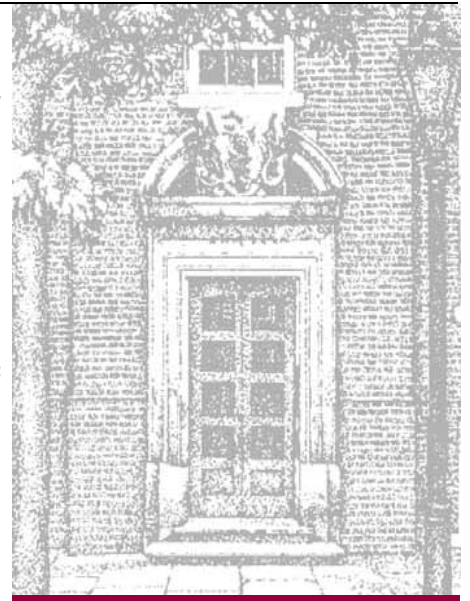


Newsletter

September 2009

Pump Court Chambers' Personal Injury Team Newsletters have established themselves as regular sources of topical news and comment for solicitors. Published four times a year under the diligent editorship of Adam Gadd they seek both to inform and entertain. They now serve a further purpose in that by completing an interactive test on the Chambers website solicitors can earn themselves CPD points without leaving their desks. See page 7 for details. Chambers is delighted to welcome Spencer Keen as a new member. He is an experienced civil practitioner bringing welcome cross-over between the complimentary disciplines of personal injury litigation and employment law, as his article on developments in the law of harassment demonstrates. The contributions of Heather Platt and Helen Trotter touch on matters of current interest. We welcome feedback from readers and suggestions of topics for future coverage. Please contact Adam Gadd on abg@3pumpcourt.com with your ideas. We would also be pleased to add any of your colleagues to our mailing list. I hope you enjoy the following pages and wish you good fortune in the web quiz.



MARK HILL QC

Leader of the Personal Injury Team

THE END OF 'WIND SWEEP LIBERTY'? SMITH V FINCH: A SYNOPSIS

In January of this year, Mr Justice Griffith Williams heard the case of Smith v Finch, which arose from a road traffic accident between a pedal cyclist (Mr Smith) and a motor cyclist (Mr Finch). Each party claimed against the other for personal injury, loss and damage. Due to the head and brain injuries which he sustained in the accident, Mr Smith was unable to recollect the course of events, but Mr Finch claimed that

the Claimant had pedalled into his path when it was too late to avoid a collision.

The resolution of the conflicting claims was uncontroversial, with Mr Justice Griffith Williams finding that the Defendant, who sustained only a fractured arm in the accident, had been driving

at excessive speed, well above the 30 mph speed limit and had caused the accident.

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THE END OF 'WIND SWEEP LIBERTY'? SMITH V FINCH: A SYNOPSIS CONTINUED

However, Mr Justice Griffith Williams then went on to address the issue whether pedal cyclists who do not wear cycling helmets, such as Mr Smith, can be found to have been contributorily negligent.

The Defendant in this matter submitted that the Claimant's failure to wear a helmet constituted contributory negligence, and that, had Mr Smith been wearing such a helmet, the injuries suffered in the collision would have been lessened. Unlike seat belts in motor cars, there is no legal requirement for a pedal cyclist to wear a helmet. However, the Highway Code provides that cyclists should "wear a cycle helmet which conforms to current regulations". Counsel for the Defendant cited the decision of *Froom v Butcher* [1976] 1 QB 286 which held that motorists and passengers involved in an accident, and who do not wear seat belts must bear the consequences of that failure themselves. He then extended that guidance, and submitted that it should apply also to pedal cyclists, quoting Lord Denning's comment that "...in so far as the damage [from an accident] might have been avoided or lessened by wearing a seatbelt, the injured person must bear some share."

Whilst the judge accepted that there was no legal requirement to wear a cycle helmet whilst riding a push bike, he was satisfied that the wearing of helmets afforded protection and commented "...it must follow that a cyclist of ordinary prudence would wear one, no matter whether on a long or short trip or whether on quiet suburban roads or a busy main road... I am satisfied on a balance of probabilities that the cyclist who dies not wear a helmet runs the risk of contributing to his/her injuries."

Perhaps, unsurprisingly, this principle has raised eyebrows and comment within the pedal cycling community. However, the judge went on to rule that, in this case, even if Mr Smith had been

wearing a helmet, he was not of the opinion that it would have lessened the injuries sustained. Although the helmet that the Claimant had was about 20 years old, did not conform to modern European safety standards, and had various flaws, the expert witnesses gave evidence that even a modern helmet would not have offered the Claimant significant protection due to the speed of the collision, and force of the impact.

Practically, what impact will this ruling have on claims? It is clear that there is now a basis for arguing contributory negligence against pedal cyclists who fail to wear adequate protective head gear. Pre-trial, specific questions as to the effect of a helmet must be put to medical experts. Thought should be given to instructing a cycle helmet expert. One should be prepared to adduce evidence as to the design of any helmet worn, compliance or lack of with EU safety standards, the speed of the collision and the force of any subsequent impact, and whether the injuries caused would have been lessened by the wearing of a helmet. It is clear that, even if a helmet is worn, if it is shown to be inadequate by today's standards, contributory negligence can still rear its head.

To quote London's eminent mayor, it seems that the days of "hatless, sun-blessed, wind swept liberty" are well behind the cyclists among you...

HELEN TROTTER



Newsletter

LUCKY TO HAVE A JOB?

The difficult economic climate and increasing levels of unemployment during the recession seems to be coinciding with a marked escalation in work-related stress.

This article looks at the development of case law in this area and in particular the relaxing of the *Hatton* hurdles particularly regarding the provision of counselling services (*Sutherland & Ors v Hatton & Ors* [2002] EWCA Civ 76).

WHAT IS STRESS?

Stress has been described by the Court of Appeal (*Hatton*) as “an excess of demands upon an individual in excess of their ability to cope”. The Court of Appeal felt that there are no occupations which should be regarded as intrinsically dangerous to mental health.

CASE LAW

The starting point is LJ Hale’s now well known guidelines in *Hatton* (approved by the House of Lords in *Barber v Somerset County Council* [2004] UKHL 13) which state *inter alia*:

(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.

COUNSELLING SERVICES

Hatton seemed to offer a “get out of jail free” card to employers who offer counselling services. However, more recent case law suggests a loosening of these tight constraints, which are acknowledged as the *Hatton* hurdles and which claimants often find difficult to overcome.

For example, in *Intel Corporation (UK) Ltd v Daw* (2007) IRLR 355 which has relaxed the requirement regarding counselling. In that case, Mrs Daw had been employed from 1988 and was promoted in 2000. Within 4 months of the promotion she was making representations to her managers about her workload being too much. In March 2001 her manager found her in tears at her desk; he asked her to write down

what was bothering her. She did so by writing him an email which detailed the problems caused by her being overworked. Intel promised a reorganisation and an additional employee to assist her. However, the employee did not materialise and in June that year, she had a breakdown followed by a lengthy period of depression. Intel relied upon the fact that they had a counselling service which Mrs Daw had not used (as per para 11 of *Hatton*).

The Court of Appeal rejected that argument and found that once Mrs Daw had spoken to her manager, her employer was on notice that there was a risk of harm to Mrs Daw and urgent action should have followed. A short term counselling service would not have helped as it could not have reduced her workload.

At para 45 of Pill LJ’s judgment: “the reference to counselling services in *Hatton* does not make such services a panacea by which employers can discharge their duty of care in all cases”.

This particular *Hatton* hurdle received a further blow in *Dickins v O2* [2008] EWCA Civ 1144. In this case the claimant had notified her employer that she felt stressed out and was “cracking up”: she requested a 6 month sabbatical on 23 April 2002 and was advised to take advantage of O2’s confidential counselling helpline. On 30 May 2002 she repeated her concerns during an appraisal and was referred to the occupational health department. There was a delay and before the appointment was fixed, Ms Dickins suffered a breakdown and did not return to work. The Court of Appeal found that the claimant’s psychiatric injury was foreseeable from 23 April 2002 onwards. The trial judge found that the employer had breached its duty of care by not sending the claimant home and in not making an immediate referral to occupational health: the CA agreed.

HEATHER PLATT

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DEVELOPMENTS IN THE LAW OF HARASSMENT IN 2009

Harassment is not defined in the PHA 1997 but includes causing a person alarm or distress. The type of 'conduct' that can amount to harassment under the PHA 1997 includes speech. One of the biggest challenges for courts considering claims under the *Protection from Harassment Act 1997* is identifying the blurred line between regrettable conduct which each of us is subjected to from time to time and unacceptable conduct which the PHA 1997 prohibits. 2009 has provided a number of cases which examine this difficult issue and provide some helpful guidance.

Section 1 of the PHA 1997 provides that:

- (1) A person must not pursue a course of conduct which:
 - (a) amounts to harassment of another; and
 - (b) he knows, or ought to know, amounts to harassment of the other.

Section 3 of the PHA 1997 provides a civil remedy for anyone who is the subject of actual or

apprehended harassment under s.1 PHA 1997. Importantly, s.2 of the PHA 1997 provides that a person who breaches s.1 also commits a criminal offence.

The fact of parallel criminal liability has, from an early stage, been used by the Courts to determine whether the alleged conduct was of sufficient gravity to constitute a civil wrong. In *Hammond v International Network Services UK Ltd* [2007] EWHC 2604 His Honour Judge Coulson QC stated:

"To be actionable under the 1997 Act the conduct in question will be criminal and might even attract a custodial sentence. It must therefore have an element of real seriousness. It must, in Lord Nicholl's works be "oppressive and unacceptable".

In this case HHJ Coulson held that the only allegations proved against the defendant were actions reasonably taken as part of ongoing managerial functions. They were not criminal in nature, and did not qualify as



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as harassment.

One week after the case of Hammond was decided the Court of Appeal handed down its judgment in the case of *Conn v The Council of the City of Sunderland* [2007] EWCA Civ 1492. In that case the claimant was a paver who had worked for the Defendant for over 40 years. The claimant alleged that his foreman had, on five occasions since July 2000, threatened and intimidated him. The recorder at first instance found two of the five alleged incidents of harassment proved but the Court of Appeal allowed the appeal against this decision holding that the alleged incidents were not sufficiently serious. Lord Justice Gage held:

“It seems to me that what, in the words of Lord Nicholls in Majrowski, crosses the line between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might not be harassment in the hospital ward and vice versa. In my judgment the touchstone for recognising what is not harassment for the purposes of sections 1 and 3 will be whether the conduct is of sufficient gravity as to justify the sanctions of the criminal law.”

Buxton LJ stated:

“the conduct concerned must be of an order that would sustain criminal liability, and not merely civil liability on some other register.”

After *Conn* it appeared clear that, in order to make a civil claim under the *Protection from Harassment Act 1997* the alleged conduct had to be shown to be so serious that it would also attract criminal liability.

However, the case of *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46 which was decided on 10 February 2009 cast some doubt on that proposition. Ms Ferguson alleged that she used to be a customer of British Gas until 25 May 2006 when she became a customer of NPower. From 21 August 2006 until January 2007 British Gas sent Ms Ferguson bill after bill and threatening letter after threatening letter and refused to recognise that she was no longer a customer. Lord Justice Jacob described three types of threats:

- i. threats to cut off her gas supply;
- ii. threats to start legal proceedings;
- iii. threats to report her to the credit ratings agencies.

Since Ms Ferguson was a property developer she was particularly concerned about the threat to damage her credit rating. She sued British Gas for harassment.

The defendant applied to strike out her claim on the ground that the conduct was insufficiently grave to qualify as harassment under the PHA 1997. Lord Justice Jacob accepted that the impugned conduct must be grave before the offence or tort of harassment was proved and also accepted that the only real difference between the crime of s.2 and the tort of s.3 was the standard of proof. However his Lordship added what he described as a “word of caution”:

“the fact of parallel criminal and civil liability is not generally, outside the particular context of harassment, of significance in considering civil liability. There are a number of other civil wrongs

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which are also crimes.... In the field of intellectual property both trade mark and copyright infringement, and the common law tort of passing off ... may all amount to crimes. It has never been suggested generally that the scope of a civil wrong is restricted because it is also a crime. What makes the wrong of harassment different and special is because, as Lord Nicholls and Lady Hale recognised, in life one has to put up with a certain amount of annoyance: things have got to be fairly severe before the law, civil or criminal, will intervene." [para. 18]

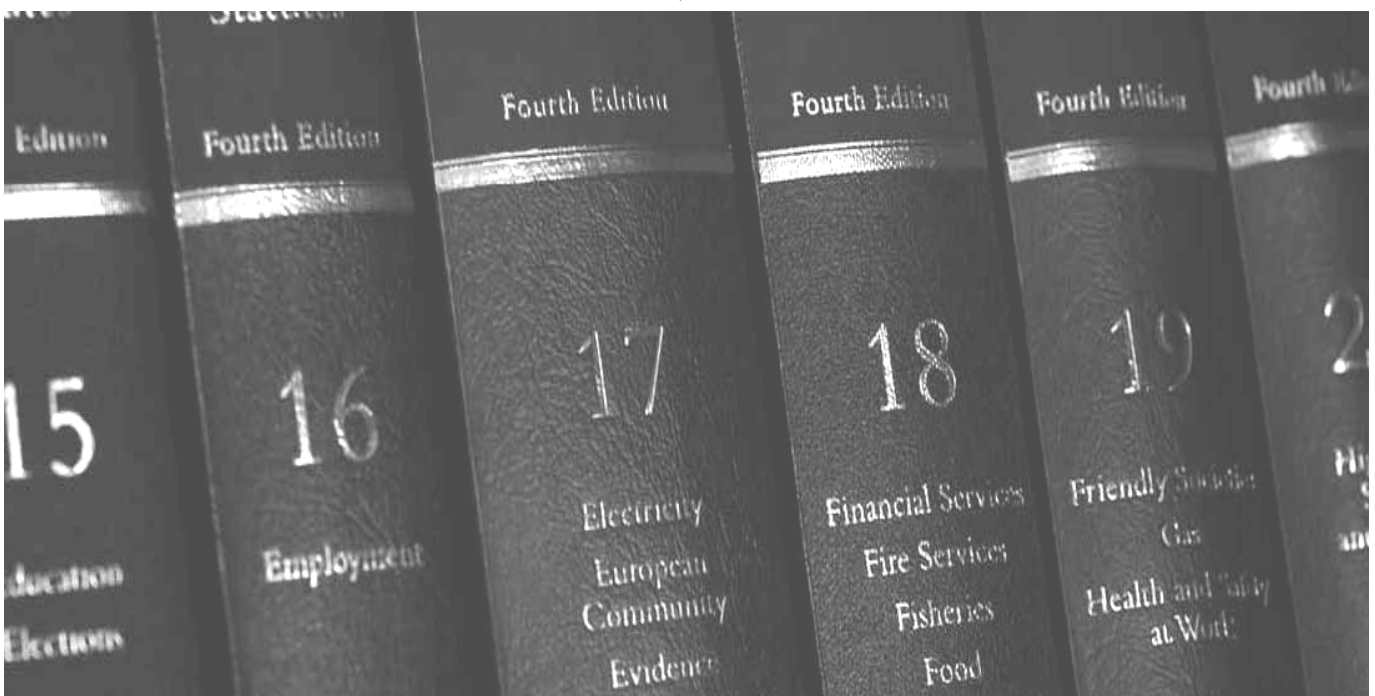
Some commentators (including myself in the New Law Journal) considered that *Ferguson* marked a retreat from the use of a criminal standard to determine civil liability under the PHA 1997. It was thought therefore that the civil wrong might encompass a broader range of conduct than the criminal wrong. The courts have now rejected that notion.

Although Lord Justice Jacob stated in *Ferguson v*

British Gas that the scope of the civil wrong of harassment is not restricted because it is also a crime the more recent case of *Dowson v Chief Constable of Northumbria Police* [2009] EWHC 907 has clarified that *Ferguson* did not water down the requirement for conduct to be of a particular gravity in order to amount to harassment under the 1997 Act. Coulson J in *Dowson* reaffirmed that the conduct must be capable of constituting a criminal offence.

One unrelated point to note is that, after conducting a review of recent authorities, Coulson J also identified five principles relevant to *Protection from Harassment Act* claims. They are helpful and worth repeating here:

a) It is incumbent on the claimant on his pleading to allege conduct which is arguably unreasonable: see Gray J in *Sharma v Jay* [2003] EWHC 1230, cited



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with approval by Longmore LJ in *Allen v London Borough of Southwark* [2008] EWCA Civ 1478;

b) "The mere fact that the conduct complained of has foreseeably caused distress to an individual is not enough; the requirement to establish an arguable case of oppression and unreasonableness must also be satisfied if the claim is not to be struck out": again, see Gray J in *Sharma*, cited with approval by Longmore LJ in *Allen* at paragraph 8 of his judgment;

c) There must be a genuinely offensive and oppressive course of conduct, in which the context may well be important (Conn). "A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary

banter and badinage of life and genuinely

d) offensive and unacceptable behaviour": Baroness Hale in *Majrowski v Guys and St Thomas's NHS Trust* [2006] UKHL 34, para. 66 of her speech.

d) The conduct must be targeted at the claimant (see *Helen Green v DBG Group Services (UK) Ltd* [2006] EWHC 1898 and *Thomas v News Group Newspapers Ltd* [2002] EMLR 4).

e) The conduct must be calculated to produce alarm and distress on the part of the claimant (even if, as per *Majrowski*, no alarm or distress were in fact caused).

SPENCER KEEN

CPD

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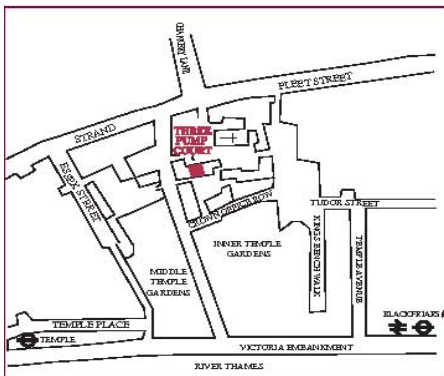
Pump Court Chambers will be publishing their Annual Seminar Programme 2009/2010 in November 2009.

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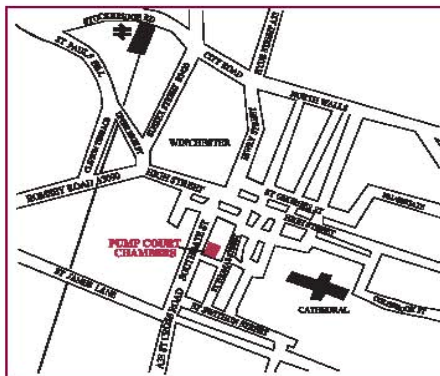
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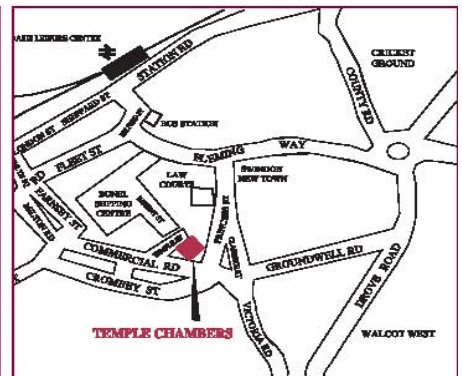
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