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PROFESSIONAL  
INSIGHTS

## Chapter 5

### Work-related illness or injury

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## Chapter 5

# Work-related illness or injury

It is every employer's nightmare to be sued for a work-related injury or illness. Being open and honest with staff and acting promptly are two key elements in defeating negligence claims.

### Concerns for employers

Employers often have to deal with specific disorders or conditions – some of which may be difficult to deal with, either because the employer does not understand the nature of the condition or because its prognosis is uncertain. There may be other worries for an employer, such as being sued for negligence.

Some of the issues that can cause employers to worry are:

- **Work Related Upper Limb Disorders (WRULDS) – erroneously also known as RSI.**
- **'Stress' and stress-related symptoms and absence reported to be due to stress.**
- **Mental illness.**
- **Alcohol and drug abuse.**

### Work Related Upper Limb Disorders (WRULDS)

There are a number of good textbooks to which an employer may refer in order to gain some understanding and knowledge of a disorder or injury. These include:

- Hunter's Diseases of Occupations, 9th edition, published by Arnold, 2000;
- Merck Manual, 18th edition, published by Merck Research laboratories, 2000;
- Fitness for Work – The Medical Aspects – 3rd edition, published by Oxford University Press, 2000;
- Black's Medical Dictionary.

This does not suggest for a moment that lay managers can become doctors overnight or can substitute their own knowledge for that of an expert. Always ask your Occupational Health Physician, or nurse, for information – do not ever rely upon your own knowledge. In one case this proved disastrous!

In **Crampton v Dacorum Motors Ltd [1975] IRLR 168**, the managing director received a medical certificate concerning one of their employees, Mr. Crampton, which stated ‘angina pectoris’. The managing director decided to look up the meaning in a medical dictionary. He decided that it was a serious illness and that it would be in Mr. Crampton’s best interests that his contract of employment be terminated. The Tribunal said that this was a hasty decision. The Company should have invited the employee to submit to a further medical examination by a specialist or at the very least, the company should have discussed Mr. Crampton’s condition with his own doctor.

There are a multitude of conditions that can comprise WRULDS including:

- Tenosynovitis
- Tendonitis
- Epicondylitis
- Carpal tunnel syndrome
- de Quervains’ syndrome
- Trigger finger
- Tennis elbow
- Golfer’s elbow
- Repetitive strain injury (RSI)
- Cervical spondylosis
- Frozen shoulder
- Injury to the upper limbs including fractures

## Duty to warn and train

Employers are under a clear duty to warn employees, and prospective employees, of any inherent risks to their job and to prevent, or minimise, the development of an injury or condition which it is reasonably foreseeable a breach of duty may cause. The duty to warn the workers about the known risks is so that they are able to make an informed choice as to whether or not they wish to work in that workplace.

The degree and detail of the warning and the need to repeat it at regular intervals will depend upon whether the workers are young and inexperienced, whether they ought to know for themselves that there are inherent dangers in certain types of work, whether the risks are known and obvious etc. In **White v Holbrook Precision Castings Ltd [1985] IRLR 215**, the Court of Appeal spelt out the employer's duty to warn about the dangers in the workplace as being part of the duty of care.

There is, however, one other issue for employers to consider and that is their duty to protect workers from the dangers that might be posed by their co-workers with disabilities or injuries. This factor must operate in the mind of any reasonable employer in weighing up his common law duty to protect the health and safety of his workforce.

Under ss. 7 and 8 of Health and Safety at Work Act, every worker is responsible for his own health and safety and has a duty not to pose any risk of injury to others, and must co-operate with his employer in complying with his health and safety duties. Furthermore, every employee has a duty not to do anything whether intentionally or recklessly, which may interfere with the health and safety of himself or others.

Many cases may not be so clear cut as the one described above. Employers may well need medical advice from an occupational physician.

## Warnings

We are living in a time when warnings are becoming increasingly common. Employees and prospective employees should be carefully warned of the risks, although, the value of warnings is questionable. Do people really read them and if so, do they really weigh up the described risk in determining whether or not to take employment?

On the one hand, there is a positive disadvantage to warnings as there is no doubt that they help increase the awareness of health and safety risks. Warnings from whatever source can commence or stoke an occupational neurosis leading to an epidemic of whatever the warning concerns.

Two leading computer companies, Compaq and Microsoft, have now placed 'health warnings' on keyboards as a response to the fears that continued keyboard use can lead to RSI. Both companies are reported to be facing legal actions in the USA from some users. The keyboard labels will refer users solely to safety instructions advising on correct posture. Other instructions advise on safe lighting in order to avoid eyestrain.

On the other hand the need for notices to be given where there is a foreseeable risk of injury developing is now well enshrined in our legal system. Mr Justice Mellor in **Moutenay and Ors v Bernard Matthews** (unreported) said:

*"The duty to warn into which the duty to educate is subsumed is directed towards the achievement of two prime objectives, namely:*

- a) that workers be given the opportunity of making an informed choice as to whether to undertake work that involves an RSI risk; and*
- b) that workers should bring symptoms to the attention of nurses and doctors at the first opportunity and not, for instance, delay reporting for such collateral reason, say, a desire to earn overtime pay.*

*In the particular circumstances of the Defendant, it would have been reasonable during the periods with which I am concerned for warnings to have been given:*

- i) to prospective employees who, if taken on, would have become new workers; and*
- ii) existing employees in the event of a transfer to a particular job involving a known RSI risk or following a significant absence from such work; and*
- iii) by way of periodic reminders to the workforce generally."*

In the **Moutenay** case the Judge found that the warnings given were inadequate. Renewed warnings should have been periodically given to the staff to remind them of the risk of injury, and that verbal instructions to report to the company nurse were not sufficient to protect employees.

In another case, **Wyeth v Thames Case Ltd [1986]** (unreported) the plaintiff worked in a team of three ladies on a production line making cardboard cartons. One of the team made up the pre-cut carton, another stitched the cartons up with a stapling gun, while the third stacked the finished cartons. There was an attractive bonus scheme for each team. The teams were supposed to rotate so that no individual did the same work all the time.

They had often been warned of the dangers of ‘**strains and sprains**’ if they did not rotate the work but the teams steadfastly refused to change because the output inevitably slowed down when new members joined.

On one occasion, they had threatened to strike when a manager insisted on rotation. When the plaintiff eventually contracted tenosynovitis from continual, excessive fast working on the same job, she claimed damages from her employer alleging they had been negligent in failing to warn her more specifically of the dangers of tenosynovitis.

The Court of Appeal held that there had been no breach of duty by the employer. The general warnings of ‘hand injury’ were sufficient. There was no duty to give warnings of a specific type of injury that may result. The teams had ignored the warnings at their peril. It is important to show evidence of such warnings – i.e. diary notes of time, place and people attending meetings and memos circulated to staff.

The author would point out that the Courts might not hold today that the employer’s duty is satisfied once warnings of the risk of injury have been given. There is a greater duty nowadays, because of the increased knowledge of the dangers of repetitive work movements, for employers to ensure that they are monitoring staff in order to ensure that they are following the instructions on safe work practice.

In **Storey v National Coal Board** (unreported) unauthorised ‘man-riding’ was condoned by management. When Mr Storey was killed after he was tipped off a hopper of coal that he was ‘man-riding’, the NCB argued that he was a trespasser and therefore was owed no duty of care at common law. The Court heard however, that management knew about this practice and fined the men £1 which was then given to the union’s charity. The Court held that since this practice had been condoned by management, it was not a forbidden practice albeit an unsafe practice and that a duty of care was owed to Mr Storey in such circumstances.

In another case, **Ping and Ors v Esselte-Letraset [1992]** (Current Law April 1992, at p. 231) nine employees working in the factory in Ashford all developed injuries including tenosynovitis, tennis elbow and trigger thumb. They claimed damages for their injuries caused by the repetitive movements involved in their work. The Court decided that:

- the injuries had been caused by their work;
- the injuries had been foreseeable;
- there was a duty of care on the employers which could have been discharged by giving a proper warning before the dangerous work had begun.

The Court held that the warning should have included an explanation for the **reason** for the warning and the **importance** of reporting any wrist or arm pain **immediately**. There should also have been a regular educational process in relation to the risks. Since there had been no adequate warnings, the employer was liable.

### **Timing of the warning notices**

It is sensible to publish warning notices on three separate occasions. Firstly, to all new employees (along with the Health and Safety Policy); secondly, periodic reminders and when employees are transferred to a job involving repetitive movements and, thirdly, to those who return after long sickness absence.

### **Office health and safety**

In offices a common health risk is identified with constant keyboard operations in work related upper limb disorders (WRULDs). These conditions can involve the swelling of the tendons in the wrist and other injuries to the fingers, joints and muscles. They can be particularly painful and can sometimes lead to spells of sickness absence away from work. If any jobs involve constant and prolonged keyboard operations, the employer should take the following steps:

- Warn all relevant staff of the risks and what to do when experiencing any pain or discomfort;
- Ensure that the work is planned so that extended working with repetitive wrist movements is limited, that jobs are rotated and that breaks are provided;
- Ensure that staff with any problems are instructed to report any pain immediately to their supervisor.

In Appendix 5, there is an example of the type of warning notice that employers could use if any of their workers are at risk of upper limb disorders.

### **How warning notices should be communicated**

It is important for the employer to prove that the warning notice was given to the employee and was read and understood. Personal notices should be re-enforced on notice boards. It is also advisable that employees return their signed acknowledgement before commencing employment. This signed acknowledgement should be filed in their personnel file.

## **What makes an employer guilty of negligence?**

In the **Mountenay** case, the judge gave some useful guidance on the question of negligence. Employees should be protected from risk of injury by their employer taking the following steps:

- Warning of the risk.
- Enabling employees to make an informed choice as to whether they will take the risk.
- Offering training.
- Advising employees to take medical advice at the first sign of aching wrists or hands.
- Providing mechanical assistance for squeezing movements.
- Gradually introducing new employees to repetitive working movements.
- Rotating the duties.
- Assessing risks in accordance with the Management of Health and Safety at Work Regulations 1992.
- Following up with supervision by way of regular inspection of working practices.
- Invoking the aid of occupational health personnel.
- Ensuring that the involvement of the occupational health team:
  - a) actually does take place.
  - b) takes place at regular intervals.
  - c) is available on request if the situation changes.

## The Court's views on work-related injuries

In a case involving a worker painting plates at the Royal Doulton factory, **Bettany v Royal Doulton (UK) Ltd** (27 April 1993, High Court), the view was expressed that 'repetitive strain work' causing only pain, with no other associated symptoms, could be classed as an injury caused by that occupation. In this case the company had not been negligent as it had drawn the plaintiff's attention to the risks, had a system for medical referral which had operated effectively and had moved her onto lighter work.

Here there was common grounds that she suffered pain in her thumb and her wrist and the complaint was genuine. However, the Court confirmed that it might not be necessary for any physical or demonstrable symptoms to be detected, nor was it fatal to her claim that a particular medical diagnosis had not been presented. Mrs Bettany's medical expert stated that she had 'occupational overstrain syndrome' due to the highly repetitive movement involved in painting, although there was no evidence that he could point to.

He thus had to hypothesise about the cause of the pain and whether it had something to do with an early part of the spectrum of recognised injury of tenosynovitis. He said that whilst the cause was sometimes psychological, in this case it was physical.

The Company's medical expert, specialising in hand surgery, claimed that Mrs Bettany's injury was not work-related. The work involved would not lead to such an injury and as no physical complaint was identifiable, all that remained was a psychological cause. He too could only hypothesise as to the cause of the problems; for example the amount of publicity on upper limb disorders in the industry.

The Judge preferred the plaintiff's expert that on the balance of probabilities, Mrs Bettany had suffered a work-related injury in 1990. However, the following issues determined a finding of no negligence:

- Drawing to her attention the risk of upper limb strain and the consequent need for her to report promptly any symptoms of pain – this happened when she was first engaged as a trainee;
- A system in place for reporting pain and she was seen by both the company nurse and the works doctor; in addition she was advised to see her GP;
- In the early stages she had been moved on to lighter work with less active brush movements, repetitiveness and accuracy.

The Judge also found that those in charge of her training were ‘wholly concerned for her welfare’. There was no criticism in the fact that the company did not insist that she stopped work and allowed her to carry on between March and 8 May 1990. Neither was there any evidence to support the view that as a consequence of allowing her to continue, there developed a more prolonged disability.

## The ‘egg shell skull’ principle

This principle is best summed up as ‘the defendant must take the plaintiff as he finds him’. Employers are under a far higher duty of care to employees who fall within the ‘egg shell skull’ category. (**Paris v Stepney Borough Council [1951] 1 ALL E R 42**. This principle applies both to the question of liability and to the question of quantum of damages.) This principle provides that those with special needs or disabilities may be at greater risk of injury and/or at risk of greater injury and that therefore, the employer who knows, or ought to know, of these greater risks owes a higher duty of care to such persons.

It will, therefore, be essential for employers to ask questions at the pre-employment medical about any previous history of WRULDs, or any muscular-skeletal injuries, in order to satisfy not only their common law duty but their statutory obligations.

This principle also applies to employees with pre-existing mental illness (see below).

## Some prescribed diseases

**Carpal Tunnel Syndrome** has recently been accepted as a prescribed disease (PDA 12) for industrial injury benefit. Other prescribed diseases include writer’s cramp; Beat Hand; Tenosynovitis; Vibration White Finger (VWF) etc.

If an employee suffers from such a condition and is assessed by the Department of Social Security (DSS) Benefits Agency Branch for even below 14% disability which is required for benefit, then it would still be powerful evidence of a work-related injury and no further debate about Upper Limb Disorders would need to happen.

There is useful advice in ‘Fitness for Work – The Medical Aspects’, in the chapter on Cardiovascular Diseases.

### **Disclaimers of liability**

Some employers have attempted to obtain the informed written consent of the employees to these dangers with a disclaimer of liability. These are almost certainly invalid because this principle relies upon three elements to be present:

1. Not only must the plaintiff know about the risk but must have fully understood the risk;
2. The plaintiff must then accept the risk; and
3. There must have been no duress in obtaining the consent.

The Health and Safety Executive (HSE) has published useful guidance on the prevention of WRULDS. All employers should have a copy and should be following its guidelines – Work Related Upper Limb Disorders – a Guide to Prevention (HS(G)60) HMSO.

### **Stress and mental illness**

There are many mental illnesses and they are categorised into two main categories, neurotic and psychotic. Generally speaking the psychotic illnesses are the more serious and in some cases would render the individual incapable of working, e.g. someone with Munchausen Syndrome or a serious phobic or obsessive-compulsive disorder. For an excellent description of mental illness please refer to Chapter 7 on Psychiatric Disorders written by Dr Maurice Lipsedge and Dr Joe Kearns in the third edition of 'Fitness for Work'.

However, there are some serious mental illnesses such as manic depression (or bipolar depression) where the individual may be able to resume or continue working in most fields of employment so long as they continue taking medication such as lithium, which is able to control the excessive mood swings.

Psychotic illnesses involve the patient not being able to differentiate reality from fantasy. Someone suffering from a neurotic illness may have real but exaggerated concerns or fears and be unable to deal with these fears or anxieties, but they are able to differentiate reality from fantasy.

In order to determine whether someone has a mental illness a diagnosis must be made and that diagnosis should be found either in the DSM (US classification of mental health diseases) or the ICD (International Classification of Diseases).

For example, Chronic Fatigue Syndrome (or ME as it is incorrectly sometimes described) is classified under both the DSM and ICD as a recognised illness.

Stress is not a medical term, neither is it a diagnosis, and the Appellate Tribunal has recently ruled that at least for the purposes of the Disability Discrimination Act 1995 and establishing a disability, it will not be good enough for doctors to ‘diagnose’ stress or anxiety.

The term ‘stress’ is an engineering term and refers to metal fatigue or metal which is ‘necking’ to the point where it will fracture.

Any stress-related illness will be multi-factorial, i.e. there will not be one single cause although there may be one primary or significant factor. This could be bereavement, financial worries, job insecurity, domestic or marital problems, sexual or interpersonal problems etc.

Many stress-related illnesses exhibit symptoms of depression and/or anxiety – it is possible to have both. Some serious depressive illnesses can be of the delusional or psychotic type and will therefore be more serious.

Most depressions are what is called ‘unipolar’, resulting only in a lowering of the mood, and with effective treatment, normally with antidepressants, for a prescribed length of time, patients will normally recover and have a very favourable outcome. However, it is estimated that a significant number of patients will experience a further episode of depression in their lifetime.

### **Defining stress in the workplace**

Dr Maurice Lipsedge suggests that it is probably more helpful to refer to ‘stressors in the workplace’ and a useful definition for employers would be:

*“Where there is disparity between the demand on the worker and the ability to respond to it, when the individual has little or no control over the situation.”*

(Taken from the chapter on Psychiatric Disorders in Fitness for Work, Medical Aspects, third edition.)

It is probably worth mentioning here that employers often receive MED3 medical statements with ‘stress’ written as the reason for the advice to refrain from work as soon as a disciplinary matter is raised or a warning is given.

In the former case, it is important that the individual understands that whilst they may feel ‘stressed’ and anxious that disciplinary issues are hanging over them, the doctor is only advising the patient to refrain from work and not from attending an investigatory or disciplinary hearing.

In such cases a number of options can be selected:

1. Send the individual to the Occupational Health Physician to determine whether they are mentally fit to answer the charges and attend a hearing; and
2. Offer several choices to the individual:
  - a) that they attend the hearing on site or at another location;
  - b) that they send in written submissions to be considered in their absence;
  - c) that they send their representative in their place to speak for them;
  - d) that they ask their representative to read out their representations and speak for them.

### Guidelines on ‘stress’ cases from the Court of Appeal

On 5th February 2002, the Court of Appeal gave judgment in four cases relating to stress at work:

- Terence Sutherland (Chairman of The Governors of St Thomas Becket RC High School) v Penelope Hatton
- Somerset County Council v Leon Alan Barber
- Sandwell Metropolitan Borough Council v Olwen Jones
- Baker Refractories Ltd v Melvyn Edward Bishop (2002) – CA (Brooke LJ, Hale LJ, Kay LJ) 5/2/2002

These were unconnected appeals by employers against damages awarded to staff who stopped working because of stress-induced psychiatric illness.

The Court of Appeal allowed the employers’ appeals in three of the cases (**Hatton, Barber and Bishop**). In the fourth (**Jones**) it dismissed the employer’s appeal ‘not without some hesitation’.

Two of the claimants were teachers in comprehensive schools, the third was an administrative assistant at a local authority training centre, and the fourth was a raw materials operative at a factory.

Described as ‘**tightening the rules on stress payouts**’ or ‘**curbing the compensation culture**’, what the judgment actually does is provide important guidance for the future. Whether this will result in fewer stress-related claims is impossible to judge.

Companies who offer a confidential advice service, with referral to appropriate counselling or treatment services, are unlikely to be found in breach of duty in stress cases.

#### THE JUDGMENT

The judgement contains an analysis of the nature of the legal duty imposed on employers in such cases (**paras 19-22**), the circumstances in which a court may find that it was reasonably foreseeable to an employer that his employee might suffer psychiatric illness through stress at work (**paras 23-31**), and the circumstances in which a court may find an employer in breach of his duty (**paras 32-34**).

The Court of Appeal also sets out practical propositions for the guidance of courts concerned with this type of claim. These are summarised below:

- There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.
- The threshold question is whether this kind of harm to this particular employee was **reasonably foreseeable**. This has two components:
  - an injury to health (as distinct from occupational stress) which
  - is attributable to stress at work (as distinct from other factors).
- **Foreseeability** depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (i.e. staff who feel under stress at work should tell their employers and give them a chance to do something about it).
- The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.

- Factors likely to be relevant in answering the threshold question include:
  - **the nature and extent of the work done by the employee**

Is the workload much more than is normal for the particular job?

Is the work particularly intellectually or emotionally demanding for this employee?

Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs?

Or are there signs that others doing this job are suffering harmful levels of stress?

Is there an abnormal level of sickness or absenteeism in the same job or the same department?
  - **signs from the employee of impending harm to health**

Has he a particular problem or vulnerability?

Has he already suffered from illness attributable to stress at work?

Have there recently been frequent or prolonged absences which are uncharacteristic of him?

Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

- The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.
- To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.
- The employer is only 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 practicability of preventing it, and the justifications for running the risk.

- The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.
- An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.
- **An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.**
- If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.
- In all cases, therefore, it is necessary to identify the steps which the employer both could, and should have, taken before finding him in breach of his duty of care.
- The claimant must show that that breach of duty has caused, or materially contributed, to the harm suffered. It is not enough to show that occupational stress has caused the harm.
- Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible.
- The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event.

### **Proper diagnosis and effects upon day-to-day activities is required**

Whether in a disability discrimination case or otherwise, it will be important for a specialist in the field (normally a psychiatrist) to provide a full diagnosis with the symptoms and the effects that those have on the patient's normal day-to-day activities.

In **Staffordshire University v Morgan (EAT 11th December 2001)**, Mrs Morgan resigned shortly after returning to work following an assault by her female supervisor. The Occupational Health Physician had recommended that she returned to work in a job where she would never again have contact with either the supervisor or her seven former colleagues, all of whom gave evidence in support of the supervisor. While alternative roles were offered, the University could not guarantee that no contact would ever again happen. Mrs Morgan resigned and claimed constructive dismissal and discrimination on the grounds of her disability of 'stress' and 'anxiety'. She claimed that:

*"My employer forced me into this position by its failure to recognise, in dealing with my Supervisor, the mental effect of her assault on me and the totally unreasonable expectation that I could continue to work for her."*

The EAT has concluded that in disability discrimination cases for a 'mental impairment' to be proved to a tribunal:

*"In general there will be three or possibly four routes to establishing the existence of 'mental impairment' within the DDA namely:*

- i) proof of a mental illness specifically mentioned as such in the World Health Organisation's International Classification of Diseases (WHO ICD);*
- ii) proof of a mental illness specifically mentioned as such in a publication such as that classification, presumably therefore referring to some other classification of very wide professional acceptance;*
- iii) proof by other means of a medical illness recognised by a respected body of medical opinion;*
- iv) A fourth route, which exists as a matter of construction but may not exist in medical terms, derives from the use of the word 'includes' in **para 1 (1), Schedule 1** to the Act. If, as a matter of medical opinion and possibility, there may exist a state recognisable as mental impairment yet which neither results from, nor consists of, a mental illness, then such state could be accepted as a mental impairment within*

*the Act because the statutory definition is inclusive only rather than purporting to exclude anything not expressly described by it. This fourth category is likely to be rarely if ever invoked and could be expected to require substantial and very specific medical evidence to support its existence.”*

In the Morgan case above, the EAT held that:

*“as the WHO ICD does not use such terms without qualification and there is no general acceptance of such loose terms, it is not the case that some loose description such as ‘anxiety’, ‘stress’ or ‘depression’ of itself will suffice unless there is credible and informed evidence that in the particular circumstances so loose a description nonetheless identifies a clinically well-recognised illness.”*

The EAT stressed the importance of Applicants receiving expert advice and a medical report from a properly qualified psychiatrist who is able to state clearly what symptoms are present and how they affect normal day-to-day activities stating the diagnosis in terms of an ICD classified illness where possible.

Whilst making it clear that an expert psychiatrist may not be needed in every case, the EAT suggested that in many cases, it would!

*“This summary we give is not to be taken to require a full Consultant Psychiatrist’s report in every case. There will be many cases where the illness is sufficiently marked for the claimant’s GP by letter to prove it in terms which satisfy the DDA. ...the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion. Whoever deposes (gives evidence), it will be prudent for the specific requirements of the Act to be drawn to that doctor’s attention.”*

## **Alcohol and drug abuse**

The Tribunals distinguish between misconduct cases where an employee is drinking alcohol when not permitted to do so, or attending work under the influence of alcohol, (both of which could amount to gross misconduct and ‘alcoholism’ being an illness for which sympathy, understanding, treatment, time off and rehabilitation into work is essential.

Drug abuse is a criminal offence per se and whilst the tribunals are not sympathetic to someone who has abused illicit substances at work or has come on duty under the influence of illicit substances, the tribunal still requires the

employer to investigate the facts thoroughly and to consider an appropriate penalty. Automatic dismissal is likely to be regarded as unfair.

Employers often have rules about not drinking alcohol on duty, not being in possession of alcohol on company premises, not getting drunk either at work or coming to work drunk etc.

These offences have to be dealt with under the disciplinary procedure.

## Defining alcoholism

### LEGAL DEFINITION

As far as the criminal law is concerned, alcoholism may be a defence of diminished responsibility to a charge of murder where (**R v Tandy, Court of Appeal, Times Law Report, December 23rd 1987**).

*“Alcohol dependence syndrome, or alcoholism in the severity, constitutes a disease. It may include such a craving for drink as to produce in itself an abnormality of mind.*

*If alcohol has reached the level at which the brain had been injured by the repeated insult from intoxicants there can be gross impairment of judgment and emotional responses.*

*Further, even if the brain has not been damaged, if the alcohol has reached the level that the person’s drinking had become involuntary, then he is no longer able to resist the impulse to drink.*

*Their Lordships conclude that for a craving for drink or drugs in itself to produce an abnormality of mind within the meaning of s.2(l) of the Homicide Act 1957, the craving has to be such as to render the accused’s use of drink or drugs involuntary”.*

### LAYMAN’S/EMPLOYER’S DEFINITION

A more helpful definition of alcoholism as far as employers are concerned is:

*“Someone whose drink dependency interferes with their work, their performance or ability to do their work or have relationships at work.”*

Employers normally recognise problem drinkers by their erratic attendance at work, their poor timekeeping, their long lunch hours, their erratic performance at work and sometimes a breakdown in relationships with other colleagues.

## Some legal issues

In looking at the cases which have reached the Courts and Tribunals, it is important to bear in mind that these involve employers who have sometimes not taken a particularly sympathetic approach to employees with a drink or drugs problem. On the other hand the Courts have made it quite clear that employers do have certain obligations towards these employees and to dismiss as soon as the problem comes to the employer's attention will almost always be unfair.

The Courts have also recognised that employers have both common law and statutory duties towards their other employees, members of the general public and other people's employees who are working on their premises. Employers must not therefore be indulgent or ignore cases of drink problems in the workplace, as they could be held vicariously liable for any injury or fatality caused by any drink problem.

If the employer knows that illegal drugs are being used on his premises, there could be liability on the employer under the criminal law for being an accessory before or after the fact.

As an occupier of a premises, the occupier is liable for any drugs found on the premises under s.8 of the Misuse of Drugs Act 1971 (see **Sweet v Parsley [1969]**, House of Lords).

Similarly, the employer could be in breach of his statutory duties under the Health and Safety at Work Act 1974 for failing to provide a safe place of work and endangering the safety of others (including members of the general public) – another criminal offence.

So those managers and supervisors or colleagues who cover up for an alcoholic may be contributing to important breaches of their employer's statutory and common law obligations.

## Ignoring employees with alcohol or drug problems

The legal position of individual managers/supervisors is interesting to consider. Under Section 7 of Sections 36/38 of the Health and Safety at Work Act 1974, individual managers/supervisors may be liable if an employee with a drink problem was considered a health and safety risk either to himself or to others, and those managers/supervisors ignored or positively connived to cover up the problem.

**MANSLAUGHTER**

Directors and/or the individual car driver (employee) could be prosecuted for manslaughter if it is established that the Directors must have known about the individual with a drink problem and had done nothing about it, e.g. that a manager driving a company car had an alcohol problem.

**TRANSPORT AND WORKS ACT 1992**

Under the Transport and Works Act 1992 it is a criminal offence for specified people to work on the railways and tramways whilst 'over the limit' or 'unfit' through alcohol or drugs.

The employer will also be liable unless it can be shown that he has exercised 'all due diligence' to prevent the commission of the offence – e.g. alcohol and drug testing!

**OTHER OCCUPATIONS**

There may be certain occupations – publicans are an obvious example – where their duty of care and legal liability may extend to ensuring that customers do not drink to the extent that they are likely to put themselves or others in serious imminent personal danger.

A few years ago, a publican was successfully prosecuted for aiding and abetting a customer to commit a criminal offence, namely drive over the legal limit – after he had been allowed to stay behind after hours to 'help clear up'. The customer was killed following an accident in his car on the way home from the pub. (Morning Advertiser, May 9, 1989.)

Here important factors were the licensee's actual knowledge of the customer's drunken state, permitting him to stay behind after hours, knowing that he must be well over the legal limit and permitting him to drive home.

In such a case, the licensee should have exercised some degree of care in ensuring that the customer did not drive home and in refusing to serve him any more alcoholic drinks once he knew that he was over the limit. The most sensible solution would have been to call for a taxi or ring his home and ask for a member of his family to collect him. Doing nothing amounted to a criminal offence!

This is particularly the case if the employer knows that the employee is drinking heavily, e.g. at an office function or party, and continues to provide him with alcohol and then allows him to drive away from the party or function.

Brewers ought to remind all their staff and tenants in writing of the following points:

1. the rules about after hours drinking;
2. the rules about permitting customers to 'work' on the premises, e.g. help to clear away;
3. their duty to ensure as far as is reasonably practicable that any customer that they know is driving a car is in a fit state and to take measures to prevent any potential injury to themselves or others, e.g. calling a taxi or that person's home and insisting that the car remains in the pub car park until the driver is in a fit state to drive;
4. the rules about common sense in these matters!

In the context of drugs, the position is even clearer and is discussed below:

#### **COMMON LAW**

Employers could also be held liable at common law for negligence if anyone suffered personal injuries (either another employee or a member of the public or visitor) as a result of the activities or omissions of an employee with a drink problem who was known to the employer but who had done nothing about the problem (or the individual).

Employers could also be guilty of an offence under Section 2(1) and (2) of HASWA for failing to provide and maintain a safe system of work and to take reasonable care of the health, safety and welfare of his employees including the problem drinker himself.

#### **Distinction between drinking offences and alcoholism**

It is important to differentiate between 'drinking' offences and alcoholism.

Drinking offences should be categorised as misconduct and treated as such under the disciplinary procedure. This would include being drunk on duty, drinking on duty or possessing alcohol whilst at work.

Alcoholism on the other hand is an illness and should be treated as any illness under the heading of 'capability'.

There may be cases where such a distinction is not clear and an employer may be uncertain as to whether the drinking falls into the sickness or misconduct category.

### **Drinking offences or being under the influence of drink or drugs whilst at work**

First, it is important to look at the disciplinary rules to see what they say about drinking on duty or being at work whilst under the influence of drink or drugs. It is certainly accepted by the Tribunals that employers are entitled to treat such offences as gross misconduct and dismiss anyone who commits such an offence. Where employers have lost a case of this nature it has generally been because of some substantial breach of procedure.

If the nature of the industry would render it dangerous for any employee to drink whilst on duty, then you should spell this out in the rules, under the heading of 'gross misconduct' and display notices to this effect.

Industries such as the chemical industry, manufacturing companies with dangerous machinery, construction companies and the Health Service are examples where 'no drinking' rules are obviously important since there are other consequences of drinking, such as, breaches of health and safety requirements, accidents to other employees or members of the public, which could result in negligence claims against the employer.

There are certain industries where specific regulations prescribe the question of alcohol on the plant. The food industry is one example, the effect of the Food Act 1984, Schedule 11 is to make it unlawful for anyone dealing in the manufacture of food or drugs to bring any glass, including glass bottles, near the manufacturing process. So it is a common rule in food manufacturing companies to ban the bringing of any drink into the manufacturing area. In these circumstances, it has been held fair to dismiss an employee who has broken this rule.

The Tribunals have stressed a number of important points:

1. It is crucial to show that the rules are clear and well understood by the workforce;
2. If possible you should agree these rules with union representatives and get them embodied in a union agreement (this was done, for example, at Yarrow Shipbuilders);
3. These drinking rules must be applied in a reasonable not rigid or inflexible way;
4. The rules should spell out the penalty, i.e. employees should know that they will normally be dismissed even for a first offence;
5. The circumstances of the case should be carefully explored before any employee is dismissed for a first offence.

Lord McDonald, then the President of the Employment Appeal Tribunal in Scotland, said in **John Walker & Sons Ltd v Walker 1984**:

*“If in any industry it is thought to be necessary to have a rigid draconian code related to certain offences it is incumbent upon the employer to spell this out with the greatest clarity in his disciplinary procedure. Even where such procedure exists and is properly followed there still remains an over-riding obligation upon an employer to act reasonably and fairly, notwithstanding the terms of his disciplinary code.”*

### **Terms in a contract**

Should it be necessary, employers may consider putting a term in the contract of employment which advises staff about the state of their health and readiness for work when they start a shift. This is particularly important for those who work evening or night shifts and who may spend several hours before their shift starts, drinking in the pub. Such a clause could read:

*“Because of the nature of our business and the need, for safety reasons, for you to start your shift fully competent and alert in a fully sober state, you will be required to conduct yourself sensibly before the start of your shift. This may mean that you will need to abstain from any alcoholic beverages/prescribed drugs several hours before your normal starting time since there may still be alcohol present in your blood and this may affect your ability to perform your duties or may potentially endanger yourself or others.*

*Anyone who presents themselves for work in a condition determined by their manager as unfit for any reason, which may include being under the influence of alcohol, or drugs (whether prescribed or not) may be suspended from duty with or without pay depending on the circumstances.*

*In normal cases, if this occurs on a single occasion, your manager will warn you either informally or formally about your condition but may decide to pay you your normal pay. On any further occasion, management reserves the right to suspend your pay and request that you return home.”*

Some employers may care to advise their staff about what sensible drinking means!

The CAA has clear rules for airline pilots.

CAA RULE	
24 HOURS BETWEEN BOTTLE AND THROTTLE	8 UNITS OF ALCOHOL
8 HOURS BETWEEN BOTTLE AND THROTTLE	NO ALCOHOL

### Examples of disciplinary rules

Employers may wish to spell out the different rules about drinking on duty, being drunk at the start of a shift and carrying alcohol into the premises. Such rules include:

1. Prohibition on the consumption of any alcohol (sometimes also food) on Company premises or during working hours;
2. Prohibition on possession of alcohol or any bottles/cans etc. on site;
3. Prohibition on presenting for work under the influence of alcohol (or drugs).

### DISMISSAL FOR BREACH OF THE RULES MUST ALWAYS BE REASONABLE

The Tribunals will always look at the reasonableness of the employer's response in dismissing for breach of the 'no drinking' rules in any given case despite the fact that the rules may classify such an offence as gross misconduct.

One cardinal rule, stated in the Court of Session in **Ladbroke Racing Ltd v Arnott and Another [1983] IRLR 154**, is 'the punishment must fit the crime'.

In many cases the employer may be able to justify the summary dismissal of an employee for breaching the no drinking rules but in others he may not.

In an EAT decision, **Weetabix Ltd v Criggie and Williamson EAT 344/89**, the employer was held to have acted unfairly in dismissing two men with 11 years' unblemished service for drinking cans of lager towards the end of the shift. Mr Williamson had a stressful domestic problem and he asked Mr Criggie to come to a rest room to discuss it. Since they had taken some cans of lager for their fishing trip after the Friday night shift had ended, which they then called off, they started drinking a couple of lagers. The machinery by this time had been

closed down. The strict 'no drinking' rules considered this offence as 'serious industrial misconduct' but laid down a range of penalties ranging from a warning, to suspension without pay, to summary dismissal.

The Tribunal (Chairman dissenting) and the EAT concluded that this conduct was not sufficiently serious to warrant summary dismissal. Taking the actual offence, the range of penalties open to the employer, the record of the men, the fact that Friday night was regarded as a 'less formal' work night, the fact that others who had more seriously infringed the alcohol rules in the past had been dealt with much more leniently, the Tribunal concluded that these dismissals fell outside the range of reasonable penalties that any reasonable employer would have adopted.

Here the EAT stressed that it was not for the Tribunal to look at the employer's policy in regard to an offence in a subjective way but to assess what would have been the response of a reasonable employer in the circumstances.

Having a policy which makes dismissal an automatic penalty, regardless of the circumstance, it not unreasonable, as long as this has been made crystal clear to the workforce.

Here the employer had laid down a range of penalties in its disciplinary code for breaches of its no alcohol rules.

(The minority view was that the men worked in the food processing industry, had long service and were well aware of the drink rules and of their employer's strict enforcement of them. Strict application of these rules was not unreasonable. The employer had said that they had taken account of the long service and domestic problems).

### **An alcohol policy**

Employers with alcohol policies are less likely to fall foul of the Employment Tribunals if dismissal eventually occurs. A policy, however, cannot be any excuse for acts of gross misconduct and it is important that the Policy makes this clear. The policy could state words to the effect that even if an employee admits to an alcohol problem, they will be expected to maintain reasonable standards of conduct, attendance and performance at work and that any act of gross misconduct such as violent behaviour, intimidatory conduct or language, act of dishonesty, damage to property or gross drunkenness at work will not be tolerated or excused by the illness and will be dealt with in exactly the same way as any other act of gross misconduct.

## Summary

1. Be honest and open with staff about the risks to health.
2. If you can, employ some form of counselling service so that employees can seek assistance at the early stages of any problem.
3. Have well publicised health policies for matters such as drug and alcohol abuse, work related upper limb disorders and 'stress'.
4. Seek expert advice when faced with specific medical problems, injuries or illness at work.