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Judgment: approved by the Court for handing down | *Delivered:* **24/09/04**

(subject to editorial corrections)

2003 No. 1886

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MICHAEL MCCOTTER

Plaintiff;

-and-

LIAM MCNALLY AND JOSEPH MCGEOWN
PRACTISING AS JOHN J MCNALLY & CO SOLICITORS

Defendants.

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Ruling on direction application

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MORGAN J

[1] The plaintiff is a solicitor who entered onto the Roll of Solicitors on 10 September 1998. He had served his apprenticeship with Francis J Irvine & Co and remained with them until 20 August 2000 when he left by agreement. He intended to seek work with some other firm that would offer better prospects of advancement and increased remuneration. He applied for a job with the defendants, the partners in John J McNally & Co, and was successful. It was agreed that he would become the principal litigation solicitor in the firm and he commenced employment on 2 January 2001.

[2] The plaintiff contends that he developed a psychiatric illness as a result of the stress to which he was exposed in the course of his employment and that the defendants were negligent in not taking steps to reduce his workload.

At the end of the evidence called on behalf of the plaintiff the defendants submitted that they had no case to answer.

[3] For the purpose of this application I have to take the plaintiff's case at its height. Accordingly I do not intend to set out the areas of dispute that arose in cross-examination before me and where there was such dispute I accept at this stage the evidence adduced on behalf of the plaintiff.

[4] The test which I apply is whether a reasonable jury of people of ordinary reason and firmness properly directed could find for the plaintiff as set out in **O'Neill v DHSS (No 2) [1986] NI 290 at 292A** by Carswell J

[5] The relevant facts are as follows:

(a) The plaintiff was employed to take over the caseload of Liam Magill who had left the firm to take on other employment.

(b) Prior to the commencement of his employment the plaintiff knew nothing about the content of those files.

(c) Upon his arrival on 2 January 2001 he found approximately fifty files in his office that required attention.

(d) While trying to deal with those files he was receiving approximately twelve phone calls per hour from clients. In order to deal with the phone calls he obtained each file to see whether he could deal with the query immediately or would need to examine the file more closely. Consequently the volume of files in the office was building up.

(e) He found difficulty coping with the workload on the first day. When he got home that evening his brother asked him how he had got on and the plaintiff burst into tears because he had found the day so difficult.

(f) The following morning he returned to work but found that he was still having difficulty and decided to leave. He packed his bags and informed Mr. McNally he was leaving.

(g) At Mr. McNally's suggestion he went up to the first floor in the building to talk to Mr McGeown. He explained to both defendants that he found the work overwhelming and that he had burst into tears with his brother the previous evening when discussing his day's work.

(h) The discussion lasted for approximately one hour as a result of which the plaintiff decided to stay on the basis of an assurance by the

defendants that they would take over Mr Magill's caseload and allow the plaintiff to build up his own client base.

(i) The plaintiff accepts that approximately half a dozen files were transferred to the defendants. He says, however, that the workload persisted at the same intensity. In order to keep up he was bringing files home every night and working often until 1am. He also had to do long hours at the weekend.

(j) Towards the end of the first week he described an incident when Mr. McNally came into his room and encouraged the plaintiff to put his professional qualifications on the wall of his office for display. The plaintiff says that he declined to do so and explained that he was still not sure as to whether he would stay.

(k) At the end of that week he went for a social drink with the partners. There was no discussion about his working conditions during that meeting.

(l) The plaintiff says that he was aware from the end of the first week that the partners had failed to honour their assurance to take over Mr. Magill's workload. Indeed he says that Mr. McGeown added to his workload by giving him additional files on a daily basis.

(m) Some weeks into his employment the plaintiff asserts that Mr. McGeown persistently rang him about doing some job for a particular client. Because of other pressing business the plaintiff did not carry out the task immediately and he says that Mr. McGeown eventually rang him and held the phone silently at his end. The plaintiff resented this treatment.

(n) The plaintiff resigned on 14 February 2001. During his period of employment he says that he was drinking at least two whiskies a night after work and more at the weekend to help him cope with his work. He felt fatigued and run down. He discussed his drinking and heavy workload with his family. On the evening of his first day at work his father had cautioned him about continuing to work at the firm but there was no other discussion about his leaving his job.

(o) In the course of his work on 14 February 2001 the plaintiff was interviewing a client. Mr. McGeown instructed his secretary to advise the plaintiff that Mr. McGeown wanted the plaintiff to deal with a client who had to be attended to urgently. The plaintiff was embarrassed in front of his own client and having established that Mr. McGeown was himself free suggested that Mr. McGeown see the client. Eventually the plaintiff received an email from Mr. McGeown

saying "not an option". After finishing with his client the plaintiff went up to Mr McGeown's room, used foul language to him and shortly thereafter left the premises having resigned his position. He was extremely upset by what he perceived to be high-handed and unreasonable behaviour by Mr. McGeown. When he reached home and had composed himself somewhat he rang Mr. McNally to explain what had happened and to advise him of the plaintiff's resignation.

(p) During that conversation the plaintiff made no complaint to Mr. McNally about the failure to honour the assurance that the plaintiff says was given on the second day of his employment and apart from the incidents set out above during the period of his employment the plaintiff made no other complaint about his workload or any effect it had upon him.

(q) Some weeks later the plaintiff obtained employment with Johnsons solicitors. Prior to taking up that position he felt he needed a holiday. While on holiday, in late March 2001, he became anxious, could not sleep and felt suicidal. He returned within two days. He developed a major depressive illness requiring a period of hospital treatment and the medical evidence is that the major contributing factor to his illness was his experience at work in the defendants' firm. Other contributing factors were a strong family history of a similar illness and the plaintiff's own pre morbid personality as a man with rather anxious personality traits. There was no evidence that either of the latter contributing factors would have been known to the defendants.

[6] The plaintiff's case is that the defendants were on notice of the plaintiff's complaint of overwork, the large volume of work with which he had to cope, which he described as organised chaos, and his emotional reaction to his working conditions on the second day of his employment. Accordingly the plaintiff contends that the defendants should have foreseen from the second day of his employment the risk of psychiatric injury to him and taken steps either by honouring their undertaking or otherwise to alleviate his workload.

[7] The legal principles applicable in a case of this kind are now to be found in the decision of the Court of Appeal in **Hatton v Sutherland [2002] EWCA Civ 76** and the later decision of the House of Lords in **Barber v Somerset CC [2004] UKHL 13.** That portion of the Court of Appeal's judgment dealing with the law was explicitly approved by Lord Walker at paragraph 63 of his opinion in **Barber** subject, perhaps, to one qualification in paragraph 65 of his opinion.

[8] The threshold question as recognised in paragraph 23 of **Hatton** is whether this kind of harm, psychiatric injury, to this particular employee was reasonably foreseeable by the defendants. Practical guidance on how that question should be approached is set out at paragraph 43 of **Hatton** as follows:

> 43. From the above discussion, the following practical propositions emerge:
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> (1) 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 (para 22). The ordinary principles of employer's liability apply (para 20).
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> (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).
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> (3) 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 (para 23). 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 (para 29).
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> (4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para 24).
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> (5) Factors likely to be relevant in answering the threshold question include:
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> (a) The nature and extent of the work done by the employee (para 26). 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?
>
> (b) Signs from the employee of impending harm to health (paras 27 and 28). 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?
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> (6) 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 (para 29).
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> (7) 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 (para 31)."

[9] Mr McCotter pointed out that Lord Walker had cautioned against elevation of practical guidance to something like statutory force at paragraphs 64 and 65 of his opinion where he said:

> "64. In particular the Court of Appeal has recognised that although injury which takes the form of psychiatric illness is no different in principle (for a primary victim) than physical illness or injury, the causes of mental illnesses
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> > '. . .will often be complex and depend upon the interaction between the patient's personality and a number of factors in the patient's life. It is not easy to predict who will fall victim, how, why or when" (para 5).'

This uncertainty has two important consequences. First, the reaction of some of Mr Barber's colleagues—"We are all overworked, and your workload is no worse than anyone else's"—is entirely understandable, but ultimately irrelevant. Overworked people have different capacities for absorbing stress, and different breaking points. Hence (and this is the second point) the importance of what the employee tells the employer. Senior employees—especially professionals such as teachers—will usually have quite strong inhibitions against complaining about overwork and stress, even if it is becoming a threat to their health. Personal and professional pride, loyalty to the head teacher and to colleagues, and the wish not to add to their problems and workload, may all influence a teacher not to complain but to soldier on in the hope that things will soon get a little better.

65. The Court of Appeal set out its view on this point in para 29 of its judgment:

> 'But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he is bound to probe further into what he is told? *Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job.* It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive inquiries. *Generally he is entitled to take what he is told by or on behalf of the employee at face value.* If he is concerned he may suggest that the employee consults his own doctor or an occupational health service. But he should not without a very good reason seek the employee's permission to obtain further information from his

> medical advisors. Otherwise he would risk unacceptable invasions of his employee's privacy.' [original emphasis]

This is, I think, useful practical guidance, but it must be read as that, and not as having anything like statutory force. Every case will depend on its own facts and the well-known statement of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783, remains the best statement of general principle:

> '. . . the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent'."

[10] I recognise that each case has to be examined on its own facts and it is to those facts that the general principle should be applied. It is clear, however,

that reasonable foreseeability in this context is not satisfied by a mere possibility of harm. If that were so it would arise in virtually every case of a person engaged in a demanding occupation. The test is whether there were indications of impending harm arising from stress at work that were plain enough for the defendants to realise that they should do something about it.

[11] In this case the plaintiff relies upon the volume of work associated with the job, the circumstances in which that work had to be performed, the fact that he had burst into tears on the first night after work, the fact that he was moved to submit his resignation with immediate effect on the second day, the fact that he was relatively inexperienced and the fact that the defendants agreed to reduce his workload as an indication of their knowledge that the workload was heavy.

[12] The plaintiff took on a demanding job in a new firm. He clearly had doubts about his capacity to do the job during the first day. That experience gave rise to a single emotional reaction on the first evening at home and a decision to resign the following day which was reversed approximately an hour later. It is common case that the defendants were anxious to encourage the plaintiff to continue in his employment but I do not consider that a properly directed jury could conclude on the facts established in this case that the defendants were ever placed in a situation where they had to consider taking steps to protect the plaintiff's psychiatric health.

[13] Accordingly I accede to the defendants' application and the plaintiff's case must be dismissed.

[14] Finally I consider it appropriate to acknowledge the skill, composure and expertise that the plaintiff displayed in personally presenting a case about which he clearly feels strongly.