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# Jurisdictions and Causes of Action: Commercial Considerations in Dealing with Bullying, Stress and Harassment Cases-Part II

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# Jurisdictions and causes of action: Commercial considerations in dealing with bullying, stress and harassment cases—Part II

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# **Jurisdictions and causes of action: Commercial considerations in dealing with bullying, stress and harassment cases—Part II**

**Niall Neligan** □B.L.\*

In the concluding part of this two part article, the author will examine how the courts have developed rules for dealing with tortious claims for psychiatric injuries arising out of bullying, stress and harassment cases. The article will examine whether it is desirable to consolidate and codify employment rights law in order to provide clarity to prospective litigants. Finally, the author will argue that if codification is required, then this will necessitate a change in the nature of present jurisdictions for bringing claims involving bullying, stress and harassment in the workplace.

## **Tortious claims for psychiatric injuries arising from bullying and stress cases**

Having established that potential litigants in cases involving bullying, stress and harassment can pursue claims under a variety of headings, it is now necessary to consider what impact bullying and harassment in the workplace is having on the emerging tort of stress-induced psychiatric injuries. The law on personal injuries in the workplace is well settled; however, in the last 10 years there has been a dramatic increase in the number of bullying and stress-induced claims coming before the courts. Whereas considerable jurisprudence existed for dealing with cases involving physical injuries and indeed, cases for nervous shock,<sup>1</sup> the courts were, for a long time, reluctant to allow claims for work-induced stress injuries to succeed. Quite often, cases which were brought failed to satisfy the test of foreseeability which applies to actions brought under the tort of negligence.

However, since the case of *Walker v Northumberland County Council* [1995] 1 All E.R. 727, it has been accepted that the common law principles of liability can apply to stress-induced injuries.<sup>2</sup> The principle enunciated in the *Walker* decision has evolved and now applies to a variety of situations, including cases where the stress-induced injury has been brought on by incidences of

bullying and harassment. A major problem encountered by the UK courts in the aftermath of the *Walker* decision was to determine the precise parameters of the duty concerned. Indeed, the *Walker* decision had the potential to open the floodgates to a myriad of fictitious or exaggerated claims reinforcing the view, in the UK press at least, of a compensation culture at work.<sup>3</sup> In reality, liability for psychiatric injury caused by stress at work was no different from liability for physical injury; the courts merely had to refine the existing principles.

The opportunity to do so arose in *Sutherland v Hatton*,<sup>4</sup> which gave the Court of Appeal a chance to review the law and refine the principles of negligence and duty of care owed by an employer to an employee<sup>5</sup>.

In *Hatton*, the Court of Appeal established 16 principles which need to be considered in a case involving work-induced stress.<sup>6</sup> The principles were summarised by Smith & Wood in their text on Employment Law.<sup>7</sup>

- . (a) existing principles of employer's liability can apply to work-induced stress injuries— namely whether the injury was foreseeable on the part of the employer; □
- . (b) mental injuries by their very nature are more difficult to foresee than physical injuries, therefore an employer is entitled to assume that an employee can withstand the normal pressures of work; □
- . (c) there are no inherently dangerous jobs in relation to stress and so much will depend on whether the demands on the employee were excessive—was there evidence of prior sickness; did the employee, or indeed, other employees complain about stress? □
- . (d) whether or not the employer enquired from the employee if he or she was able to cope with the strains of the job—an employer is entitled to take at face value what the employee tells him; □
- . (e) a breach of duty will only take place if the employer has failed to take steps which he reasonably could have been expected to take—which will inevitably boil down to whether the employer had the necessary resources at his disposal; □

- . (f) employers who provide an operative and confidential counseling service are unlikely to be found in breach of duty;□
- . (g) if the only way to avoid exposure to a breach and thus injury to the employee is to dismiss, demote or reassign the employee, the employer will not be in breach if the employee demonstrates a willingness to continue working in that job;□
- . (h) there must be a causal connection between the breach of duty and the stress-induced injury sustained; and□
- . (i) where the employer was only partly responsible (namely there were other extraneous causal factors) then the employer will only be liable for his part and the court must apportion the blame when awarding damages. Finally, in *Hatton* the Court took the view that there was an onus on the plaintiff to inform his employer of the effect on his health.<sup>8</sup> This may be practical in some instances but where the immediate supervisor is the person to whom the complaint is made, problems may arise.□

The *Hatton* principles provide a framework whereby one employer will be held responsible, while a more conscientious employer will at least be afforded a valid defence, in so far that he could not have foreseen, or if he did, at least tried to minimise the impact on the employee.<sup>9</sup> Furthermore, where the employer offers a confidential advice service, with referral to appropriate counseling or treatment services, he may depending on the circumstances, escape liability. While this may be good in theory and practical for large employers who have the resources to provide such a service, it will provide little solace for a small to medium-size employer who may not be in a position, for financial reasons or otherwise, to provide counseling to their employees. Moreover, even the provision of such a service may not be enough.

The *Hatton* principles, while helpful, place a very high burden on the employee, and unsurprisingly, the House of Lords has lowered the threshold in circumstances where the employee did not specifically bring it to the employers attention. In the case of *Barber v Somerset County Council*,<sup>10</sup> Lord Walker found liability was established from a three week sick cert which referred to stress and depression and which, he said, should have led to enquiries by management about the plaintiff's problems and an attempt to alleviate them:

“[An] employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.”<sup>11</sup>

The court took the view that the prudent employer, once he was aware that an employee took time of work due to workload-induced stress, should have investigated the situation to assess how the difficulties might have been improved.

It is important to note that in relation to the duty of care owed, the employer does not guarantee that an employee will not be injured; the employer only undertakes to take reasonable care, and consequently will only be liable if there is a lack of care on his part in failing to prevent an occurrence which was reasonably foreseeable. This of course places a corresponding duty on the employee to look after himself, and not to blame the employer for every incident which occurs or for his own misfortunes.

The *Hatton* decision must be interpreted in light of developments where the stress-induced injury is attributed to bullying and harassment, as can be seen in the case of *Majrowski v Guy's and St Thomas's NHS Trust*.<sup>12</sup> In the *Majrowski* case, the plaintiff would have been statute-barred if his case had been one involving a physical injury. Moreover, it is likely that he would have failed the foreseeability test in *Hatton*. As noted above, *Majrowski* brought an action under the Protection from Harassment Act 1997 and succeeded in his argument that the defendants were vicariously liable—because vicarious liability involved strict liability there was no requirement for foreseeability.<sup>13</sup> Additionally, the court allowed the plaintiff to claim damages for anxiety as opposed to mental injury which was the bedrock of the *Hatton* decision. Finally, the action taken in *Majrowski* was an alternative to a discrimination-based case, where an employer would have a defence based on taking all reasonable steps to prevent discriminatory behaviour.<sup>14</sup> As such, there was no defence available to the employer within the meaning of the Prevention of Harassment Act 1997

## Safety, Health and Welfare at Work Act 2005

The principles of breach of duty arising under the law of tort must also be examined in light of the Safety, Health and Welfare at Work Act 2005 , in particular s.8, which sets out the general duties of an employer:

- . “8.—(1) Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.□
- . (2) Without prejudice to the generality of *subsection (1)* , the employer's duty extends, in particular, to the following:□
  - . (a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;□
  - . (b) managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk;□
- .  
...”□

Section 8(1)(b) has a very broad application, providing a complainant with a cause of action in bullying cases arising out of a breach of statutory duty. This applies where the employer has neglected to manage his workplace in such a way so as to prevent improper conduct or behaviour, and which is therefore likely to put the safety, health and welfare of his or her employees at risk.

The parameters of this provision have yet to be fully tested, although the relevance on health and safety legislation was considered in one of the most important cases to come before the courts: *McGrath v Trintech Technologies Limited and Trintech Group plc* , which is considered below.<sup>15</sup> In the same year, Lavan J. in the High Court expressly referred to health and safety law in the case of *Quigley v Complex Tooling and Moulding*.<sup>16</sup>

## **Tortious and contractual claims for psychiatric injuries arising under Irish law**

The law in Ireland has been re-evaluated in light of the *Hatton* decision, which has provided some guidance to the courts in dealing with cases involving bullying and stress-induced injury claims. However, before considering court decisions, it is necessary to consider the nature of the jurisdiction for dealing with such cases. There are several question marks over the nature of the jurisdiction for bringing stress-induced injury claims; the waters having been somewhat muddied by the introduction of the Personal Injuries Assessment Board. The present view would seem to suggest that such claims should go before the board for consideration, however, in the absence of any reference to assessment in the book of quantum and moreover the absence of sufficient case law, it is likely (though it cannot be taken for granted) that the board will authorise claimants to issue civil proceedings.

After the *Walker* decision the Irish courts demonstrated a willingness to consider such claims. As such the law must be divided between pre-and post- *Hatton* decisions.

### *Pre-Hatton decisions*

In *Sullivan v Southern Health Board* , the Supreme Court upheld a High Court award of £15,000 in damages to a doctor “for the stress and anxiety caused to him in both his professional and domestic life by the persistent failure of the Board to remedy his legitimate complaints”.<sup>17</sup> Similarly, in *McGrath v Minister for Justice and the Attorney General* , Mr McGrath, a member of An Garda Síochána was awarded compensation by Morris J., which included compensation of £40,000 for the stress, anxiety and general disruption to his enjoyment of life.<sup>18</sup> This stress occurred following his suspension on grounds of criminal embezzlement, of which he was found not guilty, because the suspension continued for a time period which was longer than that within which it would have been reasonably practicable to have held a full hearing into the suspension.

In *Curran v Cadbury (Ireland)* , a case involving nervous shock, the plaintiff claimed she suffered a psychiatric illness having been involved in a workplace accident when she turned on a conveyor machine unaware of the presence of a fitter who was servicing the equipment at the time. McMahon J. in the Circuit Court acknowledged the existence of the broad common law duty:

“The duty of the employer towards his employee is not confined to protecting the employee from physical injury only; it also extends to protecting the employee from non-physical injury such as psychiatric illness or the mental illness that might result from negligence or from harassment or bullying in the workplace.”<sup>19</sup>

With particular reference to the decision in *Walker* , the judge went on to state:

“The English Courts imposed liability where the plaintiff foreseeably suffered a nervous breakdown because of unreasonably stressful working conditions imposed on him by his employer. There is no reason to suspect that our Courts would not follow this line of authority if it came before the Courts in this jurisdiction.”

Two years later in the case of *McHugh v The Minister for Defence & Others* , Budd J. in the High Court awarded compensation for negligence and breach of duty to a soldier who suffered post-traumatic stress disorder.<sup>20</sup> In particular, the court made it clear that the defendants were under a duty to take reasonable care for the health and safety of their employees and to keep abreast of contemporary knowledge in the area of those afflictions to which soldiers were inevitably exposed in the course of duty. Furthermore, the defendants had negligently failed to take appropriate care for the health of the plaintiff, in so far that they had failed to observe the obvious manifestations of post-traumatic stress disorder, or else had failed to recognise the significance of the symptoms, and had negligently failed to obtain remedial therapy for the plaintiff.

In *O'Byrne v Dunnes Stores* ,<sup>21</sup> the plaintiff was awarded damages arising out of a breach of contract where the plaintiff was forced to move location without any notice or opportunity to make representations. The court held that the defendant must have contemplated that the plaintiff would suffer mental distress from this

particular breach of his contract. It was also noted that the plaintiff had been subjected to an incident of bullying which the court described as “inexcusably offensive” and “reprehensible”. The judge went on to criticise the defendant for failing to apologise for its behaviour towards the plaintiff, who had rendered 25 years service to the company and who was entitled to be treated in a civilised manner.

### *The impact of Hatton on Irish case decisions*

Although the courts in this jurisdiction were prepared to consider stress-induced injuries, like their UK counterparts before *Hatton* there was an absence of guidelines from the superior courts concerning the circumstances in which a claim would be entertained. In *McGrath v Trintech*, Laffoy J. in the High Court considered the importance of establishing foreseeability in cases for stress-induced injuries at work.<sup>22</sup> In *McGrath*, the plaintiff did not succeed in his action for damages, the court holding:

“[that]...the plaintiff has not crossed the foreseeability threshold. The risk of psychological harm to the plaintiff was not reasonably foreseeable; The fundamental test is whether the defendant fell below the standard to be properly expected of a reasonable and prudent employer. In my view it did not. Having done what was reasonable in the circumstances, the defendant did not breach its duty of care and has no liability to the plaintiff either in contract or in tort.”

The court recognised that the plaintiff did suffer from a recognisable form of psychiatric illness, noting that there is a statutory duty on the employer to protect the psychiatric health of employees. However, the plaintiff failed to establish a breach of statutory duty on the part of the defendant in consequence of which the plaintiff suffered stress-induced injury.

Not long after the decision in *McGrath*, Lavin J. in the High Court considered the question of foreseeability in *Quigley*. The plaintiff

had previously brought a successful claim against his employer in which the Employment Appeals Tribunal (“EAT”) ordered his re-engagement; he subsequently initiated proceedings claiming damages for personal injuries as a result of harassment, bullying, humiliation and victimisation by the Plant Manager and Managing Director of the defendant company. Lavin J. noted that the plaintiff had made several complaints to his employer about being bullied and noted that nothing was done to prevent it re-occurring. Lavin J. followed the test laid down by Laffoy J. in *McGrath* , concluding that the inaction on the part of the defendant in *Quigley* fell short of the standard of the reasonably prudent employer.

In *Maheer v Jabil* ,<sup>23</sup> Clarke J. applied the 16 principles derived from the *Hatton* decision, accepting that the injury which the plaintiff sustained was directly attributable to the experience in the workplace. However, the court dismissed the plaintiff's claim on the grounds that the types of injuries sustained were not reasonably foreseeable. In reaching his decision, Clarke J. distinguished between circumstances in which a plaintiff suffered from ordinary occupational stress and circumstances in which a plaintiff sustained an injury to his health arising out of unacceptable practices.<sup>24</sup> The court took the view that the targets which the employer had set for the plaintiff in *Maheer* , though challenging, were not excessive; consequently, it was the court's belief that the defendants were not in breach of duty to the plaintiff. Of further interest, the court in obiter commented on the nature of the counselling services provided by employers (in line with the common law developments initiated by the *Hatton* decision), saying the mere existence of a counseling service itself would not exempt an employer from liability where such a service existed on paper but in reality did not provide such a service necessary to ensure compliance with an appropriate duty of care.

Perhaps the most interesting case to come before the High Court since the *McGrath* decision<sup>25</sup> is *Berber v Dunnes Stores* , where the plaintiff sought a declaration that the defendant had unlawfully repudiated his contract of employment and further sought damages for personal injury founded both in tort and contract.<sup>26</sup> In considering the action brought under the headings of tort and contract, Laffoy J. expressly referred to the judgment of Coleman J. in the *Walker* case

where it was held that the scope of the duty of care owed to an employee to take reasonable care to provide a safe system of work is co-extensive with the scope of the implied term as to the employee's safety in the contract of employment; a statement which was later approved by the Court of Appeal in the case of *Gogay and Hertfordshire County Council*.<sup>27</sup> Laffoy J. accepted counsel for defendants submission that the starting point for consideration of the issue of liability should be the questions raised by Clarke J. in *Maher*; namely, (a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress; (b) if so, is that injury attributable to the workplace; and (c) if so, was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.

The process of bringing a claim under breach of contract was also considered in the recent decision of the High Court in *Pickering v Microsoft Ireland Operations Limited*,<sup>28</sup> where liability was imposed for breach of contract rather than breach of duty and negligence. The court established that the defendant breached an express term of the plaintiff's contract of employment by failing to address concerns which had been raised by the plaintiff. Consequently in the eyes of the court, the defendant's failure to honour its contractual obligations and its treatment of the plaintiff thereafter was a causative factor in the plaintiff's psychological injury.

Having regard to the formula laid down by *Hatton*, Smyth J. established that Pickering had suffered a psychological injury to her health which went beyond ordinary occupational stress, and was directly attributed to both the defendant's breach of contract and breach of duty.<sup>29</sup> The judge acknowledged that Microsoft was not aware of the harm from the offset and consequently it was not reasonably foreseeable; however, when the defendant became aware that the plaintiff was suffering from stress then a clear duty was owed.<sup>30</sup> The court further noted that having heard evidence it would have been useful and good practice if the plaintiff had been contacted by a manager while on leave in an effort to resolve the situation. Consequently, the court awarded the plaintiff general damages of €60,000 for pain and suffering to date and €20,000 for future loss.<sup>31</sup>

## **Dignity at work legislation**

Having considered bullying, stress and harassment claims under the headings above, and having noted the increasing overlap in cases which have come before the courts and tribunals, the question is whether legislation should be introduced to consolidate the law in this field. Bullying, stress and harassment at work claims are clearly on the rise. In the absence of one comprehensive statute covering this area, employers are forced to navigate a variety of different causes of action arising in different jurisdictions; clearly this is unsustainable and impractical. From a critical evaluation of the law, there is clearly a need for a statutory intervention which defines the parameters of this burgeoning area of law and which limits the jurisdictions in which actions may be brought.<sup>32</sup> Certain countries such as Belgium, France, Finland, the Netherlands and Sweden have already introduced specific legislation for dealing with workplace bullying.<sup>33</sup> In terms of common law jurisdictions, few have embraced legislation to date, however there is movement towards placing clearly defined rules on the statute book.<sup>34</sup>

The *Expert Advisory Group on Workplace Bullying*, in its most recent report, has recommended statutory intervention, offering a number of recommendations for dealing with the problem of workplace bullying<sup>35</sup>:

- . **1.** Legislative force to be given to the requirement that bullying be a mandatory inclusion in all employers' Safety Statements and that appropriate policies and procedures be implemented in every workplace.□
- . **2.** All employees, irrespective of employer or employment status, would fall within the remit of these recommendations.□
- . **3.** All persons in the workforce, whether permanent employees or those operating under contracts of service, must be made subject to the policies and procedures of the employing organisation in respect of bullying.□
- . **4.** The decisions of the Employment Appeals Tribunal or the Labour Court in cases of bullying would be binding and

enforceable through the courts.□

The Advisory Group has proposed a model for dealing with bullying; however, the model suggested is laborious, time consuming and involves too many stages.<sup>36</sup> Furthermore, it does not provide any guidance on how a defendant should deal with the perpetrator(s) of bullying once a successful claim has been brought before the Tribunal, or indeed the Labour Court.

## **Developments in the UK**

Inevitably, because of proximity and the influence of UK decisions on Irish law, it is necessary to consider movements towards placing bullying, stress and harassment on a statutory footing in the UK. Indeed, there have been a number of attempts by Baroness Gibson to introduce dignity at work legislation before parliament, most recently in 2001. The Dignity at Work Bill 2001 which was passed by the House of Lords, (but not the House of Commons) makes for interesting reading and may serve as a template for the Oireachtas to consider in the future.<sup>37</sup> The major provisions of the Bill are as follows:

### ***Right to dignity at work***

Section 1:

- . **“1.-(1)** Every employee shall have a right to dignity at work and if the terms of the contract under which a person is employed do not include that right they shall be deemed to include it.□
- . **(2)** Subject to section 5 of this Act, an employer commits a breach of the right to dignity at work of an employee if that employee suffers during his employment with the employer harassment or bullying or any act, omission or conduct which causes him to be alarmed or distressed including but not limited to any of the following—□
  - . **(a)** behaviour on more than one occasion which is offensive, abusive, malicious, insulting or intimidating;□
  - . **(b)** unjustified criticism on more than one occasion;□
  - . **(c)** punishment imposed without reasonable justification,

or □

- . (d) changes in the duties or responsibilities of the employee to the employee's detriment without reasonable justification.” □

## *Victimisation*

### Section 2:

- . “2.-(1) An employer commits a breach of the right to dignity at work of an employee if he treats that employee *less favourably* than he would treat other persons and does so by reason that the employee has – □
  - . (a) brought proceedings under this Act against the employer or any other person; □
  - . (b) given evidence or information in connection with proceedings brought by any person under this Act against the employer or any other person; □
  - . (c) otherwise done anything under or by reference to this Act in relation to the employer or any other person; □
  - . (d) alleged that the employer or any other person has committed an act which (whether or not the allegation so states) would give rise to a claim under this Act, or by reason that the employer knows or suspects that the employee has done or intends to do any of those things.” □

The Bill provides for a more streamlined approach for dealing with bullying complaints.

## *Complaint to an employment tribunal*

### Section 4:

- . “4.-(1) Without prejudice to his right to remedies for breach of contract for breach of the right to dignity at work, a complaint by an employee that another person has committed a breach of his right to dignity at work under this Act may be presented to an employment tribunal. □
- . (2) An employment tribunal shall not consider a complaint under

this section unless it is presented to the tribunal before the end of the period of three months beginning with the day on which the act complained of was done, unless in all the circumstances of the case the tribunal considers that it is just and equitable to do so.□

- . (3) For the purposes of this section any act extending over a period or any persistent or recurrent breach of section 1(2) shall be treated as done at the end of that period or at the date of the last such act.”□

Clearly this provision is markedly different from the recommended model put forward by the Expert Advisory Group, suggesting that the matter should go before the Labour Relations Commission (“LRC”) first, with the possibility of the case being referred to a Rights Commission and or the EAT / Labour Court later. The merit of such an approach is that it reduces lead time, making the whole process more user friendly and efficient for both employers and employees.

The Bill also provides for a full defence to an employer under s.5 if, at the time of the act, or acts complained of, the employer has in force a *Dignity at Work* policy and has taken all steps to implement it, including appointing a competent person to assist the employer in undertaking the measures to comply with the requirements of this Bill and the *Dignity at Work* policy. Provision is given to the competent person to repudiate the act or acts complained of within three working days after he / she has been notified. Furthermore, positive steps are taken by the employer to remedy the loss.

The Bill also provides the complainant with redress where a complaint has succeeded before a Tribunal: (a) an order may be made declaring the rights of the complainant; (b) an order requiring the respondent to pay to the complainant compensation assessed in like manner as any other claim in tort<sup>38</sup> ; (c) a recommendation that the respondent take, within a specified period, action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect of any breach of the right to dignity at work to which the complaint relates.

Clearly a piece of legislation along the lines of the UK Dignity at Work Bill 2001 would be of great assistance in alleviating some of

the problems facing employers and employees in the present climate. However, the Bill has its shortcomings and could be more comprehensive in relation to the provision dealing with Right to Dignity at Work under s.1. Curiously, the Bill makes provision for compensation assessed in a manner as any claim in tort. This may include an award for injuries to feelings, although the precise scope of the provision is vague and it remains unclear whether it would cover circumstances in which an employee suffers a stressed-induced psychiatric injury.

Ultimately the question that needs to be asked is whether it would be desirable to create an all-embracing statute dealing with bullying, stress and harassment in this jurisdiction. If legislation were passed to merely supplement the existing provisions then it would be a fruitless exercise. However, if the legislation has as its object or effect the consolidation, codification and amendment of existing provisions then it would be a useful instrument; as to how it would be achieved is another matter, and would inevitably require changes in jurisdiction.<sup>39</sup>

## **Conclusions**

What is clear from an examination of the law dealing with bullying, stress and harassment is that there are too many causes of action dealt with in a myriad of jurisdictions. It would be wrong to conclude that the laws which presently exist for dealing with claims of bullying, stress and harassment amount to a code, as in reality the laws examined above are merely vehicles which have been used by litigants to seek redress in the absence of dedicated legislation. One longstanding solution would be to clarify, consolidate and codify existing employment rights legislation, much in the same way as taxation and company law have been consolidated in the past.<sup>40</sup> By adopting the consolidation and codification model, some of the anomalies which exist under the present law could be addressed; for example, the dismissal provisions under the common law, the Unfair Dismissals Acts and the Equality Acts could be streamlined and broadened.<sup>41</sup> Provision could also be made for circumstances where the employee has suffered an injury to his health arising out of work-related stress, thus bringing together the law under the Safety, Health

and Welfare at Work Act 2005 and the law of tort based on the courts interpretation of the *Hatton* principles.

To achieve consolidation and codification however, would require a revolutionary change in jurisdiction, a discussion of which would require a separate article. From the author's perspective, the existence of parallel institutions such as the Rights Commission, the Employment Appeals Tribunal and the Equality Tribunal is unsatisfactory and untenable in the long run. One possible solution would be to restructure the existing jurisdictions to create a three-tier system to deal exclusively with employment rights law. The first tier would be a mediation-based service to deal with non-contentious issues; the second tier would involve creating a dedicated Employment Tribunal (amalgamating the EAT and Equality Tribunals) equipped to deal with contentious employment rights disputes, including equality claims with a jurisdiction limited to a defined monetary amount; and the third tier would involve the creation of a dedicated Employment Law Court as a division of either the Circuit Court or the High Court, equipped to provide equitable remedies and competent to deal with awards of compensation in excess of the Employment Tribunal.<sup>42</sup>

\* [ *Niall Neligan* is a practising barrister. ]

<sup>1</sup> [ *The implied duty of care to prevent psychiatric injury from stress has developed separately from the tort of nervous shock which tends to arise from trauma. Whereas psychiatric stress cases evolve over a period of time, for example in the Walker case, the stress-induced factor was excessive work demands. It should be noted that there is nothing to preclude an employee from bringing an action for a trauma-induced injury at work; however, they would still have to comply with the normal rules for nervous shock as established in the case of Alcock v Chief Constable of South Yorkshire [1999] 2 A.C. 455; [1999] 1 All E.R. 1 (HL) . ]*

<sup>2</sup> [ *Although the Walker decision marks a watershed in respect of claims for stress-induced injuries, it was by no means the first such decision of this nature. Indeed, almost 20 years before, in the case of Cox v Philips Industries Ltd [1976] I.C.R. 138 at 146; [1976] 3 All E.R. 161 , Lawson J. noted: "I can see no reason in principle why, if a situation arises which within the contemplation of the parties*

*would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach should not be compensated in damages for that breach. Doing the best I can, because money can never really make up for mental distress and vexation – this is a common problem of course in personal injury cases.” ]*

<sup>3</sup> *[ In the aftermath of the Walker decision there were a number of cases where the court examined the scope of the employer's duty, in particular the Scottish courts in the cases of Rorrison v West Lothian College [1999] Rep. L.R. 102 and Cross v Highlands and Islands Enterprise Board [2001] I.R.L.R. 336 . ]*

<sup>4</sup> *[ [2002] 2 A.E.R. 1. ]*

<sup>5</sup> *[ This was, in fact, four conjoined appeals taken against different employers by different complainants ]*

<sup>6</sup> *[ The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components: (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors). ]*

<sup>7</sup> *[ Employment Law (9th edn, Ian Smith & Gareth Thomas, OUP, 2007). ]*

<sup>8</sup> *[ Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability. ]*

<sup>9</sup> *[ Per Hale “[An] employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.” ]*

<sup>10</sup> [ *Barber v Somerset CC* [2004] U.K.H.L. 13; [2004] 1 W.L.R. 1089 (HL) . *Mr Barber was applicant in one of the four conjoined cases in Hatton and decided to appeal to the House of Lords.* ]

<sup>11</sup> [ [2004] U.K.H.L. 13. ]

<sup>12</sup> [ *See above at 27.* ]

<sup>13</sup> [ *The House of Lords also noted that the time limits for bringing such an action was six years and not three.* ]

<sup>14</sup> [ *An employer would have a similar defence also in an action for common law negligence.* ]

<sup>15</sup> [ [2005] E.L.R. 49. ]

<sup>16</sup> [ *Unreported, High Court, March 9, 2005.* ]

<sup>17</sup> [ [1997] 3 I.R. 123. ]

<sup>18</sup> [ [2001] E.L.R. 15. ]

<sup>19</sup> [ [2000] 2 I.L.R.M. 343. ]

<sup>20</sup> [ [2001] 1 I.R. 424. ]

<sup>21</sup> [ [2003] E.L.R. 297. ]

<sup>22</sup> [ [2005] E.L.R. 49. ]

<sup>23</sup> [ [2005] I.E.H.C. 130. ]

<sup>24</sup> [ *Clarke J., in following Hatton as a starting point, followed a three step test in Maher : (a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress; (b) if so, is that injury attributable to the workplace; and (c) if so, was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.* 25 *See n.17 above.* ]

<sup>26</sup> [ *The plaintiff also sought damages for defamation but did not succeed under this heading.* ]

<sup>27</sup> [ [2000] I.R.L.R. 703. ]

<sup>28</sup> [ [2006] E.L.R. 65. ]

<sup>29</sup> [ See above at 72. ]

<sup>30</sup> [ Which was when the company doctor and nurse consulted with her. ]

<sup>31</sup> [ The defendants argued that they had in place a referral service with a psychiatric nurse; the plaintiff was seen by the company doctor and had provided the plaintiff with a number of sessions with a counsellor, and thus in the circumstances had done everything that was reasonable. ]

<sup>32</sup> [ One clear example is the existence of two forms of statutory dismissal: one under the Unfair Dismissals Acts and one under the Equality Acts—the latter being wider in scope in so far that an employer is exposed to an order of compensation and in the view of the author this later provision should be repealed. ]

<sup>33</sup> [ Sweden's National Board of Occupational Safety and Health introduced guidelines as far back as 1993 in its Ordinance AFS 1993:17. ]

<sup>34</sup> [ At the time of writing this article, there are 13 states in the US which are debating anti-bullying Bills: New Jersey, Washington, New York, Vermont, Oregon, Montana, Connecticut, Hawaii, Oklahoma, Kansas, Missouri, Massachusetts, and California. ]

<sup>35</sup> [ August 17, 2005. ]

<sup>36</sup> [ For the full text of the model proposed, see “The Report of the Expert Advisory Group on Workplace Bullying,” August 17, 2005, pp.20–21. For a summary of the procedure see M. Smith “What can be done? Suggestions for Amended and New Legislation Dealing with Workplace Bullying” 3 [ELJ] 2005 at 57. A summary of the procedure by Smith is repeated here. “... on foot of an allegation of bullying being made by an employee, and where internal procedures and a later formal internal investigation under the employer's dispute resolution procedures did not resolve the matter, the case should be referred to the Labour Relations Commission. The LRC

*may try and mediate, or if this is not successful, it will refer the matter to a Rights Commissioner for investigation and recommendation. If the recommendations of the Rights Commissioner are not accepted by either or both parties, the case should be referred to the Employment Appeals Tribunal or the Labour Court for a decision. According to the model this would be binding on all parties.” ]*

<sup>37</sup> *[ A Dignity at Work Bill was put before the House of Commons in 1997 but was rejected by the Conservative Government under John Major. The subsequent Blair Government who included a provision in their 1997 manifesto would not allow time for consideration of the Bill in 2001. Gibson maintained that there were problems with the definition of bullying. ]*

<sup>38</sup> *[ The full wording for s.6(1)(b) of the Dignity at Work Bill provides “that where an employment tribunal finds that a complaint presented to it under Section 4 is well founded the tribunal shall make such of the following as it considers just and equitable ... (b) an order requiring the respondent to pay to the complainant compensation assessed in the manner as any other claim in tort in reparation for breach of statutory duty, which may include an award for injury to feelings whether or not they include compensation under any other head”. ]*

<sup>39</sup> *[ For an excellent discussion of the Dignity at Work Bill, see ‘What Can be done? Suggestions for Amended and New Legislation dealing with Workplace Bullying.’ Murray Smith (3) ELR 2005 at 57. ]*

<sup>40</sup> *[ The process of consolidation and codification is ongoing under Irish law, particularly in the field of criminal law. ]*

<sup>41</sup> *[ Such a provision if introduced would be broad enough to allow for compensation in circumstances where the dismissal was brought about by bullying, harassment and other less favourable treatment. ]*

<sup>42</sup> *[ The author would like to thank Marguerite Bolger B.L., Murray Smith B.L., Pauline Codd B.L., John Eardly B.L., Cliona Kimber B.L. and Ercus Stewart S.C. for their assistance and advice in relation to the subject-matter dealt with in this and the preceding*

*article. Originally written as one article, for the purpose of space the subject-matter was divided in two and therefore should be read in conjunction with Part I, published in (2008) 15 C.L.P. 3. ]*