

A
Court of Appeal

Hatton v Sutherland

Barber v Somerset County Council

B
Jones v Sandwell Metropolitan Borough Council

Bishop v Baker Refractories Ltd

[2002] EWCA Civ 76

2001 Nov 27, 28, 29, 30;
2002 Feb 5

Brooke, Hale and Kay LJJ

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Negligence — Duty of care to whom? — Employee — Employees suffering psychiatric injury caused by work-related stress — Whether employers under duty of care — Whether employers in breach of duty — Appropriate test and approach

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Claims by employees for damages in respect of psychiatric injury caused by stress arising from their employment should be considered in accordance with the ordinary principles of employer's liability, applying the same test in all cases, whatever the employment, of whether the kind of harm to the particular employee was reasonably foreseeable and, once the risk of harm to health from stress in the workplace was foreseeable, whether and in what respect the employer was in breach of his duty to take reasonable care, and whether that breach of duty had caused the harm suffered (post, paras 20, 22, 23, 25, 33, 43).

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Where, therefore, in four separate actions claimant employees were awarded damages against their employers for psychiatric illness caused by stress at work, and the employers appealed—

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Held, (1) allowing the first appeal, that, to trigger a duty on an employer to take steps, the indications of impending harm to the health of an employee arising from stress at work had to be plain enough for any reasonable employer to realise that he should do something about it; and that, on the facts, the employee's workload and pattern of absence taken together could not amount to a sufficiently clear indication that she was likely to suffer from psychiatric injury as a result of stress at work such as to trigger a duty on the employer to do more than was in fact done (post, paras 31, 43, 48).

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(2) Allowing the second appeal, that, on the facts, it was difficult to identify a point at which the employer could have had a duty to take positive steps, and the evidence, taken at its highest, did not sustain a finding that the employer was in breach of its duty of care towards the employee (post, para 59).

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(3) Dismissing the third appeal, that the employer knew that excessive demands were being placed on the employee and that she was complaining that problems at work were causing harm to her health, and once it was concluded that the combination of the way in which she was being treated and her formal complaints about it made injury to her health foreseeable, it was not difficult to identify what might have been done to prevent the injury which in fact occurred; and that, accordingly, the judge had been entitled to conclude that failure to take such steps had caused the employee's breakdown (post, paras 65–67).

(4) Allowing the fourth appeal, that there was nothing unusual, excessive or unreasonable about the demands being placed on the employee by his work, he was simply unable to cope with changes being made, and his employers were unaware of advice by his doctor that he should change his job; and that, even if the employers had

realised that something should be done, there was nothing they could reasonably have been expected to do, since the only solution would have been to dismiss the employee, and an employer could not be in breach of duty for failing to dismiss an employee who wanted to continue and master the job despite the advice given to him by his own doctor (post, paras 34, 43, 72, 73).

Walker v Northumberland County Council [1995] ICR 702 approved.

For a summary of the principles and approach to be applied to claims by employees in respect of psychiatric illness caused by stress at work, see post, para 43.

The following cases are referred to in the judgment of the court:

Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310; [1991] 3 WLR 1057; [1991] 4 All ER 907, HL(E)

Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602; [1995] 4 All ER 907, CA

Bonnington Castings Ltd v Wardlaw [1956] AC 613; [1956] 2 WLR 707; [1955] 2 All ER 615, HL(Sc)

Calascione v Dixon (1993) 19 BMLR 97, CA

Cook v Swinfen [1967] 1 WLR 457; [1967] 1 All ER 299, CA

Davies v Taylor [1974] AC 207; [1972] 3 WLR 801; [1972] 3 All ER 836, HL(E)

Doyle v Wallace [1998] PIQR Q146, CA

Frost v Chief Constable of South Yorkshire Police [1999] ICR 216; [1999] 2 AC 455; [1998] 3 WLR 1509; [1999] 1 All ER 1, HL(E)

Garrett v Camden London Borough Council [2001] EWCA Civ 395, CA

Holtby v Brigham & Cowan (Hull) Ltd [2000] ICR 1086; [2000] 3 All ER 421, CA

McGhee v National Coal Board [1973] 1 WLR 1; [1972] 3 All ER 1008, HL(Sc)

McIntyre v Filtrona Ltd (unreported) 12 March 1996, Court of Appeal Transcript No 1310 of 1996, CA

McLoughlin v Jones [2001] EWCA Civ 1743; [2002] 2 WLR 1279, CA

Page v Smith [1993] PIQR Q55; [1996] AC 155; [1995] 2 WLR 644; [1995] 2 All ER 736, HL(E)

Page v Smith (No 2) [1996] 1 WLR 855; [1996] 3 All ER 272, CA

Paris v Stepney Borough Council [1951] AC 367; [1951] 1 All ER 42, HL(E)

Petch v Customs and Excise Comrs [1993] ICR 789, CA

Rahman v Arearose Ltd [2001] QB 351; [2000] 3 WLR 1184, CA

Stokes v Guest, Keen and Nettlefold (Nuts and Bolts) Ltd [1968] 1 WLR 1776

Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] ICR 236; [1984] QB 405; [1984] 2 WLR 522; [1984] 1 All ER 881

Vernon v Bosley (No 1) [1997] 1 All ER 577; [1997] RTR 1, CA

Walker v Northumberland County Council [1995] ICR 702; [1995] 1 All ER 737

Waters v Comr of Police of the Metropolis [2000] ICR 1064; [2000] 1 WLR 1607; [2000] 4 All ER 934, HL(E)

Wilsner v Essex Area Health Authority [1988] AC 1074; [1988] 2 WLR 557; [1988] 1 All ER 871, HL(E)

Wilsons & Clyde Coal Co Ltd v English [1938] AC 57; [1937] 3 All ER 628, HL(Sc)

Withers v Perry Chain Co Ltd [1961] 1 WLR 1314; [1961] 3 All ER 418, CA

The following additional cases were cited in argument:

A B v Tameside and Glossop Health Authority (1997) 8 Med LR 91, CA

Athey v Leonati [1997] 1 WWR 97

Balfour v William Beardmore & Co Ltd 1956 SLT 205

Bolton v Stone [1951] AC 850; [1951] 1 All ER 1078, HL(E)

Bourhill v Young 1941 SC 395; [1943] AC 92; [1942] 2 All ER 396, HL(Sc)

Cross v Highland & Islands Enterprise [2001] IRLR 336, Ct of Sess

Henderson v Wakefield Shirt Co Ltd [1997] PIQR P413, CA

Milner v Humphreys and Glasgow Ltd (unreported) 24 November 1998, Longmore J

- A *McLoughlin v O'Brian* [1983] 1 AC 410; [1982] 2 WLR 982; [1982] 2 All ER 298, HL(E)
Rorrison v West Lothian Council 2000 SCLR 245, Ct of Sess
Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388; [1961] 2 WLR 126; [1961] 1 All ER 404, PC

The following additional cases, although not cited, were referred to in the skeleton arguments:

- B *Bailey v Rolls Royce (1971) Ltd* [1984] ICR 688, CA
Ball v The Post Office [1995] PIQR P5
Barrett v Enfield London Borough Council [2001] 2 AC 550; [1999] 3 WLR 79; [1999] 3 All ER 193, HL(E)
Fraser v State Hospitals Board for Scotland The Times, 12 September 2000
General Cleaning Contractors Ltd v Christmas [1953] AC 180; [1953] 2 WLR 6; [1952] 2 All ER 1110, HL(E)
- C *Gillespie v Commonwealth of Australia* (1991) 104 ACTR 1
Kossinski v Chrysler United Kingdom Ltd (1973) 15 KIR 225, CA
Morris v West Hartlepool Steam Navigation Co Ltd [1956] AC 552; [1956] 1 WLR 177; [1956] 1 All ER 385, HL(E)
Overseas Tankship (UK) Ltd v Miller Steamship Co Pty [1967] 1 AC 617; [1966] 3 WLR 498; [1966] 2 All ER 709, PC

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Hatton v Sutherland

APPEAL from Judge Trigger sitting at Liverpool County Court

By a summons and particulars of claim dated 4 October 1998 the claimant, Penelope Hatton, claimed damages for psychiatric injuries arising from the breach of duty and negligence of the defendant, Terence Sutherland (the chairman of the governors of St Thomas Becket Roman Catholic High School). On 7 August 2000 the judge awarded the claimant damages of £90,765.83.

- E By notice of appeal dated 18 September 2000 the defendant appealed with the permission of the judge on the grounds, inter alia, that (1) the judge's finding that the defendant ought to have realised that the claimant was on the brink of suffering a bad psychological reaction as a consequence of the mounting pressures of her job was against the weight of the evidence; (2) the judge ought to have found that the claimant's work did not give rise to a foreseeable risk that she might suffer psychiatric illness; and (3) the judge's imposition of a duty of care on the defendant to have a system of checks and balances to pick up the early warning signs of stress imposed a duty of care on the defendant which was too high in all the circumstances.

- F By a respondent's notice dated 3 October 2000 the claimant sought to uphold the judge's order on the additional grounds that the judge ought to have found that (1) the risk that teachers might develop mental illness as a result of the stressful nature of their work was well documented in the published papers which referred to in evidence; (2) the defendant was under a duty to take action to assess and reduce the risk to employees of developing stress-related illness by providing appropriate instruction, counselling services and by encouraging the use of such services; and (3) the defendant was in breach of that duty.

H The facts are stated in the judgment of the court.

Barber v Somerset County Council

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APPEAL from Judge Roach sitting at Exeter County Court

By a summons and particulars of claim dated 30 October 1998 the claimant, Leon Alan Barber, claimed damages for psychiatric injuries arising from the breach of duty and negligence of the defendant, Somerset County Council. On 8 March 2001 the judge awarded the claimant damages of £101,041.59.

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By notice of appeal dated 8 March 2001 the defendant appealed with the permission of Hale LJ granted on 14 May 2001 on the grounds, inter alia, that the judge (1) erred in failing to direct himself correctly that a claimant could not establish liability by showing that stress was foreseeable but had to show that a recognised psychiatric injury was foreseeable and in subsequently eliding stress and mental illness; and (2) failed, when dealing with the issue of whether any breach of duty caused the claimant's injuries, to consider the most important of the potential alternative causes of the claimant's injuries, namely the normal and admittedly stressful consequences of the work which the claimant performed.

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By a respondent's notice dated 4 June 2001 the claimant sought to uphold the judgment on the additional ground, inter alia, that, on the issue of foreseeability, the judge had failed to heed all the evidence and did not take into account potential alternative causes for the claimant's injuries.

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The facts are stated in the judgment of the court.

Jones v Sandwell Metropolitan Borough Council

APPEAL from Judge Nicholl sitting at Birmingham County Court

By summons and particulars of claim the claimant, Olwen Jones, claimed damages for psychiatric injuries arising from the breach of duty and negligence of the defendant, Sandwell Metropolitan Borough Council. On 31 October 2000 the judge awarded the claimant damages of £157,541.

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By notice of appeal dated 14 November 2000 and with the permission of Hale LJ granted on 14 February 2001 the defendant appealed on the grounds, inter alia, that (1) if, in finding that the claimant's job was an obvious potential source of stress, the judge meant that the nature of the work per se posed a generally foreseeable risk of mental illness, his finding was not justified and was wrong; and (2) the judge erred in finding that the claimant's illness ought to have been foreseen by the defendant and accordingly was wrong to find the defendant liable in damages for that illness and its consequences.

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The facts are stated in the judgment of the court.

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Bishop v Baker Refractories Ltd

APPEAL from Judge Kent-Jones sitting at Leeds County Court

By a summons and particulars of claim dated 2 February 2000 the claimant, Melvyn Edward Bishop, claimed damages for psychiatric injuries arising from the breach of duty and negligence of the defendants, Baker Refractories Ltd. On 26 January 2001 the judge awarded the claimant general damages of £7,000 and interest in respect of general damages.

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By notice of appeal and with the permission of Hale LJ granted on 12 March 2001 the defendant appealed on the grounds, inter alia, that

A (1) the judge erred in finding that the defendants were negligent and ought to have been aware that the claimant was showing signs of an impending breakdown; (2) the judge was wrong to find that the defendants were negligent and that they were bound to take the steps which he identified (or any steps) to avert such a breakdown; (3) the judge was wrong to find that the defendants owed a duty to the claimant to remove him from his work and/or to dismiss him therefrom; and (4) the judge ought to have found that
 B the true and effective cause of the claimant's injury was his decision to return to work notwithstanding the medical advice which he had received from his general practitioner.

The facts are stated in the judgment of the court.

Peter Atherton for Mrs Hatton.

C *Andrew Collender QC* and *Stephen Archer* for the defendant employer.

Robert Glancy QC and *Christopher Goddard* for Mr Barber.

Andrew Hogarth for the defendant council.

Mark Anderson for Mrs Jones.

Ralph Lewis QC for defendant council.

Howard Elgot for Mr Bishop.

D *Robert F Owen QC* for the defendant employers.

Cur adv vult

5 February 2002. HALE LJ handed down the following judgment of the court.

E 1 Introduction

1 These four appeals are related only by their subject matter. In each a defendant employer appeals against a finding of liability for an employee's psychiatric illness caused by stress at work. Two of the claimants were teachers in public sector comprehensive schools; another was an administrative assistant at a local authority training centre; the fourth was a raw materials operative in a factory. There is broad agreement as to the
 F applicable principles of law. But there are difficulties in applying the principles developed in the context of industrial accidents to these very different circumstances. Hearing four very different cases together has also cast valuable light upon how those difficulties might be resolved in individual cases.

2 This judgment of the court, to which we have all contributed, is arranged as follows. First we consider some relevant background considerations; then the legal principles and how these are to be applied in this class of case; and we conclude with a summary of the questions to be asked in determining individual cases. Then we summarise the facts and our conclusions in each of the four cases under appeal. The details of each of these cases are contained in the appendix, which also contains an analysis of issues relating to damages which arose in two of the appeals.
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2 Background considerations

3 This type of case has been described as the "next growth area" in claims for psychiatric illness: see an essay by Nicholas J Mullany in "Fear for the Future: Liability for the Infliction of Psychiatric Disorder" in *Torts in the*

Nineties (1997) (ed Nicholas J Mullany), p 107. This growth is due to developing understanding in two distinct but inter-related areas of knowledge. A

Psychiatric ill-health

4 The first is of psychiatric illness generally. The Law Commission, in their Consultation Paper on Liability for Psychiatric Illness (1995) (Consultation Paper No 137), para 1.9, commented: B

“We are aware from our preliminary consultations that there are strongly held views on this topic. On the one hand, there are those who are sceptical about the award of damages for psychiatric illness. They argue that such illness can easily be faked; that, in any event, those who are suffering should be able to ‘pull themselves together’; and that, even if they cannot do so, there is no good reason why defendants and, through them, those who pay insurance premiums should pay for their inability to do so . . . On the other hand, medical and legal experts working in the field, who are the people who most commonly encounter those complaining of psychiatric illness, have impressed upon us how life-shattering psychiatric illness can be and how, in many instances, it can be more debilitating than physical injuries.” C
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5 The latter we entirely accept. But, although there have been great advances in understanding of the nature and causes of psychiatric ill-health, there are still important differences between physical and mental disorders.

(1) The dividing line between a normal but unpleasant state of mind or emotion and a recognised psychiatric illness or disorder is not easy to draw. Psychiatric textbooks tell us that with a physical disease or disability, the doctor can presuppose a perfect or “normal” state of bodily health and then point to the ways in which his patient’s condition falls short of this. There is probably no such thing as a state of perfect mental health. The doctor has instead to presuppose some average standard of functioning and then assess whether his patient’s condition falls far enough short of that to be considered a disorder. However, there is now a considerable degree of international agreement on the classification of mental disorders and their diagnostic criteria, the two most commonly used tools being the most recent American Diagnostic and Statistical Manual of Mental Disorders, the DSM-IV (1994) and the World Health Organisation’s ICD-10 Classification of Mental and Behavioural Disorders (1992). E
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(2) While some of the major mental illnesses have a known or strongly suspected organic origin, this is not the case with many of the most common disorders. Their causes will often be complex and depend upon the interaction between the patient’s personality and a number of factors in the patient’s life. It is not easy to predict who will fall victim, how, why or when. G

(3) For the same reason, treatment is often not straightforward or its outcome predictable: while some conditions may respond comparatively quickly and easily to appropriate medication others may only respond, if at all, to prolonged and complicated “talking treatments” or behavioural therapy. There are strong divergences of views amongst psychiatrists on these issues. H

A 6 In their report on Liability for Psychiatric Illness (1998) (Law Com No 249) at para 1.2, the Law Commission referred to the divergence of academic views on the approach the law should take:

B “At one end of the scale are those who argue that the same principles that apply to liability for physical injury should be applied to liability for psychiatric illness, and that there is no legitimate reason to impose special restrictions in respect of claims for the latter [most forcefully by N J Mullany and P R Handford in *Tort Liability for Psychiatric Damage* (1993)]. At the other extreme are those who argue that liability for psychiatric illness should be abandoned altogether. They say that the arbitrary rules which are required to control potential liability are so artificial that they bring the law into disrepute [cogently expressed by C Dr J Stapleton, ‘In Restraint of Tort’, in P Birks (ed), *The Frontiers of Liability* (1994), vol 2, pp 94–96].”

Both the law and the Law Commission have followed a middle course, in some cases treating a recognised psychiatric illness as no different in principle from a physical injury or illness, while in others imposing additional “control mechanisms” so that liability does not extend too far.

D *Occupational stress*

E 7 The second area of developing understanding is of the nature and extent of occupational stress. We have been referred to three particularly helpful documents. The first is the report of a working party of the Health Education Authority, *Stress in the public sector—Nurses, police, social workers and teachers* (1988). This discusses the “Meaning of Stress” in appendix 1:

F “as with many words in a living language, the word ‘stress’ has acquired a vague, catch-all meaning, used by different people to mean different things. It is used to describe both physical and mental conditions, and the pressures which cause those conditions. It is also used to describe stress which is beneficial and harmful both in its sources and in its effects.”

Hence the definition of stress adopted in that report was “an excess of demands upon an individual in excess of their ability to cope”. The report confirmed that the four occupations discussed had much in common in this respect.

G 8 Second is the report of the Education Service Advisory Committee of the Health and Safety Commission, *Managing occupational stress: a guide for managers and teachers in the schools sector* (1990). This adopted a similar definition: “stress is a process that can occur when there is an unresolved mismatch between the perceived pressures of the work situation and an individual’s ability to cope.” It confirmed, if confirmation were needed, that teaching can be a stressful profession. It is also a profession H which has undergone profound changes in recent years.

9 The third is a general booklet of guidance from the Health and Safety Executive, *Stress at work* (1995). This is particularly helpful in distinguishing clearly between *pressure*, *stress*, and *the physical or psychiatric consequences* (p 2):

“There is no such thing as a pressure free job. Every job brings its own set of tasks, responsibilities and day-to-day problems, and the pressures and demands these place on us are an unavoidable part of working life. We are, after all, paid to work and to work hard, and to accept the reasonable pressures which go with that.”

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“Some pressures can, in fact, be a good thing. It is often the tasks and challenges we face at work that provide the structure to our working days, keep us motivated and are the key to a sense of achievement and job satisfaction.”

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“But people’s ability to deal with pressure is not limitless. Excessive workplace pressure and the stress to which it can lead can be harmful. They can damage your business’s performance and undermine the health of your workforce.”

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Stress is defined, at p 4, as: “the reaction people have to excessive pressures or other types of demand placed upon them. It arises when they worry that they can’t cope.” It can involve both physical and behavioural effects, but these “are usually short-lived and cause no lasting harm. When the pressures recede, there is a quick return to normal”.

“Stress is not therefore the same as ill-health. But in some cases, particularly where pressures are intense and continue for some time, the effect of stress can be more sustained and far more damaging, leading to longer-term psychological problems and physical ill-health.”

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10 Two other important messages emerge from these documents. First, and perhaps contrary to popular belief, harmful levels of stress are most likely to occur in situations where people feel powerless or trapped. These are more likely to affect people on the shop floor or at the more junior levels than those who are in a position to shape what they do. Second, stress—in the sense of a perceived mismatch between the pressures of the job and the individual’s ability to meet them—is a psychological phenomenon but it can lead to either physical or mental ill-health or both. When considering the issues raised by these four cases, in which the claimants all suffered psychiatric illnesses, it may therefore be important to bear in mind that the same issues might arise had they instead suffered some stress-related physical disorder, such as ulcers, heart disease or hypertension.

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Differences from other work-related harm

11 Mr Hogarth, on behalf of the employer in Mr Barber’s case, has pointed to several differences between this and other kinds of work-related harm, such as injuries suffered in accidents at work or illnesses caused by exposure to deleterious physical conditions at work. These are in addition to the general differences between physical and psychiatric disorders discussed earlier.

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(1) The most significant relates to who knows what. The employer is or should be aware of what is going on in his own factory, school or office. He is much less aware of what is going on in his employees’ minds or in their lives outside work. There are many other people, such as family, friends and colleagues, who are likely to know far more about this than the employer. Indeed, the employee may very well wish to minimise or conceal the true

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A state of affairs from his employer: no one wants to be thought unable to cope.

(2) The employer is or should be largely in control of the workplace, equipment and physical conditions in which the work is done. He is much less in control of the way in which many of his employees, especially professionals or those who are expected to prioritise their own tasks, choose to do their work and balance the demands of their work and life outside the workplace.

(3) The employer can be expected to take responsibility for keeping the physical risks presented by the workplace to a minimum. But responsibility both for causing and for doing something about its psychological risks may be shared between many people, family, friends and the individual himself, as well as the employer. An individual who recognises that he is experiencing levels of stress which may be harmful to him has to make some decisions about how to respond to this. The employer's room for manoeuvre may in some cases be limited. At the extreme, his only option may be to dismiss the employee who cannot cope with the job.

12 There are some jobs which are intrinsically physically dangerous: the most obvious examples are the armed forces, fire-fighting and the police. The employee agrees to run the inevitable risks of the job, although not those which are the result of his employers' negligence. Psychological pressures are inevitable in all jobs, although greater in some than in others. But it is, as the documents quoted show, rather more difficult to identify which jobs are intrinsically so *stressful* that physical or psychological *harm* is to be expected more often than in other jobs. Some people thrive on pressure and are so confident of their abilities to cope that they rarely if ever experience stress even in jobs which many would find extremely stressful. Others experience harmful levels of stress in jobs which many would not regard as stressful at all.

13 When imposing duties and setting standards, the law tries to strike a balance which is reasonable to both sides. Here there are weighty considerations on each side. It is in everyone's interests that management should be encouraged to recognise the existence and causes of occupational stress and take sensible steps to minimise it within their organisation. It is in the interest of the individual employees who may suffer harm if their employers do not. It is in the interest of the particular enterprise which may lose efficiency and workers if it does not. It is in the public interest that public services should not suffer or public money be wasted. Concern about this issue arose during a period of great upheaval in the workforce, and in many large organisations, bringing changes in management ethos, instability and insecurity. The documents we have seen all aim to encourage management to take the issue of occupational stress seriously.

14 The law of tort has an important function in setting standards for employers as well as for drivers, manufacturers, health care professionals and many others whose carelessness may cause harm. But 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 upon the employment market. In particular, employers may be even more reluctant than they already are to take on people with a significant psychiatric history or an acknowledged vulnerability to stress-related disorders. If employers are expected to make searching inquiries of employees who have been off

sick, then more employees may be vulnerable to dismissal or demotion on ill-health grounds. If particular employments are singled out as ones in which special care is needed, then other benefits which are available to everyone in those employments, such as longer holidays, better pensions or earlier retirement, may be under threat. A

15 Some things are no one's fault. No one can blame an employee who tries to soldier on despite his own desperate fears that he cannot cope, perhaps especially where those fears are groundless. No one can blame an employee for being reluctant to give clear warnings to his employer of the stress he is feeling. His very job, let alone his credibility or hopes of promotion, may be at risk. Few would blame an employee for continuing or returning to work despite the warnings of his doctor that he should give it up. There are many reasons why the job may be precious to him. On the other hand it may be difficult in those circumstances to blame the employer for failing to recognise the problem and what might be done to solve it. B C

16 There is an argument that stress is so prevalent in some employments, of which teaching is one, and employees so reluctant to disclose it, that all employers should have in place systems to detect it and prevent its developing into actual harm. As the above discussion shows, this raises some difficult issues of policy and practice which are unsuitable for resolution in individual cases before the courts. If knowledge advances to such an extent as to justify the imposition of obligations upon some or all employers to take particular steps to protect their employees from stress-related harm, this is better done by way of regulations imposing specific statutory duties. In the meantime the ordinary law of negligence governs the matter. D

17 However, we do know of schemes now being developed and encouraged which recognise and respond to the peculiar problems presented both to employees and employers. The key is to offer help on a completely confidential basis. The employee can then be encouraged to recognise the signs and seek that help without fearing its effects upon his job or prospects; the employer need not make intrusive inquiries or over-react to such problems as he does detect; responsibility for accessing the service can be left with the people who are best equipped to know what the problems are, the employee, his family and friends; and if reasonable help is offered either directly or through referral to other services, then all that reasonably could be done has been done. Obviously, not all employers have the resources to put such systems in place, but an employer who does have a system along those lines is unlikely to be found in breach of his duty of care towards his employees. E F C

3 *The law*

18 Several times while hearing these appeals we were invited to go back to first principles. Liability in negligence depends upon three inter-related requirements: the existence of a duty to take care; a failure to take the care which can reasonably be expected in the circumstances; and damage suffered as a result of that failure. These elements do not exist in separate compartments: the existence of the duty, for example, depends upon the type of harm suffered. Foreseeability of what might happen if care is not taken is relevant at each stage of the inquiry. Nevertheless, the traditional elements are always a useful tool of analysis, both in general and in particular cases. H

A *Duty*

19 The existence of a duty of care can be taken for granted. All employers have a duty to take reasonable care for the safety of their employees to see that reasonable care is taken to provide them with a safe place of work, safe tools and equipment, and a safe system of working: see *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57. However, where psychiatric harm is suffered, the law distinguishes between “primary” and “secondary” victims. A primary victim is usually someone within the zone of foreseeable physical harm should the defendant fail to take reasonable care: see *Page v Smith* [1996] AC 155. A secondary victim is usually someone outside that zone: typically such a victim foreseeably suffers psychiatric harm through seeing, hearing or learning of physical harm tortiously inflicted upon others. There are additional control mechanisms to keep liability towards such people strictly within bounds: see *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. In *Frost v Chief Constable of South Yorkshire Police* [1999] ICR 216 the House of Lords applied that distinction to police officers (and others) who were not themselves within the zone of physical danger caused by the defendant’s negligence, but had to deal with the consequences of catastrophic harm to others in the course of their duties. Lord Steyn observed, at p 255:

“The rules to be applied when an employee brings an action against his employer for harm suffered at his workplace are the rules of tort. One is therefore thrown back to the ordinary rules of the law of tort which contain restrictions on the recovery of compensation for psychiatric harm . . . The duty of an employer to safeguard his employees from harm could also be formulated in contract . . . But such a term could not be wider in scope than the duty imposed by the law of tort.”

Taken to its logical conclusion this would apply the same distinction between those inside and those outside the zone of foreseeable risk of physical harm to the employer’s general duty of care to his employees.

20 We have not been invited to go down that road, no doubt because it is not open to us. In *Petch v Customs and Excise Comrs* [1993] ICR 789 it was accepted that the ordinary principles of employers’ liability applied to a claim for psychiatric illness arising from employment, although the claim failed. In the landmark case of *Walker v Northumberland County Council* [1995] ICR 702 Colman J applied those same principles in upholding the claim. Both have recently been cited with approval in this court in *Garrett v Camden London Borough Council* [2001] EWCA Civ 395. Also in the *Frost* case [1999] ICR 216, 262, Lord Hoffman stated:

“The control mechanisms were plainly never intended to apply to all cases of psychiatric injury. They contemplate that the injury has been caused in consequence of death or injury suffered (or apprehended to have been suffered or as likely to be suffered) by someone else.”

As to *Walker’s* case, he commented, at p 263: “The employee . . . was in no sense a secondary victim. His mental breakdown was caused by the strain of doing the work which his employer had required him to do.”

21 In summary, therefore, claims for psychiatric injury fall into four different categories: (1) tortious claims by primary victims: usually those within the foreseeable scope of physical injury, for example, the road

accident victim in *Page v Smith* [1996] AC 155; some primary victims may not be at risk of physical harm, but at risk of foreseeable psychiatric harm because the circumstances are akin to those of primary victims in contract (see (3) below); (2) tortious claims by secondary victims: those outside that zone who suffer as a result of harm to others, for example, the witnesses of the Hillsborough disaster in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; (3) contractual claims by primary victims: where the harm is the reasonably foreseeable product of specific breaches of a contractual duty of care towards a victim whose identity is known in advance, for example, the solicitors' clients in *Cook v Swinfen* [1967] 1 WLR 457, *McLoughlin v Jones* [2002] 2 WLR 1279 or the employees in *Petch v Customs and Excise Comrs* [1993] ICR 789, *Walker v Northumberland County Council* [1995] ICR 702, *Garrett v Camden London Borough Council* [2001] EWCA Civ 395, and in all the cases before us; (4) contractual claims by secondary victims: 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 contractual relationship with the defendant, as with the police officers in the *Frost* case [1999] ICR 216.

22 There are, therefore, no special control mechanisms applying to claims for psychiatric (or physical) injury or illness arising from the stress of doing the work which the employee is required to do. But these claims do require particular care in determination, because they give rise to some difficult issues of foreseeability and causation and, we would add, identifying a relevant breach of duty. As Simon Brown LJ pithily put it in *Garrett's* case, at para 63:

“Many, alas, suffer breakdowns and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simply overworking, the tensions of difficult relationships, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. *Unless, however, there was a real risk of breakdown which the claimant's employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability.*” (Emphasis supplied.)

Foreseeability

23 To say that the employer has a duty of care to his employee does not tell us what he has to do (or refrain from doing) in any particular case. The issue in most if not all of these cases is whether the employer should have taken positive steps to safeguard the employee from harm: his sins are those of omission rather than commission. Mr Owen, for the employer in Mr Bishop's case, saw this as a question of defining the duty; Mr Lewis, for the employer in Mrs Jones's case, saw it as a question of setting the standard of care in order to decide whether it had been broken. Whichever is the correct analysis, *the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable.* The question is not whether psychiatric injury is foreseeable in a person of “ordinary fortitude”. The employer's duty is owed to each individual employee, not to some as yet unidentified outsider: see *Paris v Stepney Borough Council* [1951] AC 367. The employer knows who his employee is. It may be that he knows, as in

A *Paris's* case, or ought to know, of a particular vulnerability; but he may not. *Because of the very nature of psychiatric disorder, as a sufficiently serious departure from normal or average psychological functioning to be labelled a disorder, it is bound to be harder to foresee than is physical injury.* Shylock could not say of a mental disorder, "If you prick us, do we not bleed?" *But it may be easier to foresee in a known individual than it is in the population at large.* The principle is the same as in other cases where there is a contractual

B duty of care, such as solicitors' negligence: see *Cook v Swinfen* [1967] 1 WLR 457 and *McLoughlin v Jones* [2002] 2 WLR 1279.

24 However, are there some occupations which are so intrinsically stressful that resulting physical or psychological harm is always foreseeable? Mr Lewis appeared to accept that this was so: he gave the examples of traffic police officers who regularly deal with gruesome accidents or child

C protection officers who regularly investigate unthinkable allegations of child abuse. Some warrant for this might be drawn from the way in which Dillon LJ formulated the foreseeability test in the *Petch* case [1993] ICR 789, 796-797:

D "unless senior management in the defendants' department were aware or ought to have been aware that the plaintiff was showing signs of impending breakdown, or were aware or ought to have been aware that his workload carried a real risk that he would have a breakdown, then the defendants were not negligent in failing to avert the breakdown . . ."

Later, at p 798B, he referred to the same two-pronged test: "but Mr Bamfield had no knowledge of any sign whatever of impending danger, nor was he bound to regard the plaintiff's workload, so eagerly accepted, as per se

E dangerous." These observations were made in the context of a particular employee in a particular high grade Civil Service post. They were not made in the context of such posts as a whole. The notion that some occupations are in themselves dangerous to mental health is not borne out by the literature to which we have already referred: it is not the job but the interaction between the individual and the job which causes the harm.

F Stress is a subjective concept: the individual's perception that the pressures placed upon him are greater than he may be able to meet. Adverse reactions to stress are equally individual, ranging from minor physical symptoms to major mental illness.

25 All of this points to there being a single test: *whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned. Such a reaction will have two components:*

G (1) *an injury to health; which* (2) *is attributable to stress at work.* The answer to the foreseeability question will therefore depend upon the inter-relationship between the particular characteristics of the employee concerned and the particular demands which the employer casts upon him. As was said in *McLoughlin v Jones* [2002] 2 WLR 1279, expert evidence may be helpful although it can never be determinative of what a reasonable employer should have foreseen. A number of factors are likely to be

H relevant.

26 These include the *nature and extent of the work being done by the employee.* Employers should be more alert to picking up signs from an employee who is being overworked in an intellectually or emotionally demanding job than from an employee whose workload is no more than

normal for the job or whose job is not particularly demanding for him or her. It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable. Also relevant is whether there are signs that others doing the same work are under harmful levels of stress. There may be others who have already suffered injury to their health arising from their work. Or there may be an abnormal level of sickness and absence amongst others at the same grade or in the same department. But if there is no evidence of this, then the focus must turn to the individual, as Colman J put it in the *Walker* case [1995] ICR 702, 713:

“Accordingly, the question is whether it ought to have been foreseen that Mr Walker was exposed to a risk of mental illness materially higher than that which would ordinarily affect a social services middle manager in his position with a really heavy workload.”

27 More important are the *signs from the employee himself*. Here again, it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health. The *Walker* case is an obvious illustration: Mr Walker was a highly conscientious and seriously overworked manager of a social work area office with a heavy and emotionally demanding case load of child abuse cases. Yet although he complained and asked for help and for extra leave, the judge held that his first mental breakdown was not foreseeable. There was, however, liability when he returned to work with a promise of extra help which did not materialise and experienced a second breakdown only a few months later. If the employee or his doctor makes it plain that unless something is done to help there is a clear risk of a breakdown in mental or physical health, then the employer will have to think what can be done about it.

28 Harm to health may sometimes be foreseeable without such an express warning. Factors to take into account would be frequent or prolonged absences from work which are uncharacteristic for the person concerned; these could be for physical or psychological complaints; but there must also be good reason to think that the underlying cause is occupational stress rather than other factors; this could arise from the nature of the employee’s work or from complaints made about it by the employee or from warnings given by the employee or others around him.

29 But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he is bound to probe further into what he is told? *Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job*. It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive inquiries. *Generally he is entitled to take what he is told by or on behalf of the employee at face value*. If he is concerned he may suggest that the employee consults his own doctor or an occupational health service. But he should not without a very good reason seek the employee’s permission to obtain

A further information from his medical advisers. Otherwise he would risk unacceptable invasions of his employee's privacy.

30 It was argued that the employer is entitled to take the expiry of a general practitioner's certificate as implicitly suggesting that the employee is now fit to return to work and even that he is no longer at risk of suffering the same sort of problem again. This cannot be right. A general practitioner's certificate is limited in time but many disorders are not self-limiting and may
 B linger on for some considerable time. Yet an employee who is anxious to return to work, for whatever reason, may not go back to his general practitioner for a further certificate when the current one runs out. Even if the employee is currently fit for work, the earlier time-limited certificate carries no implication that the same or a similar condition will not recur. The point is a rather different one: *an employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he was doing before*. The employer is usually entitled to take that at face value unless he has other good reasons to think to the contrary: see *McIntyre v Filtrona Ltd* (unreported) 12 March 1996; Court of Appeal Transcript No 1310 of 1996.

31 These then are the questions and the possible indications that harm was foreseeable in a particular case. But how strong should those indications be before the employer has a duty to act? Mr Hogarth argued that only "clear and unequivocal" signs of an impending breakdown should suffice. That may be putting it too high. But *in view of the many difficulties of knowing when and why a 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*.
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Breach of duty

32 What then is it reasonable to expect the employer to do? His duty is to take reasonable care. What is reasonable depends, as we all know, upon the foreseeability of harm, the magnitude of the risk of that harm occurring,
 F the gravity of the harm which may take place, the cost and practicability of preventing it, and the justifications for running the risk: see the oft-quoted summary of Swanwick J in *Stokes v Guest, Keen Nettlefold (Nuts and Bolts) Ltd* [1968] 1 WLR 1776, 1783D-E.

33 It is essential, therefore, once the risk of harm to health from stresses in the workplace is foreseeable, to consider whether and in what respect the employer has broken that duty. There may be a temptation, having concluded that some harm was foreseeable and that harm of that kind has taken place, to go on to conclude that the employer was in breach of his duty of care in failing to prevent that harm (and that that breach of duty caused the harm). But *in every case it is necessary to consider what the employer not only could but should have done*. We are not here concerned with such comparatively simple things as gloves, goggles, earmuffs or non-slip flooring.
 H Many steps might be suggested: giving the employee a sabbatical; transferring him to other work; redistributing the work; giving him some extra help for a while; arranging treatment or counselling; providing buddying or mentoring schemes to encourage confidence; and much more. But in all of these suggestions it will be necessary to consider how reasonable

it is to expect the employer to do this, either in general or in particular: *the size and scope of its operation will be relevant to this, as will its resources, whether in the public or private sector, and the other demands placed upon it. Among those other demands are the interests of other employees in the workplace.* It may not be reasonable to expect the employer to rearrange the work for the sake of one employee in a way which prejudices the others. As we have already said, an employer who tries to balance all these interests by offering confidential help to employees who fear that they may be suffering harmful levels of stress is unlikely to be found in breach of duty: except where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear.

34 Moreover, *the employer can only reasonably be expected to take steps which are likely to do some good.* This is a matter on which the court is likely to require expert evidence. In many of these cases it will be very hard to know what would have done some let alone enough good. In some cases the only effective way of safeguarding the employee would be to dismiss or demote him. There may be no other work at the same level of pay which it is reasonable to expect the employer to offer him. *In principle the law should not be saying to an employer that it is his duty to sack an employee who wants to go on working for him for the employer's own good.* As Devlin LJ put it in *Withers v Perry Chain Co Ltd* [1961] 1 WLR 1314, 1320:

“The relationship between employer and employee is not that of a schoolmaster and pupil . . . The employee is free to decide for herself what risks she will run . . . if the common law were to be otherwise it would be oppressive to the employee, by limiting his ability to find work, rather than beneficial to him.”

Taken to its logical conclusion, of course, this would justify employers in perpetuating the most unsafe practices (not alleged in that case) on the basis that the employee can always leave. But we are not here concerned with physical dangers: we have already rejected the concept of an unsafe occupation for this purpose. If there is no alternative solution, it has to be for the employee to decide whether or not to carry on in the same employment and take the risk of a breakdown in his health or whether to leave that employment and look for work elsewhere before he becomes unemployable.

Causation

35 Having shown a breach of duty, *it is still necessary to show that the particular breach of duty found caused the harm.* It is not enough to show that occupational stress caused the harm. Where there are several different possible causes, as will often be the case with stress related illness of any kind, the claimant may have difficulty proving that the employer's fault was one of them: see *Wilsher v Essex Area Health Authority* [1988] AC 1074. This will be a particular problem if, as in *Garrett v Camden London Borough Council* [2001] EWCA Civ 395, the main cause was a vulnerable personality which the employer knew nothing about. However, *the employee does not have to show that the breach of duty was the whole cause of his ill-health: it is enough to show that it made a material contribution:* see *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

A *Apportionment and quantification*

36 Many stress-related illnesses are likely to have a complex aetiology with several different causes. In principle a wrongdoer should pay only for that proportion of the harm suffered for which he by his wrongdoing is responsible: see eg *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] ICR 236, *Holtby v Brigham & Cowan (Hull) Ltd* [2000] ICR 1086 and *Rahman v Arearose Ltd* [2001] QB 351. The *Thompson* and *Holtby* cases concerned respectively deafness and asbestosis developed over a long period of exposure; not only were different employers involved but in *Thompson* some of the exposure by the same employer was tortious and some was not. Apportionment was possible because the deterioration over particular periods of time could be measured, albeit in a somewhat rough and ready fashion.

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C 37 *It is different if the harm is truly indivisible*: a tortfeasor who has made a material contribution is liable for the whole, although he may be able to seek contribution from other joint or concurrent tortfeasors who have also contributed to the injury. In the *Rahman* case [2001] QB 351, 361, para 17, Laws LJ quoted the following illuminating discussion from *Prosser & Keeton on Torts*, 5th ed (1984), pp 345–346:

D “If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no reasonable basis for dividing the injury between them, and each will be liable for all of it. If they shoot the plaintiff independently, with separate guns, and the plaintiff dies from the effect of both wounds, there can still be no division, for death cannot be divided or apportioned except by an arbitrary rule . . . If they merely inflict separate wounds, and the plaintiff survives, a basis for division exists, because it is possible to regard the two wounds as separate injuries . . . There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant [liable] for the wound inflicted by the other. Upon the same basis, if two defendants each pollute a stream with oil, in some instances it may be possible to say that each has interfered to a separate extent with the plaintiff’s rights in the water, and to make some division of the damages. It is not possible if the oil is ignited, and burns the plaintiff’s barn.”

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G 38 In *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 the employee was exposed to harmful dust, all of it at work, but some of it in breach of duty and some not: the employer was held liable for the whole of the damage caused by the combination of the “guilty” and “innocent” dust. The question of apportionment was not argued. The problem there, as in *McGhee v National Coal Board* [1973] 1 WLR 1, was whether the claimant could prove causation at all, given the possible contribution of both “guilty” and “innocent” dust to his illness.

H 39 As Stuart Smith LJ commented in the *Holtby* case [2000] ICR 1086, 1094, para 20:

“[The claimant] will be entitled to succeed if he can prove that the defendant’s tortious conduct made a material contribution to his disability. But strictly speaking the defendant is liable only to the extent

of that contribution. However, if the point is never raised or argued by the defendant, the claimant will succeed in full as in *Bonnington* and *McGhee*.”

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Clarke LJ went further and placed at least the evidential burden of establishing the case for apportionment upon the defendant, at p 1099, para 35:

“It seems to me that once the claimant has shown that the defendant’s breach of duty has made a material contribution to his disease, justice requires that he should be entitled to recover in full from those defendants unless they show the extent to which some other factor, whether it be ‘innocent’ dust or tortious dust caused by others, also contributed.”

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But he acknowledged that these cases should not be determined by the burden of proof: assessments of this kind are “essentially a jury question which has to be determined on a broad basis” (p 1100, para 37).

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40 Hence the learned editors of *Clerk & Lindsell on Torts*, 18th ed (2000), para 2–21, state: “Where it is possible to identify the extent of the contribution that the defendant’s wrong made to the claimant’s damage then the defendant is liable only to that extent, and no more.” This may raise some difficult factual questions. *Calascione v Dixon* (1993) 19 BMLR 97 is an example of apportionment between different causes, one the fault of the defendant, the other not: the claimant suffered post traumatic stress disorder as a result of seeing the aftermath of the accident in which her son was killed, but her normal grief reaction had become abnormal as a result of later events. In *Vernon v Bosley (No 1)* [1997] 1 All ER 577 the majority in this court held that the whole of the claimant’s psychiatric injury was the result of the accident in which his two daughters died, although Stuart Smith LJ dissented on the ground that it had not been shown that it was caused by his witnessing the unsuccessful attempts to rescue them, that is by the breach of the defendant’s duty towards him. These were both, of course, secondary victims. The *Rahman* case [2001] QB 351 is an example of apportionment of the psychiatric injury suffered by a primary victim between different tortfeasors. Neither tort caused the whole injury, some was caused mainly by one, some mainly by the other, and some by their combined effect. Neither tortfeasor would have been held liable for the whole.

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41 Hence if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities. The analogy with the polluted stream is closer than the analogy with the single fire. Nor is there anything in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 or *McGhee v National Coal Board* [1973] 1 WLR 1 requiring a different approach.

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42 Where the tortfeasor’s breach of duty has exacerbated a pre-existing disorder or accelerated the effect of pre-existing vulnerability, the award of general damages for pain, suffering and loss of amenity will reflect only the exacerbation or acceleration. Further, the quantification of damages for financial losses must take some account of contingencies. In this context,

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A one of those contingencies may well be the chance that the claimant would have succumbed to a stress-related disorder in any event. As it happens, all of these principles are exemplified by the decision of Otton J at first instance in *Page v Smith* [1993] PIQR Q55 (and not appealed by the claimant: see *Page v Smith (No 2)* [1996] 1 WLR 855). He reduced the multiplier for future loss of earnings (as it happens as a teacher) from 10 to 6 to reflect the many factors making it probable that the claimant would not have had a full and unbroken period of employment in any event and the real possibility that his employers would have terminated his employment because of his absences from work.

4 Summary

C 43 From the above discussion, the following practical propositions emerge.

(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).

D (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).

E (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).

(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).

F (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?

C 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?

H (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 inquiries of the employee or seek permission to make further inquiries 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).

We will now apply these principles to the facts of the four cases before us. For convenience we are including only a brief summary of the individual cases in the main body of this judgment. They are given more extensive treatment in the appendix.

5 Mrs Hatton

44 Mrs Hatton began teaching in 1976. From 1980 to 1995 she taught French at a comprehensive school in Huyton, Liverpool. In October 1995 she was signed off from work because of depression and debility and never returned. She retired on ill health grounds in August 1996. The defendant school governors, the employers, appeal against the order of Judge Trigger in the Liverpool County Court on 7 August 2000 awarding her a total of £90,765.83 in damages and interest.

45 She had two months off work suffering from depression in 1989, following the break-up of her marriage. Her two sons, born in about 1983 and 1988, lived with her. But she continued to enjoy her work and was coping with the workload until September 1992.

A 46 Mrs Hatton's workload was no greater or more burdensome than
that of any other teacher in a similar school. Nor had she complained to
anyone about it. Certain changes had taken place in the school years
1992-1993 and 1993-1994 but their effect had been absorbed by September
1994. In 1992 the school went over to a modular GCSE French course. No
other teacher found that this course involved more preparation and marking
B after the first few weeks. Mrs Hatton did not complain. The head of her
department was absent from January 1993 and retired in May 1993 and
supply teachers were used for a while. No one knew that this was involving
her in much more work outside school. In September 1993 it was decided to
use English rather than supply teachers to help out with French. Mrs Hatton
was off work for a considerable part of 1993 to 1994 but did not tell anyone
at the school that she attributed her absences to overwork. In September
C 1994 a new head of department was appointed and the use of English
teachers stopped. Her work regime this year was entirely normal compared
with other French teachers. The only difference in the year from September
1995 was a retiming and reduction by one in her free periods, about which
she did complain to the deputy head.

D 47 Mrs Hatton's pattern of absence and illness was on the face of it
readily attributable to causes other than stress at work. In January 1994 she
was off work for a month following an attack in the street. In April 1994
one of her sons had to go into hospital for a considerable period. A deputy
head sent her home. She remained away for the rest of the term, certified
with depression and debility. She saw a stress counsellor in August 1994 but
did not tell the school about this. When she returned in September 1994 she
attributed her absence to her son's illness. During the school year 1994-
E 1995 she had no absences due to depression or debility, but she did have a
number of absences for minor physical ailments, including 19 days for
sinusitis. She was a smoker who had suffered from this before.

F 48 Her workload and her pattern of absence taken together could not
amount to a sufficiently clear indication that she was likely to suffer from
psychiatric injury as a result of stress at work such as to trigger a duty to do
more than was in fact done. The school could not reasonably be expected
to probe further into the causes of her absence in the summer term 1994
when she herself had attributed it to problems at home which the school
knew to be real. Hence the claim must fail at the first threshold of
foreseeability.

G 49 Even if the breakdown had been foreseeable, the judge would have
had to resolve the conflict in the expert evidence as to its causes and what if
anything the school might have done to prevent it. The judge was entitled to
find that her own perception of stress at work was at least a contributory
factor. But he should have had difficulty in concluding that it was the only
factor, given the evidence of the employers' expert witness, Dr Wood. He
should also have identified a specific breach of duty which had contributed
to the illness: an omission to do something without which it would in all
probability not have happened. If there was no breach of duty in not
H probing further into her account of the summer of 1994, the only possible
candidates are a failure to probe further into her pattern of physical illness in
1994 to 1995 or to react to her complaint about the 1995 timetable. It
would, however, be difficult to conclude that anything the school could have
done by that stage would have made a difference.

50 This is a classic case where no one can be blamed for the sad events which brought Mrs Hatton's teaching career to an end. It was sought to meet some of the obvious difficulties in her case by the argument that teaching is such a stressful profession that by 1995 all employers should have had in place systems which would overcome the reluctance of people like Mrs Hatton to reveal their difficulties and seek help. We have already explained why we take the view that, although an employer who does have such a system is unlikely to be found in breach of duty, it is not for this court to impose such a duty upon all employers, or even upon all employers in a particular profession.

6 Mr Barber

51 Mr Barber was also an experienced secondary school teacher. He was appointed head of maths at East Bridgwater Community School in 1984 and remained there until 12 November 1996 when he ceased work on medical advice. He accepted early retirement on 31 March 1997. The defendant local education authority, the employers, appeal against the order of Judge Roach in the Exeter County Court on 8 March 2001 awarding him a total of £101,041.59 in damages and interest.

52 The school was under particular pressure in the year 1995 to 1996. It was a comprehensive school in a deprived area of Bridgwater. Its roll had more than halved between the mid-1980s and the mid-1990s and resources had fallen accordingly. Restructuring became essential. However, there was comparatively little effect upon the maths department, as opposed to others. In September 1995 Mr Barber, in common with other heads of department, became the "area of experience co-ordinator" in maths. There was still the same number of maths teachers but the two former deputy heads of his department were given pastoral rather than management roles. To keep his former salary level Mr Barber took on another responsibility, as project manager in charge of publicity and media relations. He was working long hours.

53 The evidence was that all the area of experience co-ordinators, and the senior management team, were suffering from work overload at this time. In addition to the restructuring and worries over falling rolls, the school was due for an Ofsted inspection in autumn 1996. While everyone was in the same boat, the evidence did not support the suggestion that Mr Barber was more overworked than any of his peers in these difficult circumstances. The judge found that his workload was not so extreme as to put his employers on notice.

54 Mr Gill, one of the two deputy heads, was in charge of the timetable and curriculum and saw all the co-ordinators periodically. In October 1995 Mr Barber told him that the loss of his deputies was resulting in more work, and in February 1996 that work overload was affecting both him and the maths department. Mr Gill did not appreciate that Mr Barber was by then finding things too much; he advised Mr Barber to prioritise and delegate more.

55 Mr Barber had developed depressive symptoms during the autumn 1995 term but told no one at school about these. He felt worse during the spring 1996 term but again told no one at school. He explored the possibility of other jobs or taking early retirement. In May 1996 he had three weeks off work with depression: he was surprised to be told the diagnosis as he had

A never thought of himself in that way. When he came back he had an informal meeting with the head, Mrs Hayward, and raised his concerns that he was finding things difficult. On 16 July 1996, he saw Mrs Newton, the other deputy head, and told her that he could not cope and that the situation was becoming detrimental to his health. She referred him to Mr Gill, who was more sympathetic. This was very shortly before the end of the summer term. He did not tell either of them about the symptoms of weight loss, lack of sleep and out of body experiences which he described in his evidence.

B 56 Mrs Hayward retired unexpectedly at the end of term and Mr Gill became acting headmaster. On return for the autumn term he expressed some concern about Mr Barber and asked a colleague to keep an eye on him. Mr Barber had continued to suffer symptoms of stress over the summer holidays but had not been able to discuss these with his doctor. He first raised them with the doctor in October. In November he lost control in the classroom and was advised to stop work immediately.

C 57 This was a classic case in which it is essential to consider at what point the school's duty to take some action was triggered, what that action should have been, and whether it would have done some good. Instead, the judge first considered whether the illness was caused by stress at work and reached the conclusion that it was. No doubt this was because the school had argued that Mr Barber's breakdown was caused by other things, and the judge had to resolve that issue. There was certainly evidence entitling him to hold that stress at work had made a material contribution. But that in itself was not enough to lead to the conclusion that the school was in breach of duty or that its breach caused the harm.

D 58 Mr Barber did not think of himself as a candidate for psychiatric illness until it was diagnosed in May 1996. The first the school knew of any possible adverse effects upon his health of the difficulties at work which they were all experiencing was after his return. He simply told Mrs Hayward that he was not coping very well. He made a more explicit reference to his health to Mrs Newton and Mr Gill, but did not explain the symptoms from which he was suffering. This was just before the summer holidays, which are usually a source of relaxation and recuperation for hard-pressed teachers. E Indeed he was unable to tell his own doctor about his symptoms until the month before the crisis arose. He told no one at school of any problems during that term.

F 59 In those circumstances it is difficult indeed to identify a point at which the school had a duty to take the positive steps identified by the judge. It might have been different if Mr Barber had gone to Mr Gill at the beginning of the autumn term and told him that things had not improved over the holidays. But it is expecting far too much to expect the school authorities to pick up the fact that the problems were continuing without some such indication. Given the speed with which matters came to a head that term it might be difficult to sustain the judge's finding that temporary help would have averted the crisis. But in our view the evidence, taken at its highest, does not sustain a finding that they were in breach of their duty of care towards him.

7 Mrs Jones

60 Mrs Jones was employed as an administrative assistant at Trainwell, a local authority training centre, from August 1992 until 20 January 1995

when she went off sick with anxiety and depression. She never returned and was made redundant when the centre closed at the end of 1996. The defendant local authority, the employers, appeal against the order of Judge Nicholl in the Birmingham County Court on 31 October 2000 awarding her a total of £157,541 damages and interest. A

61 Mrs Jones's job was unique, a new post resulting from the consolidation of training activities in one site. The tasks were varied and the deadlines tight. They included submitting monthly claims to the local Training and Enterprise Council on which the whole operation depended. B
The judge found that she was having to work grossly excessive hours over the 37 per week required by her contract of employment. There was unchallenged evidence that her personnel officer, Mr King, had acknowledged in February 1993 that they knew it was a gamble to expect one person to do the work of two to three. C

62 She complained of overwork to her immediate managers, Mr Papworth and his deputy, from an early stage. She complained to Mr King at head office in February 1993. She also complained to him of unfair treatment and that she had been threatened with non-renewal of her temporary post if she persisted in her complaints of overwork. He said that he would try to get her extra help. Extra help was earmarked for her by Mr Papworth's superior but diverted by Mr Papworth to other tasks. In July 1994, Mrs Jones complained to Mrs York, who had taken over as her personnel officer, in a five page document listing the problems under "health", "excessive workload", "equal opportunities" and "managerial disagreements". Once again it was noted that extra help should be provided but none was forthcoming. In November 1994, Mrs Jones invoked the formal grievance procedure, complaining of discrimination in her unsuccessful application for an instructor's job at Trainwell and harassment during her time there which had affected her health. The grievance hearing did not take place until January 1995 when it was adjourned. She went off sick shortly afterwards. D
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63 The judge also found that she had been "harassed" by Mr Papworth. He meant that she had been treated unreasonably in such matters as his reaction to her complaints of overwork, dismissing these with the unfounded suggestion that she had more than enough time to do what was required of her, threatening her with loss of her job if she complained, failing to allocate the extra help provided to her, and completely inappropriate behaviour around the grievance hearing. This was not a case like Mr Barber's where everyone was overworked and under pressure, but one where the job itself made unreasonable demands upon an employee in a comparatively junior grade, and the management response to her complaints was itself unreasonable. F
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64 Mrs Jones did not go off work sick during any of this time. She did not even consult her general practitioner until March 1994, when she consulted him about abdominal problems which he noted might be psychosomatic. Thereafter she suffered from headaches which were not eased by multiple analgesics, although he diagnosed migraine rather than psychiatric illness. There was therefore no specific medical event which might have alerted her employers to the risk of the breakdown which occurred in January 1995. H

A 65 However, the employers did know that excessive demands were being placed upon Mrs Jones. They also knew that she was complaining of unreasonable behaviour by her immediate manager. These were taken sufficiently seriously for extra help to be arranged, not once but twice, but it was not actually provided. She made two written formal complaints, one in July and one in November 1994, that problems at work were causing harm to her health. It was not disputed that they did in fact cause her breakdown in January 1995.

B 66 The question, therefore, is not whether they had in fact caused harm to her health before January 1995, but whether it was sufficiently foreseeable that they would do so for it to be a breach of duty for the employers to carry on placing unreasonable demands upon her and not to follow through their own decision that something should be done about it.

C We have concluded, not without some hesitation, that the evidence before the judge was sufficient to entitle him to reach the conclusion that it was. We are conscious that the employers relied mainly on the evidence of Mr Papworth, which the judge did not find impressive. They did not call either Mr King or Mrs York to explain what they had made of Mrs Jones's complaints, and in particular her complaints in 1994 of the adverse effect that these problems were having on her health. Unlike the other cases before us, this was one such as was envisaged by Lord Slynn of Hadley in *Waters v Comr of Police of the Metropolis* [2000] ICR 1064, 1068C-D, where the employer knew that the employee was being badly treated by another employee and could have done something to prevent it.

D 67 Once it is concluded that the combination of the way in which she was being treated and her formal complaints about it made injury to her health foreseeable, it is not difficult to identify what might have been done to prevent the injury which in fact occurred. The judge was entitled to conclude that failure to do this caused her breakdown. There was no challenge to the quantification of damages in this case. We have not therefore been able to consider whether any of the matters discussed earlier in this judgment might have led to any modification of the award. Our conclusion on liability should not be taken as any indication of our view on the appropriate measure of damages in this or any other such case.

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8 Mr Bishop

68 Mr Bishop worked for the defendant company, the employer, from 1979 until February 1997 when he had a mental breakdown and attempted suicide. He never returned to work and was dismissed in 1998. The employer appeals against the order of Judge Kent-Jones in the Leeds County Court on 26 January 2001 awarding him general damages of £7,000 and adjourning his claim for loss of earnings.

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69 The employer was taken over by an American company in 1992 and reorganisation began. New shift patterns were introduced in 1994. Work was reorganised so that employees were expected to do a greater variety of tasks. Mr Bishop was at that time employed on mixer cleaning and graphite blowing. But in 1995 the mixer cleaning tasks were spread among other employees for health and safety reasons. Mr Bishop was employed mainly in receiving and distributing raw materials. Most employees welcomed the new shifts and coped well with the reorganisation. Mr Bishop did not. He

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was a meticulous worker, set in his ways, who found it hard to adjust and to make the very limited decisions now expected of him.

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70 He complained about this to his manager, Mr Fairhurst, and asked to go back to his old work. His opposite number on the alternating shift also mentioned to Mr Fairhurst, and less formally to the foreman, his concern that Mr Bishop was not coping. Mr Fairhurst explained to Mr Bishop that there was nothing he could do: his old job was no longer available and he could not rearrange the work so as to give Mr Bishop what he wanted. He tried to reassure Mr Bishop that he was doing a good job and had nothing to worry about.

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71 Nevertheless, Mr Bishop did worry. He went to see his general practitioner in November 1996. He was advised to change his job. He did not tell his employers about this. He was away from work between 24 January and 16 February 1997. Some of this time he would have been off shift. For the other times he submitted two sick notes referring to "neurasthenia". He returned to work for two days, after which there was a holiday and then the usual four days off. He returned on 24 February and his breakdown took place the following day.

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72 There was nothing unusual, excessive or unreasonable about the demands which were being placed upon Mr Bishop by his work. The sad fact was that he was unable to cope with the changes. His employers knew that he was unhappy and wanted to go back to the old ways, but they were not told of the advice given to him by his doctor. The two sicknotes were not in themselves such clear signs of a risk to his mental health that a reasonable employer should have realised that something should be done.

D

73 Even if they had been, there was nothing that the employer could reasonably be expected to do. The job that he wanted was no longer available. The work which was available could not be reorganised to suit one employee. The reality was that the general practitioner's advice was correct: the only solution would have been to dismiss him. The employer could not be in breach of duty for failing to dismiss an employee who wanted to continue and master the job despite the advice given to him by his own doctor.

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9 Conclusion

74 We therefore allow the employers' appeals in the cases of Mrs Hatton, Mr Barber and Mr Bishop. Not without some hesitation, we dismiss the appeal in the case of Mrs Jones.

Appendix

G

A Mrs Hatton

[Paragraphs 75 to 129 set out the judge's findings, evidence not recorded by the judge and expert medical evidence.]

Our conclusion on liability

130 We consider that this judgment cannot stand. At the very least the action should be retried in order that findings of fact might be made which properly reflected the evidence and proper reasons given why one side's evidence should be preferred to the other side's. There was, as our analysis has shown, overwhelming evidence which tended to show that except during

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A the two terms following [the head of department's] departure Mrs Hatton was not given any more work than was reasonable for a French teacher of her experience to undertake. The judge did not explain why, despite all this evidence, he was disposed to find that she was subjected to an increased workload.

B 131 It is, however, possible to go one step further. For the reasons set out in paragraphs 48–50 of our main judgment, the judge approached the question of the school's legal duty to Mrs Hatton in the wrong way. We are satisfied that even on Mrs Hatton's own evidence her breakdown in health was not reasonably foreseeable by the school. The judge should also have identified the specific breach of duty which contributed to her illness and explained why anything the school could have done at the time she complained about the 1995 timetable could have made any difference.

C *Damages*

D 132 The issue as to damages arises in this way. There is no dispute about the award of £6,000 for general damages or the award for lost earnings between 31 August 1996 and 1 December 1998. The employers, however, challenge the way in which the judge approached the question of compensating her for loss of earnings, or earning capacity after that date.

E 133 The judge accepted the evidence of [the claimant's expert, a neuropsychologist specialising in dealing with people with brain injuries] that she would have been well enough to seek employment as a teacher again by about June 1998. He said that given the economic problems on Merseyside and the difficulties of obtaining part-time teaching work in private schools in the area, it would be reasonable to expect her to have obtained such employment by December 1998. After that date he deducted from the net salary she would have received at the school a notional net earning capacity which gradually increased from £600 per month to £625 per month by the date of the trial. So far as the future was concerned he applied a multiplier of six to a net loss of £8,760 per annum. In the result, the award was made up as follows:

F	General damages	£ 6,000
	Past loss of earnings (gross of CRU)	£ 46,876.14
	Future loss of earnings	£ 53,560
		<hr/>
		£106,436.14
	CRU	£ 18,866.31
		£ 87,569.83
G	Interest	£ 3,106
		<hr/>
		£ 90,675.83

H 134 The employers complained that the basis for the monthly figure of £600 was not explained. Moreover Mrs Hatton did not seek to adduce any evidence of her earning capacity. In the absence of such evidence the judge should have made a modest lump sum award for disadvantage on the labour market.

135 The employers were not arguing that she should give credit for her ill-health retirement pension of £500 a month. They maintained, however, as an alternative argument, that the evidence suggested that she had a significantly greater earning capacity than that suggested by the judge. She

had told the judge that she had checked with the Teachers' Pension Agency as to what she could and could not do, so as to avoid impinging on her pension, and that she had found out that she was not allowed to teach at a school run by a local education authority if she wished to continue to receive her pension. In any event, she said that she did not think she would want to go back into a situation like the one she left before. A

136 The employers argued that it was not just to have no regard to her pension payment when calculating her losses, while allowing her to take into account the possibility of losing her pension as a reason for limiting her job search. She had said that she was searching for work at an annual salary of £12,000 gross (£9,575 net). This figure should have been taken as the best indicator of her residual earning capacity. B

137 Mr Atherton showed us how the judge had intervened during his final submissions at the trial to indicate that he was thinking of finding that Mrs Hatton had an earning capacity which he would draw from his knowledge of the world in the absence of evidence. He said that the judge's approach was reasonable, given Mrs Hatton's disadvantage in the labour market due to her age, medical history and lack of transferable skills. He showed us that even Dr Wood had considered that Mrs Hatton would not be able to cope with the pressures of teaching in the public sector. She had not in fact said that she had made no effort to resume public sector teaching because she might lose her pension, and Mr Atherton said that no inference to that effect could fairly be made. Her lack of success in applying for jobs suggested that the salary figures suggested by the employers were unrealistically high. C D

138 If we had upheld this judgment on liability, we would have awarded her a sum of £10,000 in respect of her loss of earning capacity for the period from 1 December 1998 onwards. The idea that she might have been able to go on teaching at any comprehensive school and avoided stress-related illness appears to us to be a little far-fetched, and Mrs Hatton clearly made no attempt to find any public sector teaching, part-time or otherwise, for fear of losing her pension. We consider that there is considerable force in the employers' contentions, and that justice demands that we should approach the question of compensation for the period in the broad-brush way we have indicated. E F

B Mr Barber

[Paragraphs 139 to 163 set out the judge's findings, other background evidence and evidence about Mr Barber's health.] G

Liability: our conclusions

164 Mr Hogarth criticised the judge for failing to link causation with breach of duty. The judge had so structured his judgment that he had concluded that Mr Barber's depressive illness was caused by the stress he suffered at work following the restructuring before he considered the nature of the duty the employers owed him, the circumstances in which they were in breach of that duty, and whether it was reasonably foreseeable to them that Mr Barber would suffer a psychiatric illness as a consequence of that breach. H

165 It appears to us that these criticisms were well-founded. We have set out our reasons for holding that the judge's findings on liability cannot

A stand in paragraphs 57 to 59 of our main judgment, and we need not repeat them here.

Damages

B 166 There is no appeal against the judge's award of £10,000 by way of general damages for a moderately severe psychiatric illness. The judge went on to find that Mr Barber was fit to return to work on 1 April 1998. He expressed the view that there should be no reduction for the possibility of any future psychiatric difficulty in the event that Mr Barber had not suffered his depressive illness in 1996, and had continued to work for the employer. The judge said that Mr Barber had never suffered from mental illness before, and had seldom visited his general practitioner, and that there was nothing in the experts' reports to justify such a finding.

C 167 The judge also took the view on the balance of probability that Mr Barber would have continued in his chosen profession until retirement age but for his illness, provided that he had received assistance to alleviate the work overload and the pressures to which he had been subjected during 1996.

D 168 The parties had agreed that a multiplier of four from the date of the trial was appropriate by way of a compromise of any dispute there might otherwise have been about Mr Barber's likely retirement age, and the judge computed his award of damages on this basis.

E 169 Mr Hogarth submitted that the judge was wrong to approach his assessment of what might happen in the future by making a finding on the balance of probability that Mr Barber would otherwise have continued working until his normal retirement age, and by extrapolating from that assessment a conclusion that this would have happened, making no discount from his award for the chance that things might not have turned out that way. He relied in this context on the judgment of Otton LJ in *Doyle v Wallace* [1998] PIQR Q146, 148–150, where reference is made to a passage in the speech of Lord Reid in *Davies v Taylor* [1974] AC 207, 213, and to the judgment of Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, 1609–1611.

F 170 Mr Glancy invited us to approach Mr Barber's case as if it fell into the second of the three classes of case discussed by Stuart-Smith LJ in the *Allied Maples* case, at pp 1610C–1611A. This is the type of case in which the defendant has negligently failed to provide ear-muffs or breathing apparatus or a safety-belt, and a question arises whether the injured employee would have used this equipment if it had been provided. In these circumstances, once it is decided on the balance of probability that the employee would have taken advantage of these facilities if they had been available, the court will find that he would have done so, and makes its further findings on this basis.

H 171 This type of case, however, which focuses on what would probably have happened in the past, is entirely different from a case where a court has to make an estimate of what may happen in the future. If there is a chance that an event may occur which would mean that an injured claimant would not have gone on working until retirement age in any event, then a familiar way of taking that chance into account is to reduce the multiplier used for calculating future loss. The first instance decision of Otton J in *Page v Smith*

[1993] PIQR Q55, 75–76 provides a good example of this technique at work. A

172 Mr Glancy argued, in the alternative, that an appropriate adjustment to the multiplier had already been made when the multiplier of four was agreed. While we have no doubt that ordinary contingencies were taken into account, like the chance of death or some other kind of serious incapacitating injury or illness befalling Mr Barber before retirement age, when the multiplier was agreed, we can see no evidence of any further discount being made for the chance to which Mr Hogarth referred. B

173 In our judgment the judge was wrong not to reduce the multiplier for future loss to cover the chance that if Mr Barber had continued with a similar teaching job, his health might nevertheless have broken down in the same way. He was a man, after all, who had showed himself on the evidence unable to adopt the alleviating measures that were necessary if he was to manage his not unreasonable workload successfully. There was evidence that he had disliked the changes the school had felt obliged to introduce, and on the hypothesis (which the judge adopted) that he would have opted to soldier on as a teacher until his normal retirement age, we consider that there was a significant chance, which the judge should have taken into account when computing damages, that he would have found it altogether too much for him, to the extent that his health would have been detrimentally affected in the same way. C D

174 Given that on this hypothesis we are to imagine that he would have continued to work uninterruptedly from November 1996 onwards, we consider that a annual multiplier of one (not four) would have been more appropriate for computing future loss if proper account were taken of the chance to which we have referred. In the event we have decided to allow the employers' appeal on liability, so that this part of our decision will only become relevant if another court were to hold that we were wrong on the liability issue. E

C Mrs Jones

[Paragraphs 175 to 194 and 196 to 199 set out the evidence and the judge's findings.] F

195 The employer argued that Mrs Jones had taken no time off for depression; her own general practitioner did not diagnose it in August or September 1994; she made no visits to the occupational health department; she made out she was fine when colleagues asked; the employer had no knowledge of her vulnerability; and even her husband did not realise that she was heading for a breakdown. C

The arguments on appeal

200 The employer takes issue with the judge's finding that Mrs Jones's mental illness was foreseeable. The employer relies upon all the points relied upon before the trial judge, outlined at paragraph 195 above. But the employer also takes issue with his findings of fact as to the hours worked by Mrs Jones and the "harassment" suffered from Mr Papworth [her line manager]. H

201 As to the volume of work, the judge was well aware of the discrepancies in Mrs Jones's case. He was also well aware of the need to

A treat her evidence with some caution, because he had rejected her account of the earlier episode in 1991. But he noted that Mrs Jones's present account was consistent with the account she said that she had given to Mr King [her personnel officer] in February 1993. Mr King had acknowledged that it was a gamble to expect one person to do the work of two to three. The judge also noted that no one had done a proper time and motion study of what the job required. Mrs Bell [who had stayed on to train Mrs Jones in the work] thought that it was manageable but she was a high flier. All the other observations were that it was too much for one person. Both Mr King and Mrs York [who took over from Mr King as Mrs Jones's personnel officer] had proposed extra help. Mr Papworth himself had acknowledged that he could see what she meant about the excessive hours. Perhaps the best indication was the chaos which ensued when Mrs Jones left.

C 202 The issue is not exactly how many hours Mrs Jones actually worked. The judge was entitled to find that she regularly worked way beyond the 37 hours for which she was paid. She was a dedicated and ambitious employee who was anxious to show that she could do the work required even if it took more than the allotted hours. The issue is whether the demands placed upon her were reasonable in all the circumstances. It is not necessarily reasonable to expect so much of an administrative assistant whose pay and status are not those of a professional with an open-ended commitment to getting the job done. The judge was amply justified in reaching the conclusion that Mrs Jones was overworked.

E 203 This is allied to the question of harassment. The judge based his findings on Mr Papworth's general and specific shortcomings as a manager. Again, whether those collectively amount to "harassment" as it is understood in other contexts is not the point. The point is whether the behaviour towards Mrs Jones was reasonable in all the circumstances. An employee in her position should not be placed in a dilemma where she feels unable to complain about her workload because of threats, not only to her future employment, but also to her future employability. The combination of unreasonable demands and an unreasonable reaction to complaints about those demands justifies a finding of unreasonable conduct even if the epithet "harassment" is not appropriate.

C 204 But that finding does not answer the questions which had to be answered in this case. The judge had first to consider the issue of foreseeability. The employer had some powerful points to make: in particular, there was no sickness absence during the period in question; there was no complaint of injury to health to Mr King in 1993; the complaint of injury to health in July 1994 was unspecific; had it been further investigated, it would have elicited nothing of any value because Mrs Jones's own doctor had not yet been consulted about, let alone detected any work-related illness; and her own husband, who was exceptionally involved and supportive, had not anticipated it. It is also argued that the employer had no knowledge of the earlier episode in 1991; but that is less powerful, because she was also working for the employer at the time, albeit in a different post.

H 205 The judge did not clearly separate the issues of foreseeability, breach of duty and causation as he should have done. It is impermissible to reason that because an employer has behaved unreasonably the risk of psychiatric injury should have been foreseen. Equally it is impermissible to

reason that because an injury has resulted from stress at work it has resulted from an employer’s breach of duty. A

206 However, Mr Anderson is right to argue on behalf of Mrs Jones that unreasonable demands are relevant to the question of foreseeability. Placing unreasonable demands upon an employee and then responding in an unreasonable way to the employee’s complaints about those demands are among the factors to be taken into account in deciding whether the employer knew or ought to have known that the pressures of the job were causing occupational stress. Mrs York clearly did know that much. This knowledge was coupled with two express warnings from Mrs Jones that this occupational stress was indeed damaging her health. On balance, therefore, and bearing in mind that neither Mr King nor Mrs York gave evidence, the judge was entitled to find that actual damage to her health was foreseeable. B

207 Once that hurdle is crossed, Mr Anderson is also right to argue that it was easy to identify a relevant breach of duty. Senior management knew that there were complaints of overwork which were likely to have some substance but that line management was making it impossible to make an effective complaint. They actually offered help. But because of line management’s attitude that help was never effective. If psychiatric harm was the foreseeable result of doing nothing when there were obvious steps which could have been taken it is easier to conclude that there had been a breach of duty. Although the judge does not in terms address the risk/benefit question he was entitled to conclude that there was a breach of duty when it was the employer’s own unreasonable demands which were producing a foreseeable risk of harm to the employee’s health. C D

208 Unlike the others before us, this is the sort of case described by Lord Slynn in *Waters v Comr of Police of the Metropolis* [2000] ICR 1064, 1068: E

“If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. It seems to me that he may also be in breach of that duty if he can foresee that such acts may happen and, if they do, that physical or mental harm may be caused to an individual.” F

209 The question still arises of whether that breach of duty caused the harm which was suffered. Was the judge entitled to conclude that if something had been done to lighten Mrs Jones’s workload and acknowledge the validity of her complaints her eventual breakdown could have been avoided? The underlying vulnerability would still have been there, as would Mrs Jones’s basic ambition to become an instructor rather than an administrator. But the judge gave sound reasons for preferring the view of the expert psychologist instructed on behalf of Mrs Jones to that of the expert instructed for the employer, who had not been supplied with all the relevant material. G

Conclusion

210 It must be acknowledged that although the judge gave a long and detailed judgment, it did not address each of the issues in turn in a systematic manner. This was not an easy case and would have benefited from such an H

A approach. Nevertheless, there was evidence before the judge which entitled him to reach the factual conclusions he did, and from those to conclude that the indications of risk to mental health were strong enough for a reasonable employer to think that he should do something about it, not least because senior management *did* think that there was something they should do. That something was to cease placing unreasonable demands upon Mrs Jones. There was also expert evidence from which the judge was entitled to conclude that it was the failure to take those steps which caused, or at least materially contributed to, Mrs Jones's mental illness. There is no challenge to his assessment of the damages resulting. It was for these reasons, which are set out more succinctly in paragraphs 66 and 67 of our main judgment, that we are dismissing the employer's appeal in Mrs Jones's case.

C *D Mr Bishop*

[Paragraphs 211 to 222 set out the evidence.]

223 The most striking feature of Mr Bishop's case was that his employers had no notice that he was likely to suffer a psychiatric illness if he continued in his job. Mr Bishop had concealed from his employers the advice that his doctor had given him the previous November, and two sicknotes referring to neurasthenia are a shallow foundation for the finding the judge made with the benefit of hindsight. Mr Bishop knew that his employers had no other work for him, and that his doctor had advised him to change jobs. He chose to go back to work, as he was entitled to do, but there is in our judgment no evidential basis for a finding that the breakdown in his health was reasonably foreseeable, and in any event there was nothing the employers could have done to continue Mr Bishop's employment, if he could not cope with it, because work of the kind he wanted to do was not now available.

E 224 We have set out in paragraphs 72 and 73 of our main judgment our reasons for allowing this appeal.

Orders accordingly.

F *Solicitors: Silverbeck Rymer, Liverpool; Rollingsons; Graham Clayton, Exeter; Veitch Penny, Exeter; Martineau Johnson, Birmingham; Simpson & Co, Birmingham; Morrish & Co, Leeds; Whitfield Hallam Goodall, Batley.*

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