Can an Employee Suffering from Psychiatric Illness Caused by Occupational Stress Claim Against His Employer?

Introduction
It is notorious that Hong Kong people endure considerable stress in the workplace. Such stress could possibly lead to psychiatric illness like anxiety, depression, obsessive-compulsive disorder or even suicidal thoughts or schizophrenia. Could an employee claim against his employer for the loss and damage suffered from psychiatric illnesses induced by occupational stress?

Employees' Compensation Claim
Employees who suffer from psychiatric illness caused by occupational stress have difficulty in recovering employees' compensation from their employers under the no-fault scheme in the Employees' Compensation Ordinance (Cap. 282) (“ECO”). The ECO only concerns “injury by accident” arising out of employment, which excludes a “continuous process” that triggers an injury, for example, prolonged noise over the course of time causing deafness (in respect of which compensation is payable under the Occupational Deafness (Compensation) Ordinance (Cap.469)). Further, psychiatric illness is not among the occupational diseases as defined in ECO which are deemed to be accidents. Therefore, unless an employee can prove that he suffers psychiatric illness as a result of an accident, he cannot recover employees' compensation under ECO.

Negligence Claim under Common Law
In common law, an employer owes to his employee a duty to maintain a “safe system of work”; the employer’s breach of such duty would enable the employee to claim in negligence. The English courts have expanded the interpretation of such duty to include a duty not to cause employees psychiatric damage by the volume or character of work. In *Barber v Somerset County Council* [2002] 2 All ER 1 (“Barber”), Lady Hale LJ (as she then was) of the Court of Appeal elaborated on the requisite elements to establish liability in a negligence claim based on psychiatric illness induced by occupational stress.

Duty of Care
A duty of care is presumed when a contract of service between the employer and employee exists.
A Medically-Recognised Psychiatric Illness

Mere stress is not actionable, and the claimant must prove a medically recognised psychiatric illness, by expert evidence usually from a consultant psychiatrist who can assess and classify the illness against one of the recognised diagnostic criteria, such as the DSM-5\(^1\) or ICD-10.\(^2\)

Reasonable Foreseeability of the Psychiatric Injury

Whether a psychiatric injury, which is attributable to stress at work, is reasonably foreseeable in the individual employee concerned, depends on what the employer knows, or ought reasonably to know, about the individual employee. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability. The test on foreseeability is the same whatever the employment, and there are no occupations which should be regarded as intrinsically dangerous to mental health. The nature and extent of work as well as signs from the employee of impending harm to mental health (for example particular illness or vulnerability) are relevant in assessing this element.

Standard of Care and Breach of Duty

Lady Hale LJ in *Barber* further set out several indicators of the standard of care required of the employer.

1. The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary.

2. To trigger a duty for the employer to take steps, the indications given by the employee of impending harm to mental health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.

3. The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

4. The employer can only reasonably be expected to take steps which are likely to improve the employee’s situation.

\(^{1}\) Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, published by the American Psychiatric Association

5. 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.

6. If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.

**Causation**

The employee must establish that the particular breach of duty by the employer, as opposed to occupational stress *per se*, made a material contribution to the psychiatric illness.

**Implications for Employers and Employees**

The legal principles expounded by the Court of Appeal in *Barber* have been endorsed by the House of Lords, and consistently applied in subsequent English cases, most recently in *Olulana v Southwark LBC* [2014] EWHC 2707 (QB).

Nevertheless, the High Court of Australia in *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44 set more stringent requirements in terms of duty of care and foreseeability of psychiatric illness. It held that employers would not owe such duty of care in the first place if employees are told to simply perform their contractual obligations, and the employees have to complain specifically about the likelihood of psychiatric illness in order that the illness be reasonably foreseeable.

It is possible for Hong Kong courts to follow the English or Australian authorities to impose liability on employers for their employees’ work-induced psychiatric illness.

The issue of foreseeability of psychiatric illness, stated as the “crucial test” by the Court of Appeal in *Barber*, largely depends on the information that the employer possesses about the particular employee when signs of psychiatric illness begin to arise. Therefore, in order to maintain a potential claim on psychiatric illness induced by occupational stress, an employee should inform his or her employer clearly of excessive stress and seek help at the first instance.

For employers, to minimise risks of negligence claims based on psychiatric illness induced by occupational stress, they should be more acquainted about and cater for the mental conditions of their employees. Moreover, employers should be encouraged to recognise psychiatric illness and excessive stress in the workplace, and should not treat such illness as a taboo or perceive it as mere weakness or incompetence. As suggested by Lord Walker in the House of Lords in *Barber*, employers must recognise that it is not in their interests that a valuable employee is permanently lost through psychiatric illness.
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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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