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Workplace duty of care:

Do employers view workplace counselling as a shield against litigation or a weapon fighting for duty of care? **Peter Jenkins** investigates.

Duty of care is clearly the buzzword of the new millennium, just as 'workplace stress' was for many practitioners back in the nineties. Counsellors and their employers are currently struggling to define the limits to their respective duties and liabilities, in an uncertain and shifting legal landscape. In what the Daily Mail describes as 'the fevered casino atmosphere of Britain's compensation culture', it seems ever more important to be clear about what counsellors can (or can't) realistically achieve in providing effective care to staff in the workplace.

The changing face of employment provides a sobering backdrop to this sudden flurry of interest in duty of care issues. According to research carried out by the Chartered Management Institute this year, Britain is suffering from employment patterns dominated by job insecurity, long hours and pressure of work. According to Professor Cary Cooper, of Lancaster University, 'we are seeing a short-term contract culture added to a long-hours culture'. An estimated 33 million working days are lost due to stress at work, more than 60 times the amount lost via industrial action. According to the TUC, bullying now causes the loss of 18 million working days, with managers being identified as the bully responsible in three-quarters of the cases involved.

A compensation culture?

Added to this potent mix, there is the emergence of a



counselling and the what next?

culture of litigation, fuelled by the persistent and intrusive adverts on lunchtime TV - 'Have you had an accident at work?' - underpinned by the pervasive theme that 'where there's blame, there's a claim'. The move to a 'no win, no fee' model of funding litigation has led even the Lord Chief Justice to sound the alarm. He has pointed out that, in fact, personal injury claims actually fell by 5% over the last 5 years. Medical negligence claims, now a major source of financial strain on a hard-pressed NHS, have similarly shown a fall by one third over the same period. The 'compensation culture' may be something of a myth, therefore, but it is, at the same time, a destructive one, if it encourages overly defensive medicine in hospitals, and a predatory, litigious culture in society at large.

How has this impacted on the notion of employer's duty of care? In narrowly legal terms, employers have specific statutory responsibilities for ensuring a safe and well-monitored workplace, under the Health and Safety At Work Act 1974, and the associated Management Regulations 1999. In addition, a recent successful case against bullying, brought under 'anti-stalking' legislation, the Protection From Harassment Act 1997, has further added to the growing list of employer responsibilities to protect their workforce.

These are, however, statutory duties under the law. The real interest in defining employer's duty of care derives not from this branch of law, but from the successful use of negligence law to bring cases for psychological injury caused to employees by workplace stress. The landmark Walker case in

1994 opened the door, firstly to a trickle, and then to a seeming flood of cases, where employees were able to successfully sue their employer for compensation, for damage caused by poor management, work overload and resultant mental ill-health.

Test for negligence

Under negligence law, there is a simple three-stage test applied to determine whether a case is successful. Firstly, is there a duty of care between the parties? Secondly, has there been a breach of this duty? Thirdly, and most difficult to prove, as the fearsome 'causation test', was it reasonably foreseeable that this breach would directly cause the psychological injury to the plaintiff? An added hurdle is that the injury suffered needs to be of a high order, namely a psychological injury, consistent with psychiatric criteria from diagnostic manuals such as the DSM 4 or ICD 10, rather than being consistent with simple, everyday stress or tension.

The criteria for establishing successful cases for workplace stress were clarified in detail in the subsequent Hatton case, heard at the Court of Appeal in 2002. These criteria were set out by Lady Justice Hale, who showed an impressive familiarity with the debate on workplace stress and the various publications of the Health and Safety Executive. Despite jubilant claims for the Hatton case ('Stress bandwagon halted': Management Today), a more cautious reading of the judgement suggests otherwise. The judgement did no more than carefully add some finishing touches to the Walker case before it, rather than dictate a completely new direction for such cases in the future.

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The test for the organisation's duty of care under negligence law is a minimal one, namely to act as a 'reasonable employer' would. The challenge for employees is the uphill one of establishing, not that work caused them stress, but that the stress of work caused them a psychological injury, because the employer knowingly failed to take the necessary steps which could have reasonably limited or prevented this outcome. Once aware of the adverse impact on the member of staff, the employer can act to avoid foreseeable damage occurring, by providing retraining, reorganising existing work patterns or providing additional support and supervision. However, the Hatton judgement contained two very clear statements, worth bearing in mind: the first being that no job is considered to be 'inherently stressful', and secondly that, quite contrary to the entrepreneurial spirit of the TV adverts mentioned previously, some things, quite simply, are no one's fault. Some forms of damage are, therefore, not actionable in law.

Duty of care as a banner

The emerging case law on workplace stress has, predictably, led to a renewed emphasis on the employer's duty of care, and of the role of workplace counselling as demonstrable evidence of this being fulfilled. However, there is a sense that 'duty of care' is also becoming a banner of aspirations, or even being seen as a powerful lever for change in its own right. The notion of a duty of care is being advanced in a whole series of ways by counsellors as a persuasive argument that, for example:

- employers must provide supervision to counsellors
- supervisors have a duty of care towards clients
- counsellors must always report child abuse
- counsellors have a duty to prevent clients from committing suicide

In a narrow legal sense, none of these statements are true. This is because each would depend upon previous successful case law in the UK courts having established them as unmistakable facets of the duty of care. Without this prior case law, the notion of 'duty of care' simply becomes a persuasive definition, packed with speculative outcomes. These elements may be very desirable from an ethical or professional perspective, but currently have absolutely no grounding, at least as yet, in the rather more gritty and down-to-earth world of the law.

Confidential counselling service

Using the notion of a forever expanding 'duty of

care' makes sense for counselling as an emerging profession, eager to bring home to reluctant employers the value of employee support. However, what is striking, in the Hatton judgement, is the complete lack of discussion about what 'a confidential counselling service' for employees should look like. Unlike the substantive references to HSE literature and the informed debate on workplace stress, there is a complete lack of engagement with the literature on counselling in the workplace, such as NICE guidelines, the Cochrane review of PTSD research, or even the usual obligatory reference to the primacy of CBT as an intervention.

This leaves counsellors in uncharted territory when it comes to arguing for a particular model of workplace care. Workplace counsellors are probably more sensitive to the legal implications of, and justification for, their work than their colleagues working in many other settings. However, it remains very unclear whether employer (and counsellor) duty of care necessarily embraces (or even excludes) interventions such as psychological debriefing after traumatic incidents at work, or requires the adoption of screening measures to identify staff members who are potentially vulnerable to longer-term psychological conditions, such as PTSD. The existence of rival, competing perspectives on these key debates actually makes it less likely that judges will seek to support one school as the new standard, any more than currently happens with differing schools of treatment in medicine.

Duty of care – a shield for employers?

The concept of duty of care may, on the one hand, represent a banner of aspirations for workplace counsellors. It can also operate as a very effective shield for employers against litigation by employees. This is the key lesson to be drawn from the highly significant failure of the class action by former soldiers against the Ministry of Defence in 2003 (Jenkins, 2004). While not an easy read, the judgement very clearly shows what will happen where an employer is able to demonstrate a reasonable level of awareness and engagement with the issue of employee welfare. This may be shown through evidence of policy formulation and review, and the provision of some level of psychological support services, perhaps in a variety of forms. Where this is the case, then successful claims for negligently caused stress will then generally become the exception, rather than the rule. As the MOD judgement concludes:

'the employer will only be in breach of duty if he

has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicality of preventing it, and the justifications for running the risk.' (Multiple Claimants v MOD [2003] para 32).

As counsellors, it may be tempting to see the growing significance of duty of care issues as a powerful, rallying banner for change, which can be used to advance the case for ever more effective and specialised forms of workplace support for staff. However, the Hatton and MOD cases point to another, all too likely, outcome, where the

provision of a generic confidential counselling service for staff in effect discharges the employer's same duty of care. It, moreover, will provide an effective defensive shield, against which future claims for negligently caused workplace stress will largely bounce off. ■

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Liability for injury caused by stress at work

We report on guidance from the Court of Appeal on the circumstances when an employer will be liable for an employee's injury due to stress at work. In particular the principles set out in the Court of Appeal's decision in *Hatton -v- Sutherland*

A recent case involving Intel Corporation demonstrates how these principles are applied. Mrs Daw worked for Intel Corporation between 1988 and 2001. She was considered a very able employee. She suffered bouts of postnatal depression in 1986 and 1998-99. Both HR and management generally were aware of these bouts of depression. As a result of various changes at Intel Mrs Daw's workload increased. She struggled to keep up with the workload and made various requests to Intel for further assistance. She also struggled with the blurred reporting lines which meant that she had problems dealing with the priorities of demands made by different managers. In 2001 she suffered from depression and attempted suicide.

The way in which the court applied some of the principles in *Hatton* is interesting.

■ One of the *Hatton* principles is that an employer is more likely to be liable if it is aware that an employee is vulnerable to stress or has suffered from work related stress in the past. In this case, it was accepted by both sides that Mrs Daw's previous incidences of postnatal depression made her more vulnerable to subsequent episodes of non-postnatal depression. However the court decided that even if you could assume that the employer had knowledge of the previous incidences of postnatal depression, that did not mean that a reasonable employer should, without any other indications, have taken into account that her mental health was more at risk if she was placed under stress.

■ Secondly, the *Hatton* principles provide that an employer is entitled to take what an employee says at face value and does not have to make probing enquiries of the employee. In the *Intel* case Mrs Daw's manager had found her in tears at work and had asked her to set out in writing what the problem was. The letter did not refer directly to depression but it did refer to her having 'been there twice before'. Her manager did not ask her what she meant by this and did not understand what it meant. Had he asked her she would have told him and the link between her previous depressions and how she then felt would have been made. The court said that this was not the sort of situation *Hatton* was talking about when it referred to probing enquiries. Since the manager had asked her to write the letter and she was clearly upset and under considerable stress, he should have asked her to explain what she meant.

■ Finally, as required by the *Hatton* principles, the court took into account the company's resources. It found that it had 'no doubt that a company with the resources of Intel could have immediately ameliorated the position as far as Mrs Daw was concerned.'

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This is intended for general guidance and represents our understanding of the relevant law and practice as at June 2006.