

Weathering the **Perfect Legal Storm**

Analysis and Commentary

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Weathering the Perfect Legal Storm: Navigating requirements of the emerging duty to provide a psychologically safe system of work in the context of the voluntary National Standard of Canada on Psychological Health and Safety in the Workplace CSA Z1003-13/BNQ 9700-803

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The Great-West Life Centre for Mental Health in the Workplace commissioned this report in support of its ongoing efforts to provide practical information and resources to employers seeking to improve psychological health and safety in the workplace. This report builds on an earlier report authored by Dr. Shain on behalf of the Mental Health Commission of Canada.

Introduction

In Tracking the Perfect Legal Storm (2010) (Perfect Storm) it was proposed that beneath the profusion of specific rules and doctrines found in several branches of law relevant to the protection of mental health, there can be found a trend toward a single, implied duty to provide a psychologically safe workplace.

In the three years since the publication of Perfect Storm, the new national standard on psychological health and safety in the workplace was developed and issued in January 2013 (the Standard).

Although it has no legal force, the concept of the single, implied duty is reflected in the following vision statement of the Standard:

> *"The vision for a psychologically healthy and safe workplace is one that actively works to prevent harm to worker psychological health, including in negligent, reckless, or intentional ways, and promotes psychological well-being. This voluntary Standard has been developed to help organizations strive toward this vision as part of an ongoing process of continual improvement."*

Essentially, the Standard helps to define the content of this implied duty of care by presenting a management system that can assist organizations in making significant strides toward the creation and sustenance of a psychologically safe and healthy workplace.

As the Standard finds its way into the fabric of Canadian workplaces, resistance to the idea of a single implied duty to provide a psychologically safe workplace has softened to the point at which, at least in some quarters, there is a growing openness to the view that this may be an opportunity for employers rather than a threat. After all, if employers can adopt one way of helping to reduce the risk of legal liability for mental injury from multiple sources, they can regain a significant degree of control and predictability over the direction and management of their workplaces. Not only that, but they also have at their disposal a method for helping to raise the general mental health, morale and effectiveness of their workforces. This would appear to be in the interests of employers, workers and society at large.

This is not to say, however, that adopting the Standard will *guarantee* avoidance of legal liability. The point here is simply that implementation of the Standard in good faith is likely to be seen by courts and tribunals as a positive step toward demonstrating *intent* to improve the psychological safety level of a workplace. It must be kept in mind too that implementation, in the words of the Standard, is a process of continual improvement and the extent to which it provides any kind of legal shield against liability depends a great deal on where in the journey an organization is when claims of psychological harm or failure to implement a psychologically safe system of work arise (however such claims may be framed legally).

However, further conceptual, legal and practical links have yet to be forged between the idea of an implied single duty of care in law and the requirements of the voluntary Standard. In forging these links, it is evident that there are not only opportunities and advantages but also potential risks and disadvantages.

This report surveys some of the important developments in law since the publication of Perfect Storm and argues that, in spite of certain risks, the Standard emerges as the single most useful strategy for employers to adopt if they wish to reduce the threat of liability for mental injuries and their related costs. The following sections also consider various possibilities for how the Standard could be seen in the future as a concise articulation of the single implied duty by judges, arbitrators and tribunals.

The Standard as a proactive expression of due diligence

Due diligence defined

Due diligence is the duty under all Occupational Health and Safety Acts in Canada (OH&S Acts) to take all reasonable precautions, under the particular circumstances, to prevent injuries or accidents in the workplace.[1] This type of directive is commonly referred to as a "general duty clause." Although it is commonly thought of as a defense to prosecutions, it is also – if not more so – a proactive duty of care.[2]

While the duty in recent history arises from the "general duty clause" in OH&S statutes as noted above, its roots go back to Common Law where the duty to provide "a safe system of work" has formed part of the implied terms of the employment contract since at least the first third of the twentieth century.[3] These common law roots require separate examination in the next section because they offer an alternative to seeing the duty to provide a psychologically safe workplace as mainly an expression of a statutory duty of due diligence.

Content of the duty of due diligence - general

It is worth examining the content of the duty of due diligence as it is seen by one of the nation's leading authorities on such matters, the Canadian Centre for Occupational Health and Safety (CCOHS).

According to the CCOHS, the key elements of the duty of due diligence (framed without reference to mental health *per se*) are as follows:[4]

- "The employer must have in place written OH&S policies, practices, and procedures. These policies, etc. would demonstrate and document that the employer carried out workplace safety audits, identified hazardous practices and hazardous conditions and made necessary changes to correct these conditions, and provided employees with information to enable them to work safely.
- The employer must provide the appropriate training and education to the employees so that they understand and carry out their work according to the established policies, practices, and procedures.
- The employer must train the supervisors to ensure they are competent persons, as defined in legislation.
- The employer must monitor the workplace and ensure that employees are following the policies, practices and procedures. Written documentation of progressive disciplining for breaches of safety rules is considered due diligence.
- There are obviously many requirements for the employer but workers also have responsibilities. They have a duty to take reasonable care to ensure the safety of themselves and their coworkers – this includes following safe work practices and complying with regulations.
- The employer should have an accident investigation and reporting system in place. Employees should be encouraged to report "near misses" and these should be investigated also. Incorporating information from these investigations into revised, improved policies, practices and procedures will also establish the employer is practicing due diligence.
- The employer should document, in writing, all of the above steps: this will give the employer a history of how the company's occupational health and safety program has progressed over time. Second, it will provide up-to-date documentation that can be used as a defense to charges in case an accident occurs despite an employer's due diligence efforts."

[1] The duty is expressed in slightly different ways in different jurisdictions. For example, section 25(2) (h) of Ontario's OH&S Act says that an employer shall "take every precaution reasonable in the circumstances for the protection of a worker."

[2] See, for example: Strahlendorf P. "Supervisory due diligence: doomed if you don't" in OHS Canada Jan/Feb 1998

[3] See next section: "framing the implied duty as an implied term of the employment contract" and cases cited there

[4] http://www.ccohs.ca/oshanswers/legisl/diligence.html

It is important to reiterate that due diligence is really a way of conducting business - it is not an add-on program or practice. This is why many prefer to use the term "health and safety management ***system***" to describe the nature of what is required to demonstrate due diligence. In fact, the CCOHS articulation of the incidents of due diligence above can also be seen as a restatement of the Common Law duty to provide a safe ***system*** of work in a statutory context.

But the duty of due diligence is not just a matter of knowing, following and enforcing rules, even when they are expressed in the context of a system of work. According to Strahlendorf, there is a proactive element to the duty that he describes as "creativity". He says, "Where the legislation has a general duty clause for supervisors, he or she may be held liable for failing to be creative; for failing to identify and address a hazard that was not covered by the regulations or by the employer's safety manual. Due diligence here would involve engaging proactively in various risk assessment and control activities. Inspections, investigations and task analysis are some of the many techniques supervisors should be able to engage in under the general duty clauses. Due diligence is definitely not mere regulatory compliance, and supervisors are not merely passive rule enforcers."[5]

Content of the duty of due diligence – directors and officers

When Gowlings LLP describes what an OH&S management *system* is, they refer to the *Bata* case (even though they make it clear it is a case in environmental law) in which the board of directors is clearly identified as the ultimate point of accountability for due diligence.[6]

In R. v. Bata Industries Ltd., the Ontario Court of Justice set out a list of criteria to be considered in determining whether accused directors and officers had established the due diligence defence to an environmental offence.[7] Gowlings LLP observe that *Bata* provides guidance in determining how the due diligence defence may be used by directors and officers under health and safety law. Gowlings LLP stated that, per commentary in Bata, for directors or officers to prove that the exercised due diligence under OH&S law, they must establish that they:

(a) created a system to ensure compliance with health and safety law;

(b) gave instructions for implementing the system;

(c) created a system to ensure that the Board of Directors received reports on operation and effectiveness of the system;

(d) reviewed compliance reports that were provided to them;

(e) were aware of industry standards in dealing with the risks faced by the corporation and met those standards; and

(f) reacted immediately to and rectified a system failure.

Content of the duty of due diligence – supervisors and workers (as opposed to employers)

For a person at the ground level (e.g. a supervisor or someone with direct oversight over employees) to prove that they exercised due diligence under OH&S laws, according to Work Safe Alberta's guidelines for example, they must establish that they:[8]

1. Could not, as a reasonable person under the particular circumstances, have *foreseen* that the event would occur.

What is a **reasonable person** in this context depends a lot on situational factors. As Peter Strahlendorf says:

> "What is reasonable is not absolute perfection or anything superhuman. It is a balanced, wise, prudent judgement that is understandable to others.

[5] Strahlendorf, note 3 above

[6] Gowlings, Lafleur and Henderson LLP general advice on directors' liability –section 7, Liability under the Occupational Health and Safety Act. Extract from a memorandum published on line August 2010

[7] (1992), 9 O.R. (3d) 329 [appeal allowed in part (1993), 14 O.R. (3d) 354]

[8] Alberta Work Safe (2010) Workplace Health and Safety Bulletin L1015 on Due Diligence

A neat mental test of what is reasonable is to imagine that a jury of your peers is watching. They are mature, unbiased, experienced supervisors like you. What would they think is the wise thing to do in the circumstances in question?

Asking what your peers might do in the circumstances can lead to the use of industry standards, codes of practice and so on. But be aware that it is possible that a particular industry is behind the times in terms of safety. Courts have said that in a particular area or industry group the standards have generally slipped to an unreasonably low level. Doing what the average supervisor is doing can be a mistake. It is far wiser to adopt a "best practices" approach.

The due diligence standard is also very contextual. "What is "reasonable" varies with the circumstances and the risk. The greater the risk, the greater the care that is reasonable. Risk is a combination of the probability that something will happen and the severity of the event if it happens. We tend to focus on high probability events, but we should also be looking at high severity accidents."[9]

Note that in this context Strahlendorf is making a close connection between being "reasonable" and being able to "foresee" an occurrence.

2. Could not have prevented the occurrence because they had taken every reasonable precaution

According to Work Safe Alberta, reasonable precautions would include taking and documenting the following steps:

(a) identifying hazards — performing a hazard assessment is extremely important;

(b) preparing and enforcing safe work procedures — ignoring a worker's poor compliance or non-compliance with company procedures is not an adequate defense;

(c) training the worker, which includes training in appropriate safe work procedures;

(d) monitoring the worker after they receive their training to verify that their performance is acceptable (or corrected if unacceptable) — reasonable employers are expected to monitor the work of their employees. Unsafe behaviour must be corrected before a worker is allowed to perform work unsupervised; and

(e) having a progressive disciplinary policy to ensure continued compliance with company safety policies and procedures.

3. Did not have the degree of control over the risk to avoid it

As Work Safe Alberta says "If for instance you note a problem with the brakes of the car you borrowed from the company auto pool and report that to the Auto Pool Manager, you would not be expected to fix the brakes yourself. The person responsible for the car is the Auto Pool Manager. If there was an incident involving the brakes of the car, your lawyer could argue that you had no control over the circumstances related to the incident."

[9] See footnote 4 above

Interpreting the duty of due diligence with the Standard

The analysis so far suggests that due diligence should be thought of as a proactive duty, rather than simply as a reactive defence to alleged offences under relevant statutes. As it articulates a psychological health and safety management system, the Standard could be used as a resource to help specify the requirements of due diligence under occupational health and safety legislation, as applied to the protection of mental health.

Law firms have been discussing this possibility in the last year, and it is clearly a subject that attracts strong feelings. For example, one firm during the development of the Standard referred to the possibility as a threat to employers as follows:

"While CSA standards are voluntary and have no legal force in their own rights, they are considered best practice documents in their subject matter area and have the potential to affect employers' legal obligations.

> *The proposed standard could become part of OHS law either through references in occupational health and safety legislation, which would require specific amendments to enabling legislation or regulations, or as a result of being used by courts and tribunals to determine whether an employer has complied with the general duty clause in OHS legislation.*
>
> *In determining whether a particular step taken by an employer has satisfied the general duty clause, courts and tribunals will consider standards for health and safety promulgated by respected external sources — such as the CSA — and accordingly, it is possible that the standard could be used to interpret and inform employer obligations under the general duty clauses of OHS legislation.*
>
> *The fact that the standard far exceeds the provisions of any current OHS legislation in its definitions, duties and responsibilities in relation to mental or psychological safety could have very significant long-term consequences for employers who have not met the extraordinarily far reaching and stringent provisions of this proposed standard."*[10] *(Emphasis added)*

Another law firm commenting on the Standard after its release said:

> "Employers' duties with respect to assessing workplace mental health risks and addressing employee mental health issues continue to be defined by the OHSA, the Code, and other relevant legislation. Unlike the OHSA and the Code, however, the Standard does not have the force of law, and as such does not create legal obligations. The Standard's voluntary nature means that employers are not legally required to adopt its recommendations.
>
> *However, courts and other adjudicative bodies will likely consider the Standard in their determinations of the* ***standard of care*** *employers must meet in the context of providing a psychologically safe workplace. For instance, a court may well look to the Standard when assessing employee claims relating to mental stress and other psychological health issues experienced in the course of work.(Emphasis added)*
>
> *While the significance and interpretation courts will give the Standard remains to be seen, employers should nevertheless familiarize themselves with the Standard and assess the degree to which its guidelines accord with its current practices."*[11] *(Emphasis added)*

[10] Edwards, C.A. of Heenan Blaikie LLP "Creating a standard for psychological health" in *Canadian Occupational Safety* 29 March, 2012 http://www.cos-mag.com/legal/legal-columns/creating-a-standard-for-psychological-health.html

[11] Gergin, M. of Borden Ladner Gervais LLP "New Mental Health Safety Standard May Impact Employers' Duties Related To Employee Mental Health" comment on MONDAQ service

Possible Objections

Assuming the existence of an overarching responsibility to provide a psychologically safe workplace as articulated in the Standard would have the advantage of creating a higher level of certainty and predictability for employers and a clearer course of action for workers claiming mental injury. However, there are some drawbacks to framing this single implied duty within the context of Occupational Health and Safety legislation.

If the protection of mental health is seen in this legal context then it is only a matter of time before a prosecutor argues before the court that the infliction of mental injury should be subject to the same penalties as any other infraction under OH&S legislation. This could open the door to a flood of claims of mental injury.

The basic problem with seeing the single, implied duty as arising from OH&S statutes is that violations of the general duty clause, if applied to mental health protection, would essentially become quasi-criminal in nature as are all other offenses under OH&S statutes. Such offences attract strict liability, meaning that the actor's state of mind is not relevant to a defense in prosecutions for breach of the duty (i.e., it is not necessary to demonstrate intent to establish liability).[12] In this sense, infractions under OH&S Acts are treated more like traffic violations.

While it could be argued, as above, that following the requirements of the psychological health and safety management system in the Standard may offer a good defence of due diligence to such allegations, the prospect of a flood of cases in this area is not a pretty one.

The Single Duty as promoted by Bill 168

General

Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009 S.O. 2009 c.23,[13] was introduced in 2010, and is now incorporated into the *Occupational Health and Safety Act* (Ontario) (the Ontario OH&S Act). In many ways, Bill 168 draws the duty of due diligence under the "general duty clause" and the prevention of mental injury resulting from violence and harassment in the workplace, closer together under the Ontario OH&S Act, although they emanate from different parts of the Ontario OH&S Act. For this reason it is necessary to explore the role of Bill 168 in the protection of mental health and prevention of mental injury. Note that some other jurisdictions have similar provisions in their legislation, and these are reviewed in an Appendix for easy reference. Similar issues in relation to the single duty and the Standard can be expected to arise in these jurisdictions.

Under Bill 168, most employers in Ontario are required to:

(a) undertake a workplace violence risk assessment;

(b) prepare internal programs and policies aimed at workplace violence and harassment;

(c) create procedures for summoning immediate assistance when workplace violence is imminent or occurring;

(d) create procedures for reporting and investigating complaints of workplace violence or harassment; and

(e) provide information and instruction to all staff on internal policies and programs.

[12] For a discussion see Zimmerman G.F., Occupational Health & Safety Legislation Framework and the Demand for Due Diligence at http://www.mross.com/law/digitalAssets/9/9889_GFZ_OHS_Demand_for_Due_Diligence.pdf

[13] Bill 168 now forms part III.0.1 of the amended Occupational Health and Safety Act of Ontario adding new sections 32.0.1 to 32.0.7. Definitions of harassment and violence have been added to section 1.1 of the Act

As amended by Bill 168, workplace harassment in the Ontario OH&S Act is defined as: "Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome." This definition is the same as the definition of harassment contained in the Ontario Human Rights Code.[14]

There is no explicit requirement that harassment should result in mental injury, but subsequent case law based on these provisions seems to assume that it does. It is possible that the term "vexatious" in the definition of harassment is intended to imply some level of injury.

We must be clear about what the Ontario OH&S Act does and does not require. It does not:

(a) require a harassment free workplace[15];

(b) require a risk assessment for harassment (but it does for violence);

(c) include an explicit right to refuse unsafe work for harassment (but there may be a right to refuse unsafe work for violence that resided in the law even prior to legislation such as Bill 168[16]).

Rather, a typical violation of the Act takes the following form as it did in the case of Pro-Cut Concrete Cutting Ltd.[17] where the Labour Relations Board of Ontario made the following finding:

(f) Despite s.32.0.1 of the Occupational Health and Safety Act, the responding party has failed to prepare, review and post policies with respect to workplace violence and harassment.

(g) Despite sections 32.02 and 32.0.6 of the Occupational Health and Safety Act the responding party has also failed to develop and maintain a program to implement policies with respect to workplace harassment and violence.

(h) Finally, despite s. 32.0.6 of the Occupational Health and Safety Act, and perhaps as a result of apparently not having any of the relevant policies, the responding party has failed to provide information and instruction for its workers on the contents of its policies and programs with respect to workplace harassment."

In short, all the Ontario OH&S Act requires is that the employer must follow the rules for developing and implementing policies, programs and training in connection with harassment and violence.

Inspections by the Ontario Ministry of Labour

Workplace violence and harassments provisions of the Ontario OH&S Act may also be activated by Ministry of Labour inspectors who can randomly, as well as on request, examine the degree to which the Ontario OH&S Act is being implemented.

The Ontario Ministry of Labour, in fact, has taken the requirements of the Act very seriously as signified by a compliance blitz conducted by inspectors in 2012 in the manufacturing sector[18]. During this compliance blitz, the second most common category of compliance orders made by inspectors related to workplace violence and harassment[19]. The specific reasons for orders were not stated, but the relevant sections of the Ontario OH&S Act under which orders were issued included sections relating to:

(a) failure to prepare a workplace violence policy and program and workplace harassment policy and program;

(b) failure to conduct a workplace violence risk assessment;

(c) failure to provide "information and instruction" to employees regarding workplace violence and harassment; and

(d) failure to post the workplace violence and workplace harassment policies.

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[14] See section 10(1) of the Human Rights Code, R.S.O 1990, Chapter H.19 (Ontario)

[15] Harper v Ludlow Technical Products Canada Ltd, 2011 CanLII 73172 (ON LRB). Citing Investia Financial Services Inc., 2011 CanLII 60897 (ON LRB) at para #15: "In the case of an employee who complains that he has been harassed, there is no provision in the OHSA that says an employer has an obligation to keep the workplace harassment free. The only obligation set out in the Act is that an employer have a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not."

[16] See: Nunavut (Minister of the Environment) v. WSCC, 2013 NUCJ 11 (CanLII) for a discussion of this possibility

[17] Labourers' International Union of North America, Local 506 v. Pro-Cut Concrete Cutting Ltd, 2013 CanLII 1240 (ON LRB)

[18] Inspectors visited the following types of manufacturing workplaces: automotive; food and beverage; wood and metal fabrication; textiles and printing; chemical, rubber and plastics; ceramics; logging (sawmills); pulp and paper.

[19] http://www.labour.gov.on.ca/english/hs/sawo/blitzes/blitz_report44.php. 13% (720) of the 5,392 orders dealt with workplace violence and harassment (under sections 32.0.1 to 32.0.7). The number of orders in this category was second only to a catch-all category dealing with general safety duties (but not the "general duty clause").

Harassment in the workplace – trivial versus serious acts in the context of Bill 168

When individual workers allege that they were harassed in the workplace, a court or tribunal hearing the case will be concerned to distinguish trivial acts or omissions from serious ones deserving condemnation. To make determinations of this kind, judges and arbitrators often refer to cases that draw the line between trivial acts from more serious ones.

While there are many such cases across the country, a certain class of them is of particular importance to employers. These are cases that differentiate the legitimate exercise of management rights from harassment. Such differentiation has been attempted in various areas of law and for years before Bill 168, but many are relevant to the same exercise in the framework of Bill 168. So while harassment is not in itself prohibited by Bill 168, a worker could claim that harassment had taken place because there was no policy or program directed at its prevention. In such a case the worker seeking redress at a *personal* level would likely have to establish that the acts complained of amounted to harassment under another branch of law, while invoking claimed violations of Bill 168 in order to seek redress at a *systemic* level.

Some examples of situations in which harassment has been distinguished from non-actionable conduct are:

1. Exercise of management rights does not constitute harassment (provided that the employer does not exercise these rights in an abusive or discriminatory manner) when its purpose is:
   - management of discipline, performance at work or absenteeism;
   - assignment of tasks;
   - application of progressive discipline and even just cause dismissal.[20]

2. There is no harassment when a supervisor is simply trying to resolve discrepancies in hours recorded by an employee per email. This was not an OH&S case but a grievance appealing to a provision in the collective agreement that required the employer to "make reasonable provisions for the safety and health" of employees.[21]

3. There is no harassment simply because an unwelcome job performance observation is made bluntly and without tact. As the arbitrator held in one case:

   > "I also find that [the supervisor's] comments regarding the applicant's inability to keep up ….. do not constitute a course of vexatious conduct or comment. I do not accept the applicant's characterization that, in suggesting the applicant work harder and put in additional time, [the supervisor] demanded that she work unlimited overtime to complete an impossible task, thus potentially imperilling the applicant's health. That is not a reasonable interpretation of what [the supervisor] said based on the applicant's description of the incident. The worst that can be said of what happened is that [the supervisor] made a blunt, unflattering assessment of the applicant's performance and demanded in no uncertain terms that she fulfill management's work expectations or risk discipline. Arguably, [the supervisor] might have utilized greater tact and sensitivity. But as I have stated, the reality is that sometimes the exercise of management functions – which is what [the supervisor] was engaging in - results in unpleasant consequences for workers. That does not necessarily translate into workplace harassment. It does not in this case."[22]

4. While they may not constitute harassment, excessive work requirements may be regarded as safety issues under the Act if complaining about them is seen as activating the rule against reprisals for asserting OH&S rights.[23]

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[20] Centre hospitalier régional de Trois-Rivières (Pavillon St-Joseph) v. Syndicat des infirmières et infirmiers de Trois Rivières (2006), No. 2004-9453.

[21] Kinark Child & Family Services Syl Apps Youth Centre v Ontario Public Service Employees Union, Local 213, 2012 CanLII 97669 (ON LA)

[22] Amodeo v Craiglee Nursing Home Limited, 2012 CanLII 53919 (ON LRB),

[23] Watkins v. The Health and Safety Association for Government Services, 2013 CanLII 57037 (ON LRB)

Interpreting Bill 168 with the Standard

So where does this leave us with regard to the use of Bill 168 in defining the single duty and as an impetus to adopt the Standard? So far the dots have not been joined by arbitrators or courts. However, there may be a certain appeal in using the Standard as an articulation of Bill 168's intent. Bill 168 is a slice of what the Standard requires. One might say it is a necessary but by no means sufficient set of legal requirements to fulfill the vision of the Standard.

Framing the implied duty as an implied term of the employment contract

General

As suggested earlier, there may be a way of using the generic elements of due diligence as articulated in the Psychological Health and Safety Management System of the Standard that does not import the implications of quasi-criminal behaviour embedded in OH&S law. Such a possibility is explored in this section.

So, under some circumstances, the contract of employment, even in the absence of explicit language to this effect, may be viewed by courts and tribunals as containing implied terms for protection from harassment and discrimination, breach of which can support claims of constructive dismissal.[24]

Historically, the employer's right to control and direct the work has been linked to its duty to afford employees certain basic protections.[25] Freedom from severe harassment would appear to be among these protections.

The employment contract could also be construed as containing an implied term for the provision of a psychologically safe system of work. While a harassment-free workplace may not equate with a psychologically safe workplace, it is certainly a necessary, if not sufficient component of it.

The notional duty to provide a psychologically safe workplace is consistent with the established duty to provide a safe system of work at common law[26] and under statute.

For example, the duty to provide a psychologically safe workplace would involve the same management *system* requirements that characterize the duty of due diligence as reviewed in the previous section. This is a *prescriptive* system calling for specific policies and practices regarding the *assessment and abatement* of psychosocial risks that could foreseeably lead to mental injury.

There are signs of greater willingness on the part of tribunals and courts to admit claims of mental injury due to alleged failure of a psychologically safe system of work.

Arbitrator Shime's conclusion in the now 7 year old TTC case that collective agreements should be deemed to include the provisions of relevant OH&S statutes and that OH&S statutes in turn should be deemed to embrace mental as well as physical health and safety has not been challenged to this writer's knowledge anywhere in the country.[27]

Arbitrator Shime has also proclaimed his strong views on the nature of the contract between worker and employer in the Toronto Airport case[28] where he refers, albeit in a somewhat different context, to an implied term of trust in employment relationships following British jurisprudence that is often cited with approval in Canada.

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[24] See Disotell v. Kraft Canada Inc., 2010 ONSC 3793 (CanLII) citing with approval Chadwick J. in Robinson v. Royal Canadian Mint, [1992] O.J. No. 2270 (Ont. Gen. Div.) aff'd [1997] O.J. No. 1966 (Ont. C.A.), an employer owes a duty "to see that the work atmosphere is conducive to the well-being of its employees". An employer's failure to prevent the harassment by co-employees is a breach of this duty capable of amounting to constructive dismissal. See Sheppard v. Sobeys Inc., [1997] N.J. No. 78 (Nfld. C.A.) at para. 25.

[25] For a discussion see: Shain M. (1991) The Right of Employees to participate in the Organization and Design of Work: a legal and social analysis. A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science, University of Toronto particularly at 252ff.

[26] Wilson & Clyde Coal Co. Ltd. v English [[1937] 3 All E.R. 628. See also: Marshment v. Borgstrom, [1942] S.C.R. 374 which confirmed Wilson as applying in Canada.See also: Huba v. Schulze, 37 W.W.R. 241 (MBCA)(1962)

[27] TTC and Amalgamated Transit Union 132 LAC 4th 225. 2005. Note, however that arbitral decisions are not binding on courts

[28] Public Service Alliance of Canada, Local 0004 v. Greater Toronto Airports Authority. Canada Grievance Arbitration February 12, 2010; appealed to Divisional Court 2011 ONSC 487

His decision in this case was appealed but the following comments on the nature of the employment relationship as a whole were not disturbed by the Divisional Court:

> "There are reciprocal duties on both the employer and employee. An employer's obligation is well articulated by the House of Lords in *Malik* v. *Bank of Credit and Commerce International S.A. [1997], 3 All E. R. 1*, where the House of Lords stated that there is an obligation on the employer not to conduct itself, without reasonable and proper cause, in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee[29]. Lord Nicholls, in affirming that there is a relationship of trust and confidence between an employer and employee, stated at p. 8: "Employment and job prospects are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. *Employers must take care not to damage their employee's future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term."* (Emphasis added)

Lord Steyn at p. 15 stated the following with respect to the development of the employer's obligation:

> "The reason for this development is part of the history of the development of employment law in this century. The notion of a "master and servant" relationship became obsolete. Lord Slynn of Hadley recently noted in *Spring* v. *Guardian Assurance plc [1994] 3 All E.R. 129* at *161 [1995] 2 AC 296 at 335* "the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee... it was the change in legal culture which made possible the evolution of the implied term of trust and confidence".

That Court went on to find that where there is a breach of the implied term of trust and confidence by the employer, the employee may claim for financial loss including loss of benefits, which the employee should have received had the contract run its course; these benefits include salary, and pension rights as well as other promised benefits. Lord Nicholls concluded, as did the Supreme Court of Canada in *Whiten* v. *Pilot Insurance Co.*,[30] that damages should be assessed in accordance with ordinary contractual principles".

The Supreme Court of Canada too, as reported in Perfect Storm, has offered a non-binding opinion on the question of the extent to which provisions for psychological protection can be inferred in the employment contract.

Following a long line of cases going back to the mid-19th century, the Supreme Court identified the crux of the matter in contract law generally as being the answer to the question: did the parties have such protection within their contemplation at the time the contract was made?[31]

As applied to the contract of employment, the question becomes: *was the provision of a psychologically safe system of work within the contemplation of the parties at the outset of the*

[29] The decision in Malik was cited by the Ontario Court of Appeal in Haldane v. Shelbar Industries Ltd (2000) 46 O.R. (3rd) 206.

[30] 2002 SCC 18. While Whiten is an insurance case it is cited here in the context of another such case (Fidler, note 31infra) in which the Supreme Court speculates that contract principles are sufficiently generic to apply to employment relationships also.

[31] Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, 2006 SCC 30

relationship? If yes, it could be construed as an implied term of the contract of employment and could be the basis for a claim of breach (constructive dismissal). A similar line of reasoning was subsequently used by the Ontario Grievance Settlement Board in *Charlton*.[32] The Board in that case determined that, at least in cases of collective agreements and in contracts of employment with non-union Crown employees, the contract can be seen as containing an implied term that guarantees a workplace free of racial harassment. This was found to be so because relevant provisions of the Ontario Human Rights Code were deemed to be incorporated in employment contracts involving Crown employees.

It remains for other tribunals and courts to explore how far this principle may be extended.

Meanwhile, courts are scrupulous about drawing the line between "harassment" and "stern talk" that can be simply an expression of a grating management style that is still within the bounds of expected decency.[33]

In finding that an employee was not constructively dismissed, Ontario's Court of Appeal stated in a recent case that allowing a poisoned work environment to exist (which, by definition, raises the risk of psychological injury) can be the basis for a claim that a contract of employment has been unilaterally dissolved, and can give rise to claims for constructive dismissal if the following conditions are met[34]:

(a) The plaintiff bears the onus of establishing a claim of poisoned workplace. There must be evidence that, in the eyes of an objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created.

(b) Except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated.

(c) The test for establishing constructive dismissal is whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed.

The Court of Appeal cited with approval the following succinct summary of Justice Gonthier regarding when constructive dismissal can be said to have taken place:

"In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination."[35]

The problem with using constructive dismissal as the basis for remedies against abusive employers, however, is that this type of claim is available by definition only as a last resort after the employment relationship is deemed by one party to have been terminated. And given the restrictions placed by the Supreme Court on the type and amount of damages that can be recovered in such cases[36], claims in contract frequently offer considerably less compensation to unfairly treated employees than claims in tort.

[32] Charlton v. Ontario [2007] O.P.S.G.B.A. No. 4

[33] Chartrand v. R.W. Travel Limited, 2011 ONSC 2148 (CanLII). Wilcox J. observed in this case that "Whether such treatment is viewed as a breach of a specified fundamental implied term of the employment relationship (see, for example, Lloyd v. Imperial Parking Ltd., [1996] A.J. No. 1087 (Q.B.), and Sheppard v. Sobeys Inc., [1997] N.J. No. 78 (C.A.)), or as a repudiation of the entire employment relationship (see, for example, Lloyd v. Imperial Parking Ltd., [1996] A.J. No. 1087 (Q.B.), and Sheppard v. Sobeys Inc., [1997] N.J. No. 78 (C.A.)) the result is the same. The employee is entitled to treat the employment contract as at an end and to recover at least damages in lieu of reasonable notice."

[34] General Motors of Canada Limited v. Johnson, 2013 ONCA 502 at para. 66 to 68.

[35] Farber v. Royal Trust Co., [1997] 1 S.C.R. 846 at para.33. See also: Gillam v. Waschuk Pipe Line Construction Ltd. 2011 SKQB 308 (CanLII).

[36] Honda Canada Inc. v. Keays, 2008 SCC 39

Framing violation of a single implied duty as a tort

As noted in Perfect Storm, in Ontario, tort claims based on negligent infliction of mental suffering have been excluded by the courts, although intentional infliction (which requires a very high standard of proof) of such harm is still actionable. In British Columbia, both courses of action are still open to litigants in non-union environments.

Since publication of Perfect Storm, however, Bill 168 in Ontario was passed as an amendment to the Ontario OH&S Act. According to Leslie Dizgun, below, its passage may offer new opportunities for bringing tort claims of mental injury forward in Ontario since it appears to address objections to these actions previously raised by the Court of Appeal in Bell Mobility.[37]

The opportunity arises from the possibility of framing a statutory breach (in this case a breach of the workplace harassment and violence sections of the Ontario OH&S Act) as evidence of a breach of a duty to provide a harassment and violence free workplace that in itself could provide evidence of negligence.

As Leslie Dizgun of Himelfarb Proszanski LLP says:

> "An employer may have fallen below the duty of care in the circumstances where it fails to have a policy, where it fails to devise a program, and if it fails to properly implement that program in the workplace. This can be likened to a duty of due diligence. In many respects, such a statutory standard both limits the Court of Appeal's concerns with respect to the indeterminate nature of such an obligation and provides the employer with a defence to a claim of negligence if it has taken steps to comply with its statutory obligation. Employers cannot police each and every employee in the workplace in order to prevent harassment of other employees. In that respect, the passing of Bill 168 ought to be welcome to both employees and employers.
>
> In my view, the passing of Bill 168 represents an answer to the Court of Appeal's policy concerns for not recognizing a tort of negligence; and a substantial difference which would allow the Court Appeal to once again revisit a similar claim in light of a different legislative landscape."[38]

However, actions in tort, even when successful, are most often used when the employment relationship has ended. This is part of the reason why claims in tort and contract are often launched simultaneously in claims of unjust and harsh dismissals. If one doesn't work, the other one might.

Sometimes it is difficult to be sure upon what basis the court ultimately made its award.

For example in the *Walmart* case, which has attracted much attention because of the $1.4 million award made by a jury, the decision included a substantial head of damages for intentional infliction of mental suffering (a tort) even though the case is often described as a constructive dismissal case (breach of the employment contract).[39]

One final note must be made about the use of tort law as a source of remedy for aggrieved workers. If the trend in workers' compensation law across the country (reviewed below continues,[40] we can expect to see more and more awards of compensation for chronic and cumulative stress related injuries. Where such workers compensation is available, it is likely that either the defendant to a claim or the legal body hearing the case will raise the "tort bar". The tort bar was incorporated into workers compensation legislation at the outset because the avoidance of common law, fault-based suits in tort was the primary reason that an insurance based scheme

[37] Piresferreira v. Ayotte 2010 ONCA 384 ("The Bell Mobility Case")

[38] http://www.himprolaw.com/blog/160-torts-in-the-workplace-after-piresferreira-and-bill-168

[39] Boucher v. Walmart Canada Corp. and Jason Pinnock 2012 (unreported)

[40] We are seeing more and more breaches in the rule against allowing claims for chronic or cumulative stress in workers compensation. In BC, this breach has been brought about by a challenge to the constitutionality of legislative provisions that exclude compensation for mental injury and more such challenges are being launched in Ontario. See later section on Workers' Compensation and the Standard.

was devised in the first place. The trade-off was: if no-fault compensation is available, you cannot sue in tort for damages related to the same injury or disease. For example, the tort bar was raised by the Court of Appeal in Newfoundland and Labrador in the case of Rees v. RCMP[41].

Given the problems with remedies for mental injury in both contract and tort, and if relief is to be had during the course of the employment relationship (not just at its end) in the hope that it might be salvaged, other remedies must be sought.

This means that in many cases resort must be had to legal channels such as human rights claims where damage awards are usually far lower than in contract or tort.

Human Rights Law and the Standard

General

A lawyer from a prominent law firm has observed, citing Lane[42] for support:

> "From a risk management standpoint, it [the Standard] addresses many of the concerns that Canadian adjudicators already have raised in considering complaints involving discrimination based on mental illness. In 2008, for example [in *Lane*], the Divisional Court (of the Ontario Superior Court of Justice) faulted an employer for its lack of awareness of its responsibilities under the *Human Rights Code*, including the absence of any policies or training of managers. The Court ordered substantial damages to the employee and imposed public interest remedies against the employer found to have discriminated against an employee with bipolar disorder. In addition to developing an anti-discrimination and harassment policy, the public interest remedies included the retention of a consultant to train all managers and employees [on] their human rights obligations with a particular focus on accommodation of persons with mental health issues. *Although novel, the Standard has a foundation in existing Canadian case law."* [Emphasis added]

The commentator concludes, "Employers are well-advised to consider the Standard as a resource to achieve both the benefits and mitigation of risk associated with a psychologically healthy workplace."[43]

In one recent case the Ontario Human Rights Tribunal made an unusual order to reinstate an employee nearly 10 years after she had been terminated. It held that the employer's failure to accommodate her at the time was discriminatory and that the employer could have found ways to address her limitations without her suffering undue hardship. The applicant in this case had developed a debilitating anxiety disorder and was subsequently diagnosed with depression and post-traumatic stress disorder related to a fear that she would make a mistake regarding the removal of asbestos from School Board buildings and face personal liability for a breach of the Ontario OH&S Act.

In addition to reinstatement, the Tribunal also ordered the employer to pay the employee nearly 10 years' worth of lost wages and $30,000 for injury to dignity, feelings and self-respect.[44]

While the size of personal damage awards appears to be growing in the context of human rights violations,[45] such individual awards may be less important in the end than systemic remedies.

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[41] Rees v. RCMP 2004 NLSCTD 208

[42] ADGA Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON S.C.D.C.)

[43] Taylor K. (2013) http://www.casselsbrock.com/CBNewsletter/How_Psychologically_Safe_is_Your_Workplace_ See also: Carlson L. Reinstatement: "An illustration of the wide remedial powers of Human Rights Tribunals". Borden Ladner Gervais LLP July 30 2013

[44] Fair v. Hamilton-Wentworth District School Board, 2013 HRTO 440. See also: Kalyn v. Vancouver Island Health Authority (No. 3) 2008 BCHRT 377, an earlier case in which the BC Human Rights Tribunal reinstated an employee after 2 years.

[45] See for example: Ontario (Ministry of Community Safety and Correctional Services) and OPSEU ("Ranger"), Re, 2013 CarswellOnt 10358 (Ont. Grievance S. Bd.) for the highest award yet in a harassment/discrimination case under the Human Rights Code.

Further developments in Human Rights Law 2009 -2013

1. The British Columbia Human Rights Tribunal has asserted that the duty to accommodate is proactive and not merely reactive. So, before taking any disciplinary action, employers may be required under certain circumstances to inquire whether, or to what extent a poor performance problem is associated with a mental disability (particularly if there was existing knowledge of the condition), even if the employee does not request accommodation.[46] This "duty to inquire", however, would presumably be activated only when there is reasonable cause to believe that a performance problem was related to a mental health issue of some kind.

Execution of the duty to inquire, however, requires some reciprocity on the part of employees. But one law firm made the following observation in connection with the case referred to above:

"Although some employees may prefer not to disclose particulars of their disability to their employer, some disclosure is necessary to trigger an employer's duty to accommodate and to inquire about the potential link between poor performance and the health issue experienced by the employee."[47]

In fact, the principle that an employee seeking accommodation must participate in a "shared process" to enable the employer to make "an informed decision" seemed to be fairly well entrenched in Canadian case law as reviewed by Arbitrator McEvoy in a 2009 decision.[48] However, a more recent decision makes even more explicit the duties of each party with regard to accommodation of mental disabilities.[49]

In this case, an arbitration panel headed by George Surdykowski described the principles as follows:

- "In the purely technical sense of the term, an employee has an 'absolute' right to keep her confidential medical information private. But if she exercises that right in a way that thwarts the employer's exercise of its legitimate rights or obligations, or makes it impossible for the employer to provide appropriate necessary accommodation, there are likely to be consequences, because an employee has no right to sick leave benefits or accommodation unless she provides sufficient reliable evidence to establish that she is entitled to benefits, or that she has a disability that actually requires accommodation and the accommodation required. Although an employer cannot discipline an employee for refusing to disclose confidential medical information, the employee may be denied sick benefits, or it may be appropriate for the employer to refuse to allow the employee to continue or return to work until necessary such information is provided." [para. 86]
- "As the Human Rights Commission's Policy indicates, the employee has an obligation to ask for accommodation and to provide sufficient information, including necessary otherwise private confidential medical information, to establish the accommodation required, and to participate in and facilitate both the search for and implementation of accommodation – whether or not the accommodation available is 'perfect' from the grievor's subjective perspective. The employer has a legitimate need for sufficient information to permit it to satisfy its accommodation obligations. An employee can neither expect accommodation if she withholds the information to establish that she requires it, nor dictate the accommodation required." [para. 88]
- "The employer cannot be faulted if the employee fails or refuses to provide sufficient information to establish that accommodation is necessary, or to establish the accommodation required... Accommodation is a matter of equal treatment required by the Code. It is not intended to be, and no employee is entitled to, a superior working arrangement merely because that is what she wants or thinks is best." [para. 89]

[46] Mackenzie v. Jace Holdings Ltd., 2012 CarswellBC 3320 (B.C. Human Rights Trib.).

[47] Minken R. Canadian Employment Law Today Jan 23, 2013. "Failure to accommodate costs employer more than $22,000"

[48] Canadian Union of Public Employees v. A Nursing Home [2009] N.B.L.A.A. No. 16 (QL)

[49] Complex Services Inc. (c.o.b. as Casino Niagara and Niagara Fallsview Casino Resort) v. Ontario Public Service Employees Union, Local 278, 2012 CanLII 8645

- "The cases demonstrate that the following otherwise confidential medical information will generally be required for accommodation purposes:
    1. The nature of the illness and how it manifests as a disability (which may include diagnosis, particularly in cases of mental illness).
    2. Whether the disability (if not the illness) is permanent or temporary, and the prognosis in that respect (i.e. the extent to which improvement is anticipated, and the time frame for same).
    3. The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties).
    4. The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions), including the examinations or tests performed (but not necessarily the test results or clinical notes in that respect).
    5. The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform her job, or interact with management, other employees, or customers. [para. 95]
- "It is [in] cases of invisible disability, particularly mental illness, that questions most often arise about an individual's request for particular accommodation and the adequacy of supporting information. The employer is entitled to seek confirmation or additional information from an appropriate medical health professional to obtain further information if there is a reasonable and bona fide basis for doing so. … Although an [Independent Medical Examination] is a resource of last resort, there are cases in which one is necessary and appropriate. An employee who exercises her right to refuse the incontestably intrusive IME when one is objective[ly] justified may find herself unable to continue or return to the work." [para. 118]

The bottom line to the series of cases dealing with duties of the parties in this regard still seems to be that an employee is required to disclose only the *least* amount of confidential medical information that is necessary in order to enable appropriate accommodation. But what that minimum actually constitutes remains a vexing issue and it appears there is no wholly reliable legal guideline to be found at present beyond what the Tribunal stated in *Complex Services* above.

Employers cannot delegate their duties under human rights legislation and as a result they can be vicariously liable for the discriminatory acts and omissions of third parties acting as their agents. Consequently, when a consultant hired to screen applicants for a job opening made stereotypical assumptions about an older candidate, the employer attracted liability.[50] As one legal commentator remarks in relation to this case, "Employers should be aware that liability under the Code can be grounded in not only the actions of its employees, but also as a result of the actions of its agents, including consultants or contractors".[51]

[50] Reiss v. CCH Canadian Limited, 2013 HRTO 764 (CanLII)

[51] Hockin W. and Timm A. (per Stikeman Elliott LLP) "Employer Liable under Ontario's Human Rights Code for Actions of Consultant" Last Updated: August 7, 2013

Workers Compensation and the Standard

Overview of developments

The Standard entered the stage at a time of significant transition in the field of workers' compensation.

Worker's Compensation Boards that have not yet had their legislation and policies modified to allow compensation for chronic and/or cumulative stress-related disorders may choose to treat the Standard as a repository of evidence and argument to support such an expansion of coverage. That is, they may see the Standard, and the legal/scientific evidence it is based on, as a legitimate social assertion that certain ways of managing people and organizing work can and do give rise to mental/psychological injury.

Nova Scotia, for example, appears to be seeing the Standard in this light as that province undertakes a review of its own Workers' Compensation legislation and policies.[52] High level reviews of OH&S legislation and workers' compensation legislation, together with their related policies and regulations, could invoke the Standard as a basis for harmonizing preventive and compensatory practices within a single philosophical framework.

As explained below, British Columbia has moved sure-footedly toward this kind of harmonization, but several influences in addition to the Standard appear to have brought about this development in that province.

In the three years since the publication of Perfect Storm, British Columbia has introduced reforms to its Workers Compensation Act and related policies that acknowledge the role of the work place in the genesis and precipitation of mental injury and create a more integrated approach to its prevention and compensation. These reforms are particularly significant because the inclusion of a policy designed to penalize harassment and bullying is *explicitly* connected to the general duty clause in the part of the Workers Compensation Act that contains British Columbia's Occupational Health and Safety Regulation. The stated rationale (discussed below) for this inclusion is encouragement to employers to create and sustain psychologically safe working environments that promote mental well-being.

These developments in British Columbia are not the result of any one influence, although the amendment of the Workers Compensation Act to allow claims for cumulative or chronic stress clearly owed more to the British Columbia Court of Appeal's decision in *Plesner* than to any other factor.[55] In Plesner, the court decided in effect that it was discriminatory and contrary to section 15 of the Canadian Charter of Rights and Freedoms to disallow such claims, so action was required to bring the legislation in line with this verdict.

Other provinces are now examining the constitutionality of their legislation in this regard. But going forward, the Standard is "out there", helping to define the parameters of a psychologically safe and healthy workplace, making clear the consensus view of the framers of the Standard that governance of the workplace and management of the people in it are strong influences on mental health in their own right.

In that sense, the Standard may be helpful for jurisdictions in Canada that have not already begun to examine their legislation with a view to bringing it in line with current thinking about the genesis and precipitation of mental health and mental injury in the workplace.

[52] Based on personal correspondence with the policy analyst in charge of the review of Nova Scotia's legislation

[53] Plesner v. British Columbia Hydro and Power Authority, 2009 BCCA 188. See discussion in Perfect Storm

British Columbia developments in detail

Bill 14 was introduced May 31st 2012 to amend section 5.1 of the Workers Compensation Act of British Columbia.

The rationale as stated by Minister MacDiarmid while introducing the second reading in the house was stated as follows:

[1135] "…Perhaps most importantly, this change will encourage workplace practices that promote the mental well-being of all workers in British Columbia."

"The amendments contained in Bill 14, particularly the expanded coverage for work-related mental disorders, encourage employers to take a leading role in providing environments that promote the mental well-being of workers."[54]

The Amended Workers Compensation Act Section 5.1

5.1 (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder:

(a) either

(i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or

(ii) *is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,* [Emphasis added]

(b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

The following excerpts from British Columbia's educational handbook on prevention and addressing bullying and harassment provide further commentary on the meaning of the terms harassment and bullying.[55]

"Examples of behaviour or comments that might constitute bullying and harassment include verbal aggression or insults, calling someone derogatory names, harmful hazing or initiation practices, vandalizing personal belongings, and spreading malicious rumours.

Intent does not determine whether the behaviour is bullying and harassment. A person cannot excuse his or her behaviour by saying he or she did not intend it to be humiliating or intimidating. Situations, context, and circumstances may vary. For example, yelling in the workplace may be acceptable sometimes. It might be appropriate for a construction foreman to yell to warn a fellow worker of a potential danger, or for a fire chief to shout commands at the scene of a disaster. However, yelling that humiliates and intimidates is not acceptable.

Bullying and harassment should not be confused with exercising managerial authority. Examples of reasonable management action might include decisions relating to job duties, workloads, deadlines, transfers, reorganizations, work instructions or feedback, work evaluation, performance management, and/or disciplinary actions."

[54] Debates of the Legislative Assembly (Hansard) Thursday May 3rd 2012

[55] See: Work Safe BC Handbook on Preventing and Addressing Workplace Bullying and Harassment

Developments elsewhere in Canada

Alberta

Policies under the Alberta Workers' Compensation Act relating to cumulative and chronic stress have evolved over the last 10 years to provide greater emphasis on the concept of psychological injury as opposed to psychological disability. Even though the term psychological injury was evident in policies going back to 1996, its use has become more prominent over the years. It is not clear to this writer what the practical significance of this clearly deliberate change is. The most recent language (June 27, 2013) is as follows:[56]

"chronic onset psychological injury or stress is compensable when it is an emotional reaction to:

(a) an accumulation, over time, of a number of work-related stressors that do not fit the definition of traumatic incident,

(b) a significant work-related stressor that has lasted for a long time and does not fit the definition of traumatic incident, or

(c) both (a) and (b) together.

As with any other claim, the Workers Compensation Board investigates the causation to determine whether the claim is acceptable. Claims for this type of injury are eligible for compensation only when *all* of the following criteria are met:

(a) there is a confirmed psychological or psychiatric diagnosis as described in the DSM 5,

(b) the work-related events or stressors are the predominant cause of the injury; predominant cause means the prevailing, strongest, chief, or main cause of the chronic onset stress,

(c) the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation, and

(d) there is objective confirmation of the events.[57]

In addition to the duties reasonably expected by the nature of the worker's occupation, normal pressures and tensions include, for example, interpersonal relations and conflicts, health and safety concerns, union issues, and routine labour relations actions taken by the employer, including workload and deadlines, work evaluation, performance management (discipline), transfers, changes in job duties etc."

As yet, Alberta has not explicitly expanded the general duty clause in its OH&S Act to include a duty to protect mental as well as physical health. However, the province does take a liberal view of what due diligence is. In its most recent version of its Workplace Health and Safety Bulletin we find the following statement: "due diligence is as much a culture and way of doing business as it is a legal defense"[58]. This way of thinking about due diligence is fertile ground for expanding the scope of the doctrine to the protection of psychological health.

[56] Alberta Policies and Information Manual. Policy 03-01 Part II Application 6: Psychiatric or Psychological Injury Issue Date: June 27, 2013 Part II App. 6 page 5 of 6 Supersedes: February 1, 2012 Alberta WCB Policies & Information

[57] Ibid.

[58] Workplace Health and Safety Bulletin L1015-Legislation - Revised November 2005. See also: note 2 above and accompanying text.

Nova Scotia and New Brunswick

Both provinces have been struggling recently with what is essentially a double standard when adjudicating claims of compensation for mental injury for federal employees working in those jurisdictions. Federal employees are covered by the *Government Employees Compensation Act* (GECA), but this act is administered by the province within which the employees actually work. GECA does not exclude gradual onset stress and cumulative stress whereas the Workers Compensation Acts of the two provinces do. This leads to what is essentially a two tier system that could be characterized as discriminatory because it favours one group (federal employees) over another (other workers in the province).

In the case of Nova Scotia, the response had been to review the provincial Workers Compensation Act in an effort to address this discrepancy[59] while New Brunswick stands by its rationale for exclusion on policy grounds articulated in *D.W.* v. *Workplace Health, Safety and Compensation Commission (N.B.), 2005 NBCA 70, 288 N.B.R. (2d) 26*.

Saskatchewan

This province added a prohibition against harassment to its *Occupational Health and Safety Act* in 2007, but in November 2012 it added new and more onerous duties for employers and supervisors that appear to be framed as further expressions of the general duty clause in Saskatchewan's *Occupational Health and Safety Act*[60] which states that:

> "Every employer shall…ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers"

Supervisors now have an additional duty under this provision to ensure, as far as is reasonably practicable, that all workers under the supervisors' direct oversight and direction are not exposed to *harassment* at the place of employment.

By virtue of the fact that employers have a duty to ensure that all work at the place of employment is sufficiently and competently supervised they may become vicariously guilty of offences under the Act relating to supervisory misfeasance.

> Harassment is defined in Saskatchewan's *Occupational Health and Safety Act* as follows:
> "inappropriate conduct, comment, display, action or gesture by a person that is either based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin, *or that adversely affects the worker's psychological or physical well-being,* and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated." (Emphasis added)
>
> Such a definition goes beyond harassment based on protected status discrimination (race, creed, religion etc.) to include personal harassment.

Ontario

At time of writing there are three ongoing cases before the Workers Compensation Appeals Tribunal involving claims that exclusion of compensation for cumulative and chronic stress-related disorders is unconstitutional[61], following the lead of British Columbia.

[59] Program Policy Background Paper: Compensability of Workplace Stress April 24th 2013. This consultation document was available until October 31st 2013 per Caroline Read, Policy Analyst, Workers' Compensation Board of Nova Scotia, PO Box 1150, Halifax NS B3J 2Y2

[60] The Occupational Health and Safety Amendment Act, SS 2012, c 25, amending The Occupational Health and Safety Act, SS 1993, c O-1.1.

[61] M.Giroux, Koskie Minsky LLP, Barristers and Solicitors. Personal correspondence

The Standard and Employment Standards legislation

The most relevant body of law under this category is Quebec's *Employment Standards Act*. This was reviewed in Perfect Storm prior to development of the national Standard.

It is unclear to what extent if any the Standard will influence policy and practice under this regime. Quebec has considerable experience in dealing with workplace harassment within the context of its *Employment Standards Act* and it has developed an enviable jurisprudence around the topic.

Time will tell whether the depiction of a psychologically safe system of work under the Standard will have any added value for Quebec since, in addition to the *Employment Standards Act*, that province already has its own voluntary *Healthy Enterprise Standard*[62] that, to some extent, incorporates accumulated knowledge about the effect of workplace dynamics on mental health. Indeed, the roots of this standard are in some ways similar to those of the new national standard.

A member of the Technical Committee that developed the national Standard and who was also intimately involved in the development of the Quebec standard opines that the two are largely seen as complementary.

[62] http://www.groupeentreprisesensante.com/fr/norme/pourquoi-norme-promotion-sante-mieux-etre

Conclusion

The Standard could be invoked to support claims of mental injury and to indict psychologically unsafe working environments in a number of ways given that in itself it has no legal force.

The Standard's very existence is an open invitation to see it as an expression of the responsibility to provide a psychologically safe system of work that arguably resides in various guises in OH&S legislation, in contract and in tort. This view is supported by many law firms across the country.

The Standard may also serve as guidance to Human Rights Tribunals as they attempt to craft systemic or public interest remedies.

Furthermore, by confirming (largely through material available in its Annexes) that mental injury can arise from the way work is organized and people are managed, the Standard paves the way for WCBs across the country to either create policies allowing admission of claims for chronic and cumulative stress leading to mental injury or to reinforce, amplify and defend the rationale for policies that already exist.

The risk to employers of being caught up in legal issues related to psychological injury and failure to provide a psychologically safe system of work continues to grow.

In light of this fact, and as a precautionary measure, employers would do well to study the Standard as a potentially effective way to avoid or weather the storm that such potential liabilities can attract.

Beyond this strategy of self defence, and as a transformative measure, employers can review the Standard as an opportunity to shift the employment relationship toward one in which their interests in business and service efficiency are served by the same strategies that protect psychological health and safety at work.

Biography

Martin Shain, S.J.D.

Dr. Martin Shain is principal of the Neighbour at Work Centre®, a consulting agency in the area of workplace mental health and safety. Martin is trained in both law and social science.

Currently he holds appointments in the departments of public health at the University of Toronto and Simon Fraser University where he is involved in research, development and teaching.

Martin helps private and public sector employers and unions understand and meet their new legal obligations to provide and maintain psychologically safe workplaces.

His three discussion papers for the Mental Health Commission of Canada on this subject are available on that organization s website at www.mentalhealthcommission.ca.

As part of his mission to enhance the protection of mental health at work, Martin served as a member of the Technical Committee developing Canada s first National Standard of Canada on Psychological Health and Safety in the Workplace, Z1003.

His most recent book is “Preventing Workplace Meltdown: an employer s guide to maintaining a psychologically safe workplace” (Shain and Baynton, Carswell, 2011).

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