# 12 King's Bench Walk

## Annual Personal Injury Conference

## Tower of London

## Thursday 17th July 2008

CPD Ref: AVV/CHRW

12 King's Bench Walk, Temple, London EC4Y 7EL,
Tel: 020 7583 0811, Fax: 020 7583 7228, Video Conferencing: 020 7583 4190
E-mail: chambers@12kbw.co.uk, Website: www.12kbw.co.uk, DX 1037 Chancery Lane

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# Insurance issues facing solicitors in personal injury actions

## Ronald Walker QC

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# *Insurance issues facing solicitors in PI actions*

**Ronald Walker Q.C.**
**12 King's Bench Walk**

## Introduction

1. There appears to be an increasing tendency for EL and PL insurers to look for ways of refusing indemnity. There are, basically, two courses of action open to them, (1) to avoid the policy, or (2) to rely upon the terms of the policy (e.g. failure to comply with a policy condition) to justify refusal to indemnify.

2. This presents practical difficulties for both the insurers (and their solicitors) and for the claimant. The purpose of this paper is to consider how these difficulties may best be dealt with in practice.

## Defendant problems

3. The insurers' first problem is that they usually have to make up their minds quite quickly whether they are going to avoid or refuse indemnity. If they have grounds for avoidance, they need to be careful not to waive those grounds by affirming cover. On the other hand, once insurers have purported to avoid the policy, the insured, if he accepts the avoidance as discharging the contract (as he will usually be wise to do) has no continuing obligations under the policy (e.g. to co-operate with the insurer, to defend the action, to have regard to the insurer's interests when settling the action, or even to keep the insurer informed about what is going on). The insurer thus effectively forfeits any control over the underlying action.

4. Yet the insurers may wish to defend the underlying action, or at any rate have the opportunity to investigate it properly with the co-operation of their insured. For these reasons unless the grounds for avoidance are very strong, insurers are much better advised to reserve their rights against the insured and to proceed to act under a "reservation of rights".

*Is there a right to avoid at all?*

5. The right to avoid an insurance policy (or any other contract) arises where the insurer can prove that he was induced to make the contract of insurance by some material non-disclosure of, or misrepresentation concerning, a material fact. The insurer must prove both that the fact is material, that is to say that it would have affected the judgment of the prudent insurer when deciding whether to accept the risk, and if so on what terms ("materiality"), and that he in fact relied upon it ("inducement").

6. In addition, as a matter of insurance law, breach of a contractual warranty by the insured entitles the insurer to avoid the policy, irrespective of materiality.

7. In order to give themselves the benefit of this principle insurers commonly include in their proposal forms a "basis of the contract" declaration.[1]

8. Finally, where performance of an obligation imposed upon the insured by the policy is a "condition precedent" to the insured's right to indemnity, failure to comply with that obligation will entitle the insurer either to refuse indemnity in respect of a particular claim, or to avoid the policy (depending upon the wording of the policy).[2]

*Waiver and reservation of rights*

9. Insurers who believe, or suspect, that they may have grounds to avoid the policy[3], but who wish to investigate further before taking that draconian step, need to be careful not to do anything which might subsequently be held to be a waiver of their right to avoid. Typically such conduct involves exercising rights which depend for their existence upon the validity of the policy, for example requiring the co-operation of the insured, or, in the case of liability insurance, taking some step in the underlying action in the name of the insured.

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[1] "I/We declare that to the best of my/our knowledge or belief the particulars and statements given in this Proposal and any additional information provided are true and complete and that this Proposal and declaration shall be the basis of the contract between me/us and *[insurers]*"

[2] But there has to be a "condition precedent" clause in the policy; cf *McAlpine (Alfred) v BAI* [2000] 1 Lloyd's Rep 487

[3] The same principles apply to the right to rely upon failure to comply with a condition precedent

10. Waiver, in its general contractual sense, consists of electing to affirm rather than avoid a contract, knowing of the facts which would entitle the innocent party to avoid. It arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them. It is sometimes called "waiver by election" or "waiver by affirmation".

11. Waiver, as described above, is not a species of estoppel. However, waiver of a breach of warranty requires something more than mere election. It requires that there be (1) an unequivocal representation by the insurer, by words or by conduct, that he does not intend to rely upon the breach of warranty, and (2) reliance by the assured upon that representation.[4]

12. In order to avoid waiving a right to avoid (however that right is asserted to arise) insurers will make it clear from the outset that they are conducting investigations (or doing whatever else they are doing) under a "reservation of rights", the insurers stating that their enquiries / investigations are continuing but that meanwhile insurers are unable to confirm policy cover and are reserving their rights in that regard.

13. Insurers are then in a position to contradict any assertion that they have elected to affirm the policy, when they could have avoided it, or, in the case of breach of warranty, that they have represented to the insured that they do not intend to rely upon his breach of warranty.

14. Although I have not encountered any case in which waiver or estoppel has been successfully asserted in the face of an express reservation of rights, there appear to me to be two potential pitfalls. First, the wording of the reservation of rights may indicate that it is only to last until a specified time, e.g. on a reservation worded as follows:

> *Insurers are reserving their rights under the policy until more detailed information about the incident, sufficient for them to consider liability, arises*

it seems to me strongly arguable that, once insurers have completed their investigations into liability, the reservation of rights comes to an end.

15. Secondly, however expressed, I do not believe that insurers can justifiably continue to

3. [4] *The Good Luck* [1992] 1 AC 233

exercise rights under the policy while reserving the right at any future date to treat it as void. In other words, the reservation of rights must expressly or impliedly be limited in duration. Insurers must have a reason to reserve their rights, the most common one being to enable them to complete their investigations, whether into the insured's conduct, or the merits of the underlying claim, or both. Once those investigations are complete the reservation of rights must, I think, cease to be effective.

*Should insurers who may wish to avoid the policy become involved in the defence of the underlying action?*

16. Having undertaken such investigation as they have been able to do into the merits of the underlying action, insurers are often faced with the dilemma of either having to step in and conduct the defence of the action, at any rate in the first instance, or simply avoiding the policy and leaving the defence of the action to the insured. If the grounds for avoidance are perceived to be very strong, the latter course is likely to be the preferred one. The downside risk is, of course, that the insured may lack the will or the means to defend the action himself, with the result that the claimant will rapidly obtain a default judgment, bankrupt the insured[5] and proceed against the insurers under the Third Party (Rights against Insurers) Act 1930. By this time insurers will have lost the opportunity to raise what may have been a well arguable defence, or at any rate arguments on quantum, in the underlying action.The alternative course is to take over the defence of the action on behalf of the insured. Of course the disincentive to do this is that insurers thereby have not only to fund the defence of the action, but they render themselves potentially liable to a costs order against themselves personally. Furthermore, the order may be made even though the sum which becomes payable by the insurers is outside the limit of policy cover. This has recently been confirmed by HH Judge Thornton QC in *Plymouth & South West Co-Operative Society Ltd v Architecture Structure & Management Ltd.*[6]

*How can they do so?*

17. There are three possibilities:

(1) They can exercise their right under the policy, while reserving their right to avoid (see above);

(2) They can act on behalf of the insured with the latter's consent;

[5] Or, more probably, take an assignment of his rights under the policy

[6] [2006] All ER (D) 248 applying *Chapman Ltd v Christopher* [1988] 1 WLR 12

(3) They can apply to be joined as a party to the action in their own name.

18. If they adopt the second course insurers must, of course, take care to make it clear that in agreeing to conduct the defence of the claim on behalf of the insured, they are continuing to reserve their rights and therefore do not accept any liability to indemnify him against any judgment that may be obtained against him. They will also need to agree that they may cease to represent him at any time, in which event solicitors and counsel would only continue to act on the insured's behalf if he were prepared to fund his representation. Failure to agree a term to this effect in advance will make it difficult for insurers to refuse to continue the funding of the defence of the action, if and when the action appears to be no longer worth defending.

19. The last option is for insurers to apply to be joined as a party. This is not quite as straightforward as might be supposed. The application is made under CPR 19.2(2). That rule provides for joinder only if

    (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings, or

    (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

20. Paragraph (a) above will not apply (because policy response is not an issue in the underlying proceedings). Therefore insurers who wish to be joined to the action have to rely upon paragraph (b), but in that event, in order to satisfy the requirements of the rule, insurers are, as it seems to me, obliged to seek a declaration that they are not liable to indemnify the insured.[7] This may not be a course they would wish to take (because the avoidance may be disputable, and the claimant's solicitors and counsel may be in a position to dispute it more efficiently and energetically than would the insured).

21. On the other hand, if the case for avoidance is a strong one, insurers will probably be well advised to apply to have the issue of policy response determined as a preliminary issue so

[7] See *Wood v Perfection Travel Ltd* [1996] LRLR 233, applied in *Chubb Insurance Co of Europe SA v Davies* [2004] EWHC 2138

that, if it is determined in their favour, they can withdraw from the action thereby saving the costs of defending the claim on its merits.

*Conflict of interest and how to deal with it*

22. A difficulty which may arise where insurers wish both to reserve their right to avoid the policy, and conduct the defence of the underlying action, so as to minimise their exposure should they lose on policy avoidance, is that of conflict of interest.

23. For example insurers may wish to deny negligence on the part of their insured in the underlying action, and yet assert gross negligence for the purpose of justifying avoidance, or refusal to indemnify.

24. Similarly solicitors and counsel acting on behalf of the insured in the defence of the underlying action, in circumstances where there is or may be an unresolved avoidance issue, may come into possession of information which is relevant to the avoidance issue. If they are instructed by the insurers, they will be in a position of conflict. This will certainly be the case where insurers are conducting the defence in the insured's name with his consent, and have instructed solicitors and counsel for this purpose. In these circumstances, therefore, it seems to me that insurers' best course is to appoint solicitors and counsel other than those who have been representing the insurers in the avoidance dispute. Those solicitors and counsel are then acting solely on behalf of the insured and owe no duties of disclosure to the insurers.

25. If they do not so, so that solicitors and counsel are effectively jointly retained, the position is that there is an implied waiver of privilege by the insured which extends to (a) all communications made by the insured to the solicitors down to such time as an actual conflict of interest emerges and (b) to all communications made by the insured to those solicitors after the notification by the solicitors to the insured of such conflict and the lapse of such further time as the insured reasonably requires to decide whether to instruct separate solicitors. It follows that, assuming the avoidance issue (and therefore the conflict) has arisen prior to solicitors and counsel being appointed to act for the insured,he must be told of the conflict and advised to instruct his own solicitors if he wishes. If he does not, then he must accept that information received from him is liable to be passed to his insurers, potentially to his detriment.

26. These principles were laid down by the Court of Appeal in the remarkable case of *TSB Bank plc v Robert Irving & Burns*,[8] in which the court understandably took a dim view of the conduct of solicitors and counsel who, acting on behalf of the insurers and insured in a negligent valuation case, invited the insured to a conference at which he was effectively cross-examined with a view to obtaining answers to justify a refusal to indemnify in circumstances where the insured was unaware that there was a policy issue. The insurers were not permitted to rely upon the answers that he gave.

27. The problem is also present where insurers are joined as a party under CPR 19(2).. In those circumstances their appointed solicitors and counsel are clearly representing them and not the insured. Yet they may need to confer with the insured, take a witness statement from him, obtain instructions on allegations made by the other side, and so on. Supposing, in so doing, they obtain information which may be material to the issue of policy avoidance. Are they under an obligation to disclose that information to the insurers? One might argue not, if that information is not relevant to the defence of the underlying action, because the scope of their instructions is limited to the defence of that action. However, the authorities, culminating in the *TSB* case (above) suggest otherwise.

28. Furthermore, if solicitors and counsel are also instructed to represent the insurers in the avoidance issue which is being determined as part of the same proceedings as the underlying action, it seems inevitable that those solicitors and counsel will be obliged to pass on to insurers any information which they receive which is relevant to that issue.

29. In these circumstances it seems to me that all that the insurers' solicitors and counsel can do is to make it clear to the insured from the outset (a) that they are representing his insurers and not him, (b) that he should obtain his own legal advice, if he so wishes, as to his position generally and as to whether he should communicate with the insurers' legal representatives, and (c) that he understands that any information which he gives to those representatives may be passed on to the insurers.

**Claimant problems**

30. When the Claimant's solicitors discover that the Defendant's insurers are refusing to indemnify, or are defending the action under a reservation of rights, they will be anxious to

[8]7 [2000] 2 All ER 826

assess the strength or weakness of the insurers' position.

31. For if the insurers are in a strong position to refuse indemnity, the Claimant's solicitors will need to consider whether it is worth bringing, or continuing with, the action at all. At this stage they will doubtless carry out company searches and take such other steps as they can to investigate the Defendant company's financial health.

32. The Claimant's solicitors will therefore wish to obtain as much information as they can as to the strength of the insurers' grounds for avoidance / refusing indemnity.

*Obtaining disclosure from the Defendant*

33. In *Harcourt v Fef Griffin*[9] the Claimant managed to obtain from Irwin J an order that the Defendants, who were proprietors of a club in whose gymnasium the Claimant had suffered injury, disclose details of their insurance cover. The Claimant's application was made under CPR Part 18, which provides that the court may order a party to give further information in relation to any matter in dispute in the action. The Claimant wanted to know the full extent of the cover, whether it would apply to cover periodical payments as well as a one-off award and whether it would cover costs as well as damages. Since the extent of the Defendants' cover was not in itself a dispute in the proceedings the basis of the decision appears highly questionable. Nevertheless the judge felt that the Rules should be applied liberally so as to ensure that the parties had all the information they needed to deal efficiently and justly with the matters in dispute between them.

34. On the same basis the Claimant could presumably obtain from the Defendant disclosure of documents relating to the insurers' purported avoidance or refusal to indemnify, or even of documents relevant to the dispute between the Defendants and their insurers.

35. However if the Defendant is insolvent the Claimant should have no difficulty in obtaining disclosure of all documents relevant to the insurance position, because the Defendant's rights against its insurers will vest in the Claimant pursuant to the provisions of the Third Party (Rights against Insurers) Act 1930. Under section 2 of the Act it is the duty of the Defendant, and of whoever is administering the Defendant's estate "to give at the request of any person claiming that the bankrupt, debtor, deceased debtor, or company is under a liability to

[9] [2007] EWHC 1500 (HC)

him such information as may reasonably be required by him for the purpose of ascertaining whether any rights have been transferred to and vested in him by this Act and for the purpose of enforcing such rights".

36. Accordingly the Claimant's best course will usually be to proceed to obtain judgment against the Defendant, with a view to proceeding against the insurers under the 1930 Act, or at any rate investigating the prospects of succeeding against insurers, at a later date.

37. In fact, because insurers know that, in the event of insolvency proceedings against their insured they will eventually have to disclose the relevant documents, they will usually be prepared to disclose voluntarily the grounds for avoidance / refusal of indemnity.

38. However, if insurers are defending the action under a reservation of rights the Claimant is in a difficult position since, unless he can obtain disclosure relating to the policy dispute, he will not know whether his judgment, if obtained, will be enforceable. He may obtain an order for costs against the insurers personally, even if they are not liable under the policy (cf paragraph 16 above) but this may be small consolation if the claim itself goes unsatisfied.

39. Since the insurers' documents are not likely to affect the issues between the Claimant and the Defendant, a disclosure order under CPR 31.17 (disclosure against non-parties) would seem to be inapplicable.

40. However, if the Claimant could satisfy the court that the insurers were "likely to be a party in subsequent proceedings" (i.e. under the 1930 Act) there would seem to be no obstacle to an application under CPR 31.16 (disclosure before proceedings start), on the basis that disclosure in advance of proceedings is desirable to save costs (i.e. the costs of the action against the insured)

Ronald Walker Q.C.
17 July 2008

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# Workplace accidents – the new Construction Regulations and Work at Height Regulations

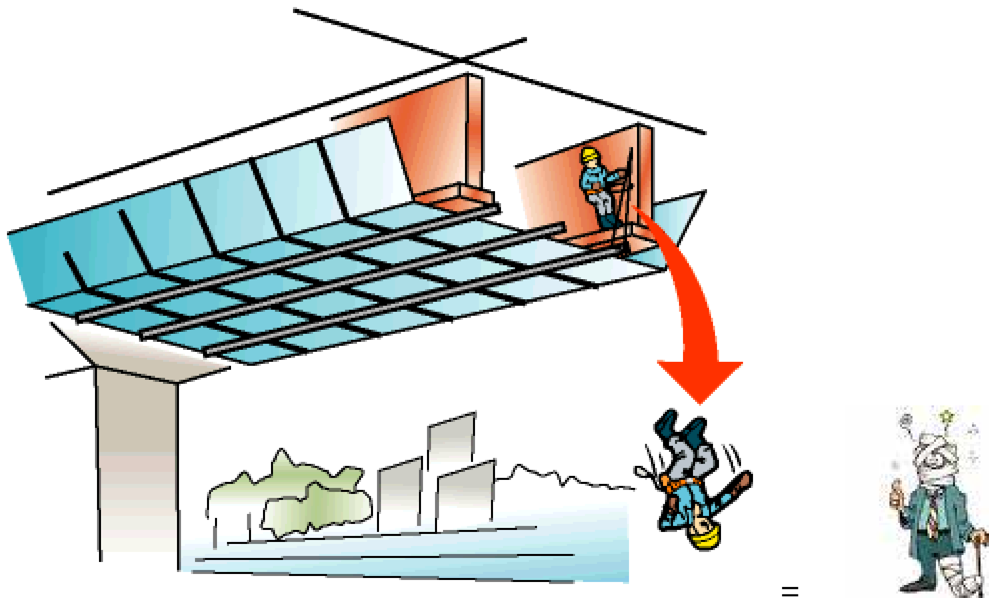
## Freya Newbery and Gemma Scott

CPD Ref: AVV/CHRW

12 King's Bench Walk, Temple, London EC4Y 7EL,
Tel: 020 7583 0811, Fax: 020 7583 7228, Video Conferencing: 020 7583 4190
E-mail: chambers@12kbw.co.uk, Website: www.12kbw.co.uk, DX 1037 Chancery Lane

## CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2007

## WORK AT HEIGHT REGULATIONS 2005



STOP PRESS:

- The UK construction industry employs more than 2 million people;
- CDM 2007 places legal duties on virtually **everyone** involved in construction work.
- Civil liability only arose under the old Condam Regulations in limited circumstances and they were not usually pleaded - however there is civil liability to **employees** in respect of all the Part 2 and 3 duties (the Condam type Regs) and unrestricted liability for the Part 4 duties (the old Construction Regs)
- Construction work remains defined much more widely than just work on building sites

## Who are the duties imposed on?

Dutyholders under CDM 2007 are:

- **Clients** - A 'client' is anyone having construction or building work carried out as part of their business. This could be an individual, partnership or company and includes property developers or management companies for domestic properties.
- **CDM co-ordinators** - A 'CDM co-ordinator' has to be appointed to advise the client on projects that last more than 30 days or involve 500 person days of construction work (i.e. a notifiable contract). The CDM co-ordinator's role is to advise the client on health and safety issues during the design and planning phases of construction work.
- **Designers** - The term 'designer' has a broad meaning and relates to the function performed, rather than the profession or job title. Designers are those who, as part of their work, prepare design drawings, specifications, bills of quantities and the specification of articles and substances. This could include architects, engineers and quantity surveyors.
- **Principal contractors** - A 'principal contractor' has to be appointed for projects which last more than 30 days or involve 500 person days of construction work. The principal contractor's role is to plan, manage and co-ordinate health and safety while construction work is being undertaken. The principal contractor is usually the main or managing contractor for the work. A smaller project will still have a main contractor.
- **Contractors** - A 'contractor' is a business who is involved in construction, alteration, maintenance or demolition work. This could involve building, civil engineering, mechanical, electrical, demolition and maintenance companies, partnerships and the self-employed.
- **Workers** - A ’worker’ is anyone who carries out work during the construction, alteration, maintenance or demolition of a building or structure. A worker could be, for example, a plumber, electrician, scaffolder, painter, decorator, steel erector, as well as those supervising the work, such as foreman and chargehands

## In respect of what work?

**Interpretation**

**2.**—(1) In these Regulations, unless the context otherwise requires—

“ “construction site” includes any place where construction work is being carried out or to which the workers have access, but does not include a workplace within it which is set aside for purposes other than construction work;

“construction work” means the carrying out of any building, civil engineering or engineering construction work and includes—

(a) the construction, alteration, conversion, fitting out, commissioning, renovation, repair, upkeep, redecoration or other maintenance (including cleaning which involves the use of water or an abrasive at high pressure or the use of corrosive or toxic substances), de-commissioning, demolition or dismantling of a structure;

(b) the preparation for an intended structure, including site clearance, exploration, investigation (but not site survey) and excavation, and the clearance or preparation of the site or structure for use or occupation at its conclusion;
(c) the assembly on site of prefabricated elements to form a structure or the disassembly on site of prefabricated elements which, immediately before such disassembly, formed a structure;
(d) the removal of a structure or of any product or waste resulting from demolition or dismantling of a structure or from disassembly of prefabricated elements which immediately before such disassembly formed such a structure; and
(e) the installation, commissioning, maintenance, repair or removal of mechanical, electrical, gas, compressed air, hydraulic, telecommunications, computer or similar services which are normally fixed within or to a structure,

"excavation" includes any earthwork, trench, well, shaft, tunnel or underground working;

"place of work" means any place which is used by any person at work for the purposes of construction work or for the purposes of any activity arising out of or in connection with construction work;

"structure" means—

(a) any building, timber, masonry, metal or reinforced concrete structure, railway line or siding, tramway line, dock, harbour, inland navigation, tunnel, shaft, bridge, viaduct, waterworks, reservoir, pipe or pipe-line, cable, aqueduct, sewer, sewage works, gasholder, road, airfield, sea defence works, river works, drainage works, earthworks, lagoon, dam, wall, caisson, mast, tower, pylon, underground tank, earth retaining structure or structure designed to preserve or alter any natural feature, fixed plant and any structure similar to the foregoing; or

(b) any formwork, falsework, scaffold or other structure designed or used to provide support or means of access during construction work,

(c) and any reference to a structure includes a part of a structure.

**Examples of work that are construction work:**

i. A local authority employee:
   - using a high pressure hose to clean graffiti from the side of a building;
   - painting a school;

ii. A BT employee repairing telephone lines on a mast or pylon;

iii. An employee dismantling scaffolding;

iv. An employee replacing sandbags in a sea defence;

v. Arguably low grade internal domestic cleaning and decoration may not be covered by the Regulations. The decision of Sheriff Scott in Matthews v Glasgow City Council [2004] HLR 136 was that domestic redecoration work did not fall within the 1996 Regulations. However, the line between domestic redecoration and the redecoration of a structure (which is by definition 'construction work') is a difficult one to maintain.

## What are the duties?

## The three C’s and the Condam duties: Parts 2 and 3

**Competence**

**4.**—(1) No person on whom these Regulations place a duty shall—

(a) appoint or engage a CDM co-ordinator, designer, principal contractor or contractor unless he has taken reasonable steps to ensure that the person to be appointed or engaged is competent;

(b) accept such an appointment or engagement unless he is competent;

(c) arrange for or instruct a worker to carry out or manage design or construction work unless the worker is—

(i) competent, or

(ii) under the supervision of a competent person.

(2) Any reference in this regulation to a person being competent shall extend only to his being competent to—

(a) perform any requirement; and

(b) avoid contravening any prohibition,

imposed on him by or under any of the relevant statutory provisions.

**Co-operation**

**5.**—(1) Every person concerned in a project on whom a duty is placed by these Regulations, including paragraph (2), shall—

(a) seek the co-operation of any other person concerned in any project involving construction work at the same or an adjoining site so far as is necessary to enable himself to perform any duty or function under these Regulations; and

(b) co-operate with any other person concerned in any project involving construction work at the same or an adjoining site so far as is necessary to enable that person to perform any duty or function under these Regulations.

(2) Every person concerned in a project who is working under the control of another person shall report to that person anything which he is aware is likely to endanger the health or safety of himself or others.

**Co-ordination**

**6.** All persons concerned in a project on whom a duty is placed by these Regulations shall co-ordinate their activities with one another in a manner which ensures, so far as is reasonably practicable, the health and safety of persons—

(a) carrying out the construction work; and

(b) affected by the construction work.

**Duties of contractors**

**13.**—(1) No contractor shall carry out construction work in relation to a project unless any client for the project is aware of his duties under these Regulations.

(2) Every contractor shall plan, manage and monitor construction work carried out by him or under his control in a way which ensures that, so far as is reasonably practicable, it is carried out without risks to health and safety.

(3) Every contractor shall ensure that any contractor whom he appoints or engages in his turn in connection with a project is informed of the minimum amount of time which will be allowed to him for planning and preparation before he begins construction work.

(4) Every contractor shall provide every worker carrying out the construction work under his control with any information and training which he needs for the particular work to be carried out safely and without risk to health, including—

(a) suitable site induction, where not provided by any principal contractor;

(b) information on the risks to their health and safety—

(i) identified by his risk assessment under regulation 3 of the Management of Health and Safety at Work Regulations 1999, or

(ii) arising out of the conduct by another contractor of his undertaking and of which he is or ought reasonably to be aware;

(c) the measures which have been identified by the contractor in consequence of the risk assessment as the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions;

(d) any site rules;

(e) the procedures to be followed in the event of serious and imminent danger to such workers; and

(f) the identity of the persons nominated to implement those procedures.

(5) Without prejudice to paragraph (4), every contractor shall in the case of any of his employees provide those employees with any health and safety training which he is required to provide to them in respect of the construction work by virtue of regulation 13(2)(b) of the Management of Health and Safety at Work Regulations 1999.

(6) No contractor shall begin work on a construction site unless reasonable steps have been taken to prevent access by unauthorised persons to that site.

## The Construction Regs as was: Part 4

**25.—**(1) Every contractor carrying out construction work shall comply with the requirements of regulations 26 to 44 insofar as they affect him or any person carrying out construction work under his control or relate to matters within his control.

(2) Every person (other than a contractor carrying out construction work) who controls the way in which any construction work is carried out by a person at work shall comply with the requirements of regulations 26 to 44 insofar as they relate to matters which are within his control.

(3) Every person at work on construction work under the control of another person shall report to that person any defect which he is aware may endanger the health and safety of himself or another person.

Pausing there:

### What is "control"

The focus is on factual control.

"Control" under regulation 4 of the 1996 regulations was first considered by the Court of Appeal in McCook v Lobo [2002] EWCA Civ 1760.

The claimant was fitting a waste pipe to a ceiling when he fell. The ladder was unsupported and unsecured [note that this scenario would now be covered by the Work at Height Regs]. The judge found that the employer in that case was in control of both the building work and claimant. The employer was found to be 25% liable; the claimant was 75% contributorily negligent. The two owners of the premises were found in the first instance judge to have no control over the site, having delegated that to the employer.

Judge LJ commented that the question of whether an owner has control is not answered affirmatively by demonstrating that a person has some control over a site in a general sense as the occupier:

"The employer owes express duties under regulation 4(1). That, therefore, identifies the starting point. But someone who is not an employer may also be bound by the statutory obligation under regulation 4(2). Whether the appropriate level of control over the work is or should be exercised by an individual other than an employer so as to create the duty to comply with the obligations under regulation 4(2) is, in my judgment, a question of fact. It is not answered affirmatively by demonstrating that an individual has control over the site in a general sense as an occupier, or that as the occupier of the site he was entitled to ask or require a contractor to remove obvious hazards from the site. The required control is related to control over the work of construction (paragraph 16)."

The fact that 'control' relates to control over the work of construction and not control over the site was confirmed in Hood v (1) Mitie Property Services (Midlands) Ltd (2) Royal Mail Group plc (unreported, QBD, 1 July 2005).

More than one person can be in control at the same time and more than one person can be found liable for breach of the same regulation: see eg Humphreys v Nedcon UK Ltd [2004] EWHC 1260 (QB).

**Safe places of work**

**26.**—(1) There shall, so far as is reasonably practicable, be suitable and sufficient safe access to and egress from every place of work and to and from every other place provided for the use of any person while at work, which access and egress shall be properly maintained.

(2) Every place of work shall, so far as is reasonably practicable, be made and kept safe for, and without risks to health to, any person at work there.

(3) Suitable and sufficient steps shall be taken to ensure, so far as is reasonably practicable, that no person uses access or egress, or gains access to any place, which does not comply with the requirements of paragraph (1) or (2) respectively.

(4) Every place of work shall, so far as is reasonably practicable, have sufficient working space and be so arranged that it is suitable for any person who is working or who is likely to work there, taking account of any necessary work equipment present.

**Good order and site security**

**27.**—(1) Every part of a construction site shall, so far as is reasonably practicable, be kept in good order and every part of a construction site which is used as a place of work shall be kept in a reasonable state of cleanliness.

(2) Where necessary in the interests of health and safety, a construction site shall, so far as is reasonably practicable and in accordance with the level of risk posed, either—

(a) have its perimeter identified by suitable signs and be so arranged that its extent is readily identifiable; or

(b) be fenced off,

or both.

(3) No timber or other material with projecting nails (or similar sharp object) shall—

(a) be used in any work; or

(b) be allowed to remain in any place,

if the nails (or similar sharp object) may be a source of danger to any person.

**Stability of structures**

**28.**—(1) All practicable steps shall be taken, where necessary to prevent danger to any person, to ensure that any new or existing structure or any part of such structure which may become unstable or in a temporary state of weakness or instability due to the carrying out of construction work does not collapse.

(2) Any buttress, temporary support or temporary structure must be of such design and so installed and maintained as to withstand any foreseeable loads which may be imposed on it, and must only be used for the purposes for which it is so designed, installed and maintained.

(3) No part of a structure shall be so loaded as to render it unsafe to any person.

**Demolition or dismantling**

**29.**—(1) The demolition or dismantling of a structure, or part of a structure, shall be planned and carried out in such a manner as to prevent danger or, where it is not practicable to prevent it, to reduce danger to as low a level as is reasonably practicable.

**Excavations**

**31.**—(1) All practicable steps shall be taken, where necessary to prevent danger to any person, including, where necessary, the provision of supports or battering, to ensure that—

(a) any excavation or part of an excavation does not collapse;

(b) no material from a side or roof of, or adjacent to, any excavation is dislodged or falls; and

(c) no person is buried or trapped in an excavation by material which is dislodged or falls.

(2) Suitable and sufficient steps shall be taken to prevent any person, work equipment, or any accumulation of material from falling into any excavation

(3) Without prejudice to paragraphs (1) and (2), suitable and sufficient steps shall be taken, where necessary, to prevent any part of an excavation or ground adjacent to it from being overloaded by work equipment or material;

**Prevention of drowning**

**35.**—(1) Where in the course of construction work any person is liable to fall into water or other liquid with a risk of drowning, suitable and sufficient steps shall be taken—

(a) to prevent, so far as is reasonably practicable, such person from so falling;

(b) to minimise the risk of drowning in the event of such a fall; and

(c) to ensure that suitable rescue equipment is provided, maintained and, when necessary, used so that such person may be promptly rescued in the event of such a fall.

**Traffic routes**

**36.**—(1) Every construction site shall be organised in such a way that, so far as is reasonably practicable, pedestrians and vehicles can move safely and without risks to health.

(2) Traffic routes shall be suitable for the persons or vehicles using them, sufficient in number, in suitable positions and of sufficient size.

(3) A traffic route shall not satisfy sub-paragraph (2) unless suitable and sufficient steps are taken to ensure that—

(a) pedestrians or vehicles may use it without causing danger to the health or safety of persons near it;

etc

**Vehicles**

**37.**—(1) Suitable and sufficient steps shall be taken to prevent or control the unintended movement of any vehicle.

(2) Suitable and sufficient steps shall be taken to ensure that, where any person may be endangered by the movement of any vehicle, the person having effective control of the vehicle shall give warning to any person who is liable to be at risk from the movement of the vehicle.

etc

**Temperature and weather protection**

**43.**—(1) Suitable and sufficient steps shall be taken to ensure, so far as is reasonably practicable, that during working hours the temperature at any place of work indoors is reasonable having regard to the purpose for which that place is used.

(2) Every place of work outdoors shall, where necessary to ensure the health and safety of persons at work there, be so arranged that, so far as is reasonably practicable and having regard to the purpose for which that place is used and any protective clothing or work equipment provided for the use of any person at work there, it provides protection from adverse weather.

**Lighting**

**44.**—(1) Every place of work and approach thereto and every traffic route shall be provided with suitable and sufficient lighting, which shall be, so far as is reasonably practicable, by natural light.

The HSE has provided comprehensive guidance as to what the dutyholders are required to do – the following being an example:

| | **All construction projects (Part 2 of the Regulations)** | **Additional duties for notifiable projects (Part 3 of the Regulations)** |
|---|---|---|
| **Clients (excluding domestic clients)** | • Check competence and resources of all appointees<br>• Ensure there are suitable management arrangements for the project welfare facilities<br>• Allow sufficient time and resources for all stages<br>• Provide pre-construction information to designers and contractors | • Appoint CDM co-ordinator*<br>• Appoint principal contractor*<br>Make sure that the construction phase does not start unless there are suitable welfare facilities and a construction phase plan is in place.<br>• Provide information relating to the health and safety file to the CDM co-ordinator<br>• Retain and provide access to the health and safety file<br>**(* There must be a CDM co-ordinator and principal contractor until the end of the construction phase)** |
| **CDM co-ordinators** | | • Advise and assist the client with his/her duties<br>• Notify HSE<br>• Co-ordinate health and safety aspects of design work and cooperate with others involved with the project<br>• Facilitate good communication between client, designers and contractors<br>• Liaise with principal contractor regarding ongoing design |

| | | |
|---|---|---|
| | | • Identify, collect and pass on pre-construction information<br>• Prepare/update health and safety file |
| **Designers** | • Eliminate hazards and reduce risks during design<br>• Provide information about remaining risks | • Check client is aware of duties and CDM co-ordinator has been appointed<br>• Provide any information needed for the health and safety file |
| **Principal contractors** | | • Plan, manage and monitor construction phase in liaison with contractor<br>• Prepare, develop and implement a written plan and site rules (Initial plan completed before the construction phase begins)<br>• Give contractors relevant parts of the plan<br>• Make sure suitable welfare facilities are provided from the start and maintained throughout the construction phase<br>• Check competence of all appointees<br>• Ensure all workers have site inductions and any further information and training needed for the work<br>• Consult with the workers<br>• Liaise with CDM co-ordinator regarding ongoing design<br>• Secure the site |
| **Contractors** | • Plan, manage and monitor own work and that of workers<br>• Check competence of all their appointees and workers<br>• Train own employees<br>• Provide information to their workers<br>• Comply with the specific requirements in Part 4 of the Regulations<br>• Ensure there are adequate welfare<br>• facilities for their workers | • Check client is aware of duties and a CDM co-ordinator has been appointed and HSE notified before starting work<br>• Co-operate with principal contractor in planning and managing work, including reasonable directions and site rules<br>• Provide details to the principal contractor of any contractor whom he engages in connection with carrying out the work<br>• Provide any information needed for the health and safety file<br>• Inform principal contractor of problems with the plan<br>• Inform principal contractor of reportable accidents, diseases and dangerous occurrences |
| **Workers/ everyone** | • Check own competence<br>• Co-operate with others and co-ordinate work so as to ensure the health and safety of construction workers and others who may be affected by the work<br>• Report obvious risks | |

Imagine the disclosure!

# The Work at Height Regulations 2005 (in force since 6th April 2005)

## Who do they apply to?

The requirements imposed by these Regulations on an employer shall apply in relation to work –

(a) by an employee of his; or
(b) by any other person under his control, to the extent of his control.

The requirements imposed by these Regulations on an employer shall also apply to -

(a) a self-employed person, in relation to work -

(i) by him; or
(ii) by a person under his control, to the extent of his control; and

(b) to any person other than a self-employed person, in relation to work by a person under his control, to the extent of his control.

## What sort of work?

**"work at height" means -**

**(a) work in any place, including a place at or below ground level;**

**(b) obtaining access to or egress from such place while at work, except by a staircase in a permanent workplace,**

**where, if measures required by these Regulations were not taken, a person could fall a distance liable to cause personal injury;**

"work equipment" means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not) and includes anything to which regulation 8 and Schedules 2 to 6 apply;

"working platform" -

(a) means any platform used as a place of work or as a means of access to or egress from a place of work;

(b) includes any scaffold, suspended scaffold, cradle, mobile platform, trestle, gangway, gantry and stairway which is so used.

## Anything left out?

Regulations 4 to 16 of these Regulations shall not apply to or in relation to -

(d) the provision of instruction or leadership to one or more persons in connection with their engagement in caving or climbing by way of sport, recreation, team building or similar activities.

## Duties imposed

**Organisation and planning**

**4.** - (1) Every employer shall ensure that work at height is -

(a) properly planned;

(b) appropriately supervised; and

(c) carried out in a manner which is so far as is reasonably practicable safe,

and that its planning includes the selection of work equipment in accordance with regulation 7.

(2) Reference in paragraph (1) to planning of work includes planning for emergencies and rescue.

(3) Every employer shall ensure that work at height is carried out only when the weather conditions do not jeopardise the health or safety of persons involved in the work.

**Competence**

**5.** Every employer shall ensure that no person engages in any activity, including organisation, planning and supervision, in relation to work at height or work equipment for use in such work unless he is competent to do so or, if being trained, is being supervised by a competent person.

**Avoidance of risks from work at height**

**6.** - (1) In identifying the measures required by this regulation, every employer shall take account of a risk assessment under regulation 3 of the Management Regulations.

(2) Every employer shall ensure that work is not carried out at height where it is reasonably practicable to carry out the work safely otherwise than at height.

(3) Where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.

(4) The measures required by paragraph (3) shall include -

(a) his ensuring that the work is carried out -

(i) from an existing place of work; or
(ii) (in the case of obtaining access or egress) using an existing means,

which complies with Schedule 1, where it is reasonably practicable to carry it out safely and under appropriate ergonomic conditions; and

(b) where it is not reasonably practicable for the work to be carried out in accordance with sub-paragraph (a), his providing sufficient work equipment for preventing, so far as is reasonably practicable, a fall occurring.

(5) Where the measures taken under paragraph (4) do not eliminate the risk of a fall occurring, every employer shall -

(a) so far as is reasonably practicable, provide sufficient work equipment to minimise -

(i) the distance and consequences; or
(ii) where it is not reasonably practicable to minimise the distance, the consequences,

of a fall; and

(b) without prejudice to the generality of paragraph (3), provide such additional training and instruction or take other additional suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.

**Selection of work equipment for work at height**

**7.** - (1) Every employer, in selecting work equipment for use in work at height, shall -

(a) give collective protection measures priority over personal protection measures; and

(b) take account of -

(i) the working conditions and the risks to the safety of persons at the place where the work equipment is to be used;
(ii) in the case of work equipment for access and egress, the distance to be negotiated;
(iii) the distance and consequences of a potential fall;
(iv) the duration and frequency of use;
etc

**Requirements for particular work equipment**

**8.** Every employer shall ensure that, in the case of -

(a) a guard-rail, toe-board, barrier or similar collective means of protection, Schedule 2 is complied with;

(b) a working platform -

(i) Part 1 of Schedule 3 is complied with; and
(ii) where scaffolding is provided, Part 2 of Schedule 3 is also complied with;

(c) a net, airbag or other collective safeguard for arresting falls which is not part of a personal fall protection system, Schedule 4 is complied with;

(d) a personal fall protection system, Part 1 of Schedule 5 and -

(i) in the case of a work positioning system, Part 2 of Schedule 5;
(ii) in the case of rope access and positioning techniques, Part 3 of Schedule 5;
(iii) in the case of a fall arrest system, Part 4 of Schedule 5;
(iv) in the case of a work restraint system, Part 5 of Schedule 5,

are complied with; and

(e) a ladder, Schedule 6 is complied with.

**Fragile surfaces**

**9.** - (1) Every employer shall ensure that no person at work passes across or near, or works on, from or near, a fragile surface where it is reasonably practicable to carry out work safely and under appropriate ergonomic conditions without his doing so.

(2) Where it is not reasonably practicable to carry out work safely and under appropriate ergonomic conditions without passing across or near, or working on, from or near, a fragile surface, every employer shall -

(a) ensure, so far as is reasonably practicable, that suitable and sufficient platforms, coverings, guard rails or similar means of support or protection are provided and used so that any foreseeable loading is supported by such supports or borne by such protection;

(b) where a risk of a person at work falling remains despite the measures taken under the preceding provisions of this regulation, take suitable and sufficient measures to minimise the distances and consequences of his fall.

etc

**Falling objects**

**10.** - (1) Every employer shall, where necessary to prevent injury to any person, take suitable and sufficient steps to prevent, so far as is reasonably practicable, the fall of any material or object.

(2) Where it is not reasonably practicable to comply with the requirements of paragraph (1), every employer shall take suitable and sufficient steps to prevent any person being struck by any falling material or object which is liable to cause personal injury.

(3) Every employer shall ensure that no material or object is thrown or tipped from height in circumstances where it is liable to cause injury to any person.

(4) Every employer shall ensure that materials and objects are stored in such a way as to prevent risk to any person arising from the collapse, overturning or unintended movement of such materials or objects.

**Duties of persons at work**

**14.** - (1) Every person shall, where working under the control of another person, report to that person any activity or defect relating to work at height which he knows is likely to endanger the safety of himself or another person.

(2) Every person shall use any work equipment or safety device provided to him for work at height by his employer, or by a person under whose control he works, in accordance with -

(a) any training in the use of the work equipment or device concerned which have been received by him; and

(b) the instructions respecting that use which have been provided to him by that employer or person in compliance with the requirements and prohibitions imposed upon that employer or person by or under the relevant statutory provisions.

NB: They are not reproduced here but the Schedules to the Work at Height Regulations are of key importance.

Schedules 1 to 6 set out the detailed requirements for work platforms, guard rails, barriers scaffolds, personal fall protection systems, ladders etc

**<u>What Regulations will or might apply to the following scenarios?</u>**

**Example 1**

John Wilson works for labour only subcontractor Drain Men Limited (DML) run by a family friend Ted Butler. The main contractor East Sussex Water Works plc (ESWW) contracts with DML for their men to install drainage pipes adjacent to an area of agricultural land within pre existing ditches. Another subcontractor provides the excavator together with the excavator driver. Ted Butler has checked with ESWW that their own foreman will be on site to coordinate and direct the works.

When John Wilson arrives at the relevant ditch the foreman is not present but the excavator driver says he knows what to do and wants to get on because time is limited.

Unfortunately the excavator dislodges some pipes which in turn knock into John Wilson knocking him several feet head down into the ditch. Before anyone notices John Wilson has drowned in 10 inches of water.

**Example 2**

Half a mile away at about the same time, Bob Wiley, a farm worker, has built a large funeral pyre to cremate infected cattle during a foot and mouth epidemic. Following his tea break he returns to the pyre to find his workmates have loaded 15 large carcasses onto it. As he approaches the pyre to get a closer look it starts to collapse, one of the carcasses falls from the top and strikes Bob Wiley causing him injuries.

**Example 3**

Bob Wiley's wife Jean has a part time job in the Coroners Office in Lewes. She is putting together the file for use at the inquest into John Wilson's death. Some of the documents she needs are stored on high shelves in one of the offices. As she reaches up she is distracted somewhat by something she sees out of the window. She tugs at the file she needs accidentally dislodging a whole pile of files which fall and knock her off the footstool causing her injury.

**Example 4**

Jean Wiley's attention had been caught by two workmen on a neighbouring construction site. They were carrying out intricate tiling work at high level wearing (as far as she could see) nothing but a safety helmet and shorts. The hot July sun was beating down on them.

The younger one, Daniel Webb aged 18, has no clue that the combined effect of the hot sun and the reflection from the glass and white tiles is affecting his body. By the end of the day he has severe sun stroke and sun burn with blisters requiring hospital attention.

**Example 5**

John Wilson lived by himself in a council flat and after he died his flat was empty for some weeks and vandalised. Council worker Ali Wasim has nearly finished repainting the flat when he trips over and onto the old window frame left lying on the floor by the carpenter. His injuries are relatively minor but exacerbated by the wounds inflicted from projecting nails.

Annual Personal Injury Conference
Thursday 17th July 2008

# Harassment claims by employees

# Andrew Hogarth QC and Sarah Beslee

CPD Ref: AVV/CHRW

12 King's Bench Walk, Temple, London EC4Y 7EL,
Tel: 020 7583 0811, Fax: 020 7583 7228, Video Conferencing: 020 7583 4190
E-mail: chambers@12kbw.co.uk, Website: www.12kbw.co.uk, DX 1037 Chancery Lane

12
King's Bench Walk

**HARASSMENT**

**IS BEING UNPLEASANT ENOUGH TO IMPOSE LIABILITY?**

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1.1. In 1993 the Court of Appeal had to perform some legal gymnastics in order to grant an injunction to Ms Bush who was being harassed by a former friend, Mr Khorasanjian [1]. The legal basis for granting an injunction to Ms Bush was that threats of violence he had made were actionable in any event and that the making of telephone calls to her parents' house, in which she lived, were held to be actionable as a private nuisance interfering with her quiet enjoyment of the property. This was stretching private nuisance well beyond its normal confines as Ms Bush was not a tenant of nor was she the owner of her parents' house. As Lord Goff pointed out when discussing Khorasanjian in the latter case of Hunter v Canary Wharf there were limits to private nuisance and it was not possible to use it as a basis for preventing unwanted telephone calls received while the recipient was walking down the road, or in a shop or in someone else's flat. Nor was it possible to stretch the tort of assault to cover a situation in which women were followed by stalkers.

1.2 This unsatisfactory state of affairs led to the passing of the Protection from Harassment Act 1997.

1.3 However, since the Act was passed two unexpected things have happened. Firstly, it has been widely suggested that in an employment context the employee is in fact well protected against harassment by his employer, by fellow employees and even from persons the employee comes into contact with in the course of his work. Secondly, what is said to amount to harassment seems to have become very diluted so that almost any form of conduct on the part of an employer is said to amount to "harassment"; today we have moved from a situation in which there was no cause of action for harassment to one in which almost anything is said to give an employee a cause of action against his employer for harassment.

2.1 In this talk we will try to identify why harassment claims have become more popular and then to see whether that popularity is justified; to see whether there is a cause of action based on harassment which will succeed when more conventional causes of action will fail to produce a remedy.

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[1] [1993] 1 QB 727. The Domestic Violence Act did not provide a remedy as the parties were only friends.

2.2 There is, if you like to think of it in this way, a sort of order of difficulty for claims which can involve what is described as harassment and the easiest way of approaching an analysis is to look at the most difficult of these causes of action first of all and to see why these cases are difficult for claimants to win and then to look at the various harassment type claims in order to see whether they allow a claimant an easier route to the recovery of damages.

2.3 With very few exceptions the cases on harassment or bullying are psychiatric injury claims and psychiatric injury claims are always difficult to understand for, as Lord Steyn pointed out in Frost v Chief Constable of South Yorkshire, *"the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify"*. The enormous increase in stress at work claims brought before the courts has meant that the difference between different causes of action has been explored in greatest depth by the courts when dealing with such claims but for our purposes it is necessary to bear in mind that they are just one type of claim for damages for psychiatric injury and the principles established in such cases are capable of being transposed to other situations including harassment claims.

2.4 The conventional route to a claim for damages for some form of psychiatric injury resulting from anything which may sensibly be called harassment is a claim in negligence. Many of the complications present in psychiatric injury claims do not cause any difficulties in harassment cases. The claims are seldom dependent on the foreseeability of physical injury , nor is it necessary to consider whether the claimant satisfies any of the proximity criteria required of secondary victims as the claimant is invariably a primary victim. In short, we can pretend that Page v Smith and many of the other major cases on psychiatric injury do not exist.

2.5 Almost all of the early cases simply proceeded as straightforward personal injury actions using the tort of negligence as the cause of action. Following the heavily publicised decision in Walker v Northumberland County Council[2] there was a considerable increase in claims and it seemed as if the claimants were having a remarkable degree of success in winning such claims. Eventually a group of appeals by defendants reached the Court of Appeal and in their judgment in Hatton v Sutherland the Court of Appeal considerably restricted the number of claims which would result in awards of damages.

2.6 As much of the meanderings around other causes of action is intended to circumvent the restrictions imposed by the Court of Appeal it is necessary to look at what the restrictions imposed by the Court of Appeal were:

2.6.1 The Court of Appeal re-affirmed the principle that damages were not recoverable for emotional distress with the result that many cases of harassment necessarily fail as the claimant would not be able to establish that they were suffering from a recognised psychiatric illness.

[2] [1995] ICR 702

2.6.2 More important, and following on inevitably from this requirement, was the statement that foreseeability of stress, or any other emotional response, was not sufficient for a claimant to establish a cause of action, the claimant had to establish that psychiatric injury was foreseeable. Inevitably foreseeability of psychiatric illness is considerably more difficult than foreseeability of an emotional response.

**2.6.3** But finally, the Court of Appeal decided that the standard of the care owed in stress at work cases should be higher than in other similar personal injury actions. They said at paragraph 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? [Counsel] 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. [ The court's emphasis]***

2.7 It follows from this analysis that in order to succeed in many cases the claimant needs to rely on a duty which either does not require foreseeability of psychiatric illness or which a defendant can breach rather more easily than the duty of care. The object of looking at other causes of action is to find one for which damages may be awarded for an emotional response and preferably for one which does not have foreseeability of injury as a criteria.

2.8 There are four possible candidates for the way past Hatton:

2.8.1 Use one of the statutory discrimination causes of action in the ET.

2.8.2 A breach of contract claim,

2.8.3 The Protection from Harassment Act 1997.

2.8.4 Some claims fall within the criteria for the bringing of a statutory claim if the harassment amounts to sex, race etc discrimination.

**3. Statutory discrimination torts.**

3.1 This one is easy if it can be used. Virtually anything seems to be considered to be harassment and such is the disapproval of behaviour which has as its motivation a prohibited form of discrimination that a claimant has to establish little more than some form of improperly motivated bad behaviour. Not even a bad motive is always required. It is now clear that the scope of this statutory tort is wider than some appreciate. In EOC v Secretary of State, Burton J found that the new legislation did not comply with the underlying Directive rights which required a wider form of words; on the "grounds of " a person's sex requires some form of causation test and whilst motive is enough, there are

or can be situations in which motive is not required. In concluding that the requirement imposed by the underlying directive was broader, he concluded that harassment for directive, and thus legislative purposes did not require an element of causation, the effect is that conduct which is offensive to women even if it was not directed at women was capable of amounting to harassment. Thus in an example given in the judgment the training officer in Brumfitt[3] was found, by dint of the generally unpleasant nature of his language and the fact that the audience was of mixed sexes, not to have discriminated against the claimant on grounds of sex. Given that the Tribunal decided that the claimant in that case had been exposed to language which was "*offensive and humiliating to her as a woman*", it appears likely that she would today have succeeded in a claim in respect of unwanted conduct related to her sex.

## 4. The contractual route.

4.1 There are a number of contractual terms which can be brought into play when a harassment claim is advanced. There is the trust and confidence term, there is the implied term that an employer will take reasonable care for the safety of his employee and there may be some express provisions, especially provisions relating to the conduct of disciplinary proceedings and the like.

**The implied contractual duty to take care for the safety of the employee.**

4.2 There is of course such a term implied into all employment contracts. The difficulty is that it is difficult to see that it adds anything to the tort of negligence. Indeed the courts have frequently asserted that it is indistinguishable from the employer's duty in tort.[4] In Martin v Lancashire County Council Clarke LJ said at paragraph 55

*"The duties of an employer to his employees are essentially the same, whether they are framed in contract or in tort. It is a matter for the employee whether he sues in contract or in tort.*

4.3 Does putting such a claim in contract assist in circumventing the requirement in Hatton that foreseeability of emotional distress is sufficient to found a cause of action? In contract there are some instances in which the contract has as its main purpose the conferring of emotional peace or enjoyment in which event it is possible to claim for loss of what might be described as an emotional benefit; however these cases are the exception and not the rule.

4.4 The reason for a contractual cause of action seems to be that some some lawyers appear to believe that foreseeability is not required before damages may be recovered in contract. This is, of course, nonsense. In **Victoria Laundry v Newman**[5] the Court of Appeal summarized the rule first outlined in Hadley v Baxendale[6] in this way:

[3] Brumfitt v Ministry of Defence [2005] IRLR 4,
[4] [2001] ICR 197
[5] [1949] 2KB 528
[6] 9 Exch. 341

*"In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.*

*What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.*

4.5 Without descending into the dispute about whether there is a difference between foreseeability in contract as a result of the decision in the Heron II, a topic of interest to no one apart from a few academic lawyers, the test may be taken as being the same[7].

**4.6 The trust and confidence term.**

A non employment lawyer has vaguely heard of the trust and confidence term; that an employer shall not behave to his employee in a manner calculated or likely to destroy the mutual bond of trust and confidence between employer and employee. They point to some action or inaction by the employer and suggest that it is a breach of the term of trust and confidence. It all looks very easy; all one has to ask is whether the employer's action is a breach of the mutual bond of trust and confidence. Employment law cases are frequently reported and it is easy to find examples of pretty minor misbehaviour by an employer which has been categorised as a breach of the mutual trust and confidence term. My favourite is the employer who said to an employee, "*You can be an intolerable bitch on Monday mornings."*[8] The danger of using this series of decisions is that they are almost all employment tribunal claims in which the tribunal is considering whether the employee has been constructively dismissed. In those circumstances the tribunals have adopted a liberal approach to the question of breach of contract as that allows them to accept jurisdiction. Having accepted jurisdiction, they will then consider the merits of the case.

4.7 In the context of psychiatric injury claims arising from work the obvious example of a case which was put as a breach of the trust and confidence term is **Gogay v Hertfordshire County Council** [9], a case which involved a flawed disciplinary procedure. Rather worse than flawed really; a wholly unjustified allegation of child abuse. The question which needs to be considered is whether this means that a claim can succeed if the claim is put as a breach of this implied term when it would fail if it was put in negligence.

4.8 The overwhelming probability is that there is in fact no material difference in the result if the claim is put as a breach of this implied term and that a case will not succeed if put in contract rather than in tort. There are four reasons for thinking that this is the correct conclusion:

[7] See the discussion in the judgment of Moore-Bick in Deadman v Bristol City Council for the latest reconciliation of the duty in contract and in tort.
[8] The facts of Isle of Wight Tourist Board v Coombes [1976] IRLR 441.
[9] [2000] IRLR 773. Court of Appeal per Hale LJ.

[a] It should be remembered that there is already an implied contractual term dealing with an employer's obligation to take reasonable care to ensure his employee's safety, and whether it is necessary to imply a term which imposes a stricter form of liability in respect of psychiatric injury must be very doubtful.

[b] In Gogay itself Hale LJ pointed out that the behaviour complained of had to be really serious. In part at least such a conclusion is inevitable as the implied term itself requires that the behaviour is sufficiently serious to potentially destroy or seriously damage the bond of mutual trust and confidence. In Gogay itself there is little discussion of the severity of the breach of the implied trust but Hale LJ describes the test as being "severe". In **Clark v Nomura Bank**[10], a case reported in the same volume of the IRLR Burton J, who was subsequently President of the Employment Appeal Tribunal, reviewed all of the relevant cases and concluded that an employer would only be in breach of the implied term if his action could be categorised as perverse. It is therefore reasonably clear that that the employer's behaviour has to have been close to unacceptable before he will be in breach of the implied term. Interpreted in this way the test becomes very similar to, and probably exactly the same as, the test set out in Hatton. In Hatton, Hale LJ described the circumstances in which an employer would be held to be in breach of its duty in tort in these terms, " *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.* Put in this way the behaviour of an employer is invariably going to fail the contract test if it also fails the tort test.

[c] The same test of foreseeability applies as in all contractual claims.

[d] The employer is entitled under an employment contract to subject employees to considerable risks of injury. The duty is qualified by the words "without reasonable and proper cause". An employer may dismiss, the employer may reorganise his business, the employer may change working practices, all of which carry with them a foreseeable risk of psychiatric injury, but none of which give rise to a claim for breach of contract.

**The express contractual term.**

4.9 It is possible to have a different duty under the contract than exists in tort, sometimes an employer agrees to a contractual provision which imposes a more severe obligation on him. In Deadman v Bristol City Council, [2007] IRLR 888, the employee had been the subject of a harassment complaint made by a female member of staff. The complaint was investigated and the panel found against him. He appealed and the appeal was allowed on the basis that the panel should have had three members on it and not two. He was informed that there was to be a rehearing in a letter which was left on his desk in a

[10] [2000] IRLR 776

brown envelope. The trial judge described this means of communication, but not the contents of the letter, as being "most insensitive."

The judge held that the council's harassment policy was contractual.

4.10 On the face of it not an enormously promising claim. However, the trial judge concluded that the contractual harassment policy included an obligation to act "sensitively" and that the employer's breach of the contractual term materially contributed to the injury. He concluded that the City Council were in breach of the express provisions of their disciplinary procedure. He awarded the claimant £290,000 in damages and over £800,000 in costs.

4.11 The Court of Appeal decided that the language of the harassment policy was unlikely to have been intended to give rise to contractual obligations. However, they concluded that the terms of the disciplinary procedure did give rise to a contractual obligation. However, they concluded that the foreseeability test still had to be satisfied and that the employer's breach did not give rise to a foreseeable risk of injury. Following the Deadman case it seems unlikely that there will be many cases in which the breach of an express term will give rise to a liability for harassment which did not otherwise exist.

## 5. The Protection from Harassment Act 1997.

5.1 The common law had failed to find a basis to enable the courts to stop the anti social behaviour in the form of stalking which had become more common and the 1997 Act was intended to remedy that deficiency. If that was the intention of the Act it certainly was sufficient for that purpose. However, in the context of harassment it has proved to be a victim of its own success and many types of behaviour have been found by magistrates and courts to amount to harassment under the Act.

5.2 Such has been the Act's popularity that it is encountered in some very unexpected places and in some very unexpected factual circumstances.

### 5.2.1 The adulterer.

In CC v AB[11] the claimant had had a relationship with the defendant's wife. This relationship had become known to the defendant who decided to extract as much revenge from it as was possible, an attempt made the easier by the fact that CC is described in the judgment as being an important public figure. Various policy issues, that is freedom of expression and the right to privacy in a family life, were discussed in the judgment. However, the reason why the claimant obtained an injunction against the defendant was that the defendant

[11] [2006] EWHC 3083 (QB) Eady J

had issued a series of threats against the claimant The threats were such that the judge considered that they amounted to harassment under the 1997 Act

**5.2.2 The mother –in-law.**

In Singh v Bhakar[12] the claimant was a young Sikh woman who had undergone an arranged marriage with a Hindu man. She went to live in his family's house where she met her mother in law. She was a paradigm of the awful mother in law. In addition to various religious discourtesies she heaped work on her daughter in law, making her sweep the house almost continuously and generally treating her like the resident slave. She left the house and her husband and then sued the mother in law for harassment. The court had no difficulty in deciding that she had been harassed and awarded her a total of £35,000.

**5.3.3 The stuffed owl.**

This I found as a news report in the paper. A resident of Peterborough kept racing pigeons. His neighbour was irritated by their habit of sitting on the ridge of his roof and doing what pigeons do on a roof. In order to stop them visiting his house he bought a large stuffed owl which he placed prominently on his lawn. The pigeons vanished much to the annoyance of their owner but the neighbour was delighted and put the owl out on several occasions. He was just congratulating himself on the success of his tactic when he was prosecuted for harassing his neighbour under the 1997 Act. The magistrates convicted him.

## 6. The Protection from Harassment Act 1997.

6.1 Under the Act damages can be claimed for emotional distress. It thus provides a route to circumvent one of the difficult Hatton criteria. The undecided issue is whether it requires foreseeability of injury before damages for personal injury can be recovered. Although foreseeability is not normally a criteria for either duty or damages in cases of breach of statutory duty, the same end result is reached if the behaviour has to be really quite serious before it amounts to a breach of the duty imposed by the statute. If it does require serious misbehaviour then the claim put in tort is likely to succeed.

6.2 **The statutory provisions**.

***1.***_--(1) A person must not pursue a course of conduct—_

_[a] which amounts to harassment of another, and_
_[b] which he knows or ought to know amounts to harassment of the other._

[12] Gina Satvir Singh v (1) Prithpal Singh Bhakar(2) Dalbir Kaur Bhakar. Dep Judge Armstrong QC

*(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a course of conduct amounted to harassment of the other*

*(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—*

*[a] that it was pursued for the purpose of preventing or detecting crime,*

*[b] that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or*

*[c] that in the particular circumstances the pursuit of the course of conduct was reasonable.*

***3.**--(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.*

*(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.*

**7** (2) provides:

*"References to harassing a person include alarming a person or causing the person distress"*

**7** (3) provides*:*

*course of conduct" must involve conduct on at least two occasions.*

6.3 Basically, the law under this statute is in a mess. A statute that is intended to control anti-social behaviour should be interpreted very widely as such behaviour should be stopped. However, if it is interpreted very widely and is combined with a provision granting a civil cause of action, then almost anything can give rise to liability. The result is that courts, having enthusiastically used the act to prevent all sorts of miscellaneous bad behaviour, now find themselves confronted with the problem of deciding how to deal with the civil clams they have also apparently created, because there is no need to prove that an injury was foreseeable in order for damages to be recovered under the statute; all that has to be proved is a course of conduct amounting to harassment.

6.4 Three things about the statute are clear:

[a] The civil standard of proof is that applicable. See **Hipgrave v Hipgrave** [13](Tugendhat J) 8/12/2004.

[13] [2004] EWHC 2901 (QB)

[b] Only two incidents can be a course of conduct. ( Section 7) That does not mean that only two incidents will be sufficient as the Act speaks of a course of conduct; it is only for threats of violence that two instances is certain to be sufficient.

[c] An employer can be vicariously liable for harassment by his employee. See. **Majrowski v St Thomas' Hospital NHS Trust**[14].

6.5 What amounts to harassment is not at all clear. What is needed in order to decide whether claims pleaded in this way will succeed is some form of guidance on how serious some form of activity has to be before it amounts to harassment. Put another way, "Is foreseeability of injury a necessary requirement?"; if it is, then only serious misbehaviour will amount to harassment.

6.6 It is quite easy to find examples among the criminal cases in which really pretty trivial incidents have been regarded as harassment.

6.7 For instance, in **Tafurelli v DPP** QBD (Admin) (**Leveson J**) 25/11/2004, the appellant father and son (G and L) appealed by way of case stated against their convictions for harassment. G and L had been neighbours of the complainants. Their convictions followed evidence of a course of conduct comprising an incident of a joint attack by them on the complainants and several further incidents where dogs controlled by L and G had been incited by them to bark in the night. L and G argued that a failure to control dogs could not form part of a course of conduct within the meaning in the Protection from Harassment Act 1997 s.1(2). It was argued that whilst a deliberate act of omission could in some circumstances form such conduct it was not within the power of a person with custody of a dog to control it at all times.

The court was not prepared to state that the incitement of a dog to bark could not form part of a course of conduct within the meaning in the Protection from Harassment Act 1997 s.1(2). In any event, the magistrates' court had found as a fact that L and G had deliberately failed to control the dogs by inciting them to bark.

6.8 The issue which the courts have to face is whether types of behaviour which are normally considered to be too trivial to create a foreseeable risk of injury, give rise to a civil cause of action under the 1997 Act.

6.9 So far the courts have not provided clear guidance on whether foreseeability is a requirement of this statutory tort, although the Court of Appeal has had at least one opportunity to do so. What is reasonably clear is that the Courts are unwilling to accept that anything apart from really quite serious misconduct is capable of amounting to harassment under the 1997 Act.

[14] [2005] QB 848, [2005] ICR 977, [2005] IRLR 598.

6.10 In **Sharma v Jay (2) Wells (3) Medico Legal Investigations Ltd**[15], when dealing with an application to strike out the claim , Gray J defined what amounted to harassment in these terms at paragraph 22:

> *"(i) that in order to constitute harassment the conduct must be calculated (ie* ***likely****) to produce the consequence that the claimant is alarmed or distressed;*
>
> *(ii) that the conduct must in addition be oppressive and unreasonable;*
>
> *(iii) as to reasonableness, that it is incumbent on the claimant in his Pleading to allege conduct which is arguably unreasonable;*
>
> *(iv) that the mere fact that the conduct complained of has* ***foreseeably*** *caused distress to an individual is not enough: the requirement to establish an arguable case of oppression and unreasonableness must also be satisfied if the claim is not to be struck out. "*

6.11 If this is the correct test then it inevitably means that there is little difference between the circumstances in which a claimant will succeed at common law and under the 1997 Act.

6.12 In **Banks v Ablex Ltd** [16]Kennedy LJ , Longmore LJ , Maurice Kay LJ had to face the question of whether foreseeability of injury was required under the 1997 Act before a claimant had a civil cause of action. The trial judge in this case had decided that foreseeability was required under the 1997 Act. As one would expect, the issue arose because the serious allegations made by the claimant against a fellow employee were rejected by the judge, and that only left the claimant with some incidents of what one may term vulgar abuse, which were said to amount to harassment.

6.13 The Court of Appeal's judgment delivered by Kennedy LJ is not a masterpiece and it is very difficult to work out what it was that they actually decided. It is reasonably clear that they thought that foreseeability was a necessary requirement, but there is no real hint as to why they took that view. After reviewing the evidence to see whether the claimant had established the existence of more than one episode of harassment he said of all the earlier incidents of vulgar abuse:

> *"38. In my judgment there was no evidence from which the judge could safely have concluded that prior to 14th October 1998 the defendants ought to have foreseen significant injury to the mental health of the claimant as a possible consequence of misconduct in the form of aggressive behaviour by Briggs."*

6.14 It is possible that this is what Kennedy LJ also said earlier in the judgment. In a passage in which he was discussing an earlier case he said:

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[15] [2003] EWHC 1230 (QB)

[16] [2005] ICR 819, [2005] IRLR 819

*In* <u>*Thomas v News Group Newspapers Ltd*</u> *[2002] EMLR 78 Lord Phillips MR said at paragraph 30 -*

*"The Act does not attempt to define the type of conduct that is capable of constituting harassment. 'Harassment' is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct."*

*Mr Gore submitted that the conduct did not have to be "calculated to produce the consequences" if that is understood to mean that the alleged offender must be shown to have intended to achieve the consequences.* ***I agree, but the words used by the Master of the Rolls seemed to me to mean no more than that the conduct must be such as is liable to produce those consequences."***

6.15 In between these two passages is a long summary of the foreseeability parts of the judgments in Hatton, Barber and Hartman.

6.16 All this suggests that the Court of Appeal did in fact conclude that foreseeability of injury had to be established. It is just a pity that if that is what they were saying, then they did not make the point more clearly.

6.17 The third case is the Court of Appeal's decision in **Majrowski v St Thomas and Guy's Hospital NHS Trust.** [17](Auld LJ , May LJ and Scott Baker LJ). The trial judge had heard argument on a preliminary issue, whether or not the employer could be vicariously liable for harassment under the 1997 Act. Auld LJ and May LJ decided that the employer could be vicariously liable. Scott Baker LJ disagreed in the main as a result of his view that the Act conferred rights which effectively circumvented all the guidelines in Hatton, Hartman etc. May LJ expressed sympathy with this view but then went out of his way to set out why he thought Scott Baker's concerns were not valid. In essence he said that a very high level of misconduct was necessary before a claim could be advanced under the Act.

6.18 May LJ said at paragraph 82:

*"…in my view, although section 7(2) provides that harassing a person includes causing the person distress, the fact that a person suffers distress is not by itself enough to show that the cause of the distress was harassment. The conduct has also to be calculated, in an objective sense, to cause distress and has to be oppressive and unreasonable. It has to be conduct which the perpetrator knows or ought to know amounts to harassment, and conduct which a reasonable person would think amounted to harassment. What amounts to harassment is, as Lord Phillips said, generally understood. Such general understanding would not lead to a conclusion that all forms of conduct, however reasonable, would amount to harassment*

[17] [2005] IRLR 340. This case was subsequently appealed to the House of Lords who reached the same conclusion on vicarious liability but they did not discuss the nature of the liability.

*simply because they cause distress. Employees may be distressed, and understandably so, by managerial conduct which, for instance, being properly and reasonably critical of an employee's poor performance, is entirely within the proper and reasonable scope of the manager's functions and duties.*

*83. There are other features of the 1997 Act which, in my view, tend to confine what a reasonable person would think amounted to harassment. Section 2 provides that a person who pursues a course of conduct in breach of section 1 is guilty of an offence punishable by imprisonment or a fine or both. This should colour any appreciation of conduct which amounts to harassment. It would, I think, reinforce the view of a reasonable person that harassment is serious conduct calculated to produce the consequences described in section 7(2) and which is oppressive and unreasonable. The reasonable person should also understand from section 3 that an actual or apprehended breach of section 1 can sustain, not only a claim for damages, but also an injunction, granted in the High Court or county court, restraining the defendant from pursuing any conduct which amounts to harassment. Alleged breach of an injunction may lead to arrest and, if the breach is established, the defendant is guilty of an offence. This again colours, so as to confine, any appreciation of conduct which amounts to harassment. Of course, a person who alleges harassment can pursue a civil claim for damages without recourse to criminal or injunctive remedies. But the same conduct sustains the criminal and injunctive remedies. In the civil context, the court will be alive to this fact when considering whether what is alleged really does amount to harassment. These considerations may not readily enable a court to strike out a claim without hearing evidence, but they do circumscribe the possible ambit of such claims."*

**6.19 Conn v Sunderland City Council.**

These early indications that the Court of Appeal intended to take a restricted view of the ambit of the Act were not entirely borne out by their recent decision in Conn v Sunderland City Council, an appeal which the defendants won, but which they could have won more comprehensively had the Court of Appeal wished to take a hard line against the alleged victim in such cases.

6.20 In Conn v City of Sunderland the Court of Appeal faced the issue of how serious conduct had to be before it amounted to harassment 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 only speak to him on work matters, the foreman lost his temper and threatened to give Mr Conn a hiding.

6.21 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 entirely."* The other judges agreed with Lord Justice Ward's view that the first incident could not amount to harassment.

**6.22 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 not 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.

6.23 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.

**6.24 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

Sarah Beslee.

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