Health&Safety news

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Martyn Gwyther, Thompsons Solicitors' National Practice Lead for Overseas Accident claims, considers the implications of work-related accidents abroad

Trouble overseas

INCREASING NUMBERS of people now travel overseas as part of their job with British registered companies and there is no sign that this growing trend is likely to change soon, whatever the outcome of the Brexit negotiations.

There are many possible reasons for this including:

- the European Union providing unrestricted movement within EU countries
- success stories within British manufacturing for large companies
- improved transport links and cheaper transportation costs
- the development of international trading relationship and cross selling of skilled and experienced designers, architects, manufacturers and tradespeople.

"Mr Tomas Dusek and 13 others were tragically killed in a helicopter crash that took place in the Andes Mountains in Peru in 2012"

In any event, large numbers of people now work for British registered companies but in circumstances in which they have to travel overseas to perform their contract of employment.

Questions that are often asked include: what happens in the event that a person engaged in such employment is injured while abroad? Do they have to pursue the claim overseas, or might they be able to bring the action against their employers in the UK?

Employers' legal duty

It may be surprising but the answer to these questions has been evident for quite some time. In particular, the Law Lords in the case of **Wilson & Clyde Coal Company Limited -v- English** [1937] 3 All ER 638 determined that there are certain duties that an employer cannot pass onto anyone else. These include the duties of providing:

- a safe place of work,
- a safe system of work,
- safe plant and equipment, and
- competent fellow employees

This is an old case but the law remains true today and it is coming to prominence again because of recent legislation known as the Enterprise Act 2013, which in section 69 precludes an injured party from relying upon the employer's breach of statutory duty as an automatic foundation for a personal injury claim.

But just what is required, and what will be considered reasonable?

There is no one-size-fits-all approach. Each case will turn on its own unique facts. However, helpful guidance has been provided in the case of **Dusek v StormHarbour Securities LLP** [2016] EWCA Civ 604.

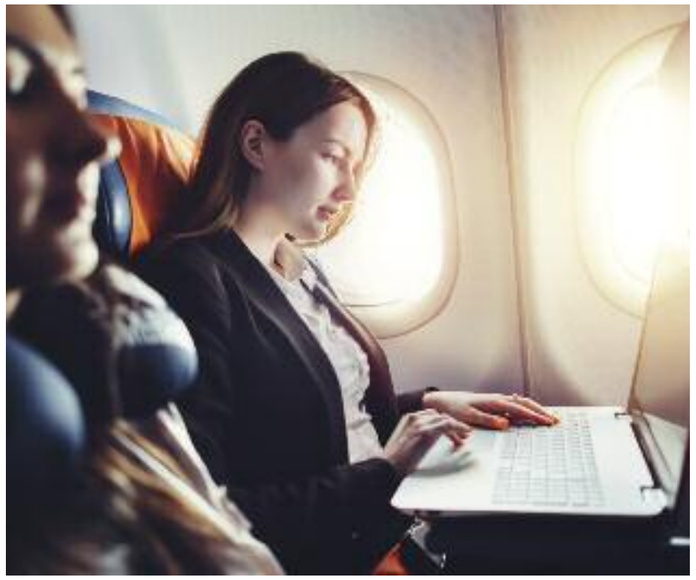
A brief summary of the facts of the case are that Mr Tomas Dusek and 13 others were tragically killed in a helicopter crash that took place in the Andes Mountains in Peru in 2012. At the relevant date, Mr Dusek was employed by StormHarbour as an investment banker and had travelled to the location as part of his employment which included an obligation to secure funding for the development of a hydroelectric complex.

Work-related accidents abroad

Mrs Dusek commenced claims in the High Court alleging that StormHarbour were in breach of their duty of care to provide a safe place of work, safe equipment and a safe system of working. The defendant denied that they could be held accountable for safety issues on board the helicopter that had been chartered by Peruvian clients from a local operator who held the appropriate operator's license in Peru.

Mr Justice Hamblen (now Lord Justice Hamblen) held in favour of the claimant by finding as a matter of fact that:

- StormHarbour owed a duty of care to their employees, including a responsibility to take reasonable care for their safety and to prevent them from being exposed to an unnecessary risk.
- They were in breach of this duty by failing to investigate the safety of the proposed helicopter flight.
- The flight was, in fact, poorly planned, took place at night and in poor conditions. As a result, the helicopter struck the mountainside.
- The helicopter used had limitations that had not been considered but meant that it may not have been the most appropriate equipment to use for the journey.
- The flight crew were tired and were operating in breach of local regulations.



- Had a suitable and sufficient risk assessment been undertaken by StormHarbour, they would have advised Mr Dusek not to take the flight because of safety concerns, and he would have complied.
- StormHarbour were wrong in their contention that no specific safety enquiry was needed, or that any such safety enquiry would have been limited to checking that the supplier of the flight (the carrier) was properly licenced and was reputable.

In the circumstances, even if an accident occurs overseas as a result of a failure by a third-party organisation, there are still situations in which a claim against the employer in the UK may prevail.

Conclusion

What to consider if you are injured working in a foreign country:

- **Always get a copy of your employment contract before you travel.**
- **Report any accident as soon as it occurs, or as soon as is possible after the accident to an appropriate member of staff.**
- **Ensure that a member of staff completes an accident report, or incident report as soon as possible. If the organisation does not offer to do this, ask to speak to a supervisor, manager or other senior official and insist that they complete the appropriate entry.**

If you are not physically able to complete such a report, ask a work colleague to do so on your behalf. It is best to have agreed an appropriate system in advance with work colleagues about how this will be done in the event of a traumatic injury.

- **Keep a copy of the accident report or incident report if possible.**
- **Make a note of the details of other personnel who have been involved in the incident and/or the post-accident investigation, such as names and contact details for employees of other organisations present at the time.**
- **Seek medical treatment as soon as possible after the accident. Obtain and keep copies of the medical records that are created following your attendance, if possible. If not, take the name and address of the hospital, private clinic or doctor that has provided the treatment.**
- **Find out from those around you, co-workers and/or Union representatives, whether there have been previous incidents before your accident. If so, take full details of these incidents.**
- **Take photographs, if possible of the cause and scene of the accident. Where possible, give some idea of the scale of the problem by putting something next to the problem that can be used to demonstrate its size like a ruler, a coin for smaller problems or a tape measure for larger items.**
- **If an engineer of some type, or some other member of staff attends to fix the problem after the accident, try to take his or her name and contact details so that they can provide further information in due course.**
- **If the matter is investigated by an independent party, or even an internal investigator, obtain contact details of the personnel completing the investigation.**
- **Report the matter to specialist solicitors as soon as possible because the time limits for pursuing this type of claim can be very short in certain countries.**

Industrial Disease Solicitor Ian Cross looks at the history of hand/arm vibration syndrome and the law around making a claim

Hand/arm vibration syndrome: an overview

HAND/ARM VIBRATION syndrome (HAVS) is an industrial disease which is very much of the modern age.

Any gunner on an 18th century man-of-war would have known about noise induced hearing loss; even if the term was unlikely to be used. The Roman author, Pliny the Elder, who died when Pompeii was destroyed, wrote about the dangers of asbestos.

By contrast "vibration white finger" (as it was first known) was not documented until the early 20th Century. The first scale for assessing the condition (the Taylor-Pelmear scale) was not published until 1975 and, in the United Kingdom, it was not listed as a prescribed disease until 1985.

Only in 2005 were regulations brought in concerning hazards of vibration. The Noise Regulations, as they are known, had been in force since 1990.

Symptoms

It is now accepted by most that HAVS consists of three components:

- The vascular component, which can cause blanching or whitening of the skin due to loss of blood flow. It is often set off by sudden exposure to cold. It was this that gave it the old name "white finger". When blood returns to the fingers this is often painful.
- The sensorineural component, causing numbness and tingling in the fingers and in more severe cases a loss of sense of touch and dexterity.
- Carpal tunnel syndrome, a compression of the median nerve as it passes through the wrist. This can cause symptoms similar to the sensorineural component. The connection between vibration and carpal tunnel syndrome is far from wholly accepted.

Similar Conditions

To complicate matters further, many of these symptoms can be caused by other illnesses, most notably Raynaud syndrome, also known as Raynaud's phenomenon or Raynaud's disease.

The symptoms of this illness (which is not work-related) are almost exactly the same as HAVS – indeed HAVS is generally considered to be a sub-type of Raynaud's. When it is not work-related it is sometimes known as Primary Raynaud's.

Other conditions can also produce symptoms suggestive of HAVS. Many have no known cause and occur in individuals who have never used vibrating tools and medical experts will often refer to these using the broad-brush terms "constitutional" or "idiopathic."

There are no tests that can easily distinguish between HAVS and a constitutional condition. It is a matter of medical opinion.

> *"Only in 2005 were regulations brought in concerning hazards of vibration. The Noise Regulations, as they are known, had been in force since 1990"*

The cause of HAVS

The condition is caused by exposure to vibration through holding, and particularly gripping, tools that vibrate. Among the most notorious examples are jack-hammers, chainsaws, strimmer's and swaging tools used in metal industries.

There are two main factors for lawyers to consider when establishing the cause of a client's HAVS – the length of time that the worker is exposed to vibration and the nature of the vibration during that time.

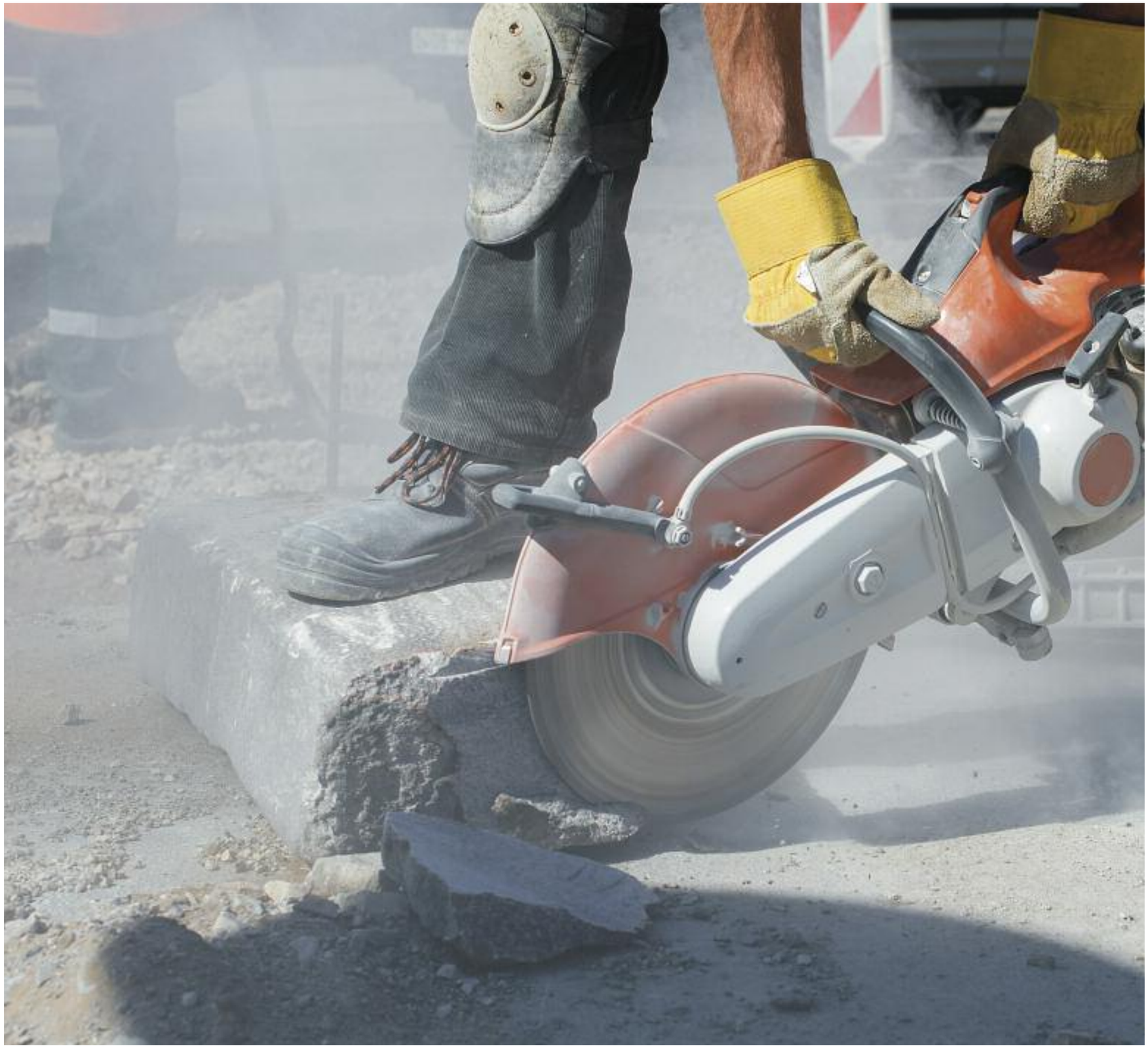
The length of time is often controversial. Employers always argue that employees/claimants exaggerate (deliberately or not) the time spent actually using the tools. The concept of "anger time" has developed – the time that the tool is actually in use and vibrating. This can be the source of much argument when trying to work out exposure in the past. A sensible employer will, however, record the anger time by having someone with a stopwatch measure the time the work is being done.

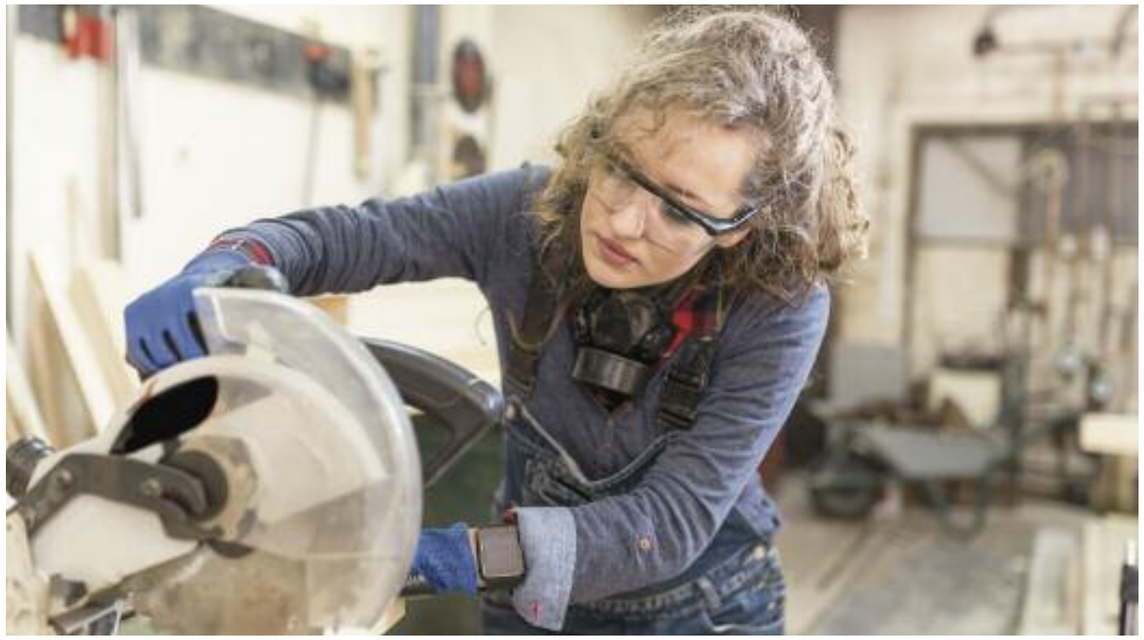
> *"Employers always argue that employees/claimants exaggerate (deliberately or not) the time spent actually using the tools"*

The second factor is the nature of the vibration. This is where matters become complicated. Vibration is an "oscillatory motion." It is a movement backwards and forwards, side to side or up and down – or a combination. Each movement will take place a number of times per second. The more movements per second the higher the frequency and the greater the acceleration and deceleration.

What needs to be determined is the daily exposure, the total dose, of vibration. This is measured by reference to what is known as A(8) which is a dose from an eight hour shift. It is measured in m/s^2 a measure of acceleration.

Exactly what is and what is not a safe A(8) is a matter of considerable debate but some agreement exists that vibration magnitudes of below 1.0 m/s^2 are seen as "acceptable." A claimant is unlikely to win a case where exposure is this level or below.





➲ Employers will predictably argue that higher levels are not hazardous.

Bringing Claims

In most HAVS cases, an employer is considered to have had knowledge of the risks of HAVS since around 1976. This reflects how recently the medical knowledge about the condition has developed. By contrast, in most noise cases the "date of knowledge" is 1963.

There have been a number of HAVS cases where small businesses have convinced the court that their date of knowledge was not until a date much later than 1976.

Employers have had a legal obligation, after the date they are deemed to have had knowledge, to fulfil their duty of care to their employee. Where they have failed to do so, and where an employee suffers HAVS, compensation can be awarded by a court. This, however, is also a complicated subject in itself.

It was not until 2005 that Parliament introduced law specifically targeted at vibration. The Control of Vibration at Work Regulations 2005 introduced various standards and duties that came into force on the 6 July that year and that an employer has since had to follow. The starting point is that an employer is under a duty to eliminate exposure if possible or, if not, to reduce it as far as reasonably practicable.

Sadly, and shamefully, the right to sue for breach of these regulations was removed by an act of Parliament passed by the coalition government – though this only applies to injuries sustained after October 2013.

As with most personal injury claims, a claim for HAVS is subject to a three-year time limit. However, this does not necessarily start with the date of formal diagnosis; it can be much earlier.

Roughly it is the date that the claimant first knew, or ought to have known, that they had an "injury" that might be work-related. Just to confuse matters this is also known as the "date of knowledge" and is yet another complicated area of law.

Fortunately for Thompsons' clients the firm has specialist teams, with years of experience of this field of law, who can guide clients through the legal technicalities, particularly as the firm has been involved in many of the key legal cases in this area.

David Robinson, Thompsons Solicitors' Professional Support Lawyer for Personal Injury Litigation, discusses psychological injuries caused in the workplace

Keeping it in mind

MENTAL HEALTH problems in the workplace, once a taboo subject and something whispered about in the tea room, are now increasingly being openly discussed in a much more supportive way. This "turning of the tanker" is in no small part down to the continued efforts of trade unions who have stood by their members and supported them at some of the worst moments of their lives.

The statistics speak for themselves, with one in six people reporting symptoms such as anxiety and depression. Furthermore, evidence reveals that over 12 per cent of reported sickness absence in the UK is attributed to mental health problems.

It is therefore in the interests of employers to provide as much support to employees as possible to avoid conditions in which mental health becomes a problem at work and to support who may be feeling vulnerable. This article seeks not to look at the employment law issues, but the avoidance of incidents that may actually cause or trigger psychological problems for staff.

The Duty

The law does not distinguish claims of physical injury from claims of psychological injury, and employers owe their employees a duty of care to protect them from foreseeable risks of all injury. But, while falling from a broken ladder or slipping on a wet floor may be easy to argue as foreseeable, it becomes more difficult when it comes to psychological injury.

This difficulty is in no small part down to the fact that with psychological injury there is a spectrum of responses and an individual's background and general resilience level play a part. That said, the law is clear that employers must take their employees as they are, which includes with any existing vulnerabilities their employees may have.

What might or might not be foreseeable can still be a real challenge. For example, an explosion at a factory caused by faulty wiring is likely to leave a devastating scene of injury and destruction, which would cause someone of moderate fortitude some emotional response that could lead to psychological problems.

> *"The law is clear that employers must take their employees as they are, which includes with any existing vulnerabilities their employees may have"*

However, should a worker, who is required to view distressing material repeatedly on a day-to-day basis as part of their job, suffer a psychological response when he or she has been trained and receives regular support, it is less clear that it is foreseeable.

Where there is repeated exposure to distressing scenarios or materials, it will be necessary to review all background information to determine whether the injury could have reasonably been foreseen and therefore prevented. This involves a process that includes:

- Understanding the nature of the work an employee is required to undertake.
- Consideration of the frequency of the work and whether time away from a particular distressing work type was provided. ➲

- An assessment to determine whether employees have been adequately pre-screened for any pre-existing vulnerabilities such that would make them more susceptible to psychological injury.
- Training to ensure that employees were aware of the potential risks and also to ensure they were working in accordance with key policies and procedures.
- Support measures available and how accessible they were.
- Review and monitoring processes, including supervisory review and self-review opportunities.

The above are by no means exclusive but they demonstrate what might be reasonable for an employer to implement. None of them are particularly burdensome. It is about creating an openly supportive environment. It is recognised that some types of employment have a greater propensity for psychological injury than others, particularly those who work daily with unknown situations, such as in the emergency services.

"While it may not be possible to prevent exposure to a particular distressing situation, employers can ensure they have measures in place to mitigate the impact of such a situation"

However, while it may not be possible to prevent exposure to a particular distressing situation, employers can ensure they have measures in place to mitigate the impact of such a situation so as to promote and protect their employees' mental wellbeing.

Conditions Caused

To be successful in a civil claim for personal injury, it is necessary to prove that "a recognisable psychiatric condition" has been caused as a result of someone else's fault. It is not the purpose of this article to provide a definitive list, but some conditions that arise include:

- Post-Traumatic Stress Disorder: a condition that normally arises from a person experiencing, witnessing or being confronted with an event that involved actual or threatened death or serious injury, or a threat to the physical integrity of that person or others. There is a formal classification and the condition ranges in severity.
- Adjustment Disorder: this is a response (within three months) to an identifiable stressor that leads a person to display emotional or behavioural symptoms. To meet the clinical criteria, the distress must be out of proportion to the expected reactions to the identifiable stressor and/or the symptoms must be clinically significant, usually meaning that they must impair day-to-day functioning.
- Major Depressive Disorder: often classed as "depression", and generally involves an overwhelming feeling of sadness, isolation or despair that lasts for two weeks or more at a time. There is again a scale of severity, and it is a condition that can fluctuate over time.

It should be noted that the above are brief descriptions for the purpose of this article and are not designed to be relied upon in any diagnostic way. Referral to a medical expert will always be necessary.

The above are just three types of condition from a significant range, but they demonstrate the breadth of psychological injuries that exist, and it is not appropriate simply to group employees who suffer with psychological injuries together – you would not classify workers with a broken finger in the same group as those who are paraplegic, and employers should recognise the differing range and severity of psychological injuries just as with physical injuries.

Prevention is better than cure

Each person is different but often, once a person is exposed to something such that he or she suffers a psychological injury, even if recovery is possible, that person may always have an existing vulnerability; that is to say, should he or she be exposed to a future event there is a greater likelihood of further injury.

Therefore, while offering support and treatment following a particular incident is a must, it is far better to seek to prevent psychological injury in the first place.

Prevention techniques include:

- a regular review of risk assessments
- knowing employees
- health screening and reviews
- supportive environments underpinned by supportive policies, procedures and managers
- open door policies
- break-out spaces and quiet rooms
- staff surveys
- confidential reporting of concerns.

Of course, much will depend on the workplace, but thought should be given as to how to best protect the employees within it from all forms of harm, not just obvious physical injury.

It may seem clichéd, but if employers look after their employees then the employees will look after their businesses.