

## Knowing the risks – foreseeability of stress related illness in the time of Covid 19

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### Introduction

Employers and workers are facing unprecedented challenges in responding to the current pandemic and the measures put in place by the UK governments to tackle it. One area of increasing concern is the impact of the crisis on mental health and wellbeing<sup>1</sup>.

It appears to be broadly acknowledged that there are specific risks to mental health associated with working during the crisis, particularly in the health sector but also that there are increased risks across a range of other groups of workers, including those working from home and those who are furloughed.

Stress at work can lead to several potential claims. This article will consider the potential impact of the current crisis on personal injury claims for psychiatric injury arising from stress, particularly the impact on foreseeability of injury.

### Personal injury claims arising from workplace stress – a brief overview

The leading authority in relation to employer's liability claims arising from workplace stress remains the Court of Appeal judgment in *Hatton v Sutherland* [2002]<sup>2</sup>.

The ordinary principles of employer's liability apply to claims for psychiatric (or physical) injury arising from stress at work. An employer will be under a duty to take steps to protect an employee from psychiatric injury due to stress at work where it is reasonably foreseeable that the employee is at risk of suffering that kind of harm.

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<sup>1</sup> <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov-technical-guidance-OLD/coronavirus-disease-covid-19-outbreak-technical-guidance-europe-OLD/mental-health-and-covid-19>: <https://www.gov.uk/government/news/covid-19-mental-health-campaign-launches>

<sup>2</sup> [2002] ICR 613, on appeal to the Supreme Court in *Barber v Somerset County Council* [2004] ICR 457 although the decision in *Barber* was overturned on its facts the dicta of Hale LJ in *Hatton* was endorsed.

What is foreseeable depends on what the employer knows (or could reasonably be expected to know) about the individual employee and their circumstances. An employer will be expected to take into account any known pre-existing condition or vulnerability, but in the absence of knowledge of any such issue, employers are entitled to assume that employees are able to cope with the ordinary demands of their jobs. While a lot of emphasis is (rightly) placed on what signs were exhibited by the employee of an impending breakdown (such as complaints, tearfulness, absences due to stress etc) the employer's knowledge of the wider context of the employee's work is also relevant. As Hale LJ identified in *Hatton*, considerations will often include:

- the nature and extent of the work the employee was doing;
- whether there were wider issues of sickness, for example, in the same team or department;
- whether the requirements placed upon the employee were unreasonable (either per se or in comparison with the demands placed on others in similar circumstances).

To trigger a duty on behalf of the employer to take steps to protect the employee the indications of impending harm to health arising from stress must be '*plain enough for any reasonable employer to realise that he should do something about it*'.

While foreseeability of injury can often be a difficult hurdle for Claimants to overcome, there are some circumstances where it will be readily apparent psychiatric injury could ensue, for example following traumatic events. A lack of 'signs' of an impending breakdown in an individual is also no answer where the employer in fact foresaw the risk of injury; *Melville v the Home Office*<sup>3</sup>.

Breach of duty will be established if the employer failed to take reasonable steps to protect the employee from suffering the injury. What steps were reasonable will

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<sup>3</sup> [2005] ICR 782, one of 6 combined appeals heard in the Court of Appeal. There the employer had specifically recognised that there was a risk of psychiatric injury arising from staff dealing with prisoner suicides and their aftermath.

depend on the circumstances of each case and will involve a balance between the level of risk and severity of likely harm to the employee against the cost and practicability of the proposed step. The nature of the employer's operation will be relevant to this consideration as will considerations of the interests of other employees.

Although in *Hatton* it was suggested that an employer who provided access to counselling services was unlikely to be found to be in breach of duty in a workplace stress claim, this will not necessarily be the case and it is important to consider whether reasonable steps could and should have been taken to deal with the cause of the stress and not only its effects<sup>4</sup>.

Finally, it is necessary for a Claimant to establish causation between the employer's breach of duty and the injury.

### The Covid 19 Context

It is important to bear in mind that the common law duty of care employers owe towards employees as well as many of the more specific statutory duties, continue to apply in circumstances where employees are working from home or otherwise working atypically. Even in circumstances where employees are not working at all, because they are furloughed, shielding or absent due to self-isolation or illness, employers will still have obligations towards their employees, for example in relation to communication (particularly if significant changes are planned) or to ensure access to employee services. There are likely to be many areas of concern to employers and employees arising from working during Covid 19 with many articles and resources addressing such issues available online<sup>5</sup>.

In the particular context of workplace stress claims, it is useful to consider to what extent employers are likely to be viewed as 'on notice' of a risk of psychiatric injury to their employees due to stress because of the current crisis. In effect, does the fairly widespread general knowledge that living and working during this crisis involves

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<sup>4</sup> *Dickens v. O2* [2008] EWCA Civ 1144 and *Intel UK Ltd v. Daw* [2007]

<sup>5</sup> <http://www.oldsquare.co.uk/practice-areas/covid-19>

inherent risks to mental health mean employers will be precluded from arguing that psychiatric injury was not foreseeable?

There is certainly evidence that could support this argument in particular sectors of the workforce, particularly staff working in health and social care<sup>6</sup> or other roles where workers are at direct risk of contracting the virus. NHS England in particular appears to have acknowledged the risk posed to staff and has provided staff with access to a suite of support for mental health issues, including a dedicated hotline, in response to the crisis<sup>7</sup>. As there appears to be an expectation of injury to the mental health of staff working during the crisis, it may be difficult for NHS employers (and perhaps others in a health care setting) in particular to deny foreseeability of the risk of such harm if and when employees become ill.

In other sectors the evidence that an employer was aware of a risk of harm may be less clear cut. However, the context of the Covid 19 pandemic will inevitably be known to employers. It is likely that some awareness of the risks to employees working from home of, for example, social isolation or difficulties in managing work alongside childcare commitments, should be appreciated by employers, given the widespread media coverage of such issues and calls for increased support<sup>8</sup>.

However, even if (in some sectors) reasonable foreseeability can be presumed, difficult questions will inevitably arise in relation to breach of duty.

It is likely that some of the evidence which claimants could point to in order to suggest foreseeability of injury can be established, such as additional counselling services and resources that promote health and wellbeing, will be advanced by defendants as evidence of compliance with their obligations. While such steps are to be commended, questions will remain as to whether they are insufficient being, as they are, tolls that

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<sup>6</sup> <https://www.scientificamerican.com/article/psychological-trauma-is-the-next-crisis-for-coronavirus-health-workers/>

<sup>7</sup> <https://www.england.nhs.uk/2020/04/nhs-launches-mental-health-hotline-for-staff-tackling-covid-19/>  
And <https://www.theguardian.com/society/2020/apr/08/nhs-staff-mental-health-shell-shock-tackling-covid-19-coronavirus>

<sup>8</sup> <https://www.cipd.co.uk/about/media/press/mental-health-coronavirus>

mitigate the impact of stress rather than prevent or directly reduce it. Could other, practical, steps to reduce stress reasonably have been taken? An obvious issue is the provision of PPE in roles where staff are at risk of contracting the virus, but there are likely to be other issues in particular types of employment, such as disputes about whether certain roles can be carried out remotely, the distribution of workload etc.

With respect to public sector employers such as the NHS, Hale LJ has stated that they cannot expose their employees to unacceptable risk, but added that:

*"[...] what is reasonable in relation to employee safety may have to be judged in the light of the service's duties to the public and the resources available to perform those duties."*

It is likely that courts will have particular regard to the difficulties faced by the NHS and other health and social care providers in responding to the crisis with limited resources and may well be reluctant to criticise individual employers for failures related to, for example, national shortages of PPE.

Workplace stress claims will inevitably remain extremely fact specific, however there are certainly arguments that specific factors relevant to such claims arising in the context of Covid 19 may well make it more substantially more likely, if not inevitable, that foreseeability of harm, at least, can be established.