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Psychiatric injury due to Workload

Shubham Damani

INTRODUCTION

Psychiatric injury due to the workload basically deals with the mental trauma that one suffers due to the overburdening of work. It is becoming quite prevalent in this 21st century world, where companies are racing to make huge chunks of profit and in that race of making money, the workload and the pressure gets delegated to the employee. It is very recent phenomenon in law of torts that the pure psychiatric injury is treated at par with the physical harm. Earlier, courts would only recognise either pure physical injuries or psychiatric injury along with physical injuries.

The psychiatric injury due to the work pressure is a subset of pure psychiatric harm. Employers nowadays, in this capitalistic market scenario, expose their employees to a lot of workload and undue pressure, which results in psychiatric damage and other severe repercussions. Courts have by now seen a lot of such cases, but there are still no concrete rules on which the decisions can being taken. It is still developing; we come across new rationales with every new case judgement. It is very hard to determine the liability of employer towards his/her employee because they make their employees work under a legitimate contractual relationship. This is how it becomes a very relevant topic for research in order to determine the extent of employer's liability towards his/her employee, pertaining to pure psychiatric harm.

ESTABLISHING NEGLIGENCE

Now the first thing is to determine whether the employer's conduct of not taking care of the burden of work on the employee, amounts to negligence or not? For establishing negligence, three elements have to be fulfilled: -[1]

1. Duty of care
2. Breach of that duty
3. Consequent damages

There is no doubt that employees face damages in this regard i.e. psychiatric harm (which have been so far recognised by courts as a valid sort of damages) but before jumping to damages, it has to be determined whether the employer owes a duty of care or not. And if yes, then what amounts to the breach of that duty.

[1] Psychiatric injury in the workplace and negligence | Lexology, Lexology.com (2019), https://www.lexology.com/library/detail.aspx?g=1f4bb3d0-7e38-4ada-abb0-1179ff8d19bc. (last visited Oct 5, 2019).

In legal discourse, there is a maxim called 'Volenti Non Fit Injuria' which means that one who consented for the harm or injury, does not have a remedy under the Law of Torts.[2] This principal is quite significant with respect to the duty of care because it can be argued that the employee had voluntarily consented for the work and hence the employer cannot be held liable for the psychiatric injury suffered by the employees. One more factor which is quintessential for establishing duty of care is 'reasonable foreseeability' as given in "*Donoghue v Stevenson.*"[3] Psychiatric injury or mental breakdown is not something which an employer could easily foresee and hence, it becomes quite important to adjudge the extent of reasonable foreseeability, that an employer should exercise with respect to the mental condition of his/her employees.

Now as far as the breach of duty is concerned, it becomes quite imperative to determine the 'standard of care' that an employer is expected to exercise to avoid or mitigate the psychiatric pressure that an employee could go through. And non-fulfilment of that 'standard of care' would amount to the breach of duty. The contention lies in the fact that different people have variegated mental capacity, then what amounts to a reasonable standard of care, becomes hard to determine. There is a well-established legal doctrine known as 'egg shell skull rule'[4] which means that 'Take the person as you find him'. It implies that a defendant cannot take the defence of the sensitivity of the victim, which in fact materialize the severity of the injury that a person goes through.[5] Now in the context of psychiatric harm, it would mean that some employees could enjoyably manage a huge burden of work while some would easily break down with a little pressure of work. So the problem here is whether it is fair to apply 'egg shell skull rule' in this context. If yes, then won't it open the floodgates of imposition of liability on employers and if no, then what could be a fair 'standard of care' that employer should exercise?

This article is meant for delving into these complex questions and thereby develop a critical understanding with this subject matter.

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[2] Volenti Non Fit Injuria - Law Times Journal, Law Times Journal (2019), https://lawtimesjournal.in/volenti-non-fit-injuria/ (last visited Oct 5, 2019).

[3] Donoghue v Stevenson, UKHL 100, SC (HL) 31, AC 562, 26 may,1932.

[4] Crosley Firm, What Is the Eggshell Skull Rule and How Does It Apply to Texas Car Accident Cases? Crosley Law Firm (2019), https://crosleylaw.com/blog/eggshell-skull-rule-apply-texas-car-accident-cases/ (last visited Oct 5, 2019).

[5] Ibid.

ESTABLISHING THE DUTY OF CARE

The very first step in determining the liability of employer towards his employee with regard to psychiatric damage due to workload, is to establish the duty of care of employer towards his employees. The extent of duty of care differs with the relation of the defendant's conduct with the claimant. Claimants can be classified in two categories i.e. Primary victim and Secondary victim[6]. Primary victim is the one who is in the immediate range of reasonable foreseeability of suffering harm, as established in "Alcock v Chief Constable of South Yorkshire Police"[7]. The injury could be physical harm, pure psychiatric harm or a combination of both. Whereas the secondary victim is the one whose injury cannot be attributable to the direct consequence of the claimant's conduct or who cannot be considered in the immediate range of reasonable foreseeability.[8]

Now it has to be seen whether the employee who has suffered psychiatric injury due to the workload and excessive stress imposed by the employer, comes under primary victim or secondary victim. And for determining this, we have to throw light and unpack the term 'Immediate range of foreseeability.' The next factor that has to be resolved in order to establish duty of care is the contractual relationship because employers often make a seemingly valid defence that they have a contractual relationship with the employees with respect to the work imposed on them and hence, they don't owe a duty of care towards their employees.

For the purpose of seeing the scope of foreseeability in work-induced psychiatric harm and the validity of contractual relationship, the article intends to peep into the jurisprudences of United Kingdoms and Australia, for a holistic understanding of subject matter.

REASONABLE FORESEEABLITY AND VOLENTI NON-FIT INJURIA

UNITED KINDOM'S JURISPRUDENCE

The initiation of the establishment of a stable authority with regard to the work-induced psychiatric injury, took place only in 1995. It was remarkable and popular case of "Walker v Northumberland County Council"[9]. It was the first English case where the employer was held liable for putting stressful work and not providing any assistance or additional aid to employee. Two previous

[6] Negligence Liability to Primary Victims of Psychiatric Illness, Leong Huey Sy, Susanna* and Ter Kah Leng, (1996) 8 SAcLJ 213.

[7] Alcock v Chief Constable of South Yorkshire Police ,1 AC 310, 28 December, 1991.

[8] Ibid.

[9] *Walker v Northumberland County Council***,** 1 All ER 737, 1995.

English cases were relied upon in this case. Although the claims of employees in those cases were not successful, the principles laid down by judges were taken into consideration. The first one was a 1992 case "Johnstone v Bloomsbury Health Authority"[10] where Judges held that contracts cannot be held as a good defence. Even though, the contractual relationship exists between employer and employee then also employer owes a duty of care towards employee.[11] The second one was a 1993 case "Petch v Customs and Exercise Commissioners"[12]. Here, in this case, judges ruled that after initial breakdown, it becomes foreseeable for the employer that the work stress could now leads to several subsequent repercussions.

Walker case uphold these principles and held that If an injury is reasonably foreseeable then besides physical harm, employee can also claim for psychiatric injury. It is the duty of employer, to "provide a safe system of work."[13]

This authority established by the court kept running until 2002, when the courts realised that the law has gone too far and opened floodgates for many cases. In 2002, the judgment on the famous case of "Hatton v Sutherland"[14] came. In this case judge Hale LJ, realised the problem of setting the threshold for duty of care either too low or exorbitantly high. To resolve the problem; sixteen propositions were categorically given by him which is still used as an important authority. The main essence of the propositions laid down is that the employer holds duty of care towards his employees and the question of threshold for reasonable foreseeability was answered by setting certain relevant factors. For instance – the nature of the work, evident signs from employee pertaining to stress and depression etc. It can be explicitly mentioned by the employee as well as implied from his conduct and situations. Unless and otherwise, any evident sign is made known to employer; he/she can always assume that the employee can handle the normal work pressures of the job.[15]

This judgement and principle were supplemented and strengthened by two subsequent cases. The first one was a 2004 case of "Barber v Somerset County Council"[16] which added an aspect to the Hatton's case i.e. mere absence of the employee is an indicator and promulgator for the employer to inquire about the employee. It also added that mere employment contract can't be considered to evade duty of care and the content of duty of care should also be seen. The second one is a

[10] Johnstone v Bloomsbury Health Authority, QB 333, 1992.
[11] Ibid.
[12] Petch v Customs and Exercise Commissioners, [1993] ICR 789.
[13] Supra Note 9.
[14] Hatton v Sutherland, EWCA Civ 76, February 5, 2002.
[15] Handford, Peter, Liability for Work Stress: Koehler Ten Years On (2017). (2015) 39(2) University of Western Australia Law Review 150; UWA School of Law Research Paper.
[16] Barber v Somerset County Council, ICR 457, 1 April, 2004.

2005 case of "Hartman v South Essex mental and community care NHS"[17]. It has not substantially added anything but have affirmed the validity of the Hatton's judgement.

Subsequent cases before the courts, like- "Hone v Six Continents Retail Ltd."[18], "Sayers v Cambridgeshire County Council"[19] etc. were decided on these authorities and they have not substantially contributed to our understanding of reasonable foreseeability and contractual relationships. So, till 2015, the prime authorities in the cases related to work-induced psychiatric injury were "Hatton v Sutherland" and "Barber v Somerset County Council".

Finally, a recent authority of 2015 in the case of "Easton v B&Q pic"[20] came, which substantially talked about the content of duty of care and laid down certain questions which have to be considered in order to determine the duty of care in different cases. These are- "*Is workload arbitrarily high? 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?*"[21] *So now, these become the yardstick to check the content of duty of care in United Kingdoms.*

AUSTRALIAN JURISPRUDENCE

First time when courts recognised employer's duty of care towards employees in psychiatric harm was in 1991 case of "Gillespie v Commonwealth"[22]. Court held that an employer can be held liable in this regard on the basis of two points. First is in regard with reasonable foreseeability where court said that foreseeability should be seen in context of remoteness of damage and not duty of care, because there is already a duty of care in employer-employee relationship. Second point is whether the defendant did something to mitigate the risk suffered by employee, or not.

But the author thinks that this presumption of duty of care exposes employer to a very high risk. It is quite improbable for an employer to anticipate the employee's mental condition till some signs are shown either impliedly or expressly.

[17] Hartman v South Essex mental and community care NHS, EWCA Civ 6, 2005
[18] Hone v Six Continents Retail Ltd, EWCA Civ 922, 29 June, 2005.
[19] Sayers v Cambridgeshire County Council, IRLR 29, 2007.
[20] Easton v B&Q pic, EWHC 880 (QB), 2015
[21] UK High Court gives useful recap on liability for stress-induced psychiatric illness in the workplace (Part 1) | Employment Law Worldview, Employment Law Worldview (2019), https://www.employmentlawworldview.com/uk-high-court-gives-useful-recap-on-liability-for-stress-induced-psychiatric-illness-in-the-workplace-part-1/ (last visited Oct 5, 2019).
[22] Gillespie v Commonwealth, 636 S.E.2d 430,1991.

Subsequent Australian cases like- "Arnold v Midwest Radio Ltd."[23], "New South Wales v Seedsman"[24] and "Sinnott V FJ Trouser Pty Ltd."[25] have not substantially added to the understanding of psychiatric harm. But with these cases, it was now unambiguous that the work-induced psychiatric harm can be recognised as one particular category of case and a claim for pure psychiatric harm can succeed if plaintiff establishes the breach of duty by employer.

The prime authority for Australian cases came in 2005 case of "Koehler v Cerebos"[26] which is still noteworthy and has so far been cited in many subsequent cases. High Court in its judgement focussed on two things i.e. content of duty of care and contract of employment. Court established a foreseeability test which says that employer has all the rights to assume that an employee is capable of and happy with the work that was assigned to him/her, until and unless he/she explicitly complains or mention about the stress, depression or mental trauma that is being faced by them. Judges rejected the proposition of only seeing 'threshold question' on duty of care, laid down in Hatton case. They also affirmed that only having an employer-employee relationship does not give rise to duty of care in context of psychiatric harm, there must also be reasonable foreseeability to establish duty of care. Now as far as contractual relationship is concerned, court ruled that an employer may not be held liable as long as the performance of work carried out by the employee, is in accordance with the contract of employment. "And the notion of 'overwork', 'excessive work', or the like have meaning only if they appeal to some external standard."[27]

This authority is still having the most important bearing on Australian cases and no subsequent cases like: - "Czatyrko v Edith Cowan University"[28], "AZ v Age"[29] etc. have gone in contradiction with it.

BREACH OF DUTY

After establishing the provisions regarding the duty of care, the next thing to establish is the standard of care that an employer must adhere to in order to keep his/her employee safe from work-induced psychiatric injury. The problem lies in determining a just and reasonable standard of care because different people have different mental capacity; so to what extent should an

[23] Arnold v Midwest Radio Ltd, QCA 020, 1999.
[24] New South Wales v Seedsman, 217 ALR 583, 2000.
[25] Sinnott V FJ Trouser Pty Ltd, VSC 124, 2000
[26] Koehler v Cerebos, 222 CLR 44, 2005.
[27] Supra Note 15.
[28] Czatyrko v Edith Cowan University, 214 ALR 349, 6 April, 2005.
[29] AZ v The Age, (No 1) VSC 335, [18]- [38], [2013].

employer be compelled to exercise care towards his/her employee. Also it has to be looked, whether 'egg shell skull rule' should be considered in determining standard of care, or not.

There are some factors which have to be looked upon in order to determine the reasonable standard of care. One of those factors is: - Seriousness of harm.[30] For the purpose unpacking this factor; author would look at several case laws along with the empirical researches that have so far been conducted to determine the detrimental impact of workload stress.

SERIOUSNESS OF HARM

It is already being established that the increase in the seriousness of harm would also increase the standard of care that one has to take to avoid the mishaps.[31] The seriousness of harm due to work-induced psychiatric injury is being highlighted by several empirical researches. These work shows, how workload and stress seriously affect the mental as well as physical health of an employee.

One such work is done to establish the relationship between mental workload and musculoskeletal disorders. The research study was done on office personnel, which were randomly selected and it was established that mental workload is directly proportional to the level of fatigue, stress, insomnia and sleep quality. And they in turn plays a mediating role in leading to musculoskeletal disorders. "*Musculoskeletal disorders are basically soft-tissue injuries caused by sudden or sustained exposure to repetitive motion, force, vibration, and awkward positions. These disorders can affect the muscles, nerves, tendons, joints and cartilage in upper and lower limbs, neck and lower back.*"[32]

One could see the snowballing effect of mental workload. It turns round to several physiological problems and ultimately results in Musculoskeletal disorders. It could be inferred here that the increase in mental workload has various devastating and serious repercussions. Besides mental injury, it several times has its impact on physical health. Hence, the author feels that the seriousness of harm is quite high and hence, the standard of care should be set at a higher pedestal.

Another piece of work, very substantially establishes the correlation between chronic work-stress with a syndrome called, burnout.[33] "*Burnout is a significant predictor of the following physical consequences: hypercholesterolemia, musculoskeletal pain , respiratory problems, hospitalization due to cardiovascular disorder,*

[30] 103 (2019), https://treasury.gov.au/sites/default/files/2019-03/R2002-001_Foreseeability.pdf (last visited Oct 5, 2019).

[31] Ibid.

[32] Does mental workload can lead to musculoskeletal disorders in office workers? Suggest and investigate a path, Taylor & Francis (2019), https://www.tandfonline.com/doi/full/10.1080/23311908.2019.1664205 (last visited Oct 5, 2019).

[33] Salvagioni DAJ, Melanda FN, Mesas AE, González AD, Gabani FL, Andrade SMd (2017) Physical, psychological and occupational consequences of job burnout: A systematic review of prospective studies. PLoS ONE 12(10): e0185781. https://doi.org/10.1371/journal.pone.0185781.

type 2 diabetes, changes in pain experiences, prolonged fatigue, headaches, gastrointestinal issues, coronary heart disease, severe injuries and mortality below the age of 45 years. The psychological effects were insomnia, depressive symptoms, use of psychotropic and antidepressant medications, hospitalization for mental disorders and psychological ill-health symptoms. Job dissatisfaction, absenteeism, new disability pension, job demands, job resources and presentism were identified as professional outcomes."[34]

As one can see that a lot and lot of complicated problems could squeeze in, over a period of time, if they do not get attenuated; it becomes the duty of employer to take reasonable standard of care and not let his/her employees suffer some such kind of perils.

Now there are some cases also, which tried to establish a just and reasonable standard of care. One is an 1991 Australian case of " Gillespie v Commonwealth"[35], court held that if an mental injury to the employee passes foreseeability test then it becomes the duty of the employer to 'obviate it or at least mitigate it'.

Another one is an 1993 English case, "Petch v Customs and Excise Commissioners"[36]. In that case judges ruled that after the initial breakdown, it become the absolute duty of the employer to reasonably foresee the occurrence of subsequent breakdowns and take appropriate steps to avoid that injury. A more recent and very important authority was a 2002 ruling in the case of "Hatton v Sutherland"[37]. Judge Hale LJ in his 16 propositions very clearly stated that employers are in a breach of duty, if they fail to take appropriate actions to avoid the unusual harm to employees, taking into the account – "gravity of harm, seriousness of harm, the cost involved in the prevention of harm and so on."[38]

Through these research, article and case laws; author tend to establish that seriousness of harm is quite exorbitant in the cases related to the psychiatric injury due to workload and hence the threshold of standard of care should be set at somewhat higher pedestal so that the employer doesn't ignore the mental pressure of his/her employees and carry out alternative ways to attenuate their stress and work pressure.

EGG SHELL SKULL RULE OR NORMAL FORTITUDE

Egg shell skull rule basically implies that the defendant cannot take the defence of the frailty and weakness of the plaintiff. In simpler sense it means, one have to take the victim as one finds

[34] Ibid.
[35] Supra Note 22.
[36] Supra Note 12.
[37] Supra Note 14.
[38] Ibid.

him/her.[39] Whereas Normal fortitude implies that a person is required to take standard of care, keeping in mind the person of normal mental capacity i.e. one who is not clinically prone to suffer psychiatric injuries.[40]

In an 1996 psychiatric harm case, that is of "Page v Smith"[41], House of Lords held that, if there is an injury caused to 'primary victim' then the egg shell skull rule will have its effect and the presumption of standard of care will be set high. This ruling gave the basis for arguing in favour of egg shell skull rule in the cases of work-induced psychiatric injury, as the victim here conforms to be a primary victim.

The author here intends to establish a clear relationship between egg shell skull rule and psychiatric injury due to workload. The notion behind the application of egg shell skull rule is that the defendant should not be absolved from the quantum of damages (even if it normally does not occur) as long as the pinch of harm to others is foreseeable and subsequently the duty to take care is breached. But in work-induced psychiatric injury; quantum of burden of work that would be sufficient to incur the psychiatric damage to the employee cannot be determined if the employee does not give any evident sign about his/her sensitivity about the work. If it is not informed in advance, then the employer cannot reasonably determine the standard of care that he/she must take. But it is a fact that if employer imposes on the employees, unreasonable and arbitrary workload then he/she cannot take the defence of the extent of damages that it causes, because the burden of the work itself was arbitrary and the damage suffered can vary depending on the mental capacity of an employee i.e. if it is evident to the employer about the risk of harm to the employees, he/she cannot be absolved from the amount of damage by taking the defence of sensitivity and frailty of employee. Hence egg shell skull rule applies in the cases of psychiatric injury due to work load.

There are some authorities too that accept the egg shell skull rule to be applied in work-induced psychiatric harm. One such authority comes in a 2002 case "Tames v New South Wales"[42], where judges held that normal fortitude is not necessarily be considered as a prerequisite for the liability of psychiatric injury. Another such case is "AZ v Age"[43]. It is a 2013 case where judges recognised egg shell skull rule and rejected Normal fortitude as an essential condition for claiming the breach of duty.

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[39] Crosley Firm, What Is the Eggshell Skull Rule and How Does It Apply to Texas Car Accident Cases? Crosley Law Firm (2019), https://crosleylaw.com/blog/eggshell-skull-rule-apply-texas-car-accident-cases/ (last visited Oct 5, 2019).

[40] Duty - psychiatric injury, Uni Study Guides (2019), http://www.unistudyguides.com/wiki/Duty_-_psychiatric_injury (last visited Oct 5, 2019).

[41] Page v Smith, 2 WLR 644, UKHL 7, 11may, 1995.

[42] Tame v New South Wales, 211 CLR 317, 2002.

[43] Supra Note 29.

CONCLUSION

Through this article, author elaborately substantiated and clarified the vague underlining of work-induced psychiatric harm and tried to answer the major issues. Several crucial observations are made pertaining to the duty of care and standard of care.

There is always an employer liability principle which already assume a certain level of reasonable foreseeability of injury on employer part. The threshold or the extent of reasonable foreseeability depends upon some factors like- demanding nature of job, evident signs from employee pertaining to stress and depression, subsequent change in behaviour of an employee etc. if the level of these factors are higher, the assumption of reasonable foreseeability also goes up and vice-versa. A prudent employer should always take care of his/her employees and should be conscious of his/her employees and their problems or difficulties that they might face while carrying out their jobs. If the nature of job is itself very stressful, then the employers are recommended to carry out counselling or some such kind of other programmes, over some intervals of time, to alleviate the employees of their stress and pressure.

As far as the question on the binding nature of contractual relationship is concerned, it is now quite clear that an employment contract is not a valid defence for employers to avoid the liability. That means if there is a notion of overburdening, excessive work etc. then the employer cannot escape the duty of care, just by saying that his conduct was in accordance with the contract of employment. And hence the principle of Volenti non fit injuria fails here. The rationale behind it could be that the employees has voluntarily consented to the working hours and not to the mental trauma and depression that they go through. Contract should not take away immunity and rights for their mental well-being.

The seriousness of harm that the employees are exposed to helps in determining the just and reasonable standard of care. As it has been identified that the seriousness of harm from excessive workload is very high, the pedestal for standard of care should be set high. Stress of workload could lead to a lot of devastating mental problems as well as physical intricacies. This is a perfect indicator of the seriousness of harm or the potential harm that could result in, if standard of care by the employer is kept low. The standard of care depends upon the different circumstances of different cases because the seriousness of harm and other deciding factors differs from case to case. And any shortcoming in fulfilling the due standard of care will amount to a breach of duty.

The question of application of egg shell skull rule is somewhat complex. Even though it applies to the cases of work-induced psychiatric injuries, it is not just straightaway followed. Courts have so

far established that the normal fortitude is not necessarily be considered as a prerequisite for the liability of psychiatric injury. There is a very limited development of this concept in United Kingdom's jurisprudence till now. No authorities substantially bring this principle in notice. Author, in accordance with the limited case authorities, believes that with the imposition of egg shell skull rule, it should always be taken care that employer is not exposed to unreasonable standard of care. Egg shell skull rule could be carried out in terms of compensation or damages i.e. the employer cannot be leveraged in terms of paying the extent of damages, even though the damages that resulted to the employee, because of his frailty, is very high from what a person with normal fortitude would suffer.