STRESS EFFECTS

Richard Edwards on occupational stress and pre-existing vulnerabilities

This article looks at the issues of causation, vulnerability and apportionment in occupational stress claims. It is to be read in conjunction with the case study on page 24 where some of the issues raised here also featured.

General principles

The most authoritative guidance for occupational stress claims remains Hale LJ's (as she then was) 16 principles in *Sutherland v Hatton* [2002] EWCA Civ 76. On the issues examined here, the following are of note:

- Foreseeability in stress cases depends on what the employer knows (or ought reasonably to know) about the individual employee. 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* (principle 3).
- The claimant must show that the breach has caused *or materially contributed* to the harm suffered. It is not enough to show that occupational stress has caused the harm (principle 14).
- Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered that is attributable to his wrongdoing, *unless the harm is truly indivisible*. It is for the defendant to raise the question of apportionment (principle 15).
- 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 (principle 16).

Causation, vulnerability and apportionment

Material contribution (principle 14) is a concept developed through well-established industrial disease authorities and, more recently, in a number of clinical negligence cases. It is designed to avoid the injustice that would otherwise arise if an injured claimant were denied an award of damages because they could not show that an injury would not have occurred, but for the negligence complained of. It will apply in circumstances where there are two or more (concurrent) causes, or where there might be a cumulative cause effect but only a proportion of it is actionable.

Bailey v Ministry of Defence [2009] 1 W.L.R. 1052 provides an example of the rule in operation. Here the claimant suffered hypoxic brain damage after a cardiac arrest that

was triggered after she aspirated on vomit. Focus at trial was on what had caused the weakness in her condition, as it was this that had left her unable to react to the vomit in the natural way and protect her airway. The claimant accepted that non-negligent pancreatitis was a significant cause of her weakness. But she argued that the negligent management of her care following an Endoscopic Retrograde Cholangiopancreatography (ERCP), including a failure to resuscitate that had resulted in her needing more extensive surgery, had also contributed to her weakened condition. The court was therefore invited to consider whether or not the claimant's inability to respond naturally to her vomit was because of weakness due to the pancreatitis, or because of the other issues that arose due to the negligent treatment.

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At first instance it was held that the negligence had made a more than minimal contribution to the claimant's weakened condition, and that her weakness directly caused the brain damage. This was upheld in the Court of Appeal, where Waller LJ said this of cumulative cause cases:

'If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed... If the evidence demonstrates that "but for" the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened, but can establish that the contribution of the negligent cause was more than negligible, the "but for" test is modified, and the claimant will succeed.'

In *Bailey* there were negligent and non-negligent explanations for the weakening of the claimant's presentation. Since, however, the court was unable to find, due to the limitations of scientific knowledge, which of the two components had the greater bearing upon her weakened condition; but it could find that both had made a material contribution to that state, and it was this that caused the aspiration, the claim succeeded.

The claimant's inability to dissect precisely the impact of the competing contributory factors upon her condition due to the limitations of scientific knowledge was not fatal to her claim. This was because the actionable factors made a contribution that could be shown to be more than negligible (ie. material) and, importantly, it was not shown that the aspiration would have occurred due to the non-negligent pancreatitis in any event.

In stress cases it will frequently be the case that the claimant presents with a psychiatric injury against the backdrop of a life with multiple stressors. When one is faced with an impossible work situation it tends to impact on relationships, it can lead to addictive behaviours, and other health issues can frequently emerge - complicating the picture.

Psychiatric injuries are also inherently complex, open to subjective analysis, and not easy to measure clinically in the way that a physical injury might be. Added to this, there may be other pre-existing psychiatric problems to take into consideration. Of course, if the employer is aware (or ought to be aware) of the other vulnerability, then this is a factor that they must cater for in any event (pursuant to principle 3) and it will be relevant on the question of the foreseeability of the injury. The case study at page 24 is a good practical illustration of this principle in operation. Where there are multiple potential factors to explain the psychiatric presentation, it is important to remember that a material contribution analysis such as that applied in *Bailey*, may have a role to play in establishing that an employer's breach of duty caused, or materially contributed to, the employee's illness.

It is important for practitioners to appreciate the broader potential for such an analysis with psychiatric injuries. Brain injuries, for instance, often give rise to psychiatric sequela, and it is not uncommon to come across victims of brain trauma who have pre-existing psychiatric disorders. Again, trying to disentangle the two can be challenging. Yet where this is not possible, the material contribution approach might provide the only way forward.

An example of the material contribution rule being applied in a claim for a psychiatric injury, albeit not in a stress case, is *Leigh v London Ambulance Service NHS Trust* [2014] EWHC 286 (QB). Here, the defendant was found liable for the claimant's PTSD, which emerged after she had dislocated her knee on a bus and had spent 50 minutes in agonising pain waiting for the ambulance to arrive. It was accepted that there was a negligent 17-minute delay in the arrival of the ambulance. The court held that medical science could not establish the argument the Trust tried to advance on causation, which was that the PTSD would have developed regardless of the delay. The evidence did, however, demonstrate that the delay made a material contribution to the development of the PSTD, and so the claimant succeeded.

In both *Bailey* and *Leigh* the claimants recovered their damages in full, because the brain damage and the PTSD respectively were indivisible injuries. This brings us to principles 15 and 16 from the *Hatton* framework.

Both principles 15 and 16 provide an avenue for an employer to seek to supress an award of damages. They are, however, conceptually different; as was noted by Court of Appeal in *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188. Principle 15 provides scope for an award to be apportioned (or discounted) so that the claimant does not recover what might otherwise be viewed as 'full compensation'; but only if the harm suffered is divisible. Principle 16 is a matter of causation – any award of damages must take account of harm the claimant would suffer in any event, and so the psychiatrically vulnerable claimant may see an award reduced to reflect this.

Principles 15 and 16 are, however, strictly *obiter* as apportionment and quantification did not feature in the cases before the court in *Hatton*. Thus, in *Dickins v 02 PLC* [2008] EWCA Civ 1144, the Court of Appeal took the opportunity to express doubt about the approach to apportionment taken in *Hatton*. In doing so, however, Smith LJ, giving the lead judgment, suggested that psychiatric injuries could rarely fit with the apportionment approach that had developed in other industrial disease cases. For instance, in *Thompson v Smiths Shiprepairers* (North Shields) [1984] QB 405, apportionment was considered appropriate in a hearing loss case where the claimants were exposed to negligent and non-negligent excess noise by their employers. The same approach was taken in *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All E.R. 421 CA in a case of asbestosis where more than one employer had exposed the claimant to asbestos, but his claim was brought against one who had employed him for only half of the period of exposure. *Dickins* itself was an occupational stress case in which the claimant's award was reduced by 50% to take account of non-tortious factors that had contributed to her injury, including stress brought on by relationship difficulties and a domestic flood. In the appeal, however, this reduction was not challenged and so, again, Smith LJ's reservations as to the applicability of principle 15 to stress cases were also *obiter*.

The issue, however, received full consideration in *Konczak*. Here, the claimant made allegations of sexual harassment against her employers, and brought claims for disability discrimination and unfair dismissal. She succeeded on some allegations, but others were dismissed. The effect of this was that there were many other events that had contributed to her overall psychiatric illness, but for which her employer bore no legal responsibility. The Tribunal, however, found that no apportionment should be made as the psychiatric illness was indivisible and had been triggered by a 'final straw' comment made by her employer for which it did bear legal responsibility. The challenge to this finding was dismissed. The lead judgment given by Underhill LJ is worthy of close inspection.

Underhill LJ held that principle 15 (above) was applicable where the injury is shown to have multiple causes, some of which may be attributable to a tortious act, and others not. Principle 16, however, concerns the situation where there is a pre-existing vulnerability that is not a cause of the harm, but that might have led to similar injury in the future, even if the tortious act had not occurred and for which the employer would not be responsible. It was a distinction between concurrent causes (principle 15) and pre-existing vulnerability (principle 16), but there may be cases where both are in play. Underhill LJ considered that the doubt expressed in *Dickins* about the wisdom of attempting apportionment in cases of psychiatric injury was misplaced and that, although *Hatton* was not binding, it represented an authoritative and carefully reasoned opinion that carried significant weight. Underhill LJ held that the court should at least attempt to identify a *rational basis* on which harm suffered could be apportioned in cases of psychiatric harm with concurrent causes. While attempting a division was not straightforward in instances of psychiatric injury it was not, however, impossible - as the court in *Dickins* had come close to suggesting.

One example Underhill LJ cited in support of his view was *Rahman v Arearose* [2001] QB 351. Here, the claimant succeeded in a claim against two defendants. The first, his employer, on the basis that it had

failed to protect him from an attack by two black youths at a fast food restaurant where he worked; and the second, a hospital, held liable for negligent treatment to an eye injury sustained in the assault. The negligent surgery had led to the permanent loss of vision in the right eye. Here there were four distinct psychiatric illnesses. The first a phobia of black people, the second was PTSD, the third included personality change related to the loss of vision, and the fourth a severe depressive disorder. The court held that it was appropriate as a matter of law to require that each defendant only compensate in respect of the loss and damage for which they were held responsible. As such, separate awards for general damages reflecting the findings of the psychiatric experts and the fact that the hospital accepted that it alone was responsible for the loss of vision, were made at first instance and upheld on appeal, although some other losses were subject to apportionment.

Another situation that Underhill LJ noted may arise is where a pre-existing illness has been materially aggravated by the wrongful act, in which case compensation would be awarded to reflect the extent of the aggravation. If, however, there was no rational basis for such a division, principle 15 requires that the claimant be compensated in full. Yet, it is still necessary to consider if the claimant has a vulnerable personality that would have led to them suffering a stress-related illness in the future in any event. If so, a discount in accordance with principle 16 would follow. Irwin LJ concluded the judgment in *Konczak* by emphasising the importance of these issues receiving careful consideration from the experts to 'bring to bear as much clinical and diagnostic precision as possible paying close attention to one or both of the internationally recognised psychiatric diagnostic systems'.

Another illustrative case in this context is *Green v DG Group Services* [2006] EWHC 1898. Here the claimant was employed in a senior role with a commercial bank. She had been sexually and physically abused by her adoptive father as a child. She went on to exhibit recurring psychiatric problems including bulimia and episodes of depressive symptoms before commencing her employment with the defendant.

On starting work for the bank, she faced a campaign of bullying and harassment from a group of colleagues. Her employer took action against those responsible and the claimant continued her work with the bank, but then faced yet more bullying and harassment, this time from a different group of colleagues. This led to her suffering a breakdown. She recovered from this and returned to work. The claimant alleged that her return to work was not handled with sufficient care, in that she was exposed to one of the bullies in the workplace. She ultimately suffered a second breakdown, ten months after the first, triggered by reading one of her manager's emails which she interpreted as setting out an intention to terminate her position. After this she did not return to work with the bank.

The court held that the bank was liable for the bullying and harassment, all of which had taken place before the first breakdown, but not for other subsequent conduct that preceded the second collapse. As the psychiatric experts agreed that the claimant had been left at increased risk of a further episode of severe depression by virtue of the first breakdown, the court found that it materially contributed to the second breakdown. She had, in essence, been left in a

psychiatrically vulnerable position due to the tortious conduct, meaning she was susceptible to the shock of her interpretation of the email, even though that email – the trigger for the second breakdown- was not actionable.

On the question of whether or not there should be a reduction of the award of compensation on the grounds of psychiatric vulnerability, the court noted that the claimant had overcome adversity to secure a good career in a demanding and rewarding position. Although the psychiatric experts jointly agreed the claimant would have been likely to experience periods of depression in times of stress, the court held that it was highly unlikely that she would have succumbed to episodes of major depressive disorder, except in response to wholly abnormal stress such as the bullying behaviour that she had encountered at the bank. No reduction of the award was accordingly made.

It should perhaps be observed, however, that the claimant was intending to retrain and take up a role as a lecturer, and so the future loss of earnings claim was limited in any event. If a broader claim had been advanced, there may well have been arguments about the need to discount the award for future loss of earnings in accordance with principle 16.

The question of discounting earnings claims to reflect pre-existing vulnerability did arise, however, in one of the six cases considered by the Court of Appeal in *Hartman v South Essex Mental Health & Community Care NHS Trust* [2005] EWCA Civ 6. Here one of the claimants, Mr Moore, had his award of general damages reduced to reflect the fact that he had a history of suffering from depressive illness before the bullying that was the subject of his claim. The appeal against the refusal to discount his future loss of earnings claim failed, however. The court noted that, despite his previous illnesses, Mr Moore had always been able to return to work and his entitlement of up to six months' sick pay meant that he had never suffered any loss of earnings when he had been off in the past. No further discount was therefore made.

The last case we will look at in this context is *Thaine v London School of Economics* [2010] I.C.R 1422. The claimant brought claims of sex discrimination, disability discrimination and unfair dismissal. All bar two aspects of the sex discrimination claim were dismissed. At first instance the tribunal held that the unlawful workplace discrimination had been a material and effective cause of her psychiatric ill health, for which she was entitled to damages. The tribunal also held, however, that there were other concurrent causes of her ill health including obsessive-compulsive disorder, previous depressive episodes, relationship break-up, concern about her mother's health and other serious allegations that she had made against her employers, but which had not amounted to unlawful discrimination, including an allegation of sexual assault.

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Despite finding in her favour, at least in part, the tribunal was not, however impressed by the claimant's reliability. Her award was reduced by 60% on the basis that the unlawful discrimination contributed to her ill-health to the extent of 40%. On appeal, the EAT cited with approval comments by Mustill J (as he then was) in *Thompson v Smiths Shiprepairers (North Shields) Ltd* to the effect that the simple fact that precise quantification might be impossible should not lead to a defendant being obliged to pay for the whole of an impairment in circumstances where a substantial part of the damage was not that defendant's fault. Mustill J held that the demands of justice required the court to make the best estimate it could on the available evidence in reaching an apportionment.

Applying this principle (which was also endorsed by Underhill LJ in *Konczak*) the EAT dismissed the appeal against the tribunals' apportionment, asking rhetorically: 'Why should the LSE have to compensate Miss Thaine for her psychiatric ill-health and its consequences in its entirety, when the unlawful discrimination for which it was responsible, though materially contributing to her psychiatric ill-health, was just one of the many causes of it?'.

It is, however, perhaps useful to note that the tribunal had reservations about the expert evidence and the claimant's conduct in relation to it in *Thaine*. In particular, the tribunal had only the benefit of a written opinion from a jointly instructed psychiatrist who found the claimant had exaggerated some issues. The psychiatric evidence was found to contain inconsistencies, and the tribunal questioned whether or not the claimant had deliberately set out to supress evidence of pre-existing mental ill-health by withholding her medical records from the expert. It is perhaps unsurprising that in those circumstances, the tribunal found itself leaning towards an apportionment solution to the apparent evidential difficulties.

Conclusion

The case law covered here, taken with the case study at p24, demonstrate that pre-existing vulnerability, even one active close to an actionable breakdown, is not a bar to bringing a successful claim. On the contrary, in accordance with principle 3, if the employer is aware (or should be aware) of the vulnerability, it puts them on notice of the need to treat the claimant with particular care.

It is essential that all of these issues are carefully explored, analysed and understood from the outset. The psychiatric expert will need to provide an opinion that covers the issues of causation, including questions about material contribution where there may be more than one explanation for the occupational stress. In addition, the expert must consider the 'but for' scenario in instances of pre-existing psychiatric vulnerability.

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