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Employer Liability for Death by Suicide or Stress and Overwork in the Workplace

Abstract

This article deals with the complex problem of determining the liability of an employer under the law of delict for death by suicide at work (resulting from workplace causes) or death of an employee caused by stress or overwork.

It will concentrate of the evidential problems for the executors associated with bringing a legal claim on this basis and analyse how cases in Scotland and in England and Wales have clarified the law.

The liability of employers under the criminal law for death of an employee caused by stress or overwork or by suicide at work will also be considered particularly in light of recent changes to statute law increasing liability of employers for death at work.

Introduction

There are two separate issues that will be considered here namely, what underlies the problem of death by suicide at work and death from stress and/or overwork.

Death by Suicide at Work

The issue of suicide caused by stress or overwork in employment dramatically came to public attention in Scotland in 2008 when Irene Hogg, a head teacher at a Scottish primary school, took her own life when she received critical verbal feedback from inspectors carrying out an inspection at her school.¹

¹ Her Majesty's Inspectorate of Education (HMIe).

This suicide devastated the local community because she was regarded as an inspirational, long-serving (10 years), dedicated and hard working head. Teachers' leaders in Scotland described the process of inspection in schools "as hard, aggressive and hostile" and called for reform if the enquiry into Miss Hogg's death found this process was responsible.² Although this is the first case of its kind in Scotland this is not a unique event in teaching in the UK and there are a number of cases in England and Wales where a similar outcome occurred because of teachers experiencing overwork or through fear or stress caused by school inspections.³ In January 2000 Pamela Relf, a teaching veteran of 36 years, killed herself after she was criticised by OFSTED inspectors. Her suicide note stated that she found the stress of her job too much and the pace of work and the long days were more than she could do.⁴ Highly regarded primary school teacher Keith Waller felt "singled out" by a report from schools standards body OFSTED. Severely stressed, he couldn't sleep and became depressed and in November 2007 he was found hanged in his home. A letter to his union, NASUWT, said he had been "treated unfairly and victimised." Finally in December 2007 an inquest heard how Peterborough head teacher Jed Holmes killed himself, prompted by fears over an OFSTED inspection at his primary school the following day.

Of course, employees in other professions are also liable to commit suicide because of pressure of work and/or stress. "Successive TUC safety reps' surveys identify stress and overwork as the top – and growing – workplace health and safety concern and a Hazards online dossier details a sequence of recent work-related suicides in education,

² Was inspirational head driven to take her own life? The Scotsman, Friday 28 March 2008 pp 1, 4-5

³ Examples were provided by the TUC Hazard Magazine and UNISON

⁴ Jane Dibb who was 28 and taught English and Drama at Penair School in Truro killed herself by setting herself alight. She had complained about the pressure of her work.

factory, health service and fast food workers.”⁵ There have been many incidents reported where workers committed suicide due to work pressure and excessive workload. UNISON and the TUC’s Hazards Magazine have reported numerous cases of work related suicides in recent years.

Death Caused by Overwork

There is a separate but related issue and that is when someone literally dies of overwork. It will usually only be attributable to a medical cause e.g. heart attack, stroke etc. and accordingly often regarded as having nothing to do with work, even although it is work that is partly or wholly responsible for the medical condition and death. Interestingly, in Japan where liability for death by overwork is legally recognised and compensated under the civil law⁶ the term Karoshi (death by overwork) is used and widely recognised. The correlation between stress and overwork and serious illness is now well established and accepted in the UK but where a person suffering from stress related illness eventually dies it will be very unusual for the blame to be directed at the employer. There are no figures for the incidence rate of these deaths because they are not recognised or monitored as workplace deaths by the Government or its enforcement bodies such as the HSE.

What follows is an analysis of the nature and definition of stress and overwork and consideration of the legal treatment of suicide at work and death by overwork in the UK under civil and criminal law.

Stress

⁵ <http://www.hazards.org/suicide/cryingshame.htm>

⁶ Kobayashi, T Middlemiss, S Employers’ Liability for Occupational Stress and Death from Overwork (Karoshi) of workers in Japan (2008) Vol. 1 Issue 3/4 *International Journal of Private Law* pp 256-267

Everybody experiences stress at work and most people can cope with it but some people are particularly susceptible to stress and even those that are not particularly sensitive often cannot cope physically or mentally when the stress becomes too much for them. The Health and Safety Executive (HSE) in Britain has defined stress as “The adverse reaction people have to excessive pressures or other types of demand placed upon them.”⁷

Figures released by the HSE in November 2007, showed a marked increase in cases of work-related “stress, depression or anxiety,” with the total of 530,000 people in 2006/07 being affected as opposed to only 420,000 in the previous year.⁸ Researchers recently analysed the background to occupational stress and identified further factors which placed pressure upon workers.⁹ These workplace factors included: globalisation particularly, working cross-culturally while responding to different management styles; working across different time zones; excessive workloads arising from higher expectations of workers to improve productivity using less resources; technological changes making work possible seven days a week; organisational changes leading to uncertainty and fears for job security; difficulties for workers in maintaining a suitable work/life balance and, finally, physical violence, harassment and bullying against them.

⁷ Stress, *the Health and Safety Executive*. <http://www.hse.gov.uk/stress/index.htm>, They identified six key areas as risk factors for occupational stress: demands of the job, control over work activities, level of support, relationships at work, role in the organisation and changes at work and how they are managed.

⁸ Self-reported work-related illness and workplace injuries in 2006/07: Headline results from the Labour Force Survey, HSE, November 2007

⁹ Cranwell-Ward, J. and Abbey, A. (2005), *Organisational Stress*, Basingstoke, Palgrave MacMillan, p.22-23.

It is not difficult to imagine that one or more of these stressors being present in the workplace on an ongoing basis could easily lead to a person suffering from stress related illness and in serious cases experiencing death.

Overwork

Despite the introduction of the Working Time Regulations in 1998 the United Kingdom is not immune from the culture of working long hours and is the only European country that still has an opt-out for the 48-hour limit on working hours.¹⁰

According to the Trades Union Congress in 2004¹¹, “four million workers in the UK work more than 48 hours a week on average. That’s 700,000 more than in 1992 when there was no long hours protection.” The Health and Safety Executive’s carried out a survey in 2005 which found that “around 420,000 individuals in Britain believed in 2004/05 that they were experiencing work-related stress at a level that was making them ill”.¹² A further study in 2007 carried out amongst almost 1,000 32-year-olds found 45 per cent of new cases of depression and anxiety were attributable to stressful work. The researchers defined a highly demanding job as involving a lack of control, long hours, non-negotiable deadlines and a high volume of work.¹³

The following quote from the CIPD offers a comparative analysis of long hours working in different countries and shows that the UK is clearly not the worst country for long hours working but is also far from being the best.

“Just over a fifth of people in employment (5.8 million, or 20.1%) work more than 45 hours a week This is a high proportion by EU standards though other developed countries such as Australia, Japan and the United States have more long-hours

¹⁰ Kodz, J. (2003) Working long hours: a review of the evidence. Employment Relations Research Series No 16. London: Department of Trade and Industry.

¹¹ TUC Welcomes European Parliament Challenge to UK on long hours, *TUC New Release*, 11 February 2004.

¹² Stress-related and psychological disorders, Health and Safety Executive’s stress statistics.

workers than the UK. UK workers also have less paid leave on average than their EU counterparts (20 days per year compared to 25-30 in most EU countries) but again do better than Japan (17 days) and the United States (10 days).”¹⁴

Death caused by overwork and/or stress

As can be seen from these definitions, stress and overwork are closely related and overwork represents one of most common stressors leading to stress-related illness and death. Stress and overwork can either on their own or together lead to death through suicide or overwork.

It was estimated by the Trades Union Congress (TUC) that: “in the UK there are about 5,000 suicides every year in people of working age.”¹⁵ More specifically, in 2003 they had estimated that there were well over 100 cases of work-related suicide per year.¹⁶ It is likely there are now more cases given that statistical evidence shows an increase in cases of stress related illness and overwork.¹⁷

The following quote made recently by a leading trade unionist identifies the seriousness of the problem of death by overwork and its hidden nature. "UK employees work the longest hours in Europe, yet all the evidence shows that long working hours are bad for our health, equality, our families and for society. People's

¹³ Melchior, M et al. Work stress precipitates depression and anxiety in young, working women and men, *Psychological Medicine*, 2007, Vol. 37, Issue 8, pages 1119-1129

¹⁴ Working hours in the UK October 2007
<http://www.cipd.co.uk/subjects/wrkgttime/general/ukworkhrs.htm>

¹⁵ <http://www.hazards.org/suicide/cryingshame.htm>

¹⁶ “Work to death factsheet”, *Hazards* 83, July – September 2003
(<http://www.hazards.org/workedtodeath/dropdead.pdf>).

¹⁷ *Supra* 11 & 15

jobs are by far the biggest single cause of stress, and stress-related illness is the silent killer in our workplaces, impacting on workers' physical and mental health.”¹⁸

Nevertheless none of these deaths is included in workplace death figures in the UK and work-related suicide is not monitored by health and safety organisations. The Government has also failed to monitor the statistics for work related deaths caused by stress.

Legal Position in Scotland

Death by Suicide

There is a dearth of cases dealing with work related suicide in Scotland, *Cross v Highlands and Islands Enterprise*¹⁹ a decision of the Outer House of the Court of Session is probably the leading case. What follows is a detailed analysis of this decision. The facts were that an employee committed suicide in August 1993 after suffering from depression allegedly brought on by stress at work. His widow sued Highlands and Islands Enterprise (HIE) and the Western Isles Local Enterprise Company (WIE) where he had been seconded, for damages for negligence at common law and breach of statutory duty.²⁰ She alleged that it was HIE's duty to take reasonable care for the safety of their employees including her deceased husband and to take reasonable care to provide him with a reasonably safe system of work. Also that the WIE owed Mr Cross a duty to take reasonable care not to expose him to working conditions that were reasonably foreseeable to cause harm to his mental health.

¹⁸ Derek Simpson, the general secretary of Amicus, the manufacturing, technical and skilled persons' union

¹⁹ [2001] IRLR 337

²⁰ Under the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1992 (amended in 1999).

Mr Cross was appointed as a Senior Training Manager of WIE by way of secondment from HIE in April 1991. Two years later he first went to see his GP and complained of feelings of inability to cope with his job, anxiety about his future, difficulty in concentrating and sleep disturbance. He claimed the source of this anxiety to work-related problems including having too great a workload and lacking assistance in particular inadequate availability of secretarial help. His doctor, however, found no evidence of underlying depression and no suicidal intent and unhelpfully diagnosed 'stress.' The Lord Ordinary MacFadyen held that it had not been proven that the initial cause of the depressive illness from which Mr Cross was suffering between April and August 1993 was stress arising from his work even if, as was clearly shown Mr Cross had believed that the source of his depression lay in difficulties at work.

However, Lord MacFadyen added: ²¹ "it cannot be said that liability in respect of psychiatric injury can arise only where the injury takes the form of nervous shock i.e. a sudden assault on the nervous system." ²² In circumstances that a doctor certifies someone as unfit for work on account of 'stress' this does not constitute an unequivocal diagnosis of psychiatric illness. Stress may cause psychiatric illness but it's not itself an illness. Furthermore the employer in this case had no clear information identifying: the nature of Mr Cross's illness; the severity of the condition and that the job was objectively likely to be harmful to his mental health.

He also held that "in judging what was reasonably foreseeable it was necessary to bear in mind any special susceptibility of the employee to harm, of which the employer was actually or ought reasonably to have been aware, and in the present

²¹ Ibid Lord MacFadyen, p 337

²² Supra 20 p 337

case the relevant question was the likelihood of the deceased suffering psychiatric, as opposed to physical injury.”²³

In Lord MacFadyen’s view it was not the employer’s duty to go looking for difficulties in Mr Cross’s working conditions that were not identified to them at the time as having a bearing on his illness however, a reasonable employer would find out what Mr Cross perceived to be the pressure at work that had precipitated his illness and to apply their mind to those factors in order to improve the situation.

He concluded that although HIE were under a duty to take reasonable care not to expose him to working conditions which were reasonably foreseeable to subject him to such stress as to be likely to cause him psychiatric injury, the claimant had failed to prove HIE’s breach of that duty under the law of negligence.

The court first clarified that the onus of proof of causality between the wrongful act or omission and the harm suffered, on the balance of probabilities, rests upon the pursuer: but it is not necessary for the pursuer to show that negligence or breach of duty is the sole cause of the harm and it is sufficient to show that it represents a material contribution to that harm.

However, in this case negligence and breach of statutory duty were not proved and thus the issue of causal connection between the alleged negligence and Mr Cross’s suicide did not arise.

In the Cross case a major hurdle for the executors of the deceased employee claiming damages for psychiatric injury due to work-related stress was foreseeability of his suffering psychiatric harm. Had this been established the deceased’s employers would have been liable not only for the reasonably foreseeable psychiatric injury but for his

²³ Supra 20 p 337

suicide as a consequence of the injury.²⁴ If the medical evidence had been stronger and Mr Cross had made more effort to bring his medical problems to the attention of his employer in this case his executors would have been successful in their claim.

This case highlights a key problem in this area. At what point does an employee have to recognise that they are becoming so stressed and overworked that they are likely to suffer psychological harm and what evidence should they seek to support their view.

In practical terms, employees are generally reluctant to accept they cannot cope and will let the problem go on and suffer harm for some considerable time before admitting to themselves and to their employer there is a problem. At that stage or even earlier, they are expected to produce irrefutable evidence from a psychiatrist or some other similarly qualified expert that they are mentally ill.

Death by overwork

There is no legal precedent in Scotland that recognises that stress and overwork can lead to, or materially contribute to, the death of employees. On a more positive note there is recognition by the Scottish courts that stress and overwork can lead to a physical or mental illness although they have tended place evidential obstacles in the way of employees trying to make a delictual claim for suffering harm of this kind.

As with any delictual claim, to succeed an employee would have to establish (i) the existence of a duty of care; (ii) that the harm resulting from breach of duty was foreseeable; (iii) an actual breach of the duty; and (iv) a causation between the breach of duty and the recoverable loss.

²⁴ Lord President Clyde stated in *McKillen v Barclay Curle & Co Ltd* [1967] SLT 41 at p 42

that: "it has never been the law of Scotland that a man guilty of negligence towards another is only liable for the damage in respect of ... injuries which a reasonable man would foresee as likely to follow from it. On the contrary it has always been the law of Scotland ... that once a man is negligent and injures another by his negligence he is liable for all the damage to the injured man which naturally and directly arises out of the negligence."

Physical Harm

In the case of *Smith v. Advocate General for Scotland*,²⁵ heard in the Outer House of **Check quote** the Court of Session, it was stated that: “In the present case, the issue is a general one of stress encountered while at work as opposed to work related stress i.e. stress caused by an excessive workload. ...It is the so called managerial style or incidental conduct of [a superior] that forms the basis of the complaint. The question at this stage is whether there can be disentangled from the averments sufficient to establish knowledge that a risk to the health of the pursuer was foreseeable by the defender or and was the result of those circumstances specified.²⁶ It is thought that this distinction is unhelpful and that the two types of claim identified should be indistinguishable as they are both stress cases that will lead to the same or similar outcomes. Clearly overwork can lead to physical injury where long hours are worked or heavy duties are involved but what is less obvious is that more serious injuries such as heart attacks or strokes etc. can result from overwork which of course can often lead to death. Unfortunately these illnesses can have a variety of causes including poor diet, lack of exercise, pressures at home etc. Accordingly a court is often unwilling to accept that stress at work or overwork is the main cause or even a material cause of these medical conditions even although there is clear evidence that it can be. Until this judicial acceptance is achieved, there will be little or no recourse under the law for persons in the workplace who suffer undue stress or overwork and die as a consequence.

²⁵ [2001] ScotCS 13 (19 January 2001)

Psychiatric Harm

The most notable obstacle to succeeding in a delictual claim that is based on breach of a duty of care leading to psychiatric harm, is the requirement that the employee affected inform employers of their medical condition and its workplace causes (as considered above) and produce medical evidence from a medical practitioner or more likely a psychiatrist (in cases of mental illness) that underpins their claim.

In *Rorrison v West Lothian Council*²⁷ the Lord Ordinary (Reed) observed:

“The action being based on negligence, the pursuer can only recover if she has sustained psychiatric illness in the form of a recognised psychiatric illness ... there must be a recognised psychiatric illness, not mere depression or anxiety ... the pursuer’s pleadings must give fair notice that it is her intention to lead evidence that she has suffered a recognised psychiatric disorder, and they should specify what disorder that is ... There is no suggestion [in the present case] that she has ever been diagnosed by a psychiatrist as suffering from a recognised psychiatric disorder, and there is no suggestion that her condition is recognised by any psychiatrist or body of psychiatric opinion as constituting a psychiatric disorder. It follows that an action based on negligence cannot succeed.”

In the English case of *Walker v Northumberland County Council*²⁸ it was established that the duty of an employer to take reasonable care to provide a safe system of work could extend to mental as well as physical injury. Mr Walker was a social worker who suffered a nervous breakdown because of stress and pressures at work, and in consequence was off work for three months. Before he returned to work, his

²⁶ Temporary Lord Ordinary, T G Coutts QC,

²⁷ [1999] Rep. L.R. 102 at p 102

employers agreed that the burden on him would be lessened. It was not, and six months later he suffered a further nervous breakdown. It was held that where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pressure of his workload, the employer's duty to provide a safe system of work included a duty to take reasonable care not to cause the employee psychiatric harm by reason of the volume and character of the work he had to perform. Colman J said:

"Although the law on the extent of the duty of an employer to his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable...there is no logical reason why risk to an employee's mental health should be excluded from the scope of an employer's duty.

„29

In the case of *Fraser v The State Hospitals Board for Scotland*³⁰ it was held that damages are only recoverable for stress-related illnesses in a personal injury claim where there is a recognised psychiatric disorder. An employer's duty to take reasonable care to prevent psychiatric harm to its employees does not extend to the prevention of common place negative emotions or normal human conditions such as anxiety, stress, resentment or anger. The employers' duty to prevent psychiatric harm or injury is not a general one but will only arise if it is reasonably foreseeable that negative emotions or human conditions such as stress or anxiety are liable to be suffered to such a degree as to constitute a psychiatric disorder.

Legal Position in England and Wales

²⁸ [1995] IRLR 35

²⁹ Ibid p36

³⁰ [2000] IRLR 672

Death by Suicide

The leading case concerned with suicide through stress related illness incurred at work is *Corr v IBC Vehicles*.³¹ The widow of a maintenance engineer who committed suicide when severely depressed as a result of a work-related accident brought a negligence claim against the employer for damages in relation to her husband's psychiatric and physical injuries that flowed from the accident, as well as a claim under the Section 1 of the Fatal Accident Act 1976 for damages for the loss of financial support arising from her husband's death. The employer contested this duty of care arguing it did not extend to protecting the employee from killing himself and that the suicide had broken the chain of causation and was not reasonably foreseeable. However, the Court of Appeal was satisfied that a duty of care was owed to Mr Corr and a line of causation existed between the employer's negligence and his death. They held³² that 'it was not necessary to establish that the employee's suicide was reasonably foreseeable, but only that the kind of harm that he suffered – in this case, psychiatric injury (i.e. severe depression) – was foreseeable, and that it was the injury that drove him to take his life'. The Court also heard evidence that 10% – 17% of sufferers of severe depression kill themselves. It then followed in their view that the employer was liable not only for the deceased's post-accident depression but also for his suicide as there was a clear connection between the physical injuries, the post-traumatic stress disorder, the depression and his suicide.³³

In *Corr* the Court confirmed that for purposes of foreseeability and causation the law of negligence no longer draws any distinction between physical and psychological injury and if depression is foreseeable from the physical injury, it is difficult to

³¹ [2007] Q.B. 46, [2006] 2 All E.R. 929

³² Referring to the decision in *Simmons v British Steel plc* [2004] S.C. (H.L.) 94

³³ "Negligent employer liable for employee's suicide", *IRS Employment Review* 854, 8 September 2006, p.63.

conclude that suicide as a result of that depression is not foreseeable. Accordingly, an employer must take his victim as he finds him. Applying these dicta to the Cross case earlier, if it had been proved that exacerbation of Mr Cross's depression was caused by his employer's wrongful act or omission and this led to his suicide, the pursuer could have been entitled to recover damages in respect Cross's suicide even if his suicide was not reasonably foreseeable as a likely consequence of the employer's negligence.³⁴

Corr was taken on appeal to the House of Lords.³⁵ Lord Justice Bingham gave the leading speech and dismissed the appeal. He expressed his conclusions as follows:

“To cut the chain of causation here and treat Mr Corr as responsible for his own death would be to make an unjustified exception to contemporary principles of causation... Today we are able to accept that people to whom this happens do not forfeit the regard of society or the ordinary protections of the law. Once it is accepted that suicide by itself does not place a clinically depressed individual beyond the pale of the law of negligence, the relationship of his eventual suicide to his depression becomes a pure question of fact...Once liability has been established for the depression, the question in each case is whether it has been shown that it was the depression which drove the deceased to take his own life. On the evidence in the present case, it clearly was.”³⁶

It was held that the employee, at the time of his death, was not insane, nor was he fully responsible and he had acted in a way that he would not have done but for the injury his employer's breach caused him to suffer. That being the case, his taking of

³⁴ *Fraser v State Hospitals Board for Scotland* [2000] IRLR 672

³⁵ [2008] 1 AC 884

³⁶ *Ibid* p 902 paragraphs 82 & 83

his own life, could not be said to fall outside the scope of the duty which his employer owed him.

It was held that “depression, possibly severe, possibly very severe, was a foreseeable consequence of this breach”³⁷ It was held further that it was not necessary for the plaintiff to establish that suicide was foreseeable and further that suicide was reasonably foreseeable by his employer considering the possible effect of a serious workplace accident on a hypothetical employee.³⁸ It was not unfair to hold the employer responsible for that consequence of its breach of duty.

Three of the judges in the appeal Lords Scott, Mance and Neuberger were of the opinion that a deduction from the damages paid for contributory negligence to the executors in such a case could be appropriate in circumstances where deliberate suicide was committed by the employee in a state of depression which was induced by an accident.³⁹

However the majority decision of the House of Lords was it would be inappropriate to reduce the damages to be awarded to the claimant on the basis of the deceased's contributory negligence in the absence of satisfactory material⁴⁰ on which to decide whether such a reduction should be made, and in what amount.⁴¹

Lord Bingham had little difficulty in dismissing this part of the appeal as follows: “For reasons already given, I do not think that any blame should be attributed to the deceased for the consequences of a situation which was of the employer's making, not his. Consistently with my rejection of arguments based on novus actus and

³⁷ Supra 35 p 906 Lord Bingham's judgement paragraph 13

³⁸ Suicide could be a novus actus if a person took his own life as a conscious decision in the absence of any disabling mental illness. “However, his suicide was not a voluntary, informed decision taken by him as an adult of sound mind making and giving effect to a personal decision about his future. It was the response of a man suffering from a severely depressive illness which impaired his capacity to make reasoned and informed judgments about his future, such illness being a consequence of his employer's tort.” Supra 35 p 903

³⁹ Supra 35 p 913 & 915

⁴⁰ There was no discussion of this issue at the earlier stages of the appeal

unreasonable conduct, I would similarly absolve the deceased from any causal responsibility for his own tragic death. I would accordingly assess his contributory negligence at 0%.⁴²

While the facts of this case were slightly unusual in that the medical problems suffered were caused by a physical accident at work, this is not a necessary element of the case and provided a duty of care has been breached in respect of the mental wellbeing of an employee the employer will be liable for that and any subsequent suicide.

Death by stress or overwork

There is no judicial acceptance that stress or overwork can lead to death but it is recognised that it can lead to physical or mental illness.

The position in England and Wales with respect to employees bringing claims for stress related illness is similar to that in Scotland largely as a result of the decision in the case of *Sutherland v Hatton*.⁴³ However, the courts in England and Wales have been a little more relaxed about the evidence that is needed to prove that an employer is aware that his employee is suffering from a stress related illness.

In the case of *Barber v Somerset County Council*⁴⁴ the House of Lords expressly approved the general statement of the law set out by the Court of Appeal in *Sutherland v Hatton*⁴⁵ but with the important proviso that that an employer in these circumstances has a duty to be proactive and not reactive.

The *Sutherland* propositions are as follows:

- i. The employer is not in breach of his duty of care if he allows a willing worker to continue working in a stressful job where the only alternative

⁴¹ Supra 35 Lord Justice Bingham p 906

⁴² Supra 35 p 906

⁴³ [2002] ICR 613, CA, [2002] 2 ALL ER 1

would be his dismissal or demotion presumably even if by doing so it leads to his or her death by overwork or suicide.

- ii. With similar reasoning to that of the courts in Scotland, it was decided that an employer can usually assume that an employee can safely tolerate normal job pressures unless he knows of a particular problem or vulnerability or signs of stress in a worker which is or should have been, obvious to the employer: the onus is normally on the worker to complain about undue stress and bring it to the attention of his employer;
- iii. The normal principles of employer liability under the law of tort apply to work related stress claims and there are no special rules that apply to such claims;
- iv. In circumstances where an employer offers a confidential counselling service this would be a sufficient defence to defeat a stress related claim by an employee.

Accordingly the odds are against any employee succeeding in a stress case based on physical or psychiatric injury against an employer under the law of tort.

More generally, whether death results from a physical or mental illness that is caused by stress or overwork is a moot point to the judiciary in England and Wales because this type of death is not recognised by them as a workplace death in the normal sense of the word unless it is a suicide and even then the Sutherland requirements or propositions must be met. ⁴⁶

⁴⁴ [2004] ICR 457, HL

⁴⁵ Supra 43 ICR Propositions set out by Hale J and summarised at paragraph 43, p 629

⁴⁶ Supra 43 & 45

Criminal Consequences

Position in Scotland prior to Corporate Manslaughter and Corporate Homicide Act 2007

Where an employee died at work there was the possibility of the person responsible being prosecuted under the common law offence of culpable homicide. Employers and others could also be prosecuted for health and safety offences under the Health and Safety at Work etc Act 1974 (and for breach of various Regulations made through the auspices of (and enforced under) the Act.⁴⁷ The 1974 Act placed duties on employers to ensure so far as is reasonably practicable the health and safety of employees and others who may be affected by their actions. What is perhaps surprising is the Act makes no reference to management failures which cause death and there is no specific offence under this Act for causing or materially contributing to death in the workplace.

Where breach of the Act relates to suicide caused by stress and overwork it would be treated as any other breach.

What follows is a quote from a specialist body set up to look into corporate homicide which gives an indication of the scale of the problem in Scotland.

“In Scotland, over the nine years to March 2005, an average of 30 workers (employees and self employed) each year are killed at work. On average a further 9 members of the public die each year as a result of work-related activities. These figures do not include deaths on the railways, many of which are suicides.”⁴⁸

⁴⁷ With respect to death by suicide section 2(2) of the Health and Safety at Work Act 1974 and Regulation 3 of Management of Health and Safety at Work Regulations 1999 are particularly relevant

Actual deaths can amount to several hundred a year although there is no indication of how many result from health and safety failures, suicide or overwork. Although individual workers (Section 7) and directors could be prosecuted and in some cases were, when appropriate, health and safety prosecutions were mostly taken against organisations. This was mainly because breaches were rarely the fault of one individual and usually resulted from a series of management decisions. The maximum penalty following conviction of an organisation was an unlimited fine, although lesser maximum penalties applied for particular offences. Individuals convicted of certain offences could be jailed for up to 6 months although this has almost never happened in Scotland.⁴⁹

Position in England and Wales prior to Corporate Manslaughter and Corporate Homicide Act 2007

In England and Wales there was a number of well publicised workplace disasters with considerable loss of life but often the outcome of any prosecution for corporate manslaughter was unsuccessful. Those in senior management who had control of the organizations at the time of the incident walked away with no accountability.⁵⁰ This prompted a widespread view that the legal system was not delivering justice.

The first successful corporate manslaughter prosecution was in December 1994 when OLL Limited became the first company in English legal history to be convicted of the common law crime of manslaughter. The managing director became the first director to be given an immediate custodial sentence for a manslaughter conviction arising

⁴⁸ The findings and recommendations of the Expert Group on Corporate Homicide. Scottish Government Publication, November 2005 available at <http://www.scotland.gov.uk/PublicationS>

⁴⁹ Utility firm Transco was fined £15m a UK record after being convicted on a charge arising from an explosion which killed four people. Transco fined £15m for gas blast 25.08.05 <http://news.bbc.co.uk/1/hi/scotland/4184962.stm>

⁵⁰ Since 1992 there have been more than 34 prosecution cases for work-related manslaughter but few organisations have been convicted.

from the operation of a business and was sentenced to three years imprisonment (reduced to two years on appeal). Following from that case, others were convicted of corporate manslaughter but not many and only directors in smaller companies where the management structure and decision-making was clear and directly affected the behaviour of all employees. Over the last fifteen years there have been around 34 prosecutions for work related corporate manslaughter, but only six of the companies (which again were small) have been convicted of this offence.

Under section 20 of the Corporate Manslaughter and Corporate Homicide Act 2007 corporate liability for the common law offence of manslaughter by gross negligence has been abolished. However, individual directors or managers can still be prosecuted for manslaughter by gross negligence.

Other than this the position is not dissimilar to that in Scotland regarding statutory offences in that individuals and organisations can be prosecuted for gross negligence/ manslaughter/culpable homicide which represent health and safety offences under existing health and safety law.

Under Section 2 there is a duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees and under section s 3(1) an employer has a duty not to expose to risk persons who are on its premises but not in their employment. A prosecution for suicide for work related reasons would be brought against an employer under one of these sections depending on the relationship they had with the victim. These laws are enforced by the Health and Safety Executive however, the number of successful prosecutions of

organisations for causing death at work to date are few, and tend to be restricted to serious accidents at work.⁵¹

Personal liability for individual directors or members of senior management of an organisation is possible under section 37(1) of Health and Safety at Work Act 1974 for materially contributing to a breach of the Act by the employer however, very few prosecutions under this section have been successful to date. This will arise where individuals are negligent in not acquainting themselves with the facts pertaining to a breach and failing to act by taking reasonably practicable steps to prevent the breach. The neglect of duty must have caused or contributed to the company breaching its duty under sections 2 or 3 of the Act. The evidential requirements for an offence to be established are given detailed consideration by the Court of Appeal in *Regina v P*⁵²

Where an employer through the auspices of a manager knew that someone working for them was becoming or had become mentally ill as a result of stress or overwork for which they were responsible and failed to take any action to alleviate the problem resulting in that person's suicide then not only the employer would be liable but also an individual manager. While there are no instances of employers being prosecuted under health and safety law for work related suicide the new Corporate Manslaughter and Corporate Homicide Act 2007 could change this given the Act is specifically designed to attach criminal liability to organisations for death at work.

Corporate Manslaughter and Corporate Homicide Act 2007

⁵¹ The largest fine in the UK resulting from a health and safety prosecution (prior to Transco) was a £2m fine imposed on Thames Trains after the Ladbroke Grove accident in which 31 people died.

⁵² [2007] EWCA Crim 1937

The Act created a new offence in England, Wales and Northern Ireland called corporate manslaughter and in Scotland called corporate homicide. Under section 1 of the Act the offence is defined as follows:

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised:⁵³

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

Also criminal liability is restricted to situations where a senior management⁵⁴ failure plays a significant part in breach of the relevant duty of care.⁵⁵ A relevant breach of duty of care arises inter alia where the behaviour of an organisation is a "gross" breach i.e. if the conduct alleged amounts to a breach of the duty and falls far below what can reasonably be expected of the organisation in the circumstances. This would certainly apply to most cases of death by suicide caused by stress or overwork. The prosecutor needs to prove that the accused is a qualifying organisation and that mismanagement of the organisation caused a person's death. While the former will apply in most cases the second obstacle may be more difficult to overcome and the employer will need to show the harm was foreseeable and directly caused by their failure to act.

⁵³ The Act covers most organisations and the extent of its coverage is set out in Section 2 of the Act

⁵⁴ "Senior management" means the persons who play significant roles in— (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities. Section 4 ©

⁵⁵ "An organisation is guilty of an offence ... only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to." Section 1.

The prosecutor must also show that there was a relevant duty of care owed by the organisation to the deceased but this will not be difficult when the deceased was an employee or worker. They will also have to establish that there has been a gross breach of that duty. What is required here is unclear but this might not be difficult to establish where there has been a systematic failure to deal with the problems associated with stress and overwork (including identifying the issues under a risk assessment) or respond to complaints about it from affected employees. A substantial element of the breach must relate to the way activities were managed or organised by senior management but in most cases of work related suicide it normally only occurs after continuous systematic failures by management to provide a workplace where there is an acceptable level of stress, working hours etc.⁵⁶

An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine. The offence of corporate homicide is indictable only in the High Court of Justiciary in Scotland. Section 2 sets out the meaning of a “relevant duty of care”

(1) A “relevant duty of care”, in relation to an organisation, means any of the following duties owed by it under the law of negligence—

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

⁵⁶ In *R v HM Coroner for Inner London, ex parte Douglas-Williams* [1999] 1 All ER 344. part of Lord Woolf’s definition of gross negligence manslaughter was: “The degree of negligence has to be such that it can be characterised as gross in the sense that it was of an order that merits criminal sanctions rather than a duty merely to compensate the victim.” at p 346. This could equally apply to the new offence.

(b) a duty owed as occupier of premises.⁵⁷

This duty under both subsection (a) and (b) would clearly extend to workers (including atypical workers) and could include independent contractors. The new offence applies to all companies and employing partnerships, including those in a contracting chain.

“This aspect of the ...offence is perhaps the most complex of its elements.

Nevertheless, as defined in the ... Act it includes almost all situations where a person dies while working or performing services for an organisation, whatever that person's employment status, i.e. whether he/she was an employee, self-employed or a sub-contractor.”⁵⁸

However, whether a particular contractor might be prosecuted for the new offence will depend in the first instance on whether they owed a relevant duty of care to the victim. It is important to point out that no individual can be prosecuted under the Act for either a primary or secondary offence.⁵⁹

⁵⁷ There is a further duty © which is less relevant to our topic: (c) a duty owed in connection with—

- (i) the supply by the organisation of goods or services (whether for consideration or not),
- (ii) the carrying on by the organisation of any construction or maintenance operations,
- (iii) the carrying on by the organisation of any other activity on a commercial basis, or
- (iv) the use or keeping by the organisation of any plant, vehicle or other thing;

(d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.

⁵⁸ Legislative Comment: Reflections on the Corporate Manslaughter and Corporate Homicide Act 2007 Health & Safety at Work. 2008, 15 (7) pp 1-3

⁵⁹ Section 18

As corporate manslaughter is a serious offence under criminal law and it is not regulatory such as a breach of health and safety legislation it means that the police will investigate corporate manslaughter or corporate homicide cases and the Crown Prosecution Service or Procurator Fiscal Service in Scotland will prosecute.

The health and safety enforcing authorities can provide support to the investigation and there is already in place an established protocol for liaison between the relevant parties. Under section 19 the conviction of an employer under the Act does not preclude a conviction arising out of the same circumstances of an offence under the Health and Safety at Work Act 1974

For those found guilty of corporate manslaughter or corporate homicide the sanction will be an unlimited fine and that can be set at a very high level. In addition to the fine, the courts will be able to impose remedial orders, to be addressed within a specified time. For the offending organisation that could be very costly and in some cases the combination of a fine and the cost of putting things right may render the company insolvent. The court can issue a publicity order to every offender convicted of corporate manslaughter or corporate culpable homicide. Under the terms of the order, they would be required to publicise in a manner specified by the court particulars of their offence and details of their conviction, the amount of the fine imposed and the terms of any remedial order.

The Health and Safety (Offences) Act 2008 became law recently and may serve to assuage the critics of the Corporate Manslaughter and Corporate Homicide Act 2007. The effect of the 2008 Act was to increase, the maximum fines, and the number of health and safety offences for which imprisonment of relevant directors and managers may apply and to allow the lower courts to deal with these cases and apply custodial sentences where appropriate. .

Conclusion

This article set out to analyse the legal consequences for employers and their senior management for suicide or death by overwork of their employees and workers caused by stress or overwork. This necessarily involved consideration of their liability under the law of delict/tort to the executors or relatives of the deceased and the possibility of their criminal liability under common law and statute.

The changes in the civil law brought about by decision of the House of Lords in *Corr* are important in clarifying the issues of causation and foreseeability in these cases.

The effect that a claimant only has to establish that a duty of care exists towards the deceased and this was breached by the employer when he required his employee to work in a stressful environment or to overwork. It must be shown that the employee suffered physical or psychological harm as a consequence and that the employer knew about this consequence for them (or should have known) and failed to take appropriate action. As suicide is a foreseeable outcome of psychological injury, it is not necessary that the employer had anticipated it.

The *Corr* case involves a ruling of the House of Lords which is technically not binding in Scotland although the approach in *Corr* is likely to be followed in Scotland and therefore applied by the courts in both jurisdictions. There is in reality little difference between the decision in the leading Scottish case at the moment and this case so it may not involve the courts in Scotland having to change their approach to these cases other than to relax the causation rules to ensure that once an employer's liability for psychiatric illness has been established then suicide is deemed a natural

consequence of this that cannot be challenged (e.g. on the basis of *novus actus interveniens*).

It is likely that the issue of contributory fault that was considered in *Corr* will re-emerge in future cases involving suicide at work however, it seems unjust and incorrect that having established that the employer is ultimately responsible for the suicide of a worker the court then reduce the amount of compensation payable to the claimant on the basis that it was suicide that was the cause of death of that worker.

With respect to the criminal law the most significant development is the Corporate Manslaughter and Corporate Homicide Act 2007 which attaches criminal liability in both jurisdictions for employers responsible for death at work including suicide and potentially death by overwork. Despite criticisms of this Act mainly concerned with its inability to hold individual directors or managers criminally liable for deaths in the workplace it should ensure that collective legal responsibility of directors or managers in the organisation can be determined for behaviour of a criminal nature.

“ This new offence is intended to achieve the underlining objective of the Act, which is to make conviction easier for corporate manslaughter. Thus the Act adopts a corporate approach to liability and jettisons the individualistic conception of liability under the identification doctrine. The focus is on senior management conduct. It aims to consider senior management conduct collectively as well as individually.”⁶⁰

The extent that it can be used to hold organisations liable for suicide in the workplace remains to be seen but as demonstrated earlier there are no apparent reasons why it should not.

⁶⁰ Mujih E Reform of the law on corporate killing: a toughening or softening of the law? (2008) *Company Lawyer*, Volume 29(3) pp 76-83

Prosecution of various other criminal offences in both jurisdictions (under statute and the common law) can be undertaken against organisations and/or individual decision makers who are responsible for the suicide or death by overwork of employee or workers but to date they have not been widely utilised for this purpose.⁶¹

There is no judicial appetite for accepting death by overwork is a reality in the UK. Evidential difficulties have been attached to this kind of case by judges in response to a genuine and justified fear of the floodgates opening should it be recognised as a preventable cause of death at work however, it is this writer's opinion that this is an issue that is unlikely to disappear.

⁶¹ Barrett, B Liability for safety offences: is the law still fatally flawed? *Industrial Law Journal* (2008) Vol. 37(1) pp 100-118