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KINGS
BENCH
WALK

***Doorknob**: Read the directions and directly you will be directed in the right direction.*

***Alice**: It would be so nice if something made sense for a change*[1]*.*

If asked where the thing is to stop, I should answer, in an adaptation of the language of Lord Wright (in Bourhill v Young [1943] A.C. 92, 110) and Stephenson L.J. [1981] Q.B. 599, 612,[2] *"where in the particular case the good sense of the judge, enlightened by a progressive awareness of mental illness, decides."*[3]

1. As a statement of legal principle this sort of judicial remark is not very helpful. It does come very close to an admission that the courts are struggling to find a coherent set of principles to apply to psychiatric injury claims. It may be that we are starting to see the emergence of some common principles, which will be developed over time to define the circumstances in which liability is to be imposed. It may be that some of the recent suggestions put forward as to the way forward will themselves attract as much criticism as the principles which they seek to replace.

2. **The three main types of psychiatric injury claims.**
Psychiatric injury claims are may conveniently be divided into three categories, nervous shock claims, stress at work claims and bullying claims. Different legal principles apply to each category, although the injury may be the same type. However, the more one looks at psychiatric injury claims, the more apparent it is that although there are three sets of principles applying to each of the three types of claim there is a greater degree of common reasoning behind those three sets of principles than might at first sight be apparent. The purpose of this short lecture is to look at these common features and to consider whether defences available in one category of case my be used in another category.

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[1] Alice in Wonderland.
[2] In McLouglin v O'Brien in the Court of Appeal.
[3] Per Lord Bridge in McLoughlin v O'Brien at 441.

3. **Three sets of principles for three types of claim, but the same objective.**
The object to be achieved in these three types of case is the same, indeed it is always the same whichever part of the law of tort one is looking at. The object of the law of tort is to provide a set of principles which can be applied which allow a meritorious claim to succeed and which ensure that an unmeritorious claim will fail. Everything else is a nothing more than a series of filters or devices the sole purpose of which is to achieve this result. The principles which determine whether a defendant owes a claimant a duty, the standard by which breach of that duty is judged, the manner in which causation is established and the measure of damages are the devices used to ensure that the meritorious claim succeeds and the unmeritorious one fails. In **Fairchild v Glenhaven**[4], Lord Bingham freely admitted that the tests used in the law of tort are intended for this purpose when he made, as his justification for departing from the normal test for causation, this statement:

> *"The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another.*[5]*"*

4. In the same case, Lord Hoffman said the same thing, albeit in a more complex manner, when he said at paragraph 56

> *"The same is true of causation. The concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious. And the two are inextricably linked together; the purpose of the causal requirement rules is to produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place."*

5. In **Rahman v Arearose**[6], Laws LJ had made a very similar point when he said of causation

> *" The problem at the heart of this case rests in the law's attempts to contain the kaleidoscopic nature of the concept of causation within a decent and rational system for the compensation of innocent persons who suffer injury by reason of other people's wrongdoings*[7]*."* Later he said *"Novus*

[4] [2003] 1AC 32
[5] At paragraph 9
[6] [2001] QB 351.
[7] At para 31.

actus interveniens, the eggshell skull, and (in the case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered." [8]

6. Whether a court is dealing with a victim of nervous shock, or of work related stress or of bullying it is always trying to produce a test which allows the meritorious claim to succeed and ensures that the unmeritorious claim fails.

7. **Why there is a different legal analysis for each type of claim.**
Although there may be a common objective, there are three different sets of legal principles, each tailored to achieve the objective in three different sets of circumstances. In nervous shock cases, the controls imposed are at the stage of whether a duty of care is owed at all. Once a duty is owed, the remainder of the legal chain of reasoning is usually satisfied. In stress at work cases, a duty of care is already owed to safeguard the health of an employee; it follows that the point at which the meritorious and unmeritorious claims have to be separated will be at the next stage, breach of duty. In bullying claims he duty is owed and almost by definition, the breach of that duty is proved by the action itself; it follows that any separation of the meritorious from the unmeritorious has to be when causation and damages are considered.

8. **The search for fairness.**
One of the notable features of the decision of the House of Lords in Fairchild v Glenhaven was the willingness of the judges to admit openly what it was that they were seeking to achieve and to state frankly that they were going to change the normal rules in order to achieve the right result. Lord Nicholls was the most open and said that he was looking for a result which *"justice requires and fairness demands"*. He, and three of his four colleagues, were prepared to depart from the normal rules for causation in order to achieve it.

9. Now that the judges have shown a willingness to achieve the correct result and now that they have decided to regard the long established rules of tort as being capable of modification if they think it appropriate, there may well be a much greater degree of flexibility in the approach of the courts to other classes of claim.

[8] At para 33.

10. **The review of stress at work claims carried out by the Court of Appeal.**
Against this background of a willingness to change the law to produce the right result, the Court of Appeal heard four stress at work appeals. Not all of the claims which had been started after the decision in **Walker v Northumberland County Council**[9] had been equally meritorious. The result had been a growth in the number of appeals, almost all of them from dissatisfied defendants. For this reason the Court of Appeal decided to list four appeals together for hearing in order to give themselves the opportunity to review this class of action and to ensure that the County Courts were dealing with them correctly. The cases seem to have been selected on the basis that they were all cases in which it appeared that the defendants had at least one strong ground of appeal as a result of a mistake made by the trial judge.

11. The judges had read some of the papers in advance of the hearing and were obviously uneasy about the judgments that had been produced by the County Court judges and had formed the impression that there was something wrong with them. Before the appeal started they were uncertain what it was that was wrong with the judgments and why they had that feeling of unease about them.

12. Almost as soon as the appeals started it became apparent that there were two problems. The first was that County Court judges, many of whom had never practiced in this area of law, were having great difficulties in applying the correct legal tests to the relatively complex cases in front of them. Some were confused about the existence of a duty of care, some were confused about the standard of care, almost all were confused about the tests for causation and many of them were having great difficulty in assessing damages correctly. Some managed to get every part of the legal analysis wrong! For this reason one major part of the judgment is an attempt by the judges the Court of Appeal to lay down a series of propositions which they intended would provide a definitive guide to County Court judges hearing this class of case. As a result most of the 16 propositions[10] set out in the summary given in the judgment make no new statement of law; what they do is to state the law clearly. The second problem with this class of claim arose from the evidence in the individual cases. It quickly became apparent that employers often knew very little about their employees state of mind or their psychiatric state of health. They often knew that the employee was having some form of difficulty, but the true nature and extent of that difficulty was almost always kept from the employers by the

[9] [1995] IRLR 35
[10] The introduction states that there are 15 points in the summary at paragraph 43 of the judgment, but there are in fact 16. Which one was the afterthought? Perhaps the one about damages?

employees and their doctors. In this respect these claims differed from ordinary physical injury claims where the consequences of a particular state of affairs is usually much more obvious. The Court of Appeal had to consider whether they should change the conventional approach adopted in other types of personal injury actions in order to achieve what they felt was the right result. This is what they did in the second major part of their judgment and this is where they changed the law as it had previously been understood.

13. In addition the Court of Appeal decided to make a complete change in the manner in which a defendant's responsibility for damages was assessed.

14. The special treatment of claimants in psychiatric injury claims.
In addition to the willingness of modern judges to alter the previously accepted rules, there is one additional background factor which is reflected in the outcome of the Hatton appeals. It is a factor present in many stress at work claims and always favours the claimant. Courts have been very reluctant to conclude that a claimant in such an action has been guilty of contributory negligence, even when he deliberately conceals his true state of health from his employer, even when he returns to work against his doctor's express advice. This view is a consequence of the general perception that a person with a psychiatric condition is incapable of acting normally or carefully, and therefore that he cannot be in breach of a duty to take reasonable care for his own safety. In the case of a severe episode of psychiatric illness this may be a reasonable view to take. Whether it is reasonable in the case of a man who is capable of writing long and detailed letters to his doctor in which he describes that he is ill as a result of the stresses of work, as was the case with Mr Barber, is much more doubtful.

15. However charitable this approach to contributory negligence in stress at work cases may be, it creates an artificial situation in which the courts have deprived themselves of the normal device by which responsibility is allocated between a claimant and a defendant. If this normal method of allocating responsibility is not available, then a court inevitably finds itself looking for other methods for apportioning responsibility.

16. In the Hatton appeals the Court of Appeal felt that they were dealing with a new class of claim, not because it was the first time the Court of Appeal had considered a stress at work claim, the first was **Petch v Commissioners for Customs and Excise,**[11] but because this was the first time they had conducted a substantial review of this growth area in the law of tort.

[11] [1993] ICR 789.

17. The duty of care.

Some have suggested that there should never be a duty to prevent psychiatric injury to an employee or that the duty is limited to a duty to prevent nervous shock. This contentious viewpoint was not advanced issue was not raised at the hearing of the appeal in Sutherland v Hatton. In the Court of Appeal this argument was not available to the employers as the Court of Appeal's decision in Petch, that there was such a duty, was binding on the court. Even in the House of Lords it is unlikely to be advanced as the judges have already indicated in other decisions that they do not agree with it.

18. The decisions under appeal did demonstrate some confusion amongst judges at first instance about the distinction in **Page v Smith**[12] between primary and secondary victims and the effect of the decision of the House of Lords in **Frost v Chief Constable of South Yorkshire.**[13]

19. In Frost a number of police officers at the Hillsborough disaster had brought claims for psychiatric injury suffered as a result of what they had seen. Members of the public who had suffered psychiatric injury in similar circumstances had been unable to recover as they were not within the zone of danger necessary for them to be considered as primary victims, nor were they sufficiently close in time, place or relationship to the victims to be owed a duty as secondary victims. It was said that the police officers were entitled to succeed as they were owed a duty because they were employees. The House of Lords declined to permit them to succeed as they felt that it was inappropriate for an employee to be owed such a duty when a member of the public was not. In his speech Lord Hoffman had said of Mr Walker of Walker v Northumberland County Council that he was in "no sense a secondary victim. " County Court judges were obviously somewhat confused about what all of this meant. They were not alone.

20. In Hatton, Hale LJ adopted the explanation given by Lord Hoffman in Frost. In his speech he had pointed out that the control mechanisms set out in Page v Smith and Frost only applied where "the injury has been caused in consequence of death or injury suffered (or apprehended to be suffered or likely to be suffered) by someone else". She went on to say that an employee would be a secondary victim, and therefore subject to the control mechanisms applicable to a secondary victim, "where the harm is suffered as a result of harm to others, in the same way as secondary victims in tort, but there is also a

[12] [1996] AC 155
[13] [1999] 2 AC 455.

contractual relationship with the defendant". Otherwise he is a ble to succeed only if he is a primary victim.

21. This test will exclude some who suffer psychiatric injury as a result of seeing someone else mistreated at work, or may do.

22. **The standard of care**.
It is the passages in which the Court of Appeal decide that they should adjust the standard of care in stress at work claims which mark the greatest change brought about by the decision in Hatton.

23. In Walker v Northumberland the judge had concluded that an employer was not, without more, liable for the normal risks of the job he has employed someone to do. On the assumption that the risk was a foreseeable one, one might ask , "why not?" Nowhere in the judgment is an answer given to this. The reason for the lack of an answer is that at the hearing in the Court of Appeal all counsel appearing for the Claimants were asked if they accepted that this was a correct statement of the law and as they all agreed that it was, the contrary was never argued.

24. If one takes as an example the managing director on a large salary trying to save a failing company and working long hours in his attempt to do so. It could easily be suggested that the risk of the managing director suffering psychiatric injury is not so "far fetched or fantastic as to be a mere possibility that would never occur to the mind of a reasonable man",[14] and thus it would be possible to satisfy the first part of the test of foreseeability. It would not perhaps be a danger against which the employer ought to have protected him, and thus arguably not satisfy the second part of the test for foreseeability. Although this was not a point argued it is probably right that an employer is not liable for the consequences of normal work. It is rather more difficult to pinpoint exactly why the employer ought not to have protected his employee against these risks. There are a number of points which together might lead to this conclusion, probably the most obvious of which are that the employee has agreed to do a particular type of work, the universality of stress and the fact that the employer cannot easily tell if an employee is able to cope with the normal pressures of work to the extent that they are going to suffer a psychiatric illness.

25. The Court of Appeal when describing the new standard of care concluded "*In view of the many difficulties of knowing when and why a*

[14] A test for foreseeability taken from Fardon v Harcourt-Rivington (1932) 146 LT 391, by Lord Ackner in Page v Smith [1996] AC 455 at 170. This test was strongly criticised in Tame v New South Wales by the High Court who felt that it did not adequately reflect the true and more onerous nature of the burden on a claimant.

particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it." [The court's italics.]

26. In reaching this conclusion the Court of Appeal accepted three points made on behalf of the defendants.

    [a] That unlike the normal factory accident type of case, from which almost all employers' liability principles are derived, in this class of case many of the causative factors – the pressures an employee is facing - are outside an employer's control and often arise from life outside work.

    [b] That an employee often conceals the true nature and extent of his difficulties from his employer.

    [c] That most of the employees who are affected by stress are professional or white collar employees whose manner of working is often largely outside the employer's control, but is within their own control.

27. These points led the court to conclude that they should exercise the power they had to change the rules and to impose new ones in their place. It is interesting to see how they justified to themselves their right to do so. In paragraph 13 Hale LJ said *" When imposing standards, the law tries to strike a balance which is reasonable to both sides."* In paragraph 14 she said *"… if the standard of care expected of employers is set too high, or the threshold of liability too low, there may also be unforeseen and unwelcome effects on the employment market."* In paragraph 15 she said *" Some things are nobody's fault."* This sort of statement would drive some lawyers to apoplexy.

28. Whether the court set the standard at the correct level may be debateable, but if you start from a position in which you have decided that contributory negligence is an inappropriate tool for adjusting responsibility between the parties, then you have to use a different tool to achieve the correct balance.

29. **Causation.**

    There is no new principle for causation in the judgment. There are some clear guidelines which should prevent lawyers and judges from making mistakes. A number of the judges had become hopelessly confused when dealing with causation, and the Court of Appeal point out that the claimant has to prove on the balance of probabilities that

the breach of duty of the defendant caused, or, in an appropriate case, materially contributed to, the psychiatric illness. It is not enough to conclude that the stress of work caused the injury. All pretty obvious stuff.

30. Damages.

Psychiatric illness often has multiple causes. Some of those will come from the claimant's own personality, background and personal events, love, illness, death and divorce. Some will relate to the work which a claimant does, but will be causes in respect of which a defendant will not have been in breach of duty. In the context of a teacher such as Mr Barber some will come from the stresses of dealing with unruly and uncooperative children who may show no interest in being taught a particular subject. Some of those causes will be those for which a defendant has been held to be in breach of duty.

31. How in those circumstances should a court approach the assessment of damages?

32. The starting point is said to be that a defendant should only pay for the damage which he has caused. In principle such an approach leads to the correct result, the fair result as it equates breach of duty with the damage for which a defendant is made responsible. The approach works without difficulty where there is truly only one cause for a particular damage. It becomes more difficult when there are a number of causes which are operative and, in this type of case, there is almost always more than one causative factor.

33. Using an analogy: if a jug of water is three quarters full and a defendant fills it so that it overflows, should he be liable for making it overflow or should he liable according to the amount of water he has put into the jug, a quarter? Does it make a difference if the water in the jug is three quarters full as a result of the act of another tortfeasor, or if it is three quarters full as a result of a variety of non tortious reasons? Is the damage the overflow of the water or the whole of the water in the jug?

34. Rahman v Arearose is a difficult case to understand, but it appears to conclude that psychiatric injury can be divided up between its component causes using a common sense or rough and ready sort of approach. It also makes it clear that when all causative factors are a result of the tortious acts of two persons, then each is liable to the

claimant but only to the extent that they that they were responsible for the various causative factors.

35. Lady Justice Hale seems to go one step further in Hatton and suggests that where "extrinsic causes" and tortious causes combine together the defendant is only liable for that proportion of the damage which can fairly be attributed to the cause for which they are responsible.

36. This is the weakest part of the judgment and it is difficult to see exactly what conclusion the court did reach. However, it may reasonably be said that the Court of Appeal did conclude that the person filling the jug of water is only responsible to the extent that they filled it. The egg-shell skull principle would suggest the contrary, but earlier in the judgment the Court of Appeal had expressly approved a passage from Rahman ,a case in which Laws LJ described the egg-shell skull principle as a device used by the courts. Normally contributory negligence would go some way towards remedying the injustice to a defendant by depriving a claimant of a proportion of their damages, but the court had set its face against such a course. That left open the question of how a claimant could be made responsible for his own personality and his own life. One of the key themes of the judgment is personal responsibility, and it appears to me that the court felt that he should take some responsibility for his own fate and for his own life and concluded that the best way in which that could be done is to apportion the damage as if he had himself been a tortfeasor. Certainly the earlier parts of the judgment contain strong passages making it clear that a person must bear responsibility for his own health and his own safety and this was a good way to do it.

37. The reasoning is not that clear, but the result that a defendant is only responsible to the extent of his contribution is reasonably clear.

38. New issues in the House of Lords.

The House of Lords have listed the appeal in Barber for hearing in February 2004. The appeal has taken an incredibly long time to reach this stage, in the main as a result of complete confusion as to which issues would be dealt with when the appeal is argued. Initially it appeared that the House of Lords were willing to allow argument on the question of whether the claimant should be able to succeed on the basis of an allegation of breach of statutory duty under the Management of Health and Safety at Work Regulations 1992, which imposes a responsibility on an employer to carry out a risk assessment.

39. The regulations state that they do not give rise to a civil cause of action[15], and it follows that the employee needs to rely upon the Direct

[15] Reg. 15

Effect of the Directive which gave rise to the United Kingdom Regulations[16]. The House of Lords have now decided that they will not allow this ground of appeal to be argued. In a way this is an unsatisfactory end result as it will permit a claimant to advance this argument at a later stage in a different case.

40. Opinions differ as to whether this argument has any merit. It is extensively referred to in some of the textbooks , most of which suggest that it has some merit[17]. However, the argument does have problems when it comes to considering where it will lead. There is only a point in establishing a right to make a claim for breach of statutory duty if it leads to a different conclusion than that which would be reached at common law. Unless the "risks" in "evaluate the risks to the safety and health of workers"[18] means something apart from "foreseeable risks" it becomes very difficult to see what a statutory duty will add to a common law duty. In addition, when a claimant reaches the stage of establishing causation he may have some difficulty in answering the question " If you told the employer there was nothing wrong with you and that you were fit for work, why should we assume that your answer would have been different if you had been told that your employer was carrying out a risk assessment?"

41. **The guidelines themselves**.

    At paragraph 43 of the judgment Hale LJ gave the following guidelines;

    (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 (para. 22). The ordinary principles of employer's liability apply (para. 20).

    (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para. 23): 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) (para. 25).

    (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 (para. 23). 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 (para. 29).

[16] Directive 89/391/EEC
[17] For example the editors of Redgrave and Munkman. (Possibly the same person).
[18] Article 6.3.(a) of the Directive.

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para. 24).

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

(a) The nature and extent of the work done by the employee (para. 26). Is the workload much more than is normal for the particular job? Is the work 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?

(b) Signs from the employee of impending harm to health (paras. 27 and 28). 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?

(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 (para. 29).

(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 (para. 31).

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk (para. 32).

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para. 33).

(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 (para. 34).

(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 (paras. 17 and 33).

(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 (para. 34).

(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 (para. 33).

(14) The claimant must show that that 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 (para. 35).

(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 wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras. 36 and 39).

(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 (para. 42).

42. The search for consistency and coherence.

The range of answers and tests provided by courts in psychiatric injury claims has led to a lack of coherence and great difficulty in trying to distil any meaningful general principles from the decisions. This is contrary to the manner in which courts like to develop the law. They seek to do the contrary. In Fairchild Lord Nicholls said :

" The real difficulty lies is elucidating in sufficiently specific terms the principle being applied in reaching this conclusion. To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification."

43. I will look if I may at some areas where this desire for coherence and consistency have started to influence the courts' approach to psychiatric injury claims in general and stress at work claims in particular and at some of the areas in which it may do so in the future. .

44. One rule for all.

The range of circumstances in which psychiatric injury claims can arise, the wide range of legal rights an individual has and the policy driven criteria for success and failure so characteristic of psychiatric injury claims inevitably causes difficulties for the courts whose object

has been to try and allow all equally meritorious claims to succeed. Because the courts have applied their controls at different stages in different types of action, there are times when the criteria devised for one category of case produces inconsistent and unacceptable results if applied to a different claim.

45. In **Frost v Chief Constable of South Yorkshire**,[19] one of the Hillsborough disaster claims, the House of Lords found themselves in an awkward position. They had rejected claims by a number of claims made by bystanders on the basis that they were not owed a duty of care by the negligent Chief Constable. Then a group of persons who happened to be owed a duty of care by the Chief Constable already, but who were otherwise in the same position as the bystanders, brought a claim. These were the police officers who had attended the disaster. They argued that as they were already owed a duty of care once because they were employees, they did not need to prove that they were owed it a second time as primary victims in order bring a claim. There had been previous claims for nervous shock brought by claimants who were already owed a duty as employees[20], but it had never been argued that claimants in a nervous shock case could succeed if they happened to be employees of the tortfeasor, when they would fail if they were not. In his speech Lord Griffiths said at 494;

"The law of master and servant is not a discrete and separate branch of the law of tort, but is to be considered in relation to actions in tort generally. Here we are considering the tort of negligence and the nature of the duty of care owed by one who negligently creates a catastrophic situation."

46. In order to ensure consistency the House of Lords concluded that the fact that an employee was already owed a duty of care in an employment context, did not mean that he did not have to prove that he was owed a duty as a victim of nervous shock when bringing a different type of claim.

47. The employer's defence- an inconsistency or not?

This search for consistency and coherence is proving to be highly relevant in all psychiatric injury claims, especially in stress at work claims where the jurisdiction to deal with claims is shared with Employment Tribunals. If one takes a an example one of the guidelines in Hatton itself, Guideline 11, which states:-

[19] [1999] 2 AC 455.

[20] For instance the High Court of Australia had such a case Pusey v Mount Isa Mines approved in Page v Smith and considered in Frost v Chief Constable of South Yorkshire..

"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."

48. Many have criticized this guideline because it allows an employer to escape liability for a state of affairs which he or his employees has created. However, if we look briefly at psychiatric injury which results from sex discrimination, we can see that this guideline has its parallel in the sex discrimination field.

49. It is assumed by tort lawyers that it is only necessary to prove an incident of harassment by an employee and that the employer is vicariously liable for the actions of that employee. This is not so. The Sex Disccrimination Act 1975 contains a definition of vicarious liability in s.41(1)

> ***41.*** *– (1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.*

50. For practical purposes this looks like a standard test for vicarious liability. However, the Act also provides the employer with a defence. In s 43(3) we find:

> *"In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description."*

51. Employment courts have regarded this statutory defence as capable of exonerating an employer who has a suitable Equal Opportunities policy, provided the employer ensures that it is properly implemented. This would normally include a procedure for the provision of advice to employees, a confidential referral service for the making of complaints and a process for any complaints to be investigated. Thus an employer who offers a confidential referral service will not be liable to an employee who is harassed but who chooses not to take up the offer of confidential help.

52. This is a very similar result as that achieved by guideline 11 of the Court of Appeal in Hatton. It seems to me to be unlikely that a court would regard it as appropriate for a person who has been sexually harassed being in a worse position than an employee subject to the

same harassment but without a sexual content to the harassment. I suggest that the need for consistency means that this guideline is not one which is vulnerable ; on the contrary the desire evidenced by the decision in Frost for consistency between different claims of the same general type is likely to mean that this is a guideline which will stand.

53. The egg shell skull.

The conclusion in Page v Smith that whether a person is of normal fortitude should be ignored when considering nervous shock claims is one of the two parts of the decision which has come in for the strongest criticism.Lord Lloyd had said in that case

> *"In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude."*[21]

54. In Frost v Chief Constable for South Yorkshire, Lord Goff subjected this view to scathing criticism in his dissenting speech. In Australia the High Court in **Tame v Chief Constable for New South Wales,** pointedly agreed with Lord Goff and rejected the views expressed in Page v Smith. McHugh J. said:

> *Counsel for Mrs Tame also submitted that injecting the normal fortitude test into the question of foreseeability conflicts with the accepted principle in negligence of talem qualem - the "egg-shell skull" rule. That submission cannot be accepted. The normal fortitude test is an issue going to liability; the egg-shell skull rule goes to quantification of damages once duty, breach and some damage are established. In White v Chief Constable of South Yorkshire Police Lord Goff of Chieveley pointed out that the egg-shell skull rule "is a principle of compensation, not of liability". It operates in the field of nervous shock in the same way that it operates in other areas of the law. Once the plaintiff establishes that a person of normal fortitude would have suffered psychiatric illness as the result of the defendant's action, the defendant must take the plaintiff as he or she is. The defendant's liability extends to all the psychiatric damage suffered by the plaintiff even though its extent is greater than that which would be sustained by a person of normal fortitude.*

55. In Hatton, Hale LJ. said as part of the court's guidelines:

[21] [1996] AC at 198.

" 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".

56. It will be appreciated that there is a degree of tension between this view and the view the House of Lords expressed in Page v Smith about the normal fortitude standard. In view of the heavy and almost unanimous criticism of the view expressed in Page v Smith, it is likely that the view in Hatton will be preferred in the long term.

57. Coherence.

We see in Frost a desire to ensure that the same principles are used to decide claims of all types. This is also evident in the manner in which courts have approached the difficulties caused by overlaps between different legal remedies. In stress at work claims there are many overlaps and these continue to present difficulties.

58. Two torts or choice of torts.

In Tame v Chief Constable of New South Wales, McHugh said at paragraph 122:

"In determining whether Acting Sergeant Beardsley owed a duty of care to Mrs Tame, it is proper to take into account - quite apart from the issue of reasonable foreseeability - that the law of defamation appears a more appropriate medium for dealing with the facts of her case than the law of negligently inflicted nervous shock. Her action arises out of a communication to a third party, her concern is with her reputation and the law of defamation has various defences that reconcile the competing interests of the parties more appropriately than the law of negligence. This Court has already taken the view that, independently of policy issues relevant to the interests of the parties and persons like them, the need for the law to be coherent is a relevant factor in determining whether a duty exists. In Sullivan v Moody, the Court said that coherence in the law was a relevant factor in determining whether a duty of care existed. In Sullivan, the Court held that officers of the Department of Community Welfare owed no duty of care to a person affected by a communication made as the result of investigating, under a statutory power, a sexual assault allegation.

59. The same concerns about allowing the tort of negligence causing personal injury to expand into liability for careless statements, or tactless statements is also apparent in the courts unwillingness to impose liability for the making of careless statements causing personal injury. Crossing the boundary will usually only occur where the alternative tort does not provide adequate protection. In **Spring v**

Guardian Royal Exchange Assurance[22]**,** the negligent reference case, the overlap was between defamation, malicious falsehood and a claim in negligence. The House of Lords were willing to provide a remedy in negligence in respect of a reference but only once they had concluded that the alternative torts of defamation and malicious falsehood did not protect Mr Spring and that he deserved protection. The same could not be said of Mrs Tame, whose claim for defamation would have failed in defamation, but whose claim was perceived as unmeritorious. In Johnson v Unisys, the fact that the House of Lords concluded that damages for personal injuries could be awarded in an unfair dismissal claim was central to their conclusion that Mr Johnson was protected without the need for a claim in negligence.

60. Contract or tort.

This same reasoning is seen in the recent series of decisions in British Courts dealing with the overlap between claims for psychiatric injury when put in tort and when put as breach of contractual duty and in the manner in which they are dealt with when put in tort or as an employment tribunal claim.

61. Many claims can be put in tort or put in contract as a breach of the implied duty of trust and confidence. It is now accepted that with the exception of actions which face some jurisdictional difficulty there is no advantage in bringing proceedings in contract over bringing an action in tort. However, there is a view that one can use this principle backwards and to look first at the duty in contract, argue that that has been breached and then suggest that the duty in tort is also broken.

62. The breach of contract fallacy.

A non employment lawyer has vaguely heard of the trust and confidence term, that an employer shall not behave to his employee in a manner calculated or likely to destroy the mutual bond of trust and confidence between employer and employee. They point to some action or inaction by the employer and suggest that it is a breach of the term of trust and confidence. It all looks very easy and all one has to ask is whether the employer's action is a breach of the mutual bond of trust and confidence. Employment law cases are frequently reported and it is easy to find examples of pretty minor misbehaviour by an employer which has been categorised as a breach of the mutual trust and confidence term. My favourite is the employer who said to an employee, "You can be an intolerable bitch on Monday mornings."[23] The danger of using this series of decisions is that they are almost all

[22] [1994] IRLR 440 House of Lords.
[23] The facts of Isle of Wight Tourist Board v Coombes [1976] IRLR 441.

employment tribunal claims in which the tribunal is considering whether the employee has been constructively dismissed. In those circumstances the tribunals have adopted a more liberal approach to the question of breach of contract which leads to them accepting jurisdiction. Having accepted jurisdiction they will then consider the merits of the case.

63. In the context of psychiatric injury claims arising from work the obvious example of a case which went the trust and confidence route was Gogay v Hertfordshire County Council [24] , a case which involved a flawed disciplinary procedure. Rather worse than flawed really; a wholly unjustified allegation of child abuse.

64. In Gogay the test to determine whether a breach of the implied term has been established is not set out. However, in a recent decision of Burton J in Clark v Nomura Bank, the judge, who is currently President of the Employment Appeal Tribunal, reviewed all of the cases and concluded that an employer would only be in breach of the implied term if his action could be categorised as perverse. This makes it clear that the employer's behaviour has to have been close to completely unacceptable before he will be in breach of the implied term. This brings it close to the test in Hatton which was expressed in these terms " *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*. Put in this way the behaviour of an employer is invariably going to fail the contract test if it also fails the tort test.

65. **Employment tribunals and the High Court.**

In **Sheriff v Klyne Tugs**[25] the Court of Appeal considered a psychiatric injury claim. The claimant had brought and settled a race discrimination claim against his employers. He sought to bring a claim for damages for personal injuries. The Court of Appeal concluded that his claim should be brought in an Employment Tribunal, that the employment tribunal had exclusive jurisdiction and that the High Court had no jurisdiction. In **Johnson v Unisys**[26] the House of Lords considered a claim for psychiatric injuries brought by a person who had already brought and won unfair dismissal proceedings. The House of Lords considered that general damages for pain and injury were available in the Employment Tribunal and that as jurisdiction was conferred upon employment tribunals by statute they had sole jurisdiction in all claims for personal injuries arising out of the fact or manner of dismissal. This analysis of the decision in Johnson v Unisys

[24] [2000] IRLR 773. Court of Appeal per Hale LJ.
[25] [1999] IRLR 481
[26] [2001] IRLR 279

was accepted **in Eastwood v Magnox Electric** [27]by the Court of Appeal. In **McCabe v Cornwall County Council**[28] a distinction was made on the facts and the Court concluded that the events complained of were too early for them to be considered to be part of the circumstances of the dismissal; because they were therefore outside the jurisdiction of the Employment Tribunal they were within the jurisdiction of the High Court.

66. Eastwood, and I understand McCabe, are under appeal to the House of Lords who will have an opportunity to review their own recent decision in Johnson v Unisys. The President of the EAT has recently, in a remarkable piece of judicial blind eye[29] has decided to ignore that part of Johnson v Unisys in so far as it allows the award of general damages for pain and injury arising out of the dismissal.

67. Conclusion.

It is apparent that courts now attach a great deal of importance to the need to ensure that legal principles are developed coherently and that there is a justification in principle which is clear between claims which succeed and those which fail. The question which no one knows the answer to is whether they will adopt the highest or the lowest common denominator when deciding between conflicting sets of principles.

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"Cheshire-Puss she went on. "Would you tell me, please, which way I ought to go from here?

""That depends a good deal on where you want to get to," said the Cat

"I don't much care where-" said Alice."Then it doesn't matter which way you go, "said the Cat.

"-so long as I get somewhere," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

[27] [2002] IRLR 447
[28] [2003] IRLR 87
[29] Dunnachie v Kingston Upon Hull City Council. Unreported 8.4.2003