A REVIEW ON EMPLOYER'S LIABILITY FOR MENTAL INJURIES ATTRIBUTABLE TO STRESS AT WORK

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What's in a name? That which we call a rose. By any other name would smell as sweet.
-Shakespeare in *Romeo and Juliet*

Introduction

The development in the law of tort concerning employer's liability for mental injuries sustained by the employees due to stress at work concerns the issue of recoverability of compensation for the infringement of 'rights' or 'interests' associated with the employees' mental well-being. The terminology of 'rights' and 'interests' has become contentious in modern tort scholarship[1]. In recent times some tort scholars have asserted that tort law has as its main goal, the protection of 'rights' that the claimant enjoys prior to an injurious interaction which results in the bringing of a tort action against the defendant[2]. Witting argued that, in theory, rights and interests are distinguished on a more empirical basis where rights are those interests that are protected strongly by courts while 'interests' are the attributes and goods for which persons frequently seek legal protection.[3]

By adopting a doctrinal method, this paper will explore and seek to provide clarification of the current *status quo* of the law on employers' liability for the mental injuries sustained by employees due to stress at work and to offer a prediction on the possible direction of the legal development in future, based on its current trend of growth in England and Wales. At the end of the paper, a discussion, and analysis of the development of law on employers' liability concerning cases where the employees sustained mental injury attributable to work, will be presented.

General application of tort law on the protection of bodily integrity

Generally, the law of tort protects bodily integrity, which includes protection from physical and mental harm. Since the landmark decision in *Donoghue v Stevenson*[4] the courts have developed the tort of negligence to provide further protection for personal safety including, within limits, mental integrity. 'Nervous shock 'or 'psychiatric injury' which terms are used interchangeably by tort scholars, refers to mental injury suffered by the plaintiff that is compensable upon successful proving of fault against the defendant. Though the protection of

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[1] Christian Witting, *Street on Torts*, (16th edn OUP 2021), 12.
[2] ibid
[3] ibid
[4] [1932] AC 562

one's bodily integrity often overlaps with the jurisdiction of criminal law, these two domains of law serve different purposes in the attainment of justice. Lies at the heart of tort law, it is concerned with the protection against interference on bodily autonomy, dignity, and mental well-being that warrants compensation upon its infringement.

Following the 'neighbour principle' as propounded in *Donoghue and Stevenson*[5], a person is protected against all sorts of injuries which is foreseeable, including mental injuries. However, under the incremental approach of imposing a duty of care following *Caparo Industries and Dickman*[6], there is a question of whether it is "fair, just, and reasonable" to impose a duty to the defendant in a situation when the courts are to deal with novel circumstances. In the context of an employment relationship, an employee is protected from reasonably foreseeable risks related to the nature of the work due to this proximity. As the question of law concerns the issue of duty of care herein, the development of the law in this area is bound to be restricted by the precedence set up by these authorities as control mechanisms to avoid opening the floodgates of litigation.

Mental Injury is a Recognised Compensable Harm at Law

In theory, mental injuries are often referred to as the reduced functionality of the mental faculty of the affected victims, which the law recognizes as a 'loss' *ipso facto* compensable. Legally, to have a claim for mental injury, the claimant must suffer one of the types of mental injury that is 'medically recognised' as mental illness, as held in the cases of *Page v Smith*[7] and *Alcock v Chief Constable of South Yorkshire*[8]. Further, in *Rothwell v Chemical and Insulating Company Limited*[9], the House of Lords affirmed the propositions of what counts as compensable mental injuries in the law of negligence, as decided in earlier cases. In this case, the court propounded that there could be no recovery from mere grief or anxiety and if the claimant suffered various hurts and the sum of the aggregates of the hurts greater than its individual parts, that also would not be claimable.

In *Page v Smith*[10], the claimant was involved in an accident with a car which was driven by the defendant negligently. The claimant suffered no physical injury, however, he succumbed to a revival in an acute form of chronic fatigue syndrome (ME) from which he had suffered periodically in the past. Consequently, he became so ill that he was unable to work. The defendant in this case argued that as the claimant had suffered no physical injury, the defendant was not liable for injury through nervous shock. The defendant further contended a normal person with no previous history of mental illness would not be expected to become ill as a result of a minor collision. On appeal to the House of Lords, the court rejected the contention and found for the claimant. It was held that in cases involving external physical events causing mental illness, the accepted distinction between 'primary' and 'secondary' victims becomes

[5] ibid
[6] [1990] UKHL 2
[7] [1996] AC 155
[8] [1992] 1 AC 310
[9] [2008] 1 AC 281
[10] [1996] AC 155

apposite. The court further, that for secondary victims, certain 'control mechanisms' must be imposed to limit the defendant's potential liability for mental injury. Among other things, nervous shock in a person of normal fortitude must be foreseeable.

Later in *White v CC of South Yorkshire Police*, the court distinguished temporary emotional states and compensable mental injuries. The court propounded that the recognised mental injuries must be at least one of the 'medically recognised' conditions, of such a nature that disturbs the normal functioning of the mind.[11] This term, therefore, covers many more specific mental illnesses that tort law may recognise as compensable harm.

In the past, the courts have been wary of permitting a wide ambit of liability for mental illness whether in cases involving an external event stressor or not. The policy reasons for adopting a cautious approach include the intangible nature of many mental illnesses, the risk of fictitious claims and excessive litigation; the indirect nature of their causation, and consequent problems of proving the causal link between the defendant's negligence and injury to the claimant. The courts are aware that the potential for liabilities might be large and 'disproportionate' to the defendant's fault.

Of all the limitations, there are difficulties in putting monetary value in the award of damages for mental injuries. Of that fact, the courts have taken a pragmatic approach to claims in this area and through judicial activism, engage in a process of working out a set of rules which permit recovery in the most extreme and deserving circumstances only. Nonetheless, as Lord Stein admitted in *White v Chief Constable of South Yorkshire*[12], his lordship remarked that 'the law on the recovery of compensation for pure mental harm is a patchwork quilt of distinctions which are difficult to justify'. This illustrates that the law on the duty of care for mental injury is complex and outcomes of cases are often not easily predictable, especially on the assessment of remedies. The problem remains, even after judicial attempts to clarify the principles governing liability for mental harm where claims are packaged neatly according to a scheme of primary and secondary victims[13].

Despite the policy concerns that continue to affect the development of the law, gradual judicial recognition of the genuine nature of mental illness led to the abandonment of the 19th-century attitude that non-physical harm to the persons is irrecoverable as seen in *Victorian Railways Commissioners v Coultas.*[14] In modern cases like *Alcock v Chief Constable of South Yorkshire Police*[15] and *McLoughlin v O'Brien*[16], there was a significant shift in judicial attitude where the courts began to allow damages for nervous shock. Following that, a claimant who became mentally ill because of the shock to his nervous system caused by a physical event that either threatened his safety or involved witnessing exceptionally distressing injuries to others is entitled to claim damages. The scheme of classifying the claimants into primary and

[11] *White v CC of South Yorkshire Police* [1999] 2 AC 455, 491
[12] [1999] 1 All ER 1, at 38
[13] *Page v Smith* [1996] AC 155
[14] [1888] 13 App Cas 222.
[15] [1992] 1 AC 310
[16] [1982] 2 All ER 298

secondary victims in cases of mental injury perhaps serves as the 'safety valve' for the court to control the floodgates of litigations in this area.[17]

Mental Injuries Attributable to Stress at Work – Understanding Liability of Employers

Though the courts were quite reluctant to endorse mental injuries as compensable harm in the past, the development of law after the decision in *Alcock*[18], *McLoughlin v O'Brien*[19], and *Page v Smith*[20], indicates a clear proposition that 'mental injuries' or 'nervous shock' or 'psychiatric injuries' are recoverable in tort law today.

In addition, the employers also owed non-delegable common law duties towards employees, over and above the written provisions regulating such relationships. Among others, the employers owe a duty not to inflict foreseeable harm to the employees' bodily integrity; be it in the form of physical injuries or mental injury. Whether this duty extended to cases involving mental injury suffered by the employee due to work stress was still uncertain until the House of Lords passed its judgment in *Walker v Northumberland*[21]. In this case, an employer was held liable for mental injuries sustained by their employees due to stress attributable to work. In this case, the court held in favor of the employees on reason that mental injury was imminent and foreseeable in that circumstance. Due to this proximity, the court ruled that it is "fair, just, and reasonable" to impose a duty on the employer for mental injury sustained by the employee attributable to the stress at work.

Following that direction, the court in *Hatton and Sutherland*[22] adopted the principles of 'foreseeability of psychiatric harm' that follows the 'neighbour principle' propounded in *Donoghue v Stevenson*[23] and *Caparo Industries v Dickman*[24] when dealing with an action brought by the employee who claimed to have suffered mental injuries attributable to his work. The court expounds that the law requires the defendant employer to be liable if he can foresee the development of mental illness in an employee with ostensible peculiarities to be more susceptible to such injuries. In other words, the damages are recoverable only when there is something in the employee's work history that would sufficiently alert the employer to a particular susceptibility that the employer should take note of. Furthermore, the defendant's actual knowledge of the claimant's frailties and susceptibilities will also affect the required standard of care. In the absence of some special knowledge on the claimant's susceptibility to

[17] *Page v Smith* [1996] AC 155
[18] [1992] 1 AC 310
[19] [1982] 2 All ER 298
[20] [1996] AC 155
[21] [1995] 1 All ER 737
[22] [2002] ICR 613
[23] [1932] AC 562
[24] [1990] UKHL 2

mental injuries, it had to be assumed that the claimant was of ordinary mental fortitude, as was held in *Grieves v FT Everard & Sons Ltd.*[25]

Therefore, the law today reinforces the requirement of foreseeability of mental injuries in each situation for such claims to be successful. Today, the notion that employers must ensure the safety, health, and welfare of employees at work from unnecessary risk of bodily harm, which includes physical and mental harm was affirmed by the UK Supreme Court in the recent case of *Woodland v Essex County Council* [26]. In this case, the Supreme Court affirmed the earlier decision in *Hatton v Sutherland*[27] on the principle that the employer's duty extends to the effect of working conditions or environment on the mental injury of his employees as well, alongside the foreseeable physical injury. This decision is observed as a significant development in this area, as it clarifies the entitlement of employees to initiate legal action, for the mental injuries sustained due to stress at work or unconducive work environment, against the employers. Hale LJ (as her ladyship then was), had expounded several questions or criteria, to determine the foreseeability of mental injury suffered by the employees. These criteria include the nature and extent of the work, whether the workload had gone beyond the normal workload for that particular position, whether it was intellectually or emotionally demanding for the employee, whether in common practice the demands exceed the threshold, whether there is abnormal absenteeism or sickness within the same department, whether there are any signs exhibited from the employee of his impending harm to health, whether the employee has a particular vulnerability or had suffered from illness attributable to stress at work. It is observed that the stressed employees would celebrate the current state of law since it is deemed that the protection of their mental health is now recognised clearly by the law.

In *Hatton v Sutherland* (supra), the availability of counselling services and confidential advice may be sufficient to prevent a breach of the duty on the part of the employers, however, it seems that after *Dickins v O2 Plc*[28], more is expected from the employer to discharge the duty. In *Dickins*, the mere provision of such a helpline for a worker who has suffered a mental injury due to excessive work-related stress is no longer sufficient to discharge the employers of their duty, and employers are expected to conduct 'managerial intervention' and to do more than merely directing their employees to a helpline when they are notified by the employees of experiencing from extreme stress.

Though the employer's duty of care on mental injury seems expanding, the control mechanism adopted by the court lies in the issue of foreseeability of such harm. In cases where mental injury is not foreseeable, it is highly likely for the employer not to be held liable.[29] As held in *Simmons v British Steel Plc*[30], the courts propounded that where the risk of physical injury is reasonably foreseeable in the circumstance, the employer would also be liable for any mental injury caused by the risk.

[25] [2008] 1 AC 281, at [26] and [99]
[26] [2013] UKSC 66
[27] [2002] 2 All ER 1
[28] [2008] EWCA Civ 1144
[29] *Woodland v Essex County Council* [2013] UKSC 66
[30] [2004] UKHL 20

The duty to prevent nervous shock on the employees also extended to cases where the nature of work is inherently dangerous, such as in jobs involving emergency services, armed forces, and other intellectual or emotionally demanding jobs, just to name a few for illustration. In such circumstances, although the courts are hesitant to interfere with the employment agreement between them (where employees have given their consent prior to the employment), employers still owe non-delegable duty to the employees. For instance, in *Melville v Home Office*[31], the court allowed the claim of mental illness suffered by the plaintiff after dealing with traumatic events in the prison when he was stationed on duty as a health officer there. The outcome of this case is therefore fortifying the protection of employees against foreseeable mental injury.

However, a claim for mental injury against the employer was denied in *Barber v Somerset CC*[32], hence it is observed that the court is setting a limitation for claim in the area. The outcome was not for the want of proximity between the parties, but because of both problems in establishing foreseeability and policy reasons (including those relating to the importance of the contract of employment in determining what the employer has the right to demand of the employee). According to Hale LJ, her ladyship said that, usually, after suffering a nervous breakdown the question would be whether psychiatry illness was foreseeable by the employer not in the person of ordinary mental fortitude, but in the individual employee[33]. The court had taken such an approach because of the existence of an actual working relation between the parties, that establishes the requisite proximity of the relationship. In this case, the court laid down the relevant factors to determine whether or not the injury was foreseeable on the particular employee, that would include the nature and extent of work being done by the employee, sense of ill health from the employee, and frequent or prolonged absence from work. The outcome of the case signifies the present judicial approach effectively insulates the employer from liability in a quite typical case where the employee would not admit to experiencing stress for fear of being unable to cope, thus striking the balance between the interests of employers and employees.[34]

Magnifying the *ratio decidendi*- case analysis and discussion

In every novel case involving a claim of the negligent causation of mental illness, the claimant will succeed on the issue of duty of care provided that the framework in *Caparo Industries Plc v Dickman*[35] was proven, that the injury was foreseeable to the victim, and it is 'fair, just, and reasonable' to impose a duty in that situation. As the preliminary filter on the imposition of a duty of care in negligence, this *Caparo* test is the first hurdle that litigants must pass through. Often, the question of whether it is "fair just and reasonable" to impose a duty in such

[31] [2005] EWCA Civ 6
[32] [2004] 1 WLR 1089
[33] ibid
[34] M. Lunney and K. Oliphant, *Tort Law: Text and Materials* (5th edn, 2013), 367.
[35] [1990] UKHL 2

circumstances, was deemed being used as the ‘triumph card’ to defeat a claim under mental injury for want of certainty and to control the floodgates of litigation.

The question as to what amounts to ‘fair, just, and reasonable’ as required by *Caparo* test remains an unsolved mystery, and it was criticised for echoing 'policy considerations' in *Anns v Merton London Borough Council*[36]. Though the principle of ‘policy considerations’ was overruled outrightly in *Murphy v Brentwood District Council*[37] the spirit of the principle seems to reincarnate and camouflage in the brand-new labeling of “fair, just, and reasonable” test that still ‘possess’ the body of the modern legal framework. Cacophonously, the spirit of ‘policy considerations’ in *Anns v Merton* that mysteriously reincarnates in a new form, continues to ‘whisper’ to the ears of the judges when shaping the development in this area as seen in *Page v Smith*[38]. Thus, the development in this area is often observed to be unpredictable and “controversial” as criticised by academics Bailey and Nolan.[39]

In the context of the infliction of mental injury in employment relationships, the decision in *White v Chief Constable of South Yorkshire Police*[40] clearly close the door to further expansion of the categories of recoverable claims for mental injury. Due to this restriction, it forms the precursor to the later development in this area. As Stapleton argued, "The complaint seemed to be that if the analysis of duty was generalised in this way into some sort of simple principle or 'test' it was doomed to generate far too much liability in the hands of lower courts who needed more restraining guideline."[41]

Though the court in *Walker and Northumberland*[42] allowed the claim for nervous shock where the risk of mental injury is imminent and foreseeable in the circumstances, that requirement can be restrictive rather than prompting an expansion. Subsequently, Lady Justice Hale explains the condition on the recoverability of claims in mental injury in *Barber and Somerset City Council*[43], which also introduced further limitations for further development to take place. Finally, when the court in *Hartman v South Essex Mental Health & Community Care NHS Trust*[44] held that employers would be liable for mental injury sustained by the employees which was due to the course of employment, this provides another shade of situations that requires further refinement in the future.

Conclusion

In the context of mental injury, the duty of care rules are complex and represent a desire to balance competing interests involving mental integrity and a desire to avoid crushing liabilities.

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[36] [1978] AC 728
[37] [1991]1 AC 398
[38] [1996] AC 155
[39] Bailey and Nolan, ‘The *Page v Smith* Saga: A Tale of Inauspicious Origins and Unintended Consequences’ (2010) 69 Cambridge Law Journal 495: “*Page* was controversial when it was decided and hard to analyse, and has caused a range of difficulties in subsequent litigation”.
[40] [1992] 2 AC 455
[41] Jane Stapleton, ‘In Restraint of Tort’ in P Birks (ed), Frontiers of Liability (1994), 83
[42] [1995] 1 All ER 737
[43] [2004] 1 WLR 1089
[44] [2005] EWCA Civ 6 CA

Though we have a properly structured scheme of primary and secondary victims of mental injuries, the entitlement of the employees to succeed in this area is fraught with the ‘horror’ of uncertainties lies on ‘policy reasons’ which is a legal mystery that remains unsolved camouflaging as the filtering test as to whether it is ‘fair just and reasonable’ to impose a duty against the employers. Until and unless this cosmetic labeling of 'policy reasons' (that is also personified in various other fancy terms) is removed from the test in imposing or expanding the duty of care, the court retains wide discretion in deciding whether a claim is to be allowed. The old ‘policy considerations’ principle that was eventually embedded in the new ‘fair, just, and reasonable’ test seems to fit squarely to the famous line by Shakespeare in Romeo and Juliet, “*What's in a name? That which we call a rose by any other name would smell as sweet*” as things are what they are, no matter what name it is called!