

M659 MILNE, M. Stress in the workplace.

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STRESS IN THE WORKPLACE

LLB HONOURS RESEARCH PAPER

LAWS 489

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I INTRODUCTION

On the evening John's partner walked out, he drunk a bottle of whiskey and smoked a packet of cigarettes. Over the next five months he continued to drink himself to oblivion on a regular basis, he smoked heavily and regularly gambled his dwindling savings account. John continued to attend work as an insurance investigator in a large company. At work he continued to work long days, his budgets increased, and the number of staff decreased, he complained to his supervising partner but to no avail. After 6 months of long hours, hard work and a staple diet of whiskey and cigarettes John had a breakdown at work, his doctor recommended a change in jobs, having not mentioned this to his employer he continued on. After 8 months he had another breakdown and was forced to retire on medical grounds. He then sued his employer for unjustified constructive dismissal, and claimed his illness was a result of stress at work.¹

The above scenario of John's life is an extreme, however, the issues in the scenario are not dissimilar to some of the issues that judges have had to deal with in recent cases. The cases of *Gilbert v Attorney General* ("Gilbert")² and *Brickell v Attorney General* ("Brickell")³ and the proposed amendments to the health and safety legislation,⁴ have meant that stress in the workplace has become an increasingly significant issue.

The purpose of this paper is to explore the topic of stress in the workplace. This paper will begin by exploring the concept of stress and the recent stress cases both in New Zealand and the United Kingdom. It will then discuss the current statutory framework. This will involve a consideration of the Health and Safety in Employment Act 1992, the Employment Relations Act 2000, and the proposed amendments to the health and safety legislation. I will conclude that

¹ Jenni McManus "Employment Court stresses out the nation's employers" (2000) Independent 8.

² *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

³ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

⁴ Health and Safety in Employment Amendment Bill 2001, no 163 - 1.

⁵ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁶ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

the proposed amendments to the health and safety legislation in New Zealand simply confirm the common law.

II WHAT IS STRESS?

In New Zealand, the Health and Safety in Employment Act 1992 (“HSIE Act 92”) monitors the health and safety of employees in the workplace. The Act requires employers’ to proactively identify hazards, to minimise and isolate them.⁷ In addition, employers’ are subject to common law obligations to take reasonable care.

The *Gilbert*⁸ and *Brickell*⁹ cases confirm that the concept of stress is wide. In the case of *Gilbert*,¹⁰ Mr Gilbert was stressed, and he suffered ‘vital exhaustion’ as a result of being overworked. The court recognised that vital exhaustion/stress could be linked to “poor employment practices.”¹¹ Vital exhaustion was able to manifest itself as a “psychological disability” and, therefore, the employers of Mr Gilbert were liable for the psychological disability.¹²

While all employees experience some level of stress it becomes problematic when it effects a persons physical or psychological wellbeing. More problematic, is the need for an employer to be able to identify stress, and to know when it is necessary to take action as it is detrimental to a person’s health.

⁷ Health and Safety in Employment Act 1992 ss 8 – 10.

⁸ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁹ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

¹⁰ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

¹¹ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 26 Elias CJ.

¹² *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 26 Elias CJ.

Stress is by nature difficult to define and consequently the word 'stress' has become a "catch all" concept which can include tiredness, fatigue, over worked, sickness, personal, psychological and physical factors.¹³

Overall, it seems unlikely that an employee will be able to hold an employer liable in the case where they are simply 'stressed'.¹⁴ An employee will need to show medical evidence of their stress, and to be able to link their suffering to the employer's failure to take reasonable steps to protect the employee from the harm.

A Is stress a particular problem for New Zealand?

Stress appears to be a problem for employees regardless of which country they reside, however, in comparison to other countries, New Zealanders work hard. This year the Council of Trade Unions produced an interim report on work hours in New Zealand.¹⁵ The research focused on thirty New Zealand families and their employment situations. The interim report recorded the "excessive working hours" many of the families were subject to, and that many of the workers worked 45 to 55 hours a week on average.¹⁶ As a result of similar studies, it is evident that New Zealanders are increasingly working longer hours as opposed to other countries where hours of work are declining.¹⁷ However, it is likely that the prevalence of stress in workplaces is similar to that of other western countries.

¹³ Department of Labour "Review of the Health and Safety in Employment Act 1992: Working Time/Occupational Stress" (14 September 2000) <<http://www.osh.dol.govt.nz>> (last accessed 2 February 2002).

¹⁴ Findlaw Website <<http://www.findlaw.co.nz>> (last accessed 14 June 2002).

¹⁵ New Zealand Council of Trade Unions "Thirty Families – Work Hours" <<http://www.union.org.nz/publications>> (last accessed 20 August 2002).

¹⁶ New Zealand Council of Trade Unions "Thirty Families – Work Hours" <<http://www.union.org.nz/publications>> (last accessed 20 August 2002).

¹⁷ Department of Labour "Review of the Health and Safety in Employment Act 1992: Working Time/Occupational Stress" (14 September 2000) <<http://www.osh.dol.govt.nz>> (last accessed 2 February 2002).

In the past, New Zealand employers have typically not been concerned with stress in the workplace or their liability to cause mental injury, rather employers have been concerned with physical injury and safety in the workplace. However, the two leading cases in New Zealand,¹⁸ and the exclusion of occupational stress under the current ACC legislation¹⁹ has meant employers can no longer ignore workplace stress. There is little doubt that the current legislation and new cases will cause considerable concern for all employers. These concerns and the recent cases are discussed below.

III THE COMMON LAW POSITION AND ITS EVOLUTION

In the past the law placed various restrictions on the recovery of damages for mental injury and psychiatric harm. Where psychiatric injury occurred the victims of injury were categorised as either primary or secondary victims.

A "primary victim" was generally a person "within the zone" of the foreseeable harm.²⁰ A "secondary victim" was generally a person who suffered harm, but was out of the zone, for example they may have seen the event occur but were not involved. Liability for secondary victims was restricted to those situations where the harm suffered was a "recognisable psychiatric injury."²¹

In recent years the above principles have been applied to employment situations. Before the United Kingdom case of *Walker v Northumberland County Council* ("*Walker*")²² it was clear that an employers duty of care did not extend to mental injury suffered as a result of workplace stress, compensation was only available for physical injury. As a result of the *Walker*²³ case it is now accepted that an employer owes a duty of care not to cause mental harm/injury or psychiatric injury to their employees. Where it is reasonably foreseeable that an

¹⁸ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00 and *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

¹⁹ Injury, Prevention, Rehabilitation and Compensation Act 2001.

²⁰ *Page v Smith* [1996] AC 155.

²¹ *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179.

²² *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

²³ *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

employee may suffer harm due to stress in the workplace the employer is under a duty to take "practicable steps" not to cause injury to the employee.²⁴

It is useful to briefly outline *Walker*.²⁶ Mr Walker worked for Northumberland County Council as an area social services officer, and a manager from 1970 until 1987. As an officer, his workload increased, and the number of social workers who reported to him increased. In 1986 Mr Walker suffered his first breakdown as a result of stress, exhaustion, and work pressure. He took time off, and later requested that he be relieved from some of his work pressures, and another officer was arranged, however this fell through. Mr Walker took a short holiday and returned to work, he later took sick leave and suffered another nervous breakdown and was unable to work. He was diagnosed as suffering from stress related anxiety.

In 1988 Mr Walker was dismissed on grounds of permanent ill health. He sued the local authority and claimed his employer had breached their duty of care as they had failed to take reasonable care to avoid exposing him to a health endangering workload.

In relation to Mr Walker's first breakdown, Colman J stated:²⁷

Accordingly, the question is whether [the Council] ought to have foreseen that Mr Walker was exposed to a risk of mental illness materially higher than that which would ordinarily affect a social services middle manager in his position with a really heavy workload. For if the foreseeable risk were not materially greater than that there would not, as a matter of reasonable conduct, be any basis upon which the council's duty to act arose.

Therefore, the first breakdown was regarded as not reasonably foreseeable. However, Colman J held that the Council ought to have foreseen that unless

²⁴ Health and Safety in Employment Act 1992 s 2.

²⁵ *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

²⁶ *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

²⁷ *Walker v Northumberland County Council* [1995] 1 ALL ER 737, 752.

steps were taken to alleviate Mr Walker's workload a second breakdown was foreseeable. Colman J stated:²⁸

There has been little judicial authority on the extent to which an employer owes to his employees a duty not to cause them psychiatric damage by the volume or character of the work which the employees are required to perform. It is clear that the employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. 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 damage should be excluded from the scope of an employer's duty of care or from the co-extensive implied term in the contract of employment.

And²⁹

The duty of an employer public body, whether in contract or tort, to provide a safe system of work is, as I have said, a duty only to do what is reasonable, and in many cases it may be necessary to take into account decisions which are within the policy-making area and the reasons for those decisions in order to test whether the body's conduct has been reasonable.

Colman J ruled that there was no difference between a physical and a mental injury and, therefore, an employer owed a duty of care to cover both. The court held that the Council had breached their duty of care in failing to take reasonable steps to protect Mr Walker from mental harm.

The *Walker*³⁰ decision raises the following four considerations.

First, the decision makes it clear that the employer has an implied obligation to provide employees with a safe system of work and to take reasonable steps from exposing an employee to risks that are foreseeable.

Secondly, an employee will be able to terminate the contract of employment and claim damages for unjustified dismissal, or constructive dismissal if an employer fails to minimise stress in the workplace.

²⁸ *Walker v Northumberland County Council* [1995] 1 ALL ER 737, 749.

²⁹ *Walker v Northumberland County Council* [1995] 1 ALL ER 737, 759.

³⁰ *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

Thirdly, an employee would need to bring their suffering to their employer's attention. If the employee continues to accept the situation after laying a complaint they may be regarded as having affirmed the contract.

Finally, employers have a responsibility to ensure employees are not overworked and to minimise the levels of stress.

Following the decision of *Walker*,³¹ there have been a number of similar claims in New Zealand.

IV NEW ZEALAND'S LEADING CASES

The principles in the *Walker*³² case have now been confirmed in New Zealand. In both, *Brickell*³³ and *Gilbert*,³⁴ the employers were found to be in breach of failing to take reasonable care of their employee's health and safety. The court held that an employer had an obligation to minimise workplace stress.

These decisions have far reaching implications for employers in New Zealand. Employers will need to learn to identify factors that could lead to stress and find ways to minimise those factors. In both *Brickell*³⁵ and *Gilbert*³⁶ the employers failed to do so. It is worth outlining the facts in both of these cases.

A *Brickell v Attorney General*

Mr Brickell suffered post traumatic stress disorder ("PTSD"). He contended that his employer was negligent in placing him in an unsafe system of work, and he was awarded \$242,000.

³¹ *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

³² *Walker v Northumberland County Council* [1995] 1 ALL ER 737.

³³ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

³⁴ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

³⁵ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

³⁶ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

Mr Brickell was a former employee of the New Zealand Police and was employed as a video producer for 15 years. His work involved producing and editing horrific homicide and gruesome scenes for the New Zealand police.

In 1992, the police developed a policy where sworn officers received compulsory counselling. Mr Brickell was only referred to counselling twice. In 1993 he requested compulsory counselling for his staff, the request was turned down. At various times between 1988 and 1996 Mr Brickell was diagnosed with stress and depression. Eventually, the symptoms developed into post traumatic stress disorder ("PTSD") and he took early retirement.

The High Court held that the predominant cause of Mr Brickell's PTSD was his work with horrific videos. The threshold question was whether the harm was reasonably foreseeable to the individual employee. In this case there was evidence that the Police had knowledge of the impending harm because Mr Brickell had expressed concerns about the nature of the work, and the stress that the work was causing him and his colleagues. As a result, the police were under a duty to take "reasonable efforts" to provide a safe workplace. The court held that the Police failed to minimise the risk, and were negligent in failing to provide a safe workplace, and the PTSD was a foreseeable consequence.³⁷

B Gilbert v Attorney General

Mr Gilbert worked as a senior probation officer with the Department of Corrections from 1971 until 1996. The office in which he worked was understaffed with high workloads and "grossly deficient" management.³⁸

Mr Gilbert and other staff made numerous complaints regarding the management and staff problems within the probation services, but their suggestions were ignored. By 1994 Mr Gilbert was progressively unwell, he took sick leave, however, on return he was expected to undertake fulltime work.

³⁷ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97, 32 McGechan J.

³⁸ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 8 – 11 Elias CJ.

In 1996 he resigned for medical reasons. He brought an action against the department claiming they had breached express and implied terms of his employment contract. He claimed that their breaches had contributed to his development of artery disease and collapse.

The Employment Court held that Mr Gilbert had been constructively dismissed. The department had breached terms of the employment contract by failing to take reasonable steps to ensure Mr Gilbert was protected from unreasonable stress. The court awarded Mr Gilbert: a lump sum payment for loss of income, \$75,000 as general damages for humiliation, anxiety and distress, \$50,000 for loss of career, and employment status, approximately \$14,000 for medical expenses and \$50,000 exemplary damages.³⁹

The decision was appealed. The Court of Appeal upheld the decision and found that Mr Gilbert's employment contract was subject to the State Sector Act 1988 and the health and safety provisions in the Health and Safety in Employment Act 1992. Stress was found to be a significant hazard in his workplace. The department had failed to take all "practicable steps" to ensure the safety of employees while at work.⁴⁰ The department was in breach "of established minimum guidelines", the workload was "excessive" and the department failed to "put in place any occupational health and safety plan."⁴¹ They "failed to identify, eliminate, isolate or minimise and monitor the hazards."⁴²

In addition, the court found the department had breached the implied terms present in all employment contracts.⁴³ The court held that an employer is under a duty to "take reasonable steps to maintain a safe workplace."⁴⁴ The court confirmed that it would be contrary to the duty of trust and confidence if the

³⁹ *Gilbert v Attorney General* [2000] 1 ERNZ 332.

⁴⁰ Health and Safety in Employment Act 1992, s 6.

⁴¹ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 6 -9 Elias CJ.

⁴² Health and Safety in Employment Act 1992 ss 8 - 10.

⁴³ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 23 Elias CJ.

⁴⁴ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 23 Elias CJ.

employer "could expose the employee to unnecessary risk of psychological harm reasonably avoided."⁴⁵ The court allowed the appeal in part.

C Summary of Cases

The abovementioned New Zealand cases confirm the availability of compensation for mental injury caused in the workplace. In the past such claims were not possible, that is because Accident Compensation ("ACC") legislation allowed claims for pure mental injury. 'Mental injury' fell within the definition of 'accident' this meant all non ACC actions were barred.

Nowadays, purely mental harm is completely excluded from cover under the Injury Prevention, Rehabilitation, and Compensation Act 2001. This exclusion means litigants are no longer barred from pursuing a claim against their employer for any mental injury they may suffer. Employers will need to be particularly aware of the potential for civil liability in mental injury claims.

Before these two cases it was clear that employers had a duty to take steps to ensure a safe workplace and protection from exposure to any "harm". Arguably, it was not clear whether the definition of "harm" included psychiatric or mental harm. These cases make it clear that the employer has an express statutory duty under the HSIE Act 92 to protect the employee from physical and mental injury. Mental injury falls within the category of an "identifiable hazard" which employers must protect employees from. In addition, the employer has an implied duty in all employment contracts to avoid exposing an employee to an unnecessary risk.

As a result of these cases, it seems likely that the New Zealand courts may see more employees claiming damages where employers have failed to minimise hazards which in turn may cause harm. Moreover, it seems only likely that the courts will need to provide particular direction on the concept of stress and what is expected of employers in order to limit the risk of such litigation.

⁴⁵ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 22 Elias CJ.

The recent decision of the Court of Appeal in the United Kingdom, the case of *Hatton v Sutherland*⁴⁶ ("Hatton") may provide guidance to where the New Zealand judiciary will go from here.

V UNITED KINGDOM CASE - HATTON v SUTHERLAND

The English Court of Appeal case of *Hatton*⁴⁷ adopted a similar approach to the New Zealand courts and imposed an obligation on employers to protect their employees from physical and mental injury caused from workplace stress, however the case also provided clear guidelines for employers.

This case concerned four appeals, which were related due to the subject matter being 'stress' and the workplace. In the Lower Court the employees were awarded damages for the negligence of their employers arising from the sustained stress which induced psychiatric illnesses. The employers appealed against the findings of liability.

The four respondents included two teachers, Hatton and Barber, Jones - an assistant at an authority-training centre, and Bishop, a raw materials operator. Three respondents out of the four lost their cases on appeal. In this paper it is useful to identify each of the appeals separately.

A The Appeal

1 Mrs Hatton

Mrs Hatton was a schoolteacher who suffered from depression. Due to the stress she was suffering, she took an extended period of leave and did not tell anyone that her absence was a result of stress. Mrs Hatton saw a stress counsellor but

⁴⁶ *Hatton v Sutherland* [2002] 2 All ER 1.

⁴⁷ *Hatton v Sutherland* [2002] 2 All ER 1.

did not tell her employer, and attributed absence from work to her sons sickness. As a teacher her workload was no greater than that of any of her colleagues.

The Court of Appeal held that Mrs Hatton's absence did not provide a sufficient indication to her employer that she was "likely" to suffer from psychiatric injury. Therefore, she failed at the first threshold of foreseeability.⁴⁸

2 *Mr Barber*

Mr Barber was a schoolteacher who ceased work on medical advice. His workload along with other teachers at the school had increased, however, there was no evidence to suggest that Mr Barber was more overworked than his colleagues.

Mr Barber told a deputy head of the school that he was feeling the effects of work overload and the concern was dismissed. He later developed symptoms of depression and took three weeks off work. On returning to school, he raised concerns regarding his workload, but did not disclose the extent of his suffering. He later "lost control" in the classroom, and was advised to stop work.⁴⁹

In the Court of Appeal Mr Barber's claim failed on the basis that there was no breach of duty, as it was not possible to ascertain a point at which the school had a duty to intervene. In Mr Barber's situation his employer was not aware of the stress until he returned to work which was just before the summer holidays (a known time of relaxation), and even then, he simply said he was not coping well, but did not elaborate on his symptoms. Presumably, if Mr Barber had made his symptoms known to the employer at an early stage or after the holidays, the court would have expected the employers to take some action, but at the time Mr Barber's illness became known it was too late for intervention.

⁴⁸ *Hatton v Sutherland* [2002] 2 All ER 1, 26.

⁴⁹ *Hatton v Sutherland* [2002] 2 All ER 1, 38.

3 *Mr Bishop*

Mr Bishop was employed in receiving and distributing raw materials. Following a restructure in the workplace he was expected to do a greater variety of tasks. Mr Bishop did not cope well with the changes and complained to his manager about his inability to cope. Later Mr Bishop consulted his doctor, and was advised to change jobs, but did not tell his employers. He eventually took sick leave, and on returning, he suffered a breakdown.

The court held that there was nothing unusual or excessive about Mr Bishop's workload, and the harm suffered was not foreseeable.⁵⁰

4 *Mrs Jones*

Mrs Jones was employed as an administrative assistant. There was evidence that her employers were aware that she was not coping. Mrs Jones was working long hours, and there were unreasonable demands placed on her. She complained of being overworked, and of unfair treatment, and spent time off work with anxiety and depression. Her employer's promised to provide extra help but it never eventuated. Mrs Jones formally complained of the excessive demands on her.

The court found that in this situation Mrs Jones's formal complaints made the harm she suffered clearly foreseeable, her employers' failed to act and, therefore, Mrs Jones's claim was successful.⁵¹

B Summary of *Sutherland v Hatton*

The decision of *Hatton*⁵² confirms the principles outlined in *Gilbert*⁵³ and *Brickell*,⁵⁴ that an employer has a duty not to do anything that exposes an employee to harm. In addition, the decision provides guidelines to employers of their duties and what the court will expect. In *Hatton*⁵⁵ the court emphasised

⁵⁰ *Hatton v Sutherland* [2002] 2 All ER 1, 52.

⁵¹ *Hatton v Sutherland* [2002] 2 All ER 1, 44.

⁵² *Hatton v Sutherland* [2002] 2 All ER 1.

⁵³ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁵⁴ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

⁵⁵ *Hatton v Sutherland* [2002] 2 All ER 1.

four points the employee would need to satisfy in order to bring a successful claim.⁵⁶

- (a) The employee will need to be able to show that they suffered a diagnosed mental illness;
- (b) The mental injury was caused partly or wholly by work related stress;
- (c) The injury was foreseeable by the employer; and
- (d) The employer failed to take all reasonable steps to alleviate the stress.

These points are discussed below.

1 Foreseeability

The “threshold question” for an employer’s liability will be whether the kind of harm suffered by the employee was foreseeable.

In relation to this Hale LJ said:⁵⁷

The question is not whether psychiatric injury is foreseeable in a person of “ordinary fortitude”. The employer’s duty is owed to each individual employee, not some as yet unidentified outsiders. The employer knows who the employee is. It may be that he knows... or ought to know, of a particular vulnerability but he may not.

Foreseeability means, what the employer “knows, or ought to have known.”⁵⁸ In the employment context the employer has a duty to be aware of “particular vulnerability”.

The Court of Appeal summarised a list of factors that are likely to be relevant when assessing whether the harm is foreseeable. Regard should be had to:⁵⁹

- (a) The nature and extent of the work done by the employee... Is the work particularly intellectually or emotionally demanding for this employee? Is the workload much more demanding for this employee? Are demands being made of these employee

⁵⁶ A & L Goodbody Solicitors <<http://www.algoodbody>> (last accessed 15 May 2002).

⁵⁷ *Hatton v Sutherland* [2002] 2 ALL ER 1, 13.

⁵⁸ *Hatton v Sutherland* [2002] 2 ALL ER 1, 13 – 15.

⁵⁹ *Hatton v Sutherland* [2002] 2 ALL ER 1, 14.

unreasonable when compared with the demands of others in the same or comparable jobs? Is there a abnormally high level of sickness or absenteeism in the same job or the same department?

- (b) Signs from the employee of impending harm to health. For example has the employee got a particular problem or vulnerability? Has he/she already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him?

Where an employee exhibits signs of “impending harm” an employer is obliged to take steps to minimise and alleviate the stress. Generally, an employer is “entitled to take what he is told by his employee at “face value.”⁶⁰ In some circumstances, however, an employer may be obliged to take proactive steps to identify stress particularly, if an employee is in an “intellectually or emotionally demanding job.”⁶¹

Lady Justice Hale confirmed this duty when she said:

These include the *nature and extent of the work being done by the employee*. Employers should be more alert to picking up signs from an employee who is being over-worked in an intellectually or emotionally demanding job than from an employee whose workload is no more than normal for the job or whose job is not particularly demanding on him or her. It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable.

Therefore, it is arguable that an employer will be required to identify stress in particularly “intellectually or emotionally demanding” jobs rather than being able to rely on an employee to bring their suffering to the employers attention. This is because in the case of an “intellectually or emotionally demanding job”, the employer “ought to have known” that the job could cause stress.

This analysis means that Mr Brickell who had an “emotionally demanding” job would have met the threshold of foreseeability even if he had not brought his suffering to his employer’s attention.

2 Reasonable Steps

⁶⁰ *Hatton v Sutherland* [2002] 2 ALL ER 1, 15.

⁶¹ *Hatton v Sutherland* [2002] 2 ALL ER 1.

Having established the test of foreseeability, the next question in determining whether an employer will be liable is if they have failed to take reasonable steps to minimise the harm. This is discussed below.

An employer is only in breach of their duty if they failed to take steps that are reasonable in their particular circumstance. For example, the steps taken will be dependant on "the size and scope of it's operation," the "resources" available, whether the firm is in the "public or private sector", and if the employer has additional "demands" placed on them.⁶² Depending on the circumstances an employer could be expected to do any of the following:⁶³

- (a) Allow an employee a sabbatical;
- (b) Transfer the employee to alternative work;
- (c) The work could be redistributed;
- (d) Arrange counselling or treatment;

These options will be dependant on the individual workplace, and the gravity of the harm that the employee is suffering.

Overall, an employee must show that the loss suffered flowed from the employer's breach of duty.

VI IMPLICATIONS FOR NEW ZEALAND LAW

So where do the above cases leave New Zealand law? It seems likely that the general guidelines offered by the English Court of Appeal will be highly persuasive in New Zealand.

If the case of *Hatton*⁶⁴ had been applied to the situations of Mr Gilbert or Mr Brickell it seems the same result would have been reached. The threshold is

⁶² *Hatton v Sutherland* [2002] 2 ALL ER 1, 16.

⁶³ *Hatton v Sutherland* [2002] 2 ALL ER 1, 16.

⁶⁴ *Hatton v Sutherland* [2002] 2 ALL ER 1.

whether the harm is foreseeable. In *Gilbert*⁶⁵ it was acknowledged that the department was aware of the workload and staff shortages and failed to act.

In *Brickell*⁶⁶ the employer should have been aware of the risk of PTSD because of the 'emotionally demanding job'. However, as was mentioned above, it appears that in Mr Brickell's case even if the police were not aware, the court would have held that they should have been regardless of Mr Brickell exhibiting any symptoms.

Similarly, using the test in *Hatton*,⁶⁷ the employers in both *Gilbert*⁶⁸ and *Brickell*⁶⁹ breached their duty of care as they failed to take reasonable steps. This is because, Mr Gilbert's employer failed to act after repeated warnings of work overload and stress, and similarly, Mr Brickell's employer failed to provide adequate counselling.

While it appears that in both cases, had the New Zealand courts applied the principles outlined in *Hatton*⁷⁰ the same conclusions would have been reached, the case of *Hatton*⁷¹ extends the New Zealand decisions as it clarifies the extent of the employer's duty. The case provides guidelines on the "reasonable" steps the court would expect to an employer to take.

A Preventative Action

The key points that can be drawn from the discussion in the above cases are, that in order to comply with the employers duty the employer will need to establish procedures to monitor employees, and to intervene when necessary to ensure an

⁶⁵ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁶⁶ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

⁶⁷ *Hatton v Sutherland* [2002] 2 ALL ER 1.

⁶⁸ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁶⁹ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

⁷⁰ *Hatton v Sutherland* [2002] 2 ALL ER 1.

⁷¹ *Hatton v Sutherland* [2002] 2 ALL ER 1.

employee is protected from mental injury. Various commentators have suggested that employers do the following:⁷²

- (a) Implement policies to identify, minimise and eliminate stress;
- (b) Provide a counselling program for employees who suffer from stress;
- (c) Monitor work absence;
- (d) Provide a system for work complaints; and
- (e) Respond to work related concerns, perhaps by allowing extra breaks, or light duties for a short time.

Stress is an integral part of any workplace however, an employer is required to do what it can to ensure that stress does not result in any serious harm. The question then becomes how an employer can eliminate harm. The difficulty is that as compared to a physical injury stress will generally result in mental injury, which is difficult to identify. Such difficulties were evident in *Gilbert*.⁷³

In *Gilbert*,⁷⁴ Mr Gilbert had a heart condition, his condition was linked to the stress of the workplace. There was evidence to say he suffered vital exhaustion from a number of different factors, but it is difficult to identify in advance that this would have happened. There was something in the workplace that was wrong that led to the exacerbation of the conditions for Mr Gilbert, but did not necessarily lead to other employees suffering the same or similar injury. It is inevitable that a similar situation will occur again because a situation may lead to a number of outcomes depending on the employee.

While the problem of indeterminate liability for employers causes much concern for employers, particularly because stress will impact on each employee differently, it is a well established principle in tort law that you must take your

⁷² Alastair Sherriff "OSH Case Law Update" (Buddle Findlay Research Paper 2001).

⁷³ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁷⁴ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

victim as you find them. In the employment context an employer must take the employee as they find them, this is termed the 'egg shell skull' rule.

An employer owes a duty of care not to cause mental injury. The employee need not be a person of "ordinary phlegm" rather the duty is owed to every individual employee.⁷⁵ In some situations an employee may end up with depression or at the extreme an eating disorder, whereas other employees will be fine, however, all outcomes are related to the same cause. This makes it very difficult for an employer to see the obvious signs.

In addition to the difficulties of identifying stress and the ultimate result of that stress, many employees may find it difficult to warn their employer of the stress they are suffering. Employers will need to be aware of their obligations in accordance with the health and safety legislation, implement procedures to actively identify stress and then make the employees aware of the situation.

VII NEW ZEALAND'S STATUTORY LAW

The cases of *Gilbert*⁷⁶ and *Brickell*⁷⁷ confirm the existence of implied and statutory obligations on employers. In addition, the statutory law provides various options for redress for employees. An employee can bring a claim in accordance with the Injury Prevention, Rehabilitation and Compensation Act 2001, the Employment Relations Act and the State Sector Act 1988.

At present the only protection for employees from stress in the workplace is contained in the ERA 2000, the Injury Prevention, Rehabilitation and Compensation Act 2001, and the common law. However, the Health and Safety in Amendment Bill 2001 if enacted, will provide another means of redress for an employee suffering stress as a result of their employers' failure to act.

⁷⁵ *Page v Smith (No 2)* [1996] WLR 855.

⁷⁶ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁷⁷ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

A Injury Prevention, Rehabilitation, and Compensation Act 2001

As mentioned above, the Injury Prevention, Rehabilitation, and Compensation Act 2001 does not provide cover for purely mental harm. Consequently, employees are no longer barred from pursuing their employer for their work related mental injury.

Prior to the change in legislation, employees could make an accident compensation claim for physical injury and mental injury, and did not need to take additional action against an employer.⁷⁸ This meant that any common law claims such as *Brickell*⁷⁹ and *Gilbert*⁸⁰ were not possible. The change in legislation⁸¹ and the exclusion of cover under ACC may now mean more people will take personal claims against their employer.

B The Employment Relations Act 2000 ("ERA 2000")

The ERA 2000 also provides an avenue for a stressed employee wishing to make a claim against their employer as an alternative to a health and safety complaint.

An employee can bring a claim under the personal grievance provisions of the ERA 2000 for constructive dismissal or unjustified disadvantage, where an employer's breach of duty has led the employee to resign.⁸² Under the ERA an employer has a duty to provide a safe workplace, and to act in a manner which is not "likely to destroy or seriously damage, the relationship of trust and confidence".⁸³

⁷⁸ Vincent Hearing "Stress Makes a Dangerous Scapegoat" (1996) *The Independent*, 18.

⁷⁹ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

⁸⁰ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁸¹ Injury Prevention, Rehabilitation, and Compensation Act 2001.

⁸² Gordon Anderson, Charles Chauvel, John Hughes, Kenneth Johnston, Michael Leggat, Paul Roth (Eds) *Employment Law Guide* (5th Edition, Butterworths, Wellington, 2001) 561.

⁸³ Gordon Anderson, Charles Chauvel, John Hughes, Kenneth Johnston, Michael Leggat, Paul Roth (Eds) *Employment Law Guide* (5th Edition, Butterworths, Wellington, 2001) 561.

This provision was addressed in the recent decision of *Transmissions & Diesels Limited and Diane Margaret Matheson* ("Matheson").⁸⁴ In this case the appellants had employed Mr Matheson as a branch manager. He worked long hours, and often worked at nights, causing him stress. Mr Matheson committed suicide on the day after resigning from his job. The estate of Mr Matheson was able to bring the personal grievance claim to the court for the failure of Mr Matheson's employers to provide a safe working environment.

The Employment Court and the Court of Appeal found that Mr Matheson had been constructively dismissed. The employers had breached their duty to act fairly and reasonably in their treatment of Mr Matheson. They had failed to help Mr Matheson with management difficulties he was experiencing and did not inform him of inquiries the directors were making of him. There was evidence that Mr Matheson had been working long hours, but the court found that these were self imposed rather than unreasonable conduct on behalf of the employers. The court awarded \$50,000 which the Court of Appeal reduced to \$35,000, for failure to offer management support.

While the outcome of this case is justified on the facts it is difficult to determine any clear principles as to when and how employers identify stress. Therefore, it seems likely that the case of *Hatton*⁸⁵ will be influential for employers in the future, as it provides guidelines on the steps an employer could be expected to take.

In addition to the personal grievance provisions, the ERA 2000 requires that an employer throughout the employment relationship act in good faith.⁸⁶ The employment relationship is no longer restricted to personal grievances, it now

⁸⁴ *Transmissions & Diesels Limited v Diane Margaret Matheson* (6 March 2002) Court of Appeal CA97/01, Richardson P.

⁸⁵ *Hatton v Sutherland* [2002] 2 ALL ER 1.

⁸⁶ Employment Relations Act 2000 s 3.

includes "any other problem relating to or arising out of an employment relationship."⁸⁷

This means that in addition to the Health and Safety in Employment legislation, an employee can also bring a claim under the ERA 2000, where an employer fails to act in good faith without reasonable cause.

C State Sector Act 1988

The State Sector Act 1988 confirms the common law, in that it imposes a statutory requirement on State organisations to provide for "good and safe working conditions." A state employee is able to claim that their employer has breached the "good employer" principles imposed on state organisations in addition to their redress available under the HSIE Act 92.

This Act simply confirms the common law, therefore, it appears the preferable approach for an employee would be a claim in accordance with the ERA 2000 or the HSIE Act 1992.

D Health and Safety in Employment Act 1992 (HSIE Act 92)

In New Zealand the HSIE Act 92 and the Health and Safety in Employment Regulations impose further obligations on employers to provide a safe workplace environment.

The stated object of the HSIE Act 92 is: to "provide for the prevention of harm to employees at work".⁸⁸

Under the HSIE Act 92 an employer has a statutory duty to take "all practicable steps" to maintain a safe workplace, that is, what is reasonable in the circumstances.

⁸⁷ Employment Relations Act 2000 s 5.

⁸⁸ Health and Safety in Employment Act 1992 s 5.

Section 6 states:

Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—

- (a) Provide and maintain for employees a safe working environment; and
- (b) Provide and maintain for employees while they are at work facilities for their safety and health; and
- (c) Ensure that plant used by any employee at work is so arranged, designed, made, and maintained that it is safe for the employee to use; and
- (d) Ensure that while at work employees are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things—
 - (i) In their place of work; or
 - (ii) Near their place of work and under the employer's control; and
- (e) Develop procedures for dealing with emergencies that may arise while employees are at work.

“All practicable steps” is defined in section 2, this means:

All practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—

- (a) The nature and severity of the harm that may be suffered if the result is not achieved; and
- (b) The current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- (c) The current state of knowledge about harm of that nature; and
- (d) The current state of knowledge about the means available to achieve the result, and about the likely efficacy of each; and
- (e) The availability and cost of each of those means:

In the case of *Gilbert* Elias CJ considered this definition and stated:⁸⁹

It is to be noted that the scope of the pleaded obligation did not make the employer a guarantor of a safe workplace. It was obliged only to take reasonable care to avoid unnecessary risk.

An employer is obliged to maintain a “safe” working environment. The word “safe” is defined in section 2 of the HSIE Act 92 as meaning “in relation to a person as not exposed to any hazards.” The term “hazard” is defined as “an activity, ... that is an actual or potential cause or source of harm”. The word “harm” is defined as “means illness, injury, or both”.⁹⁰ The Act does not draw a distinction between physical and psychological illness or injury, however, as

⁸⁹ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 22 Elias CJ.

⁹⁰ Health and Safety in Employment Act 1992 s 2.

discussed above, the common law recognises that the word “injury” is no longer limited to physical injury, but includes mental injury.⁹¹

This means an employer must do all that is reasonable to provide a safe workplace free from any activity that is likely to cause injury.

Section 7 provides:

7 Identification of hazards

- (1) Every employer shall ensure that there are in place effective methods for—
 - (a) Systematically identifying existing hazards to employees at work; and
 - (b) Systematically identifying (if possible before, and otherwise as, they arise) new hazards to employees at work; and
 - (c) Regularly assessing each hazard identified, and determining whether or not it is a significant hazard.

- (2) Where there occurs any accident or harm in respect of which an employer is required by section 25(1) of this Act to record particulars, the employer shall take all practicable steps to ensure that the occurrence is so investigated as to determine whether it was caused by or arose from a significant hazard.

This section further provides that it is not enough for an employer to have procedures in place, the Act places a pro-active duty on employers to “systematically identify” and “minimise” the hazards in the workplace causing stress.⁹²

Prior to the cases of *Gilbert*⁹³ and *Brickell*⁹⁴ it was not clear that the definition of “hazard” and “harm” included mental injury, what was clear was that an employer had a duty to identify hazards that caused physical injury. It is now clear from the common law and the proposed amendments to the current legislation that the word “harm” will include mental injury as well as physical injury.

⁹¹ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 22 Elias CJ.

⁹² Health and Safety in Employment Act 1992 s 10.

⁹³ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁹⁴ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

VIII HEALTH AND SAFETY IN EMPLOYMENT AMENDMENT BILL 2001

In November 2001 the Government introduced the Health and Safety in Employment Amendment Bill (“the Bill”), the Bill amends the HSIE Act 92. Of most relevance for this paper is the proposed clarification of the law on fatigue and stress in the workplace. This clarification is obvious from the stated purpose of the bill:

The purpose of the bill is to –

- (a) make the principal Act more comprehensive in its coverage, in particular by –
 - ...(iv) confirming that fatigue and work-related stress are covered
- (b) include provisions in the principal Act requiring good faith co-operation between employers and employees in relation to health and safety; and
- (c) provide for more effective enforcement of the principal Act.

The Bill is an attempt to clarify the law in relation to stress and fatigue. The definition of the words “hazard” and “harm” in the Bill will be amended to include both physical and mental injury. The terms “harm” and “hazard” will be redefined as:⁹⁵

Harm

- (a) means illness, injury, or both; and
- (b) includes physical or mental harm caused by work-related stress

Hazard

- (a) means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; and
- (b) includes a situation where, for example, because of physical or mental fatigue, a person may be an actual or potential cause or source of harm.

The effect of the Bill will, therefore, be that an employer must be take all practicable steps to minimise any activity that could cause “physical or mental fatigue”.

⁹⁵ Health and Safety in Employment Amendment Bill 2001, no 163 – 1, cl 4.

In addition to the amendment to the above definitions, the Bill aims to encourage a more inclusive approach for employees and employers.

Clause 14 provides:⁹⁶

- (14) An employee may refuse to do work and may continue to refuse to do work if the employee believes on reasonable grounds that the work that the employee is required to perform is likely to cause serious harm to him or her.

Employees are given powers to ensure their own safety in the workplace. An employee is able to refuse to work where they believe their safety could be compromised. However, the Bill fails to fully protect employees at serious risk of stress as the right is restricted, and an employee who refuses to carry out work must perform other reasonable work at the request of the employer.

In addition to clause 14, the proposed amendments may allow another avenue of redress against an employer who fails to take "all practicable steps" to minimise hazards. Under the current law OSH are the only people who may bring prosecutions against employers. The Bill proposes that the monopoly on prosecutions is removed, this will enable employees the opportunity to bring a private prosecution against their employer.

A Commentary on the Bill

The proposed amendments to the law have arisen as a result of employers concerns and the developments in the common law.

It is questionable whether such concerns are warranted, the recent decisions of the Court of Appeal in New Zealand and United Kingdom would suggest not.

The decision of *Gilbert*⁹⁷ suggests that the cause of action is already available.

In *Gilbert*⁹⁸ it was established that an employer has a duty to take steps to minimise causing psychological harm and physical harm.

⁹⁶ Health and Safety in Employment Amendment Bill 2001, no 163 – 1, cl 14.

⁹⁷ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

Chief Justice Sian Elias stated:⁹⁹

The definition of 'harm' is not limited to a 'recognisable psychiatric illness'. Nor is 'illness' so limited... It would be contrary to the objects of the Act if an employer is not required to take steps reasonably practicable for it to take to avoid causing psychological harm. It would also be contrary to the employer's acknowledged duty of trust and confidence in the relationship if the employer could expose the employee to unnecessary risk of psychological harm reasonably avoided.

Such a statement signals that the new bill simply codifies the existing common law.

Another concern expressed by employers is that of potential prosecutions brought by employees. The Department of Labour's discussion paper on the Review of the Health and Safety in Employment Act (1992) highlighted the various concerns.¹⁰⁰ Employers expressed concern that: the removal of the monopoly may motivate employees to bring private prosecutions; that New Zealand could potentially end up a litigious country with a similar environment to the United States; and that such a concept was incompatible with good faith obligations of the ERA 2000.¹⁰¹

On further examination these concerns seem to be exaggerated. Although an employee has the right to prosecute their employer, it seems that the technicalities of the various provisions may undermine the employee's ability to exercise the right.

Under the proposed amendments an employee has six months from the date of the incident to bring a prosecution. This time lag is significant, and perhaps may be impracticable. Take for example, an employee who brings two actions, an employment complaint within the provisions of the ERA 2000, and a threat of

⁹⁸ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

⁹⁹ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00, 24, Elias CJ.

¹⁰⁰ Department of Labour "Discussion Paper on the Review of the Health and Safety in Employment Act (1992) Summary of Submissions" (Wellington, 2001).

¹⁰¹ Department of Labour "Discussion Paper on the Review of the Health and Safety in Employment Act (1992) Summary of Submissions" (Wellington, 2001).

prosecution under the HSIE Act 92. Under the ERA 2000 mediation would take place, it seems likely that the mediator would try to resolve both the causes of action within the one mediation.

The difficulty for the employee is, that it is likely that the full six month period allowed to bring a prosecution will be required to get inspectors to audit the premises, and to arrange the prosecution. In comparison, a personal grievance claim must be lodged within 90 days of the incident. It seems that the time lag for an employee to be able to bring two claims may prove impracticable, which leads me to the conclusion that there is little concern for employers.

On the other hand, it is accepted that the ability to bring private prosecutions will allow the employee more bargaining power and control over the workplace. The upside for employers being, that it may encourage employers to take more responsibility for safety in the workplace, and it will allow employees to have more control over their own safety in the workplace.¹⁰²

In the Department of Labour discussion paper¹⁰³ some employers expressed reservations in allowing employees the right to refuse to work in unsafe conditions. These concerns seem largely over inflated. It seems likely that an employee will often possess more knowledge about potential hazards than an employer, this means such hazards will be brought to the immediate attention of an employer when they are encountered, and may potentially save the employer time and money. In addition, allowing an employee the right to refuse to work allows the employee to participate in the control of the workplace, and perhaps overall may increase an employee's commitment to health and safety in the workplace.¹⁰⁴

¹⁰² Department of Labour "Discussion Paper on the Review of the Health and Safety in Employment Act (1992) Summary of Submissions" (Wellington, 2001).

¹⁰³ Department of Labour "Discussion Paper on the Review of the Health and Safety in Employment Act (1992) Summary of Submissions" (Wellington, 2001).

¹⁰⁴ Department of Labour Discussion Paper on the Review of the Health and Safety in Employment Act (1992) Summary of Submissions (Wellington, 2001).

On balance the proposed amendments affecting stress in the workplace will ensure protection for employees and employers. The removal of the monopoly on prosecution will provide employees with more bargaining power, but at the same time employers will be encouraged to take responsibility for the workplace.

Finally, the introduction of the words "stress" and "fatigue" into the definition of hazard will simply confirm the principles developed in the common law.

Overall, the proposed amendments will encourage employers to take responsibility for the safety of others in the workplace.

X CONCLUSION

Much has changed since the decision of *Page*¹⁰⁵ where only primary victims were compensated. The egg shell skull rule has developed and come to be recognised in the employment context. In recent years the employment relationship has been recognised as a source of a duty of care. An employee now has the right to recover damages for mental injury against their employers in both tort and contract.

The right to sue for stress is not as simple as 'being stressed' - an employer must have failed to act. To avoid liability an employer will need to implement procedures to identify and minimise stress.

In New Zealand employers have an implied and statutory obligation to provide and maintain a safe workplace. These obligations were confirmed in the two cases of *Gilbert*¹⁰⁶ and *Brickell*,¹⁰⁷ and reconfirmed in the United Kingdom case of *Hatton*.¹⁰⁸

¹⁰⁵ *Page v Smith* [1996] AC 155.

¹⁰⁶ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00.

¹⁰⁷ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

¹⁰⁸ *Hatton v Sutherland* [2002] 2 All ER 1.

First, an employer has both an implied and statutory obligation to take reasonable care, and to maintain a safe workplace for all individual employees.

Secondly, an employer will only be liable where the employers breach has caused the employees suffering, and an employee will only be successful where the court finds a finding of fault on the employers part.

Finally, if the Health and Safety in Employment Amendment Bill 2001 is passed, stress will become a workplace hazard, this change in legislation will simply confirm what employers already know of the cases of *Gilbert*¹⁰⁹ and *Brickell*,¹¹⁰ that is, employers can be held liable for mental harm.

It must be remembered that the case of *Gilbert*¹¹¹ is extreme, Mr Gilbert was exposed to an office that was understaffed and under resourced, and was subject to ill-equipped management. Such a work environment is rare

In my view, the proposed amendments to health and safety do no more than confirm the developments in the common law. This means that it will be “business as usual” for the majority of employers and it will only be those “careless employers” who need worry.¹¹²

¹⁰⁹ *Attorney General v Gilbert* (14 March 2002) Court of Appeal CA141/00

¹¹⁰ *Brickell v Attorney General* (9 June 2000) High Court Wellington CP267/97.

¹¹¹ *Gilbert v AG* (14 March 2002) Court of Appeal New Zealand CA141/00.

¹¹² Ian Gordon *Stress Claims* (BYLAW, Morrison Kent Newsletter, 2002).

XI BIBLIOGRAPHY

A Legislation

The Employment Relations Act 2000.

The Health and Safety in Employment Amendment Bill 2001.

The Health and Safety in Employment Act 1992.

Injury, Prevention, Rehabilitation, and Compensation Act 2001.

B Cases

Brickell v Attorney General (9 June 2000) High Court, Wellington CP267/97.

Attorney General v Christopher John Gilbert (14 March 2002) Court of Appeal, CA141/00.

Hatton v Sutherland [2002] 2 All ER 1.

Maritime Safety Authority v Tranz Rail Ltd [2000] DCR 363.

Matheson, Being Executrix of the Estate of Mark Douglas Matheson v Transmissions and Diesels Ltd [2001] 1 ERNZ 1.

Page v Smith [1996] AC 155.

Transmissions & Diesels Limited v Diane Margaret Matheson (6 March 2002) Court of Appeal, CA97/01.

Van Soest v Residual Health Management Unit [2000] 1 NZLR 179.

Walker v Northumberland County Council [1995] 1 ALL ER 737.

White v Chief Constable of South Yorkshire Police [1992] 2 AC 455.

C Articles

Peter Hanford "Psychiatric Injury in the Workplace" (1999) 2 Tort Law Review 126 – 164.

Vincent Heering "Stress makes a Dangerous Scapegoat" (1996) *The Independent*, 18.

Bill Hodge "Suing for Stress" (1996) *Safeguard* 14 – 19.

John Hughes "Damages for Work-related Stress" (1995) 2 *Employment Law Bulletin* 21 – 23.

John Hughes "New guidelines on liability for occupational stress" (2002) 2 *Employment Law Bulletin* 23 – 27.

Ann Knowles "Owning the Responsibility" (2002) *Safeguard* 16 – 17.

Michael Leggat "The emergence of exemplary damages in employment law" (2001) 4 *Employment Law Bulletin* 65 – 67.

Rebecca Macfie "Does Margaret Wilson's Industrial Health & Safety Bill Threaten New Zealand's Economic Health?" (2002) *Independent* 4 – 5.

Jenny McManus "Employment Court stresses out the nation's employers" (2000) *Independent* 8 – 9.

Paul Robertson "Sharing the burden" (2002) *Employment Today* 37 – 38.

Andrew Scott-Howman "Just what employers need: A little more stress" (2001) *Independent* 12.

Andrew Scott-Howman "Stretching Stress To Screw The Boss" (2002) *Independent*.

Alistair Wishart "Stress appeal" (2002) *Employment Today* 4.

D Seminar Papers

Department of Labour "*Review of the Health and Safety in Employment Act 1992: Working Time/Occupational Stress*" (14 September 2000)
<http://www.osh.dol.govt.nz>.

Department of Labour "*Discussion Paper on the Review of the Health and Safety in Employment Act (1992) Summary of Submissions*" (Wellington, 2001).

Alastair Sherriff "OSH Case Law Update" (Buddle Findlay Research Paper, 2001).

E Electronic Materials

New Zealand Council of Trade Unions <<http://www.union.org.nz/publications>>
(last accessed 20 August 2002).

F Texts

Gordon Anderson, Charles Chauvel, John Hughes, Kenneth Johnston, Michael Leggat, Paul Roth (Eds) *Employment Law Guide* (5th Edition, Butterworths, Wellington, 2001).

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VUW
A66
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