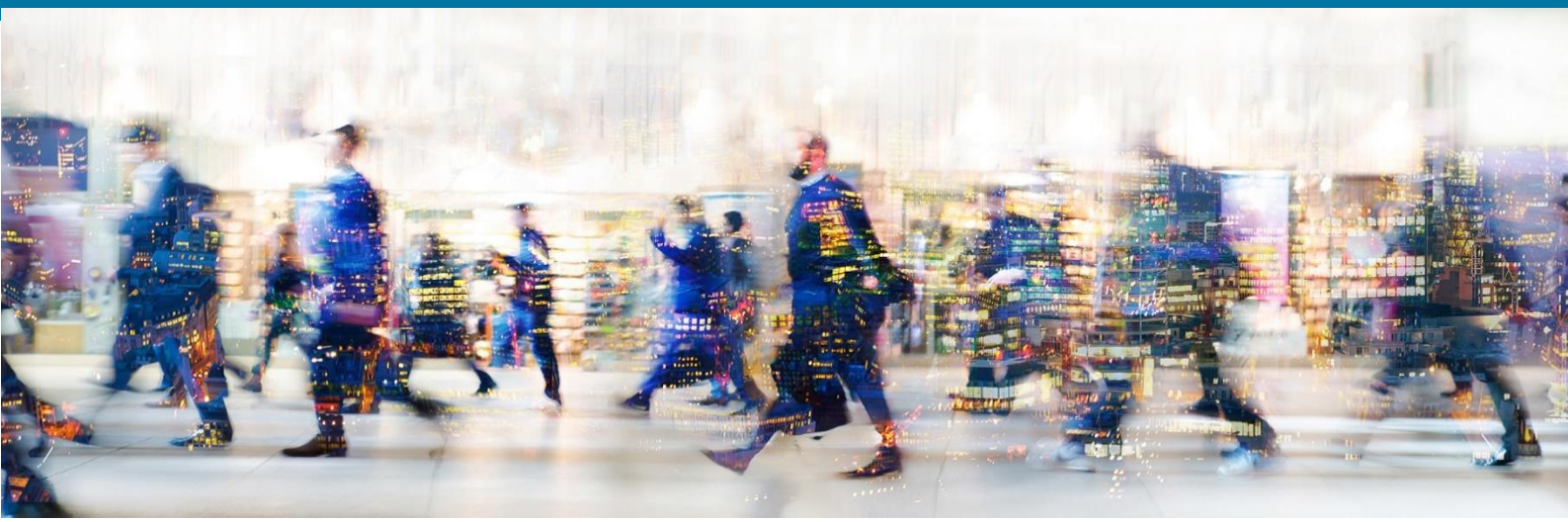
Occupational stress claims: Why *Hatton* is inconsistent with Health and Safety practice



Key messages

- The findings in the 2002 case of *Hatton v Sutherland* are inconsistent with modern Health and Safety practice due to changes in standards since that time.
- Experts in occupational stress risk management can assist the courts to consider achievement of 'the standards of the day' in occupational stress related claims.

- Current health and safety practice recognises that work related stress hazards may exist in any working environment. Stress related injury is, therefore, a foreseeable hazard of work.
- The findings in *Hatton* relied on now outdated guidance to suggest that there are no occupations that are intrinsically dangerous to mental health.
- *Hatton* therefore appears to be inconsistent with modern Health and Safety practice.

- The extent of any workplace stress related injury risk that exists depends on the circumstances of work and the individual's response to those circumstances.
- Employers should proactively assess risks of stress related injury.
- *Hatton* implies that a reactive approach to occupational stress risks is acceptable and focusses on foreseeability of risk to the individual; such an approach is inconsistent with current health and safety practice.

- The Health and Safety Executive (HSE) have defined 'Management Standards' in relation to occupational stress risks which represent the current 'knowledge and standards of the day'.
- Employers should be proactive in stress risk assessment and control risks for the whole workforce, with further systems in place to respond to any individual concerns
- Proactive achievement of the stress 'Management Standards' will reduce risk to individuals and prevent injury.

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Introduction

All occupations have the potential to cause stress related illness. Employers are legally required to assess and control occupational ill health risks, including the risks of stress related illness. So why does case law in compensation claims suggest that there are no occupations that are intrinsically dangerous to mental health?

In this paper, Certified Stress Management Consultant Ches Moulton describes modern management practice of occupational stress risks and considers the implications in the context of case law, in particular the findings of the Court of Appeal in the case of *Hatton v Sutherland* which reflects now outdated guidance. Ches describes how the knowledge and standards of the day in relation to psychosocial risks, or, more colloquially, 'stress risks' compares to the findings of the Court.

The paper examines:

- What employers should know about occupational stress risks
- What employers should do about occupational stress risks
- The implications in the context of compensation claims by individuals pursuing compensation claims for stress related conditions.

Occupational stress and psychosocial injury

Occupational stress is sometimes defined to occur when a person perceives an inability to cope with the demands of their work. More formally, a 'psychosocial risk' can be considered as a combination of:

- The likelihood of occurrence of exposure to work related hazards of a psychosocial nature and
- The severity of ill health injury that can be caused by those hazards.

Hazards of a psychosocial nature include aspects of work organisation, social factors at work, the work environment, equipment and hazardous tasks.

Detailed examples of sources of psychosocial hazards are given in the international standard ISO 45003 "*Occupational health and safety management – psychological health and safety at work – guidelines for managing psychosocial risks*". The examples are grouped into three tables dealing respectively with:

- Aspects of how work is organised
- Social factors at work
- Work environment, equipment and hazardous tasks

Organisational stress hazards may arise, for example:

- Where there is a lack of control over workloads
- Where workers have low levels of influence or independence in their work
- Where there is continual work exposure to interaction with people

Social factors that may create stress hazards at work include those relating to interpersonal relationships. These could be as obvious as harassment or bullying, or less obvious such as social or physical isolation of workers.

Examples of stress hazards associated with the work environment, work equipment or tasks may include poor workplace conditions such as lack of space, poor lighting, excessive noise or work in extreme conditions or situations, such as very high or low temperatures, or at height. Service by the Armed forces or work by others in conflict zones would be a specific example of work in extreme conditions that involving psychosocial hazard.

There are no 'Stress at Work Regulations' and, therefore, no prescriptive legislation that regulates how psychosocial/stress risks should be mitigated in the workplace. However, it has long been accepted that management of occupational stress risks is a requirement for employers in the context of the general duties of both the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations (which first came into force on 1 January 1993).

General guidance to employers on how to manage occupational stress risks was first published by the Health and Safety Executive (HSE) in their 1995 booklet *"Stress at work – A Guide to Employers"*. In 2005 the HSE published explicit "*Management standards*" to be achieved in the context of stress. The HSE 'Management Standards' approach continues to the be the focus of HSE advice. In June 2021, further detailed guidance was published in ISO 45003 "*Occupational health and safety management – psychological health and safety at work – guidelines for managing psychosocial risks*"

What should employers do?

Employers should identify the psychosocial/stress hazards associated with the work of their employees. The detailed guidance given in ISO 45003 can be used to do this and reflects the longstanding 'Management Standards' advice from the HSE.

Having identified the stress hazards associated with their work activities, employers should assess the risks associated with their employees' work. HSE guidance defines standards in this regard in six areas:

- Demands: which relates to employees' ability to cope with their work
- Control: which relates to the extent to which employees are able to have a say about the way that they do their work
- Support: which relates to the how employees indicate that they receive adequate information and support from their colleagues and superiors
- Relationships: which includes the promotion of positive working relationships to avoid conflict and deal with unacceptable behaviour
- Role: which relates to employees' understanding of their position and the absence of uncertainties or conflicts in activities and responsibilities
- Change: which relates to how organisational adjustments are managed and communicated

Employers should record the significant findings of their risk assessment. This need not be complicated but should include a record of what is being done to control stress risks in the workplace. For example, employers could:

- Record how workloads are managed
- Describe arrangements for flexible working
- Describe the steps being taken to ensure that workers have personal freedom to choose how and when they perform certain tasks
- Refer to policies for conflict resolution and/or training
- Record how roles and responsibilities are communicated to individuals
- Record procedures for change management.

In smaller workforces and in the absence of any indication that workers are suffering stress related injury, then recording and reviewing a simple risk assessment will usually be enough. In larger businesses, a more detailed management review may be appropriate, for example involving surveys to evaluate workers' psychosocial wellbeing, and ensuring that relevant policies and procedures are up to date.

In the event that individuals come forward or are identified as suffering from stress related injury, then it is important that employers have systems in place locally to respond to concerns that have been raised.

A flow chart describing how Pragma help employers manage workplace stress can be seen in our leaflet describing our workplace mental health assurance service.

Health and safety practice and the legal position

So far we have seen how employers should manage the risks of stress related injury. We have also seen that employers have duties under the Health and Safety at Work etc Act 1974 (HASAWA) and the Management of Health and Safety at Work Regulations 1999 ('the Management Regulations'). However, those requirements do not confer a right of action in a claim for compensation. Consequently, workers who believe that they have suffered stress related injury must rely on proving that their employer was negligent.

In *Walker v Northumberland County Council*, 1995 it was ruled that:

"*Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employee as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of the [employer's] duty of care*".

Notwithstanding the inclusion of psychiatric damage, synonymous with psychosocial or stress related injury, within the employer's duty of care in *Walker*, workers have, however, found it difficult to claim for injuries arising from stress at work. In *Hatton v Sutherland*, 2002, the Court of Appeal held that teaching cannot be regarded as intrinsically stressful and that the school had done all they could reasonably be expected to do. It was further suggested that there are no occupations that are intrinsically dangerous to mental health. Furthermore, it was suggested that for stress related ill health to be foreseeable, indications of impending harm to health must be obvious enough to show that employers need to act. It was found that:

"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 [including the 1995 HSE 'Stress at Work' booklet]. It is not the job but the interaction between the individual and the job which causes the harm …

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: (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 on him. As was said in McCloughlin v Grovers, 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 relevant."

The factors to be considered included the nature and extent of the work being done by the employee and the position in comparison to other workers, however, analysis of *Hatton* typically suggests that foreseeability of risk depends on what the employer knows, or ought reasonably to know, **about an individual employee** and that an employer is entitled to assume that the employee can withstand the normal pressures of the job unless they know of some particular problem or vulnerability for that employee.

In *Hatton* reference was made to the 1995 HSE *"Stress at work"* booklet. At the time, this would have been the principal document in the context of stress risk management knowledge and standards. The booklet referred to employers' duties in relation to stress as required by HAWAWA and the Management Regulations and went on to advise:

"Employers should bear stress in mind when assessing possible health hazards in their workplaces, keeping an eye out for developing problems and being prepared to act if harm to health seems likely."

The above is arguably a reactive approach requiring no more that to 'bear stress in mind', 'keep an eye out' and act only when problems become apparent.

In view of the foregoing, the focus on the individual in *Hatton* is perhaps unsurprising. The general view of *Hatton* seems to be that the findings suggest that employers can discharge their duty of care to employees simply by providing a confidential helpline. Furthermore the judgement is generally taken to read that if an employee wishes to remain in a job that is known to be stressful, and the only alternative is demotion or dismissal, the employer is not in breach of duty of care in allowing them to remain in the position.

Knowledge and standards: developments since Hatton

The position has moved on. Although not referred to in *Hatton*, in March 1999 the Health and Safety Commission (HSC) had published a 'Discussion Document': *"Managing Stress at Work"* which recognised stress as a work-related issue and that proactive action was necessary in the context of HASAWA and the Management Regulations commenting:

"We think most people agree that, in some circumstances, work may cause stress. But should we only be concerned with stress that causes an actual illness? Not to take action until someone develops an illness goes against the preventive principles of the Health and Safety at Work etc Act."

"A risk assessment under the Management of Health and Safety at Work Regulations 1992 must … cover risks to mental health and well as physical health and safety."

The Discussion Document went on to note the options available in relation to control of work related stress, including the potential for further guidance or the implementation of specific Regulations. The Discussion Document commented that:

"… the existing guidance does not appear to have had the effect of persuading people to do something. Perhaps we need to do more than just issue guidance."

By 2004 the HSE had adopted the 'Management Standards approach' to work related stress which continues to be the basis of current guidance[1]. Advice issued to HSE Inspectors reflected the move towards more proactive management of stress risks (as opposed to management of individual's problems):

"Interventions [by HSE] are only likely to be effective if applied to management systems and work organisation, rather than at the individual level"

"HSE's policy for tackling [work related stress] is to do so at an organisational level… Tackling individual experiences of [work related stress] or seeking to increase the resilience of individuals will not tackle the underlying causes."

Organisational actions v actions relating to individuals

The key difference between the approach taken by the Court in *Hatton* and the approach that should be taken by employers in the context of Health and Safety practice is the focus on the ***individual*** in Hatton compared to the initial focus on measures to protect ***the workforce*** in Health and Safety practice (with action being required in relation to the individual only when there are indications that the workforce level risk control measures are not protecting an individual).

[1] *"Tackling Stress. The Management Standards approach"* INDG 406 ISBN 0717661407

As we have seen, employers are required to assess the stress risks associated with work and take action at a workforce level with a view to reducing those risks. At the time of Hatton the key 1995 HSE guidance on stress did not make that clear and was consistent with a reactive approach focussed on the individual. It is, of course, right and proper that employers should have systems in place to react to individuals with concerns, but the duty arises before then with the consideration of risk at workforce level.

The root of the above difference between Health and Safety practice starting with workforce considerations and case law (or at least *Hatton*) focussing on the individual seems to be the general proposition in *Hatton* that there are no occupations which should be regarded as intrinsically dangerous to mental health. This is at odds with current Health and Safety practice which clearly identifies that hazard exist and should be managed.

'Knowledge and standards of the day' post Hatton

The legal position in any claim is a matter for lawyers and ultimately for the courts. There have, of course, been cases since Hatton. However, the author is unaware of any case since Hatton where a court has been invited to reconsider in detail the developments in Health and Safety knowledge, standards and practice.

It is not usual for experts in the workplace management of stress risks to be instructed in work related stress claims. The foregoing begs the question: Should they be? There are clearly 'knowledge and standards of the day' that should be followed by employers. It seems equally clear that if employers do not follow those standards, then injury may result.

An expert in management of occupational stress risks could assist the Court by identifying the relevant standards and commenting on the extent to which those standards were achieved by the employer. On the basis of that evidence the Court would be able to consider whether any failure by an employer to achieve the 'standards of the day' resulted in injury to an individual. The extent to which the employers' actions matched relevant standards when an individual is discovered to have suffered a potential work stress related injury could also be examined in the same way.

The author is unaware of any direct consideration by a court of the implications of the HSE's Management Standards assisted by an expert in the management of occupational stress.

If stress hazards are identified at workforce level, and the risks are managed at that level, then those individuals who might be particularly susceptible to stress related injury will be protected. Those individuals may not go on to develop injury that would otherwise have arisen in the absence of such management.

It is interesting to consider two post Hatton judgements as follows.

Dickins v O2 Plc

In Dickins v O2 Plc the courts found for the Claimant at first instance and on appeal. No reference was made to the HSE's Management Standards and foreseeability turned on the Claimant's complaints about events. The Claimant had accepted a new role (preparation for external audit) which led to her stress. Analysis of the facts of that case suggests that the court may have been assisted by expert comment on the Defendant's approach in comparison to the HSE's Management Standards. In particular such evidence could have assisted in each of the six areas of the standard:

- Demands: The role was 'very demanding' for the Claimant – to what extent did the Defendant ensure that demands were adequate in relation to the agreed hours of work? Were the Claimant's concerns adequately addressed?

- Control: To what extent did the Claimant have control over her work? Was the Claimant encouraged to develop new skills to help her in the new role? Was she consulted about her work patterns (which involved a long commute following a change in location)?
- Support: Others in the organisation were tasked with assisting the Claimant; to what extent was she supported to undertake her role in comparison to the standards: what systems were in place in this regard, how did the Claimant's feedback compare to the standards?
- Relationships: Were positive working relationships promoted? Were there procedures to deal with any unacceptable behaviour?
- Role: Did the new role match the Claimant's skills and was the job within her capabilities? Were the requirements of the role made clear to her?
- Change: How was the change in the Claimant's role managed and communicated? Was training and support given? Was the change implemented over a realistic timeframe?

The HSE's Management standards set down ways that the appropriate standards can be achieved. An expert in the management of occupational stress risks would have been able to comment on whether the appropriate standards had been met.

In the end the case was successfully argued because the Claimant made clear complaints, however, if no complaint had been made the issues would have been the same. In another case the employer's achievement of the HSE Management Standards may be crucial in the context of breach of duty.

Easton v B&Q Plc

In Easton v B&Q Plc the role of risk assessment in relation to stress was part of the Claimant's pleaded case, however, the conclusion reached was that:

"… on the facts of this case proper risk assessment would have had no effect on the outcome. That being so Mr Easton has failed to establish that his psychiatric illness was foreseeable and, in any event, that there was any breach of duty on the part of B&Q. It follows that his claim for damages must fail."

In the judgement B&Q were noted to have had a *"Stress Management Policy"* that Mr Easton had seen. The Defendant's witness evidence was, however, that risk assessments in relation to stress were not carried out by B&Q and that B&Q 'did not run training courses on stress awareness'. By reference to Hatton it was noted (with my emphasis added) that:

"Foreseeability depends upon what the employer knows (or ought to know) about the ***individual employee*** *…An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability….*

The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to health".

The court went on to cite the factors likely to be relevant to the threshold question of whether harm to a particular employee was reasonably foreseeable. One of those is:

"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."

In Easton v B&Q, the court was referred to the HSE stress management standards but does not appear to have heard evidence from an expert in occupational stress risk management. The court did not therefore have access to any comment on the steps that could or should have been taken, or on the adequacy of B&Q's approach to the HSEs stress management standards. Such expert evidence would have been of potential assistance to the court in addressing whether or not steps were, in fact, necessary or taken and, importantly, whether they would have 'done some good'.

The principal alleged causes of Mr Easton's stress related condition related to changes at the store that he was manager of at the time. The changes related in the first instance to stocks being replenished during store opening hours rather than at night. Mr Easton's evidence was that this caused an increase in his working hours, although this was rejected by the court.

The second change was the introduction of a 'Trade Point' at the store which required building works. It was accepted that it was foreseeable that this would impose 'real pressure' on the store management, however, such pressure was not, of itself a breach of duty. Mr Easton sought to criticise the way the change was introduced. It was accepted that Mr Easton expressed misgivings about the timing of the change but found that those misgivings:

"… were not expressed in such terms as to indicate that it ought to have B&Q on notice of a significant risk of excessive stress being imposed on Mr Easton".

The issues in Easton v B&Q Plc related principally to one of the HSE's stress management standards 'Change'. The HSE guidance in this regard includes the following advice:

The standard	Employees indicate that the organisation engages them frequently when undergoing an organisational change.
What should be happening	• The organisation provides employees with timely information to enable them to understand the reasons for proposed changes. • The organisation ensures adequate employee consultation on changes and provides opportunities for employees to influence proposals. • Employees are aware of the probable impact of any changes to their jobs. If necessary, employees are given training to support any changes in their jobs. • Employees are aware of timetables for changes. • Employees have access to relevant support during changes.
Ways to achieve the standard	• Ensure all staff are aware of why the change is happening – agree a system for doing this. • Define and explain the key steps of the change. • Ensure employee consultation and support is a key element of the programme. • Establish a system to communicate new developments quickly. • Agree methods of communication (eg meetings, notice boards, letters, email, feedback forums) and frequency (eg weekly, monthly). • Ensure staff are aware of the impact of the change on their jobs. • Provide a system to enable staff to comment and ask questions before, during and after the change, eg for staff who want to raise their concerns. • Review unit and individual work plans after the change to ensure objectives are clear and workloads are appropriately distributed.

Expert evidence could have been obtained in relation to whether or not the appropriate standards were achieved and, if not, what the likely effect would have been in the context of Mr Easton's condition. It does not appear that that happened. It is a moot point and unknown whether such evidence would have resulted in a different outcome, however, retrospective consideration of the case illustrates the issues that may be pertinent in future cases.

Conclusion

Explicit standards that employers should reach in the management of work related stress risks have existed for over 15 years.

Current practice in compensation claims does not typically involve the instruction of experts to assist with how those standards applied to the circumstances of an individual's work or how they were applied in the event of a work related stress condition arising. In the absence of such evidence it may be that claimants are being denied a line of argument that their employer was negligent. It may equally be the case that defendants are being denied an argument that their actions were consistent with the 'knowledge and standards of the day'.

Ches Moulton has over 25 years of experience in the management of work related stress conditions and would be interested to discuss the implications further with interested legal professionals.

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