Workplace stress claims in an Age of Anxiety

Stephen Hanaphy BL

In cold prose Joyce regarded himself as put out of the tower. What happened was that Trench began to scream one night in a nightmare involving a black panther; he woke up sufficiently to snatch a revolver and fired some shots at the fireplace. Then he fell back to sleep and Gogarty removed the gun. Joyce was understandably frightened. When Trench began to scream about the panther again, Gogarty called out, "leave him to me ". He then shot at some pans on the shelf above Joyce's cot. **The terrified Joyce considered this fusillade his dismissal**; he dressed and left in the rain without a word on September 15. His revenge, he told Cosgrave, would come later in the pages of *Stephen Hero*.

Objectives

1. Consider recent developments and current trends
2. Review the area of stress in the workplace
3. Anticipate future developments

Recent developments

- "Covid-19 has led to a sharp increase in depression and anxiety", *The Economist*, 11 October 2021
- "Panic 101: what to do during a panic attack – and how to prevent them", *The Guardian*, 24 May 2022
- "The pandemic body: How we have changed physically and what to do about it", *Irish Times*, 8 January 2022
- "It's time to embrace slow productivity", *The New Yorker*, 3 January 2022
- "'Doomscrolling' bad news can trigger life-wrecking 'burnout' - but *Daily Star* is cure", *The Daily Star*, 3 May 2022

"How a new age of surveillance is changing work Look out: your boss may be watching you", *The Economist*, 13 May 2022

- "many studies link excessive individual surveillance to higher levels of stress. And if algorithms trained on biased data are used to make more decisions, the odds of discrimination will rise. One analysis found that AI systems consistently interpret black faces as being angrier than white ones…

- What to do? As law and practice evolve, some principles should govern workplace surveillance. Individuals must be fully informed, as the New York law provides. Some firms now disclose monitoring methods in the fine print of their employee handbooks, and specify what data managers have access to. But that is no substitute for consistent, easily understood information for staff—so they can decide how to behave at work, and whom they choose to work for."

"the hypothesis is that the brain inflammation caused by Covid-19 is triggering both the psychiatric conditions and neurological symptoms"

"Long Covid can lead to trauma and depression", *Sunday Times (Ireland Edition)*, 6 June 2022

“94 results”

Yield of cases mentioning both “stress” and “covid” on WRC website, 15 June 2022

Laffoy J in *McGrath v Trintech* [2005] 4 IR 382

- **The issue is not whether the stress the plaintiff suffered was caused by work, but whether the stress induced injury was a consequence of a breach by the first defendant of its statutory duties**. Where an employee is injured because of the malfunction of a faulty piece of equipment given to him by his employer, the causative link is obvious. The injury would not have been inflicted if the faulty piece of equipment had not been given to the employee. The question which arises here is whether it can be said, as a matter of probability, that if the first defendant took all of the steps which the plaintiff contends it was statutorily obliged to take (dealing with workplace stress in the safety statement, having in place a system for monitoring stress and an employee assistance programme and providing further training for the plaintiff) the plaintiff would not have suffered psychological injury. In my view it cannot.

Maher v Jabil Global Services Ltd [2008] 1 IR 25

- (a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress;
- (b) if so is that injury attributable to the workplace; and
- (c) if so was **the harm** suffered to **the particular employee** concerned **reasonably foreseeable** in all the circumstances.

Hickinbottom J in ***MacLennan v Hartford Europe Ltd*** [2012] EWHC 346 (QB) (see also ***Mackenzie v AA plc and another*** [2021] EWHC 160)

- (i) It is insufficient for a claimant to show that his employer knew or ought to have known that he had too much work to do, or even to show that he was vulnerable to stress as a result of overwork. To succeed, he must show that his employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm in terms of a psychiatric or other medical condition.

MacLennan v Hartford Europe Ltd [2012] EWHC 346 (QB)

- (ii) Even then, it is insufficient merely to show that there was a known risk of some psychiatric or other injury in the future. The claimant must show that the employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm of the kind he in fact suffered. Thus, the employer must have knowledge of an imminent risk of the sort of collapse of health that in fact occurred.

MacLennan v Hartford Europe Ltd [2012] EWHC 346 (QB)

- (iii) An employer is entitled to assume that an employee can withstand the normal pressures of the job unless it is such that employees are known to be at particular risk of injury…
- (iv) Most employees will on occasions be 'overworked' and will have problems in 'coping' with their work. However, that does not mean that work necessarily poses a threat to that person's health.

MacLennan v Hartford Europe Ltd [2012] EWHC 346 (QB)

- (v) An employer has a duty to act only when the indications of (imminent) harm are plain enough for any reasonable employer to realise that it should do something about it.
- (vi) An employer has no general obligation to make searching or intrusive enquiries, and may take at face value what an employee tells it.
- (vii) The foreseeability threshold in such claims is therefore high and may prove a formidable obstacle on the facts of a particular case.

John Ward v An Post [2021] IEHC 470 (Heslin J)

- Even where it is proved that a plaintiff has suffered an injury to their health which is attributable to the workplace, the evidence must demonstrate that the harm suffered by the particular employee was reasonably foreseeable in all the circumstances.
- It is also clear from the authorities that it is appropriate for the court to examine the conduct of *both* parties to the relationship, namely the conduct of the employee as well as that of the employer…

John Ward v An Post [2021] IEHC 470 (Heslin J)

- A careful consideration of the evidence does not support any finding that, as of October 2017, the Plaintiff was suffering from a " *significant psychiatric injury* ". The evidence, however, does support the proposition that the Plaintiff was reluctant to comply with his obligations, specifically his obligation to attend review meetings, which obligation flows from the responsibility of every employee to co-operate with the operation of the ASMP [Attendance Support and Management Process] policy.

John Ward v An Post [2021] IEHC 470 (Heslin J)

- the Plaintiff has proven to be **a poor historian**. In the manner explained in this judgment, I have found the Plaintiff's evidence to be unreliable in relation to certain issues, each of which is explored in detail in this judgment. Whether any one, or more, of the instances of unreliable testimony given by the Plaintiff can be explained by **the passage of time** and by failing memory cannot be known with certainty. Regardless of the explanation, if there be one, I have given extensive reasons as to why, where relevant, I have not found the Plaintiff's evidence to be accurate or reliable and it also must be said that poor memory is difficult to understand or accept as an explanation in respect of certain unreliable testimony given by the Plaintiff.

Caulfied v Fitzwilliam Hotel Group Limited [2019] IEHC 427 (Meenan J)

- It is now necessary to consider "the balance of justice". The first matter to be considered is that the nature of the claim which is one for bullying and harassment. **Claims of this nature necessarily require the testimony of those who were present or who witnessed the alleged events. These events are alleged to have occurred some ten years ago. A lapse of time of this order must impinge upon the accuracy of those who may give evidence concerning the alleged events.** This must amount to prejudice for the first named defendant in defending the claim.

Breen v Wexford County Council [2019] IEHC 112 (Noonan J)

- bullying cases more often than not concern multiple events occurring over a protracted period of time as between the plaintiff and the defendant, its servants or agents. Such events are frequently numerous and in the present case cover a two year period.

- Asking witnesses to call to mind a range of events occurring over a protracted period some two decades later is, to use the oft quoted phrase, putting justice to the hazard.

Fox v Cherry Orchard Hospital and HSE [2019] IEHC 285 (Barrett J)

- High Court noted that there was "*no good excuse*" for the inactivity of the legal representatives of the plaintiff between November 2015 and July 2018
- *Counsel for the defendants has identified 13 witnesses of fact whose involvement may be required at trial. Those witnesses will be asked to testify to events back in 2008. It is difficult to see how their memories of matters from 11 or so years ago could remain fully intact, with the result that the defendants may (almost certainly will) be hindered in challenging such factual evidence as the plaintiff may present at trial.*

In sum

- Causation and foreseeability have been, and will continue to be, very important factors in workplace stress-related cases
- Don’t underestimate significance of EAP and similar facilities
- Relatively long-standing cases may warrant motions to dismiss

Thank you