

EMPLOYERS' LIABILITY FOR STRESS AT WORK DUE TO AN EXCESSIVE WORKLOAD: NEW POINTERS FROM THE UNITED KINGDOM^{*}

Marlize van Jaarsveld
Blur LLB LLM
Associate Professor of Mercantile Law
University of South Africa (UNISA)

"[T]he 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 implied terms as to the employee's safety in the contract of employment."¹

SUMMARY

Stress-induced illnesses experienced by employees due to excessive workloads are an alarming problem facing employers in the United Kingdom. Not only are stress-induced illnesses a major cause for concern, but these illnesses have moreover been recognised as the second most common work-related ill-health problem in the UK. Workplaces in South Africa are not shielded from the problematic consequences of the work pressures experienced by employees. So far, these problems have mostly been addressed by utilising the provisions of existing legislation. However, despite the existence of legislation in the UK which deals with safety and health issues in employment, a number of employees have successfully claimed damages from their employers by proving breach of contract. In this article, the possibility of South African employers being held contractually liable for stress-induced illnesses based on the excessive workloads of their employees is analysed from a comparative point of view. It is concluded that contractual liability may very well be a reality should the guidelines which emanated from British case law be followed.

1 INTRODUCTION

It was with great sadness that I received the news of Professor JMT Labuschagne's sudden death. As one of his former students, both during my under- and postgraduate studies I, and undoubtedly many other students, enjoyed his classes immensely, mainly because Professor Labuschagne

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¹ Coleman J in *Walker v Northumberland County Council* [1995] 1 All ER 737 (HC) 759D (emphasis added).

engaged his students in those intricate, usually rather peculiar, aspects of the law. He had a keen interest in human nature which is reflected in the topics of his numerous publications.² As such he would never pass up an opportunity to share some perplexing notion of his with students, ultimately entertaining different perspectives of a younger generation. I am honoured to dedicate with respect and humility this article to the memory of a distinguished and versatile academic who was also a kind and an intriguing lecturer.

2 GENERAL BACKGROUND

Employees and employers alike are more than ever before faced with various work-related challenges. The effects of globalisation, new technological innovations, and a general increase in competitiveness are impacting on business.³ Employees are required to keep up with a faster-moving society where a "time-is-even-more-money"-attitude is seemingly embraced. Add to this the possibility of financial constraints, excessive personnel turnovers and limited resources, and the outcome is predictable. Something had to give, and it was not the services rendered.

Many employees in the United Kingdom are battling to cope with their workloads. Therefore, stress-induced illnesses have increased at an alarming rate,⁴ and are major causes for concern.⁵ It is thus not surprising that stress-related illnesses are recognised as the second most common work-related ill-health problem.⁶ Moreover, some employers in the United

² See, eg, "Die Spanningsveld Geskep Deur die Selfverantwoordelike en Verwoordelikeheids-deflektiewe Persoonlikheidsstipes in 'n Plurale en Liberale Regstaat" 2001 *De Jure* 292; "Tele -en Sluipsteiering: Opmerkinge oor die Behoeftes aan Strafregtelike Beskerming van die Persoonlike Lewensfeer en Biopsigiese Outonomie" 2002 *De Jure* 274; "Persoonlike Outonomie en die Deliktuele Aanspreeklikheid Weens Vryheidsontneming" 1999 *De Jure* 174; "Ubuntu as a Conceptual Directive in Realising a Culture of Effective Human Rights" 1999 *THRHR* 114; "Deliktuele Aanspreeklikheid Weens Skending van die Emosionele Band Tussen Mens en Dier" 1997 *TSAR* 145; "Menseregterlike Status van die Psigiatrisiese Pasiënt" 1997 *De Jure* 174; and "Die Menseregterlike Dimensie van Sekuele Teistering in Arbeidsverband" 1997 *SA Merc LJ* 76.

³ See *Bennett and Mondipak* 2004 25 *ILJ* 583 (CCMA) 590J-591A. The Health and Safety Commission in Britain reported that key changes in the changing world of work are *inter alia* a decline in labour intensive heavy manufacturing, growth in service activities, privatisation of state enterprises, downsizing of large organisations, contracting out of support activities and a concentration on core activities. See further "Revitalising Health and Safety Consultation Document of July 1999" 155 referred to by Barrett "The Impact of Safety Legislation on the Contract of Employment" in Collins, Davis and Rideout (eds) *Legal Regulation of the Employment Relation* (2000) 253.

⁴ During 1995/1996 work-related stress cost the United Kingdom between £353- and £381-million per year. See Mackay, Cousins, Kelly, Lee and McCaig "Management Standards' and Work-related Stress in the UK: Policy Background and Science" April/June 2004 *Work & Stress* 91.

⁵ The word "stress" is derived from the Latin word "stringere" which means "to draw tight". See Earnshaw and Cooper *Stress and Employer Liability* (1996) 6 referred to by Christie "Breach of Duties, Broken Minds" 2000 *Scottish Law & Practice Quarterly* 376. "Stress" relates to a state of tension created by *inter alia* demands and pressures of an employee's work as well as other external and internal generated demands. See further <http://www.stressfree.com/stress.html> referred to by Christie 2000 *Scottish Law & Practice Quarterly* 376.

⁶ An estimated half a million people are suffering from work-related stress, anxiety or depression in Great Britain. See the Health and Safety Executive ("the HSE") "Psychosocial

Kingdom have experienced the financial implications of stress-related illnesses based on workloads. During recent years a myriad of cases have been reported where employees have claimed contractual damages from their employers based on a breach of the contractual duty to prevent work-related health problems which occurred due to excessive workloads.⁷

In this article I shall address the likelihood that South African employers can be held contractually liable by their employees based on their excessive workloads. The article is divided into three parts. In the first part, I shall explain the foundation of an employer's liability for the health and safety of its employees in South Africa. Stress-related incidents as they have emerged from case law are also addressed in this part. In the second part of the article, I shall analyse the recent developments in British law with regard to the confirmed contractual liability of employers for their employees' stress-related illnesses due to excessive workloads. Aspects pertaining to legislation and case law are analysed here. Lastly, I shall consider whether the legal implications emanating from British contractual liability for excessive workloads are forewarnings for employers in South Africa.

3 RECOMMENDATIONS

3.1 Duty of care – contract or delict

The relationship between an employee and a employer is a contractual one.⁸ This contractual relationship has been accepted to give rise to a duty of care on the part of the employer.⁹ Employers are accordingly contractually obliged to provide their employees with reasonably safe and healthy working conditions. Still, whether this duty of care emanates from delict or contract

Working Conditions in Great Britain in 2004" 1, <http://www.hse.gov.uk/statistics/causdis/pwc2004.pdf>, accessed on 1 July 2005. Employers have been urged by the HSE to make sure that their employees are not made ill by their work. Employers were warned that if they do not take stress seriously, they leave themselves open to compensation claims from employees who suffered ill-health due to work-related stress. See The Society of Stress Managers "A Stress Management Policy for Employers" <http://www.managstress.co.uk/policy.doc>, accessed on 1 July 2005. According to one trade union representative, excessive workloads are creating exceptional levels of stress for two-thirds of employees, thus making it a current number one workplace health concern. See TUC "Don't Get Stressed, Get Organised!" <http://www.gpmu.org.uk/hs/hsstress.html>, accessed on 1 July 2005.

⁷ See par 4 5 below.

⁸ See Mowatt "Sexual Harassment – Old Remedies for a New Wrong" 1987 *SALJ* 439 448; Swanepoel *Introduction to Labour Law* 3ed (1992) 2; and Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) 39. The contract of employment is the "cornerstone of the edifice of labour law". See Kahn-Freund referred to by Davis "From Contract to Administrative Law: The Changing Face of South African Labour Law" in Visser (ed) *Essays on the History of Law* (1989) 79.

⁹ It was held in *Van Deventer v Workmen's Compensation Commissioner* 1962 4 SA 28 (T) that an employer owes a common law duty to an employee to take reasonable care for his safety (31B-C). This principle was later applied in *Oosthuizen v Homegas Pty Ltd* 1992 3 SA 463 (OPD) where the court noted that an employer who takes an employee into its service is responsible to provide a safe workplace (471 F). The existence of a contractual duty of care between an employer and an employee is confirmed in *Du Pisanie v Rent-A-Sign (Pty) Ltd* 2001 2 SA 894 (SCA).

has not been settled.¹⁰ An employee is entitled to refuse to work in dangerous working conditions, which suggests that the law recognises an implied contractual duty in this regard.¹¹ According to Oliver, uncertainty remains whether the old demarcation between tort¹² and contract is still valid.¹³ In certain areas of the law there may even exist a tortification of contract, for instance in breach of contract, and in the calculation of damages.¹⁴ Support has been found in early British case law for the principle that a breach of duty in the context of employment may give rise to a choice between an action in contract or in tort.¹⁵ There should be no difference in contracts, where a negligence-based standard of liability is included as an implied term, between the contractual and delictual standard of care, and the concurrence of actions should thus not be denied on that basis.¹⁶

¹⁰ See, eg, *Bowley Steels (Pty) Ltd v Danlian Engineering (Pty) Ltd* 1996 2 SA 393 (T) 398 where the court referred to Fleming *The Law of Torts* 4ed (1971) 136 who stated:

"[The] recognition of a duty of care is the outcome of a value judgement ... the decision whether or not there is a duty, many factors interplay: ... history, our ideas of morals and justice ... the incidence and extent of duties are liable to adjustment in the light of constant shifts and changes of community attitudes."

The application of a "policy issue" in employment thus means that the legal considerations of the society dictate that once an employer is engaged for its own benefit in business to make a profit, and he has control over the potentially dangerous aspects of his undertaking accompanied with control over his employees, he owes it to his employees to take reasonable care of their safety. See Scott "Safety and the Standard of Care" 1980 1 *ILJ* 161 164. In *Joubert v Impala Platinum Ltd* 1998 1 SA 463 (BHC) Waddington AJP held an employer liable for damages because an employer's liability arises in principle from the conduct of the employer, or from the conduct of its employees. Waddington AJP held that the existence of a concurrent contractual claim does not prevent an action based on a delict provided that the requirements for delictual liability are present (475C).

¹¹ Grogan *Workplace Law* 8ed (2004) 65.

¹² The English law of obligations has traditionally been divided into contractual obligations, which are voluntarily undertaken and owed to a specific person(s), and obligations in tort which are based on the wrongful infliction of harm to certain protected interests owed to a wider class of persons. "Tort" is thus the word used in English law for the South African word "delict". See Beatson *Anson's Law of Contract* 28ed (2002) 22.

¹³ Oliver "The Tortification of Contract" in Scott and Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (2000) 283. The author explains that a contractual obligation is produced by the mutual consensus of the parties. A delictual obligation arises from the unlawful violation of the rights of others. In *Bayer South Africa (Pty) Ltd v Frost* 1991 1 SA 559 (A) Corbett CJ accepted that a negligent misstatement may give rise to a delictual claim for damages even though the misstatement induced such person to enter into the contract. Pre-contractual negligent misrepresentation is an acknowledged delict (as referred to by Oliver 298).

¹⁴ Oliver 299.

¹⁵ See Loubser "Concurrence of Contract and Delict" 1997 2 *Stell LR* 113, 114-115 and 128. The author explains that the distinction between delict and contract may in present times become somewhat unfashionable although there are still important differences between the underlying values of contract and tort law. Nonetheless, in the old English case *Brown v Boorman* 8 Eng Rep 1003 (HL) 1844 it was held that where a contract of employment exists, and there is a breach of duty in the course of employment, the injured party may recover in tort, or in contract. See also *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 1 SA 475 (A) where the ordinary difference between the standard of care required by the rules of contract and delict was one of the grounds for denying the concurrence of contractual and delictual actions. Grosskopf AJA held that where parties are in a direct contractual relationship a delictual remedy is unnecessary because they have satisfactory remedies based on their contractual relationship (500F-G). See also Neethling, Potgieter and Visser *Law of Delict* 4ed (2001) 6-7.

¹⁶ See Loubser 1997 2 *Stell LR* 129.

Accordingly, a concurrence of contractual and delictual actions should be allowed in cases where damages were caused by an intentional or a negligent breach of contract. A contract does not automatically exclude the existence of a delictual action between the parties but rather gives specific content to the rights and duties of the contractual parties.¹⁷ Since an employer does not have an absolute duty to prevent every remote possibility of danger, only those actions that reasonable standards would impose must be taken.¹⁸ An employee may under certain circumstances give consent to the possibility of harm, implying that the liability of the employer will be excluded.¹⁹

3 2 Legislative framework

There is a duty in common law and in legislation on employers to provide a workplace that is without risk to the safety and health (also mental health) of employees. This duty means that employers must set standards of acceptable behaviour with which employees must comply to create and maintain a healthy and safe working environment.²⁰ Various forms of legislation have been enacted to ensure that the regulations dealing with health and safety aspects are complied with.²¹ An employee is in principle entitled to compensation when he has contracted an occupational disease.²² Stress-related illnesses are not listed as "occupational diseases" in Schedule 3 of the COIDA. Notwithstanding this, section 65(1)(b) of the COIDA defines an

¹⁷ See Loubser 1997 2 *Stell LR* 149.

¹⁸ *Barker v Union Government* 1930 TPD 120 130. See, eg, *Kruger v Coetzee* 1966 2 SA 428 (A) 430E-G where the liability for negligence is explained as when a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct harming another in his care and causing him patrimonial loss and would take reasonable steps to prevent it, and the defendant failed to take such steps. In *Van Eeden v Minister of Safety and Security Women's Legal Centre Trust, as Amicus Curiae* 2003 1 SA 389 (SCA) 395I-396E the court noted that the existence of a legal duty in a particular case is: "a conclusion of law depending on a consideration of all the circumstances of the case, and on the interplay of the many factors which have to be considered". The test was approved in *Minister of Safety and Security v Rudman* 2004 2 All SA 667 (SCA) 683B-F.

¹⁹ This is a defence available to an employer known as "volenti non fit injuria". See *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A); and *S v Collett* 1978 3 SA 206 (RA). The defence needs to be "cautiously" applied. See *Waring & Gillow Ltd v Sherborne* 1904 TS 340; and the general discussion in Van Jaarsveld and Van Eck 71.

²⁰ Campanella "Sexual Harassment as Misconduct – Is There Strict liability for Harassers?" 1994 *ILJ* 491 498. See Coaker and Zeffertt *Wille and Millin's Mercantile Law of South Africa* 18ed (1984) 348; Van Jaarsveld and Van Eck 404; and Du Plessis, Fouché and Van Wyk *A Practical Guide to Labour Law* 5ed (2001) 167.

²¹ See, eg, s 8(2)(a)-(j) of the Occupational Health and Safety Act 85 of 1993 ("the OHSA") with regard to the general health and safety duties of employers; the Health and Safety Mines Act 29 of 1996 which regulates the health and safety of workers in the mining industry, and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("the COIDA") which deals with aspects pertaining to the compensation employees are entitled to based on work-related illnesses and injuries.

²² Defined as "an occupational disease" in the COIDA during the course of his employment. S 1 of the COIDA defines an "occupational disease" as any disease contemplated in s 65(1)(a) or (b) of the COIDA. According to s 65(1)(a) an "occupational disease" is a disease listed in schedule 3 of the COIDA. Schedule 3 of the COIDA lists different occupational diseases. These include diseases caused by different industrial agents, diseases which target certain organ systems, cancers caused by different occupational agents, and Miners' nystagmus.

"occupational disease" as any disease other than a disease mentioned in section 65(1)(a) of the COIDA, provided that the disease has arisen out of and in the course of the employee's employment. One may argue that a claim for a stress-related illness, for example depression or anxiety, is subject to compensation provided an employee is able to prove that the stress-related disease arose out of and in the course of the employee's employment.²³

3 3 Work-related stress in South Africa

3 3 1 Stress in general

The ability of a person to work is subject to highly personal factors such as intelligence, training, personality and the culture of the workplace.²⁴ A number of work-related situations may create stressful working environments. In most instances these situations have been approached by utilising the statutory path provided by the provisions of the Labour Relations Act²⁵ and the Employment Equity Act.²⁶ An employee who suffers from a stress-related illness, and who is unable to perform his duties, may fairly be dismissed provided that the guidelines in the Code of Good Practice: Dismissal have been taken into consideration.²⁷

In *Hendricks v Mercantile & General Reinsurance Co of SA Ltd*²⁸ the appellant was suffering from anxiety and depression which was aggravated by the "depressing circumstances" of his work. Apparently a younger colleague was promoted to a position superior to that of the appellant.²⁹ It was held that the dismissal was fair since the employer tried to accommodate the employee by offering him alternative, less stressful employment which he declined. Also in *Jordaan v Grey Security Services*³⁰ the dismissal of a security guard who was suffering from a stress-related mental disorder was held to be fair, based on incapacity due to poor health. It was held that his employer had clearly gone to great lengths to attempt to accommodate the employee but the nature of the employee's incapacity rendered him unfit to perform any work, especially in the security industry. In *Henn v Eskom*³¹

²³ S 65(1)(b) of the COIDA stipulates that "any other disease" than the diseases listed in Schedule 3 is regarded as "an occupational disease" if it arose in the course of the employee's employment. I could not find any case where an employee suffering from work-related depression or anxiety was granted compensation within the ambit of the OHSA and the COIDA.

²⁴ See Claasen "Die Regsaard van Arbeid in die Suid-Afrikaanse Arbeidsreg" 1983 8 *TRW* 12 14.

²⁵ Act 66 of 1995 (hereinafter "the LRA").

²⁶ Act 55 of 1998 (hereinafter "the EEA"). The provisions of the EEA are used when a stressful working situation is created by sexual harassment, a form of unfair discrimination. See s 6(3) of the EEA. Sexual harassment is a ground for dismissal based on misconduct. See s 188(1)(a)(i) of the LRA; items 3(5)-(6); and 7 of the Code of Good Practice: Dismissal in Schedule 8 of the LRA (hereinafter "the Code").

²⁷ S 188(1)(a)(i) of the LRA; and items 10 and 11 of the Code.

²⁸ 1994 15 *ILJ* 304 (LAC).

²⁹ The judgment of the court was based on the general principles of incapacity. See further 312H.

³⁰ 1999 11 *BALR* 1305 (CCMA).

³¹ 1996 6 *BLLR* 747 (IC).

the court considered the employee's psychological problems under the fairness rules of incapacity.³² Due to continued absences from work, he was subjected to disciplinary steps and eventually transferred to another department. Although the court found Henn's dismissal procedurally unfair, it held that an employee who is frequently absent from work may be dismissed due to ill-health provided that it is proved his absences at work had reached a stage where an employer cannot be expected to tolerate such absences.³³ Four years later, in *Insurance & Banking Staff Association obo Isaacs v Old Mutual Life Assurance CO*³⁴ the dismissal of an employee who suffered from severe depression which was triggered by an unpleasant incident at work involving her and her superior was held to be unfair.³⁵ Although the applicant was unable to work with her superior and consequently stayed away from work, the commissioner found that the company should have considered other alternatives before dismissing her.³⁶ An employer may dismiss an employee who is absent from work due to a stress-related illness on grounds of the employer's operational requirements provided the usual substantive and procedural guidelines have been complied with.³⁷ In *Spero v Elvey International (Pty) Ltd*³⁸ a sales representative who suffered from stress and depression was dismissed after he had taken an overdose of medication. His employer contended that his dismissal was based on the operational requirements of the business, and justified because the employee posed an unacceptable commercial risk in that he would be unable to maintain the high standards of performance that the employer demanded from its sales personnel. The court held that the dismissal was unfair but added:

³² In this case the applicant, Henn, suffered from stress after his request for an increase was denied.

³³ The court accepted that his work situation contributed to his psychological problems, but held that the applicant was not too sick to work. His subsequent dismissal was regarded as a fair dismissal based on incapacity due to poor health as well as a matter of insubordination (761B-C). However, in *NEHAWU v SA Institute for Medical Research* 1997 2 BLLR 146 (IC) the court held the dismissal of an employee who suffered from depression was fair after she was excessively absent from work. Although the court accepted that the applicant had social and psychological problems and her working environment might have exacerbated her condition, it found that her dismissal based on incapacity was fair because her employer tried other alternatives, and waited five years before dismissing her.

³⁴ 2000 7 LLD 584 CCMA.

³⁵ The applicant employee was introduced by her supervisor to the manager of the internal audit department as "our new slut in the department". Although her supervisor later apologised, the working relationship between them was damaged and the incident traumatised the employee triggering severe depression (585).

³⁶ See also *NUMSA obo Damons v Delta Motor Corporation* 2003 2 BALR 180 (CCMA) where it was contended on behalf of the applicant that his excessive absenteeism from work was due to the duties of his job and his epilepsy. The employee was eventually dismissed for repeated absences which rendered him unable to comply with his contractual obligations. The arbitrator remarked that an employer is in principle entitled to take action against an employee for repeated absences. Nonetheless, in this case the dismissal was held as unfair because the employee's absences for chronic illness were incorrectly calculated. The claim that work-related activities rendered the employee unable to work was found to be unsubstantiated.

³⁷ Ss 188(1)(a)(i) and 189 of the LRA; Code of Good Practice on Dismissals Based on Operational Requirements (GG 20254 of 1999-07-16) incorporated in the Code as a separate item 12; and s 41(2) of the Basic Conditions of Employment Act 75 of 1997. See further Van Jaarsveld and Van Eck 179.

³⁸ 1995 4 LCD 342 (IC).

"[I]n view of lack of guidance in caselaw and literature on the correct approach to misconduct, poor performance or incapacity of employees affected by psychological stress (*however defined*) or by medical dependence or abuse ... it would not be equitable to impose an order which penalised the employer and disregarded or jeopardised its commercial interests."³⁹

In some stress-related instances employees terminated their employment because the circumstances at work became intolerable.⁴⁰ In *Pretoria Society for the Care of the Retarded v Loots*⁴¹ the court remarked that it must be determined whether an employer conducted itself in such a manner as to destroy the working relationship to the extent that an employee cannot be expected to put up with it.⁴² A number of cases have been reported where the conduct of the employer or a co-employee created a stressful working environment and left the affected employee with no other choice but to resign.⁴³ In *Gerber v Algorax (Pty) Ltd*⁴⁴ the commissioner stated that an employer has a duty to protect his employees. When the conduct of a fellow employee leads to great unhappiness of the staff and some of them choose to resign, an employer must act appropriately.⁴⁵ Due to its very nature, sexual harassment at work may trigger stress-induced illnesses in employees.⁴⁶ In *Ntsabo v Real Security CC*⁴⁷ the resignation of a security

³⁹ Labuschagne AM in *Spero v Elvey International (Pty) Ltd* 1995 4 LCD 342 (IC) 344 (own emphasis added). The court held that the dismissal was both substantively and procedurally unfair based on the following reasons: (i) there was not any proof that the dismissal was the last resort left to the employer under the circumstances; (ii) no evidence of a commercial risk existed should the employee have been allowed to continue working; and (iii) no counselling took place. The court reinstated the employee but made the order subject to a provision that should the employee in future abuse any medication to the extent that it impaired his capacity to perform, he would be liable to summary dismissal.

⁴⁰ S 186(1)(e) of the LRA defines a constructive dismissal as a dismissal where an employee terminated a contract of employment because continued employment was intolerable for the employee.

⁴¹ 1997 18 ILJ 981 (LAC).

⁴² See also *J v M* 1989 10 ILJ 755 (IC) 758E where it was held with reference to an employer's circumstances that an employer has an interest in ensuring a happy work environment since it leads to higher productivity. See also *Smith v Magnum Security* 1997 3 BLLR 336 (CCMA); *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 18 ILJ 361 (LAC); and *Lubbe v ABSA Bank Bpk* 1998 12 BLLR 1224 (LAC).

⁴³ See generally Coaker and Zeffert 363 referred to by Mowatt 1987 SALJ 448; and *Aldendorf v Outspan International Limited* 1997 18 ILJ 810 (CCMA).

⁴⁴ 1999 20 ILJ 2994 (CCMA).

⁴⁵ The commissioner emphasised that the relationship of trust lies at the heart of the employment contract and that destruction of the relationship renders the continuation of the contract intolerable (*Gerber v Algorax (Pty) Ltd supra* 3006A). Accordingly, the dismissal of the harasser was found to be appropriate. See also Joubert "Regsvernuwing en Seksuele Teistering" in Van Wyk (ed) *Nihil Obstat Feesbundel vir WJ Hosten Essays in Honour of WJ Hosten* (1996) 75 77. Joubert stated that an employee is entitled to damages based on breach of contract. If an employer has created an intolerable working environment and the employee resigns, the conduct of the employer may be viewed as repudiation of the contract of employment, and the resignation of the employee as the latter's acceptance of the former's repudiation.

⁴⁶ Sexual harassment is recognised as a form of unfair discrimination. See s 6(3) of the EEA.

⁴⁷ 2003 24 ILJ 2341 (LC). The court found that in terms of s 186(1)(e) of the LRA the security guard was subjected to an intolerable working environment. The applicant, a security guard, reported the incidents but her employer failed to act. S 60 of the EEA formed the basis of her claim. In terms of this section an employer may be held liable for sexual harassment if an incident of sexual harassment was reported and the employer failed to act appropriately

guard after she was sexually harassed was held to constitute an unfair constructive dismissal. Based on the intrusive nature of the sexual harassment, the applicant suffered from a range of psychological problems including severe depression, anxiety and post-traumatic stress disorder.⁴⁸ It was argued that the post-traumatic condition she was suffering from was a condition that should have been dealt with in terms of the COIDA.⁴⁹ It was held that the condition of the applicant did not fall within the ambit of the COIDA because it did not involve a condition listed in Schedule 3 of the COIDA nor did it arise from or within the course and scope of her employment.⁵⁰ The court awarded her damages for future medical costs and for general damages including contumelia to the amount of R50 000.⁵¹ In the well-known case of *Media 24 Ltd v Grobler*,⁵² a secretary, Grobler, was sexually harassed by her supervisor, one Samuals, who was eventually dismissed. Grobler collapsed emotionally and was thus unable to work. She claimed damages from the company for sexual harassment.⁵³ The court held that Media 24 was liable for damages based on the common law duty of an employer to take care of its employees.⁵⁴

3.3.2 *Stress due to an excessive workload*

Two cases reported in recent years have specifically dealt with the consequences of stress-induced illnesses due to heavy workloads. In *Oelofse v New Africa Publications Limited*⁵⁵ a sub-editor employed by the respondent newspaper resigned because the work of junior journalists that was presented to him was of such a poor quality that it led to a lot of additional work for him. It was contended that his additional work-load induced stress, and he was of the opinion that he did not receive any support from his employer. The applicant claimed that he had been

to eliminate the conduct. Eventually the employee resigned. She was granted the maximum compensation based on an unfair dismissal.

⁴⁸ The applicant also claimed damages for *inter alia* pain, suffering and impairment of normal amenities of life. This claim was based on the principles of a delict.

⁴⁹ S 16 of the COIDA; and see *Ntsabo v Real Security CC supra* 2380A-C.

⁵⁰ *Ntsabo v Real Security CC supra* 2380D-E. With regard to the EEA, the court held that the compensation envisaged in the EEA stems from a work-related phenomenon. The condition of the applicant was clearly brought on by conduct that fell outside the duties or job description of the harasser (2381D).

⁵¹ In terms of s 60 of the EEA the employer was held liable based on its failure to act when the employee reported the sexual harassment.

⁵² 2005 26 *ILJ* 1007 (SCA). This case was decided on common law principles and not the available legislation. Farlam JA did not find it necessary to decide on the applicability of vicarious liability since a negligent breach of a duty to provide a safe working environment was established (1024E-G).

⁵³ Grobler claimed that the sexual harassment to which she was subjected led to her suffering from a post-traumatic stress disorder because she became an emotional wreck who was incapable of working, she was anxious and required constant psychological assistance, and she also required hospitalisation.

⁵⁴ See Mischke "The Employer's Liability For Sexual Harassment" August 2004 *Contemporary Labour Law* 5 10. See also generally Neethling and Potgieter "Sekuele Teistering en Gedingvatbare Psigiese Letsels: 'n Mylpaal vir die Suid-Afrikaanse Reg" 2004 16 *SA Merc LJ* 488; and Irvine "Liability of Employers in Sexual Harassment Cases Confirmed by the Supreme Court of Appeal" June 2005 *Contemporary Labour Law* 106-110.

⁵⁵ 2001 10 *BALR* 1098 (CCMA).

constructively dismissed.⁵⁶ It was submitted that the nature of the applicant's work was to find and correct errors of other employees. The applicant was a "Night Editor" and his job was also to identify issues and make strategic decisions on management issues. Since his position was a managerial position, the general high level of stress he experienced was not unique to him. High stress levels are universal problems of newspapers and are inherent to the sub-editing department.⁵⁷ Accordingly, it was found that the applicant was not constructively dismissed.⁵⁸

In the next case the applicant, one Bennett, a human resources clerk who had suffered two nervous breakdowns due to work-related stress, was dismissed based on incapacity.⁵⁹ Bennett was responsible for the administration of the "time and attendance" reports of the company's employees every week, and then to send the information through to a wage clerk weekly. It seemed that his stress was caused by the uncooperativeness of supervisors who failed to submit these reports timeously. The matter was referred to the CCMA as an alleged unfair dismissal. It was stated on behalf of the employer that it was left with no other alternative but to dismiss the employee because: (i) the employee was unable to cope with the circumstances of the work; (ii) the employer was unable to change the circumstances; and (iii) the employee refused to accept alternative positions in the company. Evidence was accepted that the stress levels associated with the employee's work were untenable, and that his psychiatric health problems were the result of work-related stress. The commissioner noted:

"Modern work environments, due to the competitive nature of the markets, have experienced increased demands on employees' performance ... there has been a rise in general work stress levels. This is a commonly established phenomenon throughout all industries ... More so in those which face stiff competition and which are characterised by new modes of working and which involve an element of rapid change."⁶⁰

However, it seemed that the natural stress associated with Bennett's work was compounded by factors beyond his influence but which were within the ambit of his employer's managerial authority.⁶¹ Bennett was found to be unable to perform the work because his employer was not prepared to change

⁵⁶ It was contended on behalf of the applicant that in terms of s 186(1)(e) of the LRA the workload and associated stress made his working environment intolerable to such an extent that he was left with no other alternative but to resign.

⁵⁷ *Oelofse v New Africa Publications Limited supra* 1103.

⁵⁸ In order for the applicant to be constructively dismissed his employer must have acted in a deliberately oppressive manner that left him with no other choice but to resign. Additionally, the applicant conceded that the employer did make concerted efforts to improve the quality of the work through training, performance appraisals and by dismissal of non-performing employees. Testimony was accepted that the very nature of the applicant's work was stressful and deadline driven because he was expected to find and correct mistakes. Some sub-editors would leave because of stress while others won't. It was accepted that the work of a sub-editor was inherently stressful and deadline driven. This is a recognised problem at all newspapers (*Oelofse v New Africa Publications Limited supra* 1106).

⁵⁹ *Bennett and Mondipak supra*.

⁶⁰ Jamodien C in *Bennett and Mondipak supra* 590J-591A.

⁶¹ *Bennett and Mondipak supra* 591B-C. The commissioner referred to the guidelines in items 10-11 of the Code that must be considered when an employee is incapacitated by a work-related illness. It was noted that a more onerous duty rests on the employer to try and accommodate an employee who is suffering from a work-related illness.

the circumstances of the work.⁶² An employer is expected to adapt the work circumstances of an employee in cases of incapacity and is also required to investigate the issues which cause the work-related incapacity. Possible solutions to prevent the stressors must also be investigated.⁶³ It was held that the employer should have addressed the flaws in its work system before alternative positions were offered to Bennett as possible solutions.⁶⁴

4 STRESS AND WORKLOADS IN THE UNITED KINGDOM

4.1 General

Employees' health and safety at the workplace in Great Britain are protected in two ways. First, through the common law of negligence an employer is required to take reasonable care to protect his employees based on the duty of care. The duty of care is translated into an implied term in a contract of employment, and if it is broken it can be seen as a repudiatory breach of contract that is based on the implied duty of care.⁶⁵ Secondly, various forms of legislation and directives exist with provisions to protect the health and safety of employees in Europe.⁶⁶ An important aspect is that the breach of legislative provisions does not constitute a cause of action for employees to sue an employer, because a breach in terms of the legislation is a cause of action in respect of criminal proceedings and not in civil law.⁶⁷

4.2 Duty of care – tort or contract

Every employer has an implied obligation to take reasonable care and steps to ensure the safety of its employees at work.⁶⁸ It is not only an implied term of the contract of employment, but also a duty of care derived from the tort of negligence.⁶⁹ In *Caparo Industries v Dickman*⁷⁰ the duty of care at common

⁶² The employee would have been able to perform the work provided the employer adapted his work circumstances (*Bennett and Mondipak supra* 595C-E).

⁶³ *Bennett and Mondipak supra* 595F-G.

⁶⁴ *Bennett and Mondipak supra* 595H and 596B-C. The dismissal was held to be unfair, and the employee was reinstated with back-pay.

⁶⁵ See Lockton *Employment Law* 4ed (2002) 76. See also Farrell "The Law of Workplace Stress, Bullying and Harassment" March/April 2002 *Bar Review* 188 190, who stated: "Breach of this duty (duty of care) goes to the root of contract and therefore such a breach may be treated as a breach of the contract of employment."

⁶⁶ See par 4.3 below.

⁶⁷ See Farrell March/April 2002 *Bar Review* 190.

⁶⁸ See Barrett 247-248 where the author referred to old case law which explains the foundation for employer liability, eg, *Priestley v Fowler* 1837 3 M&W, where it was noted that an employer's liability is concerned with the nature and extent of the employer's implied contractual duty for the safety of employees; and *Smith v Baker* 1891 AC 325 363 where the court held an employer has a duty of taking reasonable care not to subject his employees to unnecessary risk.

⁶⁹ The expression of the employer's common law obligations in terms of a common law duty of care in tort as opposed to an implied contract term is a product of historical accident. As long as the doctrine of common employment operated through an implied contract term, the scope for a contractual solution to the employee's safety and health was limited. See Deakin and Morris *Labour Law* 3ed (2001) 318. In *Page v Smith* [1995] 2 All ER 756; [1995]

law with regard to negligence of the employer was affirmed as being the traditional categorisation of distinct or recognisable situations as guides to the existence, the scope and the limits of the duty of care.⁷¹ An employer's common law liability depends on whether the employer as a reasonably competent employer carried out its statutory duties to select, train, and inform employees.⁷² Other factors are usually considered to determine the duty and standard of care expected from an employer.⁷³ Whether an employer is liable based on the principles of tort or contract law is not clear in English law. According to one writer,⁷⁴ a defendant may be liable to the same claimant in both tort and contract. Tort liability may be grounded in an assumption of responsibility, and means that a negligent breach of contract may often give rise to claims in both tort and contract.⁷⁵ In *Lister v Romford Ice and Cold Storage Co Ltd*⁷⁶ an employer's obligation of care was evaluated, and it was noted:

2 WLR 644 it was noted that the nature and extent of negligence depends on whether the defendant could reasonably foresee that his conduct would expose the plaintiff to the risk of personal injury. If the risk of injury was so far fetched or fantastic as to be a mere possibility which would never occur to the mind of a reasonable man, the risk of injury will not be regarded as foreseeable. See also Gaymer *The Employment Relationship* (2001) 169; and Lockton 77 where she noted that the standard of liability at common law is one of negligence. An employer must do all that he can do to prevent foreseeable injury, and he must act reasonably in all circumstances.

⁷⁰ [1990] 2 AC 605 618. See also Meakin and Ellis *Work Related Injury and Illness Legislation Handbook* (2003) 5 where it is stated that general tortious principles are relevant to the duty of care of an employer.

⁷¹ See also *Stokes v Guest, Keen and Nettleford (Nuts and Bolts) Limited* [1968] 1 WLR 1776 where it was observed that the overall test is still the conduct of the reasonable and prudent employer. The Court of Appeal held in *Waters v Commissioner of Police of the Metropolis* [2000] 1 WLR 1607 that a person employed under an ordinary contract of employment has a valid course of action of negligence against her employer which arises under the contract of employment and under the common law principles of negligence.

⁷² See Barrett 262. In *Latimer v AEC* [1953] AC 643 (HL) the House of Lords held that an employer who had put sawdust on a flooded factory floor, and who had warned his employees to be careful, acted reasonably after an employee fell when he slipped on an uncovered area of the floor.

⁷³ See Meakin and Ellis 8. These factors are: (i) The particular facts and conduct in question; (ii) If an employer did not know, not reasonably ought to have known, of the risk of injury then it will probably not be in breach of its duty of care; (iii) If the risk of injury is not generally known in the industry then the standard applied will be the personal knowledge of the employer; (iv) No liability will exist if the employer takes reasonable steps to attain and maintain sufficient information regarding health and safety of a system, or a place of work; (v) Health and safety requirements and the reasonable practicability of putting them in effect are relevant; (vi) Although the costs of precautions and the resources of the employer are relevant, a lack of resources will still not relieve an employer of a reasonable standard of competence and the defence is thus limited in practice; (vii) Trade practice of a particular industry is an important factor; (viii) whether an employee known to be at risk ought to be removed or dismissed is ultimately a matter for the employer not the employee; and (ix) Health and safety publications form a useful indication of the types of risks of that injury that an employer ought to have known.

⁷⁴ See Beatson 23.

⁷⁵ See Beatson 23. Beatson referred to *Coupland v Arabian Gulf Petroleum* [1983] 2 All ER 226 228 where Robert Goff LS held: "When this is ... the claimant can advance his claim, as he wishes, either in contract or in tort, and no doubt he will advance the claim on the basis that is most advantageous to him."

⁷⁶ [1957] AC 555 (HL).

"[T]here is no real distinction between the two sources of obligation. But it is certainly ... as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract."⁷⁷

In one case⁷⁸ an employer's duty to take reasonable care with regard to the health and safety of its employees was formulated as a duty of care in tort instead of as a contractual duty. But in *Waltons & Morse v Dorrington*⁷⁹ the Employment Appeal Tribunal agreed that an employee was constructively dismissed and noted:

"[T]he correct implied term to deal with the complaint is that the employer will provide ... so far as reasonably practicable, a working environment which is reasonably suitable for the performance ... their contractual duties."⁸⁰

Yet, there are authors who believe that even though the implied aspects of the employment relationship are generally understood to be contractual in nature, it is only with difficulty that they can be seen to fit into a contractual framework, and bear evident signs of their origins in statutory regulation and the law of tort.⁸¹

4 3 Legislative framework

An employee is entitled to statutory protection through the Health and Safety at Work Act.⁸² The Health and Safety at Work Act introduced a number of general duties of employers relating to *inter alia* the protection of their employees.⁸³ Non-unionised employees are protected by the Health and Safety (Consultation with Employees) Regulations of 1996.⁸⁴ The British Government also implemented the Framework Directive⁸⁵ of the European Community Directives through the Management of Health and Safety at Work Regulations.⁸⁶

⁷⁷ *Lister v Romford Ice and Cold Storage Co Ltd supra* 587 per Lord Radcliffe. Lord Radcliffe thought that the employer's implied duty of care could equally well be expressed in either tort or contract.

⁷⁸ *Wilsons & Clyde Coal Co v English* [1938] AC 57; referred to by Deakin and Morris 318.

⁷⁹ [1997] IRLR 488 (EAT). Here an employee resigned because of her employer's failure to deal adequately with her complaints about being exposed to her colleagues' cigarette smoking.

⁸⁰ *Waltons & Morse v Dorrington supra* 490.

⁸¹ Deakin and Morris 241-242. These authors noted that the implied terms in the contract of employment are sometimes said to arise as legal incidents of the relationship because they do not arise from the presumed intention of the parties but by nature of the underlying transaction (see 242).

⁸² 1974. The Act exists to prevent injury in the first place, and it creates a criminal liability not a civil liability. See Lockton 77.

⁸³ S 2(1) of the Health and Safety Act imposes "a general liability on the employer to ensure the health and safety of its employees, so far as it is reasonably practicable". See Deakin and Morris 317.

⁸⁴ SI 1996 No 1513; referred to by Lockton 77.

⁸⁵ June 1989; 89/391/EEC.

⁸⁶ 1992 (SI 1992 No 2051), referred to as "the Regulations". The Regulations also implemented five subordinate directives which are closely related to the Framework Directive, and came into effect in January 1993. These directives are known as the "Six

4 4 Impact of legislation on employment contracts

In Britain, statute and common law run side by side but their aims are different. The common law provides the employee with compensation once he is injured at work.⁸⁷ Seemingly, the two systems complement each other and interrelate often to the extent that an employee will allege breach of statute as well as breach of contract.⁸⁸ It has been observed that the importance of statutes in common law systems should not be overlooked because nearly every branch of the common law is now heavily affected by statute.⁸⁹ Some authors argue that the common law has developed implied duties in an employment contract to protect employees during the employment relationship.⁹⁰ Breach of these common law duties will create a potential claim for a breach of contract.⁹¹

Pack" and may have an effect on the contractual relations between employer and employee. See further Barret 253-254; and Lockton 96-100.

⁸⁷ See Lockton 77; Farrell March/April 2002 *Bar Review* 190. See also, eg, the case of *Smith v Vange Scaffolding & Engineering Co Ltd* [1970] 1 WLR 733 where an employee was injured when he fell over a cable when walking back to work. It was held that his employers were in breach of their common law duty in failing to provide a safe work premises, and they were also in breach of a statutory duty imposed by the Construction (Working Places) Regulations of 1966 by failing to provide safe access and exit to and from work.

⁸⁸ Lockton 77.

⁸⁹ See J Beatson "The Role of Statute in the Development of Common Law Doctrine" 2001 117 *Law Quarterly Review* 247. See also Smith "You Signed the Contract" January 2004 *New Law Journal* 24 26 who observed that although the individual contract of employment remains the cornerstone of employment, in some circumstances the new legal position will be as reliant on ideas of "best practice" also known as "soft law" as on traditional contractual principles.

⁹⁰ See Lockton 56; Rideout "Implied Terms in the Employment Relationship" in Halson (ed) *Exploring the Boundaries of Contract* (1996) 119 122 who remarked that the mere fact of employment necessarily implies certain contractual terms. Rideout added that the duty of care exists as a general rule of law and as an implied contractual term (127). Burrows "Contractual Co-Operation and the Implied Term" 31 July 1968 *The Modern Law Review* 390 406 concluded that an implied term in a contract allows a court to approach a case in an "untrammelled" way and to take into account all relevant factors. Watt "Regulating the Employment Relationship: From Rights to Relations" in Collins, Davies and Rideout (eds) *Legal Regulation of the Employment Relation* (2000) 335 340 and 356 believes that the employment relationship should be regarded as *sui generis*, and it should be subjected to its own regulatory scheme because it has features unique amongst contractual relationships. These features include *inter alia* the need of the parties to rely upon each other, and the changing nature of their relationship.

⁹¹ *Ibid.* See also Leckie and McWilliams "Why it Pays to Manage Stress" June 2001 *Journal of the Law Society of Scotland* 29 30; and Learmond-Criqui and Jamieson "RSI, Stress and Other White Collar Health Conditions and Reporting Obligations for Employers" March 1998 *Business Law Review* 55. However, in *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL), the House of Lords rejected a claim for damages based on an alleged breach of various implied terms of an employment contract. In this case, Johnson, who worked for an international software company, was unfairly dismissed after an alleged irregularity. He instigated a claim for financial damages claiming that the manner of his dismissal induced both his nervous breakdown and subsequent depression to the extent that he found it difficult to find employment. He claimed that his mental breakdown was a foreseeable psychological injury. Lord Millet held that the statutory rules must prevail because a corresponding contractual remedy was unnecessary. This case was criticised by Barnes "The Continuing Conceptual Crisis in the Common Law of Contract of Employment" 2004 67 *Modern Law Review* 435 who stated that the case created conceptual instability in the common law understanding of a breach of an employment contract. Middlemiss "The Demise of the Common law in UK Employment Law? - Part II" 2004 22 *Irish Law Times* 214.

4.5 Some indicators from the positive law

A number of court decisions have highlighted the existence of a distinct contractual claim for damages in cases based on stress-induced illnesses due to heavy workloads.⁹² In *Paris v Stepney Borough Council*⁹³ the House of Lords held that an employer's duty of care is owed to each employee as an individual. An employer must take into account any particular susceptibility of the employee of which he is aware or ought to be aware. Whether or not the harm is foreseeable, it is relevant to consider the employer's actual knowledge of any special susceptibility to harm of the employee. A better chance of establishing a reasonable foreseeability will be established if the employer knew that the specific employee had suffered from a stress-related illness in the past.⁹⁴ Four decades later the Court of Appeal was left to decide whether an implied duty of care could override an express agreement by the parties in an employment contract. In *Johnstone v Bloomsbury Area Health Authority*⁹⁵ an employee, a hospital doctor, sought damages for ill-health brought on by working excessive hours, and a declaration that his contract of employment did not require him to work hours beyond the point where his health was in danger. His employment contract required him to work a basic forty-hour working week, and he had to be available for a further forty-eight hours overtime per week.⁹⁶ Although the case was eventually settled, the majority of the Court of Appeal agreed that an action for damages could succeed where the employee was able to show that it was reasonably foreseeable that the conduct of the employer by requiring him to work excessive hours would damage his health. Stuart-Smith LJ held that the contract terms did not override the duty of the employer in both contract and tort to take reasonable care to ensure the employee's safety and health. The working hours of the doctors as express terms had to be exercised in the light of the other contractual terms and in particular their duty to take care for his safety which was an implied term of law.⁹⁷ Browne-Wilkinson VC remarked:

⁹² Many cases have been reported which deal with stress-induced illnesses and contractual liability. Only the most important cases with core principles are referred to. Any omissions in this regard remain my own.

⁹³ [1951] AC 367 (HL) referred to and discussed by Christie "Taking Stress Seriously" 2001 29 *Scots Law Times* 249 251. Christie viewed the case as a paragon when considering the plight of an employee dealing with a far too heavy workload.

⁹⁴ See also the case of *Gillespie v Commonwealth of Austria* 1991 ACTR 1 (SCACT) where an administrative officer claimed damages for a stress-related injury following his deployment to a diplomatic mission in Venezuela where he suffered unusual stresses and a hostile environment. His claim was dismissed because the Supreme Court found it was not reasonably foreseeable that the plaintiff would suffer psychological problems beyond those "stresses" officers in such circumstances would usually be prone to. This case is referred to by Farrell March/April 2002 *Bar Review* 192.

⁹⁵ [1991] *IRLR* 118 (CA); and [1992] QB 333 (CA).

⁹⁶ Johnstone claimed he was sometimes required to work over 100 hours per week without adequate sleep. He was as a result suffering from stress and exhaustion, and claimed that his employers had breached their duty of care and put his health as well as the health of his patients at risk.

⁹⁷ *Johnstone v Bloomsbury Area Health Authority supra* 344. See also Brodie "The Heart of the Matter: Mutual Trust and Confidence" 1996 25 *ILJ* (UK) 121 126-128; Quinn and Seward "Stress at Work: Employer Obligations" 2002 13 *Practical Law for Companies* 21 23.

"[I]f there is a term of contract which is in general terms (eg a duty to take reasonable care not to injure the employee's health) and another term which is precise and detailed (eg an obligation to work on particular tasks notwithstanding they involve an obvious health risk expressly referred to in the contract), the ambit of the employer's duty of care for the employee's health will be narrower than it would be if there were no such express term."⁹⁸

It was argued that the effects of the express term in this case was to narrow down the implied obligation of care. The agreement to work overtime gave the employer an option to call the employee to perform and this option had to be exercised reasonably.

A few years later, in *Walker v Northumberland County Council*⁹⁹ an employer was held liable for damages after a social worker suffered two nervous breakdowns due to her workload. Here the employee returned to work after her first breakdown, and was given the same level and amount of work with little support from the employer. Walker suffered from another nervous breakdown and had to retire on the grounds of ill health. It was held that the employer was in breach of its safety duty. Given the first nervous breakdown, it was reasonably foreseeable that without assistance Walker's health would again deteriorate.¹⁰⁰ A year later the majority of the House of Lords agreed that in a case of damages based on psychiatric injury caused by negligence of an employer the employer "must take his victim as he finds him".¹⁰¹ However, in *Fraser v State Hospitals Board of Scotland*¹⁰² the court held that there were not any indications that the stress the applicant had experienced due to disciplinary measures, would lead to psychiatric illness. The court accepted that the duty is only to take reasonable care to prevent psychiatric harm, and as such did not include preventing an employee from experiencing unpleasant emotions such as grief or anger. It was held that Fraser's psychiatric problems stemmed from him being subjected to disci-

⁹⁸ *Johnstone v Bloomsbury Area Health Authority supra* 350.

⁹⁹ [1995] 1 WLR 737; *IRLR* 35 (QBD); and [1995] *All ER* 737 (QBD).

¹⁰⁰ Colman J held that an employer may be liable for psychiatric disease caused by exposure to a stressful working situation. The court found that the second breakdown was reasonably foreseeable, and that the response of the employer was not appropriate. The seriousness of the potential risk to the employee and the likelihood of further injury following the initial breakdown made the employer's response unreasonable (*Walker v Northumberland County Council* 760). However, employers will not always be liable for all the effects of a working environment. The relevant standard is that of the reasonable employer and the court will balance the risk of the harm and the likelihood of it occurring against the cost and practicality of preventive measures (750). Walker was awarded psychiatric and physical damages in the amount of £175 000. See also Quinn and Seward 2002 13 *Practical Law for Companies* 24.

¹⁰¹ *Page v Smith* [1996] AC 155 (HL). The minority of the House of Lords held that an employer can only be liable for damages based on psychiatric injury caused by negligence if he ought to have foreseen that psychiatric injury might be caused to a "person of normal fortitude", unless he had known that the claimant was particularly susceptible.

¹⁰² 14.12.2000 Outer House, Court of Session, referred to by Fox and Walden "Duties of Care: Psychiatric Illness Caused by Stress at Work was not Reasonably Foreseeable" 2001 660 *Industrial Relations Law Bulletin* 14. Fraser, a charge nurse with twenty-five years working experience at hospital that held patients who were also criminals, was subjected to a disciplinary hearing after a serious security breach at the ward he was supervising at the time. Following the outcome of the disciplinary hearing Fraser was required to perform a less responsible role than before with an absence of a formal review. He became depressed and was eventually placed on early retirement due to poor health.

plinary measures, and his claim for damages based on psychiatric injury.¹⁰³ In another case the claim that an employee was driven to commit suicide due to his work-related stress was dismissed because his family could not prove that his heavy workload ultimately drove him to take his life.¹⁰⁴ The well-published matter of *Sutherland v Hatton*¹⁰⁵ provided distinct guidelines in order to ascertain the liability of an employer. First, it was noted that claims for psychiatric injury fall within four different categories.¹⁰⁶ A claim arising from the stress of doing the work that the employee is required to do, is based on the contractual duty of care.¹⁰⁷ Secondly, for liability to arise there must first exist indications of impending harm arising from stress at the work-place.¹⁰⁸ Thirdly, it must be determined whether the harm to the particular employee was reasonably foreseeable.¹⁰⁹ Unless an employer knows of a particular problem or vulnerability, an employer is usually entitled to assume that an employee can withstand the normal pressures of the job and he is entitled to take what he is told by the employee at face value.

¹⁰³ See also a more recently reported case, *Dunnachie v Kingston upon Hull City Council* [2004] IRLR 727 (HL) where a claim for compensation based on the hurt of an employee's feelings following an unfair dismissal was refused.

¹⁰⁴ *Cross v Highlands and Islands Enterprise* 5-12-2000; 2001 SLT 1060; and 2001 SCLR 547, Outer House, Court of Session referred to by Fox and Walden 2001 660 *Industrial Relations Law Bulletin* 16. Although the claim was dismissed, Lord MacFadyen noted that the common law duty of an employer to take reasonable care for his employee's safety and health and to provide a safe system of work, ought to be extended to include a duty to take reasonable care not to subject the employee to working conditions that are reasonably foreseeable likely to cause him psychiatric illness. See also Christie 2001 29 *Scots Law Times* 250.

¹⁰⁵ [2002] EWCA Civ 76; [2002] 2 All ER 1 (CA); [2002] IRLR 263 (CA); and "the *Hatton* case". In this case a French teacher, Hatton, resigned due to stress induced by her excessive workload.

¹⁰⁶ Lady Justice Hale referred to: (i) tortious claims by primary victims, for example a road accident victim where there is a foreseeable scope of physical injury; (ii) tortious claims by secondary victims, for example those who suffer as a result of harm to others; (iii) contractual claims where the harm is reasonably foreseeable due to the product of a breach of a contractual duty of care towards a known victim, for example negligence of solicitors (attorneys) to clients; and (iv) contractual claims by secondary victims where the harm is suffered as a result of harm to others but where there is a contractual relationship as well, for example police officers (*Sutherland v Hatton supra* 269 par 21). See also Moore "Take the Strain" 2002 146 7 *Solicitors Journal* 166.

¹⁰⁷ *Sutherland v Hatton supra* 269 par 23. Lady Justice Hale added that in order to ascertain whether the employer is liable for the problems of the employee, one should determine whether the harmful reaction to work-related pressures was reasonably foreseeable with regard to the specific employee concerned (269 par 24).

¹⁰⁸ These indications are factors relating to the extent and the nature of the work, eg, whether the workload is more than normal for the type of work, whether the work is intellectually as well as emotionally demanding for this employee, whether the demands made by the job are unreasonable compared to the demands made on others in the same or comparable job, whether there are signs that others doing this type of job are also suffering harmful levels of stress, and whether there exist an abnormal level of absenteeism in the same department or job.

¹⁰⁹ Foreseeability will depend on what the employer knows or ought to know about the individual employee; not any employee, but that specific employee. Therefore, foreseeability depends upon the inter-relationship between the characteristics of the employee, and the demands the employer casts upon him. However, in an earlier decision of the High Court it was held that an employer should not have foreseen any greater susceptibility to work stress in the case of an individual manager, than it would have expected in the case of any other person it employed as a senior manager. See *Levy v Allied Dunbar Assurance plc* [2001] IRLR 139 (HC).

Once it has been determined that the risk of harm to the health of the employee is foreseeable, it must be considered whether there are signs of impending harm to the health of the employee himself.¹¹⁰ Lastly, it must be established whether and how the employer has broken his duty of care. An employer will only be in breach of this duty if he has failed to take reasonable steps to overcome the risk of ill health.¹¹¹ This was echoed in *Marshall Specialist Vehicles Ltd v Osborne*¹¹² where it was held that the guidelines of the *Hatton* case must be taken as declaratory since it contains considerable guidance for courts dealing with similar cases.¹¹³ Here a financial director alleged that her resignation and nervous breakdown were precipitated by an excessive burden of overwork imposed upon her by her employers in breach of an implied contractual duty.¹¹⁴ The Employment Appeal Tribunal dismissed her claim because it was not considered what exactly her employers did wrong in order to amount to a repudiatory breach of contract.¹¹⁵ Recently, in *Barber v Somerset County Council*¹¹⁶ the House

¹¹⁰ The following aspects should be considered: whether the employee has a particular vulnerability, whether he has already suffered from stress-induced illness from work, whether there are frequent absences by the employee that are uncharacteristic, and whether these absences are attributed to stress at work by the employee, or by other employees.

¹¹¹ Reasonable steps may include giving the employee a sabbatical, transferring him to another department, redistributing his work for a while, arranging treatment, providing him with additional assistance for a while or providing mentoring schemes to encourage confidence. Whether an employer may reasonably be expected to implement such steps will depend in turn on the type of business, the financial resources, whether it is in the private or public sector as well as the interests of other employees in the workplace. See however Connolly "Sutherland v Hatton – A Solution to Ireland's Occupational Stress Question?" 2002 20 *Irish Law Times* 230 235, who argued that the guidelines provided by the court are partially flawed in the sense that they impose a disproportionate burden on an employee to be the primary protector of his own health at work. She added that although it is accepted that there are issues of foreseeability to be addressed, and that employers cannot be expected to be mind-readers, evidence of overwork and clear complaints by an employee of injury to health should be sufficient to warrant a response from an employer. See also Lockton 85. It has been observed that in cases where stress-induced illness are a concern, there is an onus on both an employer and an employee. The stressed employee ought to speak out because an employer is not the policeman of his employee's health and the signs of stress must be overt (see further Fowles "Striking the Balance: Stress After *Barber v Somerset County Council*" 2002 5 *Journal of Local Government Law* 55 59).

¹¹² [2003] *IRLR* 672 (EAT).

¹¹³ The Employment Appeal Tribunal found that in order to ascertain whether an employer is in breach of his duty, it must be established what exactly the employer should have done, bearing in mind that an employer can only be expected to take steps that are likely to do some good. See Buckman "Casenotes: Tribunal Erred in Finding Breach of Health and Safety Implied term" 2003 723 *Industrial Relations Law Bulletin* 2 3.

¹¹⁴ Osborne was working very long hours with the consequence that she was warned by her GP that the stress of her work was having a significant impact on her health, and advised her that if a solution to her work pressures was not possible she should consider leaving her work for the sake of her health. Osborne did not inform her employers of her problems coping with the workload, although she did send an e-mail to her supervisor in which she made it clear that she and her staff were overworked, and unless there were major changes to the company they would be unable to fulfil their responsibilities. It was suggested that the issue would be addressed at the next management meeting, where her concerns were only briefly considered. Osborne took the view that nothing was going to be done about the matter and handed in her resignation.

¹¹⁵ See also *Pratley v Surrey County Council* [2003] EWCA Civ 1067; and [2003] *IRLR* 795 (CA) where it was held that an employer is not in breach of its duty of care if the claimant suffered from a depressive illness when she discovered after returning from holiday that her employers had not taken any steps to fulfill their promises to lighten her workload. Lord

of Lords observed that although the practical guidance of the Court of Appeal in the *Hatton* case is a valuable contribution to the development of the law, it ought not to be read as having statutory force.¹¹⁷ Every case will depend on its own facts.¹¹⁸ This dictum is not surprising although it again emphasised the daunting task in ascertaining exactly when an employer is contractually liable for stress-related diseases. A year earlier the Court of Appeal alluded to this difficulty when it held that where an employer is aware that an employee is experiencing stress-related problems due to her workload but is unaware of other pre-existing problems that make the employee vulnerable to a nervous breakdown, the employer will not be held liable.¹¹⁹

5 POSSIBILITY OF WORKLOAD-RELATED CONTRACTUAL LIABILITY IN SOUTH AFRICA

During recent years a number of court decisions in South Africa bore testimony to the “renaissance” of contractual principles pertaining to the employment relationship.¹²⁰ Given the reality that an individual employment

Justice Mance held that her employers could not reasonably foresee that she would suffer an immediate collapse because her overwork problem was not addressed at that stage. What was foreseen was a future risk of harm to her mental health if the overwork continued (800 par 29).

¹¹⁶ [2004] UKHL 13, [2004] IRLR 475 (HL); and “the *Barber* case”. *In casu* the position of Mr Barber, a former head of mathematics at a community school, was reduced to an area coordinator in mathematics. In order to maintain his former salary Barber took on additional work, and was eventually working very long hours. As he was experiencing strain, he was signed off from work because of stress and depression brought about by his workload. He did inform his superior about his problems but he was treated unsympathetically and merely informed that all the staff were under stress. On his return after a summer holiday Barber found that his workload was slightly heavier than before. Barber lost control of himself in a classroom and left the school, never to return. Eventually, he accepted health retirement when he was only 52 years old. Two psychiatrists who subsequently examined him found he was suffering from moderate or severe stress. Barber claimed his stress was caused by the stress of his workload and claimed damages from his former employers. Barber was awarded £72 547 in damages after the House of Lords held that his employer’s duty to take some action arose after Barber was signed off due to stress and depression. Although he approached a number of superiors informing them of his problems coping with his workload, nothing was done to assist him. His condition should have been monitored and if it did not improve some more drastic action should have been taken to relieve him temporarily of his duties, such as taking in a supply teacher (477 par 12).

¹¹⁷ Lord Scott of Foscote remarked that in order to determine whether an employer was in breach of a duty of care owed to an employee in respect of psychiatric illness caused by work-related stress, the following dictum of Swanwick J in *Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 is most apt: “[the] overall test is still the conduct of the reasonable and prudent employer taking positive thought for the safety of his workers in light of what he knows or ought to know” (*Barber v Somerset County Council supra* 476 par 5).

¹¹⁸ See *Barber v Somerset County Council supra* 476 par 4.

¹¹⁹ *Bonser v RJB Mining (UK) Ltd* [2003] EWCA Civ 1296, [2004] IRLR 164 (CA). See also Barrett “Employers’ Liability for Stress at the Work Place: Neither Tort nor Breach of Contract?” December 2004 33 *ILJ* (UK) 343 349 who observed that based on certain indications an employer may even be compelled to terminate the employment of an employee whose personal circumstances render him especially vulnerable to workload-related pressures.

¹²⁰ See, eg, the following cases where contractual principles have recently resurfaced: *Council for Scientific & Industrial Research v Fijen* 1996 17 *ILJ* 18 (A) where the dismissal of the

relationship is in essence a relationship of reciprocal contractual obligations, the reversion to contractual principles is not surprising. Various forms of labour legislation are available to assist aggrieved employees. Yet in some instances the judiciary allowed the parties to an employment relationship to proceed with contractual claims based on problematic issues emanating from their relationship. In *Fedlife Assurance Ltd v Wolfaardt*¹²¹ a claim for contractual damages following the breach of a fixed-term employment contract was granted. Nugent AJA held that the new constitutional dispensation did not deprive employees of their common law right to enforce the provisions of the fixed-term contract regardless of the remedy provided in the LRA for unfair dismissal.¹²²

Similarly, in *Chevron Engineering (Pty) Ltd v Nkambule*¹²³ it was held that an employee may choose to either instigate an action in the High Court for breach of contract, or refer the matter to the Labour Court as a claim for an alleged unfair dismissal. I agree with a recent statement that an employment contract ought to be flexible enough to provide for remedies other than those provided for by the LRA.¹²⁴ By the same token, an employment contract should further be flexible in that it should be possible for an aggrieved employee, who suffers from stress-related problems due to his excessive workload, to cancel the contract and to recover contractual damages from the employer who had been in breach of his contractual duty to provide safe and healthy working environment.¹²⁵

employee was justified based on his breach of the contractual duty of good faith; *Standard Bank of SA Ltd v Commission for Conciliation Mediation and Arbitration* 1998 19 ILJ 903 (LC) where it was noted that the duty of an employee to act in good faith towards his or her employer is one of long standing in the common law, and that a subsequent breach of trust goes to the "heart" of the employment relationship; *Sappi Novoboord (Pty) Ltd v Bolleurs* 1998 19 ILJ 784 (LAC) where the breach of an implied term of the employment contract justified dismissal; and *Ganes v Telecom Namibia* 2004 23 ILJ 995 (SCA) where the secret profit of an employee was held as a breach in the duty of good faith.

¹²¹ 2002 1 SA 49 (SCA).

¹²² *Fedlife Assurance Ltd v Wolfaardt supra* 571-J. It was explained that when a remedy for unfair dismissal was introduced in terms of the LRA by the legislature for unfair dismissal, it was for the purpose of supplementing the common law rights of employees.

¹²³ 2003 7 BLLR 631 (SCA) The court recognised that an employee is entitled to approach the High Court under the common law if he or she claims the dismissal was unlawful as opposed to unfair. Here an employee claimed as damages the remuneration he would have received had the contract not been cancelled. This amount exceeded the limit on compensation imposed by the Labour Relations Act.

¹²⁴ See Mischke "Acting in Good Faith" August 2004 *Contemporary Labour Law* 1 5. The LRA provides "dismissal" as a remedy for employers, and compensation for employees limited to a maximum of either 12 months remuneration for unfair dismissals, or 24 months remuneration for automatically unfair dismissals (ss 188; 194(1) and (3)).

¹²⁵ See also Grogan "Fairness and the Common Law Dismissal Actions in the High Court" October 2004 *Employment Law* 18 who observed that in actions for the breach of an indefinite employment contract, the common law remedy is limited to the remuneration that the employee would have received had the required notice been given, which would usually fall short of the LRA's limit of compensation equal to twelve months's remuneration.