normally comply with the law. Also, when health and safety inspectors seek to secure compliance with the law, they may refer to the guidance as illustrating good practice. The guides

¹⁵ (1999) 6 Q.R. 4.

¹⁶ BBC Online <<http://news6.thdo.bbc.co.uk>>.

¹⁷ *A v Shropshire County Council*, reported by <www.successunlimited.co.uk/news>.

¹⁸ European Commission, *Guidance on Risk Assessment at Work*, (1996, Directorate-General V; Employment, Industrial Relations and Social Affairs, Public Health and Safety at Work Directorate).

also make two explicit statements: firstly, they state that it is an employer's duty to ensure that employees are not made ill by their work, and that stress can make employees ill. This appears to be the Health and Safety Executive's application of section 2(1) of the Health and Safety at Work Act 1974 to stress at work. Secondly, they state that where stress caused by, or made worse by, work could lead to ill health, employers must assess the risk. This appears to be the Health and Safety Executive's application of regulation 3(1)(a) of the Management of Health and Safety at Work Regulations 1992 (now 1999) to stress at work.

To summarise: with the making of the Management of Health and Safety at Work Regulations 1992, employers were required for the first time to conduct risk assessments. As no specific reference is made to mental health or psychological factors in the UK regulations, employers may have omitted this area of employees' health in the early stages of implementation. By 1995 however there is clear guidance from the UK's Health and Safety Executive on stress at work as a health and safety issue in its own right.

B. The Further Development of Stress as a Major Health and Safety Issue

Another development of the mid nineteen nineties was the establishment of the European Agency for Safety and Health at Work. The Agency published its first research report in 1997. The report was based on a survey of all member states and entitled *Priorities and strategies in occupational safety and health policy in the member states of the European Union*. Stress at work was only one of many occupational health and safety issues tackled by the survey, however the following results are significant as they demonstrate Europe-wide thinking. The survey showed that stress at work was an area of risk paid particular attention in the last 10 years, *i.e.* the 10 years ending in 1996. Survey responses also predicted stress at work to be a main area of risk in the future, *i.e.* beyond 1997. The survey results also suggest that organisation and management issues were expected to receive increasing attention.

These predictions are being fulfilled in the UK where the latest developments have been in the form of a discussion document published by the Health and Safety Commission (HSC) in 1999, and the announcement on 15 June 2000 of a programme of work to tackle occupational stress. The discussion document, *Managing Stress at Work*, was published in April 1999 and comments were received until the autumn of that year.¹⁹ The questions posed in the discussion document fell into four distinct groups. The first group asked "what is stress and is it a problem?" The second group asked whether stress at work should be a health and safety issue. The third group asked for comments on a variety of possible measures that could be recommended by the HSE. The final set of questions was concerned with what the discussion document described as "an alternative approach". The proposed alternative to the traditional regulatory approach was a more holistic treatment of the problem of stress involving more partnership.

¹⁹ The deadline stated in the document was 30 July 1999 but comments were apparently received until 30 September 1999.

The options open to the HSC were listed as:

- “(a) asking HSE to commission more research to help answer some of the outstanding questions about stress, for example to provide illustrations of organisations where stress has been tackled successfully;
- (b) asking HSE and its Advisory Committees to issue additional ordinary guidance, perhaps in specific sectors of employment;
- (c) issuing an Approved Code of Practice; or
- (d) recommending that the Secretary of State makes regulations about work-related stress or any combination of these.”

The HSC’s preferred option was to do “more than just issue guidance” because “the existing guidance does not appear to have had the effect of persuading people to do something”. An Approved Code of Practice (ACoP) is one step up from guidance in regulatory terms. The HSC proposal was for some aspects of stress at work to be given ACoP status within a document that mostly has the status of ordinary guidance. Thus the proposal was a combination of (b) and (c). The alternative approach suggested in the discussion document was that of partnership between the HSE and, for instance, government departments, representatives of employers and employees, academics, occupational physicians and nurses, professional bodies and the voluntary sector with a view to promoting a positive health culture at work. If properly implemented this would include access to appropriate counselling (tertiary level intervention), provision of stress management training (secondary level intervention) and the consideration of stress reduction over the organisation as a whole and for individual jobs (primary level intervention).

Based on the responses to the discussion document and the results of the Health and Safety Executive’s research programme, the HSC concluded in June 2000 that: “(i) work-related stress is a serious problem; (ii) work-related stress is a health and safety issue; and (iii) it can be tackled in part through the application of health and safety legislation.” However, at that time there did not exist agreed standards of management practice against which an employer’s performance in managing a range of stressors, such as the way work is structured, could be measured. Without such standards, the HSC stated, an ACoP – a sort of health and safety “highway code” – would be unenforceable. Therefore the first theme of its new strategy on stress is “to develop clear, agreed standards of good management practice for a range of stressors.” In May 2002, the Health and Safety Commission/Executive announced that it was developing “management standards” for workplace stress, and:

“These standards will provide a clear yardstick against which to measure an employer’s management performance in preventing stress. The first pilot phase of the standards will occur in 2003, with the final phase occurring in 2005.”²⁰

²⁰ HSE press release 15 May 2002, <www.hse.gov.uk/press/2002/e02086.htm>.

In June 2003 the HSE published "Draft Management Standards on Work-related Stress: Pilot Project". A total of 24 organisations have been involved in developing draft standards and the formal pilot study is due to finish in Autumn 2003. The HSE states that: "The processes and practices here [in the June 2003 document] do not represent a finished product." It also states:

"This is a real opportunity for all sizes and types of business to have a go and influence the ongoing development of the process by broadening the pilot exercise and feeding back results."²¹

The draft standards cover the 6 main factors which can lead to work-related stress: demands, control, support, relationships, rules and changes. The first three specify that:

"at least 85% of employees indicate that they

- are able to cope with the demands of their jobs
- are able to have a say about the way they do their work
- receive adequate information and support from their colleagues and superiors"

The second three specify that:

"at least 65% of employees indicate that

- they are not subjected to unacceptable behaviours (eg bullying) at work
- they understand their role and responsibilities
- the organisation engages them frequently when undergoing an organisational change"

All six standards also demand that "systems are in place locally to respond to any individual concerns." The obvious problem with the standards as currently expressed is that up to 35% of employees could indicate that they are subjected to bullying at work and the organisation could nevertheless claim to have achieved the standard.

The HSE obviously hopes that employers will "have a go" with the draft processes. This would involve getting commitment from the organisation, a first pass to define the current position, a second pass defining problems in more detail, consultation with employees on possible action, putting "interventions" in place, and reviewing the results of the project. Although the HSE has managed to recruit 24 organisations into the formal pilot study, commitment from employers more generally may be a significant problem. There are two comments in the discussion document that provide a sharp contrast. The comment that "existing guidance does not appear to have had the effect of persuading people to do something" suggests that it is extremely hard to convince employers on this issue. In contrast, one of the advantages of the partnership approach was that "it could be part of promoting a positive health culture at work", which suggests some willingness on the part of

²¹ <<http://www.hse.gov.uk/stress/stresspilot/>> accessed 21.7.03

employers to engage in the endeavour. A union view is that employers are not doing enough:

“Linda Sohawon, the head of the legal department at the white collar trade union MSF. . . emphasises the need for employers to take responsibility . . . She says: They should not put the onus on employees to try to resolve stress by sending them on time management courses. How is someone supposed to manage a job when it is, in fact, not manageable?”²²

Evidence from employers themselves and from independent researchers also indicates a gap between the ideal and actual stress safety cultures. In February 2000 an article about how law firms are dealing with employee stress suggested that the current solution to the problem was a stress management programme. One London firm was quoted as having a programme called “Managing the Pace” that lasts only three hours, but in the context of law firms this is seen as leading the way.²³ In October 1999 it was reported that research by the Institute of Occupational Medicine in Edinburgh found that many organisations in Scotland were failing to address workers’ stress problems because of a macho organisational culture which viewed stress as a weakness.²⁴ Perhaps employers have reached the stage of at least paying lip service to the idea of stress as a costly problem that they need to think about. It seems however that most organisations are a very long way from the ideal of dealing with stress as part of a positive health culture at work.²⁵ In this context it may only be the fear of criminal or civil liabilities for the consequences of work-related stress that can provide the impetus for significant organisational change.

C. The Possible Criminal Liabilities of Employers

Breach of the general duty under section 2(1) of the Health and Safety at Work Act 1974 is an offence. It has already been argued that this general duty applies to psychological illnesses as well as physical illnesses. However, there have so far been no reported prosecutions in situations where stress at work has caused psychological illness in an employee. Another way in which workplace stress could bring about the employer’s criminal liability is where a stressed employee causes an accident. The most obvious examples are where the stress is caused by work overload, long hours or unpredictable working hours. The employer could be liable under section 2(1) of the 1974 Act if a stressed employee harms themselves or other employees in an accident. If others, *i.e.* those who are not employees, are harmed the employer may be liable under section 3(1) of the 1974 Act which provides that an employer has a duty:

“to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment

²² *Gazette* 3 February 2000.

²³ *Gazette* 17 February 2000.

²⁴ <<http://news6.thdo.bbc.co.uk>>.

²⁵ It was concern about local employers’ neglect of stress at work that prompted the Dundee City Council and the Tayside Health Promotion Centre to organise the conference where much of the material in this article was first presented.

who may be affected thereby are not thereby exposed to risks to their health or safety.”

However, not all incidents are investigated. Trotter (2000) reports that at present the HSE fails to investigate 88% of major injuries in the workplace.²⁶ This may largely be a problem of grossly inadequate resources, but it also goes some way towards explaining the lack of reported prosecutions where workplace stress can be seen as the cause of an accident resulting in harm short of death.

When a work-related death occurs there are two differences; firstly an investigation will take place; and secondly the employer may be liable under health and safety regulations or for manslaughter. Investigations are usually conducted by the HSE. Between April 1996 and April 1998 only 18.8% of deaths to workers resulted in a prosecution, of any sort.²⁷ From April 1992 to March 1998, 59 cases investigated by the HSE were referred to the Crown Prosecution Service (CPS) for possible manslaughter charges. The CPS felt able to prosecute in only 18 cases and only 4 were successful.²⁸ However, the case of *R v the DPP and others, ex parte Timothy Jones*²⁹ appears to be the first successful judicial review of a decision by the CPS not to prosecute for manslaughter over a workplace death. Also there is now a Protocol for Liaison agreed between the HSE, the Association of Chief Police Officers and the CPS aimed at securing the full investigation of workplace killings and the careful consideration of the decision whether to prosecute.³⁰ According to the government's latest proposals for reforming the law on involuntary manslaughter (paragraph 3.1.5):

“The low numbers of manslaughter cases in relation to deaths at work brought before the courts do not reflect any unwillingness on the part of the health and safety enforcing authorities to refer such cases to the CPS and the police, but result principally from shortcomings in the existing law on corporate manslaughter.”

Paragraph 3.1.3 of the proposals states the current position:

“The governing principle in English law on the criminal liability of companies is that those who control or manage the affairs of a company are regarded as embodying the company itself. Before a company can be convicted of manslaughter, an individual who can be “identified as the embodiment of the company itself” must first be shown himself to have been guilty of manslaughter. Only if the individual who is the embodiment of the company is found guilty can the company be convicted. Where there is insufficient evidence to convict

²⁶ Trotter, “Corporate Manslaughter” (2000) 150 *NLJ*, 455.

²⁷ Centre for Corporate Accountability statistics, www.corporateaccountability.org.

²⁸ *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (Home Office Communication Directorate, 2000), para 3.1.5 n 4. The proposals were followed by the Corporate Homicide Bill 2000 which the government remains committed to introducing when parliamentary time allows.

²⁹ (24 March 2000, unreported).

³⁰ HSE/ACPO/CPS, *Work Related Deaths: A Protocol for Liaison* (1998).

the individual, any prosecution of the company must fail. This principle is often referred to as the 'identification' doctrine."

The fact that application of the current law has meant that there have been no manslaughter convictions in respect of a number of disasters has led to the introduction of government proposals for reform in May 2000. These proposals are based on the Law Commission Report No 237, *Legislating the Criminal Code: Involuntary Manslaughter*, published in 1996.³¹ The government proposes that there should be a special offence of corporate killing committed where the corporation's conduct in causing death fell far below what could reasonably be expected. Also, a death should be regarded as having been caused by the conduct of the corporation if it is caused by a "management failure", so that the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by its activities. The inquiry into the Clapham junction railway accident in December 1988 found that: "work teams were assembled in a haphazard way" and "The electrician involved had worked 7 days a week for the 13 weeks immediately before committing the error which caused the accident." Barrett has argued that stress at work caused this accident.³² There was no prosecution of the employers for manslaughter, but a re-run of the events, which caused 35 deaths, could well result in a prosecution for the proposed offence of corporate killing. After the Southall rail crash in September 1997 it was found that Great Western Trains (GWT) had encouraged a culture where drivers were expected to depart on time even if their safety warning devices were not working. This pressure to depart on time no matter what could also be seen as stressful to the train drivers. GWT pleaded guilty to contravening section 3(1) of the 1974 Act and were fined a record £1.5million. GWT were also prosecuted unsuccessfully for manslaughter³³ but a re-run could, it is submitted, result in a successful prosecution for corporate killing. It should be noted that "corporate killing" is a misnomer as the government's proposals extend the list of potential defendants to all "undertakings", the term used in the 1974 Act.

The fact that in the Clapham junction incident (1988), "The electrician involved had worked 7 days a week for the 13 weeks immediately before committing the error which caused the accident" is also worthy of comment.

³¹ The Report was made by the Law Commission of England and Wales and the government proposals are correspondingly for England and Wales only. Scots criminal law includes the offence of culpable homicide rather than involuntary manslaughter. The Procurator Fiscal investigating the death of a family of four in a gas explosion in Larkhall announced in February 2002 that the supply company Transco was to be prosecuted for culpable homicide. This is the first Scottish prosecution of a company for culpable homicide and the case is ongoing. The Scottish Executive currently has no plans to legislate on corporate killing, but should the Transco prosecution fail there may be calls for legislative action in Scotland.

³² Barrett, "Stress and the Public Liability of Employers" (1996) 25 *ILJ* 53.

³³ Following the unsuccessful prosecution, the Attorney General sought the opinion of the Court of Appeal under s 36 of the Criminal Justice Act 1972; *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182. The court in this case confirmed that the identification principle remained the only basis in common law for corporate liability for gross negligence manslaughter.

The Working Time Directive³⁴ implemented in the UK by the Working Time Regulations 1998³⁵ as amended by the Working Time Regulations 1999³⁶ entitles workers to an uninterrupted weekly rest period of not less than 24 hours in each seven day period. The Working Time Directive is itself a health and safety measure adopted under Article 118a (now 138) of the Treaty of Rome. However, the rail transport sector was excluded from the UK's 1998 Regulations. Cover is currently being extended to the sectors that were originally excluded, but the blanket exclusion will be replaced with regulations allowing for derogations. Thus, the general rules on the amount of rest required for health and safety reasons will not apply in full to railways. However, following the Clapham junction incident, health and safety standards on fatigue have been devised specifically for railways. Regulation 4 of the Railways (Safety Critical Work) Regulations 1994³⁷ requires employers to ensure that employees carrying out safety critical work do not work hours which would be likely to cause fatigue which could endanger safety. This regulation is supported by an Approved Code of Practice (L50) giving further guidance.

The potential criminal liabilities of employers will now be summarised. Firstly, section 2(1) of the Health and Safety at Work Act 1974, the general duty to ensure health safety and welfare of employees, applies to psychological illness as well as to physical illness. There is therefore the potential for employers to be prosecuted where workplace stress causes psychological illness to an employee. However, 88% of major (physical) workplace injuries are not investigated by the HSE, and the HSC has yet to develop standards of good management practice concerning workplace stressors beyond the pilot stage. Overall it seems that, although there have been no prosecutions so far, regulation is currently in the process of tightening and prosecutions are likely to occur at some time in the future. Secondly, to the extent that stress at work is associated with long hours, prosecution under the Working Time Regulations,³⁸ or in the case of railways under industry specific fatigue regulations, are possibilities. Thirdly, where a stressed employee makes a mistake that causes an accident there is the potential for the employer to be prosecuted under section 2(1) or section 3(1) of the 1974 Act. Finally, where a stressed employee makes a mistake that causes an accident in which someone dies there may, in the near future, be the potential for the employer to be prosecuted for the new offence of corporate killing. As the whole point of introducing the new offence is to make more organisations criminally liable when they cause death, more employers are likely to face prosecution and conviction for work-related deaths in the future.

³⁴ Directive 93/104 EC.

³⁵ SI 1998/1833.

³⁶ SI 1999/3372.

³⁷ SI 1994/299.

³⁸ There have been over 50 improvement notices issued by the HSE for breaches of the Working Time Regulations. The vast majority of these have been in respect of the record-keeping aspects of the Regulations.

5. CIVIL LIABILITIES

In respect of civil liabilities, this article takes as its starting point an employee who is well, becomes unwell due to stress at work, and seeks damages. An employee who is already disabled, as defined by the Disability Discrimination Act 1995, and this can include a mental disability, will be covered by that Act. If such an employee can show that the employer has treated them less favourably, or failed to make reasonable adjustments to accommodate them, they may have a claim under the Act. However, their action will be founded on the employer's response to the disability, not on the employer as the source of the disability.

A. The Ground-breaking Cases

In the first half of the 1990s there were four legal decisions developing the law on the employer's liability to individual employees for psychiatric harm. Three are well-known and one unreported: *Johnstone v Bloomsbury Health Authority*,³⁹ *Francis Aston v Imperial Chemical Industries Group*,⁴⁰ *Petch v Customs and Excise Commissioners*,⁴¹ and *Walker v Northumberland County Council*.⁴²

Johnstone concerned a junior doctor who became ill (physically and psychologically) due to overwork. He was employed by the health authority under an employment contract requiring him to work a 40-hour week and to be available for overtime of a further 48 hours per week on average. He claimed that he had been required to work intolerable hours with such deprivation of sleep that his health has been damaged and the safety of patients put at risk, that he suffered from stress and depression, had been physically sick from exhaustion and had felt suicidal. This is therefore a case concerning both physical and psychiatric illnesses. It is important because it can be read as establishing an overriding employer's duty to take reasonable care not to injure an employee's health. It is a difficult case because the Court of Appeal ruled only 2:1 in favour of *Johnstone* and with differences between the two favourable judgments. It is important in the context of stress at work because *Johnstone's* claim was founded at least in part on the fact that he suffered stress and depression. It is also of interest that the judgment of Stuart-Smith LJ states:

"It must be remembered that the duty of care is owed to the individual employee and different employees may have different stamina. If the authority in this case knew or ought to have known that by requiring him to work the hours they did, they exposed him to risk of injury to his health, then they should not have required him to work in excess of those hours that he safely could have done . . . In *Paris v Stepney B.C.* [1951] 1 All ER 42, [1951] AC 367 the employer owes a duty to take greater care of a one-eyed man than a normal man in respect of injuries to the eyes. If employers know or ought to

³⁹ [1991] 2 All ER 293 (CA).

⁴⁰ (Unreported, 21st May 1992).

⁴¹ [1993] ICR 789 (CA).

⁴² [1995] ICR 702 (QBD).

know that a workman has a vulnerable back they are in breach of duty in requiring him to lift and move weights which are likely to cause him injury even if a normal man can carry them without risk."⁴³

In the second case, that of *Francis Aston v Imperial Chemical Industries Group*,⁴⁴ Aston was exposed to carcinogenic fumes in his workplace. He suffered a depressive illness as a result of anxiety about his health following the exposure. The fumes could cause angiosarcoma of the liver, which the plaintiff was told has a latency period of about 15 years, but is usually fatal within six months of the symptoms appearing. The employers were held liable because:

"The employer whose system of work negligently induces psychiatric injury without any physical injury by, for example, excessive noise or flickering lights or psychological pressures is just as liable as one who causes physical injury because the duty of care exists and the necessary proximity exists by reason of the master and servant relationship."

The case is important in the context of stress at work because it establishes that an employer can be liable where the injury or illness is psychiatric only, and not consequential on physical illness.

Petch and *Walker* were both cases of nervous breakdown where the amount of work and level of responsibility were causes. In *Petch* the employers' response to the first, unforeseeable, breakdown was held to be that of a reasonable employer and they were not liable for the first or second breakdown. In *Walker* the employers' response to the first, again unforeseeable, breakdown was seen as inadequate and they were liable for the second, foreseeable, breakdown. Walker received damages of £175,000.

Petch was a civil servant. He joined in 1961 and by 1973 had been rapidly promoted; he was considered a high flyer and was by then an assistant secretary (one grade below the highest). In 1974 he suffered a mental breakdown. In 1975, after his return to work, he was transferred from Customs and Excise to the Department of Health and Social Security. In 1983 he fell ill again but was able to return to work until 1986, when he was retired from the Civil Service on medical grounds. It was held that, unless senior management in Petch's department were aware or ought to have been aware that he was showing signs of impending breakdown, or were aware or ought to have been aware that his workload carried a real risk that he would have a breakdown, then the employers were not negligent in failing to avert the breakdown of 1974. The case can be distinguished from *Johnstone* where the employers had been informed of Johnstone's health problems. Employees in positions of managerial responsibility may inevitably be exposed to a (high) degree of stress as part of their work. *Petch* suggests that an employer would probably not be acting unreasonably merely by placing substantial demands upon such employees. When Petch returned to work in 1975 the employer's duty extended to taking reasonable care to ensure that the duties allocated to him did not bring about a repetition of his mental

⁴³ [1991] 2 All E.R. 293 at 299.

⁴⁴ (Unreported, 21st May 1992).

breakdown of October 1974. The judgment in *Petch* indicates that when Petch returned to work in 1975 his employers experienced major problems concerning his role, his behaviour and his relationships with other staff in his department. The judgment states: "In the circumstances, the transfer of the plaintiff [Petch] to another department . . . which was tactfully handled, was the obvious solution." Also, the conduct of Petch's seniors was commended.

Walker was employed by the council as an area social services officer, responsible for four teams of field workers in an area in which during the 1980s child abuse references were particularly prevalent. During that period the volume of work rose considerably without any increase in staff. In November 1986 Walker suffered a nervous breakdown. He received medical advice that he should not go back to the same level of work and responsibility as before. In March 1987 he returned to work on the understanding that he would receive assistance with his duties. In April 1987 even the limited support he in fact received was withdrawn. In September 1987 he suffered a second mental breakdown. He had 'in effect been severely mentally wounded'. It was said that in consequence he was rendered quite incapable of ever returning to the kind of social services work which for 20 years had been his career and indeed of taking on ever again work which involved the shouldering of significant responsibilities. It was held that, generally, it is the employer's duty to provide a reasonably safe system of work and take steps to protect employees from risks that are reasonably foreseeable. In 1985 (before Walker's first breakdown) it was not reasonably foreseeable that Walker's workload gave rise to a risk of stress induced mental illness materially higher than that which would ordinarily affect a social services manager with a really heavy workload. There was no liability for the first breakdown. In 1987 (when Walker returned to work after the first breakdown) the council ought to have appreciated that he was distinctly more vulnerable to psychiatric damage than he had appeared to be in 1986 and that, when the support was withdrawn, there was a significantly greater risk of injury to his health unless his workload could be substantially reduced. In failing to provide assistance the council was in breach of its duty of care. The employers were liable for the second breakdown. This is a landmark case establishing liability for psychiatric illness resulting from mismanagement and a failure to provide a safe system of work. *Aston* makes a similar point, but begins with an industrial accident, which *Walker* does not.

B. Recent Developments

The most significant recent development in the law on liability for work related psychiatric illness is the Court of Appeal's decision in *Sutherland v Hatton*.⁴⁵ The judgment includes a long discussion of the legal principles to be applied in such cases and ends with a summary in the form of 16 practical propositions. What is notable is that, despite the fact that liability for psychiatric harm has been seen as both a special and difficult area of the law, the principles to be applied are, for the most part, familiar and well known. Indeed the opening proposition of the summary in *Sutherland v Hatton* is

⁴⁵ 2002 WL 45314 (CA), [2002] 2 All ER 1, [2002] 1 CR 613, [2002] 1RLR 263.

that: "The ordinary principles of employer's liability apply."⁴⁶ The rules applying to "nervous shock" are not mentioned in the summary, but are discussed earlier in the judgment.⁴⁷ It has been a recurring theme of "stress at work" cases that the more onerous rules for establishing liability for nervous shock have been put before the courts by counsel for the employers. The courts have consistently rejected these arguments. The case of *Aston* was referred to in the Law Commission's analysis of the law on nervous shock in order to make a clear distinction between cases where employees suffer psychiatric harm due to a breach of a duty arising out of the employment relationship and other "nervous shock" scenarios. In *Cross v HIE*⁴⁸ the court held that it is right in principle to treat the risk of psychiatric injury in the same way as the risk of physical injury and cases involving nervous shock to secondary victims were distinguished. This approach can also be seen in *Fraser v State Hospitals Board for Scotland*.⁴⁹ The judgment in *Sutherland v Hatton* quotes Lord Hoffmann's view in *Walker*⁵⁰ that the employee was in no sense a secondary victim.⁵¹ The remainder of this section consists of a marrying of "the ordinary principles of employer's liability" with some of the 16 propositions made in *Sutherland v Hatton* and illustrations of specific stress at work scenarios that have been put before the courts.

Foreseeability: the nature of the job

The summary in *Sutherland v Hatton* states that "there are no occupations which should be regarded as intrinsically dangerous to mental health."⁵² It has already been argued from *Petch* that an employer would not be acting unreasonably merely by placing substantial (highly stressful) demands upon some employees, *e.g.* those in positions of managerial responsibility. The case of *Panting v Whitbread plc*⁵³ also supports this argument. Panting was employed as a pub manager by Whitbread. He claimed that he and his wife and staff were subjected to violence, threats, theft, burglary, attempted burglary and other offensive conduct which caused him to suffer permanent psychiatric illness. A key finding of the court was that it was reasonable for Whitbread to ask Panting to run the pub, despite its difficulties. Whitbread had in place a comprehensive set of arrangements aimed at protecting managers suffering as Panting was, and Panting was aware of Whitbread's employee assistance programme. However, he had not put his concerns in writing at any time during his employment.

⁴⁶ *Ibid*, para 43 (1).

⁴⁷ *Ibid*, para 19.

⁴⁸ See n 61 below.

⁴⁹ 2001 SLT 1051.

⁵⁰ Expressed in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, at 506.

⁵¹ 2002 WL 45314 (CA), para 20.

⁵² *Ibid*, para 43 (4). It can be noted that this proposition does not sit well with the question posed by the Trade Unionist quoted above in section 4: "How is someone supposed to manage a job when it is, in fact, not manageable?"

⁵³ November 24, 1998 (Gloucester CC), a claim for breach of contract.

Foreseeability: personal characteristics of the employee

The summary in *Sutherland v Hatton* states that “An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.”⁵⁴ However, once an employer is aware that an employee is particularly vulnerable there is a duty to take greater care in respect of that vulnerability. In *Johnstone* the general principle that greater care must be taken of a one-eyed man than a normal man in respect of injuries to the eyes had already been applied to a situation where the vulnerability was not merely physical.

Ward v Scotrail Railways Ltd,⁵⁵ is another case involving a particularly vulnerable employee. The case concerns the sexual harassment of one employee by another. It therefore represents an addition to the list of possible causes of stress for which an employer may be held liable.⁵⁶ An opinion has been given by Lord Reed in a preliminary hearing and the parties are being allowed a proof before answer. Ward has been employed by Scotrail since 1990 as a ticket inspector on trains and is based at Dalmuir station. In 1995 she received a letter having “sexual content” from a male clerk, Kelly, also employed at Dalmuir station. From this time Kelly’s behaviour included regularly staring at Ward, swapping shifts so as to be in the booking office with her and making efforts to show her that he knew where she was during her working day. Ward made an official claim of sexual harassment. This resulted in the offer, by Scotrail, of counselling and the presence of a supervisor at the start and end of shifts so she would not be alone with Kelly. The employer failed to provide the supervisor as agreed. Ward then went off sick and suffered prolonged illness and a number of absences from work. She received medical treatment for nervous illness that has included counselling and drugs.

Lord Reed’s opinion refers to the fact that, if the employers were aware that Ward was unusually sensitive and was being placed under severe stress by matters which a more robust individual might have shrugged off, these circumstances should feed into consideration of the question of what would constitute the response of a reasonable employer. These comments are in line with the judgment of Stuart-Smith LJ in *Johnstone* referred to above and with the reference to knowledge of “some particular problem or vulnerability” made in *Sutherland v Hatton*.

⁵⁴ 2002 WL 45314 (CA), para 43 (3)

⁵⁵ 1999 SC 255, 27th November 1998, Court of Session.

⁵⁶ Poor lighting, overcrowding, dangerous substances, excessive noise, heat or cold, career uncertainty/insecurity, lack of control of pace of work, work overload, unpredictable working hours, overbearing critical superiors, intimidation or harassment, personality clashes unresolved, and “bullying” at work, have all been cited as potential causes of stress. See McIlroy “Stress at Work Claims” *SCOLAG Journal* September 1999, 129. In addition it was held in *R v Metropolitan Police ex p Stunt* (Queen’s Bench Division, 4.5.00) that when a police officer became ill with a depressive illness during an investigation following a complaint against him, this was an “injury received in the execution of his duty as a constable”. Thus, a complaints procedure / investigation can cause stress for which an employer can be liable.

Foreseeability: what the employer is (and is not) told by the employee

The summary in *Sutherland v Hatton* states that “[T]he 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.”⁵⁷ *Pratley v Surrey County Council*⁵⁸ involved a social worker with a heavy case load. The employee had “very high standards” and was “incredibly hard working and very conscientious and well organised . . . she was a perfectionist.” This caused her to work unpaid overtime, often at home, in order to complete her work. She became stressed by this, but made every effort to conceal this fact from her employers, including asking her GP not to record “stress at work” on a sick note, he in fact recording neuralgia. Finally she did disclose worries about her health in a regular supervision meeting. But there was nothing at that time to alert the employers to the real extent of the risk. The employers were held not liable.

Foreseeability: what the employer knew or ought reasonably to have known

The summary in *Sutherland v Hatton* states that: “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.”⁵⁹

One of the main themes of the early cases that has been reinforced in later cases is the need for illness or injury to be reasonably foreseeable. In *Lancaster v Birmingham City Council*,⁶⁰ the employee was transferred to work of a very different character, involving demanding contact with the general public, and promises of training and support were not fulfilled. Lancaster’s story involved (like Walker’s) two periods of ill health. The employer admitted liability for injury, loss or damage suffered after a date between the two periods of ill health, *i.e.* from a date when (without training and support) injury to Lancaster became reasonably foreseeable. As liability was admitted the issue of foreseeability was not argued in court, but the outcome is in line with Walker.

The issue of reasonable foreseeability was an important point in *Cross v HIE*.⁶¹ The pursuers averred that the death of James Cross was caused or materially contributed to by fault and negligence on the part of HIE as his employers. Cross was employed by Highlands and Islands Enterprise (HIE) as a senior training manager. He had an office in Balivanich on the island of Benbecula and worked there alone. His colleagues worked in offices in Stornoway on the island of Lewis and Cross had to travel there for board meetings. The job commenced in April 1991. In December 1991 a friend sharing a hill walking holiday noticed that something was “not right”. Cross

⁵⁷ 2002 WL 45314 (CA), para 43 (6).

⁵⁸ [2002] EWHC 1608.

⁵⁹ 2002 WL 45314 (CA), para 43 (7).

⁶⁰ (1999) 6 Q.R. 4.

⁶¹ *Cross v Highlands and Islands Enterprise and Another*, 2001 SLT 1060, [2001] IRLR 336, Outer House, Court of Session, 5 December 2000.

looked thin and was worried about his work. On 10 February 1992 Cross's mother died of multiple sclerosis, but this was not unexpected. On 26 April 1992 Cross saw his GP and was signed off sick with "stress" for a month. He was prescribed diazepam that he did not take. On 26 May 1992 he saw the GP again and was signed off for a further month. He was offered a psychiatric referral which he refused. In early June Cross told a friend that everything at work was not right, that it was never going to get better, that he had lost his confidence and was not looking forward to returning to work. When asked if there were other problems he said: "No, the only thing making me the way I am is my work." On 15 June he visited a manager of HIE in Inverness who put him in touch with a "freelance health promotion, research and training consultant". Cross visited this consultant on the same day. The GP certified that Cross was fit to return to work on 28 June and that certificate was not qualified in any way. On 28 June Cross returned to work and spent the day in conversation with his immediate boss. On 15 August 1992 Cross committed suicide by putting the muzzle of his shotgun in his mouth and discharging it.

Lord MacFadyen stated:

"In judging whether harm to the employee is within the reasonable foresight of the employer, therefore, it is necessary to bear in mind . . . the actual knowledge of the employer of any special susceptibility to harm possessed by the employee, and any such susceptibility of which the employer (if not actually aware) ought reasonably to have been aware."⁶²

The actual knowledge of the employers at the material date amounted to:

"a certain level of general knowledge of the existence of the phenomenon of stress at work, and of the fact that such stress could harm the health, including the mental health of employees. I am also prepared to hold that the defenders were aware, in a general way, that if a person who had been made ill by stress at work returned to the same stressful working conditions, there was a likelihood of his illness being made worse or reactivated."⁶³

As to the employer's actual knowledge of James Cross, the court found that when Cross returned to work, his boss quickly appreciated that he had not fully recovered.⁶⁴ However, it was also decided that: "What they knew was that he had been ill enough to be off work for two months, but that, according to his doctor, he was at the end of that period well enough to return to work."⁶⁵ So:

"What they as reasonable employers in my view required to do was to find out what James Cross perceived to be the pressures at work that had precipitated his illness, and to apply their

⁶² 2001 SLT 1060, at 1078, para 68.

⁶³ *Ibid*, at 1079, para 72.

⁶⁴ *Ibid*, para. 71.

⁶⁵ *Ibid*, para. 79.

mind to those factors and to what might be done to improve the situation”⁶⁶

and they had not failed in this duty.

Practicability of precautions

The summary in *Sutherland v Hatton* states that breach will depend, amongst other things on: “the gravity of the harm which may occur, the costs and practicability of preventing it.”⁶⁷ Another theme from the earlier cases is the practicability of precautions. In *Petch* the employers took the precaution of transferring the employee to a department where work was less stressful and they were not liable. In *Panting* the employers had precautions in place for all pub managers in the shape of an employee assistance programme and, again, the employers were not liable. In *Walker*, the employee returned to work on the understanding that the employers were taking the precaution of providing him with assistance. When they failed to do so they were liable for the employee’s second breakdown. Similarly, in *Ward v Scotrail Railways Ltd*,⁶⁸ the employers offered a precaution and then failed to fulfil their offer. In both *Walker* and *Ward* there could be no argument as to the practicability of the precautions because they were offered by the employers who then failed to put them in place as agreed.

Apportionment

The summary in *Sutherland v Hatton* states that: “It is for the defendant to raise the question of apportionment.”⁶⁹ In the context of the *Sutherland* judgment “apportionment” is used to refer to the apportioning of blame and, therefore, damages. Employers may be able to argue that they should bear only a proportion of the responsibility for the damage sustained by the employee. The usual way in which such an argument is framed is in terms of contributory negligence. However, in *Young v The Post Office*⁷⁰ it was stated that:

“Although, as the case of *Sutherland* indicates, in many circumstances an employer may not be expected to know that an employee who does not speak up is vulnerable, an employee who is known to be vulnerable is not necessarily to be regarded as responsible for a recurrent psychiatric illness if he fails to tell his employers that his job is again becoming too much for him. A finding of contributory negligence in a case of psychiatric illness, although no doubt theoretically possible in other circumstances, does not in my view sit happily with the facts of this case.”⁷¹

After *Young*’s first illness his employers had made adjustments to his way of working, but left it to the employee to indicate if the job was again becoming stressful. The employers argued unsuccessfully that, in so far as *Young*

⁶⁶ *Ibid.*

⁶⁷ 2002 WL 45314 (CA), para 43 (8).

⁶⁸ 1999 SC 255, 27th November 1998, Court of Session.

⁶⁹ 2002 WL 45314 (CA), para 43 (15).

⁷⁰ [2002] IRLR 660.

⁷¹ *Ibid.*, 663.

failed to give them any such indication, there was contributory negligence on his part.

Emotional distress and psychiatric illness distinguished

The summary in *Sutherland v Hatton* distinguishes an injury to health from “occupational stress”. Cases in Scotland have distinguished emotional distress and psychiatric illness. In *Ward* Lord Reed held that the averments of injury appeared to go beyond emotional distress and to include psychiatric illness. This distinction was also a key element in *Rorrison v West Lothian College*,⁷² another opinion of Lord Reed. Rorrison was a qualified nurse employed as a welfare auxiliary at West Lothian College. Over a period of time she experienced many incidents in which she was upset and/or confused by a personnel manager’s words, actions and attitude to her. In the latter part of 1993 Rorrison experienced palpitations, sweating, over-breathing and feelings of panic. Her doctor prescribed a beta-blocker. These symptoms continued with increasing severity during 1994 and on 29 March 1994 she felt dizzy and unwell at work. She was taken to her health centre and diagnosed as having stress and anxiety. She has not worked since this ‘nervous breakdown’. The case was dismissed at the preliminary hearing on two grounds. Firstly, there was nothing in Rorrison’s pleadings, which if proved would establish that the employers ought to have foreseen that Rorrison was under a material risk of sustaining a psychiatric disorder in consequence of their behaviour towards her. Secondly, Rorrison’s pleadings did not refer to a recognised psychiatric illness. Lord Reed’s opinion included the following:

“... the pursuer had not pleaded any disorder which was recognised in DSM-IV; and there was no suggestion that the position was any different in relation to ICD-10.⁷³ I appreciate that what constitutes a recognised disorder is a matter for expert evidence, and I am prepared to proceed on the basis that the classifications given in ICD-10 and DSM-IV are not necessarily conclusive. ... Nevertheless, the pursuer’s pleadings must give fair notice that it is her intention to lead evidence that she has suffered a recognised psychiatric disorder, and they should specify what that disorder is. In my view that has not been done in the present case.”⁷⁴

In both *Ward* and *Rorrison* two points appear to be of major importance. Firstly, pleading a psychiatric disorder, not just for instance a nervous breakdown or anxiety, is vital. Secondly, there is the point already discussed above that employers will only be liable for their response to what they knew or ought to have known.

What sort of claim?

Recent cases have also had various procedural issues to deal with. Firstly, there is the question of suing in contract or tort (delict in Scotland). Where

⁷² 2000 SCLR 245, 21 July 1999, Outer House, Court of Session.

⁷³ DSM-IV and ICD-10 are diagnostic manuals of mental disorders used by psychiatrists and approved by various professional bodies.

⁷⁴ 2000 SCLR 245, at 251.

the employee's claim is based on breach of the employer's duty to take reasonable care not to injure health, the claim can be made either as an action for breach of contract or as an action in negligence.⁷⁵ It may also be possible to bring an action in contract based on the breach of an express term in the particular contract. *Logan v Falkirk and District Royal Infirmary NHS Trust*⁷⁶ is an example of such an action, albeit an unsuccessful one. Another procedural issue concerns the possible overlap of actions in contract and tort with claims of sex or racial discrimination, for instance, where an employee is psychologically injured due to sexually or racially motivated bullying by fellow employees. Again, it appears that a properly framed action can be brought either way. An Employment Tribunal does have jurisdiction to award damages for personal injury caused by the statutory tort of discrimination.⁷⁷

Out of court settlements

Following the landmark cases in which employees were successful in court, there have been a number of out-of-court settlements. In June 1996 Scotland's first stress at work case was settled out of court. Mrs Ballantyne had worked as a manager in an old people's home for 14 years. She claimed that in 1992 her boss, a younger woman, became outspoken and abrasive, confronting her in front of residents and sometimes reducing her to tears. She took the matter to a senior level but her pleas for help were ignored by her employers. Due to stress at work she experienced panic attacks while driving and was put on medication. She thought about committing suicide. Eventually she suffered a major panic attack at work. A spokesperson for South Lanarkshire Council stated that they decided to settle out of court for £66,000 because: "we felt there had been shortcomings in the way this woman was managed".⁷⁸ Other examples of out-of-court settlements include the cases of Randy Ingram (see section 2 above) and of Mrs Cath Noonan, a former employee of Liverpool City Council, who received £84,000 in 1999. Also in 1999, the court was left only the task assessing damages in the case of *Lancaster v Birmingham City Council*,⁷⁹ when the employers admitted liability at the door of the court.

6. CONCLUSION

Over the last decade, stress at work has progressed from the stage of being identified as a problem for some employers towards being recognised as an area of health and safety needing consideration by all employers. However, it appears that, for many employers, the consideration given to stress at work involves only secondary and tertiary interventions and not primary interventions that aim to reduce job and organisational stressors. Employers' civil liabilities for stress-related illness have been acknowledged in the ground-breaking cases of *Johnstone* and *Walker* and more recently the legal

⁷⁵ *Panting* was an action for breach of contract; *Walker* was an action in negligence; *Johnstone* and *Ward* were actions in both contract and negligence.

⁷⁶ 1999 GWD 30-1431, 3 August 1999, Outer House, Court of Session.

⁷⁷ *Sheriff v Klyne Tugs (Lowestoft) Ltd*, [1999] IRLR 481, 24 June 1999, Court of Appeal.

⁷⁸ *The Scotsman*., 12 June 1996.

⁷⁹ (1999) 6 Q.R. 4.

framework for such claims has been set out by the Court of Appeal in *Sutherland v Hatton*.

This article has described developments in the way stress at work is regulated that appear to be independent of the parallel developments in case law. However, the second conclusion to be drawn from the analysis is that in the future these two strands may become more entangled. Regulatory developments look set to demand more of employers in terms of how they assess the risks concerning stress at work and how they organise employees' tasks and responsibilities with a view to health promotion. The level of knowledge that an employer ought to have about the causes of stress, about possibilities of reducing workplace stressors and about appropriate monitoring of individual employees is likely to increase as stress at work becomes more regulated. Compliance with the draft management standards will require employers to have detailed knowledge of both general and specific stressors operating in their organisations. It has already been demonstrated that, in individual actions for damages, the test of what the employer knew or ought to have known is an important element in establishing liability. If, in the fullness of time, regulations are made in line with the draft standards an employer's failure to comply with them could also be cited as *prima facie*, if not conclusive, evidence of a breach of the duty of care.⁸⁰

The article has also exposed certain tensions that may have to be addressed in the future. Firstly there is the tension between the union view that some jobs are "simply not manageable" and the ruling in *Sutherland v Hatton* that "there are no occupations which should be regarded as intrinsically dangerous to mental health." Secondly, there is the tension between the ideal approach to stress at work that the HSE is striving towards, an approach that clearly includes not only access to appropriate counselling (tertiary level intervention) and the provision of stress management training (secondary level intervention) but also the consideration of stress reduction over the organisation as a whole and for individual jobs (primary level intervention), and the current practice of many employers. Thirdly, there is the tension between the HSE's ideal approach and parts of the ruling in *Sutherland v Hatton*. The ideal approach includes primary level intervention, whereas the judgment in *Sutherland v Hatton* appears to stop at the tertiary level stating that:

"An employer who offers a confidential advice service with referral to appropriate counselling or treatment service is unlikely to be found in breach of duty."⁸¹

⁸⁰ 'Failure to conform to a standard imposed by a statute. . . is not in itself conclusive evidence of negligence; it may, however, sometimes be *prima facie* evidence.' M Brazier and J Murphy, *Street on Torts* (10th edition, 1999) p 245.

⁸¹ 2002 WL 45314 (CA), para 43 (11).