

# Defending Workplace Violence and Bullying claims

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# The problem

Patients, pupils and prisoners

The public

Fellow employees

# The scale of the problem

~300,000 incidents of physical assault at work each year, main risk areas being protective services, health, and education

In the health and social care sector, violent and aggressive incidents third biggest cause of injuries reported under RIDDOR

Minor scuffles to fatalities

# The practical difficulties

Competing interests (duty to assailant and complainant)

Document (and witness) heavy

Highly facts-sensitive

Hard to predict

# The law

Employer's common law duty to take reasonable care

Vicarious liability for torts of fellow-employees

Protection from Harassment Act 1997

Regulations may apply on the facts (e.g. Workplace, PUWER, PPE)

No workplace-specific UK legislation (yet)

# Relevant Guidance

## HSE and government publications

- *Preventing Workplace Harassment and Violence – Joint Guidance from “UK Partners”* (EU-driven)
- *Violence at work - a guide for employers* (HSE)
- Industry specific guidance (e.g. retail/licensed sector, education, etc) giving way to more general provision see HSE website [www.hse.gov.uk/violence](http://www.hse.gov.uk/violence)

# Four-stages of risk management

1. Identify the risk
2. Decide what action to take
3. Take action
4. Review the action taken at appropriate intervals

# Patients, pupils and prisoners

Identification of risk = review the history

- Did anything happen?
- Precise circumstances of previous incidents
- Causative factors; “triggers”
- The employer’s response (vital)



# Patients, etc; prevention analysis

Why did it happen? Consider issues of

- Placement
- Staff information, instruction, training
- Staffing levels/quality
- Environment/equipment issues
- Mistake on the ground (e.g. allowed out; access to weapon; failure to assist)

And so... was it avoidable, or not?

# Patients, etc – specific issues (1)

Does the Bolam test apply?

- Bradford-Smart v West Sussex County Council [2002] EWCA Civ 07 (teachers/pupil)
- Buck v Notts Healthcare NHS Trust [2006] EWCA Civ 1576 (staff vs. psychiatric patient)
- See also Connor v Secretary of State for Scotland 2000 Rep LR 18 (CSOH)

# Patients, etc – specific issues (2)

## Confidentiality/data protection

- Data Protection Act s35; Schedules 2 & 3
- R (S) v Plymouth City Council [2002] 1 WLR 2583
- Costs of pre-action disclosure

# Patients, etc – specific issues (3)

## Expert evidence

- Industry practice
- Placement of a particular individual
- Staffing levels
- Steps which *could* be taken (training, information, equipment)
- NOT mere second-guessing

# Protection from the public

These cases require similar, if not identical, analysis

1. Was there a risk? (Consider nature of industry as well as any specific history)
2. Precisely what happened, and how (if at all) could it have been prevented?

# Protection from the public

- Henser-Leather v Securicor Cash Services [2002] EWCA Civ 816 (PPE, body armour)
- Yorkshire Traction v Searby [2003] EWCA Civ 1856 (PUWER, protective screens)
- Humphrey v Tote Bookmakers [2003] EWHC 217 (QB) (betting shop, staff levels, training)
- Mitchell v United Co-Operatives Ltd [2012] EWCA Civ 348 (convenience store; robbery *deterrence* vs. *prevention*)
- Nicholls v Ladbrokes Betting [2013] EWCA Civ 1963 (magnetic locking system, low degree of risk)

# Fellow employees – assaults

Vicarious liability (close connection test)

or

Direct liability (knowledge)

# Fellow employees – assaults

‘Close connection’ cases:

- Vaickuviene v J Sainsbury Plc [2013] CSIH 67
- Mohamud v WM Morrison Supermarkets Plc [2014] EWCA Civ 116
- Graham v Commercial Bodyworks Ltd [2015] EWCA Civ 47



# Fellow employees – bullying

No satisfactory definition of “bullying” or “harassment”

Cases tend to turn on what is deemed ***oppressive and unacceptable*** behaviour (as opposed to merely unpleasant)

- Waters v Commissioner of Police for the Metropolis [2005] 1 WLR 1607
- Veakins v Kier Islington Ltd [2009] EWCA Civ 1288
- Bailey v International Automotive Components Group Limited  
Hull County Court 21<sup>st</sup> May 2014 (HHJ Jeremy Richardson QC)

# Evidence and tactics

Clear issues analysis

Pin down the Claimant's case on causation

## Documentation

- Incident records
- Risk and capability assessments
- Policies, procedures and protocols
- Training, information, instructions
- Care plans
- Staffing records