

PSYCHIATRIC INJURY CLAIMS:
RECENT DEVELOPMENTS

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**Baron Munchausen's "Narrative of His
Marvelous Travels and Campaigns
in Russia"...**



NEW AGE...NEW ILLNESSES

- **New disorder, cyberchondria, sweeps the internet**
- “She tried to weep quietly...but inevitably he heard and opened his eyes...On the bed was her laptop...It started with tingling & numbness in her legs. For months she had searched the web...She ended up in a neurological chat room, & came to a devastating conclusion - she must have MS...”
- NZ HERALD, APRIL 2001

GP HUMOUR...



COMMON SCENARIOS (1)

- Physical & psychiatric injury
- Potential physical injury, psychiatric injury alone (“primary victim”)
- Witness of shocking, horrific event/immediate aftermath, who is not potential victim of physical injury (“secondary victim”)

COMMON SCENARIOS (2)

- “Involuntary participant” in shocking or horrific event sustaining psychiatric injury
- “Rescuer” sustaining psychiatric injury

COMMON SCENARIOS (3)

- Psychiatric injury due to occupational stress
- Psychiatric injury due to harassment at hands of co-workers

SECONDARY VICTIMS: BASICS

- *Hambrook v Stokes* (1925)
- *Bourhill v Young* (1943)
- *McLoughlin v O'Brian* (1982)
- *Alcock & Others v Chief Constable S Yorks Police* (1992)
- *White & Others v Chief Constable S Yorks Police* (1999)

SECOND VICTIMS: "CONTROL MECHANISMS"

- Close tie of love & affection
- Proximity in time & space to accident/immediate aftermath
- Shocking event perceived by own senses
- Shocking event caused psychiatric injury
- Normal fortitude
- No special rules for emergency services not exposed to risk

SECONDARY VICTIMS: THE LOSERS

- Seeing body of relative in mortuary 8 hours or longer after death (Alcock, Tranmore)
- Being informed of husband's MI, attending hospital within 20 mins, being informed of death, seeing body (Taylor)
- Briefly glimpsing fatally injured son during transfer from ambulance, remaining in ITU until death (Taylorson)

SECONDARY VICTIMS:THE WINNERS

- Discovery of body of son who had committed suicide (Waller)
- Mother seeing baby convulse, then at bedside for next 36 hours until death (Walters)
- Mother attending scene of daughter's accident about an hour after death, then viewing badly disfigured body in mortuary (Galli-Atkinson)
- Child overhearing mother say on the telephone that she had breast cancer and was likely to die (Froggatt)

PROPOSALS FOR REFORM (1)

- Remove all "control mechanisms" (Mullaney & Handford)
- Abolish liability for psychiatric injury altogether (Stapleton)
- Limited legislation: statutory definition of close tie, remove control requirement for proximity in time & space (Law Commission, 1998)

PROPOSALS FOR REFORM (2)

- Lord Worth (2004)
- Concept of “aftermath” too elastic (Walters, Froggatt)
- Rescuer’s right to recover should not depend on whether exposed to risk or not (White)
- Primary victim with “eggshell personality” should not recover (Page v Smith)

FARMER v OUTOKUMPU STAINLESS STEEL (2006)

- Worker badly burnt in explosion
- Wife initially informed by works nurse injured & taken to hospital
- Wife calls hospital & told husband very poorly, should attend
- Wife attends hospital A&E about 90 minutes after accident, about 40 minutes after triage

FARMER (2006)

- Judge rejected wife's evidence told nothing about husband's condition prior to seeing him
- Judge accepted she saw smoke blackened face & singed hair, but otherwise husband covered by sheet/burns dressed
- Held what she saw not "immediate aftermath"
- In any event would have preferred D's psychiatrist's evidence (normal bereavement reaction)

OCCUPATIONAL STRESS: BASICS

- Petch v Commissioners of Customs & Excise (1993)
- Walker v Northumberland CC (1995)
- Leach v Chief Constable of Gloucs (1999)
- Alexander v Midland Bank plc (1999)
- Garrett v Camden LBC (2001)
- Hatton v Sutherland (2002)
- Barber v Somerset CC (2004)

HATTON: GENERAL PRINCIPLES

- No special control mechanisms
- No occupations are intrinsically dangerous to mental health

HATTON: FORESEEABILITY (1)

- Threshold question: was this kind of harm to this particular employee reasonably foreseeable?
- Foreseeability depends on what employer knows or ought reasonably to know about a particular employee.
- Mental disorder is harder to foresee than physical injury, but it may be easier to foresee in a particular employee of workforce as a whole

HATTON: FORESEEABILITY(2)

- Workload of particular employee
- Demands of others in same or comparable job
- Signs others in same or comparable job have harmful stress levels
- Signs particular employee has impending harm to health

HATTON: FORESEEABILITY (3)

- Employer may assume employee can cope with normal pressures of job unless it knows of particular problem/vulnerability
- Employer entitled to take what employee says at face value unless good reason not to
- To trigger breach, signs of impending harm to health must be "plain enough" for any reasonable employer to realise action required

HATTON: BREACH OF DUTY (1)

- Failure to take the steps which are reasonable in all the circumstances
- Magnitude of risk/gravity of harm
- Costs of prevention
- Practicability of prevention
- Size/scope of operation
- Interests of other employees

HATTON: BREACH OF DUTY (2)

- Employer only expected to take steps likely to do some good
- Breach unlikely if confidential advice service with referral to appropriate counselling/treatment provided
- If only reasonable & effective step was dismissal or demotion, no breach in allowing willing employee to carry on

HATTON: CAUSATION & APPORTIONMENT

- Burden on C to show breach caused/materially caused injury. Proof that stress caused injury not enough.
- Unless injury is truly indivisible, employer only liable for proportion of harm it caused
- Assessment of damages may take account of pre-existing disorder/vulnerability/chance C would have suffered same illness in any event

THE POST-HATTON LANDSCAPE

- Foreseeability is biggest hurdle
- On the facts, were signs of impending psychiatric harm manifested by employee?
- On the facts, what knowledge did the employer have?
- Frontloading of investigation costs

THE POST-HATTON LANDSCAPE: PICKING WINNERS & LOSERS

- Repeated periods of illness/absence as a result of a recognised psychiatric condition
- Complaints to employer about health
- Employees in same/similar post absent with recognised psychiatric condition
- Employer has performed stress audits/risk assessments in line with HSE advice
- Uncharacteristic outward displays of distress

GARROD v NORTH DEVON NHS PRIMARY CARE TRUST (2006)

- Health visitor working 30 hrs PW develops depression after covering for sick colleague
- Phased return to work after 6 months sick, then normal duties but 24 hr week
- Full-time colleague goes on long term sick leave
- Repeated pleas to line managers for help – results in 1 extra hour of cover per week
- C suffers severe relapse of depression

GARROD (2006)

- Further phased return to work
- Employer's undertaking - will not be obliged to cover other HV's cases
- Colleague goes on maternity leave
- C has to cope with double case load
- C's depression relapses, does not RTW
- Employment terminated on health grounds

GARROD (2006)

- Held: psychiatric harm reasonably foreseeable
- Employee had known vulnerability
- Circumstances of breakdowns 2&3 strikingly similar to first
- Employer's breach was failing, in light of size/resources, to employ bank/agency staff
- Breach caused injury, not stress
- But damages discounted by 20% for inevitable vulnerability attributable to first breakdown

SAYERS v CAMBRIDGESHIRE CC (2006)

- C county operations manager/history of depression
- Complained about heavy workload/long hours
- D restructured, C took new role with less work
- C applied unsuccessfully for more senior position
- C commenced grievance procedure, implicating line manager
- C had taken limited time off
- C concealed depressive illness from employer but told 2 colleagues taking anti-depressants

SAYERS (2006)

- Held: injury not foreseeable
- Heavy workload in itself did not make psychiatric injury reasonably foreseeable
- D not aware of history of past depression
- C had concealed cause of limited absences from D
- Knowledge of 2 fellow employees as to anti-depressant medication not imputed to D

SAYERS (2006)

- Even if foreseeable no breach of duty on facts
- Reduction of workload on restructuring, and grievance procedure, had discharged duty
- Although D had not performed risk assessment under MHSWR 1999, no evidence this would have prevented illness

SAYERS (2006)

- D had also breached Working Time Regs 1998, but C had not worked significantly in excess of 48 hr limit and proof of causation difficult
- The Regs had adequately implemented the Working Time Directive 1993 thus no claim for "direct effect"
- Claim for breach of implied contractual term of mutual trust & confidence also failed

PROTECTION FROM HARASSMENT ACT 1997

- Civil & criminal sanctions for social mischief of “stalking”
- S1(1): Person must not pursue a course of conduct which (a) amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of another
- S3(2): on a civil claim damages may be awarded for “any anxiety” and “any financial loss” resulting from the harassment

PROTECTION FROM HARASSMENT ACT 1997

- No requirement for foreseeability of psychiatric harm
- No requirement for recognised psychiatric condition
- S7: two incidents sufficient to amount to a “course of conduct”
- Limitation period 6 years
- Anti-bullying/harassment policies & training do not provide a defence

WHAT IS HARASSMENT?

- Thomas (2002), Sharma (2003), Banks (2005)
- “Calculating”, “oppressive”, “unreasonable”
- Majrowski (CA, 2005)
- “aggression”, “vulgar abuse”
- Aggressive management style/workplace culture of oppressive & unreasonable behaviour targeted at individual & calculated (objectively) to cause alarm & distress

MAJROWSKI (HL, 2006)

- Employer can be vicariously liable under s3 for a course of conduct by one of its employees that amounted to harassment in breach of s1
- The conduct must be so closely connected with the acts the employee is authorised to do that it may be fairly and properly regarded as done by the employee in the course of his or her employment.

GREEN v DB GROUP SERVICES (UK) LTD (2006)

- The allegations (1997-2001):
- Excluding C from group activities
- Ignoring her when she spoke
- Laughing when she walked past
- Removing her name from circulation lists of internal documents
- Making raspberry noises with every step she took

GREEN (2006)

- The effects:
- C admitted to hospital with serious depressive illness
- C returned to work part-time, then relapsed and ceased work

GREEN (2006)

- Held by Owen J: “a relentless campaign of mean and spiteful behaviour”
- D knew or ought to have known it was going on
- Relentless daily bullying created foreseeable risk of psychiatric injury
- Management “weak & ineffectual”
- Breach of common law duty of care to take adequate steps to protect C from behaviour

GREEN (2006)

- Behaviour designed to cause C distress & also amounted to harassment under 1997 Act
- D argued conduct nothing to do with C’s work/work of those bullying her; employment was simply the opportunity.
- Held: conduct directly affected C’s working environment
- Some elements (eg removing C’s name from internal circulation lists) also involved work those bullying were required to undertake. D vicariously liable.

GREEN (2006)

- The award:
- PSLA for 2 breakdowns & inability to RTW £35k
- Handicap on labour market £25k
- Past earnings £128k
- Future earnings/pension £640k
- No separate award under s3 1997 Act

CORR v IBC VEHICLES LTD (CA, 2006)

- Worker badly injured in factory accident
- PTSD/depression, commits suicide 6 years later
- C claims damages for estate and dependents
- At first instance held scope of employer's duty did not extend to preventing suicide, and suicide not reasonably foreseeable

CORR (2006)

- CA: Suicide did not break chain of causation between D's negligence & consequences of suicide
- C did not need to establish that suicide (as separate kind of injury) was reasonably foreseeable
- Depression was reasonably foreseeable, admitted by D, & suicide was not uncommon in depressed
- Thus compensable consequences included suicide

AND NEARLY FINALLY...

- Darwish v Egyptair (2006)
- Jack J: "...I'll wipe the floor with you"...is likely to mean much the same as..."I'll beat you to a pulp". Or it may be used figuratively, such as saying of a football match "We wiped the floor with them, 12-love"...

AND FINALLY...GRIZZ, RIP

- 'Oregon attorney Geordie Duckler won a record \$56,400 verdict for a family whose neighbour ran over their dog... Outraged jurors awarded the family \$400 for the value of their dog, Grizz, \$6,000 for emotional distress - and a stunning \$50,000 in punitive damages. However, on the first day of trial, Clackamas County Circuit Court Judge Eve Miller reversed earlier rulings that allowed a claim of loss of pet companionship to go before the jury...'
- Natalie White, Lawyers Weekly USA 19/06/06