

Weathering the **Perfect Legal Storm**

A Bird's Eye View

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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

A Bird's Eye View

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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

There have been several significant developments in the law relating to psychological injuries in the workplace over the last three years. In the full report "Weathering the Perfect Legal Storm," many of these developments are explored in the context of the parallel development of the National Standard of Canada on Psychological Health and Safety in the Workplace (the Standard). The following is a synthesis and simplification of the analysis as well as some supplemental commentary.

Even though the Standard has no legal force, it is predicted to have an impact on the law because it offers a definition of a psychologically healthy and safe workplace, and a framework for a psychologically healthy and safe system of work. While the Standard goes way beyond the protection of psychological safety to deal with psychological health promotion as well, "Weathering the Perfect Legal Storm" concerns itself only with psychological safety since it is only in this area that legal implications are likely to arise. For this reason, it is highly unlikely that the Standard in its entirety could ever be regulated.

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Many legal commentators from prominent law firms across the country, representing both employee and employer interests, see the Standard as providing a higher level of specificity around the potential nature and quality of employer responsibilities for the protection of employee psychological safety. By providing a definition of the psychologically healthy and safe workplace as "one that actively works to prevent harm to worker psychological health including in negligent, reckless, or intentional ways," the Standard provides a framework for a level of safety higher than that found anywhere in the Canadian legal system.

The report is written as a precautionary tale so that employers can recognize the value of the Standard as a tool to help avoid legal liability for the psychological injury of workers in the workplace.

In other words, the Standard can help with an existing problem – it does not create one.

Of course, this reason for adopting the Standard is among many that propelled its development in the first place: health and productivity advantages, benefits to recruitment and retention of talent, and protection of corporate reputation. However, "Weathering the Perfect Legal Storm" focuses solely on the *legal incentives* to adopt the Standard.

Organizations that adopt the Standard will be better placed to avoid conflicts, grievances and disputes that characterize a psychologically unsafe workplace. These conflicts can simmer below the surface for months or years and fuel the furnace that ultimately gives rise to the destructive force of legal actions.

The Standard in context

When the predecessor to this paper, "Tracking the Perfect Legal Storm", was written for the Mental Health Commission of Canada three years ago, the argument was that no less than seven branches of law were converging to create a high liability risk situation for employers with regard to mental injury. These bodies of law were presented as incentives to develop a new national standard which, in essence, would assist employers in addressing certain legal risks by providing a blueprint for the creation of a psychologically healthy and safe workplace.

The basic idea of a safe system of work is firmly embedded in our law...

It was proposed too that underlying the myriad rules and regulations specific to these diverse areas of law there was an emerging, implied, single duty of care to provide a psychologically safe workplace. This view was resisted by practising lawyers for some time and indeed there was, and still is, an element of overstatement in the assertion of this single duty from a strictly legal point of view. However, the intent of proposing the existence of such a single duty (speculative though it is) was to make it easier – not harder – for employers to avoid liability for mental injury. The rationale was simple: if you only have to avoid one torpedo it is easier to take evasive action than if you have to dodge seven.

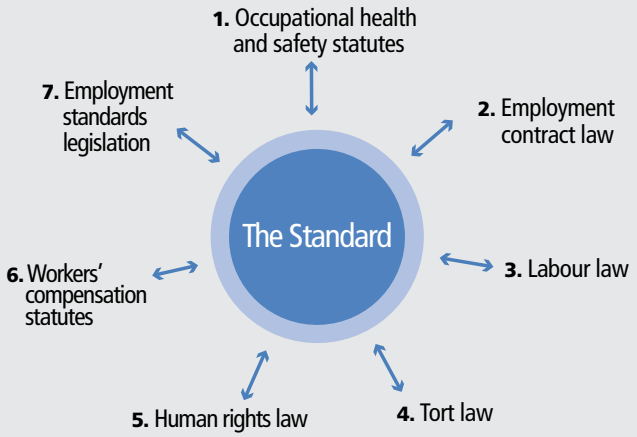
Now that the Standard is a reality, it may be prudent for employers to act as though there is a duty of care to provide a psychologically safe system of work by all reasonable means, and to view the implementation of the Standard as a way to help in discharging this duty.

Whereas before January 2013 the law had been contributing to the pressure to develop a Standard, the Standard is now poised to create a back pressure on the law by helping to fill voids in definition and specification of the duty of care to provide a safe system of work. This potential back pressure is evident in the areas of law outlined above and depicted in the following diagram.

In light of the analysis found in "Weathering the Perfect Legal Storm," it would now be more precise, and probably more to the point, to refer to an employer's responsibility *to provide a psychologically safe system of work* rather than the responsibility to provide a psychologically safe workplace. This extends the responsibility to day-to-day interactions among all staff, including resolving conflict, managing performance, and responding to employee concerns. The basic idea of a safe system of work is firmly embedded in our law and resonates in all areas identified in the diagram below and the text above.

In this context, the psychological safety side of the Standard contributes to the evolution of the law by describing the ideal nature of a psychologically safe system of work, but it does not in itself introduce such a requirement.

The Standard specifies the responsibility to provide a psychologically safe system at work



The seven branches of law named in this diagram influenced the development of the Standard. The Standard *may* have an influence on the application of these laws in the future.

Could the Standard, or parts of it, influence existing legal requirements?

1. Under occupational health and safety statutes

- In so far as the Standard deals with protection of psychological safety, it could be used by employers as an articulation of an ideal psychologically safe system of work and to assist them in meeting their obligations under the "general duty clause" of Occupational Health & Safety (OH&S) Acts. For example, the general duty clause is found in Ontario's OH&S Act at section 25(2) (h), and provides that an employer shall "take every precaution reasonable in the circumstances for the protection of a worker". The general duty clause is expressed in slightly different ways in different jurisdictions. Under the general duty clause in OH&S Acts across the country, this would only happen if the courts that hear prosecutions under that legislation decided to refer to the Standard, or if a Lieutenant Governor in Council (or equivalent) decided to issue a regulation to the relevant OH&S Act that incorporated the Standard in some manner.

Harassment and bullying are recognized risks to psychological safety in the Standard.

- Harassment and bullying are recognized risks to psychological safety in the Standard. British Columbia is the only province that has amended its Workers' Compensation Act to include compensation for mental disorder predominantly caused by a significant work-related stressor *including harassment and bullying.* This amendment was enacted before the development of the Standard, but the Standard may influence other provinces to consider a similar approach.

- Recent case law in Ontario has placed the responsibility for a safe system of work in not only the hands of senior management but also partially in those of directors of corporations. This inclusion of directors of corporations in the responsibility to ensure a safe system of work is consistent with Standard recommendations.

- Due diligence would be available as a defence to prosecution for failure to protect psychological safety. Compliance with the Standard could be interpreted as a proactive approach and may be seen as due diligence.

2. Under employment contract law

- The contract of employment under common law implies a requirement for a safe system of work. A breach of this implied contractual term has been characterized as constructive dismissal. Recent developments suggest an increasing judicial willingness to see this requirement as extending to psychological safety. The Standard definition of a psychologically healthy and safe workplace may provide a clearer basis for tribunals and courts to determine when a breach of an implied contractual term, with respect to psychological safety in an employment contract, has taken place.

3. Under labour law

- Failure to provide or maintain a psychologically safe system of work could be characterized as breach of a collective agreement where the agreement specifies compliance with all existing National Standards.

- Existing arbitration in Ontario has deemed collective agreements to include the OH&S Act and deemed that mental health is part of the definition of health in that legislation. The Standard could be used by arbitrators to further refine decisions related to psychological safety.

4. Under tort law

- Access to tort law for negligent infliction of psychological suffering in the workplace was denied by the Ontario Court of Appeal. A key objection was that there is no accepted norm for psychological safety protection in the workplace against which such claims could be assessed. The Standard articulates such a norm. If referred to, the Standard could also act as a defence against claims of negligence causing psychological injury, if an employer demonstrates every reasonable effort to comply with the Standard.

5. Under human rights law

- Human Rights tribunals could choose to see the Standard, or parts of it, as providing content for systemic or public interest remedies that would guide the redrafting of policies and retraining required to address the perceived underlying causes of specific complaints. While the size of personal damage awards appears to be growing in the context of human rights violations, such individual awards may be less important than these systemic remedies.

...certain ways of managing people and organizing work can, and does, give rise to psychological injury.

6. Under workers' compensation statutes

- Workers' Compensation Boards, that have not yet modified their legislation or policies to allow compensation for chronic and/or cumulative stress-related disorders, may refer to the Standard as best practice. That is, they may see the Standard and the legal/scientific/practical evidence it is based on (and referenced and explained in the Annexes of the Standard) as a legitimate social assertion that certain ways of managing people and organizing work can, and does, give rise to 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.

- High-level reviews of occupational health and safety and workers compensation legislation could use the Standard as a basis for harmonizing the preventive and compensatory practices within a single philosophical framework. British Columbia has moved sure-footedly towards this kind of harmonization and several influences outside of the Standard appear to have brought about this development.

7. Under employment standards legislation

- The relevant body of law under this category is Quebec's Employment Standards Act. At this point in time it is unclear to what extent, if any, the Standard will influence policy and practice under this legislation.

What does a "psychologically safe system of work" really mean?

The Standard contains a vision for a psychologically healthy and safe workplace. This is a workplace that actively works to prevent harm to worker psychological health, including in negligent, reckless, or intentional ways. Or more simply, it is a workplace in which due diligence is applied by the employer to protect the psychological health and safety of employees.

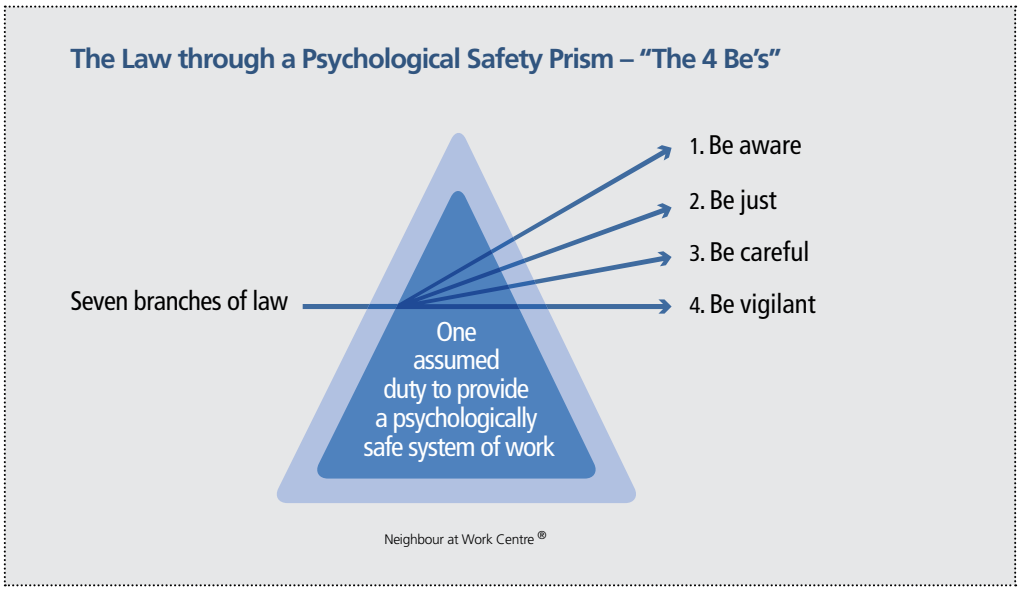
While the Standard provides detailed information and guidance on how to actively work towards a psychologically healthy and safe workplace, there are four simple principles (The 4 Be's) which can help illustrate the main concepts inherent in the seven branches of law described in the following diagram.

1. Be aware

Employers should be aware that the contract of employment could at any time be interpreted by a court or tribunal as including an implied promise to provide a psychologically safe system of work.

2. Be just

The foundation of everyday justice in the workplace is a consistent process for resolving issues fairly and promptly. This process would balance the rights and responsibilities of the employer with the rights and responsibilities of employees.



3. Be careful

Being careful, in the context of a psychologically healthy and safe workplace, means behaving in such a way as to avoid reasonably foreseeable harm to others. To help achieve this, at a minimum, those who manage, support, or supervise others should have *basic interpersonal skills* that include the ability to actively listen, elicit information and facilitate vital conversations in a respectful manner. This can also be extended to supporting the development of basic, respectful interpersonal skills for all employees.

4. Be vigilant

Be on the *lookout for signs of conflict or other interpersonal tension* among employees, and between employees and their managers or supervisors. Act to resolve conflict when you see it.

Being vigilant is facilitated by a system that includes regular evaluation of a minimum standard of fair, civil and respectful conduct, and is important in both unionized and non-unionized workplaces.

The responsibility to be proactively vigilant in this regard is a key element of sustaining a psychologically safe workplace.

Conclusions extracted from the full report

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 towards 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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