

Jo Carby-Hall

Employers' Liability – from Physical to Psychiatric Illnesses

Introduction

This text proposes to treat an important development which has taken place in the United Kingdom in recent years in the field of the employer's common law duty of care. It is proposed to analyse briefly the well established concept of the employer's common law duty of care towards his employees which, until recently, applied generally only to physical injuries and illnesses. The development of this concept in recent years into the psychiatric field is a welcome step forward and shows how labour law has progressed and is progressing in the 21st century.

The employers' common law duty of care in respect of physical illnesses

The law relating to employers' liability spans over a period of some two hundred years.¹ In the modern common law the employer owes the

¹ At the time of the British industrial revolution in the nineteenth century the courts were aware

employee a non-delegable duty of care.² This means that the employer has to take reasonable care for the health, safety and welfare of the employee. Such duty to take *reasonable* care is automatically incorporated into the contract of employment whether or not it is specifically stated therein. Furthermore, the duty of care is owed *individually* to each em-

that their judgments affected the employer/employee relationship, particularly in respect to damages employers had to pay to their employees for industrial injuries. The insurance industry was in its infancy in those days and employers were not legally compelled to insure for their employees' actions caused in the course of their employment. Being aware of this heavy financial burden imposed upon employers' shoulders, the courts encouraged employees to be responsible for their own safety. Hence the court's decision in *Priestly v Fowler* (1837) 3 M&W 1, to introduce the "doctrine of common employment" whereby the employee took full responsibility for any injury sustained through the negligence of a fellow employee provided that the employer selected a competent fellow employee. (*Bartonshill Coal Co. v Reid* (1856) 3 Macq. 266). It thus became an implied term in the contract of employment of every employee that he/she took full responsibility for any injuries caused by the negligence of fellow employees. It should also be noted that where contributory negligence was established by the employee, such contributory negligence was sufficient to prevent that employee from bringing an action in negligence. (*Senior v Ward* (1859) 1 El.&EL. 385). As times progressed and being aware of the hardship which the doctrine of common employment imposed on employees, the courts and legislature acted in tandem to remedy that hardship. By the end of the nineteenth century the House of Lords (now, since October 2009, called the Supreme Court) in *Smith v Charles Baker & Sons* [1891] A.C. 325 (H.L.) expressed its reluctance in certain circumstances to apply the doctrine of common employment. The common law thus introduced the notion of a non-delegable personal duty of care of the employer towards each employee, thus enabling employees to bring an action for damages for injuries caused by a fellow employee. See *Wilson and Clyde Coal Co. v English* [1938] A.C. 57 (H.L.). By that time the insurance industry developed which enabled employers to insure themselves against such risks. By the end of the nineteenth century, the doctrine of common employment was held in *Groves v Lord Wimborne* [1895–1899] All E.R. 147, not to apply to torts of breaches of statutory duty thus enabling the employee to sue the employer for damages. By the middle of the twentieth century, the doctrine of common employment was abolished by the Law Reform (Personal Injuries) Act 1948. Furthermore, the notion that the employee who contributed to the employer's negligence could not sue the employer was also abolished by the Law Reform (Contributory Negligence) Act, 1945. This Act permitted the courts to apportion damages.

² By analogy the element of "non-delegable duty of care" could have a statutory base such as the Management of Health and Safety at Work Regulations, 1999, where a duty is imposed upon the employer to institute a risk assessment. (See *Uren v Corporate Leisure (U.K.) Ltd* [2001] EWCA Civ. 66).

ployee. In *Paris v Stepney Borough Council*,³ the House of Lords⁴ held the employer liable for not providing goggles to a one eyed employee (even though goggles were not provided to two eyed employees) who was injured in the good eye thus making him totally blind. The employer's duty of care being an *individual* one, greater safety precautions needed to be taken towards vulnerable employees.

It is important to note that the common law duty of care is owed by an employer towards an employee and not to any other type of worker. The courts have battled over many years and formulated numerous tests in order to establish the distinction between an employee working under a contract of service⁵ and an independent contractor working under a contract for services. Limitations of space do not allow for a discussion on this important distinction and the reader is thus referred elsewhere.⁶

Although the duty of care is a *single* duty, that duty is divided for the sake of clarity into four limbs. To comply with the law relating to the non-delegable duty of care, the employer must take reasonable care (a) by employing competent staff; (b) by providing a safe place of work; (c) by providing machinery, plant and equipment which is adequate for the work to be performed; and (d) by running an overall safe system of work.

³ [1951] A.C. 367 (H.L.) See too, *Coxall v Goodyear Great Britain Ltd.* [2003] 1W.L.R. 536 (H.L.) (Asthma sufferer allowed by the employers to work as a paint operator. The employers were held liable for breach of their duty of care.); *McDermid v Nash Dredging and Reclamation Co. Ltd.* [1987] 3 W.L.R. 212 (H.L.) (A deckhand on a tug was injured by mooring ropes when the tug moved off without warning. Negligence was attributed to the captain of the tug. Although the Captain was not employed by the defendants these latter were held liable) and *Payne v Colne Valley Electricity Supply Co. Ltd. and British Insulated Cables Ltd.* [1938] 4 All E.R. 803. These cases show that the courts are prepared to take a generous approach with regard to the personal liability of the employer. See discussion by E. McKendrick in (1990) 53 M.L.R. 773.

⁴ As it was then called. Since 1st October, 2009, the House of Lords has moved to new premises and has been renamed as the Supreme Court.

⁵ A contract of service is also known as a contract of employment.

⁶ For a more detailed discussion see J. Carby-Hall, *New Frontiers of Labour Law: Dependent and Autonomous Workers*, [in:] *Du Travail Salarié au Travail Indépendant: Permanences et Mutations*, Bruno Veneziani and Umberto Carabelli (Eds) (2003) Volume 3 of the SOCRATES Programme. Cacucci Editore Bari, Italy at pp.163 to 308 and particularly at pp.246 to 282.

With regard to the employment of competent staff it was held in *Hudson v Ridge Manufacturing Co.*⁷ that the employer, – by allowing the employee over a number of years to trip fellow employees and carry out “horse play” which culminated in causing injury to the plaintiff, – breached his duty of care despite of the fact that the employer knowing of these practices reprimanded the plaintiff on numerous previous occasions. The employer should have taken stronger disciplinary measures to stop these practices from occurring. Part of the employer’s duty of care is to keep the workplace safe.⁸ In *Latimer v A.E.C. Ltd.*⁹ the employer was held to have exercised a reasonable duty of care when, as a result of an unusually heavy rain storm, the floor of the factory was flooded. The plaintiff slipped and injured himself. The employer had acted reasonably in the circumstance when sawdust and sand were applied to the floors.¹⁰ The third limb of the duty of care is the provision and maintenance of adequate plant, machinery and tools for the work to be performed in a safe manner. The employer’s duty is not such that the latest equipment should be purchased. So long as the equipment is safe for the job it is to perform and is properly maintained, this would be sufficient to meet the requirements of the law which provides for a *reasonable* duty of care. In *Davie v New Merton Board Mills Ltd.*¹¹ their Lordships held that the employer had not breached his duty of care when a metal particle from a machine hit the plaintiff’s left eye which made him lose his sight. That machine had been bought from a reputable supplier and having had a latent defect the employer was not to know, upon reasonable inspection, of that defect.¹² *Davie’s case* has

⁷ [1957] 2 Q.B. 348. Cf. *Smith v Crossley Brothers Ltd.* (1951) Sol. Jo. 655. See too *Speed v Swift (Thomas) and Co. Ltd.* [1943] 1 All E.R. 539.

⁸ See *Ashdown v Samuel Williams & Sons. Ltd.* [1956] 3 W.L.R. 1104 (C.A.) See too Lord Porter’s dictum in *London Graving Dock Co. V Horton* [1951] 2 All.E.R.1 at p 5 where he emphasises the fact that the employer’s duty of care owed to the employee is higher than that owed to an invitee.

⁹ [1952] 2 Q.B. 701.

¹⁰ See too *Donachey v Boulton and Paul Ltd.*[1967] K.I.R. 787 (H.L.).

¹¹ [1959] 2 W.L.R. 331 (H.L.).

¹² See the constructive criticism made by C.J. Hamson in (1959) C.L.J. 157 and B.A. Hepple (1970) C.L.J. 25 See too *Davidson v Handley Page Ltd.* [1945] 1 All E.R. 235 (C.A.) where it was held that the obligation of the employer to provide safe appliances covers all acts which are reasonably incidental to the daily work.

been reversed by statute some years later thus making the employer liable in such circumstances.¹³ The employee may still bring an action against the manufacturer if he/she can prove (i) that the defective equipment was the *cause* of the accident and (ii) that on the balance of probabilities the defect, whether patent or latent, was due to the *fault* of the manufacturer. The 1969 Act confirms that the rules relating to contributory negligence apply.¹⁴ The fourth limb of the employer's duty of care treats the provision of a safe system of work. The employer has a duty to take reasonable care in supervising the work performed by the employee and organise the method in which the work is to be performed. This includes giving employees adequate training, proper and clear instructions and guidance. Furthermore the employer has a duty to see that all instructions are followed. The more dangerous and complex the work, the greater is the employer's duty of care to provide a system of work which is safe. In *General Cleaning Contractors v Christmas*¹⁵ the employer was held liable for not providing a safe system of work when proper instructions were not given to window cleaners who were standing on window sills while cleaning the outside part of a sash window and when a sash broke causing the window to shut abruptly thus causing injury to the cleaner.¹⁶

¹³ This House of Lords case has since been reversed by the Employer's Liability (Defective Equipment) Act 1969 which provides that where an employee is injured in the course of his employment by defective equipment which has been purchased by the employer for the purposes of the employer's business and the defect is due either wholly or partly to the fault of an identified or unidentified third party (e.g. the manufacturer) the fault will nevertheless be deemed to be that of the employer. Machinery covered extends to plant, aircraft, vehicles, clothing, sunken ships (*Coltman v Bibby Tankers Ltd. (The Derbyshire)* [1988] 3 W.L.R. 11h1 (H.L.)) and flagstones which broke and injured the plaintiff (*Knowles v Liverpool City Council* [1993] 1 W.L.R. 1428). See too Employer's Liability (Defective Equipment) Act 1969 S. 1 (1) (3).

¹⁴ Employer's Liability (Defective Equipment) Act, 1969 S 1(1) (b).

¹⁵ [1953] A.C. 180 (H.L.).

¹⁶ See too *Drummond v British Building Cleaners Ltd.* [1954] 3 All E.R. 507 and *Smith v Austin Lifts Ltd.* [1959] 1 All E.R. 81. (the employer must take reasonable care depending upon the circumstances); *Woods v Durable Suites Ltd.* [1953] 2 All E.R. 391 (allowances to be made for the imperfections of human nature); *Rees v Cambrian Wagon Works Ltd.* 91964) L.T. 220. (work of a complicated or unusual character); *Olsen v Corry & Gravesend Aviation Ltd* [1936] 3 All E.R. 241 (apprentice's imperfect system of instruction); *James v Hepworth & Grandage Ltd.* [1967] K.I.R. 809 (C.A.) (the bringing to the attention of employees protective spats/clothing); *Bell v Arnott 7 Harrison Ltd.* [1967] 2 K.I.R. 825 (C.A.) (regular inspections of electric drills require-

The employers' common law duty of care with respect to psychiatric illnesses

From the brief discussion which has taken place above it will be readily be noticed that breach of the employer's common law duty of care towards employees related mainly to physical injuries. The reason is that, until recently, little was known about psychiatric illnesses. With the advance in medical science relating to psychiatric illnesses, a significant amount of jurisprudence treating such illnesses has developed in the last twenty five years.

In applying the general rules of the employer's liability, Coleman J. in *Walker v Northumberland County Council*¹⁷ held that the employer's common law duty of care could be extended to cover psychological illnesses.¹⁸ In *Walker*, the employee suffered two nervous breakdowns because of stress at work. The employer should have foreseen after the first nervous breakdown of a second one occurring. The employer should thus have taken measures to reduce the employee's workload. The decision in *Walker* was confirmed in the leading Court of Appeal case of

ment to meet the standard of care needed.). The degree of care which the duty involves must be proportionate to the degree of risk. (See *Northwestern Utilities Ltd. v London Guarantee and Accident Co. Ltd.* [1936] A.C. 108.) Some cases have dealt with situations in which it was difficult to determine whether there was a duty owed to the employee who is injured and how stringent the duty was. (In *Williams v Grimshaw et al.* [1968] 3 K.I.R. 610 the stewardess of a cricket club was injured by robbers while she was carrying money. It was held that the employers were under a duty not to expose her to unnecessary risk, including the risk of injury by criminals, but that in this case they had taken reasonable care for the stewardess's safety. In *Houghton v Hackney Borough Council* [1968] 3 K.I.R. 615 a rent collector was injured by robbers and the issue was whether the employee was properly protected while collecting rents. The court held that the employers were under a duty to take reasonable care to prevent unnecessary risks including criminal injury risks but that they discharged their duty in this case. See too *Cook v Broderip* The Times 27th February, 1968 (cleaner injured by an electric fire while cleaning a flat where the employer was held not liable as a competent electrician was employed).

¹⁷ [1995] 1 All E.R. 737.

¹⁸ For a detailed analysis regarding psychiatric illnesses see J. Carby-Hall, *Mental Illnesses: The British Labour Law Experience* [in:] *Prawo Pracy w Świetle Procesów Integracji Europejskiej – Księga jubileuszowa Professor Marii Matej-Tyrowicz*, eds. J. Wrątny, M. Rycak, Wolters Kluwer, Warszawa 2011, at pp. 322 to 363. See too a commentary on *Walker's case* by D. Nolan (1995) 24 I.L.J. 660.

*Sutherland v Hatton*¹⁹ in the guidance given to employers by Hale L.J.²⁰ One of the guidelines given by her ladyship was that the employer is entitled to presume that the employee is able to cope with stress or harassment at work unless he knows, or ought to know, otherwise.²¹ In *Hutton*, the plaintiff, a comprehensive school teacher, suffered from a psychiatric illness caused by stress at work. The plaintiff never complained nor asked for assistance from the school and therefore kept the stress she was experiencing a secret. Since the employers were not aware of the situation they were held to be not liable for breach of their duty of care. In *Barber v Somerset County Council*²² however, where the facts were similar to *Hutton's case*, the House of Lords reversed the Court of Appeal's decision and found for the plaintiff. The brief facts of this case were that the plaintiff who was a teacher suffered from a mental breakdown and given a sick note by his general practitioner stating that the plaintiff was suffering from depression caused by stress at work and recommended a three week period of sick leave. On several previous occasions the plaintiff had also expressed his concerns that his workload was affecting his health. The distinction between the *Hutton* and *Barber* decisions was that in the former case Mrs Hutton had not complained to her employer about her stress and her psychiatric illness. The employer could thus not have foreseen the consequences. In *Barber* however, the employers having been alerted, they were held to be in breach of their common law duty of care (in negligence) for not taking appropriate action to remedy or ease the plaintiff's stress and to make the necessary inquiries. Lord Walker made it clear in his judgment that the reasonable and prudent employer "... ought to address the safety of his workers²³ in the light of what he knows or ought to know".

¹⁹ [2002] 2 All E.R. 1 (C.A.).

²⁰ See J. Carby-Hall *op. cit.* at pp. 344 to 346.

²¹ See *ibidem* at p. 345. See too N.J. Mullany, *Containing claims for workplace mental illness* (2002) 118 L.Q.R. 373.

²² [2004] 1 W.L.R. 1089 (H.L.).

²³ Footnote inserted by the author to point out that the employer's common law duty of care applies to the "employee" and not the "worker." His lordship appears to have slipped up in his terminology! See J. Carby-Hall, *op. cit.* SOCRATES Programme (footnote 6 above).

Lest the reader should find any inconsistency between the *Hatton* and *Barber* decisions, Scott-Baker L.J. in the Court of Appeal in *Hartman v South Sussex Mental Health and Community Care NHS Trust*²⁴ made it clear that Hale L.J.'s guidelines (in *Hatton*) were accepted by Lord Walker (in *Barber*) but that each case relating to the common law duty of care, had to be decided upon its own facts and merits based on what a reasonable employer should, or ought to, know about the employee's psychiatric health.²⁵

A concluding thought

It is gratifying to note the important progress which has taken place at common law in recent years! The well established employer's liability for breach of his common law duty of care owed to his employees for physical injuries has now been extended to psychiatric illnesses and injuries.

The test to be applied in the case of psychiatric injury/illnesses is that of foreseeability of a negative reaction which the employee, seen as an individual, might suffer because of work pressures such as stress and harassment. The employer has to take *reasonable* measures to prevent physical and psychiatric illnesses/and injuries from occurring. What is

²⁴ [2005] I.C.R.782 (C.A.).

²⁵ The Court of Appeal in the *Hartman* case (a joint action brought before the Court of Appeal by six plaintiffs) dismissed one of the cases on the grounds that the employer of a nursing auxiliary assisting children with learning difficulties (a) did not owe his employees a higher duty of care than in other occupations and (b) the fact that the employee reported in confidence to the Occupational Health Department the fact that she suffered a nervous breakdown on a previous occasion does not mean that the employer did know, or ought to have known, of the employee's psychiatric illness. In contrast the sixth appeal was upheld in *Melville v Home Office* because the employers agreed that they breached their duty of care in that a reasonable person would have foreseen psychiatric illnesses occurring in those circumstances. These circumstances were that it was foreseeable that a prison healthcare officer, one of whose jobs was to recover the bodies of prisoners who committed suicide, needed the necessary support. Although such support was available, it was not made available to the plaintiff. Scott-Baker L.J. posited "It is illogical to argue that when an employer has foreseen a risk of psychiatric injury to employees exposed to (...) traumatic incidents, such inquiry is not foreseeable."

reasonably foreseeable depends upon the facts of each particular case taking into account the size, resources, and demands made upon of the establishment. The fact that a medical counselling service has been set up in the establishment to give confidential advice to those who suffer from mental disorders may in some circumstances²⁶ exonerate the employer from liability.

In *Walker's case*, Coleman J. based his judgment by applying the known principles of employers' liability. No mention was made in that case of the earlier House of Lords decision in *Alcock v Chief Constable of South Yorkshire Police*²⁷ which required that in psychiatric illness cases a restrictive approach had to be taken.²⁸ In *White v Chief Constable of Yorkshire Police*²⁹ an *obiter dictum* remark was made by Lord Hoffman which referred to *Walker's case* where his lordship made a distinction between (a) claims emanating from the work itself and (b) those originating from seeing others being injured in the course of their employment.³⁰ Although the decision in *Walker* had been questioned for a while, subsequent case law, and in particular *Hatton*, has accepted the reasoning of Coleman J. in *Walker*.³¹

²⁶ But see *Daw v Intel Corporation (U.K.) Ltd.* [2007] 2 All E.R. 126 (C.A.) where the existence of a counselling service in the enterprise did not exonerate the employer from liability. What the employer needed to do was to reduce Mr. Daw's workload.

²⁷ [1992] 1 A.C. 310 (H.L.).

²⁸ See too Lord Steyn's dictum in *White v Chief Constable of South Yorkshire Police* [1999] A.C. 455 (C.A.) which indicated that claims made by employees against their employers in respect of psychiatric illnesses should be subject to the normal rules of the tort of negligence which restrict the recovery of damages.

²⁹ [1999] A.C.455 (C.A.).

³⁰ It will be recalled that in *White* the House of Lords held that the police officers who witnessed and helped the victims of the Hillsborough disaster and who consequently suffered psychiatric illnesses did not succeed in their claim against their employer.

³¹ See too *Corr v I.B.C.* [2008] 1 A.C. 844 (H.L.). See also the Law Commission Report No. 249 entitled "Liability for Psychiatric Illness" (1998) suggesting that the decision in *Walker* represented "(...) a just development in the law." Parameters of space do not allow for further discussion. The reader may wish to consult some important cases heard in the field of psychiatric illnesses/injuries which have not been mentioned in this chapter. They include *Page v Smith* [1996] A.C. 155 (H.L.); *Frost v Chief Constable of South Yorkshire Police* [1999] I.C.R. 216. (H.L.)' *Greatorex v Greatorex et al.* [2000] 4 All E.R. 769 (QBD) and *Majrowski v Guy's and St. Thomas' NHS Trust* [2006] I.C.R. 1199 (H.L.).