

Getting Ahead of the Perfect Legal Storm

Toward a basic legal standard of care for workers' psychological safety

Analysis and Commentary

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Forward

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This update to his previous and ground-breaking works, *The Perfect Legal Storm, Weathering the Perfect Legal Storm, The Careful Workplace* and *Preventing Workplace Meltdown*, was written by the esteemed Dr. Martin Shain. Dr. Shain is a true pioneer in the field of psychological health and safety. His *Neighbour at Work* program recognized both the harm and benefit that comes from interactions in the workplace.

From there Dr. Shain contributed to the development of Guarding Minds at Work, which remains a gold standard assessment tool for psychological health and safety. Once Guarding Minds at Work was available to every organization at no cost, Dr. Shain saw an opportunity to develop a national standard that would guide all workplaces through a comprehensive framework for psychological health and safety. He was a founding member of the Technical Committee for the development of CSA z1003 National Standard on Psychological Health and Safety in the Workplace.

To put Dr. Shain's approach into a few words is not possible. But his three imperatives of awareness, understanding, and carefulness as outlined in his book, *The Careful Workplace* are arguably the essence of his elegant philosophy. He attributes his three imperatives to what the law calls the "neighbor principle" and which forms the basis of the modern law of negligence[1]:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

If the goal of a careful workplace is to avoid reasonably foreseeable harm then the operational day to day objective becomes the pursuit of awareness, understanding, and carefulness as a set of normative behaviours. Throughout this report, Dr. Shain will help us understand both the evolution of the law and how we might leverage this knowledge for the benefit of everyone in the workplace.

[1] Donoghue v. Stevenson [1932] A.C. 562 is the seminal case in which the neighbour principle was first articulated by Lord Atkin in the British House of Lords. It remains a keystone in the foundations of the law of negligence to this day.

The Standard of Care in the National Standard on Psychological Health and Safety

The National Standard of Canada on Psychological Health and Safety (the Standard) was released in 2013. It's a voluntary framework to help guide employers to prevent harm to employees' psychological well-being – it's not the law. The Standard includes the term "negligent" in its vision statement. This suggests employers should use the standard of care that applies to the law of negligence, rather than only recklessness or intentional harm. This requires that reasonably foreseeable harm be avoided and presents this as a proactive duty rather than as a basis for establishing liability.

However, it's the employer's general statutory duty to protect the health and safety of its workers, as stated in the Occupational Health and Safety Act (OHSA). If, for the sake of argument, we propose that the Standard provide a benchmark or criteria for employer actions that are "reasonably practicable" this would mean employers should conduct psychological risk assessments in line with OHS requirements.

This would mean implementing the Standard may be the best way to get ahead of the trend towards preventing reasonably foreseeable harm to employee psychological health. Reasonably foreseeable harm is similar to negligence or not caring about risk to others.

Currently, the law requires the establishment of intentional harm or recklessness to prove liability. "Reasonable foreseeability" is like working on civility and respect in the workplace instead of waiting for harassment complaints. This report helps provide some practical strategies to prevent foreseeable harm and highlights some of the trends in the legal landscape that may be of interest to employers.

What is reasonably foreseeable harm and how do we prevent it?

The concept of reasonably foreseeable harm is a legal idea derived from social standards and expectations that evolve over time. Its grounding in social standards and expectations is what gives the law its legitimacy. Legitimacy is strained when the law is slow to reflect changes in these social norms. The current duty to is to prevent reckless and intentional harm rather than the lower level of reasonable foreseeability. This fact gives rise to today's legal debate.

The term "reasonably foreseeable" is elastic in its meaning. To some degree this is desirable in a society in which ethical and legal standards continue to evolve. The Supreme Court of Canada in (Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19, [2018] 1 S.C.R. 587, p.21) describes a reasonable expectation to know how your behaviour may impact someone else: "The defendant ought reasonably to have contemplated the type of harm the plaintiff suffered." And in (Ryan v. Victoria (City) [1999] 1 SCR 201, p.28) the Supreme Court of Canada states: "What is reasonable depends on the facts of each case including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost that would be incurred to prevent the injury."

The term's vagueness is part of why it has the capacity to reinvent itself for every new generation and to have meaning in any social context.

It's important to consider a more practical interpretation of workplace behaviours that would likely be described as intentional, reckless or negligent since this could be the basis on which liability is decided. An attempt is made below to distinguish behaviour that would likely be interpreted as intentional vs behaviour that's reasonably foreseeable. An employer who strives to prevent or address behaviours on both lists could get ahead of the potential for liability.

While the behaviours in the second list may be currently seen as less serious under the law, they can lead to a psychologically unsafe work environment.

Behaviours likely to be interpreted by law as *intended or virtually intended* to cause psychological injury *(intentional or reckless injury)* are:

1. Failing to reasonably accommodate the needs of the ill or injured
2. Repeated threats of dismissal or other punishment for no reason
3. Driving a person too hard knowing it's likely to cause burnout
4. Leaving offensive messages on email, phone or social media
5. Sabotaging a person's work or getting them into trouble – for example, by deliberately withholding or supplying incorrect information, hiding documents or equipment and not passing on messages
6. Maliciously excluding and isolating a person from workplace activities
7. Persistent and unjustified criticisms, often about petty, irrelevant or insignificant matters
8. Humiliating a person through gestures, sarcasm, criticism and insults – often in front of customers, management or other workers
9. Intentionally spreading gossip or false, malicious rumours about a person to cause them harm

Behaviours with *reasonable foreseeability* of causing psychological injury *(negligent injury)* are:

1. Expecting too much of workers with no heed to the consequences
2. Withholding discretion over how work is done where no business rationale exists
3. Failing to acknowledge contributions or to assign credit
4. Demonstrating a pattern of bias in the distribution of work or rewards
5. Regularly failing to provide timely and relevant information
6. Failing or refusing to allow enough participation in team discussions
7. Making it impossible to get the job done
8. Consistently ignoring the basic needs of workers for fairness and equity
9. Failing to identify and correct psychologically harmful situations.

The distinctions made above are clearly not absolute in any sense which is why courts and tribunals often go to such lengths to come to decisions. There is a gradual progression from one level of potential harm to another which makes any absolute distinction impossible.

For this reason, preventing any potential psychological injury, including at the level of reasonable foreseeability, will afford the employer more protection than focusing only at the level of intentionality and recklessness.

From avoiding liability to supporting psychological safety

Proactive approaches intended to protect workers' psychological safety are shared in the book, The Careful Workplace. They include:

1. Having reasonable expectations for what employees can achieve given their skill levels and aptitudes
2. Allowing reasonable discretion or control over how work is done, where it can be expected to be exercised in a safe, effective and efficient manner
3. Acknowledging contributions and assigning due credit
4. Demonstrating a fair and consistent pattern in the distribution of work or rewards
5. Providing timely and relevant information and feedback
6. Allowing and encouraging employee participation in decisions within their skill levels
7. Providing psychological support and/or material resources to get the job done, including training (where such resources are available)
8. Understanding and attending to the basic needs of workers for fairness and equity
9. Identifying and correcting potential psychologically harmful situations
10. Accommodating the basic needs of the mentally ill or injured

The following are foundations of the 10 points above:

1. Awareness: Be aware of who's influenced by your words and actions and how you're influenced.
2. Understanding: Understand the legitimate needs, interests, motives and points of view of others in your circles of influence.
3. Carefulness: Act upon your awareness and understanding by being careful of others in your circles of influence and by not doing them foreseeable harm.

Toward prevention of reasonably foreseeable harm as the basis of psychological safety

Employers need to know with some certainty what they should and should not do to prevent psychological injury to their employees. Employees need to be confident that their places of employment are psychologically safe to work in. So, it would be advantageous if there were some clear and simple rules to follow. Unfortunately, this has not been the case since the law has many voices and each one seems to tell a different story about the rules and regulations.

Canadian law has several branches including occupational health and safety, and workers' compensation, torts, employment contracts, labour law, and human rights. This can lead to confusion, costs, and frustration for both employers and employees.

This report is a sequel to three previous documents which propose with growing confidence that there is in fact a common, underlying legal duty of care to protect psychological safety.

Increasingly, it appears that much of the debate about the nature of this duty revolves around the degree to which we, as a society, expect employers to be responsible for preventing reasonably foreseeable harm.

Uptake of the voluntary National Standard on Psychological Health and Safety in the Workplace reflects the emerging trend of preventing reasonably foreseeable harm to employee psychological safety to help avoid legal claims resulting from reckless and intentional harm. This course of action is one of the best ways for employers to get ahead of the perfect legal storm that continues to swirl around them.

Introduction to the present inquiry

In the five years since the publication of *Weathering the Perfect Legal Storm*[2] (*Weathering*) there have been important developments in the law regarding the central question addressed in that report, namely, *what evidence is there for the emergence of a duty to provide a psychologically safe workplace?*

In that report it was concluded that employers would do well to assume that such a duty exists and to act upon it as a key risk management strategy.

In this report, the question is revisited in light of developments that have occurred over the last five years in the various bodies of law considered in *Weathering* and its two predecessors, "Tracking the Perfect Legal Storm"[3] and "Stress at work, Mental Injury and the Law in Canada"[4].

What follows is a discussion about the evolution of legislation related to each of occupational health and safety, workers' compensation, tort, employment contract, labour law (collective agreements) and human rights.

Occupational Health and Safety (OHS) Legislation

Legislative changes to OHS law in several parts of the country are bringing this branch of jurisprudence into the spotlight as a primary vehicle for the prevention of psychological injury in the workplace. While OHS law does not provide individual remedies, it does have the potential to correct situations that are psychologically risky under general duty provisions of legislation that include protection of psychological as well as physical health. This development is in its infancy but will probably grow rapidly as changes to workers compensation law create back pressures upon it to avoid costs that are increasingly borne by employers at the remedial end of the prevention–compensation spectrum.

OHS law requires employers to manage workplace risks to protect the health and safety of workers. There are three major areas within OHS relevant to psychological safety. The first is the general duty requirement that can be found in all OHS statutes; the second is specific provisions concerning harassment and violence, often included as amendments to the original legislation; the third is the duty of due diligence that usually appears in the context of defenses to charges under OHS legislation.

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[2] https://www.workplacestrategiesformentalhealth.com/pdf/weathering_the_perfect_legal_storm_BEV_E.pdf; https://www.workplacestrategiesformentalhealth.com/pdf/weathering_the_perfect_legal_storm_AAC_E.PDF

[3] https://www.workplacestrategiesformentalhealth.com/pdf/Perfect_Legal_EN.pdf

[4]https://www.mentalhealthcommission.ca/sites/default/files/Workforce_Stress_at_Work_Mental_Injury_and_the_Law_in_Canada_ENG_0_1.pdf

The General Duty Clause

The bedrock standard of care in OHS is the general duty that falls upon the employer to do everything that is practicable or reasonable to provide a safe and healthy workplace. This duty originates in the general duty clause (GDC) that appears in all OHS statutes in Canada in one form or another. Typical wording can be found at s. 25(2)(h) of Ontario's OHS Act which charges employers with taking "**every precaution reasonable in the circumstances** for the protection of a worker". A common variant is Alberta's OHS Act at s. 3(1)(a)(i) which requires that "Every employer shall ensure, **as far as it is reasonably practicable** for the employer to do so…. the health and safety and welfare of…workers engaged in the work of that employer…" (emphases added).

An ongoing question in this area is whether the GDC is intended to cover psychological safety as well as physical safety. At this point in time the jurisdictions that explicitly or by policy directive include psychological safety in the GDC are British Columbia, Alberta, Saskatchewan, Manitoba and Canada on behalf of the Federal Government.

The inclusion of psychological safety can be accomplished by the relatively simple means of re-defining health and safety in the definitions section of the governing Act. For example, Alberta's recently amended OHS Act at s. 1(v) provides that "health and safety" includes physical, psychological and social well-being.

Ontario and jurisdictions to the East do not make such provisions although Quebec has a unique approach to the protection of employee psychological safety in that it is largely dealt with through employment standards legislation.

The advantage of having psychological safety protection understood as part of the GDC is that the duty to prevent harassment would fall naturally under the duty to protect health when health is understood as having physical, psychological and social aspects.

Also, the GDC has been held to trump any specific regulations made under the OHS Act in Ontario at least, which often makes it a deciding factor in this area[5].

[5] Ontario (Labour) v. Quinton Steel (Wellington) Limited, 2017 ONCA 1006. Referring to the GDC in Ontario's OHS Act the court held at para 44: "…This section ***establishes a standard, rather than a rule***, the requirements of which are tailored to suit particular circumstances. Employers must take every precaution reasonable in the circumstances in order to protect workers. Reasonableness is a well-known legal concept that is interpreted and applied in a wide variety of legal contexts. Its use in s 25(2)(h) does not give rise to intolerable uncertainty. "(emphasis added)

Specific provisions regarding harassment, bullying and violence

Ontario has taken an incremental approach to the protection of psychological safety at work by enacting specific amendments to Ontario's OHS Act without changing the language of the GDC. Two such amendments were Bill 168 which dealt with violence prevention and Bill 132 which dealt with prevention and management of harassment with a focus on sexual harassment[6].

Provisions such as those contained in Bills 168 and 132 certainly go some way toward engaging the attention of employers with regard to creating policies and procedures for reporting and acting upon complaints of violence and harassment. But as the Ontario Labour Relations Board has pointed out, such legislation *does not require a harassment-free workplace*, only that policies and procedures be in place to address these issues[7]. And even then, under Bill 132 *there was no requirement to assess risks for harassment* as there was in the case of violence under Bill 168. This means that a central policy element in the prevention of harassment is missing in this legislation and in the Code of Practice that was subsequently developed to help implement it[8].

However, failure to fulfill legislated policy and procedure obligations under OHS can have serious consequences for employers. For example, in one case heard before the Provincial Offences Court (Ontario Superior Court of Justice) a Ministry of Labour inspector had issued 10 orders to an employer to comply with requirements for violence prevention[9]. He had followed up with three phone calls since a number of orders were past their compliance due dates. In March 2015, the inspector attended the workplace to verify the status of the orders and issued a notice of non-compliance as seven of the 10 orders had not been complied with.

The orders required the employer to assess the risks of workplace violence, prepare a policy and develop, maintain, and implement a program to deal with it; information and training of workers about the policy and program were also to be provided. The same requirements (strangely) were ordered for workplace harassment which is not included as an amendment to OHS.

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[6] Bill 168, *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009* S.O. 2009 c.23; Bill 132, the Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015. Bill 132 arose from the Government's March 6, 2015 report, "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment"

[7] Harper v. Ludlow Technical Products Canada Ltd. (2011) CanLII 73172 (ON LRB); see also: Ljuboja v. The Aim Group Inc. and General Motors of Canada Limited (2013) CanLII 76529 (ON LRB). More recently: George Brown College of Applied Arts and Technology v Ontario Public Service Employees Union (2017) CanLII 40984 (ON LA)

[8] https://www.ontario.ca/page/code-practice-address-workplace-harassment

[9] Ontario v. Federal Force Protection Agency 2014

On February 6, 2017, Justice of the Peace Gerald Ryan agreed that the company had failed to comply with orders issued by a Ministry of Labour inspector and fined the company $10,000 for each count of non-compliance, totaling $70,000. The court also imposed a 25 percent victim fine surcharge as required by the Provincial Offences Act. The surcharge is credited to a special provincial government fund to assist victims of crime.

The order of the court in this case (noted in Ministry of Labour archives as *Ontario v. Federal Force Protection Agency 2014)* was related to Bill 168 on violence. But the order seemed to go beyond what even Bill 132 on harassment required by demanding a risk assessment for harassment as well as violence. As noted above, the actual wording of Bill 132 and its Code of Practice stop short of requiring risk assessments in this area while in the case of violence it is explicit. It is unknown to what extent other Ministry of Labour inspectors are taking this more expansive approach to the requirement to assess risks to worker psychological safety.

OHS law in Canada has not broken into the realm of risk assessment in the area of injury except in the context of violence prevention. Meanwhile, there is some evidence, such as that in the case of Federal Force Protection Agency, that Ministry of Labour inspectors and the lower courts that hear cases of infractions, at least in Ontario, are becoming more willing to enforce provisions of legislation that require employers to have policies in place that address harassment and violence.

This situation has potential to evolve if closer connections are made between proactively preventing reasonably foreseeable harm or similar recommendations found in the Standard.

Another good example of how provisions regarding harassment, bullying and violence are included in OHS statutes can be found in the recently enacted amendments to the *Canada Labour Code part 2*[10] *(Bill C65)* which defines harassment and violence as "any action, conduct or comment, including of a sexual nature, *which can reasonably be expected to* cause offence, humiliation or other physical *or psychological injury or illness* to an employee, including any prescribed action, conduct or comment" (emphases added).

Note here the specific language of reasonable foreseeability. This language appears in similar form in all definitions of harassment within OHS legislation or in policies based on it.

Note too that the language is very similar to that seen in Human Rights Codes in relation to harassment based on prohibited grounds[11]. Remedies for harassment of different kinds are available

[10] An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1 (S.C. 2018, c. 22).

[11] For example: see the definition of harassment under Ontario Human Rights Code RSO 1990 Chapter H 19. "Harassment means engaging in a course of vexatious comment or conduct that is ***known or ought reasonably to be known*** to be unwelcome". (emphasis added)

under both OHS and human rights. OHS offers public interest remedies where government agencies take the lead role in correcting psychologically hazardous working conditions. Human rights, in addition to public interest remedies, can provide individual damages.

The Duty of Due Diligence

The essence of due diligence is a defence that asserts that everything that could reasonably or practicably have been done to prevent a specific occurrence (like harassment, discrimination or failure to accommodate) had been done[12]. In the context of OHS legislation, due diligence is usually related to a defence against charges of violations under its authority.

One example is R. v. Value Drug Mart Associates Ltd[13]., a 2014 Alberta Provincial Court decision which stated:

> … The duty on the employers is not one of perfection, *and employers cannot be held at fault if the danger was not reasonably foreseeable*. The wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident. Since the determination of the reasonable steps to be taken is contextual there is no set of questions that apply to every scenario. The degree of supervision or inspection, the business practices adopted, the warnings given in the circumstances, the written or verbal instructions given to the employee may all play a part. The question to be asked is whether the company took all reasonably practicable steps to ensure the employee's safety. The nature of the steps taken may vary with the circumstances. The steps should be examined as a whole to determine whether the steps were all that was reasonably practical in the circumstances. (Emphasis added.)

In light of the discussion above, it seems fairly safe to say that OHS law encourages employers to prevent reasonably foreseeable harm and can hold employers accountable for psychological injury where the definition of health is understood to include psychological health.

Workers' Compensation Law

Workers' compensation is legal regime based on a no-fault principle. This means that certain injuries arising out of and in the course of employment are compensable as long as they fall within a classification of harms recognized by the relevant provincial or territorial board.

[12] R. v. Rio Algom (1988) 66 OR (2d) 674

[13] *R v. Value Drug Mart Associates Ltd, 2014 ABPC 164 at para 200, 594 AR 315*

In some parts of the country it seems that workers' compensation legislation and its policies are set to replace many common law remedies that for decades were the only route through which workers claiming mental injury could seek damages.

While there are many benefits associated with a no-fault system of compensation, the transfer of responsibility for providing remedies for psychological injury can also brings with it some deficits.

First, there is the issue of thresholds for compensability in claims of chronic stress. So far it appears that relatively few claims succeed since the threshold of proof has been set high. This may be challenged down the road on constitutional grounds but so far, the much feared raising of the floodgate against such claims has yet to produce the drain on the economy anticipated by some opponents to the reforms to workers' compensation law.

Second, there is the possibility of stifling debate about the responsibility of employers when decisions about compensation for psychological injury become less visible within the administration of the workers' compensation system.

That said, there is a paradox – an irony even – in the way compensation for psychological injury resulting from harassment has landed in the system. When the test of reasonable foreseeability of harm is used in determining whether harassment has taken place in workers' compensation policies, it reintroduces the common law concept of negligence as the threshold of compensability.

Although this process does not amount to a determination of employer liability, and in that sense does not assign culpability, the net effect may be to provide applicants with remedies that they would not otherwise have had in tort, at least in Ontario. Workers' compensation appears to hold employers to a higher standard of care than the common law does.

Stronger, Healthier Ontario Act (Budget Measures), 2017 (Bill 127), a recent amendment to Ontario's Workplace Safety and Insurance Act (WSIA)[14], introduces some restrictions concerning the degree to which the reasonable foreseeability of psychological injury may still play a role in determining eligibility for compensation. These restrictions arise from the definition of harassment found below where harassment is seen as a "substantial work-related stressor" specifying that to be eligible for compensation ***the conduct or comments must have been known or ought reasonably to have been known to be unwelcome***. More details are provided to help the explain how these developments may impact the workplace.

[14] Workplace Safety and Insurance Act, 1997 S.O. 1997, CHAPTER 16 Schedule A

WSIA subsections 13(4) and (5) now read as follows:

Mental stress

(4) Subject to subsection (5), a worker **is entitled to benefits** under the insurance plan **for chronic or traumatic mental stress arising out of and in the course of the worker's employment**.

(5) A worker is not entitled to benefits for mental stress caused by decisions or actions 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 employment.

The terms "chronic mental stress" and "traumatic mental stress" are not defined in the WSIA and the revised Act does not include new definitions for these two terms. However, a new policy manual[15] provides some initial clarification of these terms.

The relevant extract from the manual is reproduced below since it covers many of the issues that expanding the definition of stress introduces:

Definition

Workplace harassment

Workplace harassment will generally be considered a substantial work-related stressor.

Workplace harassment occurs when a person or persons, while in the course of the employment, engage in a course of vexatious comment or conduct against a worker, including bullying, ***that is known or ought reasonably to be known*** *to be unwelcome. (Emphasis added.)*

Chronic mental stress

A worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is caused by *a substantial work-related stressor* arising out of and in the course of the worker's employment… (emphasis added).

Note: The term "work-related stressor" is meant to include multiple work-related stressors, as well as a cumulative series of work-related stressors.

In order to consider entitlement for chronic mental stress the WSIB decision-maker must be able to identify the event(s) which are alleged to have caused the chronic mental stress.

[15] https://www.wsib.ca/en/operational-policy-manual/chronic-mental-stress

This means that the event(s) can be confirmed by the WSIB decision-maker through information or knowledge provided by co-workers, supervisory staff, or others.

Substantial work-related stressor

A work-related stressor will generally be considered substantial if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances.

Jobs with a high degree of routine stress

A claim for chronic mental stress made by a worker employed in an occupation, or a category of jobs within an occupation, reasonably characterized by a high degree of routine stress should not be denied simply because all workers employed in that occupation, or category of jobs within that occupation, are normally exposed to a high level of stress. In some cases, therefore, consistent exposure to a high level of routine stress over time may qualify as a substantial work-related stressor.

Jobs with a high degree of routine stress would typically have one or both of the following characteristics:

- responsibility over matters involving life and death, or
- routine work in extremely dangerous circumstances.

Interpersonal conflicts

Interpersonal conflicts between workers and their supervisors, co-workers or customers are generally considered to be a typical feature of normal employment. Consequently, such interpersonal conflicts are not generally considered to be a substantial work-related stressor, unless the conflict

- amounts to workplace harassment, or
- results in conduct that a reasonable person would perceive as egregious or abusive.

Standard of proof and causation

In all cases, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the substantial work-related stressor:

- arose out of and in the course of the worker's employment, and
- was the **predominant cause** of an appropriately diagnosed mental stress injury

For the purposes of this policy, "**predominant cause**" means that the substantial work-related stressor is the primary or main cause of the mental stress injury—as compared to all of the other individual stressors. Therefore, the substantial work-related stressor can still be considered the predominant cause of the mental stress injury even though it may be outweighed by all of the other stressors, when combined.

Diagnostic requirements

Before any chronic mental stress claim can be adjudicated, there must be a diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM) which may include, but is not limited to,

- acute stress disorder,
- posttraumatic stress disorder,
- adjustment disorder, and
- an anxiety or depressive disorder.

In most cases, the WSIB will accept the claim for adjudication if an appropriate regulated health care professional provides the DSM diagnosis. However, in complex cases, for example where there is evidence that a non-work-related stressor(s) may have caused or contributed to the injury, the WSIB decision-maker may require a further assessment, including an assessment by a psychiatrist or psychologist, to help clarify initial or ongoing entitlement.

Pursuant to the *Regulated Health Professions Act, 1991*, regulated health care professionals who are qualified to provide a DSM diagnosis are

- physicians,
- nurse practitioners,
- psychologists, and
- psychiatrists.

Employers' decisions or actions relating to employment

There is no entitlement for chronic mental stress caused by an employer's decisions or actions that are part of the employment function, such as

- terminations,
- demotions,
- transfers,
- discipline,
- changes in working hours, or
- changes in productivity expectations.

However, workers may be entitled to benefits for chronic mental stress due to an employer's decisions or actions that are *not part of the employment function* (emphasis added), such as

- workplace harassment, or
- conduct that a reasonable person would perceive as egregious or abusive.

It appears then that in the case of harassment, which includes bullying, there is a test of reasonable foreseeability. This does not imply however that the Ontario Workplace Safety and Insurance Board (Board) is to look for or consider fault as such. It means only that the standard of care implied by the provision is based on the prevention and compensation of vexatious conduct or comment *that rises to a certain threshold*, namely, *that which is intentional or reasonably foreseeable*.

In unionized environments, the Chronic Mental Stress provision was expected to generate a considerable amount of extra work for the Board and its tribunals. Some anticipated an increasing number of claims arising from what otherwise would have been handled as grievances under collective agreements.

For example, in *OPSEU v. Ontario* [2018] O.G.S.B.A. No. 7 the Board ruled that a grievance alleging discrimination and harassment on the part of the employer resulting in various medical symptoms as a result of the mental stress caused by the employer's actions should have been heard exclusively as a workers' compensation case under the new provisions.

The Ontario legislation joins British Columbia, Alberta, Saskatchewan, and Quebec in allowing claims for psychological injuries arising from chronic stress. However, criticisms of the Ontario legislation have been leveled at the high bar established for psychological injury: workplace stressors must be the *predominant* cause of the harm which in addition must be diagnosed as falling under one or more of the Diagnostic and Statistical Manual categories by a certified mental health professional as listed in the policy manual[16]. This latter provision may indeed at some point run afoul of the Supreme Court's ruling in *Saadati* in which the majority held that mental injury can be established by the testimony of people in the complainant's circle, such as family, friends and co-workers and does not necessarily require medical evidence to support the claim[17].

A further development of great significance is Bill 163, Supporting Ontario's First Responders, in Ontario which follows similar initiatives in Alberta and Manitoba[18]. Bill 163 amends the Workplace Safety and Insurance Act, 1997 to create a statutory presumption that Post Traumatic Stress Disorder (PTSD) diagnosed in first responders *is work-related*, unless the contrary is shown. PTSD is a mental health condition triggered by a traumatic event. The purpose of the amendment is to facilitate access to insurance benefits and treatment for the classes of workers covered by this Act.

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[16] In a Toronto Star article Dec. 4th, 2018 Sara Mojtehedzadeh reported that 94% of chronic stress claims had been denied based on a WSIB audit of cases since the implementation of the provisions in Bill 127 [94% of WSIB mental health claims denied]

[17] Note 8 above and text

[18] Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder) 2016. S.O. 2016, C4 – Bill 163

Bill 163 has significant implications for employers in terms of both the additional costs arising from expanded benefit entitlements, and the onus of rebutting the statutory presumption of entitlement, if the PTSD is not work-related.

Bill 163 applies to the following workers:

- firefighters (full-time, part-time, voluntary) and fire investigators;
- police officers;
- members of an emergency response team;
- paramedics;
- emergency medical attendants;
- ambulance service managers;
- workers in a correctional institution, a place of secure custody, or a place of secure temporary detention; and
- workers involved in dispatch.

Bill 163 requires a PTSD diagnosis to be provided by a psychiatrist or psychologist in accordance with the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) as in claims of chronic stress already considered above.

The Ministry of Labour Act is also amended by Bill 163. These amendments provide that the Minister of Labour has the authority to direct employers of first responders to make information available to the Minister concerning the employer's plans to *prevent* PTSD in the workplace. Such information may be used by the Minister to evaluate progress toward prevention of PTSD in covered workplaces.

As is the case with claims of chronic stress under Bill 127, Bill 163 specifies that workers are not entitled to insurance benefits for PTSD if the condition complained of is shown to be caused by decisions of the employer relating to the worker's employment such as changing job descriptions or working conditions, imposing discipline, and terminating of the worker's employment.

Tort

In some provinces it has been held that a reasonably prudent manager should be expected to understand the effect their behaviour has on the mental health of those who report to them. Failure to do so can attract liability for infliction of mental suffering. Standards vary across the country.

Currently most courts favour a threshold for employer liability for mental injury that is based on recklessness or intentionality However, it seems that the debate about this limit is ongoing and unlikely to subside. The focus of the debate is the extent to which employers should be held accountable to a standard of care that is based on the prevention of *reasonably foreseeable* ("negligent") harm to employee mental health. This threshold of liability imposes a higher duty of care on employers than either recklessness or intention.

Consideration of how other jurisdictions approach the role of reasonable foreseeability as a criterion for establishing liability for psychological injury can be helpful. The UK experience is of considerable value in this regard.

In *Easton*[19], the court cited a helpful summary for the principles for liability in cases of employer induced stressed based on *Hatton*[20]:

- First, a claimant must show that his employer knew or ought to have known that as a result of stress at work there was a risk that he would suffer harm in terms of a psychiatric or other medical condition.
- Second, the claimant must show that the employer knew or ought to have known that as a result of stress at work there was a risk that he would suffer harm of the kind he in fact suffered.
- Third, foreseeability depends upon what the employer knows or ought reasonably to have known about the individual employee.
- Fourth, the employer has a duty to act only when "the indications are plain enough for any reasonable employer to realize that he should do something about it."

An addendum to this report is provided for readers interested in pursuing this matter further.

UK law has to a large degree removed much of the ambiguity and provided helpful guidance on how the establishment of reasonable foreseeability can be subject to normal rules of evidence. Learning from their experience may allow Canadian employers to avoid future liability.

Employment Contract Law

The law has recognized for some time that reasonable foreseeability is a significant criterion in determining whether psychological injury inflicted in the process of terminating the employment relationship should attract liability to the employer. This recognition is based on judicial interpretations of what the parties had in their minds at the time the contract of employment was entered into: it assumes that one of these contemplated things would have been a common understanding that no reasonably foreseeable harm would be done to the employee's mental health, at least at the point of termination.

The Common Law view of the contract sees it as a bargain in which the parties are believed to have agreed to certain terms and conditions at the outset of the relationship. Courts look first to these initial understandings when disputes and conflicts between the parties arise by asking what the parties had

[19] Hatton v Sutherland [2002] ICR 613

[20] Easton v. B&Q Plc [2015] EWHC 880 (QB)

contemplated at the time the contract was entered into. The Supreme Court of Canada has clarified "contemplation" as referring to "the intent of the parties and the scope of their understanding"[21].

This general principle appears to be settled law but the question for present purposes is whether or to what extent implied terms for the protection of the employee's psychological safety *during the course of the employment relationship* as well as at the point of its termination are relevant.

This issue was recently explored in some depth by the court in Galea v. Wal-Mart Canada Corp. (note 10 above) *(Galea*) where the reasoning in *Fidler*[22], a previous case, was approved and confirmed as follows:

> [227] As long as the promise in relation to state of mind is part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable…

Earlier in *Galea* the role of reasonable foreseeability was canvassed as follows:

> [225] The availability of moral damages [relates] to the requirement that those damages for an employer's breach of good faith and fair dealing must be reasonably foreseeable… [and] arising naturally from breach of the contract itself, or those that may have been within the reasonable contemplation of both parties

While the above-quoted sections of *Galea* suggest that psychological injury arising from mental abuse in the workplace would be a reasonably foreseeable harm, the context of these observations must be kept in mind.

Galea did concern humiliation and mental abuse during the course of the employment relationship over a considerable period of time prior to dismissal (approximately nine months) but the focus of the judgment of the court appears to have been on the conduct of the defendant, Wal-Mart, primarily at the point of termination. It would be unwise to conclude that this context refers to much beyond the manner in which the employee was dismissed although possibly the period leading up to dismissal could be included in evaluating the employer's conduct.

Nevertheless, plaintiffs may not be without remedy when claiming psychological injury in the course of the employment relationship. The law of constructive dismissal, for example, may interpret certain

[21] Sattva Capital Corporation v. Creston Moly Corp., [2014] S.C.J. No. 53 cited in Galea v. Wal-Mart Canada Corp., 2017 ONSC 245 at para 154

[22] Fidler v Sun Life Assurance Co. of Canada [2006] 2 SCR 3

actions of an employer as tantamount to abdication from, or rejection of the employment relationship. Harassment has been construed by the courts as one of these actions[23].

Labour Law (Including collective bargaining)

Unionized workers have a presumptive advantage in protection against psychological injury resulting from harassment and discrimination based on prohibited grounds even if specific provisions are not included in collective agreements. This is because Human Rights Code provisions related to these harms are deemed to be imported into *all* collective agreements. In some jurisdictions, occupational health and safety legislation that prohibits harassment in all its forms, not only those based on prohibited grounds, may also be deemed to be included in collective agreements.

Since harassment is typically and variously defined as vexatious, humiliating, intimidating or otherwise offensive conduct that is *known or ought reasonably to be known to be unwelcome*[24] it is arguably a duty to avoid reasonably foreseeable harm.

Some unions have negotiated reference to the National Standard on Psychological Health and Safety in the Workplace into their collective agreements. There have yet to be any cases involved in breach of this section of a collective agreement and most contain language such as "strive towards" which will make it easier for employers to demonstrate they were working towards this goal. Full compliance is not the requirement.

There are other indications of the duty to protect worker psychological safety that the law prescribes in unionized environments. However, this has to be inferred from case law in which a duty is implied but not articulated in so many words. Two cases worthy of note in this context deal with the borderline between "shop talk" and harassment[25].

In drawing this distinction, it appears that the tribunals involved - in the absence of formal definitions of harassment in the relevant collective agreements - imported definitions seemingly based on community standards.

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[23] See line of cases cited in *Weathering (note 1 above)* at pg. 9, note 24

[24] See for example Ontario Human Rights Code, subsection 10(1) where harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome." However, since harassment in this Code is seen as a form of discrimination its scope is limited to the populations and grounds protected under that legislation.

[25] Lilydale Inc. v United Food and Commercial Workers International Union Local 1518 (2014) CanLII 26399 (BC LA); Hendrickson Spring – Stratford Operations v. United Steelworkers and its Local 8773 (2015) CanLII 60008 (ON LA)

In both cases it was held that the intimidating and threatening language was not defensible as "shop talk" or as acceptable within the norms of a given industry. These cases suggest an increasing distaste among adjudicators for workplace language and conduct that would be found unacceptable in society at large.

The following case provides further perspective on how workplace harassment may be seen by an adjudicator as a broader community issue.

In *Durham Regional Police Association*[26], arbitrator Trachuk in an interim award allowed a member of the press and other interested members of the public to attend hearings concerning alleged harassment within the police service in spite of objections from both parties to the proceedings.

In weighing the public interest in such a case against the interests of the parties the arbitrator said of the employer that it "is a police service which is one of the community's most significant public institutions…the public has an interest in how the Service for which it pays is managed. Furthermore, the interest of those employees who cannot attend the hearing themselves is in the nature of a public interest in the proceeding."[27]

And later: "I find that the desirability of the hearing being open to the public, including the press, outweighs considerations about the privacy of the intimate personal information that may be disclosed."[28]

This type of conduct was deemed to be beyond a confidential workplace matter as it had potential impact on society at large.

Human Rights Law

Human rights law is expanding in terms of whose behaviour the employer may be held responsible for, the size of awards, and the scope of the duty to accommodate employees with disabilities.

Expansion of responsibility

There is a blurring of boundaries between workplace and community when it comes to the extent of the employer's duty to protect employees against harassment and discrimination on prohibited grounds. For example, employers may be held accountable for the discriminatory behaviour of customers, patients or visitors if they violate provisions of the relevant human rights legislation while on site. The following two cases illustrate this point.

[26] Durham Regional Police Association v. Durham Regional Police Services Board (2018) CanLII 28649 (ON LA)

[27] *Durham Regional Police Association,* note 19 above at page 5

[28] *Durham Regional Police Association*, note 19 above at page 7

In *Schrenk,* the Supreme Court affirmed a positive duty upon employers to maintain a discrimination free workplace and be accountable for conduct by those in its workplace, even if they are there only on a temporary consulting basis[29]. The long list of interveners in the Schrenk case suggests that this case was seen as a singular opportunity to redefine the extent of the duty[30].

Beharrell was another case in which a tribunal asserted that the scope of the duty to provide a discrimination and harassment free workplace includes people not in a direct employment relationship[31].

In this case a truck driver who was a customer of the employer was accused of sexually harassing an employee. This was a hearing to determine if the case related to the employer's responsibility to protect the employee from sexual harassment should proceed on its merits. The employee had complained on more than one occasion to the employer about the conduct of the truck driver. The employer did not feel it was their responsibility to intervene. The tribunal involved a review of the extent of the duty only to determine if a full hearing was warranted – which the tribunal found it was. To date there is no record of its coming before the tribunal again.

Size of Damage Awards

In the Canadian human rights context psychological injuries are typically those suffered as a result of harm to dignity, feelings, or self respect. The language differs somewhat from one jurisdiction to another, but it is generally these three attributes of personhood that the law seeks to protect by penalizing those who affront them. Other intangible losses may be factored into awards.

While there are an increasing number of cases in which large awards have been made, two stand out.

1. The British Columbia Human Rights Tribunal issued an award of $75,000 for injury to dignity in *Kelly*[32]. While the award was at first overturned by a judge on judicial review it was restored by the BC Court of Appeal[33]. Prior to this decision the highest award in BC had been for $35,000.

[29] British Columbia Human Rights Tribunal v. Schrenk [2017] 2 S.C.R. 795

[30] Canadian Association of Labour Lawyers, Canadian Construction Association, Community Legal Assistance Society, West Coast Women's Legal Education and Action Fund, Retail Action Network, Alberta Federation of Labour, International Association of Machinists and Aerospace Workers Local Lodge 99, Ontario Human Rights Commission and African Canadian Legal Clinic

[31] Beharrell v. EVL Nursery, 2018 BCHRT 62

[32] Kelly v. University of British Columbia, 2013 BCHRT 302

[33] Kelly v. University of British Columbia, 2016 BCCA 271

2. In Ontario the Human Rights Tribunal awarded damages of $150,000 and $50,000 to two employees against their former employer in *Presteve*[34]. Typical awards for harm to dignity, feelings or self-respect resulting from discrimination or harassment in Ontario prior to *Presteve* had been relatively modest with amounts rarely exceeding $15,000, so *Presteve* is a quantum leap forward in this area.

Duty to accommodate

The nature and extent of the employer's duty to accommodate employees with mental disabilities has occupied the attention of many a tribunal and court over the last 40 or so years and the law remains somewhat in flux in this area. Our focus here is on accommodation of mental disabilities that are either brought into the workplace or are catalyzed or caused by the way work is organized and people are managed.

The duty to accommodate employees with disabilities also continues to expand through quasi-judicial and judicial decisions that further stretch the meaning of undue hardship. Employers can now be required to accommodate employees beyond what seemed possible ten years ago, raising important questions about how legalistic forms of accommodation could be, to some extent at least, rendered less necessary by more organic workplace cultural practices based on protecting psychological safety overall.

While the law admits that accommodation is a jointly held responsibility between employer and employee, the employer still needs to develop the workplace policies and practices that facilitate this process.

In *MacLeod,* the complainant was a former Emergency Medical Services (EMS) manager who claimed he had not been accommodated to the point of undue hardship. He had declared his bipolar disorder to the employer after running into difficulties with his performance at work[35].

In the process of going back and forth between medical leaves and returns to work, the complainant had contributed to disharmony, disruption, and conflict in the workplace. Despite this the tribunal found that the employer had failed to accommodate the employee to the point of undue hardship once it knew of his disability and that essentially this amounted to discrimination.

The tribunal made an order for the complainant's return to work as an EMS manager on a graduated basis and under medical supervision. The order included a requirement to initiate an expert-led workplace restoration process that would be directed at healing relationships damaged by the complainant while under the influence of his bipolar disorder and aggravated by the responses of other

[34] T. (O.P.) v. Presteve Foods Ltd., 2015 HRTO 675

[35] MacLeod v. Lambton County 2014 HRTO 1330

employees who in most cases were unaware of the complainant's condition at the time. The employer was further ordered to pay $25,000 in compensation for injury to dignity, feelings, and self-respect.

This case underscores the seriousness of the duty that employers bear towards employees with pre-existing mental disorders and the importance of establishing protocols for examining every possible avenue for accommodating them.

While the tribunal in *MacLeod* made it clear that the accommodation process is a shared responsibility, the law still struggles with the nature and extent of this joint responsibility[36]. Some case laws reveal massive efforts on the part of adjudicators to unravel the details surrounding the need for accommodation to the point where it is not unusual to see in excess of 100 pages of summaries of fact prior even to any legal analysis. These summaries reveal only a fraction of the human relations challenges, although often they do speak to the disruptions, frustration and demoralization of all parties involved.

One such case is *K.B*. where the tribunal reviewed copious amounts of testimony before concluding that the complainant had simply not shared essential medical information at a crucial stage during his accommodation process[37]. While there may have been discomfort for the complainant in disclosing this personal information about his psychological state and prognosis for recovery, he was bound to do so if he expected the employer to explore all reasonable pathways to accommodation short of undue hardship.

Cases such as *K.B.* can be challenging for human resource departments when the lack of perceived psychological safety in certain working environments may discourage employees from speaking up about personal problems risky for fear of stigmatization or other negative reactions.

Emond is another example of a case in which it is possible that a different type of workplace culture could have prevented the escalation of a dispute between co-workers into a fully-fledged human rights tribunal hearing[38].

In this case two employees of the Parole Board of Canada worked in neighbouring cubicles. One party, referred to as Mr. X, was to say the least eccentric, making loud and odd noises, swearing, and washing his feet in vinegar. This distressed his neighbour, Ms. Emond, who asked her supervisor that she be moved away from Mr X. However, no action was taken by the complainant's supervisor and the situation between the two neighbours deteriorated further until an incident occurred in which Mr. X gave Ms. Emond cause to fear for her safety by appearing at her door in an intimidating manner and

[36] Central Okanagan School District No. 23 v. Renaud [1992] 2 S.C.R. 970

[37] K.B v S.S 2016 BCHRT 61

[38] Emond v. Treasury Board (Parole Board of Canada) 2016 PSLREB 4

using threatening language. At that point her request to be moved was complied with although an offer of mediation was refused. Things settled down for a few months until a harassment complaint was filed against Ms. Emond by Mr. X, part of which was upheld. This caused Ms. Emond to experience depression, fear and anxiety which resulted in her being away from work for almost two years. In attempting to facilitate her return to work the employer offered the complainant a secure, access-restricted location within the same building but Ms. Emond insisted that she needed to be in a separate building altogether.

The employer opined that this was asking too much and declined the request based on undue hardship arguments. This refusal was the action that triggered the complaint by Ms. Emond in the form of a grievance. The adjudicator disagreed with the employer's decision and ordered that Ms. Emond's request be granted, warning nonetheless that this did not mean carte blanche for any further requests for accommodation regarding work location.

It is significant that the tribunal saw its decision as falling within the framework of the Supreme Court's principle (above) that affirmed accommodation as a multi-party responsibility.

While we have only the tribunal's account of the working environment at the Parole Board of Canada's 410 Laurier St. location, the story depicts a workplace culture in which it appears little value was placed on helping employees get along with one another and in which it further appears that supervisors were unskilled in dealing with interpersonal conflicts. Such a culture is likely to be the breeding ground for psychological injuries, which then become the basis for litigation that make things even worse. Accommodation then becomes a legalistic blunt instrument that brings about rough justice, if any at all.

Meanwhile in Ontario there appears to be judicial approval at a high level of a strict duty upon employers to accommodate those with mental disabilities. In the *Fair* case, the Court of Appeal confirmed findings of the Divisional Court and the OHRT in which an employee who had been on sick leave for general anxiety, depression and PTSD was reinstated with back pay after 10 years absence from the workplace plus $30,000 for injury to dignity, feelings and self respect, for a total of about $400,000[39].

The *Fair* case is a vivid illustration of how failure to accommodate mental disabilities can be a very costly and disruptive process for employers who do not have policies and procedures in place to address legitimate employee psychological safety concerns.

[39] Hamilton-Wentworth District School Board v. Fair 2016 ONCA 421

Conclusion

There is an apparent shift toward the adoption of the threshold of reasonable foreseeability within the statutory regimes of occupational health and safety, workers compensation, human rights and labour law.

Indeed, the net effect of psychological injury claims brought in tort and contract over the last 15 years has arguably been to make legislators and adjudicators outside the common law sphere more conscious of the need for legal instruments directed at either bypassing the question of culpability altogether, as in the case of workers' compensation, or at preventing psychological injury at its source as in the case of occupational health and safety[40].

The main contribution of the National Standard of Canada on Psychological Health and Safety in the Workplace (z1003) is hopefully not to increase litigation in the area of psychological injury at work but rather to provide substance to the duty to prevent reasonably foreseeable harm to psychological safety in the form of a prescription for a psychologically safe system of work.

When all is said and done, the message is to read between the many thousands of lines of legal decisions related to psychological injury and arrive at a basic understanding - we can avoid so many of the trials and tribulations associated with claims of psychological injury by building psychologically safe workplaces.

To avoid reasonably foreseeable harm to psychological safety in the workplace we must become more aware of who is influenced by our words and actions and how we are influenced by theirs. We should strive to understand the legitimate needs, interests, motives and points of view of others in our circles of influence. And we need to act upon this awareness and understanding by being careful of others in our circles of influence and by not doing them foreseeable harm.

Law can't create a culture of speaking and acting in a psychologically safe way, but it does provide some strong suggestions.

[40] These observations are based on anecdotal reports from professional consultants in Health and Safety organizations such as Workplace Safety and Prevention Services and from comments made by representatives of the Ministry of Labour in Ontario