

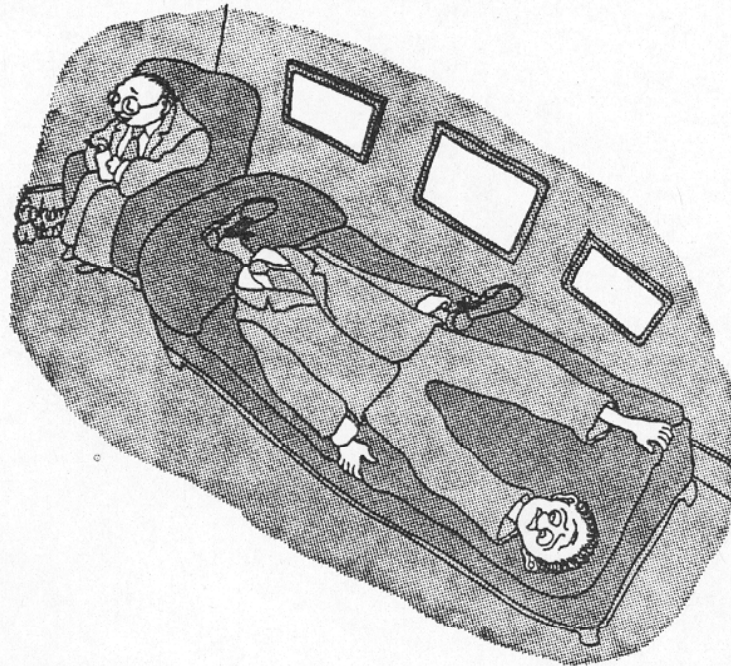
LEGAL ASPECTS, INSPECTION AND ENFORCEMENT

Colin Mackay





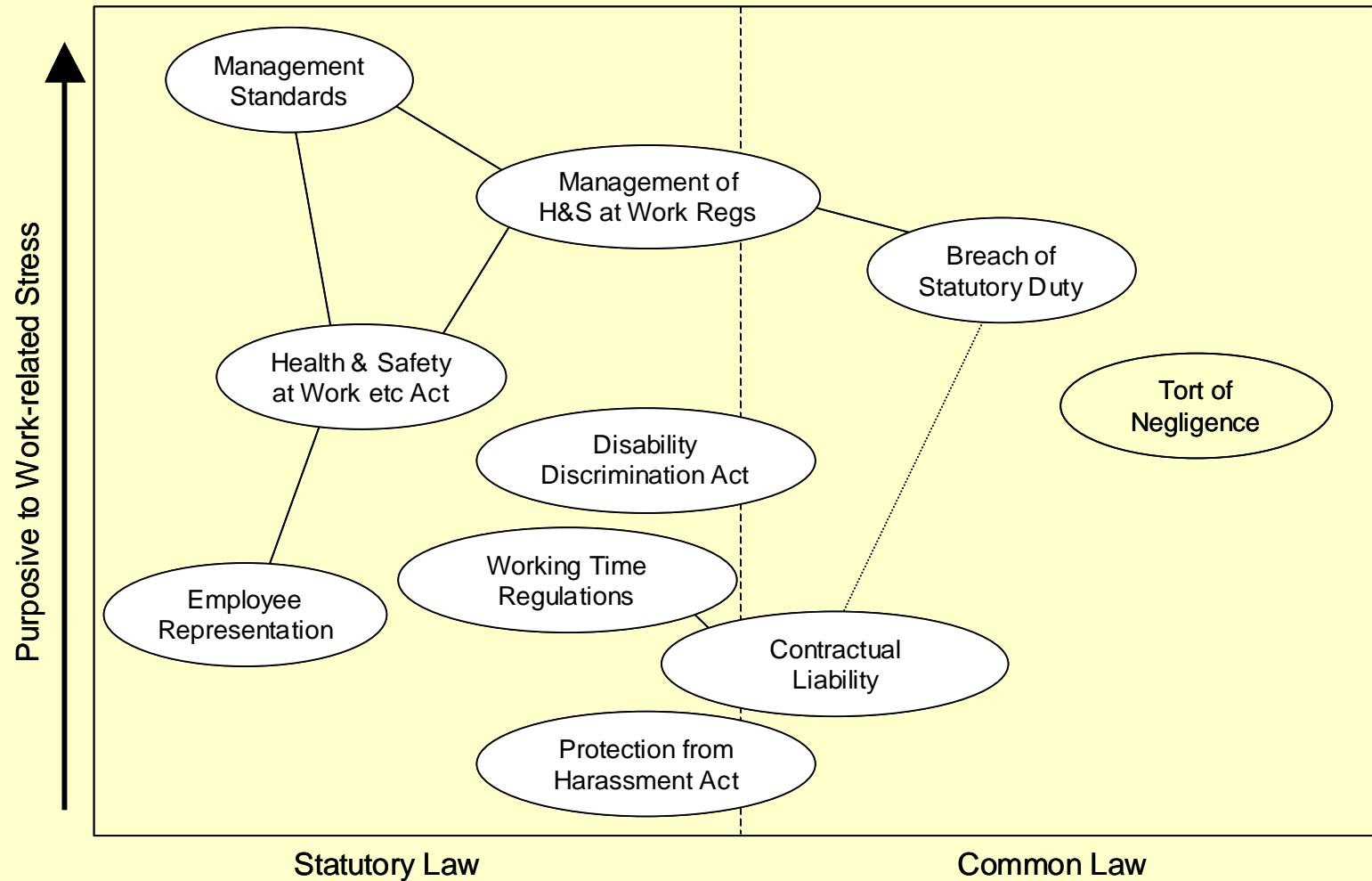
THE NEW YORKER



"We'll soon have you sorted out, Mr. Fenton."

THURSDAY
MAY 12

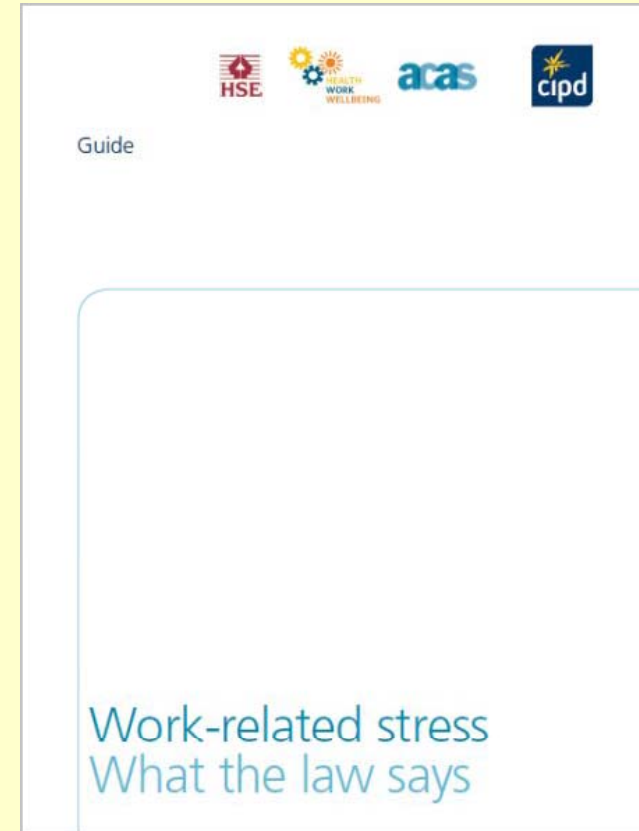
Present UK Legal Framework



Work-related Stress – *a guide to the law*

New free guide for employers providing:

- Legal Principles
- Core Requirements
- Employer Actions
- Signposts for more information



Challenges to health & safety in the workplace

- Employees are hired to do a job
- Employers are entitled to take their employees at face value
- Stress is easy to hide and difficult to detect
- Vicious circle of conscientiousness

How has the law adapted?

- Common law principles

Duties in tort and contract

- Creative use of statute

Management of Health and Safety at Work
Regulations 1999 (as amended)

Employers' duties

- Common law duty of care
 - Duty to provide a safe system of work and to avoid reasonably foreseeable psychiatric injury
- Contractual duty
 - Not to act so as to undermine the relationship of trust and confidence

Common lay duty of care

- Hatton v Sutherland (CA, 2002)
Existence of duty can be 'taken for granted'

No special control mechanisms apply to claims for injury arising from stress suffered from the doing the job employed to do

..... **but**

- Stress claims require care
Duty is owed to individuals and there are problems associated with foreseeability and causation
- Sins of omission and not commission

16 guidelines from Hatton v Sutherland

1. No special control mechanisms
2. Injury to health attributable to stress at work
3. What did the employer know about the particular employee
4. No occupations intrinsically dangerous to mental health

5. Factors relevant to deciding knowledge of employer/foreseeability
6. Employer entitled to take employee at face value
7. Indications of impending harm must be plain
8. Employer only in breach if failed to act reasonably

9. What is reasonable depends on size and scope of employer's operation
10. Employer only expected to take steps that are likely to do good
11. Employer offering confidential advice service unlikely to be in breach
12. No breach for allowing willing employee to continue doing job

13. Employee must identify the steps that could and should have been taken
14. Breach must have caused harm
15. Employer only liable for proportion of harm caused
16. Pre-existing vulnerability taken into account

Statutory duties

Management of Health and Safety
at Work Regulations 1999 – as
amended

Reg 22 – no longer an ‘exclusion’
but a restriction of civil liability for
breach of statutory duty

In force from 27 October 2003

Regulations

- (3) Duties to carry out risk assessments
- (4, Sch 1) Principles upon which preventive and protective measures are to be based
- (6) Duty to provide health surveillance for employees

- (10) Duty to provide employees with information on health and safety risks identified by employer
- (13) Duties in relation to employees capability and training on recruitment
- (19) Duties towards young persons and risks arising from lack of experience

Discharging statutory duties under HSWA and MHSWR

- Employers must:
 - Proactively identify causes of stress;
 - Assess the risk;
 - Implement measures which prevent or control the risk of physical and psychological harm.

Some legal considerations

- Duties under HSWA and MHSWR are limited and linked to:
 - **Foreseeability;**
 - **Degree of control;**
 - **Reasonable practicability.**

Burden of proof

- Criminal law requires '*beyond reasonable doubt*'
- Civil law requires '*in the balance of probabilities*'
- Therefore health and safety law does not always present the best route for individuals to seek redress
- Employees can pursue issues via other relevant legislation

Other relevant legislation

- Employment Rights Act 1996
- Protection from Harassment Act 1997
- Disability Discrimination Act 1995
- Working Time Regulations 1998
(although HSE enforce this)
- Sex Discrimination Act 1975
- Race Relations Act 1976

Inspection

Remember:

- aim of the programme is to achieve improvements in the prevalence and incidence of WRS;
- does not concentrate on experience of individuals but on population as a whole;
- to achieve this we need to secure improvements in organisational factors which are identified as a problem;
- HSE's preferred approach is for employers to work together with employees to identify hazards etc.

What should inspectors do?

Encourage employers to:

- Determine the scale and nature of the problem in their organisation;
- Judge how well the organisation is performing against the Management Standards;
- Consult with employees to further explore the problems identified and to develop solutions;
- Implement any control strategies / interventions identified.

Types of intervention available to employers

- Primary – organisational strategies to reduce exposure to stressors
- Secondary- e.g provision of training for employees to help them cope
- Tertiary – employee assistance schemes aimed at helping employees recover from illness

NB. Tertiary controls like counselling are unlikely to be sufficient to discharge statutory duties

Inspection - Interventions

- Employers should be discouraged from relying on secondary and tertiary interventions where primary interventions would provide more effective control, especially if they focus on individuals or are of unproven effectiveness.

The well managed organisation

- Prevention and management of common health problems eg. stress & MSD
- Promote 'healthy' workplaces
- Job design
- Move from a less desirable ('bad jobs') to a more desirable state ('good jobs')
- HSE Management Standards can help in prevention and management

How do the Management Standards fit in?

- Management Standards are guidance
- Legal duty is risk assessment and control
- Management Standards Approach includes
 - HSG 218 (risk assessment)
 - RSRP (how to manage)
 - Management Standards (measuring performance)

The Management Standards Approach

1. Identify the hazards:

Understand The Management Standards

5. Monitor & review:

Monitor actions

4. Record findings:

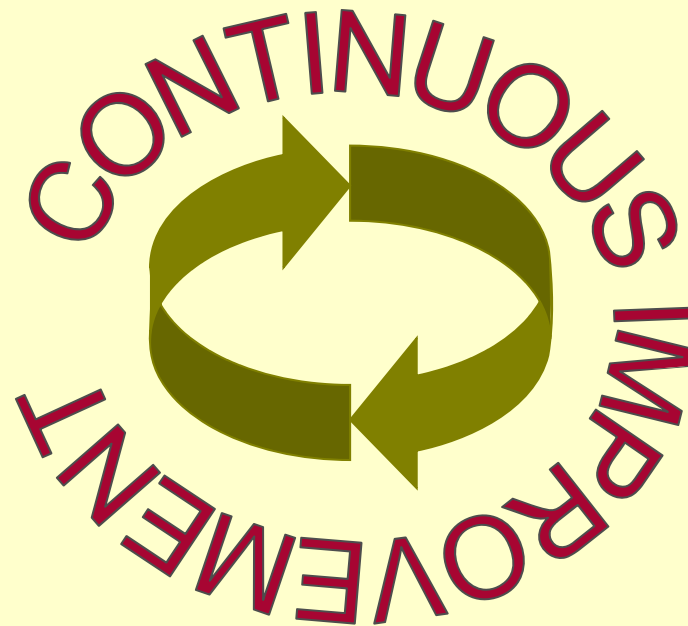
Action Planning

2. Who can be harmed and how:

Gathering data

3. Evaluate the risk and take action:

Linking problems to solutions



Equivalence

- Proactive – reducing risks at source (HS(G)65 and Reducing Risks – Protecting People)
- Assessment of situation - hazards
- Continuous improvement
- Employee involvement
- Gap analysis (using available data)
- Target level of performance
- Integratable into everyday management

Why 'equivalence' (1)

- MS's are only guidance
- Organizations do not want to begin 'de novo' (but some do – SIP1!)
- HSE approach may not be best – is only generic (SME's, manufacturing) make relevant to local situation
- We want (or may do in the future) go further than what is strictly regulation
- We don't want to close down or be an obstacle

Why 'equivalence' (2)

- There are some fundamental aspects of our of our UK approach that require that at least two (?) requirements are fulfilled:
 - a) What is 'suitable and sufficient'?, and
 - b) What is 'reasonably practicable'? in terms of control measures (interventions)

Investigation - complaints and ill health information

Need to think about

- What to investigate
- What not to investigate

NB. Selection for investigation is at the discretion of ops Band 2s

Suitable for investigation

- Complaints /information indicating a pattern of ill health
- Complaints /information indicating a number of staff are experiencing WRS

Not suitable for investigation

- Complaints which relate to matters out with the employers control
- Individual cases of ill health(unless evidence of a breach is very clear cut)
- Complaints about the provision of a service or the function of a public body
- Complaints about a consumer service

Enforcement and application of EMM

- EMM is usually used, where there is a breach of H&S law, to determine appropriate enforcement action
- Enforcement action should either be risk based or compliance based (sometimes combined)
- Risk based enforcement requires the inspector to be able to assess the actual level of risk and establish a benchmark in order to determine the risk gap
- Compliance based enforcement is different – some legal duties exist but do not directly result in control of risk

Enforcement: based on compliance

- Completion of a suitable and sufficient risk assessment is required by MHSWR Reg3. This is a defined standard.
- Application of EMM would indicate an initial enforcement expectation (IEE) of IN
- Duty holder or strategic factors can alter the IEE
- For stress recommend only serving an IN where there is:
 - Failure to respond to HSE's advice; and/or,
 - Evidence of ill health caused by WRS.

West Dorset NHS Trust - IN

Circumstances

- Investigation of initial complaint
 - No risk assessment for WRS
 - Sickness absence data revealed a problem
 - Staff surveys cited stress as an issue but no action taken
 - WRS had been cited as the reason for resignation at several exit interviews
 - The Trust indicated it was not a priority for them
- IN served (compliance date 15th December 2003)
- Extension granted until 15th March 2004 (compliance achieved)

Enforcement: based on risk

To determine the risk gap it is necessary to be able to:

- describe the consequences (serious, significant, minor)
- assess the likelihood of the consequences (probable, possible, remote, nil/negligible)
- establish a benchmark i.e where the duty holder should be (the risk remaining once actions required of duty holder are met.)

These are all difficult for stress so rigorous application of EMM is not possible.

Taking enforcement action based on risk or harm

Evidence required:

- There is/was a significant risk of ill health due to work related factors.
- It would be/was reasonable for the employer to foresee that risk.
- The employer has/had control over the factors which could reduce or eliminate the risk.
- It is/was reasonably practicable to exercise that control.

Reasonable practicability

- The burden of proof is on the accused to prove that it was NOT reasonably practicable to do more than was done
- However, courts will expect HSE to indicate the standard against which we are judging any shortfall
- We need to have a clear idea of what any additional reasonably practicable measures could and should have been

Enforcement: based on risk continued..

- Given our current knowledge about WRS it is unlikely that you will take formal enforcement action purely based on risk (or potential for harm).
- Enforcement relating to individual cases of ill health will also be rare.
- Decisions can be made on a case by case basis.

Re exposure to stressors

- A number of civil cases have set a standard in relation to preventing **re exposure of individuals to stressors** which are known to have caused them to suffer illness

Evidence required for prosecution

- Evidence linking illness to a particular stressor(s)
- Evidence demonstrating that the IP was wilfully or negligently re exposed to the same stressors