

Tracking the Perfect Legal Storm

**Converging systems create mounting pressure
to create the psychologically safe workplace**



*An update to **Stress, Mental Injury and the Law in Canada:**
a discussion paper for the Mental Health Commission of Canada 2009*
[www.mentalhealthcommission.ca "The Shain Report"]

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May 2010

*The views represented herein solely represent the views of
the Mental Health Commission of Canada.*

*Production of this report is made possible through a
financial contribution from Health Canada.*

In “Stress, Mental Injury and the Law” (the “original report”) the assertion was made that there is an emerging legal duty in Canada to provide and maintain a psychologically safe workplace.

“A psychologically safe workplace is one that does not permit harm to employee mental health in careless, negligent, reckless or intentional ways.” (Shain 2009)

More simply, it is *“one in which every practical effort is made to avoid reasonably foreseeable injury to the mental health of employees.” (Shain 2009)*

Since the publication of the original report, it has become even more evident that such a duty exists, that it is becoming more and more coherent, and that employers who ignore the omens are increasingly at risk of liability for mental injuries sustained by employees.

We can observe seven major trends in the law becoming stronger by the year.

Together, we can characterize these trends as pressures building toward a perfect legal storm, where the whole is far greater than the sum of the parts.

Conversely, the remedies available to employees are multiplying and for the first time in Canadian history it appears that real redress for harm to psychological health is within the reach of many, if not most workers.

This update to the earlier report (the “original report”) will outline and comment upon some of the more prominent developments that have occurred or become more evident since early 2009.

Trends in a nutshell

Figures 1 and 2 illustrate the continuing trends that can be observed in the law over the last several years.

Figure 1 makes the general point that there is a trend in the law to condemn more and more mentally injurious conduct as unacceptable and to define it as having the potential to give rise to legal action.

From a time no more than ten years ago, when only egregious acts of harassment and bullying resulting in catastrophic psychological harm could give rise to legal actions for mental injury, we have arrived at a point where even the negligent and chronic infliction of excessive work demands can be the subject of such claims under certain conditions.

Figure 2 shows that this trend is actually the net result of developments in no less than seven areas of the law. This figure serves as the map for the present update in that recent developments in each of the seven areas will now be reviewed.

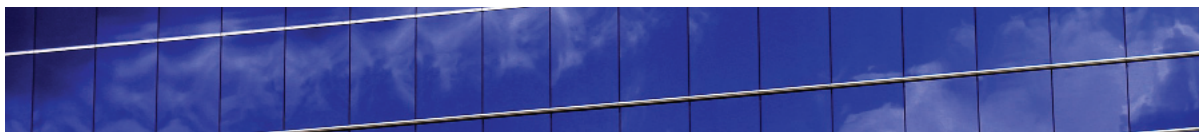
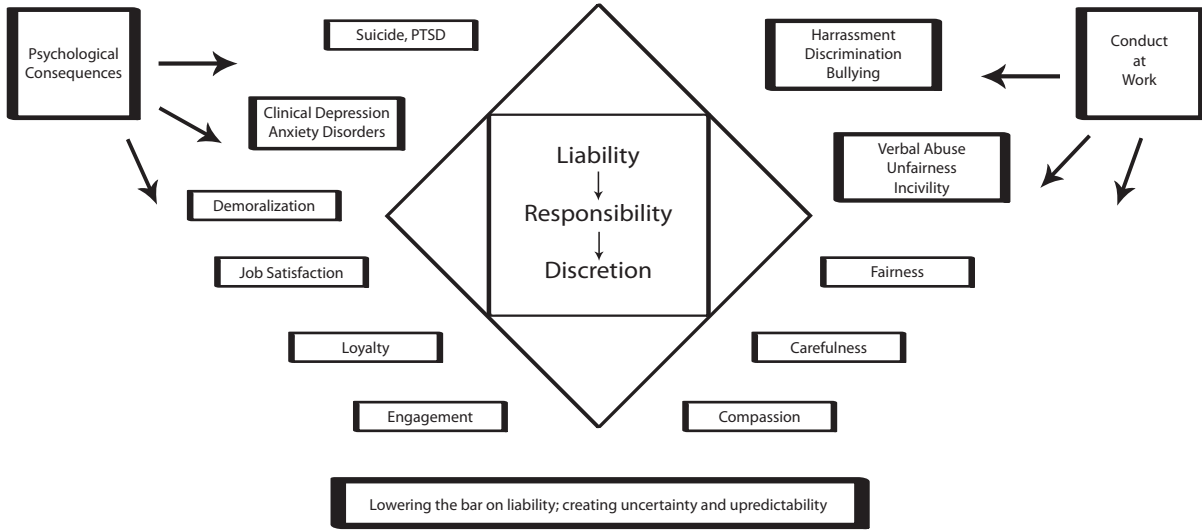


Figure 1: Legal Liability Trends 2001 - 2010

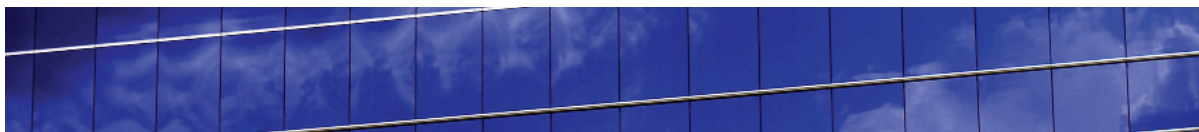
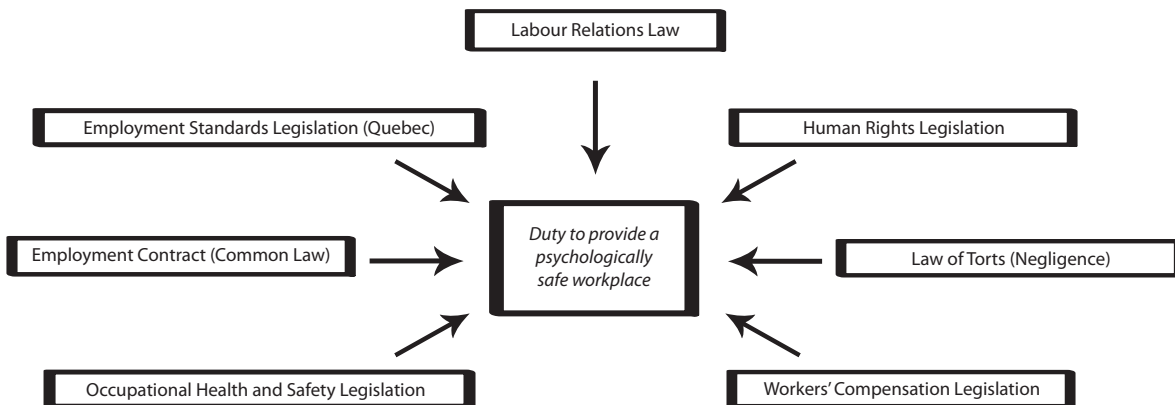


Liability Zone describes an area in which employer choices about the organization of work are constrained by legal duties and consequences because it is foreseeable that these choices could result in mental injury.

Responsibility Zone describes an area in which employer choices are constrained by perceived moral duties. These duties are based on the known or strongly suspected harmfulness to mentl health of certain choices concerning the organization and design of work.

Discretionary Zone describes an area in which employer choices are seen to be largely without moral or legal impact since they are not known to have, or are not suspected of having harmful consequences to mental health.

Figure 2: Legal Sources of Duty to Provide a Psychologically Safe Workplace



Human Rights' Law

The Human Rights' legal environment in many parts of the country continues to become more supportive of employee claims for harassment, a term that appears to be interpreted in a quite liberal manner by Tribunals.

The following are examples of trends in this area.

The Bertrend Case in BC'

When an employer discovers that an employee is suffering from depression it has a duty to accommodate that employee to a reasonable degree.

The existence of such a condition can be reasonably inferred from observation and from the testimony of employees themselves, *even in the absence of medical evidence*.

When depression is suspected as a cause of performance problems, careful inquiries should be instituted that serve to confirm or disconfirm that suspicion. At no point is it acceptable to deride or otherwise make fun of a person who exhibits signs of depression.

Using signs of depression as a reason for terminating or otherwise penalizing the employee can be characterized as discrimination on the grounds of mental disability contrary to the BC Human Rights' Code s.13.

This case is significant in that the Tribunal did not require medical evidence of clinical depression as a trigger for the duty to accommodate mental disability. The tendency for Human Rights' Tribunals to employ a liberal definition of mental health disorders was noted in the report to which this is an update and it appears that the trend continues.

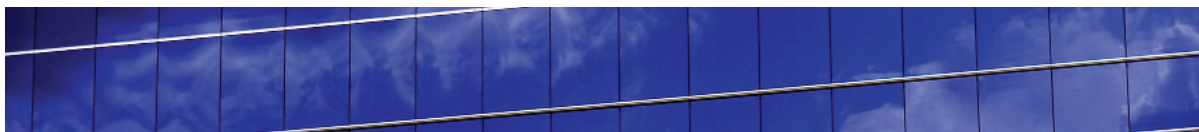
The implication of this trend for employers is that they must pay particular attention to the presence of signs of mental disorder that would trigger concern in a reasonable person. Once the condition is noted or strongly suspected, the nature and extent of the duty to accommodate the employee is still a very foggy area in the law.

That said, the precautionary principle in such cases would suggest that careful inquiries should be instituted by the employer in situations where job performance issues give rise to uncertainty about the mental state of the employee².

It is well to recall that the employer is not expected to be a diagnostician or an ersatz clinician. Rather, the duty is more akin to not making the situation worse by clumsy and inappropriate actions or intrusive inquiries³.

At the point where it is clear that normal interventions based on constructive confrontation are not producing an improvement in job performance, the most diligent course of action would likely be to offer help through an Employee Assistance Program, or in its absence to counsel the employee to seek help on their own.

Depending on the circumstances, the conduct of employers who do not follow this approach can be characterized as an assault upon personal dignity in addition to being found discriminatory and damages may be awarded accordingly, as in this case.



*The Lane appeal case in Ontario*⁴

In 2007, the Ontario Human Rights' Tribunal decided that the right of persons with a mental health disability to be appropriately accommodated in the workplace under Ontario's Human Rights' Code must be upheld, in spite of the complainant's failure to advise his employer that he was living with a bipolar disorder prior to, or at the time of hiring⁵.

On appeal, the Ontario Divisional Court has confirmed that the general duty to accommodate is not diluted by virtue of the fact that the complainant does not declare his or her existing mental disability before, or at the time of hiring. It found that the Tribunal's decision was reasonable when held against the criteria for reasonableness established in *Dunsmuir v. New Brunswick*⁶.

Because of their importance, the facts of the original case are reiterated here.

Mr. Lane was hired by ADGA as a quality assurance analyst. His responsibilities included "mission safety critical" work, such as artillery software testing.

A few days after he commenced his employment, Mr. Lane advised his supervisor that he had bipolar disorder and required accommodation.

The accommodation included monitoring for indicators that Mr. Lane might be moving towards a manic episode; contacting his wife and/or doctor; and occasionally allowing Mr. Lane to take time off work to avert a situation where he would move from a pre-manic stage to a full-blown episode.

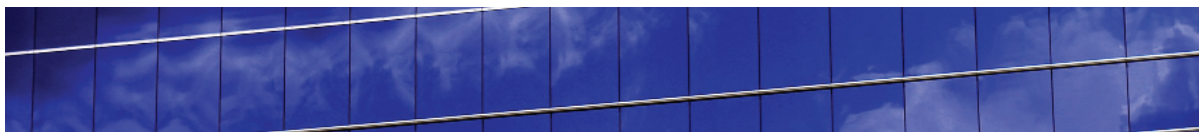
His supervisor gave no assurances, but undertook to get back to him.

As Lane became more stressed and anxious about management's response to his accommodation request, he began to exhibit pre-manic symptoms. Although Mr. Lane's supervisor and manager were aware of this when they met with him a few days later, they did not address any of his needs, they did not consider putting the meeting off to get more information, and they did not obtain legal advice. Instead, they immediately terminated his employment, which triggered a severe reaction that led to full-blown mania. Mr. Lane was hospitalized for 12 days, after which he experienced severe depression due to his inability to obtain other work. His financial position deteriorated, he had to sell his house and his marriage ended.

In its decision, the Tribunal held that management terminated Mr. Lane because of his disability and perceptions related to his disability, with virtually "no investigation as to the nature of his condition or possible accommodations within the workplace."

The Tribunal further found that ADGA had breached the procedural duty to accommodate, and this itself constituted a form of discrimination. The procedural duty to accommodate required "*those responsible to engage in a fuller exploration of the nature of bipolar disorder... and to form a better prognosis of the likely impact of (Mr. Lane's) condition in the workplace.*"

The Tribunal also rejected ADGA's argument that Mr. Lane had an obligation to disclose his disability during the hiring process.



The Tribunal held that if Mr. Lane had revealed this information, it would have likely triggered a stereotypical reaction in most employers about his ability to do the job, leading to a decision not to hire and no opportunity to explore possible accommodations.

In awarding damages, the Tribunal wrote, “This was an instance where the Respondent’s lack of awareness of its responsibilities under the Code as an employer was particularly egregious.

There were no workplace policies in place dealing with persons with disabilities. Moreover, senior management were singularly oblivious to those obligations...”

The Tribunal found ADGA’s dismissal of Mr. Lane to be “not only precipitate and unaccompanied by any assessment of Mr. Lane’s condition but also callous to the extent of its consequences in the sense that nothing was done on the day to ensure that Mr. Lane in his pre-manic condition reached his home safely and sought medical attention.”

The Tribunal awarded Mr. Lane \$35,000 as general damages; \$10,000 for mental anguish; a further \$34,278.75 in special damages, as well as pre- and post-judgement interest.

With respect to public interest remedies, the Tribunal ordered ADGA to establish a written anti-discrimination policy and retain a consultant to provide training to all employees, supervisors, and managers on the obligation of employers under the Code, with a focus on the accommodation of persons with mental health issues.

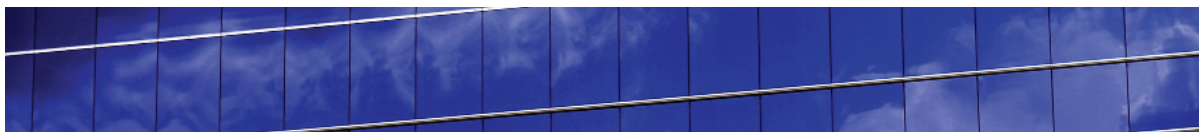
Commenting on the decision, Ontario Human Rights’ Chief Commissioner Barbara Hall stated, “This is a precedent-setting case for mental health disability in Ontario. Employers need to realize the risks in summarily dismissing someone with conditions like bipolar disorder.”

“The duty to accommodate is a reality,” she added. “At the systemic⁷ level, the decision clearly reinforces the necessity for employers to take all requests for accommodation seriously and process them appropriately. At the personal level, the devastating impact of the events on the life of Mr. Lane would have been very different had a real effort been made to explore with him and implement creative and individualized solutions.”

In upholding the decision of the Tribunal, the Divisional Court reviewed the case law in some depth and concluded that the actions of the employer were indeed reckless and exhibited a failure to anticipate the reasonably foreseeable consequences of its refusal to accommodate the mental health condition of its employee.

The court also upheld the public interest remedies required by the Tribunal, as noted above.

While the duty placed on the employer in this case may seem onerous, the transcript reveals that Lane had worked for another employer while suffering from the same condition and had thrived in that environment. There, he had taken the same approach that later failed at ADGA in that he warned his employer of his condition subsequent to hiring and provided a list of things to do if he started showing signs of mania. The accommodations provided by the employer took the form of reassigning work when Lane had to be absent in the same way that one might do so when an employee is sick from any other cause. Lane received excellent performance reviews in that company.



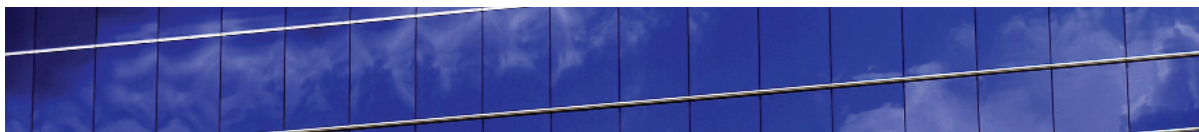
In reviewing the jurisprudence of the Ontario Human Rights' Commission since the expansion of its powers in 2008, Moffatt notes that this body can itself draft policies if requested to do so by a party and it can then require the Tribunal to consider it.

In other words, there is no requirement of a specific complaint from a specific individual in order for the Commission to activate its policy making capacity.

“This means the Commission can continue to influence human rights jurisprudence through its policy making powers.”⁸

The public interest remedies of the Ontario Commission and of the Tribunal are indeed of great potential significance to employers in that such remedies may take the form of intrusions into management rights. While it is desirable for employees that there should be a legally binding process for requiring that poisoned work environments be cleaned up, it is not in the best interests of employers to allow the situation to develop in which essentially a third party moves into the governor's seat to direct important aspects of the business. So again, the precautionary principle would suggest that the best course of action is to preempt such intrusions by preparing, implementing and monitoring policies that ensure a psychologically safe workplace.

The Lane case summarized above should also be seen in the context of amendments to the Ontario Human Rights' Code that make it easier and faster for employees to bring complaints forward and that have removed the cap for mental anguish damages.



Workers' Compensation

Plesner in BC

On a case appealed from the Workers' Compensation Appeals Tribunal, the BC Court of Appeal struck down provisions in the BC Workers' Compensation legislation which allowed compensation for mental stress *only if it was an acute reaction related to sudden traumatic workplace events*. (emphasis added)

The Court found that this limitation was contrary to section 15 of the *Canadian Charter of Rights and Freedoms* in that it treated those suffering from mental disability differently from those suffering from physical disability by requiring a higher standard of proof, and could not be saved under Section 1 of the *Canadian Charter of Rights and Freedoms*.

Section 1 of the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 15.(1) of the Charter provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age *or mental or physical disability*.

The complainant's argument was that the standard of proof to meet the threshold of compensability for *physical* accidents is simply that they arose out of and in the course of employment, while in the case of *mental* injury there was an added criterion that limits compensation to those who have suffered by way of an acute reaction to a sudden and unexpected traumatic event.

Essentially this amounted to discrimination on the basis of a personal characteristic, namely, mental disability.

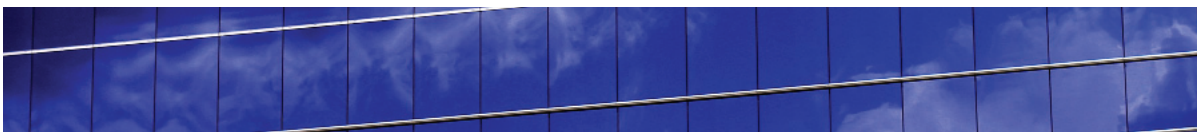
The court held that the intent of the legislation is to compensate all injuries that are work-related. But it compensates physical injuries in one way and those that are psychological in another way.

In effect, the discriminatory treatment works to exclude from compensation workers whose mental injuries are as work-related as those with physical injuries who are not excluded.

Workers with purely mental injuries are forced to meet a significantly higher threshold for compensation which is not required of those who suffer work-related injuries that are purely physical, or who suffer mental injuries which are linked to physical work-related injuries.

The Court ordered that the WCAT review their decision in the light of this judgment.

The significance of this decision is that it has created a further breach in the workers' compensation policy seawall that has traditionally held back claims for chronic stress related injuries.



While there have been exceptions to this pattern over the years, this is the first case in which a constitutional challenge has been used to dispute the social policy upon which refusal of chronic stress claims is based.

A case of this nature is bound to have repercussions elsewhere in the country in that claimants will want to use the constitutional challenge in similar fact situations.

*The Embanks Nova Scotia Appeal Case*¹⁰

This case illustrates another fissure in the workers' compensation policy floodgate that has traditionally given rise to refusal of the Boards to compensate chronic stress.

While the law appears somewhat inconsistent looking at the country as a whole, *Embanks* joins several other cases reviewed in the original report that challenge the received wisdom of tribunals in which chronic stress is simply not considered as the basis of legitimate claims.

In *Embanks*, the Nova Scotia court of Appeal held that “gradual onset stress” (aka chronic stress), or more accurately the mental injury resulting from it, can be compensable if the events in question were unusual and excessive according to the norms of the industry or occupation in question.

The Heart Attack Cases

While the erosion of the rule against compensation for chronic or gradual onset stress is clearly occurring across the country, albeit in different ways, it is equally clear that mental injury as a result of both acute and chronic stress is also being compensated through another process, namely the awards made (usually on appeal) to victims of heart attacks and their families.

There are several of these cases but one very recent decision is illustrative in many ways of the rest¹¹.

In this case Board policy allowed entitlement to benefits for a work-related aggravation of a pre-existing heart condition, if the work-related aggravation consisted of unusual physical exertion or *acute emotional stress* with no significant delay in the onset of symptoms.

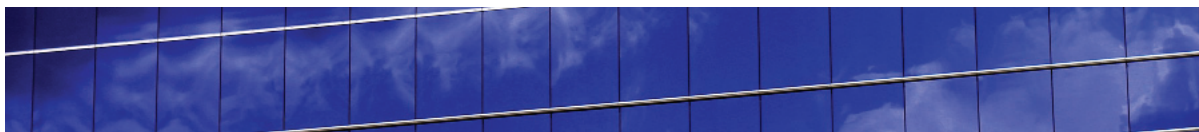
In this case the worker was a long distance truck driver who was exposed to hot, humid and cramped working conditions for a weekend when he was cooped up in his truck far from home waiting to make a delivery the following Monday.

He was angry and frustrated with his employers for sending him to a destination where they knew he would arrive too late to make the delivery and knew he would have to wait out the weekend in his truck.

He was forbidden to leave his truck for security reasons.

Also, as a diabetic, he was unable to exercise the dietary controls necessary to maintain his health because of his limited ability to seek proper food.

He also had pre-existing hypertension, kidney and gallbladder problems.



Shortly after this delivery was finally made he suffered a heart attack at another location.

The Tribunal accepted a medical expert witness's conclusion as follows:

“It is clear that he had cardiovascular death and it is clear that his risk factor, especially diabetes, played a major role. I think it is also very probable that the stresses he was under at the time or just before his death played a role in precipitating the event, especially driving in a bad storm, high temperature and humidity leading to dehydration, his *anxiety* over his diabetic control, and his *anger*. These stresses all led to a change in equilibrium of his clotting system, which likely resulted in thrombosis of one of his coronary arteries or a cardiac arrhythmia leading to his death. (emphasis added)

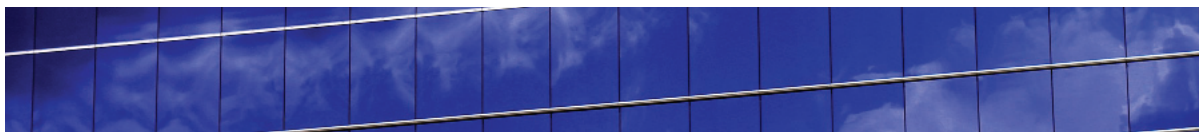
My conclusion is that he almost certainly had pre-existing cardiovascular disease but this long trip led to *anger and anxiety* and inability to control his diabetes, which were all precipitating factors in his sudden death.” (emphasis added)

Attention is drawn to cases such as these to illustrate the fact that employers can be held accountable for mental injury through indirect as well as direct routes in workers' compensation cases.

While workers' compensation is a no fault regime, employers are nonetheless found wanting and can be penalized by virtue of awards in which they are held responsible for the precipitation of fatal or debilitating heart attacks resulting from abusive and mentally injurious acts or omissions.

The penalty to employers in such cases ultimately takes the form of raised premiums paid to the Workers' Compensation Board and sometimes fines or participation in special programs.

The take-home message, again, is simple. Be proactive in the provision of a psychologically safe workplace in order to avoid losses due to preventable mental injuries in all areas of potential legal liability.



Law of Torts

The Common Law of torts as it bears upon compensation for mental injury continues to evolve.

Typically, relevant actions in this domain have clustered around the circumstances surrounding dismissal or the dissolution of the employment relationship in some other way.

However, an area of uncertainty and ferment lies in the extent to which such actions can be directed at employer conduct *during the course of the employment relationship* as opposed to at the point of its dissolution.

In legal terms, this question is framed as: is there a freestanding tort of “intentional or negligent infliction of mental suffering independent of wrongful or constructive dismissal,” since this is the manner in which claims of mental injury need to be couched?

At stake in this controversy is the legal policy floodgate that holds back claims of mental injury while the employment relationship is still intact.

The traditional legal view has been that if there is sufficient injury to mental health, then the appropriate legal response should be to claim that the employment relationship is dissolved or is in the process of being dissolved. Typically, this translates into actions for wrongful dismissal and constructive dismissal which are both actions related to breach of the employment contract.

Sometimes, dismissals that are carried out in thoughtless and harmful ways may give rise to additional claims for mental injury, in which case the torts of intentional and negligent infliction of mental suffering are invoked as add-ons to constructive or wrongful dismissal.

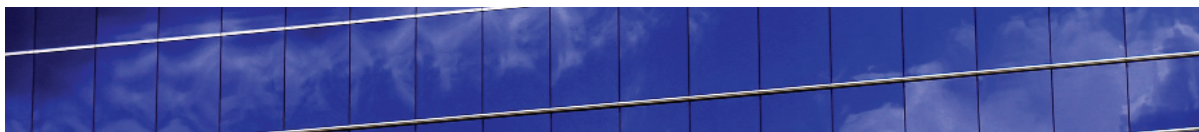
However, on careful reading, the cases on this subject display some degree of legal equivocation concerning the reach of claims for infliction of mental suffering, because the evidence presented for such claims often leads far back into the course of the employment relationship while it is still presumed to have been intact.

So, while harm to mental health may be typically litigated in Common Law at the point where the relationship is falling or has fallen apart, the conduct complained of frequently reaches back into its history.

This gives rise to legal perplexity and uncertainty concerning the very existence of a freestanding tort of negligent or intentional infliction of mental suffering independent of actions for wrongful or constructive dismissal.

In one recent case, for example, the Ontario Court of Appeal held, “For the purpose of this appeal I assume without deciding, that such a duty [a freestanding duty of care to prevent mental suffering] *does* exist in law.¹²” (explanation in square brackets added)

In this same case, the court distinguished another¹³, in which the claim of mental injury was considered to have been paired with the manner of dismissal, but a careful reading of the facts shows that the harms complained of stretched way back into the course of the employment relationship.



Should it be frankly acknowledged that there is a freestanding tort of negligent infliction of mental suffering independent of events surrounding the dissolution of the employment relationship, the implications would be far reaching. Essentially, it would make the quality of the employment relationship *in its entire course* a matter for legal intervention and critique.

And yet, in some ways this has already happened.

For example, when we examine the court's reasoning in *Bell Mobility* we can readily see that the full critique is there. It is just that it is launched from the perspective of the terminus of the employment relationship.

In that case, Aitken J. said: "In my view, it is reasonably foreseeable that a person of ordinary fortitude would suffer serious psychological injury if that person was regularly yelled and sworn at by her manager/supervisor/boss, was told by the manager/supervisor/boss that she did not know what she was doing, was not given the opportunity to explain her actions or defend herself, was pushed by the manager/supervisor/boss who at the time was clearly angry and out of control, and was immediately told that she would be put on probation or issued a PIP."¹⁴

This observation clearly refers not to an isolated instance in the employment relationship at the point of its dissolution but rather to a pattern of conduct exhibited over time during the relationship.

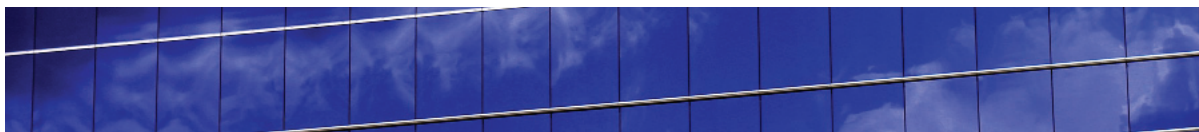
In addition, the statement above reinforces a key element of the tort of intentional or negligent infliction of mental suffering, which is the foreseeability of the harm resulting from an act or omission.

It is worth noting too that the judge in *Bell Mobility* (2008) is the same who rendered the *Bank of Montreal* decision in 2003 where the reasonable foreseeability test was explicitly depicted as the cornerstone of liability for negligent/reckless infliction of mental suffering¹⁵.

In essential ways, then, decisions such as *Bank of Montreal* and *Bell Mobility* are really about the conduct of the employment relationship as a whole, not just about how the relationship is dissolved.

The take-home for employers once again is that the employment relationship should be conducted according to the precepts of psychological safety if the stress, disruption, costs and inefficiencies of employee claims of emotional abuse are to be avoided.

This means taking every reasonable precaution to avoid foreseeable harm to employee mental health.



The Employment Contract

The jurisprudence of the employment contract has evolved over the last few years to the point at which such agreements can no longer be seen as the strictly commercial undertakings that they were legally described as, 150 years ago.

In recent years it has become clear that the employment relationship includes implicit, if limited terms for the psychological protection of employees and is not just an agreement for the exchange of labour and wages.

The trend began with the attachment of an employer duty to behave in a fair and reasonable manner in connection with dismissal.

This duty has now been typified as a function of a good faith requirement in employment, the violation of which can attract severe penalties.

In *Merrill Lynch* for example, it was held by the Alberta Queen's Bench that where an employer demonstrates bad faith in the process of dismissing an employee, he or she may sue for compensatory damages if they can show actual harm to themselves. This harm may be of a practical nature or of a more complex nature involving mental health components¹⁶.

In this case, the harm was to reputation, career and personal dignity, the violation of which was described as "mortal wounding," a term that carries a heavy emotional weight.

The penalty was greater than might have been expected under the "Wallace Bump" doctrine, which is supposed to have been supplanted by the good faith doctrine as expounded by the Supreme Court in the *Honda* appeal¹⁷.

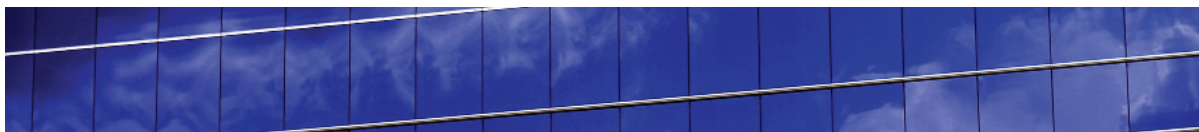
In *Merrill Lynch* the total award was for \$2.2 Million, of which \$1.6M was for predicable harm suffered as a result of the violation of good faith, while \$0.6M was compensation in lieu of notice.

This decision can be seen in the context of emerging jurisprudence that further portrays the ongoing contract of employment as one that contains implicit terms for psychological protection from egregious acts of harassment and discrimination.

While this trend has yet to take firm root in Canada, at least one decision stands as an example of how this nascent doctrine can be applied.

So, in *Charlton*¹⁸, the Board referred to a non-binding part of the Supreme Courts' *Fidler* decision¹⁹ where they suggest that contracts of the type entered into with the major or important purpose of conferring a psychological benefit on one of the parties include the employment relationship. As applied in a collective bargaining environment, this proposition was interpreted as meaning in *Charlton* that harassment resulting in injury to an employee's mental health was a breach of the employment contract itself.

The *Fidler* proposition as applied in *Charlton* therefore opens the door to another basis upon which employees can claim damages for mental injury arising *in the course of* the employment relationship as opposed to at its termination.



Given the blurring of contract and tort remedies that some legal scholars see as emerging in Canada and elsewhere²⁰, the law seems poised to define new opportunities for employees to sue their employers for mental injury while the employment relationship is still viable and where there may be no desire to end it but rather to amend it.

These opportunities may proliferate even further as it becomes easier for employees to sue their employers in the wake of amendments to procedural rules that fast track claims hitherto subject to onerous conditions. Ontario has recently joined British Columbia, Alberta, Nova Scotia and the Yukon (with Saskatchewan soon to follow) in raising the limit for suits in Small Claims Court from \$10K to \$25K. Also in Ontario the “simplified procedure” can be now be used in cases up to \$100K, up from \$50K. This means, amongst other things, that limited discovery of documents (no more than 2 hours’ worth) applies to such cases – a fact that is said to help employees because their employers can no longer use the delaying tactics of unlimited discovery which meant essentially more cost and stress for claimants.

On the other hand, cases hitherto not subject to discovery at all in Small Claims Court are now subject to limited discovery of documents which may serve as a deterrent to employees to sue at the low end of the damages scale²¹.

Another type of case in contract that is attracting the concerned attention of employers is the class action suit. Fears that such actions may proliferate have been aired with some justification²².

While there was a collective sigh of relief when the *CIBC* case was not certified as a class action²³, fears have arisen again in the wake of the court’s approval of the *Bank of Nova Scotia* certification.

This case involves a claim by over 5000 bank employees, represented by Cindy Fulawka, for unpaid overtime²⁴. The claim is for \$300 Million.

While the facts of the case do not immediately suggest mental injury, and no actual claim for such is made, the statement of claim uses language found in several cases involving such harm as a downstream consequence of overwork.

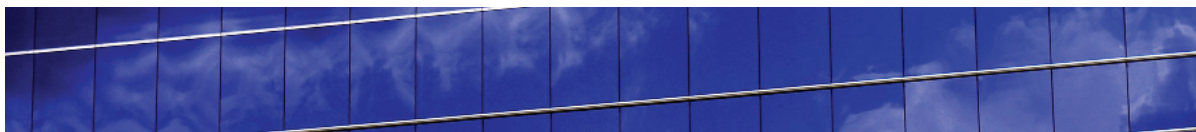
For example, at paragraph 12, it is claimed that:

“They frequently worked overtime in order to carry out the usual functions of their jobs and they did not receive compensation. Ms. Fulawka [representing the class] estimates that she worked, on average, two overtime hours per day, frequently arriving early, working after closing hours, skipping lunch and rarely taking breaks.”

Language very similar to this can be found in *Zorn-Smith v. Bank of Montreal*²⁵ where it lays the groundwork for a claim of negligent infliction of mental suffering based on failure to foresee the likely consequences of excessive work demands.

So, indeed, it would not be a great leap to see class actions of this type extended to mental injury using excessive work demands as the springboard.

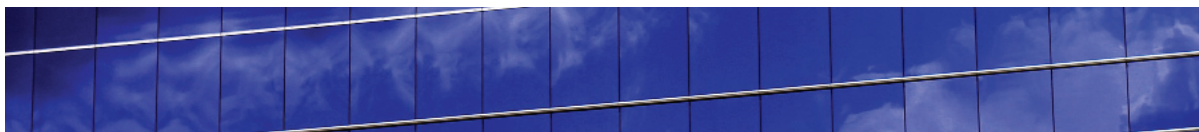
Of course, certification to succeed requires the demonstration of a community of interest that shares common concerns and has suffered similar harm.



In *Bank of Nova Scotia* the judge was satisfied that such a community of interest exists in that he believed the overtime policies of the bank create *systemic* problems that contribute to a *culture of overwork* that affect everyone, albeit to different degrees.

It is interesting, too, that the court in *Bank of Nova Scotia* appears to agree that creating *by policy* a work environment in which overwork is encouraged represents a breach of the duty of good faith which in turn is seen as a free-standing duty inherent in the contract of employment for its duration²⁶.

Certification of a class action, of course, represents only the first milestone on a long route through the legal system. The reasoning of the judge in a certification hearing has no binding power on the court that actually hears the complaint. Nonetheless, it will no doubt be treated with deference.



Labour Law

Labour Law offers employees covered by collective agreements a strong shield against mental injuries in so far as it allows them access to contractual remedies *while the employment relationship is still intact*.

While the Common Law shows signs of catching up in this area, as we have seen, it still has a way to go.

The grievance process as prescribed by Labour Law has been interpreted as one that permits employees to import broad requirements of procedural and distributive fairness into collective agreements that may not explicitly assign such terms.

And collective agreements in turn have been deemed to include the terms and conditions of provincial and territorial occupational health and safety statutes, which themselves are interpreted as including provisions for the protection of mental, as well as physical health.

In addition to protections afforded by Human Rights' Codes across the country, this Labour Law shield offers an impressive array of remedies to employees with claims of harassment and other forms of on the job abuse.

That said, there are areas of legal ferment that continue to produce new jurisprudence on the subject of the psychologically safe workplace. Some worthy of note are as follows.

The Evolution of Hybrid Cases: The Manitoba Case

A recent case illustrates some of the difficulties associated with trying to accommodate employees who have mental health issues but who appear to have sufficient volition that they can be considered at least to some degree culpable for misconduct²⁷.

In this instance, the employee's long standing mental illness appears to have had little to do with the way her work was managed and organized over the first 25 years, although she claimed that in recent months her anxiety and depression had been exacerbated by an unsympathetic supervisor.

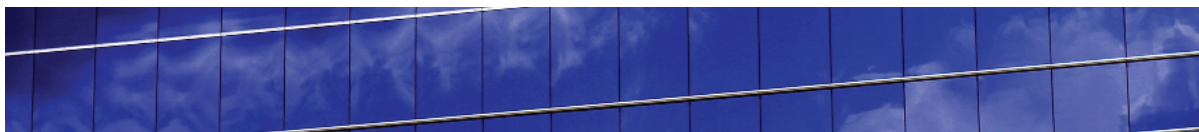
So much so, in fact, that she absented herself and was subsequently placed on unpaid medical leave.

During this period of leave she entered her supervisor's office without authorization, rifling through his filing cabinet searching, she said, for evidence to defend herself against her supervisor's allegations of misconduct that had led to her being reprimanded for insubordination and given a one day suspension.

She had engaged in similar behaviour two years previously.

This time, she was fired.

In responding to the Union's claim that her discharge was inappropriate and unjustified, the arbitrator had to decide to what extent her conduct was volitional and to what extent driven by her mental health condition, over which she had little control beyond taking her medications.



He opted for the “hybrid” approach which has been gaining in popularity in recent years, having been used with some success in cases of alcohol and drug dependence.

He found that the grievor was not fully culpable for her misconduct because of her mental state, but was sufficiently aware that her actions were wrong that some blame should adhere.

He reasoned further that the employer, although it had tried to address the grievor’s admitted difficulties in performing her job over the last two years, had failed to make sufficient inquiries into her mental state.

And while the grievor could have been more forthcoming in some respects, she was not to blame for the employer’s failure to form a more complete picture of her condition from medical evidence that was available.

In short, there is a proactive duty on the part of employers to gather enough medical information to enable it to decide on boundaries between culpability and non-culpability regarding employee misconduct.

The remedy in this case was to reinstate the employee subject to a one month suspension, placing her on sick leave until she became eligible for her pension.

In reaching this decision, the arbitrator allowed medical evidence that became available only *after* the notice of dismissal, arguing that it spoke to the issue of accommodation and should be allowed.

Reading between the lines in this case, it is apparent that mental illness that is brought into the workplace by an employee can be seen as a source of psychological distress for others.

One person’s mental illness can become another person’s nightmare if the focus is entirely on how an individual’s defined illness should be accommodated by others.

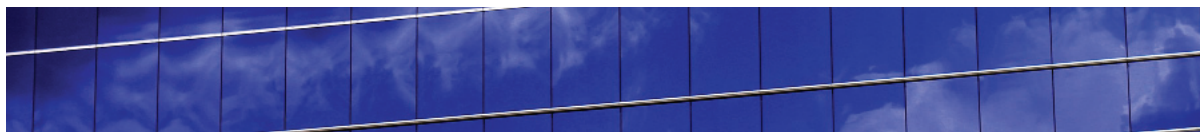
This case obliquely raises the question of the extent to which an employee living with a mental illness retains sufficient capacity to appreciate the impact that he or she is having on those around them and further begs the question, to what degree does such an employee bear some responsibility for actively participating in the creation and maintenance of an equitable and psychologically safe work environment?

The hybrid cases, of which the *Manitoba* instance is but one example, throws the issues into sharp if ugly relief, demonstrating that the law is a very blunt instrument for dealing with such matters and begging the question of how such complex situations should be dealt with.

Evolving Requirements of Psychological Safety: The Safeway Case in Alberta

Maintenance of a psychologically and physically safe workplace requires that parties to a harassment complaint be separated during the course of an investigation into a complaint²⁸.

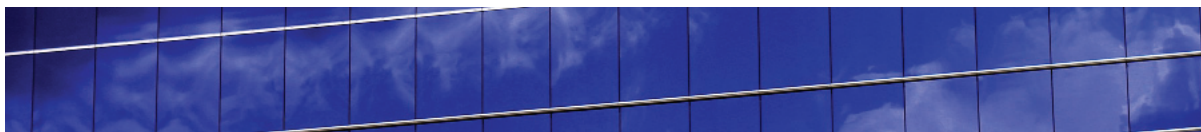
In this case, even though in the end it was concluded through investigation that there was little basis for the claim of harassment, the employer should have taken more precautions during the inquiry to protect the grievor by ensuring that the parties did not work in the same place at the same time.



It is interesting and important to note that the arbitrator in *Safeway* took the view that “safety encompasses psychological as well as physical safety” and that the same precautionary principles apply to the protection of mental health as to the protection of physical health.

For example, if a physical hazard were to be identified, and it represented a real threat to personal safety, workers are not only allowed but required to remove themselves or be removed from the location of the danger until it is fixed.

Similarly with psychosocial risks, if a hazard is perceived it must be investigated and while under investigation the worker must be removed from the source of threat. In such cases, of course, the threat lies in human conduct not in physically unsafe places or things.



Occupational Health and Safety Legislation

On December 9th 2009 an amendment to Ontario's *Occupational Health and Safety Act (Bill 168)* was declared, bringing violence and harassment within the framework of the employer's duty to provide a safe system of work²⁹.

This long debated and much awaited amendment makes Ontario the eighth jurisdiction in Canada to implement such provisions.

One of the key duties of the employer is to conduct an assessment of the risk of violence within the workplace. However, no specific guidelines are provided for this purpose.

There are no similar provisions for the assessment of risk in the area of harassment, even though it has been observed that harassment is often a precursor to violence and that indeed there are also identifiable precursors to harassment³⁰.

The diluted version of the amendments that finally emerged from the protracted debate on their nature and extent is probably a result of the legislators trying to find common ground between opposing factions, but the net result is likely to be a source of great frustration for employees and a source of great ambiguity for employers.

This legislation is in sharp contrast to the approach taken in Quebec reviewed in the original report and discussed further below.

In Quebec, the view is taken that harassment, prohibited under the amendments to the Employment Standards Act of that Province, tends to arise in fertile environments characterized by numerous warning signs documented in the training materials that accompany the legislation.

So far, no such indepth materials have been developed for Ontario, with the predictable outcome that employers will have to cast about looking for guidance from inspectors and OHS consultants who may themselves have little preparation for assisting them.

At a minimum we can expect inconsistency and confusion.

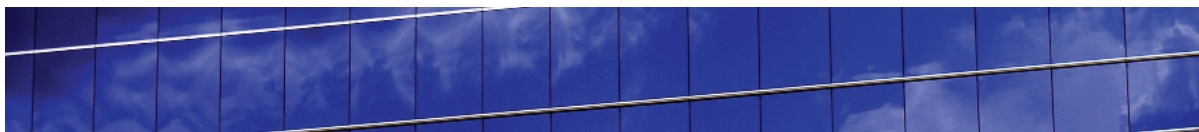
That said, there are resources available such as *Guarding Minds at Work*, which is Canada's first formal framework for helping employers to assess and address risks to mental health that are embedded in the ways in which work is organized and managed³¹.

It is to be hoped that those charged with implementing Bill 168 in Ontario will avail themselves of this resource.

In spite of the shortcomings of *Bill 168*, it is nonetheless a confirmation of the emerging legal principle that acts of harassment and violence are matters to be dealt with under the aegis of the duty to provide a safe system of work.

It further reinforces the trend that sees psychological safety as simply another dimension of safety, as contemplated by the relevant legislation.

This does not mean, of course, that harassment and violence cannot or will not be dealt with under other legal auspices too. However, the degree to which employees can seek remedies under more than one legal regime continues to be a function of jurisdictional idiosyncrasies across Canada.



Employment Standards

Quebec: An Act Respecting Labour Standards 2002, c. 80, s. 47

As noted in the preceding section, Quebec has led the country in placing protection from harassment at work in the context of employment standards.

As discussed in the original report, the case law arising from the legislation has been instructive in defining the boundaries of actionable versus non-actionable harassment.

While case law continues to build in Quebec, there have been no instances that serve to modify the law as discussed in the original report.

However, there are signs in some recent cases that damages awarded to complainants may be increasing.

For example, in *Castonguay*, the total sum awarded to a barmaid for sexual and moral harassment was \$25,000 for humiliation, suffering and insult to dignity which included a sum of \$10,000 as punitive damages, plus an indemnification for lost wages extended to a period of 165 weeks.

The commissioner emphasized the imbalance of power between a business owner and an employee as part of his rationale for awarding punitive damages³².

Other recent cases have illustrated the limits of the Commission's tolerance for complaints that emanate from vexatious employees, those with a history of malicious behaviour and even those who simply make a habit of presenting themselves as victims³³.

Ontario: the Accessibility for Ontarians with Disabilities Act (AODA) SO 2005 Chapter 11

This act explicitly includes mental disorders under its definition of disability.

While this legislation has been in existence for some time its relevance to those with mental disorders at work has yet to be revealed.

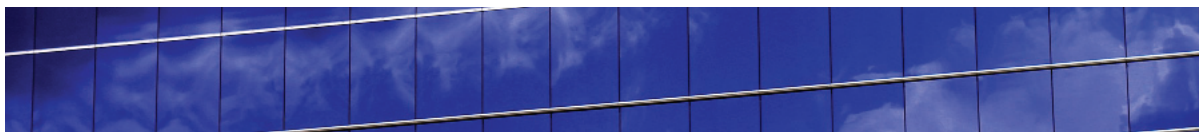
The act calls for targeted increases in accessibility for all those with disabilities in Ontario by the year 2025.

However, the title of the Act is somewhat misleading in that it deals also with the ways in which providers of goods and services must treat customers, clients and patients with disabilities, which includes those with mental disorders.

Implementation of the AODA is primarily through the development of standards, the first of which came into effect by Regulation in January 2010.

This is the “*Customer Service Standard*” that governs how providers of goods and services must behave toward customers, clients and other consumers who have disabilities.

However, standards are expected in several other areas, including employment.

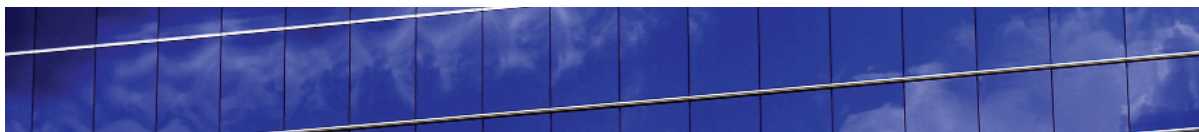


Such standards call for the development of *policies, practices and procedures* that will enable targeted organizations to meet their obligations under the law.

The guiding directive in creating such policies, practices and procedures is that they be consistent with the principles of *dignity, independence, integration and equal opportunity*.

While the present example of these directives in action can be found in the *Customer Service Standard*, a similar approach can be expected when a standard is developed for employment, leading some health and human resource specialists to speculate that the AODA framework may impose yet another set of requirements on employers with regard to those employees living with mental disorders.

Whether this will create a more coherent framework for addressing the needs and rights of those with mental disorders in the workplace is a matter for conjecture at present.



Summary

Employers are faced with mounting legal pressures to provide and maintain a psychologically safe workplace, defined here most simply as one in which every practical effort is made to avoid reasonably foreseeable injury to the mental health of employees.

Failure to provide or maintain a psychologically safe workplace is already the object of legal actions from at least seven sources that together may be characterized as a perfect legal storm.

All the indicators are that this storm will intensify.

Prudent employers will want to take proactive measures to weather this storm, the warning signs of which are listed below.

1. **Human Rights' Tribunals and Commissions** are ever more inclined to reach into the fabric of the employment relationship to dictate key aspects of how work should be organized and designed to prevent mental injury.

Using accommodation requirements and public interest remedies as their tools, human rights' bodies are defining a new legal environment for employees in which they have more substantive remedies for assaults upon their mental health than ever before.

2. The legal retaining wall that has traditionally held back claims for compensation of mental injury resulting in whole or in part from chronic or gradual onset stress in **Workers' Compensation Law** is showing progressive signs of crumbling in several parts of Canada.

Most recently, a successful constitutional challenge has been launched against legislative provisions that call for Workers' Compensation Tribunals to treat claimants with mental disabilities in a manner that is different from the way in which they treat physical disabilities.

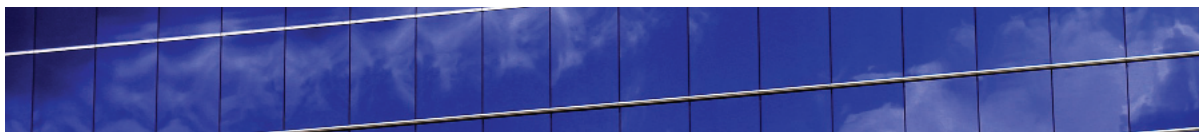
3. **The Law of Torts** that governs relationships in non-union (Common Law) environments continues to evolve by framing more stringent requirements for how work should be organized and managed to avoid reasonably foreseeable harm to employee mental health.

There are increasing signs that courts are on the brink of extending the reach of the torts of negligent and intentional suffering to govern the employment relationship as a whole, not just at the point where it is being dissolved.

As it is, decisions in this area already comment unequivocally on how the employment relationship should be managed *over its course* to avoid reasonably foreseeable harm to the mental health of employees.

Essentially, many courts are applying higher social standards for civil and respectful conduct in the workplace, meaning that places of employment governed by Common Law are progressively less like leftovers from feudalism than ever before.

4. The Common Law **Employment Contract** itself is showing more and more signs of evolution as judges allow that it contains implied, if limited terms for the protection of employee mental health.



These terms are deemed to be included in the requirement that employers act in good faith in their dealings with employees *at all stages of the employment relationship*.

The emergence of class action suits in employment law is another ominous development for employers, particularly since there appears to be a real potential to attach claims for mental injury to suits for unpaid overtime.

5. **Labour Law**, the body of legislation and cases that govern the employment relationship in unionized environments, continues to become more nuanced and sophisticated in its articulation of the requirements for a psychologically safe workplace.

Like judges in Common Law, arbitrators routinely use “deeming” provisions to import implied terms for the protection of mental health into collective agreements.

These terms revolve around a basic duty to act in a fair and reasonable manner and to interpret the requirements of a safe system of work as including psychological safety.

The legitimacy of this quasi-judicial activity is only reinforced by amendments to Occupational Health and Safety Law that add harassment and violence to the scope of the duty to provide a safe system of work, as discussed below.

Labour Law is also evolving as it struggles with the dilemma of how to balance the rights of employees with mental disorders and the needs of employers to manage and direct the work.

The use of “hybrid” solutions is one method used by arbitrators to address this dilemma.

These remedies raise some complex, thorny and as yet unresolved issues concerning the degree to which employees with mental disorders have duties as well as rights with regard to how they function in teams and in general with other employees.

There is clearly some resistance among arbitrators to see those with mental disorders as free of all volition, preferring rather to see them on a case by case basis as people with varying degrees of autonomy, given their specific condition and circumstances.

The legal issues in this area tend to cluster around the extent to which misconduct by those with varying degrees of mental disability can be characterized as blameworthy and therefore as subject to disciplinary measures.

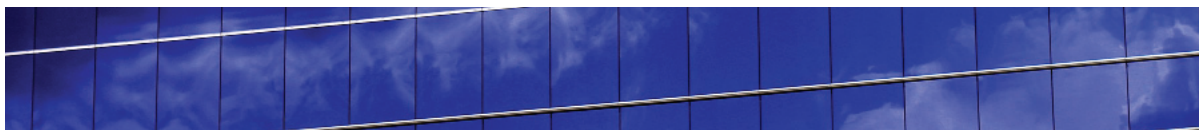
6. **Occupational Health and Safety Law** across the country is becoming more consistent in its application to mental well-being through various amendments to governing legislation.

The most recent example of this is in Ontario, where harassment and violence have been added to the legislation as areas to which the general duty of due diligence applies.

The basic implication of this amendment is that the duty of due diligence should now be understood to embrace mental as well as physical health and safety.

This means in essence that every reasonable effort must be made to prevent harm to the mental health of employees.

Ontario is eighth among Canadian jurisdictions to add these requirements.



7. The regulation of harm to mental health under the auspices of **Employment Standards** has been prominently addressed in Quebec where jurisprudence on the scope and extent of harassment and moral injury continues to evolve and to become more sophisticated.

Quebec is the nation's leader in defining the prevention and eradication of harassment as an employment standards issue, just as issues such as child labour, hours of work and basic requirements for notice of dismissal are defined.

Quebec case law is rich in detail about the boundary between frivolous claims and serious claims of mental injury and is worthy of study by all across the country who are charged with making this same crucial distinction.

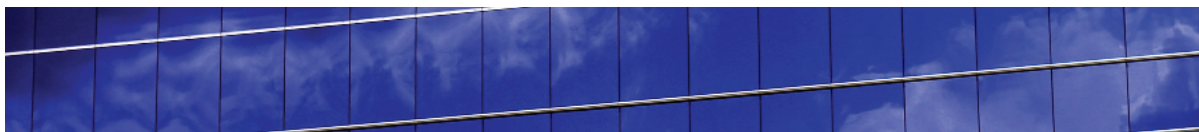
A relatively recent entrant onto the employment standards stage is legislation dealing with accessibility and treatment of those with mental disorders.

As regulations to this legislation appear, it is becoming evident that it is meant to apply to the ways in which people with mental disorders are treated generally by organizations that provide goods and services to the public.

And it is clear too that the intent of the legislators, at least in Ontario, is to apply the same general principles to the employment relationship.

As this trend evolves, it will likely put pressure on employers to think about the service profit chain in a more holistic manner, since the same principles of respect for dignity, autonomy and integration will be applied to the employment relationship as apply to customer and client relations.

This will be of special importance in health care and social service settings where the requirement to treat clients and patients with mental disorders in a respectful manner is of particular relevance.



Conclusion

A perfect legal storm is brewing in the area of mental health protection at work.

This storm brings with it a rising tide of liability for employers in connection with failure to provide or maintain a psychologically safe workplace.

The duty to provide and maintain a psychologically safe workplace is expressed and acted upon in different ways across the country and in different branches of the law, but the unmistakable common thread is the increasing insistence of judges, arbitrators and commissioners upon more civil and respectful behaviour in the workplace and avoidance of conduct that a reasonable person should foresee as leading to mental injury.

Legal *pro*scriptions are also being supplemented by legal *pre*scriptions in that arbitrators, commissioners and even judges are becoming more proactive and directive in their decisions concerning the manner in which management rights should be exercised if they are not to violate the rights of employees to a psychologically safe system of work.

It appears that, although there are limits to the duty to provide a psychologically safe workplace, the law is reaching further and further into the control rooms of both private and public organizations, large and small.

This reach extends into management of the employment relationship *while it is still intact* rather than just at the point of its dissolution.

A further ominous development for employers is the rise of the class action suit.

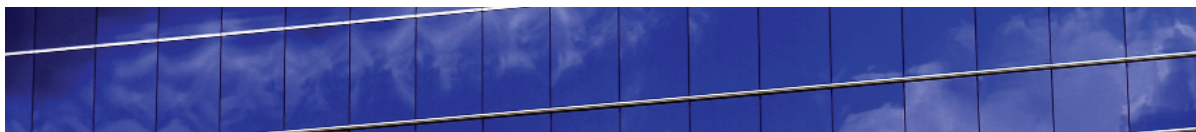
While it is a cumbersome tool that is used with uncertain results, the class action suit has the potential to pillory employers that *systematically* create psycho-toxic conditions of work for employees.

While it is not the business of this update to reiterate all the points made in the original report, one important trend referred to there should be noted again and that is the move toward the development of *standards* for the assessment and abatement of risks to mental health embedded in the ways in which work is organized and managed.

There are significant initiatives afoot in this direction.

While it is premature to predict how this process will eventuate, it is clear that Canada is at least awake to the proposition that if employers are to be held accountable to a new standard for psychological safety, then that standard should be articulated, consistent and clear for the country as whole and accompanied by resources and tools that assist in the task of assessing and addressing psychosocial risks.

Hopefully, further updates on the progress of this trend will be reported at a later date.

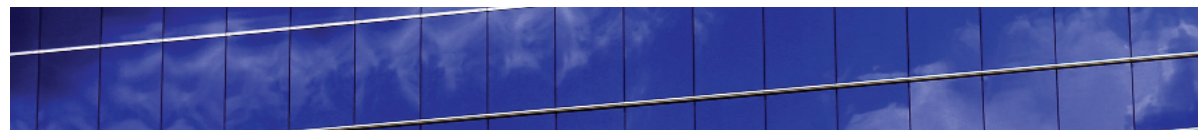


The author is grateful to Stéphanie Sofio, avocate, Commission des normes du travail, Québec and to Sara Askari B.A.Sc., third year law, University of British Columbia for their assistance in locating valuable sources for this document.

And thanks once more to Bill Wilkerson, advocate and champion at large for psychologically safe and healthy workplaces, for being the impetus behind the original report to which this is an update. Without his inspiration, none of this would have happened.

Endnotes

1. Bertrend v. Golder Associates, 2009 BCHRT 274
2. The extent of the duty to make inquiries may vary depending on the auspices under which the case arises. For example, in a grievance situation such as in *Canadian Union of Public Employees v. A Nursing Home* [2009] N.B.L.A.A. No. 16 (QL) the standard of inquiry was that an employee seeking accommodation must participate in a “shared process” to enable the employer to make “an informed decision.” However, there are prescribed limits to how much can be asked for. In *Canadian Office & Professional Employees’ Union, Local 378 v. Accenture Business Services for Utilities*, it was held that the employer’s legitimate interests do not entitle it to know the employee’s specific diagnosis, experience of symptoms or current course of treatment, but rather, the general nature of the illness or injury. “A general statement of a person’s illness or injury in plain language without any technical medical details, including diagnosis or symptoms” is what is required [2008] B.C.C.A.A.A. No. 115 (QL)
3. This approach has been validated in physical disability cases following the “Battlefords Rule” established in *L.H. v. Battlefords School Division #118*. Saskatchewan Human Rights’ Tribunal Jan. 11th 2008, which in turn followed *Conte v. Rogers Cablesystems Ltd.* (1999) 36 C.H.R.R. d/403. See also: *Datt v. McDonalds Restaurants of Canada Ltd.* (2007) BCHRTD #324 (QL)
4. *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON S.C.D.C.)
5. *Lane v. ADGA Group Consultants Inc. of Ottawa* [2007] O.H.R.T.D. No. 34
6. *Dunsmuir v. New Brunswick*, [2008], S.C.J. No. 9.



7. Hall's use of this language foreshadowed the now broader powers of the Ontario Human Rights' Commission under Bill 107 with regard to systemic remedies. Bill 107, an amendment to Ontario Human Rights' Code, R.S.O. 1990, c.19 became effective June 2008
8. Anthony R. Moffatt in Canadian HR Reporter, Nov. 30th 2009 at page 6
9. Plesner v. British Columbia Hydro and Power Authority, 2009 BCCA 188
10. Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal) [2008] N.S.J. No. 133 (QL)
11. Decision No. 851/09 2009 ONWSIAT 2309
12. Amaral v. Canadian Musical Reproduction Rights Agency Limited, 2009 ONCA 399 at Para 23.
13. Piresferreira v. Ayotte and Bell Mobility Inc. Ontario S.C.J. 2008
14. Ibid. at para.188
15. Zorn-Smith v. Bank of Montreal [2004] C.L.L.C. 210 – 012 (Ont. S.C.J.), per Aitken J. at paras. 166-167).
16. Soost v. Merrill Lynch Canada Inc. (2009) ABQB 591
17. Honda Canada Inc. v. Keays (2008) SCC 39
18. Ontario (Ministry of Community Safety and Correctional Services) and Charlton re: an arbitration under the Public Service Act before the Public Service Grievance Board between: Cassandra Charlton, Grievor - and - The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services), Employer [2007] all series clas 90 C.L.A.S. 78
19. Fidler v. Sun Life Assurance Co. of Canada [2006] S.C.C. 30
20. See for example: McCamus, J. D. The Law of Contracts. Toronto: Irwin Law, 2005.
21. Source: the Civil Justice Reform Project (2007), the recommendations of which are now implemented as of Jan.1st 2010. The report was authored by former Associate Chief Justice Coulter Osborne.
22. See for example: Shannon Klie. Overtime a growing concern: Conference Board report. In Canadian HR Reporter Sept. 7th 2009 at page 3
23. Fresco v. Canadian Imperial Bank of Commerce [2009] OJ. No.2531
24. Fulawka v. Bank of Nova Scotia (2010) ONSC 1148
25. Supra, note 15
26. Bank of Nova Scotia, supra note 24 at paras. 75-81
27. Manitoba Government Employees' Union v. Manitoba (Department of Family Services and Housing) [2009] M.G.A.D. No. 12 (QL)
28. UFCW, Local 401 v. Canada Safeway (Pady Shenher Grievance) [2008] A.G.A.A. no. 38 (QL)
29. Bill 168, an Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters. Chapter 23, Statutes of Ontario, 2009. Effective June 15th 2010
30. Workplace harassment is defined under s.1 of the Act 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"
31. www.guardingmindsatwork.ca
32. Castonguay c. Gestion A. Bossé inc. D.T.E. 2008T-800 (C.R.T.)
33. See, for example: Dupuis c. Commission scolaire de la Riveraine, D.T.E. 2008T-821 (C.R.T.) (requête en révision rejetée, C.R.T., 2009-01-06, 2009 QCCRT 3) ; Gagné c. Société immobilière du Québec, D.T.E. 2008T-541 (C.R.T.) (requête en révision rejetée, C.R.T., 2009-02-01, 2009 QCCRT 82) ; Serret c. Compagnie de la Baie d'Hudson, D.T.E. 2009T-363 (C.R.T.)

