

The Shain Reports on Psychological Safety in the Workplace – A Summary

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A rapid and profound legal transition is underway, and it is affecting every Canadian workplace. In a 2009 report, ***Stress at Work, Mental Injury and the Law in Canada***, Dr. Martin Shain illuminates a dramatic evolution of the employee-employer relationship, stressing that employers who fail to understand the shifting legal terrain are at serious risk of liability.

For decades, Canadian employers have been required by law to protect employees' physical safety and health in the workplace. **But for the first time in Canadian history, employers are under pressure of an emerging legal duty to create and maintain not only a physically safe workplace, but also a psychologically safe work environment.** Dr. Shain defines a psychologically safe workplace as "one that does not permit harm to employee mental health in careless, negligent, reckless or intentional ways." Simply, it is "one in which every practical effort is made to avoid reasonably foreseeable injury to the mental health of employees."

In the *Stress at Work* report, prepared for the Mental Health Commission of Canada, Shain explains that a growing number of case law precedents, legislation changes and tribunal deliberations support a trend toward envisioning the duty to provide a psychologically safe workplace as an implicit term of the employment contract. The law is imposing increasingly restrictive limitations on management rights by requiring that the organization and management of work must lead to no lasting harm to employee mental health that impacts their ability to function at work or outside of work. The overall implications are highly similar in unionized and non-unionized contexts.

While Shain's 2009 report highlights this emerging legal duty, only one year later he is able to illuminate considerable further development, highlighting ways in which the duties are coming into focus as legal and tribunal findings continue to accumulate. Shain's April 2010 update report is titled ***Tracking the Perfect Legal Storm:***

Converging systems create mounting pressure to create the psychologically safe workplace. According to Shain:

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.

Remedies available to employees are multiplying and for the first time it appears that real redress for harm to psychological health is within the reach of many, if not most, workers. Shain summarizes the rapid and dramatic nature of the change:

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.

In a rapidly transforming uncertain legal environment, understanding the trajectory of change will be managers' key to responding effectively. This document outlines the most critical aspects of Shain's two reports, explains why managers must pay attention, and illustrates how they can begin to make changes that will not only protect their employees, but also enhance the competitiveness of their entire organization.

As a professor at the University of Toronto's Dalla Lana School of Public Health in the Faculty of Medicine, Shain is positioned well to understand the dramatic implications of mental injury at work. Employees (and their families), employers and society at large all face the consequences.



At the individual level, personal suffering can be severe, and there can be no doubt that mental health concerns are widespread. Seven million Canadians – approximately one in five – will experience a mental health problem this year, and many of these problems will relate in some way to the workplace. If addictions are included, the total is about one in three, and adding stress and burnout raises the figure considerably higher again.

Businesses face problems with loyalty and retention and rising costs from higher turnover, lower productivity and increased disability leave. In a recent major Canadian study, 82% of responding organizations ranked mental health conditions in their top three causes of short-term disability (72% for long-term). In fact, the average responding organization reported spending more than \$10.5 million annually on absence claims. **Overall, it is estimated that between \$2.97 billion and \$11 billion could be saved every year in Canada if mental injuries to employees attributable in whole or in part to negligent, reckless and intentional acts and omissions of employers, their agents and fellow employees were to be prevented.**

Employers are at the front line of the endeavour to protect mental health at work, but this should not be seen as a burden. In fact, a psychologically safe workplace provides a serious boost to competitiveness. Paying attention to psychological safety at work is simply good business. Employers who set a strategic direction of improving mental health are rewarded with dramatic cost and effectiveness benefits, enjoying significant and sustainable enhancements in:

- 1. productivity** – happy and psychologically healthy employees work harder and more efficiently
- 2. recruitment and retention** – today's top-quality employees expect a workplace that supports their personal and professional growth
- 3. costs due to disability and absenteeism** – there is a strong link between mental health, physical well-being and injury prevention
- 4. conflict reduction** – better mental health among employees means fewer grievances and complaints and a stronger corporate reputation

5. operational success – mentally healthy workplaces are characterized by higher levels of employee motivation, commitment, innovation and creativity, as well as fewer errors, better decision making and improved planning.

A focus on psychological safety is a critical part of an overall corporate social responsibility and risk management strategy. And from a less formal perspective, employers simply cannot ignore the benefits of having mentally healthy and loyal employees who want to come to work each day, and the satisfaction of being able to play a role in maximizing their potential.

The challenge for employers is developing long- and short-term strategies for making workplace mental health a priority. The following section further explores the ongoing transformation outlined in Shain's reports, highlighting specific areas of legal risk that managers must understand when shaping their strategies. This is followed by a list of steps employers can take now to begin making changes that will protect workers and enhance the financial bottom line.

In *Tracking the Perfect Legal Storm*, Shain elaborates upon the increasing momentum toward a broadening duty of workplace psychological safety. He says, "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." Remedies by the courts include financial awards and/or remedial orders against employers, requiring them to alter conditions of work that contribute to mental injury or harm. Overall, financial rewards for damages have increased in size over the past five years by as much as 700%.

The duty to provide and maintain a psychologically safe workplace is developing in different ways across Canadian jurisdictions and within various legislative and regulatory bodies, but a 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. In addition to restricting management rights, adjudicators are also becoming more proactive in detailing how organizations must operate in order to meet this goal. Shain explains that "the 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.” An examination of the seven institutional/jurisdictional components of the “perfect storm” illuminates a momentum of profound change to the employment relationship, and highlights areas of risk.¹

1 Human Rights Tribunals and Commissions

A provincial human rights tribunal found that employers who discover that an employee is suffering from clinical depression have a duty to accommodate that employee to a reasonable degree, *even in the absence of medical evidence*. Employers must pay particular attention to signs of mental disorder that would trigger concern in a reasonable person. Failure to do so may be characterized as discriminatory and an assault upon personal dignity. Damages may be awarded. A provincial appeal court held that the general duty to accommodate applies even when the complainant does not declare his or her existing mental disability before being hired.

2 Workers Compensation Law

The traditional refusal to accept claims for compensation of mental injury resulting in whole or in part from “gradual onset stress” (chronic stress) appears to be changing. A provincial court of appeal found that allowing compensation for mental injury *only if it was an acute reaction related to sudden traumatic workplace events* treats those suffering from mental disability differently from those suffering from physical disability. 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 from an acute reaction to a sudden and unexpected traumatic event. This higher standard of proof in legislative provisions has been characterized as discrimination based on mental disability, and has been the target of a successful *Charter of Rights and Freedoms* challenge. A provincial court of appeal also recently held that the mental injury resulting from chronic stress can be compensable if caused by events or situations that are unusual and excessive according to the norms of the industry or occupation in question. Mental injury as a result of both acute and chronic

stress is also being compensated through awards made to victims of heart attacks and their families when fatal or debilitating heart attacks are precipitated by abusive and mentally injurious acts or omissions.

3 The Law of Torts (Common Law)

The tort law governing non-union environments is framing more stringent requirements for how work should be organized and managed to avoid reasonably foreseeable harm to employee mental health. 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, making the quality of the employment relationship *in its entire course* a target for legal intervention.

4 Employment Contract

Employment contracts are no longer envisioned as strictly commercial agreements for the exchange of labour and wages. The employment contract is evolving as judges allow that it contains an implied duty to protect employee mental health, deemed to be included in the requirement that employers act in good faith *at all stages of the employment relationship*. This has been interpreted as meaning that harassment resulting in injury to an employee’s mental health was a breach of the employment contract itself. Additionally, the emergence of class action suits in employment law appears to represent genuine potential to attach claims for mental injury to suits for unpaid overtime. Many employers will be interested to learn that a judge has found that certain overtime policies create *systemic* problems that contribute to a *culture of overwork* that affects every employee. Creating *by policy* a work environment in which overwork is encouraged represents a breach of the duty of good faith.

5 Labour Law

Arbitrators now routinely import implied terms for the protection of mental health into collective agreements. This labour law shield offers an impressive array of remedies to employees with claims of harassment and other forms of abuse. Labour law is also evolving as it struggles with balancing the rights of employees with mental disorders and the needs of employers to manage and direct work. Such cases raise the question of the extent to which an employee

¹ Case details appear in the full reports.



living with a mental illness retains sufficient capacity to appreciate the impact he or she is having on coworkers. To what degree do such employees bear some responsibility for actively participating in the creation and maintenance of an equitable and psychologically safe work environment? “Hybrid” solutions giving direction to both the employee and employer are one method used to address these complex situations.

In a further development, an arbitrator has held that the same precautionary principles apply to the protection of both mental and physical health. If a threat to physical safety is identified, workers are not only allowed but required to remove themselves or be removed from the location of the danger. Similarly with psychosocial risks, any perceived hazard must be investigated, during which the worker must be removed from the source of threat.

6 Occupational Health and Safety Law

Occupational health and safety law across the country is becoming more consistent in its application to psychological safety through various amendments to governing legislation. In Ontario, harassment and violence have been added to the legislation as areas to which the general duty of due diligence applies. Every reasonable effort must be made to prevent harm to the mental health of employees.

7 Employment Standards

Quebec has led the country in placing protection from harassment at work and regulation of harm to mental health in general in the context of employment standards. Quebec case law also leads in detailing the boundary between frivolous and serious claims of mental injury.

A relatively recent development in the realm of employment standards is legislation dealing with accessibility and treatment of those with mental disorders. The intent of the legislators is to apply the same principles of respect for dignity, autonomy and integration to the employment relationship as apply to customer and client relations.

Beginning the Change to a More Psychologically Healthy Workplace

Large and small organizations can take readily achievable steps immediately to begin protecting workplace mental health. A good overall strategy includes:

1. designating an individual or group to lead the process of change and ensure accountability
2. a focus on prevention and early intervention to stop problems before they become more serious
3. assessing psychosocial risk within the organization
4. communicating a strategic vision throughout the organization, especially to managers/supervisors, human resources, union representatives and health and wellness teams
5. developing and implementing appropriate policies and programs for workplace psychological health
6. assessing the results of policies and programs and adjusting accordingly
7. focusing the recruitment, selection, training and promotion processes to a greater degree on individuals’ abilities to relate to others in psychologically healthy ways.

There is also a wealth of things managers, supervisors and others can do tomorrow to begin making positive change. *Stress at Work* makes it clear that common workplace mental health conditions such as depression, anxiety and burnout (the focus of much of the legal attention) can be precipitated or aggravated by management actions such as the chronic and consistent:

- Imposition of unreasonable demands
- Withholding of adequate levels of important information by choice or neglect
- Refusal to allow the exercise of reasonable discretion over the day-to-day means, manner and methods of work
- Failure to acknowledge or credit contributions and achievements
- Failure to recognize and acknowledge the legitimate claims, interests, and rights of others

Easily achievable workplace modifications to reverse sources of stress like those above can have powerful effects. A list of organizations providing helpful tools



appears below. Managers may want to consider starting with the innovative tool *Guarding Minds at Work* (*GM@W*), Canada's first formal framework for helping employers address risks to mental health embedded in the ways in which work is organized and managed. Funded by Great-West Life's Centre for Mental Health in the Workplace and originally inspired by Shain, *GM@W* is a free, web-based risk assessment and strategy implementation process developed by a team of researchers at Simon Fraser University led by psychologist Dr. Joti Samra. Implementing the *GM@W* process is a powerful step toward meeting the legal requirements to create and maintain a psychologically safe workplace.

Conclusion – A Precautionary Tale

Managers must create a strategic vision in support of psychological safety and communicate this vision explicitly through policy and operation and implicitly by example. The employment relationship should be conducted according to the precepts of psychological safety if the stress, disruption, costs and inefficiencies of employee claims of mental injury are to be avoided. This means taking every reasonable precaution to avoid foreseeable harm to employee mental health. The legal evolution outlined by Dr. Shain has been rapid, and employers cannot risk becoming a test case for a new legal concept. Every indication points to an intensification of the “perfect storm,” making it more important than ever for employers to take proactive measures to avoid future problems as the law reaches more deeply into the activities of private and public organizations.

Find the Shain Reports Online at the Mental Health Commission of Canada Website

The Shain reports are available at:

www.mentalhealthcommission.ca

Stress, Mental Injury and the Law in Canada: A discussion paper for the Mental Health Commission of Canada (2009) [“The Shain Report”]

Tracking the Perfect Legal Storm: Converging systems create mounting pressure to create the psychologically safe workplace (2010)

Resources for Mental Health in the Workplace

A Leadership Framework for Advancing Workplace Mental Health

www.mhcleadership.ca

Tools for senior leaders. Includes videos of corporate, small business, government and union leaders talking about workplace mental health. The framework touches on business benefits, corporate social responsibility, risk management, recruitment and retention.

Guarding Minds at Work

www.guardingmindsatwork.ca

Guarding Minds at Work is Canada's first formal framework for helping employers assess and address risks to mental health that are embedded in the ways in which work is organized and managed. It provides a no-cost comprehensive set of tools for assessing and addressing psychosocial risk in the workplace. The online resources include surveys, automated scorecards, audit forms, evidence-based recommendations and evaluation methods.

Great-West Life Centre for Mental Health in the Workplace

www.gwlcentreformentalhealth.com

A public resource that includes a diversity of ideas and strategies from a variety of sources including top researchers as well as from promising practices from the business community. Includes videos, action plans, worksheets, forms, publications and strategies.

Working Through It

www.gwlcentreformentalhealth.com/wti

A collection of videos and supporting handouts by and for individuals who struggle with mental health concerns in the workplace.

The Health Communication Unit - Workplace Health Promotion

www.thcu.ca/Workplace/Workplace.html

A health promotion site focused on the workplace. Includes a planning framework, policy development guidelines and slide decks.

Workplace Mental Health Promotion

www.wmhp.cmhaontario.ca

A resource of the Canadian Mental Health Association -- Ontario. A research-based website with practical tools to improve the health of individuals and organizations. Focus is on creating mentally healthy workplaces that promote positive mental health and mental well-being for employees.

Mental Health Works

www.mentalhealthworks.ca

A resource of the Canadian Mental Health Association's initiative on workplace mental health. Information and statistics for both employers and employees. Includes information on free workshops and webinars.

Health Canada

www.hc-sc.gc.ca/ewh-semt/occup-travail/work-travail/index-eng.php

Strategies and resources related to best practices and statistics about workplace health. Includes worksheets, calculators and publications.

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