THE BUSINESS CASE
SECTION 1

The management standards are a set of principles to help employers comply with the law.

West Dorset General Hospital NHS Trust received the first improvement notice for failing to assess the risk of work-related stress to its staff. There were a number of specific reasons for this:

The absence of work-related stress policy and risk assessment regarding work-related stress.

A junior member of staff with management responsibilities had made a complaint regarding work-related stress.

The Trust admitted that they knew of several cases of stress related ill-health and resignations and suspected there were more.

A previous inspection had advised that a work-related stress risk assessment was needed.

The trust indicated that it did not intend to take action within the next 12 months.

The trust took a number of steps to address this and they have been summarised below:

- They worked with Exeter University to assess exposure to stressors.
- Developed a comprehensive action plan.
- Trained bullying and harassment advisors.
- Introduced a new appraisal process.
- Appointed a communications manager.
- Introduced a stress policy.

After these steps were implemented Robert Pascall, Director of Human Resources at the Trust stated this achieved “The long term good of our staff and better service delivery.”

Civil Prosecutions

There have been a number of successful civil actions taken by employees for work-related stress. Decisions from civil cases often influence subsequent criminal legislation.

Employee Is Entitled To Treat Psychiatric Injury Caused By Negligent Work Practice In Same Way As Physical Injury

Johnstone v Bloomsbury Health Authority (1991)
Dr Chris Johnstone was employed as a senior house officer and claimed that the job required him to work excessively long hours exceeding 88 hours on some weeks. He believed that this led to his symptoms of depression, stress and suicidal feelings. When on holiday after a 110 hour working week he fell asleep at the wheel of his car and drove into a tree. He resigned from his work and brought a case against his employer.
Settled out of court – settlement of £5,500 plus costs.

Walker v Northumberland CC (1995)
John Walker worked for Northumberland County Council as an Area Social Services Officer manager. During the 80's the number of child abuse cases increased dramatically. In 1986 he suffered a nervous breakdown. When he returned to work he asked to be relieved of some of the pressure at work and he was provided with a principal field worker to assist him on a temporary basis. The assistance was short lived. A large backlog had accumulated during his absence. He was requested to clear the backlog in addition to recommencing his normal duties. His stress symptoms increased, he went on sick leave. He suffered a second nervous breakdown and was obliged to retire from work. He claimed that the council failed to take reasonable steps to avoid exposing him to excessive workload which was a risk to his health.

Issues raised in the Walker decision:

- "Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employee as distinct from injury to his mental health, there is no logical reason why risk of psychiatric injury should be excluded from the scope of the duty of care".
- An employer's unreasonable conduct regarding taking steps to minimize stress at the workplace, and also by exposing the employee to high levels of stress through a heavy workload may be considered a fundamental breach of contract. The employee could claim constructive dismissal and claim for damages.
- If the employers conduct is sufficiently serious the employee would be entitled to leave at once. If the employee continues to accept the situation after making the complaint, the employee may lose the right to treat himself as discharged, and will be regarded as having elected to affirm the contract.
- The onus is on the employee to notify his employer of heavy workload demands.

Following the precedent set by the case of Walker v Northumberland County Council the number of stress related legal actions brought before the Civil Courts has increased year by year.

Sutherland (Chairman of the Governors of St Thomas Beckett RC High School) v Hatton (2000)
Penelope Hatton taught French at a comprehensive school in Huyton, Merseyside for 15 years. She became depressed and took several lengthy absences over the next couple of years for personal and family reasons. Within a year of seeing a stress counsellor, to whom she did not report symptoms, she went sick with depression and did not return to work.
The County Court's view was that Hatton's condition was not reasonably foreseeable given the nature of her workload and the reasons for and pattern of absence. She was awarded £90,765 damages. She appealed resulting in the court of appeal judgement.

Long v Mercury Mobile Communications Services. (2001) This case establishes a precedent of one stress breakdown rather than the two stress breakdowns required by the judgment in Walker v Northumberland County Council. Jeffery Long was a successful telephone procurement manager with no previous history of psychiatric injury. He was asked to provide a confidential report, which implicated his line manager, Simon Stone, in mismanagement. The report was disclosed to his line manager who then immediately carried out a "vendetta" against Mr Long. This vendetta involved wrongfully blaming him for the mismanagement, taking important procurement contracts from him, making unfounded allegations against him of abusing customers and breach of confidence resulting in suspension, and placing orders without authority. The Claimant complained to the Personnel Manager about this conduct but not about the effect it was having upon him. The Personnel Manager in turn complained to the Managing Director who did nothing because he favoured Stone. Eventually, the Claimant was separated from Stone by being demoted. Mr Long suffered an adjustment reaction. The Defendants had to admit liability on the third day of the trial and fought damages. Awarded £327,000.00 damages with indemnity costs.

Sutherland v Hatton et al (2002) Court of Appeal Judgement
In 2002 after hearing four appeal cases headed by Sutherland v Hatton (and including Barber v Somerset County Council), Lady Justice Hale outlined a number of practical propositions to assist courts in dealing with future claims for psychiatric injury arising from stress at work. The judgement focuses on foreseeability and when the duty of care arises.

Practical Propositions

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. The ordinary principals of employer's liability apply.

2. The threshold question is whether this kind of harm to an employee was reasonably foreseeable. This has two components:

   - An injury to health (as distinct from occupational stress), and
   - Which is attributable to stress at work as distinct from other factors

3. Foreseeability depends on what the employer know (or ought reasonably to know) about an employee. Because of the nature of a 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 they know of some particular problem or vulnerability.

4. The test is the same whatever the employment. There are no occupations that should be regarded as intrinsically dangerous to mental health.

5. Factors likely to be relevant in answering the threshold question include:
   - The nature and extent of the work done by the employee.
   - Signs from the employee of impending harm to health.

6. The employer is generally entitled to take what they are told by the employee at face value, unless they have good reason to think to the contrary. They do not generally have to make searching enquiries of the employee or seek permission to make further enquiries of their medical advisers.

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 they should do something about it.

8. The employer is only in breach of duty if they have 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 that harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

9. The size and scope of the employers 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.

10. An employer can only reasonably be expected to take steps that are likely to do some good. The court is likely to need exert evidence on this.

11. 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. (See key points from subsequent Intel Corporation UK Ltd v Tracey Ann Daw case)

12. If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of its duty in allowing a willing employee to continue in the job.
13. In all cases it is necessary to identify the steps that the employer both could and should have taken before finding them in breach of their duty of care.
14. The claimant must show 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.
15. Where harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to their wrong doing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
16. 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.

Young v The Post Office (Court of Appeal 2002)

(This was the first decision from the Court of Appeal following the Sutherland v Hatton case) Morris Young worked for the Post Office initially as a transport technician and was promoted regularly, becoming a workshop manager in 1993, leading to more work and more responsibility and pressure. The court found that despite telling his superiors repeatedly he was not coping with the pressure in effect nothing was done. The court found that the Post Office had been negligent by not taking sufficient trouble to monitor that an employee, who had suffered two breakdowns, was not exposed to conditions, which he found stressful. The Post Office had mainly relied on the employee telling them that he was still finding problems at work after his return. The court found that this was not an acceptable excuse and ruled that although he had not been heard complaining about stress, it was plainly foreseeable that there was a risk of recurrence upon his return to work.

This case considered the issues of:

1. Is it the responsibility of the claimant to notify his employer if he is finding the working environment stressful and can not cope?
2. Can the claimant be guilty of contributory negligence for failing to bring his circumstances to the attention of the employer?

Regarding the first point the Post Office has offered a remarkably flexible environment to which Mr Young could return. He could work the hours that he wished and go out for a walk if he chose. However the employers did not monitor what happened on Mr Young's return. He ended up, through the absence of another manager, back in the management role which had caused his absence initially.

Regarding the second point, the court did not criticise Mr Young for failing to mention his increased stress levels to his employer because he was accepted as a conscientious worker who would endeavour to do the best he could.

The main point from this case is that an employer, knowing of an employee's mental state, is under an obligation to not only design a less stressful working environment, but to ensure that it is implemented.

2004 House of Lords Judgement

This judgement refers to the Barber v Somerset Co Council case. This decision provides a broad view as to what an employer should do once a duty to take reasonable care has become evident. The key points are noted below:

Key points:

1. An "autocratic and bullying style of leadership" which is "unsympathetic" to complaints of occupational stress are factors that courts can take into account in deciding whether there has been a breach of duty.
2. Employers must keep up-to-date with the developing knowledge of occupational stress and the probable effectiveness of the precautions that can be taken to meet it.
3. Once an employer knows that an employee is at risk of suffering injury from occupational stress he is under a duty to do something about it. This duty continues until something reasonable is done to help the employee.
4. Employees who complain do not need to be forceful in their complaints and need not describe their troubles and symptoms in detail. After all, they may be ill at the time when they are complaining. Their complaints should be listened to sympathetically.
5. Certified sickness absence due to stress or depression needs to be taken seriously by employers. It requires an inquiry from the employer about the employees' problems and what can be done to ease them. They should not be brushed off unsympathetically or by sympathising but simply telling him or her to prioritise his work without taking steps to improve or consider the situation further.
6. A management culture that is sympathetic to employees suffering from occupational stress and "on his side" in tackling it, may make a real difference to the outcome. Monitoring employees who are known to be suffering from occupational stress is mandatory. If they don't improve more drastic steps may need to be taken to help them. Temporary recruitment may be required. Although this will cost money, it will be less costly than the permanent loss through psychiatric illness of a valued member of staff.

Hiles v South Gloucester NHS Primary Care Trust (2006)

Ms Hiles, a health visitor, expressed her difficulty in coping with an increased workload to her manager on a number of occasions. Her workload was not kept under review as promised and she developed a complete nervous breakdown. Incidents when she exhibited signs of distress were identified as evidence of foreseeability and was declared that her employer had breached its duty of care. Ms Hiles was awarded damages of almost £62,000.

Intel Corporation UK Ltd v Tracy Ann Daw (2007)

Ms Daw suffered a psychiatric breakdown caused by overwork. The Court of Appeal found the employer negligent in failing to take steps to obviate the risk of an employee suffering a nervous breakdown when she had previously complained of overwork and she had a history of depression. The court found Intel should have taken immediate action, and dismissed the argument that the provision of a counselling service to Daw was sufficient to discharge its duty towards her. The Court of appeal made the points below.

Key Points

- Once an employee has raised the issue of stress the situation must be kept under review so that the employer is in a position to take immediate action to prevent the employee from suffering a psychiatric injury.
- If following a complaint of stress, an employer offers to implement a system to reduce the level of stress the system must be implemented.
- The mere fact that an employer offers a counselling service does not automatically absolve the employer. Whether or not the counselling services are enough to discharge an employers duty depends on the facts of each case.
- The fact that an employee had a history of psychological injury does not, in itself, mean that they are at greater risk of stress related depression than other employees.
- It is not a rule of law that an employee who does not resign when stresses at work are becoming excessive necessarily loses a right of action against the employer.

Dickens v O2 Plc (Court of Appeal -2009)

Ms Dickens suffered a breakdown in 2002 having already warned her line manager of employment related stress. In 2003 she took proceedings to the County Court following a further warning to the employer and extended sick leave from which she never returned. The County Court Judge found for her with significant reliance on the "Hatton" guidance but adjusted damages to 50% as it was common case that Ms Dickens was, "...of a personality that rendered her psychologically vulnerable." 02 appealed on grounds that Ms Dickens problems "where not fully foreseeable to them and she had been referred to the company counselling service." 02 also relied on the assertion that Ms Dickens problems should be more appropriately apportioned to her failings in work performance and breach of duty.

The Court of Appeal ultimately rejected 02's Appeal finding,
"....where it is not scientifically possible to say how much that contribution is and where the injury to which that led is indivisible, it will be inappropriate simply to apportion damages across the board."

Key Points

- The case, again, emphasises that reference to a company counselling service is not a defence on its own.
- Courts will significantly reduce an award if the claimant has other contextual or historical stress indicators or psychiatric history which cannot be related to the work.
- It is possible to argue that the stress was not caused by negligence by the employer but by failings of the employee but this must be evidentially established.

Jones v Jewson Ltd (Building Merchants) (Employment Tribunal Decision 2010/11) – Subject to appeal

Mr Jones was a 55 years old branch manager with Jewson's with 22 years' service when he suffered a severe stroke which lead to 5 month's recovery. Prior to the stroke he had averaged 60 hours working time per week and had not taken his full holiday entitlement for some years persistently rolling it over. His GP advised that he needed to avoid stress on his return to work but the employer decided there was no role within the company which was without stress and dismissed him on grounds of incapacity under the Employment Rights Act. Mr Jones case was multi jurisdictional and included a Disability Discrimination claim. The Employment Tribunal (ET) found for Mr. Jones accepting that Jewson's had failed to consider a reasonable adjustment which could have been achieved with some reallocation of duties and greater managerial support. The ET further viewed Jewson's as having been complacent in accepting that working practices of long hours was necessary.

The ET awarded Mr. Jones £390,870.

Key points

- This was the third highest reward ever in this area as it incorporated a Disability Discrimination claim and considered future loss.
- The acceptance of a "long hours" culture without the ability to prove it's necessity proved costly for Jewson's.
- The need for serious and demonstrable analysis of options for reasonable adjustment was clearly emphasised.

N.B. THIS CASE REMAINS SUBJECT TO APPEAL AT THE TIME OF PRINTING.

Also Liability For Stress Caused By Abuse And Physical Danger In The Workplace

Ingram v Worcestershire County Council (1999)

A warden employed by the council to oversee a travellers site frequently had his decisions undermined by other council officers. This damaged his working relationships with the residents, resulting in both physical and verbal abuse. He eventually gave up work because of ill-health.
Settled out of court – Settlement of £203,000.

Also Liability For Stress Caused By Bulling And Harassment In The Workplace

Ratcliffe v Dyfed County Council (1998)

Deputy Head teacher Anthony Ratcliffe had suffered a series of mental breakdowns through his work circumstances (being bullied by his Head teacher).
Settled out of court – Settlement of £101,028.

McLeod v Test Valley Borough Council (2000)

Roderick McLeod a former senior housing benefits officer suffered psychiatric injury culminating in a stress breakdown caused, he alleged, by bullying, harassment and abuse of his line manager at Test Valley Borough Council in Andover, Hampshire.
Settled out of court – Settlement of £200,000.

And By Redeployment And Changing Job Roles

Lancaster v Birmingham City Council (1998)
Beverley Lancaster, a former employee of Birmingham City Council suffered from work- related stress that forced her to retire as a council housing officer at the age of 41. She worked for the council for 26 years mainly in clerical and technical roles. When her post was abolished, she was appointed as a housing officer. She had neither experience nor qualifications for this role and was not given the support and training promised. During the subsequent 4 years she was off work sick for half that time. She was diagnosed as suffering from depression and later from work-related stress. She approached her employer on many occasions but felt her concerns were not taken seriously.

The employer admitted liability for the stress caused at work. (Many cases settle with the claimant receiving a sum of money but the employer does not admit liability). Awarded £67,000 in damages.

Pocock v North East Essex Mental Health Trust (1998)
This case made further legal history - the first time that a widow had received damages for the suicide of her husband caused by stress at work. Richard Pocock's suicide, which followed the announcement of the closure of the hospital where he had worked for two decades, was described by Jeffrey Burke QC as being "directly attributable to the stress he had been under at work" and that "it was quite clear that he was going to lose his job".
Widow received £25,000 in an out of court settlement.

Post Note

It has been suggested that four ingredients need to be in place for litigation to take place. These include:

- A disenfranchised victim.
- A responsible party.
- A lawyer.
- A fund of accessible money.

It was said “You cannot prevent the disenfranchised victim from seeking legal advice; nor do you control the issue of litigation once the damage is done. By causing the conditions which result in injury, you lose control of the legal consequences.”

In the case of work-related stress, an employee has the option of suing his employer for breach of contract, negligence or breach of statutory duty in the County Court or the High Court. Alternatively he may make an application for unfair dismissal, constructive dismissal or discrimination to an employment tribunal.

To make an application for unfair dismissal to an Employment Tribunal, an employee must have had continuous employment with the same employer for at least one year prior to the effective date of termination of employment, and must have been dismissed. Dismissal covers the termination of the contract of employment by the employer, the non-renewal of a temporary contract, and constructive dismissal. It is for the employer to show the reason for the dismissal; and that it is a reason which relates to capability or qualifications, conduct, redundancy, contravention of a statute or some other substantial reason. Capability, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality. It may thus include stress or a stress related illness.

Other possible sources of action arising from employment legislation which may aid employees suffering stress at work, caused by discrimination, bullying, underpay and overwork include the Fair Employment and Treatment (NI) Order 1998 (as amended), Sex Discrimination (NI) Order 1976, the Race Relations (NI) Order 1997 (as amended) and the Disability Discrimination Act 1995 (as amended), and also legislation referring to the national minimum wage and the Working Time Regulations 1998. In cases of discrimination it is for the individual employee to bring an action for discrimination against the employer before an Employment Tribunal.

Under the Disability Discrimination Act 1995 (as amended), for example, "A person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". This has subsequently been broadened.

There is the additional consideration of mental distress in the workplace following the introduction of the revised definition for disability in the Disability Discrimination Act 2005. Employers are obliged to support the employee and make role adjustments to facilitate continued employment if they are aware of an employee's condition.

Claimant employees perspective

In order to prove an employers liability for psychiatric injury, a claimant employee is required to demonstrate the following:

1. That the employer has breached the duty of care owed to the employee to provide a safe place of work and to keep him safe from harm.
2. That the employee is suffering from recognisable psychiatric illness, which is not simply stress but clinical depression or post-traumatic stress disorder.
3. That recognisable psychiatric injury was caused by the employer's negligence and not by any other factors.
4. That the stress to which the employee was exposed was sufficient to create "a reasonably foreseeable risk of injury".

Employers considerations

1. Do we recognise the existence of stress?
2. Do we recognise that the decisions and actions that we take may result in stress and stress-related ill health amongst our employees?
3. Is there evidence to suggest the presence of stress in certain employees who may have higher than average sickness absence rates?
4. Is it possible to reorganise work practices and systems to eliminate or reduce the stress on certain employees who may be displaying manifestations of stress at work?
5. Is there a company policy on stress at work, supported by information, instruction and training of staff, together with other forms of support, such as counselling on stress-related issues?
6. Would an occupational health service be of assistance in dealing with this problem?

See case studies in Section 6 Action Plans for further information which helps demonstrate the business case for addressing work-related stress.

1.5 Presentation on the Business Case for Managing Work-Related Stress