

Conn v Sunderland City Council. [2007] EWCA Civ 1492.

Hatton by pass obstructed.

Yet again the Court of Appeal has restricted the chances of success in stress at work claims, on this occasion limiting the circumstances in which claims will succeed under the Protection from Harassment Act 1997.

The pity is that by pursuing stress at work claims under the 1997 Act claimants have compelled the courts to reduce the range of circumstances in which socially undesirable behaviour can be controlled by the courts.

The need to use the 1997 Act.

In *Hatton v Sutherland* the Court of Appeal set out, if not in stone at least in lapidary form, how the normal principles of the law of tort operated in stress at work claims. They concluded that foreseeability of stress was not sufficient to found liability but that psychiatric injury had to be foreseeable before liability could be established. In addition they concluded that care had to be taken when deciding whether or not injury was foreseeable and that *“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”*.

Faced with these two restrictions on claims, claimants’ counsel sought a cause of action for which foreseeability of psychiatric injury was not a necessity and one for which an employer was potentially liable when their actions were not sufficiently serious to breach the high foreseeability standard set by the *Hatton* decision. After some attempts at persuading the courts to use other statutory duties proved unsuccessful claimants turned their attention to the Protection from Harassment Act 1997.

The prospects of success for claims under the 1997 Act.

The initial indications were that this was a statutory duty which would enable stress claims which would otherwise fail, to succeed. There was no doubt that the Act created a civil cause of action; it said it did. There was no doubt that damages were recoverable for emotional distress; the act itself said that they were.

The big issue which was unresolved was whether conduct which would not be regarded as being serious enough to create a foreseeable risk of injury amounted to harassment under the 1997 Act. It looked as if this might well be the case. In a series of criminal prosecutions under the 1997 Act the courts showed themselves to be willing to categorise all sorts of miscellaneous anti-social behaviour as harassment under the 1997 Act.

As an example of the manner in which the 1997 Act proved to be useful in preventing anti-social behaviour one may take *Tafurelli v DPP*¹. In this appeal Leveson J was

¹ 2004 EWHC 2791 (Admin)

confronted with a criminal prosecution under the 1997 Act, an essential ingredient of which was the deliberate failure by the appellants to control their dogs with the result that they barked during the night and disturbed their neighbours. He concluded that this behaviour, which in the case of one appellant had only occurred on two occasions, was sufficient to amount to harassment.

The desire to use the 1997 Act to prevent fairly trivial misbehaviour by neighbours and others inevitably presented difficulties when the trivial behaviour in question was used as an example of behaviour which could give rise to a civil action under the same Act.

The Court of Appeal restricts the definition of harassment.

The sudden realisation that this statute which had proved to be so useful in preventing neighbours and others from carrying on anti-social activities might give rise to claims for damages for pretty trivial incidents of harassment has led the Court of Appeal to reconsider its attitude to what is and what is not harassment under the Act. The early signs that the Court of Appeal was minded to apply a severe standard before categorising some action or event as harassment in a civil context came in their decisions in *Banks v Ablex*, [2005] IRLR 357, and *Majrowski v Guy's and St Thomas' NHS Trust*, [2005] IRLR 340. However, in the first of the decisions the judgment is open to interpretation and in the second the passages were obiter. The House of Lords in *Majrowski* made it clear that the conduct had to be of sufficient severity to justify criminal sanctions without deciding what conduct did justify criminal sanctions. In the light of the earlier criminal cases deciding that really fairly trivial behaviour amounted to harassment, what might amount to harassment was distinctly debateable.

In *Conn v City of Sunderland* the Court of Appeal faced the issues directly for the first time. *Conn* may best be described as a case about bad relationships in the workplace. The foreman and the claimant did not see eye to eye and neither party appears to have been blameless. The trial judge dismissed the claimant's claim in negligence against the employer. However, he found that two incidents amounted to harassment under the 1997 Act and awarded a modest sum by way of damages. On one occasion the manager threatened to punch a window and to bring a group of employees before the personnel department after they refused to tell him who had been leaving work early. On the other occasion the manager had demanded to know why Mr Conn was refusing to talk to him, and when Mr Conn told him that he would speak to him on work matters, the foreman lost his temper and threatened to give Mr Conn a hiding.

In their judgment the Court of Appeal expressed very strong views about the use of the 1997 Act and made it clear that they disagreed strongly with the view that trivial incidents of what they considered to be bad mannered behaviour gave rise to criminal penalties or to a civil claim for damages. All three judges were satisfied that the first of the incidents could not amount to harassment. Ward LJ expressed himself most forcefully in a passage which will join Lord Hobhouse's judgment in *Tomlinson v Congleton BC* on the wall of every insurer. He said, "*What on earth is the world coming to if conduct of the kind that occurred in the third incident can be thought to be an act of harassment,*

potentially liable to giving rise to criminal proceedings punishable with imprisonment for a term not exceeding six months, and to a claim for damages for anxiety and financial loss? It falls so far short below the threshold that we are in my judgment fully entitled to interfere with the judgment of the recorder, even though he had the benefit of seeing the witnesses and judging the facts as they appeared before him. The conduct here [does] not come close to harassment and I would therefore allow the appeal, set aside his order, and enter judgment: dismiss the claim of the claimant for damages in its entirety.” The other judge’s agreed with Lord Justice Ward’s view that the first incident could not amount to harassment.

Conn was not an unqualified success for defendants.

However, it would be a mistake to think that the judgment was an unqualified success for defendants.

Gage LJ pointed out that the circumstances might affect the quality of the act in question. He said, *“what, in the words of Lord Nicholls in Majrowski, crosses the boundary between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa. In my judgment the touchstone for recognizing what is harassment for the purposes of sections 1 and 3 will be whether the conduct is of such gravity as to justify the sanctions of the criminal law.”* As few stress at work cases are brought by paviours employed by local authorities such as Mr Conn, but are brought by white collar workers employed in a more genteel atmosphere there remains plenty of scope for arguing that unpleasant remarks can amount to harassment.

Having rejected the possibility that one of the incidents amounted to harassment it was not necessary to consider whether the second more serious incident was an act of harassment. The court’s failure to decide this means that it may be said that all they decided was that some trivial incidents cannot amount to harassment. Certainly, it would have been helpful to defendants to have had a finding that the second incident did not amount to harassment.

The future

Once there are more decisions available it will become easier to determine where the dividing line between what is and what is not harassment lies. One suspects that the end result will be that anything sufficiently serious to be categorised as harassment will also create a foreseeable risk of injury.

ANDREW HOGARTH QC
February 2008