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Stress at Work: Individuals or Structures?

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ABSTRACT

Stress is a significant practical problem in modern workplaces. According to the Health and Safety Executive (HSE), more than half of all working days lost to ill health each year are attributed to stress, depression or anxiety. This article offers an overview of the occupational psychology literature on workplace stress, focussing on the job demands–resources or JD-R model, developed by Demerouti et al., and highlighting two important points: first, that stress at work is not just about excessive job 'demands' but also about inadequate 'resources' to cope with those demands; second, that stress-related ill-health is not just a matter of vulnerability on the part of the individual worker, but is also about the way in which the workplace is organised. The article then draws on these insights to offer a critique of the way in which health and safety law and tort law approach workplace stress, arguing that both bodies of law are overly focussed on treating stress as a matter of individual vulnerability. It concludes by drawing out some broader implications of the occupational psychology literature for areas of employment law less obviously related to workplace stress, and for casual or platform working.

1. INTRODUCTION

Stress is a significant practical problem in modern workplaces. Although stress is not itself a diagnosable medical condition, it can cause both mental and physical health problems. According to the Health and Safety Executive (HSE), more than half of all working days lost to ill health each year are attributed to stress, depression or anxiety.[1] Stress is gendered,

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[1] Health and Safety Executive, *Work-Related Stress, Anxiety or Depression Statistics in Great Britain, 2019* (October 2019), drawing on data from the Labour Force Survey and the Health and Occupation Research Network for general practitioners. In 2018–19, stress, depression or anxiety accounted for 44% of work-related ill health and 54% of working days lost.

with women between the ages of 25 and 44 being significantly more likely to report work-related stress than men of the same age.[2] And it has a particularly high impact on the public sector, being more prevalent in public administration, health care and education than in other parts of the economy.[3] Polls of workers suggest that the most common causes of stress are high workloads, the way people are managed, and inability to achieve a satisfactory work–life balance.[4] It seems likely that the last of these helps to explain the greater prevalence of stress among women, given the double burden of juggling work with significant caring responsibilities many women in the relevant age group will experience.[5]

It is too early to say what the impact of the Coronavirus pandemic will be on workplace stress, but it seems likely that it will significantly exacerbate the problem in many cases. Sadly, it is already apparent that there will be large-scale redundancies as a result of the pandemic, something which is generally regarded by psychologists as a highly stressful life event in itself.[6] For those who have been fortunate enough to stay in work, greater flexibility to work from home has been a benefit for some, but new sources of workplace stress have also presented themselves, including the risk of catching the virus, fears about future redundancies, and the added challenges of juggling work with home-schooling and childcare, again with emerging evidence of gendered impact. Further work will be needed to investigate these effects.

Despite the day-to-day reality of stress at work both pre- and post-pandemic, the legal literature on the subject is relatively limited, albeit with some notable exceptions.[7] Of course, there has been some interest in the cases dealing with what the courts term 'psychiatric injury' at work, a type of injury which often stems from employees being placed in stressful

[2] Ibid. 6.

[3] Ibid. 5.

[4] ACAS, *Stress and Anxiety at Work: Personal or Cultural?* (May 2019).

[5] See, for example, A. Väänänen et al., 'The Double Burden of and Negative Spillover Between Paid and Domestic Work: Associations with Health Among Men and Women' (2005) 40 *Women and Health* 1–18.

[6] See T.H. Holmes and R.H. Rahe, 'The Social Readjustment Rating Scale' (1967) 11 *Journal of Psychosomatic Research* 213, 216.

[7] Two leading scholars in the area are Brenda Barrett and Graeme Lockwood. See, for example, B. Barrett, 'Should Employers Be Held More Responsible for Stress at the Work Place?' (2011) 11 *Contemporary Issues in Law* 37; 'Psychiatric Stress – An Unacceptable Cost to Employers' (2008) 1 *Journal of Business Law* 64; Graeme Lockwood et al., 'An Assessment of Employer Liability for Workplace Stress' (2017) 59 *International Journal of Law and Management* 202.

situations.[8] And more recently, there has been some important scholarship on mental health at work, which may include mental ill-health caused by stress at work, from the perspective of disability discrimination law in particular.[9] Nevertheless, a broader analysis of the law's approach to workplace stress is long overdue.

In the first part of this article, I will offer an overview of the psychology literature on workplace stress, in order to develop a clearer understanding of the psychological processes involved when a worker develops a health problem because of stress at work. This is an important exercise because, too often, it is tempting to rely on personal experience and anecdote as our starting-point for thinking about stress. Two key points emerge from this literature. First, although we tend to think about stress-related ill-health as stemming from 'stressors', such as long working hours or high workloads, psychologists focus on a combination of factors, some of which place demands on the worker and some of which help the worker to cope with those demands. Problems arise when demands and resources are not properly balanced. Second, the worker's own 'vulnerability' or 'resilience' is only one factor among many: from a psychological perspective, workplace stress is also viewed as a matter of workplace structure and organisation.

In the second part of the article, I consider two areas of law typically thought of as being concerned with workplace stress: health and safety law and tort law. The HSE's approach to workplace stress is well-informed by the psychology literature and in many respects asks the right set of questions.[10] However, it is not clear that asking a manager to complete a 'stress risk assessment', for example, will in practice generate the kinds of profound structural change that might be needed to combat stress. Tort law's approach to workplace stress tends to focus rather too heavily on the individual worker, particularly through the foreseeability test.[11] The employer is only liable where it could have foreseen that the worker would develop a health problem, and this in turn usually depends on the worker having taken time off work on a previous occasion because of stress-related ill-health. This treats stress as a matter of individual vulnerability and largely ignores the role of broader structural factors such as how the workplace is managed.

[8] See, for example, P. Handford, 'Psychiatric Injury in Breach of a Relationship' (2007) 27 *Legal Studies* 26, setting the employment cases in their broader context.

[9] See, for example, M. Bell, 'Mental Health at Work and the Duty to Make Reasonable Adjustments' (2015) 44 *ILJ* 194; G. Lockwood et al., 'Mental Health Disability Discrimination: Law Policy and Practice' (2014) 14 *International Journal of Discrimination and the Law* 168.

[10] See Barrett (2008), above n.7, 66–7.

[11] *Walker v Northumberland CC* [1995] ICR 702.

In the third part of the article, I develop the idea of thinking about workplace stress as structural matter in two related directions, to identify questions for future research. One is to examine the role of areas of law not obviously related to stress in providing working people with a 'resource' to combat stress. This offers another way of thinking about the justifications for employment law. The other is to examine the situation of casual or platform workers. These workers have tended to be overlooked in the psychology literature, which usually focuses on employees in 'traditional' jobs and workplaces, and their legal entitlements under both health and safety law and tort law are somewhat uncertain. But their working arrangements lack many of the structures associated with tackling stress, offering another reason to be concerned about the rise and rise of these forms of working in the modern economy.

2. THE PSYCHOLOGY OF STRESS

In this section, I offer a review of some of the psychology literature on occupational stress and some of the empirical evidence about its prevalence in UK workplaces. My aim is to ground the discussion of the law in a sound understanding of the science.

An important caveat at the outset is that this literature deals principally with stress generated within the workplace. Many workers experience stress at work because of non-work factors, such as family problems, which in turn make it more difficult for them to cope at work.[12] Of course, the workplace may be more or less accommodating of these issues—through policies around working time or emergency leave, for example—and it may be difficult to untangle the precise combination of causes of an individual's difficulties.[13] But issues surrounding non-work stress will not be my main focus.

A. Definition

The dictionary definition of stress is a state of mental or emotional strain brought on by external pressures.[14] Psychologists point out that stress is not

[12] See, for example, M. Hudson, *The Management of Mental Health at Work* (London: ACAS, November 2016), 2.1.

[13] Relevant legislation includes Working Time Regulations 1998 (SI 1998/1833); Employment Rights Act 1996, s 57A.

[14] https://www.lexico.com/definition/stress (last visited 24 March 2021).

inherently negative: for example, feeling a bit nervous before a big event, such as a sporting or dramatic performance, may aid alertness and focus because the stress triggers the production of adrenaline as part of the body's 'fight or flight' response.[15] This type of positive stress is sometimes referred to as 'eustress'.[16]

But the type of stress (or 'distress'[17]) with which I am concerned is the negative type: where the external pressures overtop the individual's capacity to cope.[18] This may be either acute—in response to a specific, devastating event—or chronic—involving sustained pressure over the longer term. Within psychology, there are various 'scales' of acute 'stressors' which assign values to different types of event (bereavement, divorce or moving house, for example) in order to calculate the extent to which a person is at risk of an adverse reaction to the particular combination of stressors they face at any given time.[19] Not surprisingly, losing one's job is high on these scales, though problems within the workplace also feature. However, as we shall see, many of the cases on stress at work have been concerned less with particular catastrophic events and more with stress in its chronic form, for example, where the stressor is an unmanageable workload persisting over many months or years.

Importantly, being stressed is not, strictly speaking, itself a diagnosable psychological condition, but it can lead to the development of psychological conditions such as anxiety or depression.[20] Stress is also widely believed to be a factor in physical ill-health, ranging from increased susceptibility to coughs and colds, to the development of heart disease.[21] This is thought to

[15] Known as the Yerkes-Dodson law: RM Yerkes and JD Dodson, 'The Relation of Strength of Stimulus to Rapidity of Habit-Formation' (1908) 18 *Journal of Comparative Neurology and Psychology* 459.

[16] A term coined by H. Selye, *Stress without Distress* (Philadelphia: JB Lippincott Co, 1974).

[17] Ibid.

[18] RS Lazarus and S Folkman, *Stress, Appraisal and Coping* (New York: Springer 1984), 21.

[19] Above n.6.

[20] See, generally, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th edn (Washington: American Psychiatric Publishing 2013). The lines are blurred somewhat by the World Health Organisation's *International Statistical Classification of Diseases and Related Health Problems*, 10th Revision (Geneva: WHO, 2019), which includes as code F43 a category of diagnosable disorders labelled 'reaction to severe stress and adjustment disorders', though these tend to be triggered by acute stressors.

[21] See, for example, AE Nixon et al., 'Can Work Make You Sick? A Meta-Analysis of the Relationships between Job Stressors and Physical Symptoms' (2011) 25 *Work and Stress* 1; N. Schneiderman et al., 'Stress and Health: Psychological, Behavioral, and Biological Determinants', (2005) 1 *Annual Review of Clinical Psychology* 607.

be because the body's physiological responses to stress, such as raised blood pressure and heightened immune responses, can become harmful if they cannot be regulated and brought back to normal after a short period of time.

B. Models of Occupational Stress

Occupational psychologists have developed a number of different models to help explain workplace stress. The demand-control model (DCM) associated with Karasek predicts that workers will experience stress where they have high demands placed upon them, particularly a heavy workload with deadlines, coupled with a lack of control over how they organise their working day.[22] The effort-reward imbalance (ER-I) model predicts that workers will experience stress where the effort they put in at work is not acknowledged through appropriate rewards, which might include pay or promotion prospects.[23] A difficulty with both these models is that while there is empirical evidence to support their claims, they are overly simple, focussing on one or two dimensions of what tends to be a highly complex problem in practice.[24] Probably a more popular model in the literature today is the job demands—resources or JD-R model, developed by Demerouti et al.[25] This takes account of a much wider variety of factors which may generate or help to guard against stress, and offers a more subtle account of the psychological processes at work. I have chosen to focus on this model largely because I find its nuanced explanation more persuasive, but also because space precludes a full overview of all the available approaches.

Under the JD-R model, job 'demands' include, most obviously, workload, but can also refer to other factors like unpleasant working environments or

[22] See, for example, RA Karasek, 'Job Demands, Job Decision Latitude, and Mental Strain: Implications for Job Design' (1979) 24 *Administrative Science Quarterly* 285; R Karasek and T Theorell, *Healthy Work: Stress, Productivity, and the Reconstruction of Working Life* (New York: Basic Books 1990).

[23] For example, J Siegrist, 'Adverse Health Effects of High Effort-Low Reward Conditions' (1996) 1 *Journal of Occupational Health Psychology* 27.

[24] AB Bakker and E Demerouti, 'The Job Demands-Resources Model: State of the Art' (2007) 22 *Journal of Managerial Psychology* 309, 311–2.

[25] E Demerouti et al., 'The Job Demands-Resources Model of Burnout' (2001) 86 *Journal of Applied Psychology* 499; AB Bakker et al., 'Job Resources Buffer the Impact of Job Demands on Burnout' (2005) 10 *Journal of Occupational Health Psychology* 170; Bakker and Demerouti (2007), above n.24; AB Bakker and E Demerouti, 'Job Demands-Resources Theory: Taking Stock and Looking Forward' (2017) 22 *Journal of Occupational Health Psychology* 273.

hostility from customers.[26] Excessive job demands can cause negative consequences for the worker such as exhaustion or 'burnout'. Job 'resources' refers to a variety of factors that motivate or support workers in doing their jobs, including pay, job security, autonomy, voice and supportive colleagues or managers.[27] Job resources generate positive outcomes, typically labelled 'work engagement'. The idea is that the resources available to the individual will help them to feel motivated or 'engaged' in their job. As Bakker and Demerouti explain, '[J]ob demands and resources are the triggers of two fairly independent processes, namely a health impairment process and a motivational process'.[28] However, the two processes are not entirely unconnected, because job resources—as well as generating motivation in themselves—can also serve as a 'buffer' against the negative consequences of job demands, such as burnout.[29] It seems likely that the efficacy of any particular resource in addressing job demands will depend on the nature of those demands. For example, if a worker has to confront highly emotional situations every day, supportive colleagues and managers are likely to be more relevant in addressing this particular job demand than a pay rise, for example, whereas overtime pay might provide some encouragement in the event of a short-term surge in demand.[30]

Having outlined the JD-R model, it may be helpful to say a bit more about job demands and resources in themselves. It is important to note at the outset that demands and resources are not watertight analytical categories: something that is identified as a demand in one workplace may be experienced as a resource in another, or perceived differently by different groups of workers.[31] I offer some examples of this below.

Demands are the easiest to explain, and tend to be used to cover four main types of demand: workload, work/life balance, physical environment and emotional engagement.[32] Demands are not inherently a bad thing—after all, a key objective of the employment relationship is the exchange of work for pay, and from that perspective the 'demands' are what the employer is

[26] Demerouti et al. (2001), above n.25, 501.

[27] Ibid. 501–2.

[28] AB Bakker and E Demerouti, 'Job Demands-Resources Theory' in PY Chen and C Cooper (eds), *Wellbeing: A Complete Reference Guide* (Chichester: John Wiley & Sons, 2014), 45.

[29] Ibid. 47.

[30] Bakker and Demerouti (2007), above n.24, 314–5.

[31] WB Schaufeli and TW Taris, 'A Critical Review of the Job Demands-Resources Model: Implications for Improving Work and Health' in GF Bauer and O Hämmig (eds), *Bridging Occupational, Organizational and Public Health: A Transdisciplinary Approach* (Dordrecht: Springer 2014).

[32] Demerouti et al. (2001), above n.25, 501.

seeking to get out of the relationship. Some of the literature distinguishes 'demands' or 'threats' (negative) and 'challenges' (positive) in order to clarify this point.[33] Problems only arise when the demands are excessive, or insufficiently buffered by resources, or both. It is also worth noting that the nature of the demands experienced by workers is likely to vary from job to job, and one of the strengths of the JD-R model, according to its proponents, is its ability to be used in a variety of different work settings.[34] For example, the relevance of emotional engagement is likely to be higher in, for example, teaching or nursing, than it is in manufacturing, where workload and features of the physical environment (heat, noise, poor air quality and so on) may be more of an issue.

Resources are more complex. A useful framework is the individual, group, leadership, organisational or 'IGLO' classification set out by Nielsen et al.[35] This identifies the four main levels at which resources might be present. At the level of the individual worker, the worker's personal resilience is important. This includes resources such as 'self-efficacy' (used in psychology to denote a person's belief in their own capacity to succeed in a particular situation), self-esteem and optimism.[36] Obviously, the key point here is that workers' personal traits affect their response to job demands, which explains why it is common to find that not all workers in a group faced with the same, overwhelming job demands will develop burnout over time. This is not in any sense to 'blame' workers for their situations, but rather to acknowledge the variety of human responses, in the same way that not everyone will develop a physical injury in response to heavy lifting or sitting at a desk all day. In recent years, another 'individual' factor, which has attracted attention in the literature, is 'job crafting'.[37] This is the ability of the individual to make some adaptations to their day-to-day work to suit their interests and preferences. For example, a worker who enjoys teaching others might informally

[33] For example, Schaufeli and Taris, above n.31; A van den Broeck et al., 'Not all Demands are Equal: Differentiating Job Hindrances and Job Challenges in the Job Demands-Resources Model' (2010) 19 *European Journal of Work and Organizational Psychology* 735.

[34] Above n.28, 45.

[35] K Nielsen et al., 'Workplace Resources to Improve Both Employee Well-Being and Performance: A Systematic Review and Meta-Analysis' (2017) 31 *Work and Stress* 101, 102.

[36] See D Xanthopoulou et al., 'The Role of Personal Resources in the Job Demands-Resources Model' (2007) 14 *International Journal of Stress Management* 121, 123–4; D Xanthopoulou et al., 'Work Engagement and Financial Returns: A Diary Study on the Role of Job and Personal Resources' (2009) 82 *Journal of Organizational and Occupational Psychology* 183.

[37] For example, A Wrzesniewski and JE Dutton, 'Crafting a Job: Revisioning Employees as Active Crafters of their Work' (2001) 26 *Academy of Management Review* 179.

take on the role of training new members of staff, even though this role is not formally assigned by the employer. Allowing workers some scope to do this can have positive effects on their well-being.

Turning now to the 'group' level, the focus here is on the positive impact that a worker's relationship with their team can have on their well-being.[38] A key factor here is the social support that team members are able to provide for each other. At the 'leadership' level, attention has focussed on the nature of the relationship between a manager and their team, and on the effect of different management styles.[39] For example, managers might motivate their teams in different ways—by promising rewards, such as pay rises, or through softer measures such as providing encouragement—and these can be studied for their impact on well-being.

At the organisational level, a particularly popular focus of the literature over many years has been 'autonomy'.[40] This is the idea that giving workers some scope to determine parameters such as when and in what order they complete their work tasks increases their satisfaction and motivation at work. There are numerous studies establishing a relationship between autonomy and well-being, and of course for many people, though by no means everyone, repetitive, monotonous work is less likely to be satisfying. Some more recent studies have, however, begun to question this relationship given the potential for highly autonomous workers to experience constant and conflicting demands, for example, when they are expected to monitor work emails at all times, but this phenomenon does not necessarily undermine the general point about the value of autonomy.[41] Other job characteristics of relevance to worker well-being include: job tasks requiring a variety of different skills, being able to complete a whole task rather than just a component part, and the task itself having value or meaning, such as a positive impact on other people.[42] A body of literature further suggests that various

[38] For example, P Torrente et al., 'Teams Make it Work: How Team Work Engagement Mediates between Social Resources and Performance in Teams' (2012) 24 *Psicotema* 106.

[39] For an overview, see J Skakon et al., 'The Impact of Leaders on Employee Stress and Affective Well-Being: A Systematic Review of Three Decades of Empirical Research' (2010) 24 *Work and Stress* 107.

[40] For example, Karasek, above n.22; B Schreurs et al., 'Job Insecurity and Employee Health: the Buffering Potential of Job Control and Job Self-Efficacy' (2010) 24 *Work and Stress* 56.

[41] See S Schieman and MC Young, 'Are Communications about Work Outside Regular Working Hours Associated with Work-to-Family Conflict, Psychological Distress and Sleep Problems?' (2013) 27 Work and Stress 244; A Väänänen and M Toivanen, 'The Challenge of Tied Autonomy for Traditional Work Stress Models' (2018) 32 *Work and Stress* 1.

[42] A well-known paper on this topic is JR Hackman and GR Oldham, 'Motivation through the Design of Work: Test of a Theory' (1976) 16 *Organizational Behavior and Human Performance* 250.

human resources (HR) practices can have a positive impact.[43] These include providing clear feedback on performance, rewarding good performance, and offering training. Job security has also been a popular topic for analysis and the evidence suggests a positive relationship between job security and worker well-being.[44]

There have been numerous empirical studies designed to test the JD-R model's predictions.[45] Most of these use surveys of workers in particular sectors to identify the demands placed upon them and the resources available to them, and the causal link between the demands and resources on the one hand, and the outcomes for workers.[46] A smaller group of studies uses observation to verify workers' explanations of their experiences.[47] There has also been a more recent push towards longitudinal studies, in which the same workers are surveyed on several occasions over time, acknowledging the fact that the development of—or prevention of—workplace stress is a long-term phenomenon.[48] The various processes envisaged by the JD-R model, such as the buffering role of resources, are well-supported by the empirical evidence, though of course there are ongoing attempts to refine the model. A particular problem, as pointed out by Schaufeli and Taris, is that the model's breadth is both a strength and a weakness: it can be adapted to a variety of different contexts, but studies 'testing the model' in practice usually test different subsets of factors and may therefore be examining quite different things.[49]

[43] For an overview of studies in this area, see K van De Voorde et al., 'Employee Well-Being and the HRM–Organizational Performance Relationship: A Review of Quantitative Studies' (2012) 14 *International Journal of Management Reviews* 391.

[44] For example, Schreurs, above n.40.

[45] For useful meta-analyses, see ER Crawford et al., 'Linking Job Demands and Resources to Employee Engagement and Burnout: a Theoretical Extension and Meta-Analytic Test' (2010) 95 *Journal of Applied Psychology* 834; JRB Halbesleben, 'A Meta-Analysis of Work Engagement: Relationships with Burnout, Demands, Resources and Consequences' in AB Bakker and MP Leiter (eds), *Work Engagement: a Handbook of Essential Theory and Research* (New York: Psychology Press 2010).

[46] For example, AB Bakker et al., 'Dual Processes at Work in a Call Centre: an Application of the Job Demands-Resources Model' (2003) 12 *European Journal of Work and Organizational Psychology* 393; AB Bakker et al., 'A Multigroup Analysis of the Job Demands-Resources Model in Four Home Care Organizations' (2003) 10 *International Journal of Stress Management* 16.

[47] For example, Demerouti et al. (2001), above n.25.

[48] For an overview, see T Lesener et al., 'The Job Demands-Resources Model: A Meta-Analytic Review of Longitudinal Studies' (2019) 33 *Work and Stress* 76.

[49] Schaufeli and Taris, above n.31.

C. Relevance for Law

This review of the occupational psychology literature offers a number of useful insights into workplace stress. Two messages are particularly important. First, from this perspective, workplace stress is not solely an issue about the individual worker's susceptibility to particular stressors. Although an individual's resources are relevant, the way in which the workplace is organised and managed is also an important consideration.[50] Studies cannot easily establish the *relative* significance of these different factors, but they do demonstrate the basic point that stress is as much a structural as a personal phenomenon. Second, although excessive workplace demands, particularly high workloads, are a key factor leading workers to experience stress, the presence or absence of job resources is also highly relevant. A heavy workload is more likely to result in negative outcomes for the worker if it is coupled with, for example, low pay, tedious work and unsupportive management.

Before applying these insights to the legal materials, it is important to note the risks of taking ideas from one discipline and applying them in another. One potential problem is that the purposes of the two disciplines may be radically different. Occupational psychologists seek to understand and model workplace stress primarily in order to design interventions to tackle it.[51] These might be structural interventions aimed at employing entities, or therapeutic interventions aimed at workers. From this perspective, understanding the causes of stress and its negative consequences, such as exhaustion and burnout, is essential in understanding how to remove, reduce or address these causes. This understanding can be quite wide-ranging in nature. Presumably, employers can then decide—on a cost-benefit basis, for example—which interventions they consider to be worth pursuing. In this regard, there may be a bias towards organisational rather than individual interventions, which can be implemented by occupational health and HR professionals across an organisation at relatively low cost. As we shall see,

[50] See G Tinline and C Cooper, 'Work-Related Stress: The Solution Is Management Not Mindfulness' (2019) 48 *Organizational Dynamics* 93. It is perhaps telling that early versions of the JD-R model did not include individual resources at all and that this is a later addition to the model: see Bakker and Demerouti, above n.28; Schaufeli and Taris, above n.31.

[51] For example, Bakker and Demerouti, above n.28, 53–8; T Cox et al., *Organisational Interventions for Work Stress: A Risk Management Approach* (London: HSE Books, 2000); C Mackay et al., '"Management Standards" and Work-Related Stress in the UK: Policy Background and Science' (2004) 18 *Work and Stress* 91; Nielsen, above n.35, 115.

although the law does have some preventative aims, its purposes are more complex.

Another factor to bear in mind is that what we might term the 'preoccupations' of the two disciplines may be quite different. The psychology literature tends to focus on larger, more traditional workplaces, again, perhaps because of the audience of occupational health and HR professionals who are more likely to be working in big firms. There is relatively little analysis of the JD-R model in contexts which seem very immediately and obviously problematic to lawyers, such as employment via internet platforms, or workplaces with a high proportion of casual workers.[52] One might reasonably hypothesise that workers in these workplaces may be more prone to 'distress' because of factors such as monotonous or repetitive work, a lack of control over the working day when working 'on demand', and difficulties accessing support from managers and colleagues when working sporadically or remotely. But, with the exception of a few studies of temporary workers, it appears that relatively little research has been carried out in these contexts. I return to the significance of this in section 3, below.

3. THE LAW RELATING TO STRESS

In this section, I will examine the law's treatment of stress. This presents an immediate problem in view of the literature just considered. How can we sensibly define the law relating to stress? On one view, we could include almost any area of law that is intended to promote what we might term, following the ILO, 'decent work'.[53] For example, legislation designed to promote collective bargaining or consultation should improve workers' sense that they have a voice at work, which is one of the 'job resources' of value in buffering against stress. But this approach would not make for a practical article. The alternative is to focus on those areas of law which deal explicitly with preventing or remedying stress, the principal examples being health

[52] See C Bernhard-Oettel et al., 'Comparing Three Alternative Types of Employment with Permanent Full-Time Work: How Do Employment Contract and Perceived Job Conditions Relate to Health Complaints?' (2005) 19 *Work and Stress* 301; M Clarke et al., '"This Just Isn't Sustainable": Precarious Employment, Stress and Workers' Health' (2007) 30 *International Journal of Law and Psychiatry* 311; L Hünefeld et al., 'Job Satisfaction and Mental Health of Temporary Agency Workers in Europe: A Systematic Review and Research Agenda' (2020) 34 *Work and Stress* 82.

[53] https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (last visited 24 March 2021).

and safety law and tort law.[54] This will be my strategy here, though I will return to the broader point about decent work in section 3.

Before getting into the detail, it is worth pausing to consider what these various bodies of law are designed to do, since there is some diversity even within the narrower focus. Health and safety law has an explicitly preventative focus. It places duties upon employers and others to assess the risks to health within their business and to take reasonable steps to prevent workers and others from suffering illness or injury as a result. HSE is responsible for enforcing the law, which can include investigating incidents and prosecuting employers in the most serious cases. In recent years, HSE has had a particular focus on workplace stress, no doubt because of the evidence indicating that a high proportion of working days lost to ill-health are nowadays lost to stress-related problems. Tort law allows employees to seek compensation from their employer where they have suffered physical or 'psychiatric' injury at work due to the employer's negligence.[55] This may be relevant where the employee has suffered mental or physical ill-health as a result of workplace stress. Although the primary focus of this body of law is providing the injured employee with a remedy for losses suffered, it is often suggested that it might also indirectly perform a deterrent function. Employers who are aware of the prospect of litigation in this area might take steps to protect themselves against liability, some of which may benefit employees.

The closest alignment between the occupational psychology literature and the law is therefore in the field of health and safety, where there is a clear focus on identifying potential causes of stress and taking steps to address them. The connection in relation to tort law is less obvious, but still present. Deciding whether the employer has been negligent involves deciding whether the employer has breached its duty of care towards the employee, which in turn requires a judgment about the preventative steps the employer should have taken. However, it will be argued here that both bodies of law take a strongly individualistic approach to workplace stress, treating it primarily as a matter of individual vulnerability rather than as a reflection of the way the workplace is organised and managed.

[54] Disability discrimination law may also be relevant where a worker develops a disability as a result of stress at work, or where stress exacerbates an existing disability (above n.9), but for reasons of space, I will not consider this in detail here.

[55] Many people regard the term 'psychiatric injury' as unhelpful but I use it here because it is used by the courts. It is used to distinguish feelings such as grief or shock from more serious problems for which compensation may be sought.

A. Health and Safety

In this section, I outline the law relating to health and safety as it applies to workplace stress, and the guidance on the topic developed by HSE. I argue that the guidance, while well-designed in general terms, is more likely in practice to result in minor changes to an individual's job than in broader structural change in the workplace. There are also concerns about the enforcement of health and safety law and its proper application to the full variety of working relationships, not just to employees.

Under section 2(1) Health and Safety at Work etc Act 1974, 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'.[56] A failure to discharge this duty is a criminal offence under section 33. There are further duties to put in place a policy on health and safety[57] and to engage in consultation with trade union or other representatives.[58] Under the Management of Health and Safety at Work Regulations 1999, r. 3, the employer is placed under a duty to conduct a risk assessment.[59] This is central to ensuring that the employer gives consideration to the specific risks arising in the workplace and takes steps to prevent them. The 'principles of prevention' are derived from EU law[60] and are given effect by r. 4 and Schedule 1, and include the following matters of potential relevance to workplace stress:

> (d) adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health…
>
> (g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;
>
> (h) giving collective protective measures priority over individual protective measures…

While the employer's duty is, of course, to comply with the law, HSE plays an important role in providing detailed guidance on how the law should be applied and interpreted in particular contexts, and in setting priorities for

[56] I discuss the significance of the definition of 'employee' further below.
[57] Section 2(3).
[58] Section 2(4)–(7).
[59] SI 1999/3242.
[60] Council Directive 89/391/EC on the introduction of measures to encourage improvements in the health and safety of workers at work ('the Framework Directive'), Article 1.

enforcement. Thus, HSE's approach to workplace stress is likely to be highly influential when employers are seeking to understand what the law requires of them in practice.

HSE first issued guidance on protecting employees' physical and mental health from the effects of workplace stress in 1995,[61] and now has a sophisticated set of 'management standards' to tackle stress at work.[62] The management standards are set out on HSE's website as follows:

> Demands—this includes issues such as workload, work patterns and the work environment
> Control—how much say the person has in the way they do their work
> Support—this includes the encouragement, sponsorship and resources provided by the organisation, line management and colleagues
> Relationships—this includes promoting positive working to avoid conflict and dealing with unacceptable behaviour
> Role—whether people understand their role within the organisation and whether the organisation ensures that they do not have conflicting roles
> Change—how organisational change (large or small) is managed and communicated in the organisation[63]

It is immediately apparent that these standards have been developed in the light of the psychology literature.[64] Demands are expressly included, and also feature within some of the other headings, for example, in the focus on role conflict and dealing with unacceptable behaviour (which might include violence or emotional demands from customers, for example). And resources are also present, covering all levels of the organisation, from the worker's immediate colleagues to senior management.

[61] Health and Safety Executive, *Stress at Work: A Guide for Employers* (London: HSE Books, 1995).

[62] https://www.hse.gov.uk/stress/standards/ (last visited 24 March 2021). There is also a European social partner framework on stress (European Trade Union Confederation et al., *Framework Agreement on Work-Related Stress* (24 March 2021)), and a UK equivalent (Confederation of British Industry et al., *Work Related Stress – A Guide* (2005).

[63] Ibid.

[64] For evaluation, see K Nielsen et al., 'Conducting Organizational-Level Occupational Health Interventions: What Works?' (2010) 24 *Work and Stress* 234. For examples of research supported, commissioned or published by HSE, see T Cox, *Stress Research and Stress Management: Putting Theory to Work* (London: HSE Books, 1993); Cox et al. (2000), above n.51; Mackay et al. (2004), above n.51; R Cousins et al., "Management Standards" and Work-Related Stress in the UK: Practical Development' (2004) 18 *Work and Stress* 113; JA Edwards et al., 'Psychometric Analysis of the UK Health and Safety Executive's Management Standards Work-Related Stress Indicator Tool' (2008) 22 *Work and Stress* 96.

HSE has published a 'workbook' to support employers to fulfil their statutory duty to conduct a risk assessment and take preventative steps in relation to stress.[65] This advises various common-sense steps, such as setting up a working group, surveying the workforce, and drafting and publicising a policy. It focuses in particular on organisation-wide activities, though it also highlights the importance of conducting individual risk assessments where it is apparent that a particular employee is at risk. This is supplemented an Indicator Tool, which can be used to survey the workforce,[66] and by further guidance documents such as an 'example stress policy',[67] a leaflet entitled 'are you doing enough',[68] and the Talking Toolkit to support conversations about stress.[69] My concern is that—despite HSE's best efforts to ensure a structural focus—the end result is more likely to be a series of small-scale changes to individuals' jobs.

One example is the treatment of 'control'. As we have seen, having greater autonomy over the organisation of the working day and the work itself may act as a buffer against stress. The Workbook identifies the following as 'what should be happening':

> Where possible, employees have control over their pace of work, eg have a say over when breaks can be taken.
> Employees are encouraged to use their skills and initiative to do their work.
> Where possible, employees are encouraged to develop new skills to help them undertake new and challenging pieces of work.
> The organisation encourages employees to develop their skills.
> Employees are consulted over their work patterns.[70]

It offers further practical suggestions for achieving these objectives and some 'dos and don'ts' for employers.[71] However, the Workbook shies away from proposing any profound structural changes. For example, it identifies 'project meetings, one-to-ones, performance reviews' as suitable forums in

[65] HSE, *Tackling Work-Related Stress Using the Management Standards Approach: A Step-By-Step Workbook* (March 2019).

[66] HSE, *Management Standards Indicator Tool* (nd), available at https://www.hse.gov.uk/stress/resources.htm (last visited 24 March 2021) under the 'tools, templates and checklists' tab.

[67] Available at https://www.hse.gov.uk/stress/resources.htm (last visited 24 March 2021) under the 'tools, templates and checklists' tab.

[68] Ibid.

[69] HSE, *Talking Toolkit: Preventing Work-Related Stress* (nd), available at: https://www.hse.gov.uk/stress/index.htm (last visited 24 March 2021).

[70] Above n.65, 49.

[71] Ibid. 50.

which to give staff the chance to have a say in how their work is organised.[72] These are, of course, good ideas, but they are likely to involve either individual employees or small groups. There is no suggestion of, for example, holding a workplace-wide review of working time and flexible working policies (in the light of legal requirements and best practice) to identify whether more people could work flexibly or from home across the organisation as a whole. In turn, this puts pressure on individual employees to make a case for change for themselves.

Similarly, under the heading of 'demands', the Workbook identifies 'what should be happening' as follows:

> The organisation provides employees with adequate and achievable demands in relation to the agreed hours of work.
> People's skills and abilities are matched to the job demands.
> Jobs are designed to be within the capabilities of employees.
> Employees' concerns about their work environment are addressed.[73]

Again, these are important objectives, but the suggested ways of achieving them focus largely on holding meetings with individuals to discuss work plans, workload and how to prioritise.[74] There is no discussion of, for example, whether the employer has enough staff to meet demands, which is a particular issue in the public sector after years of austerity, or how demands themselves might be managed. The risk is that the focus shifts too readily to the individual's ability to cope with their workload, whatever that workload might be.

While it is always to be hoped that good employers will make an effort to comply with health and safety standards regardless of how they are enforced, the prospect of investigation and enforcement has a role to play in raising the profile of such standards and encouraging less enthusiastic employers to take them seriously. But HSE has limited resources and a wide range of responsibilities, and although it has occasionally used its formal enforcement powers in relation to stress,[75] I have been unable to find any recent examples.[76] In 2019, HSE updated its guidance on investigations to state:

[72] Ibid. 49.
[73] Ibid. 47.
[74] Ibid.
[75] An improvement notice relating to workplace stress was issued to West Dorset General Hospitals NHS Trust in 2003 and to United Lincolnshire Hospitals NHS Trust in 2009: see N. Paton, 'HSE issues improvement notice to NHS trust', Personnel Today, 17 March 2009.
[76] There are searchable registers of notices and prosecutions at: https://www.hse.gov.uk/enforce/convictions.htm (last visited 24 March 2021).

> HSE will consider investigating concerns about work-related stress where:
>
> There is evidence that a number of staff are currently experiencing work-related stress or stress-related ill health, (i.e. that it is not an individual case), but…
>
> HSE would expect concerns about work-related stress to have been raised already with the employer, and for the employer to have been given sufficient time to respond accordingly.[77]

It is worth noting that stress-related illnesses are not reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR), so the main route for prompting investigation by HSE would be a complaint, presumably from the affected workers or their trade union.[78] It is unclear whether any investigations have been undertaken as a result of the change in guidance.

Moreover, formal enforcement powers are something of a blunt instrument and are unlikely to be used to deal with less serious cases. This can be illustrated by reference to the improvement notice issued to the West Dorset General Hospitals NHS Trust in 2003. According to information released by HSE, the Trust had no risk assessment in place and no stress management policy, despite evidence of stress-related absences and high workloads, and had signalled that it had no intention of making stress a priority for another twelve months.[79] Under the well-known Ayres and Braithwaite 'enforcement pyramid', this was a classic case for formal enforcement because there did not appear to be any evidence of willingness to comply on the part of the employer.[80] While it is, of course, sensible to reserve limited enforcement resources for the most serious cases, this means that employers who make some effort to comply are unlikely to be troubled by the enforcement process, and there is little regulatory pressure on them to improve.

An alternative option is to allow working people themselves to enforce health and safety law through the civil courts. Since 2013, this possibility has been limited by section 69 Enterprise and Regulatory Reform Act 2013, which amended section 47 Health and Safety at Work etc. Act 1974 so that an action for breach of statutory duty is only available where the relevant

[77] See https://www.hse.gov.uk/stress/reporting-concern.htm (last visited 24 March 2021), and B Liversedge, 'HSE announces it will inspect stress "if criteria are met"', Safety Management (24 March 2021), available at: https://www.britsafe.org/publications/safety-management-magazine/safety-management-magazine/ (last visited 24 March 2021).

[78] Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, SI 2013/1471.

[79] See https://www.hse.gov.uk/foi/releases/westdorsetgen.pdf (last visited 17 August 2020).

[80] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: OUP, 1992).

health and safety regulations expressly so provide. However, claims may still be brought in negligence—discussed further below—and the courts often draw on health and safety law to determine whether the employer is in breach at common law. This is particularly true in relation to the employer's approach to risk assessments.[81]

Another limitation of health and safety law is uncertainty about its personal scope, and the extent to which employers owe duties to working people who are not employees. This issue was addressed recently in the *IWGB* case.[82] It was held that the EU Framework Directive, Article 3,[83] required Member States to implement health and safety protections for 'workers' as defined in EU free movement and equal pay law.[84] This meant that the UK's use of the term 'employee' in the 1974 Act and other implementing measures was insufficient.[85] The judge thus held that the government had failed properly to implement Articles 8(4) and (5) of the Framework Directive (the right to leave the workplace in a situation of imminent danger)[86] and Article 3 of the Personal Protective Equipment (PPE) Directive (the employer's duty to provide PPE)[87] with respect to workers, because these are rights currently available to employees only. However, the picture was more complex in relation to the general health and safety duties intended to be imposed on employers under Articles 5(1) and 6(1) of the Framework Directive. While these are implemented for employees only under section 2 of the 1974 Act, the judge was satisfied that these provisions of the Directive had nevertheless been properly implemented because section 3 made equivalent provision for 'persons not in [the employer's] employment who may be affected' by the conduct of the employer's business, which included workers (and others).

From the perspective of stress, this ruling puts beyond doubt the point that the employer should consider the needs of workers as well as employees when developing a policy on stress, conducting risk assessments and taking preventative steps. Although HSE has long taken the view that health and

[81] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] ICR 325, [110].

[82] *R (Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions* [2020] EWHC 3050 (Admin).

[83] Above n.60.

[84] Above n.82, [82]–[83].

[85] Health and Safety at Work etc Act 1974, s 53(1).

[86] Above n.60, and see Employment Rights Act 1996, ss 44 and 100. The government is, at the time of writing (March 2021), proposing to amend s 44. See the draft Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021.

[87] Directive 89/656/EC on the use of personal protective equipment.

safety law is broad in scope,[88] there is now an urgent need for it to revisit and update its workplace stress guidance to ensure that it is relevant to different types of working arrangement. The current guidance tends to assume that it is being applied in a workplace with very traditional employer/employee relationships. For example, there is a strong emphasis on training, both to provide opportunities for staff to develop their careers, and to help them deal with difficult situations,[89] but it seems unlikely in practice that much training would be on offer for workers with short-term casual contracts. More profoundly, there is a major structural question about the extent to which precarious working arrangements of various kinds are *inherently* likely to put working people at a greater risk of stress-related ill-health, regardless of their specific design. I return to this point below.

To sum up, the HSE's management standards have clearly been drafted based on psychological research, but the more detailed guidance provided by HSE is unambitious. There is a tendency for bold statements about demands, control and other factors to collapse into minor changes to a particular individual's working experience. There are also questions about the extent to which the management standards are relevant to working people who are not in traditional 'employee' relationships and whether they are effectively enforced. At least three areas can be identified for reform. First, HSE's guidance should be redrafted to emphasise the importance of considering structural changes within the employing entity to reduce the risk of stress *before* making adjustments to individuals' jobs. Second, greater priority should be given to workplace stress in HSE's enforcement activity. Although HSE clearly cannot tackle every case of stress, occasional use of its formal powers in serious cases would raise the profile of stress as a significant workplace issue. Third, new guidance is urgently needed to help employers consider suitable preventative steps to tackle the stress experienced by people in non-standard working relationships.

B. Tort Liability

Another body of law with an obvious role to play in dealing with stress at work is the law of tort. At common law, the employer is under a duty

[88] See https://www.hse.gov.uk/enforce/enforcementguide/investigation/status-intro.htm (last visited 24 March 2021) and *Lane v Shire Roofing* [1995] IRLR 493.

[89] Above n.65, Appendix 6.

to take reasonable care to protect its employees[90] from injury at work.[91] This duty arises both in the law of negligence, because of the nature of the employment relationship,[92] and as an implied term of the contract of employment.[93] As we have seen, stress itself is not a diagnosable condition, so there is no liability in respect of stress per se, but claims may be brought where the employee has developed a physical or mental illness as a result of workplace stress.[94] Most of the reported cases relating to stress in fact concern mental illness, which is referred to by the courts as 'psychiatric injury'.[95] I will argue in this section that the law's approach is highly individualistic, focussing largely on the particular employee's response to the circumstances and how their 'vulnerabilities' might have been managed, rather than on the broader structural factors at play. This perpetuates an unhelpful narrative about workplace stress, which is not consistent with the psychology literature.

One manifestation of this is in the courts' approach to 'foreseeability'.[96] Foreseeability is regarded as relevant to establishing whether the employer has breached its duty of care (alongside the seriousness of the injury to the employee and the cost of taking precautions to prevent it) and, to some extent, to establishing causation (whether the employee's illness was a result of their work situation). The key question is what the employer could or should have predicted based on its knowledge of the situation. The courts begin from the premise that no job is inherently likely to cause 'psychiatric injury':

[90] There is virtually no case law considering other types of employment relationship, though Freedland makes a strong case for extending the duty, at least in modified form, to workers and others: M Freedland, *The Personal Employment Contract* (Oxford: OUP, 2005), 152.

[91] An oft-cited summary is that provided by Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd.* [1968] 1 WLR 1776, 1783.

[92] See S Deakin and Z Adams, *Markesinis and Deakin's Tort Law*, 8th edn (Oxford: OUP 2019), 123.

[93] See *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] IRLR 112 for guidance on managing the differences between claims in contract and tort in this context.

[94] An empirical study by Lockwood et al., above n.7, showed that very few claims in fact succeed.

[95] This terminology is arguably unhelpful, but I use it for consistency with the case law. For a powerful critique of the requirement, see R Mulheron, 'Rewriting the Requirement for a "Recognized Psychiatric Injury" in Negligence Claims' (2012) 32 OJLS 77. For an analysis of the law in work and non-work cases, see D Nolan, 'Psychiatric Injury at the Crossroads' [2004] JPIL 1.

[96] *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, [23] (Hale LJ).

> The notion that some occupations are in themselves dangerous to mental health is not borne out by the literature to which we have already referred: it is not the job but the interaction between the individual and the job which causes the harm.[97]

This contrasts with the position in relation to physical injury, where it is recognised that some jobs—in the police or the fire service, for example—do carry greater risk, though workers in those services are taken to have accepted the risks inherent in their job not attributable to their employer's negligence.[98] It is, of course, true that not every employee will develop 'psychiatric injury' as a result of a stressful work situation: in most of the cases before the courts, it is apparent that other employees in the same workplace facing the same conditions have not become ill as a result. But this is the starting-point for the courts' focus on the individual.

Very occasionally, it is possible to establish liability on the basis of a 'single stressful event': where the workplace problem that caused the injury was so extreme that it was foreseeable that any employee of 'ordinary robustness' might suffer 'psychiatric injury' as a result. This was argued in the *Yapp* case, in which a diplomat was suddenly withdrawn from his posting without being given an opportunity to challenge allegations which subsequently turned out to be unfounded.[99] It was held that while the argument was available in principle, it was not made out in *Yapp* itself, because the employer's action was not so extreme as to make the 'psychiatric injury' foreseeable in the absence of any known prior vulnerability on the part of the claimant.[100] However, a version of the argument succeeded in *Melville*, in which the claimant was a prison officer who was occasionally called upon to deal with suicides at the prison where he worked.[101] The Home Office had a procedure for supporting staff who had been in this situation but it had not been implemented properly in relation to the claimant.[102] The Court of Appeal upheld the judge's finding that the Home Office was liable. The Home Office had in fact foreseen that prison officers might suffer

[97] *Hatton*, above n.96, [24], referring to Law Commission and HSE materials cited at [3]–[10].
[98] Ibid. [12].
[99] *Yapp*, above n.93.
[100] Ibid. [119]–[133], and see also *Piepenbrock v London School of Economics and Political Science* [2018] EWHC 2572 (QB), [2018] ELR 596.
[101] One of the cases heard with *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6, [2005] ICR 782, [126]–[138].
[102] Although this might seem to create a perverse incentive not to 'foresee' injuries, the employer would have had a strong argument that it had not breached its duty of care had it implemented its own policy properly: ibid. [136].

psychiatric injury when dealing with suicides and it did not matter that this was in relation to all staff rather than the particular claimant. It was in the nature of a traumatic event that the claimant would show no signs of vulnerability before the event occurred.

However, where the claim relates to more general stressors, such as workload, it is necessary to show that the employer was aware of what the courts refer to as a particular vulnerability on the part of the claimant in order to establish that the 'psychiatric injury' was foreseeable. In most successful claims, this is done by demonstrating that the employer had been put on notice by a *previous* episode of stress-related ill-health. For example, in *Walker*, the first case in which an employer was found liable for 'psychiatric injury', it was crucial that the employee, a social work manager, had suffered two breakdowns as a result of his heavy workload.[103] After the first breakdown, he returned to work and was provided with additional support, but this was soon withdrawn, with the result that he suffered further ill-health and was ultimately unable to work again. It was held that the employer was not liable for the first breakdown, on the basis that it could not have been foreseen, but was liable for the second. Some of the more recent cases have relaxed this approach to some extent, finding that injury was foreseeable where the employee had clearly and repeatedly notified the employer of concerns about stress and workload, without suffering a breakdown or taking time off.[104] Nevertheless, the requirement remains that the employer should be aware of vulnerability on the part of the particular employee.

Crucially, although the employee's work situation is relevant in establishing foreseeability, it does not appear that it could ever be sufficient. In the well-known *Hatton* guidelines, a number of factors relating to the work situation feature in guideline 5, as follows:

> Is the workload much more than is normal for the particular job? 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?[105]

[103] Above n.11.

[104] For example, *Daw v Intel Corp (UK) Ltd* [2007] EWCA Civ 70, [2007] ICR 1318; *Dickins v O2 Plc* [2008] EWCA Civ 1144, [2009] IRLR 58.

[105] *Hatton*, above n.96, [43]. Breaches of health and safety law are relevant in negligence cases but do not obviate the need to establish all the usual elements of the claim, a point neatly illustrated by *Bailey v Devon Partnership NHS Trust* (QB, 11 July 2014, unreported).

However, the remainder of the guideline summarises factors demonstrating the vulnerability of the individual employee and it is clear from the judgment as a whole that these are regarded as much more important in establishing foreseeability. Indeed, a clear contrast between stress cases (apart from those involving a 'single stressful event') and other types of case is that foreseeability must be established in relation to the particular claimant rather than just a class of persons to which the claimant belongs.

The (unintentional) effect of the courts' approach is to construct a narrative that employees who develop 'psychiatric injury' as a result of stress do so because they are particularly vulnerable, and to downplay the role of workplace factors such as workloads, long working hours or lack of sympathy from management. The deterrent effect of tort law is, of course, controversial and contested. But to the extent that it does exist, this approach largely absolves employers of the need to think about how the design of a particular job may be causing or contributing to the stress experienced by the employee.

Another element of establishing breach of the employer's duty of care is a consideration of what precautions the employer could have taken, but failed to take, in order to protect the employee. As we saw above in the discussions of both *Walker* and *Melville*, employers are particularly likely to be held liable in cases where it is apparent that they decided what precautions were required but then failed to implement their own decision.[106] In less clear-cut cases, the judge must identify with some precision the precautions the employer should have taken, considering its size and administrative resources (with clear echoes of unfair dismissal law) and their likelihood of success.[107] The Court of Appeal in *Hatton* provided a non-exhaustive list of steps, including 'giving the employee a sabbatical; transferring him to other work; redistributing the work; giving him some extra help for a while; arranging treatment or counselling; providing buddying or mentoring schemes to encourage confidence; and much more'.[108] Again, the focus is largely on steps to remedy the perceived vulnerability of the individual, rather than on reshaping the work or the workplace.

Perhaps the high-point of this emphasis on the individual is the idea that the employer's provision of an occupational health service is likely to be a sufficient precaution in most cases. Again, this is clear from *Hatton*:

[106] Above nn 11 and 101, respectively.
[107] *Hatton*, above n.96, [43], points 9 and 13.
[108] Ibid. [33].

> an employer who tries to balance all these interests by offering confidential help to employees who fear that they may be suffering harmful levels of stress is unlikely to be found in breach of duty: except where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear.[109]

This is problematic from the perspective of the literature considered in the first part of this article. While there is nothing wrong with providing an occupational health service, it again tends to 'individualise' the problem of workplace stress. It is treated as a matter to be addressed by providing the employee with advice, rather than by restructuring the work or the workplace to make the employee's situation less stressful. In some workplaces, such as that in *Melville*, the nature of the work cannot be changed, and the provision of support becomes essential. But in other cases, restructuring should be the employer's first port of call.[110] The Court of Appeal in *Hatton* added the important qualification about intolerable pressures, indicating that occupational health provision is not the answer in every situation. This was borne out in *Daw*, where the court held that the only effective precaution the employer could have taken was to reduce the claimant's workload.[111] The provision of an occupational health service and the claimant's decision not to use it were held to be irrelevant in that case. Nevertheless, there is a worry that cases like *Daw* are the exception rather than the rule, so that the message about stress and individual vulnerability is reinforced.

To sum up, tort law constructs a narrative that 'psychiatric injury' caused by stress at work is largely a matter of vulnerability on the part of the claimant employee. This is illustrated by the way in which foreseeability is interpreted and applied, and by the emphasis on counselling as a sufficient precaution in most cases. This inhibits tort law's capacity to fulfil its secondary goal of prompting employers to take preventative measures, such as redesigning jobs and workplaces to make them less stressful for their employees. To align the law more closely with what we know about stress from the JD-R model, the courts ought to place more emphasis on the predictive value of the work situation when considering foreseeability for the purposes of determining whether the employer is in breach (and, ideally, accept that foreseeability of stress-related psychiatric injury need only be established in relation to a class of persons to which the claimant belongs),

[109] Ibid. [34].
[110] Above n.101.
[111] Above n.104.

and acknowledge that the employer's obligation to take preventative steps should include reorganising the work, where possible, as well as providing support to individuals.

4. BROADER STRUCTURAL QUESTIONS

So far, the discussion has focussed on how a psychologically-informed understanding of stress might help us to critique and develop those bodies of law dealing explicitly with workplace stress, such as health and safety law or tort law. But the insight that the way in which workplaces and working lives are structured and organised is a key factor in either generating or combating stress at work has much broader implications too. These will be the focus of this section. I will develop two points. First, to tackle workplace stress in a comprehensive manner, many other bodies of law also need to be considered, including some that we would not normally think of as having any relationship to workplace stress at all. Second, the organisational and structural causes of stress seem likely to have significant implications for workplaces that are not arranged along 'traditional' lines, such as workplaces with significant use of casual work or platforms in the gig economy. Both of these points do, of course, raise huge issues, so I will need to confine myself to offering an overview and suggesting some questions for further research.

A. Other Areas of Law

There are many different ways of illustrating the argument that a legal regime promoting 'decent work' has a significant role to play in combating workplace stress, but for reasons of space, I will offer just two examples: working time and trade union representation in the workplace. The examples are contrasting in the sense that the relationship with tackling stress is much more obvious in the case of working time than it is in the case of trade union representation. Thinking about these bodies of law from the perspective of stress sheds new light on how they might be justified and interpreted.

The relationship between stress and hours of work may be obvious, but the mechanisms involved are complex. In many workplaces, long hours working is a 'coping strategy' for dealing with the fact that the amount of

work to be done (the 'demands' of the job) far exceeds what can be accomplished in 'normal' working hours.[112] This may not be a problem if it is only occasional and foreseeable—a surge in demand in a retail business just before Christmas, for example—but long-term or unpredictable long-hours working can be a significant stressor. Long-term long-hours working impedes workers' ability to spend time resting and recuperating, and can generate a sense of deep dissatisfaction through the inability ever to feel on top of job demands.

The Working Time Regulations (WTR) 1998[113] do, of course, have a health and safety objective at their heart, since they implement a Directive based on the EU's health and safety competence.[114] In addition to the various enforcement mechanisms in the Regulations themselves, they have come to play a role in tort claims relating to workplace stress. Where the employer knows that the employee is working significantly in excess of the 48-hour limit, this can be relevant to the question whether the employee's stress-related illness was reasonably foreseeable, particularly if the employee has refused to sign an opt-out and has complained about excessive hours.[115] However, thinking about the WTR from the perspective of stress adds a new dimension to the old argument about the legitimacy of the opt-out. The opt-out has long been controversial, in particular because of the likelihood that many workers will have no choice but to sign an opt-out as a condition of getting or keeping a job, so that the genuineness of any 'consent' they might have given can be called into question.[116] But from a stress perspective, the worry is that the opt-out might legitimise long-hours working as a means of coping with excessive workloads, rather than forcing the employer to tackle the cause of the problem, either by reassigning or reorganising work or by helping workers to manage their workloads more effectively. In particular, because the opt-out once signed remains valid for the duration of the employment, there is no obvious means of forcing the employer

[112] For an early case tackling the issue from a contractual perspective, see *Johnstone v Bloomsbury HA* [1992] QB 333 (CA).

[113] Above n.13.

[114] Article 118a of the Treaty Establishing the European Community, now Article 153 TFEU, provided the basis for successive Working Time Directives, the latest being Directive 2003/88/EC.

[115] *Hone v Six Continents Retail Ltd* [2005] EWCA Civ 922, [2006] IRLR 49; but cf *Sayers v Cambridgeshire CC* [2006] EWHC 2029 (QB), [2007] IRLR 29.

[116] For empirical evidence and discussion, see C Barnard et al., 'Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK' (2003) 32 *ILJ* 223, 245–8.

to review the situation to assess the impact of long-hours working on the worker over time.

A less obvious example of a body of law with relevance to workplace stress is that relating to trade union recognition and collective bargaining. On a simple level, collectively bargained terms and conditions are likely to ensure that workers are better paid for their efforts, which under some older models is considered to be a good protection against workplace stress. On a more sophisticated view though, a trade union presence in the workplace can help to give workers a voice on a variety of fronts: for example, in managing demands, such as excessive workloads, or securing resources, such as better training or support services. Empirical evidence suggests that unionised workplaces offer a wider variety of mechanisms for workers to articulate their concerns.[117] Perhaps most importantly, trade union representatives can play a significant role in coping with change in the workplace, which can be a significant source of stress for workers, particularly if they do not know what is happening and do not feel that their interests are being represented. For example, where unions are strong, employers might be more willing to respond to a need to improve productivity by training and empowering workers rather than by developing ever more aggressive performance monitoring strategies.[118]

Of course, this is not to suggest that dealing with workplace stress should be regarded as a principal justification for policies to promote trade union membership or to support collective representation at work. But it does highlight a hidden cost of the failure to make these policies a central plank of labour policy in the UK over the past few decades. As workplaces have become more individualistic, there are fewer institutions in place to serve as 'buffers' against the kinds of job demands that can lead to stress-related illness. Both workers and, ultimately, employers have suffered as a result.

[117] See, for example, J Benson, 'Employee Voice in Union and Non-union Australian Workplaces' (2000) 38 *British Journal of Industrial Relations* 453. However, it is important to acknowledge that stress is a significant problem in the UK public sector, which is highly unionised, suggesting that union voice may not always be a sufficient buffer against, for example, high levels of demand caused by budget cuts.

[118] See V Doellgast, 'Collective Voice under Decentralized Bargaining: A Comparative Study of Work Reorganization in US and German Call Centres (2010) 48 *British Journal of Industrial Relations* 375.

B. Casual or Platform Work

A thread running throughout this article has been a concern about the situation of working people who are not employees in 'traditional' jobs. This group tends to be under-represented in occupational health research, and faces uncertainties about legal entitlements. One of the key indicators of stress levels in the economy—working days lost through sickness absence due to stress—does not cover casual workers for whom the concept of a 'sick day' does not exist. What I want to highlight here is the extent to which temporary, casual or 'gig' work is likely to involve a combination of high demands and low resources, not just as a matter of a particular context at a particular time, but as a matter of the inherent structure of the job.

Of course, it is important to be careful about sweeping generalisations covering large numbers of differently-situated working people. However, we could reasonably hypothesise that some of the key problems associated with distress at work are likely to be more present in on-demand working of various kinds than they are in traditional jobs.[119] For present purposes, four examples will suffice. First, as we have seen, job insecurity has been shown to be a predictor of distress, and this is inherent in temporary or casual working. Second, constant work availability is associated with negative outcomes for permanent employees—for example, being expected to respond to work calls outside normal working hours—which might suggest that being called upon to work unpredictably and at short notice will also be a stressor for casual workers in particular. Third, having control over work tasks is a key resource which can buffer against stress, but this is wholly absent in some parts of the 'gig' economy where, once the worker has logged on to an app, their every move is governed by the app's dictates. Fourth, having supportive colleagues is another buffering resource, but this is less likely to be present among dispersed workers who may not be able to meet each other very easily to develop a sense of community, and may be more obviously in competition with each other for the available work.

In practice, some of these hypotheses are not entirely borne out by the literature. One key example is around job insecurity. Here, the evidence tends to suggest that permanent employees react more strongly to job insecurity than do temporary workers.[120] However, the reason for this is significant.

[119] See the literature cited at n.52 above.

[120] N de Cuyper and H de Witte, 'Job Insecurity in Temporary Versus Permanent Workers: Associations with Attitudes, Well-Being, and Behaviour' (2007) 21 *Work and Stress* 65.

Permanent employees expect a high level of job security, so rumours that jobs may be at risk (for example) have a particularly harmful effect because they breach those expectations, taking away one of the valuable things about having a permanent job. Temporary workers experience this form of distress much less readily because they have lower expectations of security in the first place. Another key variant is the relationship between the individual's job and other activities. For example, there is evidence to support the view that workers with 'gig' economy jobs are happier where the job is not their sole source of income or sole activity.[121] So a student doing a delivery job at weekends to make some extra money is likely to experience this very differently to someone doing the delivery job as their main job to support their family. The 'gamification' of some gig economy jobs—where completing a task quickly is rewarded in some way, as if it were a computer game—plays into this distinction, by making unskilled and potentially tedious work 'fun' for people who do not depend on it.

However, the literature exploring stress among gig economy workers is very much in its early stages of development, and there is relatively little material on more long-standing but similar phenomena such as temporary or casual working, so there is a lot more research to be done. From a legal perspective, it would be helpful to see greater dialogue between lawyers and psychologists on the most appropriate way to frame research questions about different forms of working.

5. CONCLUSION

My aim in this article has been to draw attention to a difference of emphasis between the psychology literature on stress and the legal approach. While the law tends to treat stress as a matter of individual vulnerability, to be addressed through tweaks to a person's job or the provision of counselling, the psychology literature opens up the idea that a much broader range of factors can have an effect—positive or negative—on stress at work and its negative health effects. These are principally concerned with the way in which work is organised and managed—factors such as employee voice, support from colleagues or job security, for example—with the individual's own susceptibility occupying a much less prominent place in the analysis. I draw three conclusions from this work.

[121] Clarke et al., above n.52.

First, the law should be more open to the idea that stress can have structural causes and that strategies to prevent or reduce the prevalence of stress should focus on structural change as well as support for individuals. This might be relevant in several different ways. For example, in risk assessments, greater emphasis might be placed on reviewing and altering workplace practices that contribute to stress—such as job insecurity or the lack of a mechanism for employee voice—as well as on factors relating to the individual's job. In tort litigation, the courts could be more open to the idea that poor workplace practices may, in some cases, make harm foreseeable even where the affected individual had not shown previous signs of stress-related ill-health.

Second, we should be more aware of the role of worker well-being as a potential secondary justification for various elements of labour law. I do not wish to suggest that well-being can displace other more familiar justifications, such as inequality of bargaining power, dignity or human rights, but rather that it adds another important dimension to a multi-faceted approach to justifying labour law. Many elements of labour law—controls on working hours, rights relating to trade union recognition, protection against unfair dismissal and so on—can be seen as having a positive effect on employee well-being by buffering against stress. An attraction of well-being as a justification is that it is effective from multiple perspectives: it is an aspect of the dignity of working people, it benefits employers because happy and healthy workers are likely to be more productive, and it benefits the state because there should be less call on sickness benefits or healthcare services if workers are well-cared-for at work. Of course, it is incomplete—any one intervention is not likely to be transformative in its own right—but it should be given greater consideration than at present. This is potentially particularly important in relation to the gig economy, where harm to workers' health and well-being is a significant argument against being allowed systematically to dispense with the normal protective structures of employment law.

Third, there is an urgent need for further research on the psychological effects of work in the 'gig economy' and of casual work more generally. I drew attention earlier to the limited range of psychology literature on this topic and the general tendency to focus on standard long-term employment relationships when examining employees' responses to demands and resources at work. There are good reasons to believe that casual work may have negative effects on workers' well-being, both because of its inherent uncertainty and irregularity and because of the knock-on consequences of that

uncertainty, such as difficulties in organising workers or providing them with support from colleagues. But—as the example of temporary work and job insecurity shows—the picture is not entirely straightforward and it would be preferable to have more evidence from which reliable conclusions could be drawn.