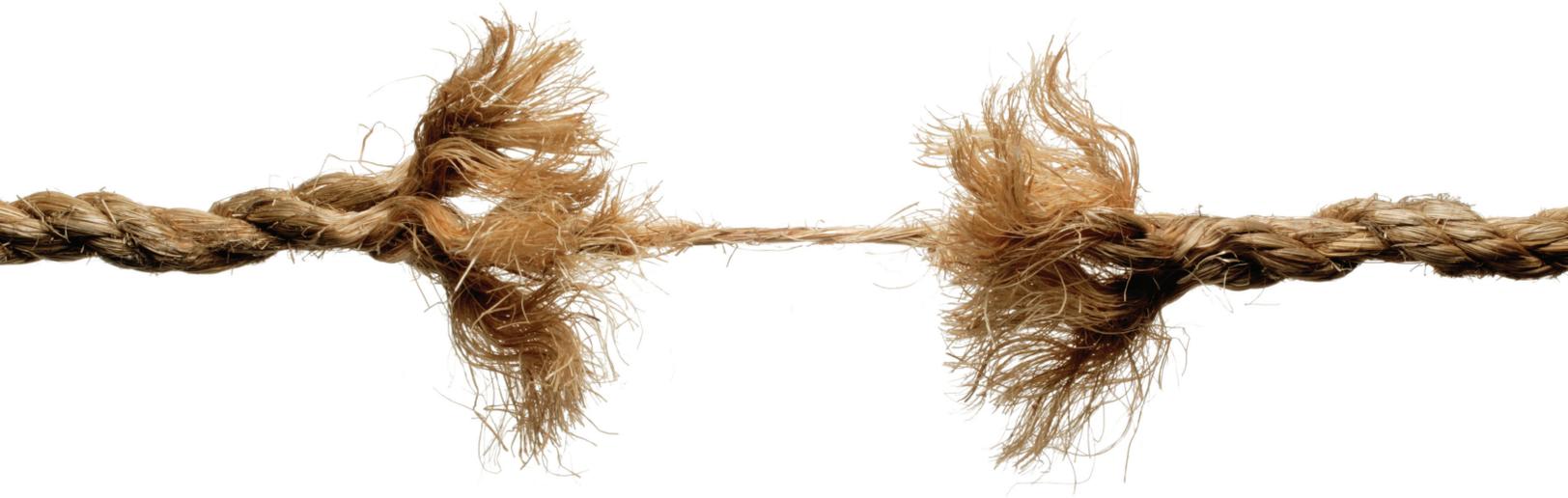


Stress at Work, Mental Injury and the Law in Canada:

A Discussion Paper for the Mental Health Commission of Canada



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Final [amended] Report



Submitted to the Mental Health Commission of Canada
via the Advisory Committee on Mental Health in the Workforce
and the Advisory Committee on Mental Health and the Law



June 30, 2009

The Mental Health Commission of Canada (MHCC) is pleased to release the report *Stress at Work, Mental Injury and the Law in Canada: A discussion paper for the Mental Health Commission of Canada*, prepared and submitted to the MHCC by Dr. Martin Shain in August 2008. The report is the product of an inquiry initiated by the Commission's Advisory Committee on Mental Health and the Workforce in conjunction with the Advisory Committee on Mental Health and the Law.

The workplace is now recognized as an important influence on mental health. Between 10% and 25% of workplaces are characterized by conditions and environments considered mentally injurious. Occupational health physician specialists report that 50 – 60 % of their caseloads are related directly or indirectly to mental health concerns.

While there is considerable uncertainty in terms of mental health protection in Canadian law and inconsistency across the country in the availability of legal remedies for mental injury, an emerging legal climate has signaled a duty for employers to ensure that the workplace leads to no serious and lasting harm to employee mental health. By definition, a psychologically safe workplace is one that permits no harm to mental health through negligence, recklessness or intention.

The MHCC is hoping that release of this report will stimulate debate on this topic, leading to eventual development of national public health policy for both the protection and promotion of mental health at work.

The Commission is interested in receiving feedback about the report. Please send any comments to info@mentalhealthcommission.ca

Michael Kirby
Chair
Mental Health Commission of Canada

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

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Author's Note

This study was initiated on behalf of the Mental Health Commission of Canada by Bill Wilkerson who, for the duration of the work, was Chair of the Commission's Workforce Advisory Committee.

Throughout the study, Mr. Wilkerson provided the authors with invaluable advice on the structure and flow of the report.

Dr. Ian Arnold, current Chair of the WAC, has been instrumental in supporting the advancement of this report to the MHCC Board. We are indebted to him.

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Principal Findings and Implications for Policy

Introduction

This inquiry, conducted on behalf of the Mental Health Commission of Canada (MHCC), began as a search for legal principles governing the liability of employers and their agents for harm to employees resulting from *stress at work*.

However, because of the way in which the law frames the issue, the inquiry became redefined as a search for legal principles governing liability for *mental injury at work*.

The impetus for the study was a growing awareness on the part of the MHCC that the law is rapidly evolving in this area and that mental injury at work is a serious source of loss to employees, their families, their employers and society at large.

Indeed, it is estimated that between \$2.97 billion and \$11 billion per annum could be saved by discretionary modifications to the organization and management of work to make it less injurious to employee mental health, with corresponding gains to productivity, efficiency and social capital.

This range of estimates is based on known and projected variations in the prevalence of *avoidable* psychotoxic (mentally injurious) conditions of work across different workplaces.

The lower figure assumes a prevalence of 10% while the higher figure assumes a prevalence of 25%. Workplaces at both ends of the range can be found in Canadian society. The true net population figure is unknown but it falls somewhere between these extremes.

Major Findings

The major findings of this inquiry are as follows.

There is a currently a high degree of uncertainty concerning where the boundaries of liability for mental injury at work lie. This situation is due in part to the rapidly evolving nature of legal developments in this area.

This uncertainty impacts upon both employees and their employers. In some important ways, the present situation mimics that in the late nineteenth century when workers compensation insurance schemes were first being contemplated by policy makers as a way of reducing this uncertainty, particularly for employers, in the realm of physical safety and accidents at work.

These uncertainties notwithstanding, one trend is clear: taken as a whole, the law is imposing increasingly restrictive limitations on management rights by requiring that their exercise should lead, at a minimum, to no serious and lasting harm to employee mental health.

Yet in spite of this trend, currently in Canada we have no standard or agreed-upon methods by which risk to employee mental health originating in the organization of work can be assessed or measured, nor (unlike in the United Kingdom) do we have coherent standards for the mentally non-injurious exercise of management rights.

The absence of such national standards compounds the uncertainty faced by employers and employees because there are no benchmarks or thresholds for risk to mental health originating in the organization of work, nor any clear guidelines for how such risks can be abated.

And there is no national public health or population health policy in place that addresses any of these points.

The progressive imposition of restrictions on management rights referred to above may be expressed in terms of an emerging, enforceable, legal duty to provide a psychologically safe workplace that parallels and complements the duty to provide a physically safe workplace.

This duty is seen in different ways in different parts of the country and while no single, unifying legal definition of this term currently exists the following is supported by the evidence and is proposed for future discussion purposes.

A psychologically safe workplace is one that permits no harm to employee mental health in negligent, reckless or intentional ways.

In this context there is no such thing as “trivial harm” to mental health at work any more than there is in the context of physical health at work.

Restating the economic reality noted above in the language of the law, between \$2.97 billion and \$11 billion per annum could be saved if mental injuries to employees that are 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.

The kinds of harm or mental injury contemplated by the law are largely those with which we are all familiar: depression, anxiety and burnout head the list.

Whereas a few years ago the law would take note only of egregious and intentional harms it now sees even negligent and reckless assaults on mental health as attracting liability.

Even the negligent imposition of excessive work demands may attract such liability if it results in foreseeable mental injury.

Further, whereas a few years ago the law would take note of mentally injurious conduct only in the context of how a person was dismissed, the law now on occasion reaches

further back into the course of the employment relationship and censures conduct that occurs while it is still intact.

Mentally injurious conduct has been censured in several contexts including

- Treatment of employees by supervisors
- Treatment of employees by fellow workers
- Management of employees returning to work
- Management of employees while on disability leave
- Management of employees with mental disorders
- Dismissal and how it is done

The sums of damages that may be awarded in cases of mental injury are also increasing overall, although recently an attempt has been made to roll back these amounts in one well-publicized Supreme Court case. That said, awards for mental injury at work have increased in size over the last five years by as much as 700%.

In unionized environments, the duty to provide a psychologically safe workplace is seen increasingly as arising primarily from a fundamental requirement of fairness and reasonableness in the conduct of the employment relationship. Increasingly, arbitrators are willing to read this requirement into collective agreements even when there is no contract language to support it.

Arbitrators are also showing a willingness to import the terms of relevant Occupational Health and Safety statutes into collective agreements and to interpret such legislation as referring to mental health protection as well as to physical health protection even when the language of the relevant act does not specifically include it.

In non-unionized environments, the duty is framed typically as one arising from the normal requirements of people to avoid harm to others that they can or should reasonably foresee. In other words, the ordinary principles of negligence law are being held to apply to the employment relationship.

There is a building trend toward seeing the duty to provide a psychologically safe workplace as being an implicit term of the employment contract, a tendency that until recently had been soundly quashed by judges. The potential implications of this development have yet to be fully revealed but it would appear to signal another deep legal raid into the heart of the employment relationship that traditionally has beat to a distinctly feudal rhythm.

Notwithstanding these developments, there is considerable inconsistency across Canadian jurisdictions with regard to the availability of remedies for alleged mental injury.

For example, in some jurisdictions such as Ontario, Human Rights legislation is sufficiently robust to offer claimants adequate compensation and redress for their injury if it is due to harassment or discrimination, while in others it is not.

In one province only (Saskatchewan), claimants may seek redress if not always personal compensation under the Occupational Health and Safety Act, while in another (Quebec) they may appeal to Employment Standards legislation for satisfaction.

While Workers Compensation Law as it bears upon mental injury is somewhat varied across the country, some uniformity exists in the sense that most jurisdictions simply will not countenance claims for chronic or slow onset stress under any circumstances. Some exceptions, though few recently, do exist.

While there are numerous areas in which the law is unclear, some of the most prominent areas in which further clarity might be anticipated are as follows.

1. How will “vulnerable” employees be treated in the future? These are employees whose mental states may be more precarious than usual due to circumstances unrelated to work.
2. To what extent is there an extended or “extra” duty of care that pertains to vulnerable employees?
3. How can employers be expected to discover such vulnerabilities given the legal climate surrounding privacy and discrimination?
4. Does any duty fall upon vulnerable employees to reveal their vulnerability to their employer if such exists at the time of hiring or develops during the course of the employment relationship?
5. How far will the law go in defining the imposition of excessive job demands as harassment?
6. How far will arbitrators go in determining what are fair and reasonable management practices?
7. How far will judges go in defining what is reasonably foreseeable harm?
8. Is the trend toward interpreting the contract of employment as including an implied term that the workplace must be psychologically safe going to continue?
9. Will the examples of Quebec and Saskatchewan be followed in other parts of the country so that mental injury resulting from an extended notion of harassment is more generally treated either as an occupational health and safety issue or as an employment standards issue?
10. Will the social policy bulwarks that in most cases prevent chronic stress from being a compensable condition under Workers’ Compensation Law eventually give way under the weight of evidence linking it to both working conditions and adverse health outcomes?

Major Implications

The protection of mental health at work can be seen both as a corporate and as a social responsibility, with legal implications in each case.

At a corporate level, the primary implication of the legal developments revealed by this study are that the provision of a psychologically safe workplace is a governance and stewardship issue in the same way that the provision of a physically safe workplace is.

The instruments of governance and stewardship that suggest themselves in this context are twofold: the diligent assessment and measurement of risks to mental health inherent in the management of work, and the implementation of policies to ensure that the recruitment, selection, training and promotion of staff be subject to new and additional criteria focused on their ability to relate to others in mentally non-injurious ways.

At a minimum, risks to employee mental health arising from the organization and design of work should be on every corporate risk register and a corresponding policy should be in place to abate such risks once discovered.

While no standard risk assessment methods are yet available in the area of work-induced hazards to mental health, there is no lack of valid and reliable surveys and instruments that could fill the gap while such measures are being developed at a national level, as proposed below.

At a social level, the implications of the same legal developments are that national standards need to be developed in connection with both measurement of risks to mental health at work and management of the employment relationship akin to those found in the United Kingdom.

This “Measurement and Standards” project would form the core mandate of a national body that would oversee and coordinate the development, implementation and evaluation of such standards.

While such standards would be in all likelihood non-binding legally, they could have considerable status as means by which employers might demonstrate their commitment to a psychologically safe workplace and show due diligence in both a moral and a legal context.

Currently, few employers appear to be aware of the emerging legal climate until they come face to face with it in the form of a suit, grievance or complaint brought against them. Consequently, one of the key functions of any national body set up to address the protection of employee mental health would be the education and training of employers and their agents concerning the nature of risks to mental health inherent in the organization and management of work.

The Federal Public Service might be considered as a test bed for developments of the kind proposed here.

The “Measurement and Standards Approach” should arguably have the status of national policy in the area of occupational health and safety or employment standards even though these are areas governed in large part by the provinces and territories.

At a minimum, it would seem appropriate for Canada to declare a population health policy of zero tolerance for serious and lasting mental injury at work resulting from negligent, reckless and intentional acts and omissions of employers and their agents.

Chapter 1

Stress at Work, Mental Injury and the Law: legal remedies for mental injury in Canada. An overview with policy implications

Introduction: Framing the Questions

This report is the outcome of a study conducted on behalf of the Mental Health Commission of Canada. It was carried out between November 2007 and March 2008.

This chapter is an overview of the others, concluding with policy implications. Readers are encouraged to study these more detailed chapters for elaboration of, and support for the propositions found here.

The initial questions that directed the study reported here were:

1. How does the law treat employee claims for financial and other forms of redress arising from work-related stress?
2. Are these forms of redress sufficient?

The inquiry included the extent to which the state, regardless of individual complaints, takes an interest in the legal remediation and regulation of work-related stress through legislation and other policy instruments and the extent to which these are adequate.

The context for the study is the fact that stress levels in the Canadian workplace are considered to be at an all time high and the source of significant loss to employees in terms of their mental health. Clearly this loss migrates to families, communities and society at large.¹

¹ See, for example: Sanderson, K., & Andrews, G. (2006). Common mental disorders in the workforce: recent findings from descriptive and social epidemiology. *Can. J. Psychiatry*, 51(2), 63-75 and Shain M., Gnam W.H., Gibson J.B., Suurvali H., Bender A. and Siu M. (2002) Mental Health and Substance Use at Work: perspectives from research and implications for leaders. A Background Paper prepared by The Scientific Advisory Committee to The Global Business and Economic Roundtable on Addiction and Mental Health (Chair, M.Shain), November 14th 2002.

Efforts to tease out the contribution of the organization of work to these losses as opposed to the contribution of influences from outside the workplace are at an early stage of conceptualization and development. But for purposes of this type of analysis, the proportion of risk to employee mental health that could be abated by discretionary modifications to the organization and management of work at a population level (called the “Etiologic Fraction”) has been estimated in the realm of 10% to 25% depending on the characteristics of specific workplaces.[see: Levi, L. & Lunde-Jensen, P. (1996) A Model for Assessing the Costs of Stressors at the National Level: socio-economic costs of work stress in two EU member states. European Foundation for the Improvement of Living and Working Conditions. Dublin. See

Almost by definition, employers are also significant losers as a result of work-related stress because of its impact on all aspects of productivity and competitive advantage.

Notwithstanding the negative impact that employee stress has upon them, employers are often identified as the source of such stress and are made the objects of various forms of legal proceedings by employees and their representatives.

Reframing the questions

While the questions listed above are those that most people outside of the legal profession would no doubt like to see answered, a central difficulty in addressing them as worded within a legal framework presents itself immediately.

This difficulty revolves around the fact that although employees who wish to launch a legal claim against their employers for mental injury of some kind often conceive of their injury as arising from work-related stress, the law for most purposes does not recognize stress as a basis for legal action, in spite of the large and reputable body of research linking such stress to mental injury.²

also: Shain M. and Suurvali H. (2006) Work-induced risks to mental health: conceptualization, measurement and abatement. *International Journal of Mental Health Promotion* 8,2,12-22

If, then, the total burden to Canadian employers in terms of mental health care costs (carried by them) and lost productivity is estimated at between \$2.2 and \$11 billion per annum, then the Etiologic Fraction, as just defined, is between \$0.22 and \$2.75 billion per annum.

If the total additional burden to society is between \$11 and \$33 billion in terms of mental health care, social service and other costs, then the Etiologic Fraction is between \$2.75 and \$8.25 billion per annum.

If we combine both corporate and public costs, the range of estimates for the Etiologic Fraction becomes \$2.97 to \$11.0 billion per annum.

Let us be clear on what this means. Between \$2.97 billion and \$11 billion per annum could be saved by discretionary modifications to the organization and management of work to make it less injurious to employee mental health.

Note also that the social costs of injury to employee mental health exceed those to employers by a very wide margin, with all the implications that this has for social policy.

² See for example: Gouveia C.G. (2007) From Laissez-faire to Fair Play: workplace violence and psychological harassment 65 U.T. Fac. L. Rev. 137-166

Perhaps this is understandable given that in Canada at this time there is no single agreed upon definition of stress that would provide even a starting point for such a legal cause of action.³

One major exception to the legal shunning of the term stress is in the area of workers' compensation. But ironically, the purpose of recognizing it in this area at all is mainly to disqualify it as an eligible basis for compensation.⁴ The only kind of stress that is compensable under most circumstances is essentially post-traumatic stress, which is the direct result of witnessing or participating in an event that injures, horrifies or otherwise appalls the claimant during, and in the course of employment.

Chronic stress (slow onset stress whose effects accumulate over time) by and large is not compensable under the Workers' Compensation System, although there have been and continue to be exceptions in various jurisdictions in Canada.

The jurisprudence in this area is strongly influenced by policy considerations that see the compensation of chronic stress as a floodgate issue. Once the gate is breached, so the argument goes, we will never get it closed again and the resulting flood of claims will bankrupt the system.

While it is true from an evidentiary burden perspective that mental injury from work-related stress is hard to prove, it is surely not beyond the powers of our jurists to supply a test on the basis of which some legitimate claims might be allowable.

Not to do so flies in the face of powerful scientific evidence linking conditions of work to identifiable, clinical manifestations of stress and strain, evidence that is just as strong as in other areas such as the relationship between airborne particles and respiratory diseases.

³ In the UK, the Health and Safety Executive defines stress as simply "the adverse reaction people have to excessive pressure or other types of demand placed on them". Earlier distinctions drawn in the clinical and scientific literature between "stress" and "strain" as mediated by the concept of "stress threshold" unfortunately do not appear to enjoy common usage in Canada at this time, practical though they are.

⁴ McKenna I. (2000) The Aftermath of United Grain Growers – Time to Revive the Employer's Contractual Duty to Provide a Safe workplace? 27 Man. L.J. 415-446

So, with the above-noted exception of stress-related claims in the area of workers compensation (most of which are likely doomed anyway), individual employees who believe that stress at work has caused them mental harm have to convert their claims into one of several legally recognizable forms before proceeding.

Accordingly, it became necessary to reformulate the questions for this study in such a way that legally relevant answers could be obtained, as follows:

1. If an employee believes that he or she has suffered mental harm⁵ as a result of some act or omission on the part of their employer or its agents what legal remedies are available to that person, and are they adequate?
2. What initiatives have been undertaken by the state at federal, provincial and territorial levels to regulate, prevent and provide redress for the occurrence of mental harm to employees, and are these initiatives adequate?

These two questions adumbrate two principal approaches to addressing the issue of mental harm in the workplace, one private one public.

Private Remedies

The first question concerns primarily the availability of *private* remedies for harm to mental health claimed to arise from acts or omissions of employers and their agents. These are the remedies that individuals are likely to pursue through courts and tribunals.

The second question concerns primarily the availability of *public* remedies for such harms pursued through avenues prescribed by legislation and the regulations that it enables.

⁵ It is important to note at the outset that the kinds of mental harm acknowledged by the law do not necessarily amount to mental illness. Indeed, although some of the harms that have been the subjects of awards in courts and tribunals do constitute diagnosable mental disorders under the DSM 4, this appears to be the exception rather than the rule. The most common disorders are depression, anxiety and the related condition known as burnout. But in many if not most cases the evidence for such harms is not based on expert testimony.

Private remedies founded in tort and contract law are aimed at finding fault and winning financial awards.

Such remedies are available to those who do not belong to unions.

Private law remedies founded in tort are based on finding that a defendant's conduct was negligent, reckless, or intended to produce mental harm.

Much of the legal language and the legal tests in this context revolve around the extent to which the harm complained of was, if not intended, then "reasonably foreseeable".

Private law remedies founded in contract are based on finding that a fundamental, implied term of the employment contract to provide a safe system of work, deemed to include mental safety, has been breached.

Outcomes from these cases are increasingly unpredictable because the law is rapidly evolving, a situation that inevitably stirs anxiety among employers and employees alike.

In some important ways the uncertain legal situation surrounding mental injury at work mimics that which surrounded physical injury at work during the late 19th century. And ironically it was the fact that employees were winning more of their claims against employers during that period that led to the introduction of Workers' Compensation legislation. Essentially the Workers Compensation System operates as a form of insurance for employers with premium discount incentives for desirable behaviour. Currently, as noted earlier, Workers Compensation law is at an ethical and practical crossroads with regard to whether or to what extent it can and should hold the line against employee claims for stress related disability.

Hybrid Remedies

For those employees who belong to unions, the grievance process available under the collective bargaining system is similarly fault based, but it is also capable of providing limited systemic remedies when arbitrators choose to pursue this option.

Systemic remedies are those that seek to address the root causes of conflict and mental harm in the workplace.

While individual complainants may ultimately benefit from systemic remedies, the primary goal of such remedies is not to compensate individuals but rather to correct situations likely to spawn cases of individual harm.

Because the grievance process has some characteristics of both private and public remedies, it is referred to here as a hybrid model. While private grievances are initiated by individuals, they require the support of unions that are empowered by public legislation based on a policy of facilitating harmonious labour relations.

Hybrid private-public remedies such as those available through the grievance process are usually based on finding within, or importing into collective agreements, language that requires the employer and its agents to act in a fair and reasonable manner, a broad duty that appears still to be expanding.

Public Remedies

Public, systemic remedies are grounded in public law and are aimed at correcting situations that may give rise to, or contribute to individual cases of mental harm.

Such remedies are available in different parts of Canada, but no one form is available everywhere. The most striking examples are found in Quebec, Saskatchewan and Ontario. The points of legal leverage are different in each of these three provinces but a common thread is harassment and discrimination. In some cases, public action is initiated only as a result of individual complaints of mental harm, while in others it can be independently undertaken.

In Saskatchewan, the Occupational Health and Safety Act is sufficiently broad in scope that it offers some remedies to complainants who believe they have been mentally injured as a result of harassment, which is defined in quite liberal terms.

In Quebec, the Employment Standards Act offers the hope of remedy for mental injury based on a very broad definition of harassment, while in Ontario the Human Rights Code is particularly inclusive of a wide range of systemic as well as personal remedies.

A Question of Burden

It is important to note that, in addition to having different objectives, private and public remedies distribute the *burden* of trying to amend mentally harmful conditions of work in quite different ways also.

In private actions, the burden is upon individuals to expend time, energy and money on the pursuit of their claims. While they may be supported in their ventures by legal counsel, the full psychological burden is upon claimants as individuals, individuals who are already likely to be, by definition, in a mentally precarious state. The benefits of private action, however, include sometime large settlements that may in some measure offset the financial and psychological costs of litigation.

In public actions, the burden is mostly relocated to one or more agencies of the state. These actions may be stimulated by individual complaints, but quickly the locus of contention is shifted to the public arena where individuals are shielded in large measure from the heat of conflict. However, the gains to individuals from public actions of this type tend to be muted in that they may never benefit from corrected situations themselves (having often left them by the time corrective systemic action has been taken) but rather they contribute to the public good by acting as champions of a cause.

Gaps in the Mental Health at Work Shield

While it is easy to get lost in the details of specific areas of the law, there appears to be emerging from specific rules and doctrines in various branches of the law *a super-ordinate duty of care that requires employers to provide a mentally or psychologically safe system of work.*

This duty is bubbling up from legislation, the common law of employment and labour law, but legally it has yet to find a name that is shared across all branches of law.

Consequently there is no seamless public policy shield that can be said to protect the mental health of employees in a consistent way across the country.

Indeed, the public policy shield is full of holes through which the social exhaust created by mentally injurious forms of conduct and governance in the workplace escapes.

Absent such an overarching definition, a psychologically safe workplace may be defined for present purposes as one that allows no serious harm to employee mental health in negligent, reckless or intentional ways.

This definition deliberately locates the duty to provide a psychologically safe workplace within the framework of occupational health and safety.

Yet while arguably the duty should reside within this framework, presently in Canada we have no common infrastructure in the workplace that routinely allows for the monitoring and abatement of foreseeable risks to mental health in ways comparable to the monitoring and abatement of risks to physical health and safety.

In particular, there are no prominent and high-level stewards of mental health and safety in individual workplaces comparable to Joint Health and Safety Committees in the domain of physical health and safety.

Nor are there such stewards at a societal level comparable to Ministries of Labour as overseers of occupational health and safety legislation as it relates to physical hazards, save to a limited degree in Saskatchewan.

Possibly because of this lack of visibility and consistency of mental health protection at a systemic, public policy level, many if not most employers seem largely unaware of the already significant legal developments in this area. Partial exceptions may apply in the three provinces that have passed legislation involving systemic remedies. But even in those jurisdictions it appears that there is little awareness of the emerging legal framework that envelops private law remedies in tort and contract.

This lack of awareness means that little is being done on a proactive basis to create and maintain a psychologically safe workplace.

Correspondingly, there is no formal countrywide process for addressing the upstream risks to mental health that are known to originate in the organization of work.

There are no nationally recognized standards for mental health protection at work and no agreed upon methods for assessing or measuring risks to mental health at work.

In essence this means we have no population health policy for the protection or promotion of mental health at work.

This lack of policy is likely related to the slow pace at which progress is being made toward seeing governance of the workplace as an important influence on the construction of mental health in its own right.

In the UK this recognition has occurred at a governmental level and efforts are now underway to disseminate this perspective as widely as possible using national agencies and resources.⁶

There is no national statement or code of practice in Canada that speaks to the desirable balance or interface between private, individual, fault-based remedies and public, systemic, regulatory remedies for injury to mental health at work once the injury has occurred.

Mending the Shield: toward policy amendments

A comprehensive policy response to the situation just described, for purposes of catalyzing discussion, should contain at least the following expressions of purpose, goals and objectives.

Policy Purpose: to promote population health through the provision of enhanced mental health protection in the workplace.

Policy Goal: to increase the extent to which employers exercise their managerial discretion in the interests of employee mental health and well-being.

Policy Objective: to provide incentives and resources to employers that will enable them to exercise their managerial discretion in the interests of employee mental health and well-being through the development, dissemination, implementation, and evaluation of a system of measurements and standards.

⁶ The Health and Safety Executive (HSE) and the Advisory, Conciliation and Arbitration Service (“Acas”). See also Chapter 3.

Preamble to the Policy

In recognition that the workplace is an engine of mental health which generates a net gain or loss for the population as a whole,

And in recognition that in our federal system of government the administration of occupational health and safety is a provincial and territorial prerogative, save for the federal public service and federally regulated agencies and workplaces,

the following policy components recommend themselves.

Policy Components of the “Measurement and Standards” Approach

1. Establish a **recommended code of practice for the measurement of risks to mental health** in the workplace that could be incorporated into the occupational health and safety or employment standards legislation of individual jurisdictions at their discretion. This initiative could include the promulgation of recommended valid and reliable instruments for these purposes.
2. Establish a **national advisory body to help employers understand better the need for, and achieve floor standards for workplace governance and management** that are known to reduce the production of adverse mental health outcomes. This body would deliver education, training and consultancy services relevant to the protection of mental health at work through recommended management and governance policies and practices.
3. Develop a **draft set of Governance and Management Standards** adapted to the Canadian context that can be used in concert with recommendation #2.

An example of such a draft is appended to this chapter.

4. Establish a **national blueprint** for the development of an infrastructure within the framework of occupational health and safety that will **elevate the stewardship of mental health and safety to the same status as the stewardship of physical health and safety**. This will likely mean the expansion of the mandates of Joint Occupational Health and Safety Committees and Representatives.

5. Develop and promulgate a **national policy statement** concerning the desired balance and interface between private and public remedies in relation to the remediation of threats and injuries to mental health at work. This policy should be cognizant of **how financial and psychological burdens are distributed in private and public law remedies**.

6. Consider the **federal public service and federally regulated agencies and workplaces as potential test beds** for the first wave development of these policy components. Employees in these environments are covered by federal health and safety legislation under the Canada Labour Code, Part 2, which could be amended and expanded to include the sorts of provisions outlined in items 1-4 above.

7. Undertake further studies of ways in which **legal tests** can be framed, consistent with sound scientific evidence, that are capable of discerning legitimate claims for compensation **for work-related and disabling mental injury due to chronic, excessive stress under the Workers' Compensation System**.

The principal parties involved in developing and implementing policies include at least federal, provincial and territorial governments, private and public employers, unions and NGOs. However, the federal government is arguable positioned to provide a key leadership role in this regard.

The role of the federal government in the area of workplace health and indeed population health has been traditionally executed by Health Canada. Over the last 25 years this department has exercised leadership in the development and modeling of key comprehensive workplace health promotion strategies that have served as examples to major stakeholders. Currently some of the former functions of this department have been taken over and amplified by the Public Health Agency of Canada.

It would seem appropriate for the roles of Health Canada and the Public Health Agency of Canada to continue and expand in the area of demonstrating the importance of mental health in the workplace within a population health framework.

This concentration on broad policy issues is consistent with a focus on strategic issues relating to health in the workplace as opposed to a focus on developing programs and services.

With regard to the development of measurements and standards, the federal government would again appear to have a leadership role in establishing templates that provincial and territorial governments can use to build their own policies.

While the development of resources for mental health protection and promotion fall squarely within the remits of Health Canada and arguably the Public Health Agency of Canada, it also involves the proactive involvement of other departments dealing with human resources and skills development. This type of inter-departmental collaboration in policy development is a clearly difficult but hopefully not an impossible challenge.

Perhaps the most pressing indication and need for interdepartmental collaboration in workplace mental health protection policy development lies in the relationship between Health Canada, the Public Health Agency of Canada, Social Development Canada and Human Resources and Skills Development Canada.

This need for collaboration is born of the fact that both science and law have identified the quality of the employment relationship as a key determinant of health and to one degree or another this determinant is identified within the mandates of the departments just mentioned.

When we juxtapose the mandates of these departments we see the potential for links between them quite clearly.

For example, the objective of the Labour Program at HRSDC is “to promote a fair, safe, healthy, stable, cooperative and productive work environment, which contributes to the social and economic well-being of all Canadians”.

And at its simplest, Health Canada is “the federal department responsible for helping the people of Canada maintain and improve their health”.

The structures of both departments are highly complex. It is therefore not appropriate in this paper to suggest how these relationships be forged save to say that a strategic alliance would appear to be required in which the functions of both departments related to the health-employment connection are coordinated at the highest level possible.

The relationship between federal departments is complicated further by their relationships with the provinces and territories. For example, a large number of employed people across the country are under federal not provincial or territorial jurisdiction with regard to employment standards, labour law and occupational health and safety legislation. The Canada Labour Code, Part 2 is a case in point. This legislation covers employees who work across the country in banks, railways, some branches of highway and air transport, ferries, tunnels, bridges, canals, telecommunications, pipelines, radio and television, shipping, certain branches of food production (e.g. grain elevators, feed mills etc.), oil exploration and Indian reserves, as well as in the federal public service and Crown Corporations.

The challenge here is to bring some level of consistency to the myriad legal and administrative frameworks that govern the health and safety of Canada’s workforce.

Addendum to Chapter 1

Toward a Standard for Canada: beginning the conversation

The following example of a proposed evidence-based standard for Canada could be used to ignite discussion about the kinds of conduct in the workplace that we believe will protect and even promote the mental health of all who labour there.

Preamble to the Proposed Standard

1. The body of scientific knowledge connecting mental health and the organization of work is large, persuasive and of long standing. Enough of this knowledge has now percolated into the public domain through the media and general discussion for it to be accurately portrayed as a dawning part of our social consciousness.

Essentially, the evidence says that the precipitation or aggravation of certain mental health conditions such as depression, anxiety and burnout can be reasonably foreseen as a consequence of certain contributive organizational practices.

Such practices include the *chronic and consistent*:

- Imposition of unreasonable demands
- Withholding of adequate levels of materially important information, whether 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 [unfairness]

2. The foreseeability of harm to mental health resulting from exposure to such risky practices can be said to attract a general duty of care, increasingly enforceable at law, to abate these hazards to mental health by all reasonable and practical means available.

This duty can be seen as an extension of due diligence in Occupational Health and Safety Law to embrace psychosocial as well as physical hazards.

In addition, such a duty also arises in the law of torts, specifically that branch concerned with negligence, the law of contracts and in human rights and employment standards legislation in some parts of the country.

Indeed, this duty is seen increasingly as part of the employment contract itself.

While the law is still evolving in these areas, examples of courts and tribunals invoking this duty in various terms are increasingly frequent. Indeed, it has been proposed that this duty may attach to an emerging super-ordinate judicial principle of fairness and reasonableness in employment and other contractual working relationships. Additionally the duty has been described as one that calls for the provision of a psychologically safe workplace.

In the UK, the Health and Safety Executive has set standards for the management of six classes of stress-related risks at work, including those associated with excessive demands, inadequate control and lack of social support. These evidence-based standards define levels above and below which such psychosocial risks are unacceptable, opening the door to remedial actions including financial and other penalties under the Occupational Health and Safety legislation of that country for failure to assess such risks.

3. Avoidance of harm from the risky organizational practices listed above has always been an article of sound business practice, although the expression of this ethic has differed from one era to another. It is probably true to say, however, that the ethic has never been normative and even today it tends to be prevalent only in organizations that

are voted “best run” or “best to work for”. And even within such organizations there are sometimes doubts concerning the sustainability of this ethic in the face of enormous economic pressures to compete, grow and provide ever increasing value for shareholders. While its prevalence in Canadian workplaces at large is unknown, the ethic is found to be absent or attenuated in survey after survey of employees.

The Proposed Standard

The duty of care to avoid reasonably foreseeable harm could be discharged to a standard of due diligence through processes described in the following general terms.

This standard incorporates the recommended requirement to measure or assess certain hazards to mental health, which in the UK is mandated through regulations enabled by Occupational Health and Safety legislation.

This leaves open the question whether or to what extent this statutory approach is practical or desirable in Canada.

The standard is:

- (a) Information is collected within workplaces on at least an annual basis concerning the prevalence of psychosocial hazards seen as arising from organizational practices and their perceived impact on mental health is collected. The focus in this regard is on the dimensions of demand, information adequacy, exercise of discretion, psychological rewards and procedural fairness.⁷
- (b) Local, workplace-specific decision rules are established for determining at what point action must be taken to abate psychosocial hazards related to unacceptable levels of demand, information adequacy, discretion, psychological rewards and procedural fairness.
- (c) Scientifically valid and reliable instruments are used for this purpose.

⁷ These dimensions are consistent with those contained in the UK standards but place a greater emphasis on procedural fairness. This emphasis is a result of recent studies that consistently point to the central importance of this dimension.

- (d) Commitment from Senior Management to act on the results of such surveys is given in unequivocal voice.
- (e) The process described in points “a to d” forms part of the central accountability procedures of the organization so that it is overseen and invigilated by at least one senior officer who reports to the CEO and whose job description includes this function.
- (f) The duty of diligence outlined above regarding information collection and use as it bears upon the prevalence of psychosocial hazards is explicitly linked to the Occupational Health and Safety surveillance and monitoring system.
- (g) Adequate financial resources are allocated to the pursuit of this process through a dedicated cost centre.

Chapter 2

Drawing the Line: a consideration of developments in the legal recognition of harm to mental health in the workplace. Implications for policy and practice

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Introduction

Over the last 20 years Canadian law has recognized an increasingly wide range of harms or injuries to the mental health of employees arising from the conduct of employers, their representatives and agents. This recognition has been reflected in financial compensation for such harms as harassment, bullying, discrimination, infliction of mental suffering and abuse of power in the workplace. The standard of care required of employers with regard to the protection of employee mental health appears to be rising every year.

The manner in which the law recognizes harm to employee mental health varies depending on the juridical auspices under which claims of harm to mental health arise. For example, it makes a difference whether the claim arises in a collective bargaining environment or in a non-union environment.

It also makes a difference where in the country the claim arises. For example, every jurisdiction has different legislative instruments pertaining to harassment and discrimination. While the various approaches have much in common, there are also important differences that raise potential issues concerning the likelihood of equal treatment under the law.

In addition, it makes a difference at what stage of the employment relationship the claim arises. For example, there are different legal considerations depending on whether the claim arises in connection with the normal course of employment, during a period of disability leave, in the process of returning to work, or in relation to the manner in which discipline and dismissal are conducted.

That said, if we look at legal developments in the area of employee mental health as a whole, it is possible to detect among the specific rulings and legislative initiatives the emergence of what might be called a super-ordinate duty of care to protect employees from employer-related or employer-condoned conduct that can be reasonably expected to result in harm to their mental health or psychological wellbeing.

This duty might be stated as the requirement for employers to protect employees from negligent, reckless and intentional conduct over which they have control and that can be reasonably expected to injure the mental health of employees.

While, or perhaps because in Canada this general duty has not been codified, the question naturally arises, how far will or should the law go in the direction of protecting the mental health of employees? And to what extent if any should policy makers be proactive in shaping the course of legal developments? In other words, where should we draw the line with regard to the protection of employee mental health from conduct over which employers have, or should have control? Indeed, legal decisions of all types in this area of injury to mental health can be seen as efforts to draw the line. The question is, should there be a more overarching and policy driven effort to decide where this line ought to be?

From a non-legal perspective, this question can be, and often is framed within the context of “workplace stress”; that is, stress thought to originate in, or to be precipitated by conditions of work created by, or permitted to exist by employers and their representatives and agents.

So far, in Canadian law, stress itself has not emerged as an organizing super-construct for rules concerning the conduct of individuals at work. Although stress is often mentioned

in legal discourse, it has little or no legal weight as such except in a very limited sense within the context of Workers' Compensation Law.

This situation is different in the UK and in other jurisdictions, a matter that will be examined in Chapter 3.

Whether or to what extent it is useful to induct stress as an organizing idea for the law is a question that Canadians may want to address, particularly given the large body of scientific research that points to its potential utility for this purpose.

In the UK and in many parts of Europe, science has been used explicitly as the foundation for legislative and regulatory approaches to the identification and abatement of harms to mental health known to arise from stress at work.

Definitional and measurement issues related to stress have been addressed in a reasonably successful manner, although some challenges concerning validity and precision remain. Central to the viability of the UK approach, for example, is the fact that risks arising from specific stressors at work can be measured and assessed with levels of accuracy sufficient to form the basis for setting goals to abate such risks.

The purpose of this chapter, therefore, is to describe legal developments in Canada in such a way that policy makers can assess the need for further measures to protect the mental health of employees or to codify existing law in a more cogent manner.

The chapter considers the following legal regimes in Canada: common law (the law pertaining to non-unionized employees); collective bargaining law (the law pertaining to unionized employees); and legislation relating to Human Rights, Occupational Health and Safety, Employment Standards and Workers Compensation. It goes on to consider the situation in the UK and in selected parts of Europe.

This is followed by a commentary on the relative merits of various policy options concerning the regulation and management of workplace stress.

Common Law

The courts have identified a common law duty of care to protect employee mental health arising from both the contract of employment itself and from a broader base known as the law of torts. These sources of protection are in addition to any statutory provisions such as those available under Human Rights, Occupational Health and Safety, Workers Compensation and Employment Standards legislation.

These common law bases for claims of injury to mental health have undergone rapid developments in the last ten years and particularly since 2003.

Some cases are of such significance in terms of the legal reasoning and research to be found in them that relevant portions of them are excerpted in this document.

In the body of the text an attempt is made to extract the essence of what these cases say, but readers are encouraged to examine the cases themselves in order to appreciate the richness of legal thinking on the subject of how the law should and should not protect the mental health of employees.

As with any branch of law, the rules associated with protection of employee mental health are as much about limits and boundaries as they are about rights and entitlements. However, as noted earlier, the dividing line between the two is ever shifting so the present exercise is no more than a snapshot of the law as it stands today in the full expectation that it will have evolved further tomorrow. This evolution is more noteworthy in this area than in other more settled branches of the law such as for example, property where specific rules may change but the fundamentals do not. What we are seeing in the law of employment appears to be change of a more foundational nature, reaching into the very nature of the employment relationship itself and potentially transforming it. More will be said of this later. For now the focus is on extraction of the nature and essence of the duty of care to protect employee mental health as it is emerging from the cases.

With regard to general statements concerning the importance of the employment relationship to employees and its relevance to mental health, the Supreme Court of Canada has gone on record as recognizing the unique role played by work in our lives.

In 1987 Chief Justice Dickson, in the context of a dissenting opinion, wrote that:

“Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.” Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect”⁸

⁸ *Reference re Public Service Employee Relations Act (Alta)* (1987), 87 C.L.L.C. 14, at para.91

More recently, in *Wallace*, the Supreme Court of Canada also recognized that "the manner in which employment can be terminated is equally important to an individual's identity as the work itself."⁹

And drawing attention to the evolving nature of the employment relationship and the duties and rights within it, the court in *Ditchburn* commented on the distinctiveness of the employment relationship, saying:

“An employment relationship is based on contract. However, it is not like purchasing a car - a contract governing a discrete transaction. It is a transitional contract in which each of the employer and employee can reasonably expect more from each other as the relationship continues. As it is a contract governing a relationship between the parties, almost by definition it continually changes.”¹⁰

With regard to the specific contractual basis for protection of employee mental health, it has been established for some time that there is an implied term in the employment contract that requires employers to treat employees with civility, decency and respect.

For example in *Lloyd v. Imperial Parking Ltd.*, [1997] 3 W.W.R. 697 the court said:

“A fundamental implied term of any employment relationship that the employer will treat the employee with civility, decency, respect and dignity This appears to be part of the trend to establish a duty upon an employer to treat employees “reasonably” in all aspects of the labour process.” [at para.41]

And in *Chambly*, Cory J. said:

“To the vast majority of Canadians their work and place of work are matters of fundamental importance. Fairness in the workplace is the desire of all.”¹¹

The important link between the duty to treat employees with civility, decency, respect and dignity and the even broader duty to be reasonable in the conduct and course of the employment relationship as a whole noted in *Lloyd* is further reflected in the following dicta from an Ontario court:

“The employer owes a duty to treat its employees in a fair and proper manner in all aspects of the employment contract. This duty goes as far as to promote the interest of its employees and to see that the work atmosphere is conducive to the well-being of its employees”.¹¹

⁹ *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 95

¹⁰ *Ditchburn v. Landis & Gyr Powers, Ltd.* [1995] 16 C.C.E.L. (2d) 1 at para.2 (Ont. Gen. Div.), varied on other grounds (1997) 34 O.R. (3d) 578 (C.A.)

¹¹ *Chambly (Commission Scolaire Regionale) v. Bergevin* (1994) 4. C.C.E.L. (2d) 165 (S.C.C.) at p.204

¹¹ *Robinson v. Royal Mint* [1992] O.J. No. 2270 para.70

It is further noteworthy that although many of the cases cited here are founded in employer conduct complained of in the context of termination of the employment relationship, the dicta of the courts often refer to duties that prevail in the course of that relationship as a whole. Although cases can be distinguished on this basis, the courts have essentially left a door wide open to counsel who are motivated to establish that the duties of care referred to above are incidents of the employment contract throughout its entire course, not just at the point of dissolution.

Indeed, it is this route that appears to have been taken in the leading case of *Sulz v. Attorney General et al. 2006* and on appeal in *Sulz v. Minister of Public Safety and Solicitor General 2006*, where it is clearly enunciated that there is an ongoing duty to ensure a harassment free work environment for employees. If a plaintiff employee can show that the person or people whose conduct is impugned knew or should have known that their acts or omissions would lead to mental injury, they attract liability in tort and arguably in contract although the latter was dismissed as a cause of action in this particular case because of a firewall of statutory bars.¹²

Most if not all the cases founded in contract involve quite extreme behaviour on the part of the defendant who is claimed to be in breach. For example, in *Lloyd*, the issue was vulgar name calling, yelling in a demeaning fashion, and threats of dismissal. In *Morgan v. Chukal Enterprises Ltd.* the issue was ongoing exposure to rudeness, hostility obscenity and belittlement.¹³ A similar scenario is found in *Saunders v. Chateau des Charmes Wines Ltd.*, where a supervisor was found to have exhibited increasing outbursts of relentless anger and intimidating behaviour.¹⁴ The managerial and supervisory acts in these cases, uncontrolled by the employer, gave rise to successful claims of constructive and wrongful dismissal.

In *Shah v. Xerox [2000]* the plaintiff's claim for constructive dismissal succeeded based on his manager's unsubstantiated accusations and warnings about poor job performance and unilateral style of supervision. The impugned behaviour in this case was not as extreme as in some other cases and this one illustrates the extending reach of the courts as they penalize employers for allowing conduct that even 20 years ago would probably have escaped legal censure.¹⁵

In contract cases of the type described above there is little need to demonstrate mental harm or injury even though clearly this may have been a result of the conduct complained of. The essential element of breach of contract in these cases is that the employer is found to have violated a basic, if implied term of the employment contract to provide a harassment free workplace and one that is supportive of civility, respect, dignity and decency contributing to employee well-being. The basis of constructive dismissal claims is that adverse conditions of work made it impossible for the plaintiff employee to do the

¹² *Sulz v. Attorney General et al.* [2006] BCSC 99; *aff'd Sulz v. Minister of Public Safety & Solicitor General* [2006] BCCA 582. See also note 23, *infra*, and related text.

¹³ *Morgan v. Chukal Enterprises Ltd.*, [2000] B.C.J. No. 1563

¹⁴ *Saunders v. Chateau des Charmes Wines Ltd.* [2002] O.J. No. 3990

¹⁵ *Shah v. Xerox Canada Ltd.*, [1998] O.J. No. 4349, 49 C.C.E.L. (2d) 30 (C.J.)

job which he or she was hired to do, so opening the door to allege that the employer had in essence caused a fundamental breach in the employment relationship such that it can be considered to have been unilaterally terminated.

However, where injury to mental health is argued as a separate head of damages in a breach of contract case, such damages may now be recovered under the “Wallace Bump” doctrine.¹⁶ This doctrine essentially allows courts to award damages in lieu of a period of notice that is artificially inflated to reflect the mentally injurious manner in which a plaintiff was dismissed. This somewhat clumsy device may soon give way to a more elegant jurisprudence if certain dicta in the Supreme Court decision of *Fidler v. Sun Life* are held to have legal valence.¹⁷ These dicta 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. This proposition is of sufficient importance that the *Fidler* case is summarized below.

Fidler is not a case about the employment relationship itself although it holds many implications for it. The Supreme Court held that an insurance contract for the provision of long-term disability benefits made available through an employer (the Royal Bank) included an implicit term for security of an employee’s peace of mind.

Damages for mental distress arising from breach of such a contract are, therefore, recoverable. This case confirms that mental wellbeing is assumed to be part of what the parties to a contract involving psychological benefits contemplate at the time of their agreement. Consequently, failure to provide LTD benefits in a fulsome and timely manner can be reasonable anticipated to result in mental suffering and anguish for which compensation can be sought and recovered.

This case represents a new beachhead in the devolution of the rule in *Addis* [1909] that mental distress damages are generally not recoverable for breach of contract.¹⁸ This case in turn had been based on a strict interpretation of the rule in *Hadley* [1854] although there is no clear basis for this interpretation beyond judicial distaste for allowing the concept of emotional harm to enter into the realm of commercial contracts.¹⁹

In fact, purely commercial contracts are still considered to be outside the realm of agreements that can give rise to successful claims of mental harm.

The erosion of the rule in *Addis* and *Hadley* has taken place since the 1970’s in regard to a widening range of contract types that now encompass those where the very object of the agreement is pleasure, relaxation or peace of mind.²⁰ Indeed, the rule now seems to have been modified further to include contracts where peace of mind is a “major or important object of the contract”.²¹

The *Fidler* court also noted the opinion of the legal scholar, McCamus (2005), in which he suggests that the doctrine of reasonable foreseeability applies in contract law just as it does in tort, thus further blurring the line between these two forms of action.²²

¹⁶ *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701

¹⁷ *Fidler v. Sun Life Assurance Co. of Canada* [2006] S.C.C. 30

¹⁸ *Addis v. Gramophone Co.* [1909] A.C. 488

¹⁹ *Hadley v. Baxendale* [1854] 156 E.R. 145

²⁰ *Jarvis v. Swan Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.)

²¹ *Farley v. Skinner* [2001] 4 All E.R. 801

²² McCamus, John D. *The Law of Contracts*. Toronto: Irwin Law, 2005.

This all raises the question, what are the limits of this expanded doctrine after *Fidler*? The Supreme Court itself in *Fidler* excludes “normal commercial contracts” because the likelihood of breach causing mental distress is not within the contemplation of the parties. “the matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit”,²³

However, the court also moots the possibility that employment contracts may be of a type that includes expectations of psychological benefits. Indeed, it says the Wallace court may have been influenced by this thinking in developing the concept of extended damages that reflect the mentally injurious manner in which an employee was dismissed.²⁴

The *Fidler* court also noted that damages for mental distress under contract do not preclude their potential availability under tort.²⁵

This case is important for two reasons relevant to a discussion of the limits of an employer’s duty to protect the mental health of employees.

1. It establishes that an agent of an employer such as Sun Life is liable for harms to employee mental health arising from its own negligence. However, it seems not improbable that the employer itself could be held vicariously liable for the acts of its agent under certain conditions.
2. It establishes that contracts that are even in part intended to promote or protect peace of mind or some other psychological benefit can give rise to an action for injury to mental health if the contract is breached.
3. It raises the possibility that employment contracts belong to that class of agreements that includes the protection of peace of mind, or some related psychological benefit.

Given the importance of the employment relationship acknowledged by the Supreme Court itself in *Wallace* and other cases referred to earlier, for example, it is not hard to see how creative counsel could argue that an important object of the employment contract is to ensure the protection of mental health as an implied psychological benefit. Indeed, there is already an indication from the public sector that the *Fidler* doctrine will be extended to collective bargaining environments. In *Charlton*²⁶, the Ontario Grievance Settlement Board (per D.D.Carter) applied the *Fidler* doctrine to a case of racial harassment in a penal institution, reasoning as follows:

The Supreme Court of Canada, in *Fidler v. Sun Life Assurance Co. of Canada* [2006] S.C.J. No. 30, has now provided guidance as to when it is appropriate to compensate for mental distress damages that flow from a breach of contract. [21]

²³ *Fidler*, supra note 18 at para. 45

²⁴ *Ibid.* at para. 54

²⁵ *Ibid.* at para. 52

²⁶ *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] 90 C.L.A.S. 78

The significance of the Fidler decision is that the Supreme Court of Canada has now made it clear that, even in the absence of bad faith, mental distress damages may flow from the breach of contracts that create the expectation of a "psychological benefit" and that this type of damage need not be based upon an independent actionable wrong. In other words, mental distress damages are not dependent on some form of egregious conduct on the part of the person in breach of the contract but flow directly from the breach of certain types of contractual terms, compensating for the mental distress that flows from the breach. [22]

In this case there has been a breach of the contractual guarantee of freedom from racial harassment in the workplace. Such a term, in the Board's view, does create an expectation of a "psychological benefit", since this provision in the employment contract is clearly intended to protect the dignitary interests of the employee. It is this provision that has been breached and, while the employer has been beyond reproach in attempting to deal with the problem of workplace racial harassment after it arose, there is also no question that the grievor has suffered very substantial mental distress as the result of a particularly nasty form of workplace harassment. Given the very substantial disruption to the grievor's life and peace of mind that was caused by the breach of the contractual guarantee of freedom from racial harassment in the workplace, the Board considers that the amount of damages for mental distress should be no less than what was considered appropriate in the Fidler case. Accordingly, the Board directs the employer to pay the grievor forthwith the sum of \$20,000 for mental distress arising from the breach of the contractual guarantee of freedom from racial harassment in the workplace. [25]

However, claims of contract breach that arise from a course of mentally injurious conduct do not have to show a visible and provable illness as an outcome of the conduct complained of. Damages in such cases are usually awarded in lieu of salary or wages for the notice period that employees who claim they have been constructively dismissed should have received had the employment relationship been terminated in a normal manner (aggravated damages in such cases are often referred to as "The Wallace Bump").²⁷ For example, in *Honda*, the equivalent of 9 months salary was awarded as a Wallace Bump in addition to the 15 months for regular notice.²⁸ The additional amount was upheld on appeal to the Ontario Court of Appeal but not on final appeal to the Supreme Court.²⁹

The question that is hanging over the law at present is whether or to what extent courts will recognize the *Fidler* dicta as having any weight in terms of implying a term for psychological benefits into the employment contract.

²⁷ *Supra* note 17

²⁸ *Keays v. Honda Canada Inc.* [2005] OSCJ; [2006] 82 O.R.(3d) 161

²⁹ *Ibid.* [2007] ONCA 564; *Honda Canada Inc. v. Keays* [2008] SCC 39

Meanwhile, and parallel with breach of contract proceedings, it is open to employees who believe they have been mentally injured by acts or omissions of their employer or its agents to sue in tort.

The torts that form the basis for most claims of mental injury arising from employer acts or omissions are the intentional and negligent infliction of mental suffering. However, it is open to courts in some circumstances to award punitive damages for mentally injurious conduct in lieu of damages for infliction of mental suffering. The Honda case just referred to is one such case although an award of punitive damages was overturned by the Supreme Court, which, as noted, also overturned the award of aggravated damages.

The elements of the tort of intentional infliction of mental suffering that must be proved by plaintiffs were well stated by the court in *Rahemtulla*.³⁰

This reasoning has been consistently followed in subsequent cases.

McLachlin J. (as she then was) addressed the question of the availability of this tort in the context of a plaintiff who was dismissed from her position as teller as a result of unfounded allegations of theft. She suffered severe emotional distress as a consequence of her summary dismissal and the accusations of the defendant.

McLachlin J. set out the elements of the tort of intentional infliction of mental suffering as being:

- (1) conduct that is flagrant and outrageous,
- (2) calculated to produce harm,
- (3) resulting in a visible and provable injury.

These elements were articulated to mean the following, as the court in *Prinzo*, following *Rahemtulla*, summarizes them in paragraphs 44-47. ³¹[*text edited, emphases added*]

The unfounded accusation of theft, even if motivated by a desire to extort a confession and solve the mystery of the missing funds, amounted to an act with *reckless disregard as to whether or not shock would ensue from the accusation.*

McLachlin J. emphasized that there was *no requirement of malicious purpose to cause the harm or any motive of spite. She thus considered that the employer's conduct met the requirement of "outrageousness"*. She said:

While the financial institution has the right to dismiss a suspect employee without investigation, the proper conduct of its affairs does not require that it be given the right to make *reckless* and very possibly untruthful accusations as to the employee's honesty which will *foreseeably inflict shock and mental suffering.*

With respect to the requirement that the conduct be *calculated to produce harm*, McLachlin J. found that this requirement was met on the basis that “*it was clearly*

³⁰ *Rahemtulla v. Vanfed Credit Union* [1984] 3 W.W.R. 296

³¹ *Prinzo v. Baycrest Centre for Geriatric Care* (2002) 60 O.R. (3d) 474 (C.A.)

*foreseeable that the accusations of theft which the defendant made against the plaintiff would cause her profound distress."*³²

Thus, it appears that the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, *or if the consequences are known to be substantially certain to follow.*³³

Concerning the requirement of a *'visible and provable illness'* it appears that the absence of a medical expert will not be necessarily fatal. In *Rahemtulla*, McLachlin J. wrote at para. 56: "Notwithstanding the absence of expert medical evidence, I am satisfied that the plaintiff suffered depression accompanied by symptoms of physical illness as a result of... her employer's accusations."

The court noted too that in the employment law context, damages for mental distress arising from the tort of intentional infliction of mental suffering have also been awarded where, for example, an employee was severely harassed by a superior who had knowledge of her fragile mental state³⁴; an employee suffered sexual harassment from her colleagues and supervisors³⁵; and where an employee was subjected to a confrontational, brash and contradictory management style³⁶

There appears to be no equivalent test for the tort of *negligent* infliction of mental suffering. For instance, in *Sulz v. Attorney General of Canada*³⁷, the court found that the tort of negligent infliction had been proved but offered scant reasons for its conclusion. *Sulz* was an action brought in both contract and tort by a former female RCMP constable against her former supervisors, the RCMP and the Attorney General of Canada [later amended on appeal to the Minister of Public Safety and Solicitor General]. The cause of action claimed she was negligently or intentionally harassed to the point at which she became clinically depressed and had no option but to accept a medical discharge from the RCMP. Indeed, medical testimony was led that claimed she would never be fully recovered or work in a normally stressful job again.

The tort claim against the RCMP alleged it was directly liable as an organization to prevent harassment or, if not directly, then vicariously liable for the acts of its employees.

The contract claim was based on an alleged breach of an implied term of the employment agreement to provide a harassment-free workplace, as noted earlier.

³² *Rahemtulla* note 31, supra at para.55

³³ The court referred, in this connection, to Linden, *Canadian Tort Law* 7th ed. (2001) at p. 34; Fridman, *The Law of Torts in Canada* (1989) at p. 53

³⁴ *Boothman v. R.*, [1993] 3 F.C. 381 (Fed. T.D.)

³⁵ *Clark v. Canada*, [1994] 3 F.C. 323 (Fed. T.D.)

³⁶ *Bogden v. Purolator Courier Ltd.* [1996] A.J. No.289 (Alta. Q.B.)

³⁷ *Sulz v. Attorney General et al.* [2006] BCSC 99

The basis of both claims lay in allegations of cruel, unfounded accusations of incompetence, malingering and manipulative behaviour on the part of the plaintiff's supervisors.

The Sulz court cites *Clark* as authority for the view that “intentional infliction of mental suffering may arise *from a course of conduct over time*”.³⁸

After briefly citing *Rahemtulla* for the elements of intentional infliction of mental suffering, the Sulz court goes on to cite *Clark* as authority for the principles that

- Knowledge of a plaintiff's special sensitivity or susceptibility can turn extreme but non- culpable behaviour into outrageous behaviour sufficient to meet the burden of proof for intentional infliction of mental suffering
- Reasonable foreseeability includes knowledge of any special sensitivity or susceptibility
- Intent to frighten, terrify or alarm is sufficient to meet the burden of proof, regardless of the outcome

Later, at para.165 the court held that “the defendants must take their victim as they found her” in reference to her possibly greater susceptibility to harsh treatment in a quasi-military organization and possibly greater vulnerability to depression. Indeed, foreknowledge of a victim's special vulnerability appears to compound or magnify the culpability of harassers.

The court noted that the plaintiff, during the course of her work-related difficulties, had experienced 3 pregnancies, two of which gave her stress because they were not planned and because two of the children had health problems. Her husband was working away from home during much of the period during which she had difficulties at work and she functioned as a virtually single parent.

In spite of this, the court held that work was the proximate cause of her major clinical depression and that the RCMP had breached its duty of care toward her and “caused her serious psychological harm”³⁹.

The language of the court at this point suggests that it is inclined to see the defendant's course of conduct as negligent rather than intentional, in spite of its citation of *Rahemtulla* above, and its rather ambiguous reference to *Clark*, which is not usually cited for authority in this context. In order to establish negligence, it is necessary to find, *inter alia*, that a duty of care between the parties exists, that the duty has been breached and that harm resulted from this breach⁴⁰. Without addressing these criteria, the court simply held that there was a duty of care to provide a harassment-free workplace under existing

³⁸ *Clark v. Canada (T.D.)* [1994] 3 F.C.323

³⁹ *Sulz* supra note 38 at para.160

⁴⁰ See: *Rees v. RCMP* [2004] NLSCTD 208 for a succinct review of the basis of negligence claims at paras. 202-226

RCMP policies, that it was breached and that it did cause serious harm to the plaintiff's mental health⁴¹.

The standard of care referred to by the court is one of reasonable foreseeability: "Smith [the supervisor] *should have known* that his intemperate and, at times, unreasonable behaviour would have negative consequences for the members of the detachment generally and the plaintiff in particular."⁴² And later, "he *ought to have known* ... that he was causing serious emotional problems for the plaintiff at a time when she was facing significant personal pressures due to her pregnancies"⁴³ [*emphasis added*]

In summary, it appears that the *Sulz* court awarded damages in both tort and contract. The RCMP was found not directly liable for the plaintiff's harm but rather vicariously liable for the acts of its supervisors.

The jurisprudence in the *Sulz* case is rather cryptic, given the large size of the award, which was upheld on appeal⁴⁴.

1. General Damages: \$125,000 for compensation related to lasting injury to the plaintiff's mental health
2. Past Wage Loss: \$225,000
3. Loss of future income earning capacity: \$600,000
4. Punitive and aggravated damages: aggravate damages were held to have been included in the General category for "injury to feelings, dignity, pride and self – respect [at para.185]"

Three observations can be made about the cases just reviewed.

1. Intentional infliction of mental suffering seems to incorporate negligent infliction by virtue of the courts' willingness to stretch the meaning of "recklessness". The distinction in law between recklessness and negligence is a fine one and it appears to have dissolved in this branch of the law.
2. The tests of intentionality, recklessness and negligence all revolve around the concept of reasonable foreseeability of harm.
3. The meaning of "a visible and provable injury" is quite elastic in the context of mental health.

The case of *Zorn-Smith v. Bank of Montreal*⁴⁵, which continues to be cited with approval, brings together these points under one set of facts. Because it is on the cusp of what the law will and will not recognize as employer liability with regard to employee mental health this case is worth reviewing in some detail.

References to paragraphs have been suppressed in the following account to facilitate readability.

⁴¹ *Sulz* supra note 38 at paras.144-146.

⁴² *Ibid.* at para.146

⁴³ *Ibid.* at para.147

⁴⁴ *Sulz v. Minister of Public Safety & Solicitor General* [2006] BCCA 582

⁴⁵ *Zorn-Smith v. Bank of Montreal*, [2004] C.L.L.C. 210-012 (Ont. S.C.J.)

The plaintiff, Suzanne Zorn-Smith (hereafter, “the plaintiff”) had worked 21 years for the bank. She was by all accounts a diligent, loyal, compliant and well-liked employee. These facts were not in dispute.

She had moved around a lot, at the bank’s request, and worked extremely long hours in spite of having a young family of three at home. She would often return to work after dinner and sometimes worked on Sundays.

There came a point, after some years of trying to upgrade her skills, where she began to burn out. The demands of the job were exacerbated by ongoing training requirements to formally qualify for the quasi-managerial position that she occupied. She succumbed to one brief episode of depressive illness, then eventually to another, on the basis of which she was placed on disability leave.

After several weeks, while still on leave, the bank gave her an ultimatum: either come back to work in her former managerial position, come back part-time in a junior position, or do not come back at all. She declined to return, and the bank dismissed her.

She sued for wrongful dismissal, the intentional infliction of mental distress, loss of disability benefits and punitive damages for the callous disregard with which she claimed the bank had treated her.

One of the plaintiff’s key supervisors testified that he had no idea of the negative effect the severe stress of the workplace, particularly that associated with chronic, severe understaffing was having on her. He was found to have trivialized her health concerns, which she brought to him on numerous occasions.

The court noted the testimony of the plaintiff’s physician that she was sleep-deprived, exhausted, irritable and burned-out. This physician (whose testimony clashed with that of the bank’s own doctor) opined that the solution to the problem was to provide the plaintiff with adequate study time and to have realistic expectations for her with regard to her current level of training, a view that the court appears to have accepted, further characterizing the employer’s lack of concern for the plaintiff’s health as “reckless”.

There was a notable lack of support from the plaintiff’s superiors with regard to technical matters. The plaintiff’s marriage began to suffer, and finally she was diagnosed as having “an adjustment disorder with depressed and anxious mood” (the technical term for burnout). The plaintiff’s physician saw this result as a workplace issue, rather than as a personal issue, with regard to potential solutions.

By this stage, the plaintiff had “loss of appetite, memory loss, lack of concentration, mood swings, exhaustion, a loss of self-worth and a loss of self-esteem ... she was angry and impatient”. In her physician’s view, this amounted to total incapacitation. He made frequent reference to the “excessive demands” to which she was subjected and to the

“disastrous” consequences of the employer’s proposal that she return to work part-time: “it will translate into being paid ½ as much to do 3 times as much”.

The plaintiff told her supervisor, in the context of refusing the bank’s final offer, that returning to an unmodified workplace “would kill her. She felt mistreated, abused and forced out because of unreasonable job requirements”.

The court determined that the plaintiff was terminated without cause, given that she was legitimately on disability leave at the time of her dismissal.

Aitken J., in determining that the plaintiff was disabled at the time of her dismissal, said, “I find that Ms. Zorn-Smith continued to suffer from exhaustion, poor concentration, an inability to think straight, lack of confidence and self-doubt to the extent that she could not have functioned in the role of Financial Services Manager, or for that matter, in any other role at the Bank”. “Her energy, initiative and stamina had been drained out of her by too many months of unreasonable work demands relating not only to the normal work day but also nights and weekends”.

In weighing the evidence concerning the role of the plaintiff’s domestic situation in her burnout, the court dismissed the bank’s contention that this was the real cause of her problem. Indeed, “there was nothing in the evidence to suggest that Ms. Zorn-Smith could not cope with everything, had her work demands been within some reasonable parameters. They simply were not.....I find that Ms. Zorn-Smith’s adjustment disorder with depressed and anxious mood was caused predominantly by unreasonable work demands, and not by family stresses”.

The court noted, “It was the responsibility of the Bank to ensure a safe workplace for its employees, a workplace that was not making them ill and unable to work”. And, “Ms Zorn-Smith had worked for the Bank since she was 15, and her father had been a Vice President of the Bank until his death. She was devoted to the Bank, and considered the Bank employees her family. The multitude of feelings which she would have experienced upon not being supported by the Bank in regard to her continuing disability and then being terminated from the Bank could not help but to have compounded her feelings of loss and inadequacy, and to have hindered her normal functioning”.

Aitken J., in assessing damages, referred to Chief Justice Dickson’s often-cited remarks in the Canadian Supreme Court’s *Reference Re: Public Service Employee Relations Act*⁴⁶ where he says, “a person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being”.

The court held that the Bank’s behaviour in the manner of dismissal was unfair and in bad faith justifying a longer notice period or damages in lieu, applying the so- called

⁴⁶ Supra note 8

“Wallace bump”⁴⁷. The court entertained “no doubt that the way in which Ms. Zorn-Smith was treated at the time of her dismissal worsened her psychological state”.

The court further characterized the plaintiff’s lack of confidence in her own ability to function as a foreseeable result of the Bank’s improper actions.

With regard to the claim for damages in connection with intentional infliction of mental distress, the court held that reckless disregard of consequences is sufficient to meet the criteria laid down in *Prinzo*⁴⁸, where the elements to be proven are:

1. flagrant or outrageous conduct that is,
2. calculated to produce harm; and
3. results in a visible and provable illness

The court interpreted element #2 to embrace “reckless disregard” as to whether or not harm would ensue.

Essentially, this results in a reading of “calculation” to include “reasonable foreseeability”, a judicial conversion of a type that we have noted already in *Sulz*⁴⁹. Indeed, the court said, “the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow. There is no requirement of malicious purpose to cause the harm or any motive of spite.”

The court held that the tort of intentional infliction of mental suffering was proven because: [*emphases added*]

- the bank *knew* that the plaintiff was exhausted and worn out as a result of chronic understaffing
- the bank was *well aware* that the plaintiff suffered burnout on a previous occasion in 2000, requiring a short leave of absence
- supervision *knew* that the plaintiff had been requesting relief from her workload
- despite this knowledge, the bank continued to reduce staffing levels, thus increasing the workload on the plaintiff
- despite the plaintiff’s *pleas for relief*, the bank continued to keep on the pressure
- the bank *knew* of her history of long hours and missed lunches
- the bank took advantage of the plaintiff’s generous nature “in total disregard to” the toll its demands were taking on her health, and the health of her family”

“This callous disregard for the health of an employee was flagrant and outrageous. That Susanne Zorn-Smith would suffer a further burnout was predictable – the only question was when it would come. It was foreseeable that such a burnout would cause her mental suffering. I find that the Bank’s conduct was the primary cause of Susanne Zorn-Smith’s adjustment disorder with depressed and anxious mood”.

⁴⁷ Supra note 9

⁴⁸ Supra note 32

⁴⁹ Supra notes 38, 45

However, the court did not award punitive damages because the elements of malice and oppression were not present.

The significant judicial principles of this case are quickly apparent, but for ease of recognition they have been italicized in the foregoing account. Essentially, they amount to the proposition that where harm to employee mental health is reasonably foreseeable in a context where there is a duty of care to provide a safe system of work, the employer or its representatives invite liability for such harm. Reasonable foreseeability is held to exist when “everyone knows” that demands are too unreasonable and that they pose a threat to health, if not on general principles of dangerousness (which might be sufficient in themselves) then on evidence that such demands have already given rise to harm, as they had in the plaintiff’s case.

Strikingly similar reasoning can be found in an English case⁵⁰. In *Walker*, the judge held, “where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pressures of his workload, the employer was under a duty of care, as part of the duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform”⁵¹. In this same case, the court (addressing the vexed issue of excessive employee vulnerability) noted that in spite of his “very considerable reserves of character and resilience” what broke the plaintiff was, among other things, “the mounting but quite uncontrollable workload” and “a feeling of frustrated helplessness because he found himself in a deteriorating situation which he was powerless to control”⁵². Note the unambiguous references to powerlessness, frustration, helplessness and lack of control as stressors in this case.

The judge noted, (addressing the question whether protection from mental or emotional damage is contemplated as an aspect of a safe system of work) “there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employers’ duty of care ...”⁵³.

Both the Canadian and English cases cited above rely on community standards for their designation of what constitute unreasonable demands and what is reasonably foreseeable. Both say or assume that the Common Law duty of care to provide a safe system of work embraces a duty to avoid reasonably foreseeable harm to the emotional or mental health of employees.

⁵⁰ *Walker v. Northumberland County Council* [1995] 1 All E.R. 737 at 74. But see: *Bonser v UK Coal Mining Ltd* [2003] EWCA Civ 1296. In this case, foreseeability of psychiatric harm was held to be established only by virtue of the plaintiff having suffered a psychiatric breakdown on an occasion *prior* to the one currently at issue. i.e. the stress complained of must have *already* harmed the plaintiff in order for subsequent episodes of illness to be reasonably foreseeable. See also *infra* under the situation in the U.K.

⁵¹ *Walker* note 51 at 737

⁵² *Ibid.* at 754

⁵³ *Ibid.* at 737

A somewhat hybrid case, again straddling the increasingly murky distinction between tort and contract bases for claims of mental injury, is *Keays v. Honda Inc*⁵⁴

Keays was fired for insubordination after refusing to submit to a mandatory medical assessment. In the late 1990's he had been diagnosed with Chronic Fatigue Syndrome while on LTD, but was forced to return to work after his benefits were cut off.

His continuing absences led to a requirement to meet with one of the company doctors, who at one point said he was fit to work on the very demanding assembly line even though he had no background or experience in this type of work.

While it did retreat from this threat, the company continued to pressure Keays, whose condition progressively worsened.

During one period, Honda required him to submit medical notes for every absence and finally to be evaluated by an occupational medicine specialist of its choosing. On the advice of his lawyer, he asked for clarification of the parameters of this evaluation, which was interpreted as insubordination and he was fired.

He sued for wrongful dismissal, intentional infliction of mental suffering, harassment and discrimination.

The court of first instance held that the company's "outrageous" behaviour was motivated by a desire to avoid its duty to accommodate the plaintiff's disability up to a reasonable standard and that it engaged in harassment to achieve its end.

"It would appear to me that Honda ran amok as a result of [its] blind insistence on production "efficiency" at the expense of [its] obligation to provide a long-time employee reasonable accommodation".

The trial judge concluded that Keays had been terminated without just cause. He fixed fifteen months as the period of reasonable notice and added a further nine months for the manner of Keays' dismissal. In addition, he ordered \$500,000 in punitive damages because he found that Honda's treatment of Keays constituted discrimination and harassment, was contrary to Ontario human rights legislation, and was both outrageous and high-handed. Finally, he awarded Keays costs on a substantial indemnity basis, together with a premium. However, he dismissed the specific claims for intentional infliction of mental suffering, harassment and discrimination, reasoning that the intent of these claims had been addressed already in his punitive damages award.

The Court of Appeal upheld the judgment of the lower court in part, but reduced the quantum of punitive damages to \$100,000, rejecting the extent to which the trial judge had characterized Honda's conduct as outrageous and high handed.

Holding that "the award, inter alia, fails to accord with the fundamental principle of proportionality"⁵⁵, Rosenberg J.A. for the majority of the court went on to say⁵⁶ (*text edited*)

When the erroneous findings of fact are disregarded, the quantum of punitive damages can be supported only on the basis of the following findings:

- The appellant's intent to intimidate and eventually terminate the respondent was for the purpose of depriving him of the accommodation he had earned.....

⁵⁴ Supra note 29 [2005]

⁵⁵ Ibid. [2006] at para.90

⁵⁶ Ibid. at paras. 102-103

- The appellant was aware of its obligation to accommodate and must have known it was wrong to terminate the accommodation without just cause and terminate him as an act of retaliation.
- The appellant knew that the respondent valued his employment and that he was dependent upon it for disability benefits.
- The appellant knew that the respondent was a victim of particular vulnerability because of his precarious medical condition.

I would add to this list Honda's refusal to deal with the respondent's counsel who made a reasonable request to discuss accommodation of the respondent's disability. Thus, while I accept that based on these findings the appellant's conduct was sufficiently outrageous to warrant an award of punitive damages, the quantum needs to be reconsidered.

A majority of the Supreme Court of Canada, however, did not agree with the interpretation of the facts of the Honda case by either of the lower courts and this body reversed the award of both aggravated and punitive damages, as noted earlier (see note 30 above and accompanying text). However, two of the justices of the Supreme Court dissented from the majority decision.

The text of this decision is interesting in that it is unusual for the Supreme Court to overrule two lower courts' judgments on the basis of disagreements about interpretation of facts. Usually such reversals are based on legal errors. Currently the Honda case stands as a prime example of how impugned conduct in the workplace can be variously seen as mentally injurious by some triers of fact and not by others. It will be interesting to observe how future courts weigh the kind of conduct that was at issue in Honda.

Rees v. RCMP, mentioned earlier⁵⁷, is an interesting case in that the court of first instance went to great lengths to elucidate what it believed to be the juridical basis for claims of intentional and negligent infliction of mental suffering. Its elegant juridical reasoning is marred unfortunately by the fact that the decision of the lower court was overruled on appeal. However, the basis for overturning the decision was one of jurisdiction not jurisprudence. The higher court ruled that the case should never have been heard before a judge because it was rightly a workers compensation issue, a conclusion that in itself has caused quite a stir in legal circles for reasons described later. Nonetheless, the reasoning of the lower court is often cited and since it does stand as an interesting legal foray into a seemingly alternate basis of claims for mental suffering it is worth examining in some detail.

The interesting aspect of the legal reasoning in this case is that it draws on the general law of negligence as the basis for the claims in question as opposed to specific tests of the sort described in *Rahemtulla*, *Prinzo* and *Zorn-Smith*, although in the final analysis they may both be found to originate from the same juridical roots.

The facts of the case are briefly as follows. The plaintiff, a guard at an RCMP detachment in Newfoundland, was called upon to give evidence against an officer in connection with his having been intoxicated on duty. The RCMP revealed the statements provided by the plaintiff to the officer in advance of a code of conduct hearing at which he was ultimately

⁵⁷ Supra note 41

exonerated and returned to the detachment where he launched a campaign of harassment and intimidation against the plaintiff. This appears to have continued unabated for the best part of four years during which time the plaintiff became increasingly depressed and suicidal. Eventually he became so distraught that he went on long-term disability. At this point he sued the RCMP for constructive dismissal, intentional infliction of nervous shock and aggravated and punitive damages.

The following is an edited account of the court's reasoning in paragraphs 202-228.

The court began its own analysis by referring to the principles enunciated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 at pp. 751-52 as adopted by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse* [2003] SCC 69.

The first stage of analysis [in *Anns*] demands an inquiry into whether there is sufficiently close relationship [proximity] between the plaintiff and defendant that the defendant owes to the plaintiff a prima facie duty of care. The question of when such a duty arises is one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the neighbour principle in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), at p. 580:

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. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para.24:

The label "proximity"was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be *mindful of the plaintiff's legitimate interests* in conducting his or her affairs. [*emphasis added*]

Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case.

Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

The second stage of the *Anns* test requires the trial judge to consider whether there exist any residual policy considerations that ought to negative or reduce the scope

of the duty or the class of persons to whom it is owed.....this stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair.

The plaintiffs must therefore establish:

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and
3. that there exist no policy reasons to negative or otherwise restrict that duty.

The court concluded that the RCMP knew or should have known that their officer's actions would lead to serious mental harm and that the organization was therefore liable for that harm. The officer himself was found not personally liable because the RCMP condoned and in effect approved his conduct in spite of clear policies that should have caused them to rein him in.

The court found no broad policy considerations that would have made the imposition of the duty of care unwise, unjust or unfair.

While *Rees* has been overruled on other grounds⁵⁸, the dicta within it are instructive in so far as they point to a potentially generic basis for claims of mental injury at work grounded in the law of negligence as opposed to employment law. There is no substantive reason why this leap should not occur although there may be policy reasons that were not identified by the court in *Rees*.

The implications of applying the general law of negligence to the employment relationship are potentially far reaching. Prominent among them is the challenge that the neighbour principle (the foundation of the modern law of negligence) presents to the basic legal paradigm of the employment contract, which is the relationship of Master and Servant⁵⁹.

The idea that all employees of an organization, regardless of status, role or responsibility are at least for certain purposes neighbours in the sense described by Lord Atkin in *Donoghue v. Stevenson*⁶⁰ is potentially a radical challenge to the master and servant

⁵⁸ *Rees v. RCMP* [2005] NLCA 15; 246 Nfld. & PEIR 79

⁵⁹ See: M.R. Freedland, *The Contract of Employment* (Oxford:Clarendon Press,1976)

⁶⁰ *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.)

paradigm which is based on power imbalances, inequality of rights and control of one party by another.

The application of the neighbour principle to employment law, seriously undertaken, implies that, for purposes of protecting mental health, all employees from the CEO to the janitor owe one another the same generic duty of care to avoid doing reasonably foreseeable harm to one another.

Perhaps these rather utopian thoughts need to be contextualized in relation to some sobering legal decisions concerning the limits currently prescribed by the courts with regard to the extent of the duty to provide a psychologically safe workplace.

For example, in *Evans v. Listel*⁶¹, the Supreme Court of British Columbia was called upon to consider the limits of the employer's duty to treat employees with civility, decency, respect and dignity. In this case, the plaintiff claimed that his employer should relieve him of his high stress levels experienced as a result of not having sufficient autonomy at work. He asserted that he suffered from bipolar disorder, a condition exacerbated by this type of job stress, and that his employer's refusal to provide the requisite conditions of work in accommodation of this disorder amounted to constructive dismissal.

The court disagreed, holding, "I am not persuaded that the changes Mr. Evans wished to obtain were the sorts of changes an employer must make to accommodate an employee's disability. No case was cited in support of the proposition that an employer must give an employee more authority and decision-making scope in order to relieve the employee's stress, nor change the reporting structure to avoid a personality conflict between an employee and his direct supervisor."⁶²

Furthermore, the failure to assign such autonomy does not constitute a failure to treat an employee "with civility, decency, respect and dignity" as required by the test in *Lloyd v. Imperial Parking Ltd*⁶³.

While the decision in *Evans* may strike us as falling well within the bounds of cultural acceptability, it should be noted that in the UK standards with some legal valence do exist within the context of occupational health and safety that can be used to address the issue of autonomy at work. This subject is pursued in a later section of this paper but for the present it should be noted that claims of mental injury resulting from not having enough autonomy at work may not be as outlandish as they sound under certain conditions.

A further limit to the duty to provide a psychologically safe work environment is found in *Alibhai v. Royal Bank*⁶⁴.

In this case intentional infliction of mental suffering was held not to include comments made in the course of job performance evaluations provided in the context of a supplying a reference when the remarks were not motivated by malice but rather arose from a legal,

⁶¹ *Evans v. Listel Canada Ltd.* [2007] BCSC 299

⁶² *Ibid.* at para.72

⁶³ *Ibid.* at para. 69

⁶⁴ *Alibhai v. Royal Bank* [2004] BCSC 1360

moral or social duty to make a statement to a person who has a corresponding duty to receive it⁶⁵.

Candid comments made in good faith in the context of providing job references were in this case covered by the “doctrine of qualified privilege”.

Also, the mere experience of humiliation, anxiety, anger, fear, sleep loss, inability to concentrate, increased heart rate and shortness of breath are insufficient to establish intentional infliction of mental suffering in the context of dismissal or job performance evaluations if no bad faith can be found in the behaviour of the employer. The tort requires flagrant and outrageous behaviour, calculated to produce harm. The establishment of emotional distress is in itself insufficient as proof of a visible and provable illness if it cannot be attributed to the conduct of the employer.

The court relied on *Rahemtulla*⁶⁶ as authority for this test.

⁶⁵ Ibid. at para.29

⁶⁶ Supra note 31

Collective Bargaining

Employees in unionized workplaces who claim that their mental or psychological health has been damaged have certain remedies under provincial legislation dealing with Labour Relations. In practice, this translates into finding some basis within a collective agreement that allows an employee to file a grievance against his or her employer.

The jurisprudence in this area reached a watershed in the recent case of *TTC and the Amalgamated Transit Union*⁶⁷. The importance of this case is due in no small measure to the careful reasoning of a veteran and widely respected arbitrator, Owen Shime Q.C..

Essentially, this case is authority for the view that management must exercise its rights to control the workplace (incorporated into every collective agreement) subject to a standard that ensures the psychological safety of all employees.

TTC is a case in which ongoing abuse and harassment by a supervisor were found to have led directly to a major depressive disorder in an employee. The disorder was characterized by “low energy, poor communications, negative self image [and] poor sleep patterns” In addition, the employee became “tearful and anxious”. The disorder required medical leave.

Arbitrator Shime said:

I determine Mr. Stina was publicly humiliated on a regular and continual basis. This form of humiliation was akin to placing him in the public stocks. It isolated him from his co-workers, humiliated him publicly and stripped him of his dignity to the point where he felt “like I was a nobody”. The treatment by Mr. Zuccaro also negatively affected his relationship with other employees and negatively affected his sense of identity, self worth and his health, including his emotional and psychological well-being.

The arbitrator concluded that both Mr. Zuccaro and the Commission were responsible for the manner in which the grievor was treated.

In particular, the employer was held responsible for not having done anything to rectify, and being callously indifferent to an obvious problem.

The TTC was told to make sure that the supervisor and the employee never came into contact and that if there was a danger of this happening, then the supervisor should be the one to be moved.

In delivering his decision the arbitrator held the employer to a high standard of conduct. Essentially, he established a new beachhead for the definition of abuse and harassment.

⁶⁷ *TTC and Amalgamated Transit Union* [2005] 132 LAC 4th 225.

In Arbitrator Shime's definition⁶⁸,

Abuse includes physical or mental maltreatment and the improper use of power. It also includes departure from reasonable conduct.

Harassment includes words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands and other unpleasantness. A single act, which has a harmful effect, may also constitute harassment.

The importance of the TTC case lies in the basis upon which the arbitrator interpreted the collective agreement and claimed jurisdiction to deal with the grievance in question which involved harassment and abuse by a supervisor. In essence, the TTC case creates a new line in the sand with regard to how management rights may be exercised at least in so far as they impinge upon the psychological well-being and safety of employees

Arbitrator Shime developed two main arguments in this respect. They are of such significance and are so well supported juridically that they deserve detailed treatment here.

1. He deemed that the collective agreement provisions dealing with health and safety serve to limit the exercise of management rights by requiring that they be exercised in the interests of employees' physical and psychological safety.

He did this as follows:

After reading the collective agreement in the manner suggested by Tarnopolsky J.A [*in Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43 (1990) 69 D.L.R. (4th) 268 (C.A.)*], I determine that Section 39 [of the collective agreement], establishing a Joint Health and Safety Committee to monitor and ensure the safety of employees, coupled with the further proviso suggesting employees consult their union or O.H.S. representative if they have concerns pertaining to safety, implies the management rights clause be exercised with a view to the safety of employees. *I further determine that the use of the word "safety" in the collective agreement embraces both an employee's physical, as well as the employee's psychological safety. Accordingly, I determine that a supervisor who abuses his/her authority is acting contrary to an implied term in the management rights clause that requires the supervisor to ensure the safety of the employee.[emphasis added]*

I also determine that Section 39, standing alone, implies a concern by the Commission and the Union for the safety of the employees, which again includes

⁶⁸ This definition in many ways echoes that to be found in Quebec's amendments to its Employment Standards Act dealing with harassment. See *infra* under "legislation".

psychological safety. *Accordingly, a supervisor who acts in a manner that jeopardizes the psychological safety of the employee is acting contrary to the collective agreement.*[emphasis added]

In my view, the *Occupational Health and Safety Act*, being a matter of public policy, requires the Commission to exercise its managerial functions in accordance with the legislation and particularly Section 27(2)(c) of the *Act*, which requires a supervisor to take “every reasonable precaution. . . for the protection of a worker.” In effect, a supervisor’s managerial authority is circumscribed by operation of the legislation. *Accordingly, I determine when a supervisor exercises his/her authority under the collective agreement, it is an implied term that the supervisor do so in a manner that is consistent with the legislation.*”[emphasis added]

2. Arbitrator Shime demonstrated why he believed that the collective agreement should be read in its entirety as requiring an overall duty of reasonableness on the part of both parties.

He did this as follows:

.....it is my respectful view that the decision of Tarnopolsky J.A. for the Court in *Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43 (1990) 69 D.L.R. (4th) 268 (C.A.)*.....has acknowledged a place for creativity and an overall notion of reasonableness and has determined there is an implied term of reasonable contract administration. Since most of management’s functions and responsibilities derive from the management rights clause, any notion of reasonable contract administration would have minimal relevance if it did not apply to the management rights provision.

.....The management rights clause [in a collective agreement] simply delineates the area of management’s functions and responsibilities. It is usual to find the word “exclusive”[parentheses added] prefacing the management rights clause. That adjective is inserted, out of an abundance of caution, to ensure the employer’s jurisdiction to manage its operations and the workforce, and prevents the union’s and employees’ encroachment in areas of concern to management, unless there is specific language to the contrary. In effect, the term exclusive is a jurisdictional term which delineates management’s functions and outlines the “where” of management’s responsibilities. With the greatest of respect, I am unable to conclude that a management rights clause in collective agreements generally, or in this collective agreement specifically, substantively defines “how” management is to exercise its functions, and *I determine that normative terms may be implied to management’s functions under the management rights clause. More particularly, I determine the direction of the workforce must be exercised*

in a reasonable manner or alternatively in a non-abusive and non-harassing manner.[emphasis added]

Arbitrator Shime distinguished two earlier cases in which the courts had taken a more restrictive view of arbitral powers to imply terms into collective agreements. He said:

It is apparent from reading both of those cases, the arbitrators implied terms that were excessive or of too high a standard given the specific management rights clause. More specifically... implied terms of “fairly and without discrimination” and “cogent” and “convincing” appeared to be overreaching by the arbitrators. However, those cases do not detract from the more moderate standard of reasonable contract administration, both referred to by Tarnopolsky J.A. and also inherent in the *Polymer* decision of the Supreme Court of Canada⁶⁹. *On that basis, I determine that a supervisor who abuses his/her authority and abuses and harasses an employee is not administering the management rights clause in a reasonable manner and is in violation of the collective agreement.[emphasis added]*

In another slightly earlier case, even the right to dismiss for cause was challenged when an arbitrator found that the employer itself contributed to the reasons for dismissal by subjecting the employee in question to excessive job stress.

In *Children’s Aid Society*⁷⁰, Arbitrator Bendel held that even employee dishonesty and dereliction of duty can be mitigated by the fact that the employer put the individual in question under such pressure that she made poor judgements and lost perspective.

In this case, the grievor was a 24 year-old social worker. On her first day of work she was assigned over 30 Crown Ward cases, which would have been a heavy caseload even for an experienced social worker. The provincial standard was 22 to 24 such files per social worker. She had no prior exposure to such files. Moreover, none of the files she was assigned was in compliance with the legislation at the time, in that they lacked Plans of Care and other documents that were supposed to have been prepared. The grievor was surprised at the volume of work she received and had to put in a lot of overtime to keep up.

At the same time as fixing deficiencies in the file documentation (which she was ordered to do) she was having to respond to an unusually large number of crises affecting her wards, such as breakdowns in foster home arrangements, court appearances by the wards, etc.

⁶⁹ *Polymer Corp. and Oil, Chemical and Atomic Workers’ International Union, Local 16-14 [1962] 33 D.L.R. (2d) 124*

⁷⁰ *The Children’s Aid Society of Ottawa-Carleton and OPSEU [2003] O.L.A.A. No. 32*

The grievor eventually fell behind with her duties and engaged in some petty dishonesty involving falsification of travel claims for which she was dismissed.

In grieving the dismissal, the union claimed on her behalf that she was carrying an unusually heavy workload for such a new employee, which led to her feeling overwhelmed.

She had a new supervisor during this period, who exercised minimal supervision over her and did not realize the pressure on her.

In addition, although the employer was not fully informed of the fact at the time, she was suffering from serious medical conditions, which led her to become depressed.

She sought professional help for her depression and was prescribed medications, from the side effects of which she became confused and forgetful. The union claimed further that the dereliction of duty and allegations of dishonesty etc. were largely attributable to her overwork, confusion and forgetfulness, as well as to her misguided attempts to cover up her shortcomings in order to save herself from embarrassment.

The arbitrator accepted the union's claim in part, saying,

I view the grievor's misconduct in this case as being closely related to the emotional state she was in as a result of her workload and lack of support.

Although I have not been satisfied that the health concerns she relied on have been proven, the evidence as a whole tends to confirm that she was 'a total mess' (to use her phrase) in the summer and fall of 2001.

I do not regard the lies she told the employer as evidence that she is not a person who can be trusted. Rather I view them as a product of her feeling of being overwhelmed. While this explanation does not excuse her conduct it does tend to negate the employer's argument that the employment relationship is not salvageable.

In these circumstances I am satisfied that the discharge should be set aside. It would not be appropriate, however, to award her compensation for lost salary and benefits.

While the jurisprudence in *Children's Aid Society* is sparse, it is clear that the arbitrator intended to subject the exercise of management rights to the requirement that it should not be knowingly and negligently injurious to employee mental health as a result of excessive job stress and lack of support. It is in effect a similar message to the one we see in the TTC case, albeit two years earlier and without the supportive juridical reasoning found in that case.

It is currently problematic how far tribunals will go in regarding excessive work pressure as a source of employee stress for which an employer may become in some sense liable. One limit to the trend is found in *Trois Rivières Hospital*⁷¹.

In this case, the Supreme Court of Canada refused to review a Quebec Court of Appeal decision that had quashed a lower court's ruling upholding an arbitrator's directive to an employer requiring it to decrease the excessive workload of dietitians and nutritionists by hiring more staff.

⁷¹ *Centre hospitalier régional de Trois Rivières v. Syndicat professionnel des diététistes et nutritionnistes du Québec* [2005] QCCA 278

The employer, in response to an award by Arbitrator Roy allowing the union's grievance that their workload was excessive, had already tried to reduce demand on union employees by issuing directives to doctors to prioritize their referrals and to the staff to work within their regular hours and take scheduled breaks.

The union said that this was inadequate because their professional code required them to treat all comers.

The collective agreement provided that the union could go back to the arbitrator if it felt the employer's actions were insufficient. It did this, and the arbitrator ordered the hospital to hire three more staff for the nutrition clinic. If implemented by the employer, this order would have violated provincial budgetary directives.

The employer applied for judicial review to the Quebec Superior Court who refused the application and then to the Quebec Court of Appeal who allowed it.

The Quebec Court of Appeal held that the QSC had erred and that the arbitrator had overreached himself. The Supreme Court declined to review the Quebec Court of Appeal's reasoning that the arbitrator was not empowered to fashion remedies that limited execution of the employer's duty to comply with provincial legislation requiring hospitals to balance their budgets.

The demands created by Quebec's provincial restrictions were found to be unfortunate and to have led to employee frustration and anxiety but it was found to be beyond the powers of an arbitrator to fix problems of this nature.

The hospital had not required staff to meet the whole of the patient demand and said that staff members were only to deal with cases that could be managed within working hours. Excessive demand does not automatically lead to excessive workload. This only happens when employees are expected by the employer to meet the whole of the demand. The fact that the nutritionists' code of ethics requires them to meet the whole of the demand does not permit the arbitrator to constrain the employer to ensure this outcome by violating provincial budgetary directives. Essentially the Quebec Court of Appeal agreed with the employer's argument that in this case, staff members were the authors of their own difficulties since these did not result from the employer's demands but rather from the dictates of their own professional code of ethics.

Essentially, *Trois Rivières* prescribes limits to an arbitrator's powers to protect the mental health of employees from excessive and stressful job demands if the source of those demands is not the employer, but rather a code of ethics unique to a particular professional association. In this case the employer had done everything within its own power and within the framework of provincial budgetary directives to alleviate stress on affected staff.

In conclusion, it appears that arbitrators currently assert wide remedial powers to limit the exercise of management rights if they impinge upon the psychological safety of employees contrary to accepted social standards of fairness and reasonableness. The source of these powers is claimed to lie in principles of reasonable contract administration and in the assertion that every collective agreement includes implied terms requiring that management exercise its rights according to legislative imperatives to provide a mentally and physically safe workplace.

However, arbitral powers to constrain the exercise of management rights are still limited by the requirement that they defer to employers who have shown good faith in their efforts to protect the psychological safety of employees.

Moreover, arbitral powers must not be exercised in contravention of public *financial* policy even when such policy limits the discretion of employers to relieve employees of excessive, stress-inducing job demands.

Conversely, however, arbitrators may indirectly enforce public *health and safety* policy on behalf of employees when they imply its directives into collective agreements, as in the case of the TTC⁷².

⁷² Supra note 68

Legislation

Various types of legislation in Canada provide remedies to, or on behalf of employees who claim that they have suffered mental harm as a result of acts and omissions attributed to their employers.

Most relevant are those forms of legislation pertaining to Human Rights, Occupational Health and Safety, Employment Standards and Workers' Compensation. While the mandates of the first two forms of legislation are relatively proscribed, the last two are more elastic in terms of the kinds of harm they contemplate. And while there are important developments in all four areas, those in Occupational Health and Safety and Employment Standards are perhaps the most striking.

That said, it is clear that each jurisdiction in Canada approaches the issue of harm to employee mental health in different ways in terms of how they use legislative instruments. Some, such as Saskatchewan, see the issue of harm to employee mental health as another aspect of occupational health and safety. Quebec, on the other hand, has chosen to frame the issue for certain purposes in the context of changes to the Employment Standards Act of that province. Ontario is embarking on major changes to the scope and reach of Human Rights legislation that will allow the Commission to make systemic orders further affecting the exercise of management rights. In addition that province has created new provisions in the Occupational Health and Safety Act to better deal with the issue of violence at work.

Workers' Compensation is another legal fault line in many jurisdictions, as regulators and tribunals struggle with the limits of compensation for chronic mental stress.

Increasingly there is overlap and sometimes tension between the mandates of the four types of legislation and with Common Law and Collective Bargaining Law.

Commentary on each of these types of legislation follows.

Human Rights

Every Canadian jurisdiction has some version of a human rights act or code. The purpose of this legislation is to declare the unacceptability of, and to provide remedies for certain proscribed forms of conduct involving discrimination and harassment against protected societal groups.

The juridical and societal basis for such legislation is the concept of "equality rights", a notion that has gained in stature as a result of the Charter of Rights and Freedoms.

Grounds for prohibited conduct include discrimination and harassment based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same sex partnership status, family status or disability.

Inherent in the law of human rights as it bears upon the workplace is a limited but still extensive duty to accommodate employees with disabilities and those who have legitimate special interests associated with gender, culture, religion and age.

The reach of this legislation extends to most types of public institution and corporate entities. This is a complex and vexed area of the law that is evolving rapidly across the country.

Currently there is significant overlap between remedies available under Human Rights legislation, Common Law, Collective Bargaining Law and potentially other statutes.

However, in relation to the focus of this paper, the relevance of human rights law lies in its provision of remedies for those employees who claim successfully that they have been discriminated against or harassed at work to the point at which it has caused them identifiable mental harm and/ or economic loss. These losses may be incurred in the normal course of employment and include those associated with failure to accommodate special interests.

Under certain circumstances, such claims can be launched under other branches of law also, a fact that can present claimants and counsel with dilemmas in terms of the likelihood of success and quantum of damages or other remedies.

Remedies extend to orders that require employers to modify their management policies and practices to accommodate those with disabilities up to a reasonable standard, or to clean up an environment poisoned by discrimination and harassment. As noted above, Ontario is in the throes of extending the scope and reach of its Human Rights Act to allow the commission to issue orders that are intended to better address systemic issues such as “poisoned environments”⁷³.

The specifics of the process according to which complaints or applications must be made vary from one jurisdiction to another, making generalizations difficult. However, there are some broad observations that can be made, which are relevant to the project at hand.

1. Employers are responsible for the maintenance of workplace environments that are free of, and not poisoned by discriminatory policies and practices.

In relation to this duty, the Supreme Court of Canada per La Forest J. in *Robichaud*⁷⁴ said, in the context of the *Canadian Human Rights Act*⁷⁵,

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, the motives or intentions of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. Theories of employer liability developed in the context of criminal or quasi-criminal conduct are therefore completely beside the point as being fault oriented. The liability of an employer, too, ought not be based on vicarious liability, as developed under the law of tort, which was confined to activities done within the confines of a person's job, but rather in terms of the purpose of the Act. The remedial objectives of the Act would be stultified if its remedies, especially those set out in ss. 41 and 42, were not available as against the employer. The Act is concerned with the effects of discrimination rather than its causes (or motivations): only an employer can remedy undesirable effects and only an employer can provide the most important remedy--a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, supports making the Act's carefully crafted remedies effective. If the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the

⁷³ Bill 107, an amendment to *Ontario Human Rights Code, R.S.O. 1990, c.19* to become effective June 2008

⁷⁴ *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84

⁷⁵ *Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 3, 7(a), (b), 41(2), (3)*.

problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.

The remedial powers referred to in this case are typical of such powers in other acts across the country. Here, under s.41 of the *Canadian Human Rights Act*⁷⁶, the remedial powers were as follows:

s.41(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated....it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate: *[text edited]*

(a) that such person cease such discriminatory practice and.... take measures, including adoption of a special program, plan or arrangement....to prevent the same or a similar practice occurring in the future;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

s.41(3) *In addition* to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice *wilfully or recklessly*, or

⁷⁶ Ibid.

(b) the victim of the discriminatory practice has *suffered in respect of feelings or self-respect* as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine. [*Emphasis added.*]

Robichaud spans the years 1983-1987.

In the first appeal from the original adjudicator's decision⁷⁷, the Canadian Human Rights Commission Review Tribunal in 1983 approved the views of Adjudicator Shime in *Flaming Steer Steak House Tavern*⁷⁸.

Arbitrator Shime clearly states that gender based insults and taunting may reasonably be perceived to create *a negative, psychological and emotional work environment*.

There is no reason why the law, which reaches into the work-place so as to protect the work environment from physical or chemical pollution or extremes of temperature ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.

The Review Tribunal also cited with approval the "poisoned workplace" doctrine that appears to have originated in American jurisprudence, concluding that the defendant Brennan was:

guilty of sexual harassment on two grounds:

- 1) By reason of his failure to rebut the prima facie case established by Mrs. Robichaud;
- 2) *By reason of his creation of a poisoned work environment; [emphasis added]*

both contrary to the *Canadian Human Rights Act, Section 7(b)*.

⁷⁷ *Robichaud v. Canada [Brennan]* [1983] 4 CHRR D/1272

⁷⁸ *Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc.* [1980], Ontario Board of Inquiry

Adjudicator Shime's views as stated above were approved by the Supreme Court in the *Jantzen* case discussed below, thus essentially importing the general concept of the poisoned environment into the jurisprudence of harassment and discrimination in the workplace.

2. Certain forms of harassment may constitute discrimination for purposes of Human Rights Statutes.

In the Supreme Court case of *Jantzen*⁷⁹, the court held that

Sexual harassment is a form of sex discrimination. Sexual harassment in the workplace is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. By requiring an employee, male or female, to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. Here, the sexual harassment suffered by the appellants constituted sex discrimination for it was a practice or attitude which had the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.

Later in the decision the court cited with approval a series of American cases in which the creation of a hostile work environment was seen as the result of employers allowing harassment to go unchecked. Employers are clearly responsible at law for the creation and remediation of such environments.

3. The general duty to provide a workplace environment free of discrimination is limited by the doctrine of *bona fide occupational requirement*. [BFOR]

The BFOR doctrine has undergone various modifications since its introduction but its present form is defined by the Supreme Court's *Meiorin* decision⁸⁰.

Basically the doctrine allows employers to defend themselves against complaints of discrimination if they can demonstrate that their impugned practices or policies, appearing to limit the rights of protected groups, meet the criteria for a BFOR.

In *Meiorin*, the facts were that the British Columbia government had established minimum physical fitness standards for its forest firefighters. One of the standards was an aerobic standard. The claimant, a female firefighter who had in the past performed her work satisfactorily, failed to meet the aerobic standard after four attempts and was

⁷⁹ *Jantzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252]

⁸⁰ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (the *Meiorin* case)

dismissed. The claimant's union brought a grievance on her behalf. In modifying the BFOR tests used up until that time, the court, per McLachlin J. held that⁸¹:

A three-step test should be adopted for determining whether an employer has established, on a balance of probabilities, that a prima facie discriminatory standard is a bona fide occupational requirement (BFOR).

First, the employer must show that it *adopted the standard for a purpose rationally connected to the performance of the job*. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose.

Second, the employer must establish that it *adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose*.

Third, the employer must establish that *the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose*. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”

[emphasis added]

The *Meiorin* test applies to accommodation for both physical and mental disabilities.

A current and not atypical application of the *Meiorin* test appears in *McDonald's Restaurants*⁸².

Here, the B.C. Human Rights Tribunal held that McDonald's breached its duty to accommodate when it fired a dedicated 23-year service employee who developed a skin condition [a disability] that prevented her from complying with its hourly hand-washing policy.

However, *McDonalds Restaurants* is as much a case about *mental* suffering and economic loss resulting from the employer's failure to accommodate as it is about *physical* disability, as described below.

⁸¹ summarized from *Meiorin* para.54 supra note 81

⁸² *Beena Datt v. McDonald's Restaurants of Canada Ltd.* [2007] B.C.H.R.T.D. No.324.

The complainant alleged before the Human Rights Tribunal that McDonald's had discriminated against her on the basis of physical disability contrary to s.13 of the B.C. *Human Rights Code*. She claimed further that she had suffered loss of dignity and self-respect as a result of the employer's conduct.

McDonald's satisfied the first two requirements of the *Meiorin* test for determining whether a *prima facie* discriminatory standard could be justified as a *bona fide occupational requirement*.

The issue in this case therefore focused on the third part of the *Meiorin* test, that is, whether McDonald's could demonstrate that it was impossible to accommodate the complainant's hand-washing disability without suffering undue hardship.

The employer acknowledged that the complainant's disability was a factor in her termination, but argued that the complainant's discharge was not discriminatory because its hand-washing policy was a *bona fide occupational requirement* that, if not strictly enforced, would result in health risks to the public. The duty to accommodate was fulfilled, McDonald's maintained, when Great West Life, acting as its agent, worked in conjunction with the complainant and her doctors to attempt a return to work on three separate occasions, none of which proved successful.

Given that McDonald's took no steps to accommodate the complainant, and indeed did not even meet with her until the decision to terminate her employment had been made⁸³, the Tribunal awarded \$25,000 for loss of dignity and self-respect in addition to another \$25,000 in general damages.

4. 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 at the time of hiring or before.

In a recent Ontario Human Rights Tribunal decision⁸⁴, the right of persons with a *mental* health disability to be appropriately accommodated in the workplace under Ontario's Human Rights Code was upheld, in spite of the complainant's failure to advise his employer that he was living with a bipolar disorder. The decision is under appeal.

The Ontario Human Rights Commission investigated and litigated a complaint filed by Mr. Lane regarding his dismissal from ADGA Group Consultants Inc., a company involved in contract government information technology services.

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

⁸³ See also: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] S.C.J. No. 73 (QL) (the *Grismer* case)

⁸⁴ *Lane v. ADGA Group Consultants Inc. of Ottawa* [2007] O.H.R.T.D. No. 34

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 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 systemic⁸⁵ 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."

ADGA is appealing the decision to Divisional Court. An issue in this case on appeal may be the fact that the employer was not informed prior to hiring that the employee had a mental illness and therefore had no chance to demonstrate a BFOR in connection with what appears to be a safety sensitive job.

⁸⁵ Use of this language may adumbrate the forthcoming broader powers of the Ontario Human Rights Commission under Bill 107 with regard to systemic remedies. Supra note 74.

Occupational Health and Safety

The broad purpose of occupational health and safety legislation is to ensure that the workplace is managed and directed in such a way as to minimize job-related risks to the wellbeing of employees.

A contemporary issue is the extent of the duty to provide a safe system of work within such legislative frameworks.

For purposes of this paper, the issue is whether or to what extent Occupational Health and Safety statutes should embrace risks to mental or psychological wellbeing. Again, each jurisdiction in Canada has a somewhat different answer to this question. The most striking developments at present are in Saskatchewan⁸⁶.

Saskatchewan is so far unique among Canadian provinces in that the government has enacted amendments to the Occupational Health and Safety regime that both protect employees from harassment and place a general duty on employers to protect the mental health of employees, as follows:

- s. 2 (p) “occupational health and safety” means:
 - (i) the promotion and maintenance of the highest degree of physical, *mental* and social well-being of workers;

- s. 3 Every employer shall:
 - (c) ensure, in so far as is reasonably practicable, that the employer’s workers are not exposed to *harassment* with respect to any matter or circumstance arising out of the workers’ employment...[emphasis added]

There is a corresponding specific duty on workers to refrain from causing or participating in the harassment of another worker⁸⁷ and a more general duty to take reasonable care to protect “the health and safety of other workers who may be affected by his or her acts or omissions”⁸⁸.

The definition of harassment⁸⁹ is “any inappropriate conduct, comment, display, action or gesture by a person:

- (i) that either:
 - (A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or
 - (B) adversely affects the worker’s psychological or physical wellbeing and that the person knows or ought to reasonably know would cause a worker to be humiliated or intimidated; and

⁸⁶ *Occupational Health and Safety Act, 1993, S.S. 1993, c. 0-1.1 as amended by the Statutes of Saskatchewan, 1996, c.19; 2001, c.25 and 2007, c.34*

⁸⁷ *Ibid.* s. 4b

⁸⁸ *Ibid.* s. 4a

⁸⁹ *Ibid.* s.2(1)l

(ii) that constitutes a threat to the health and safety of the worker...”

Some practical questions surrounding the Saskatchewan legislation include:

1. the extent to which, if any, OHS committees’ duties to participate in the identification and control of health and safety hazards under s.19(a) include involvement in the assessment of psychosocial hazards including but not limited to harassment
2. whether the right to refuse unsafe work under s.23 includes refusal to work in conditions that present a clear threat to psychological safety⁹⁰.
3. whether under ss.44 and 45 a code of practice will be issued by the Director dealing with threats to mental health and safety. While violation of such a code is declared under s.45(3) not to be an offence as such, it may be admitted in evidence in charges involving breach of a related regulation. This language may reflect a similar situation in the UK where “management standards” for the regulation of workplace stress appear to enjoy the same status as “codes of practice” in Saskatchewan. The experience of this province and of the UK may be helpful going forward as Canadians seek to determine how regulatory they want to be in controlling work-related hazards to employee mental health.
4. the circumstances under which a complainant could or would activate either the OHS Act or the relevant Human Rights Code when the impugned conduct is harassment based on the status grounds of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin.

The debates recorded in the Saskatchewan Hansard⁹¹ focused on the regulation of the new legislative regime. Specifically, some members raised concerns that the legislation was “telling businesses what to do”, and amounted to excessive government intervention. These members expressed fears that if OHS legislation was too stringent in Saskatchewan, businesses would “forum shop” and the province would lose industry. The members in favour of the legislation saw psychological harassment as an important health and safety concern, and emphasized the importance of employees having legal recourse if they are subjected to harassment.

The anti-legislation side also put forward the prospect that this legislation would put too heavy an onus on employers, and would lead employees to feel that they had no onus to ensure their own personal safety⁹².

Although the legislation provides for general protection of employee mental health, the debates indicated that members envision this legislation being used primarily to combat harassment.

⁹⁰ see infra: Ontario’s Bill 29 that would allow refusal to work under conditions of harassment.

⁹¹ Major debates: April 26, 2007 pp 1416-1425.

see:<http://www.legassembly.sk.ca/Hansard/25L3S/070426Hansard.pdf#page=17>

⁹² As we see later in chapter 3, a similar debate occurred in relation to the EU legislation, concerning the respective onus of the employer and the employee; for example, the debate around the “in so far as possible” caveat included in the UK legislation that appears to leave a door open to employers to plead the equivalent of undue hardship.

In Nova Scotia an amendment to the Occupational Health and Safety Act (Workplace Bullying) went to a second reading in the legislature on May 2005, but it died when the government was defeated.

In Manitoba, current OHS legislation also contains provisions concerning harassment in the workplace, as follows⁹³. However, these provisions are more limited than those in the Saskatchewan amendments since they lack a general prohibition against conduct that a reasonable person under the circumstances would or should foresee will result in mental harm.

The Lieutenant Governor in Council may make regulations...respecting measures that employers shall take to prevent **harassment** in the workplace⁹⁴.

"harassment" means any objectionable conduct, comment or display by a person that

- (a) is directed at a worker in a workplace;
- (b) is made on the basis of race, creed, religion, colour, sex, sexual orientation, genderdetermined characteristics, political belief, political association or political activity, marital status, family status, source of income, disability, physical size or weight, age, nationality, ancestry or place of origin; and
- (c) creates a risk to the health of the worker. ("harcèlement")⁹⁵

The Manitoba Act also includes fairly detailed directives on the development, promulgation and implementation of *harassment prevention policies*⁹⁶.

It is interesting to note that under s. the employer's harassment prevention policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law⁹⁷. This means that potentially a complainant could file charges under the OHS Act and a complaint under the relevant provisions of the Human Rights Code of Manitoba.

The introduction of the legislation and regulations noted above does not appear to have engendered much controversy⁹⁸ save for some concerns raised about its potentially negative impact on affirmative action and equity initiatives (employers wanting to keep potential victims out of the workplace). However, there is a sense from the debates that the legislation adequately addresses these issues.

⁹³ *The Workplace Safety and Health Act, C.C.S.M. c. W210*

⁹⁴ *Ibid.* s.18(1)

⁹⁵ *Workplace Safety and Health Regulation, Regulation 217/2006*

⁹⁶ *Supra* note 94, sections 10.1(1-2),10.2(1-2), 10.3

⁹⁷ *Ibid.* 10.2(1)(f)

⁹⁸ See: debates in the Legislature:

<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/26a.pdf#page=7>

Note that in both Saskatchewan and Manitoba, the provisions of the OHS Acts dealing with harassment overlap with the content of Human Rights legislation in so far as they both deal, albeit in somewhat different ways, with the rights of protected status groups. Manitoba, as noted above, specifically opens the door to the pursuit of legal remedies through more than one avenue.

The remedies available under each form of legislation, however, are quite different.

The purpose of the remedial sections of Human Rights statutes is primarily to *compensate, in financial terms, individuals* who have been wronged and secondly to amend that conduct of employers which may lead to individual abuses of employees or categories of employees.

The purpose of the remedial sections of OHS legislation, on the other hand, is to *penalize employers* that violate provisions of the Act through criminal prosecution. In such cases, wronged individuals are not awarded damages but their employers are fined or, in extreme cases, imprisoned.

For example, under the Saskatchewan Act, a person in violation of the Act's provisions (other than those dealing with death or serious injury) is liable on a first offence to a fine not exceeding \$10,000 for a single instance and to a further fine not exceeding \$1000 per day for continuing offences. A second or subsequent offence invites corresponding fines of \$20,000 and \$2000 per day⁹⁹.

In Ontario, various attempts have been made to address harassment through amendments to that province's Occupational Health and Safety Act. Currently, Bill 29, another such proposed amendment, is before the House¹⁰⁰.

Debate in the Legislature included reference to the Lori Dupont Inquest and its recommendations, as follows per the comments of Ms. Andrea Horwath¹⁰¹:

Members of this chamber will know that the Lori Dupont inquest came up with a number of recommendations. Not surprisingly, one of them was this very action that you see to amend the Occupational Health and Safety Act to make it possible for workers to refuse an unsafe work environment when that work environment includes harassment, bullying and other kinds of violence in the workplace.

⁹⁹ Supra note 87, s.58 (4)

¹⁰⁰ Occupational Health and Safety Amendment Act (Harassment and Violence), 2007. First reading: December 13, 2007, carried.

¹⁰¹ http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b029.pdf

Unfortunately, this bill has been here many times before, but the government has not chosen to move on it. It's not the first time it has been recommended by a coroner's inquest. Women are dying at work and others are dying at work as a result of this bullying and violence. It needs to stop. We need to pass this bill.

As a general observation, it is notable that Canadian legislatures are focusing largely on harassment¹⁰² as the major threat to mental health in the context of Occupational Health and Safety legislation.

While harassment is one important cause of harms to employee mental health, it is still a fairly overt and obvious form of abuse. Yet to be considered in Canada are provisions that would address conditions of work known to promote mental distress and disorder emanating from poor or ill-considered management practices leading to excessive demands, inadequate influence over one's work and lack of support. These conditions of work have been targeted by legislatures in the UK and Europe. The experience of these jurisdictions will be examined in a later section of this paper.

¹⁰² There is also a focus on violence, but this does not represent the same dilemmas for policy makers as harassment and bullying because violence has such obvious physical consequences in addition to whatever mental sequelae there might be.

Employment Standards

Quebec is unique among Canadian jurisdictions in that this province has elected to deal with harassment under the auspices of its Employment Standards Act as amended in 2002 and 2004¹⁰³.

The legislation is based on a French model implemented in 2002.

For the purposes of this Act, “psychological harassment” means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee¹⁰⁴.

However, a single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment¹⁰⁵.

According to s.81.19, every employee has a right to a work environment free from psychological harassment.

Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.

The Act applies directly to non-unionized employees and to unionized employees, as follows. The provisions of sections 81.18, 81.19, 123.7, 123.15 and 123.16, with the necessary modifications, are deemed to be an integral part of every collective agreement. An employee covered by such an agreement must exercise the remedies provided for in the agreement. Normally this would refer to the grievance procedure but at any time before the case is taken under advisement, a joint application may be made by the parties to such an agreement to the Minister for the appointment of a person to act as a mediator.

The provisions noted above are also deemed to form part of the conditions of employment of every employee appointed under the *Public Service Act*¹⁰⁶ who is not governed by a collective agreement. Such an employee must exercise the applicable recourse before the Commission de la fonction publique according to the rules of procedure established pursuant to that Act.

Penalties for breach of s.81.19 under s.123.15 include: reinstatement, lost wages, directives to employers to abate psychological hazards, “punitive and moral damages” up to \$10,000 per case, indemnity for loss of employment and requiring employers to pay for psychological (counselling) support for employees for a “reasonable period”.

The Quebec legislation, then, provides a wider array of remedies than the Saskatchewan Occupational Health and Safety Act in that it allows for the collection of personal

¹⁰³ *An Act Respecting Labour Standards 2002, c. 80, s. 47*. The harassment provisions appear to have come into force as of June 1st 2004.

¹⁰⁴ *Ibid.* s.81.18

¹⁰⁵ *Ibid.*

¹⁰⁶ c. F-3.1.1

damages as well as for penalties levied against employers. The Act is essentially a hybrid in so far as it contains both criminal and civil remedies.

The website that provides information and resources concerning the Act¹⁰⁷ includes a section on interpretation for the guidance of employers and employees.

The following edited abstract from that section is helpful as an insight into the intent of the legislators in framing the amendments concerning psychological harassment.

Incidences of behaviour, comments, actions or gestures must be hostile or unwanted and must be shown to affect the dignity or psychological or physical integrity of the person against whom they are directed, and to create a harmful work environment for him [sic]. “Harmful” refers to an environment that is detrimental, bad or unhealthy.

The hostile gestures towards the employee are not necessarily flagrant. Indeed, it is not essential that such a gesture be aggressive in nature in order for it to be considered hostile. For example, an employee could be the victim of comments, actions or gestures which, when taken on their own, may seem harmless or insignificant, but the accumulation or combination of them may be considered a harassment situation.

The concept of human dignity means that a person feels respect and self-esteem. It is associated with physical or psychological integrity. Human dignity has nothing to do with the status or the position of a person in his work environment, but rather it deals with the way in which a reasonable person feels in the face of a given situation. Human dignity is scorned when a person is marginalized, set aside and devalued [*Law v. Canada (Minister of Employment and Immigration)*, 1999, 1 R.C.S.]

Behaviour that constitutes sexual harassment, whether it is manifested physically or verbally, could be considered psychological harassment.

It is worthwhile recalling that the Québec Charter of Human Rights and Freedoms and the Civil Code of Québec have specific provisions on this subject.

Section 46 of the Charter stipulates that: “Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.”

As for Article 2087 of the Civil Code of Québec, it states that: “The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee.”

¹⁰⁷ www.cnt.gouv.qc.ca

The identification of the harassment must be made according to an objective analysis process.

In this respect, the criterion of a “reasonable person” put in the circumstances described in a harassment complaint is an objective identification standard. The point of comparison for this “reasonable person” must be a standard of conduct that is accepted or tolerated by society. As a reference, a person with ordinary intelligence and judgment is chosen, to see how this person would have reacted in a given context.

The relevant point of view is hence that of a person who is reasonable, objective and well informed of all the circumstances and finding himself [sic] in a situation similar to the one related by the employee. Would this person conclude that this was a harassment situation?

The effect of the application of such standards must not be to deny the normal exercise by the employer of the management of his human resources. It is important to distinguish the actions taken by the employer as part of the normal and legitimate exercise of his management rights, even if they involve unpleasant consequences or events, from those taken in a manner that is arbitrary, abusive, discriminatory or outside the normal conditions of employment¹⁰⁸.

During the period April 1st 2005 to March 31st 2006, the Commission des normes du travail (CNT) received 2,200 psychological harassment complaints, considerably more than the 1,700 expected¹⁰⁹. By 2007 that number had grown to 7000.

Of these, 93% involved repetitive and ongoing incidents while 7% involved a single incident.

62% of all complainants were female, although females represent 49% of the workforce.

81% cited a manager as the perpetrator of the alleged offence.

Of the 2,200 complaints, 1025 were considered to have merit. Of these, 825 were settled by employers voluntarily while another 200 went on for further legal action.

Of the remainder, about half were withdrawn by the complainants while the other half were found not to have met the criteria set out in the guidelines. The latter were found to

¹⁰⁸ See, for example, *Bourque v. Centre de Sante des Etchemins [2006] QCCRT 0104* in which an employer insisting on regular attendance was found to be well within his rights.

¹⁰⁹ Human Resources Management in Canada (2005) Report Bulletin 271 at para.271.13

have involved interpersonal conflicts, difficult working conditions, professional stress, the exercise of management rights and other situations not contemplated by the Act¹¹⁰.

Complaints are investigated by specialists who have backgrounds in psychology, sociology and law. They are trained to interview witnesses, victims and employers. It appears that in the process of conducting these interviews staff may also play the role of mediator. In fact, it was the hope and expectation of the CNT that most complaints would be resolved by negotiation.

Resources in the form of guides for employers and employees offer helpful advice on how to develop policies and procedures that meet the legal criteria¹¹¹.

These materials also include lists of risk factors that may precede or predict harassment including:

lack of respect between persons, conflicts that are poorly managed or not managed at all, poor communication, excessive competition, ambiguity or lack of precision concerning task assignments, unfair distribution of workloads, lack of training or coaching when technological changes are made, inadequate work tools and denial or ducking of serious interpersonal problems.

It is interesting and significant that in the UK it is these early indicators of serious problems, which themselves have been targeted as the subject of a quasi-regulatory approach to the prevention of debilitating stress in the workplace. This approach will be examined closely in the second part of this report.

¹¹⁰ Examples of cases falling on either side of the criteria are: *Ganley v. 9123-8014 Quebec Inc. (Subway Sandwiches & Salades)* [2006] QCCRT 0020. [award made to complainant] and *Hilaregy v. 9139-3249 Quebec Inc. (Restaurant Poutine La Belle Province)* [2006] QCCRT 0220 [case dismissed]

¹¹¹ Commission des normes du travail [2005] Psychological Harassment at Work. 1.Awareness Promotion Guide for Employers and Employees 2.Prevention Guide for employers of the Big Business Sector. www.cnt.gouv.qc.ca

Workers' Compensation Law

The aspect of Workers' Compensation Law [WC Law] that is most relevant for present purposes is the policy explicit in the legislation of all Canadian jurisdictions that chronic stress is not a compensable disorder. This policy, however, is showing signs of wear and attrition in the sense that the definition of chronic stress appears to have become more elastic over the last few years. This is the current pressure point in WC law with regard to how mental health casualties are treated.

A full review of the jurisprudence surrounding this issue is beyond the scope of this paper. However, some examples of contrasting legal perspectives on this matter will illustrate the main policy considerations involved in decisions about the compensability of mental stress.

*Hill*¹¹² is a judicial review by the Supreme Court of British Columbia of a Workers' Compensation Appeals Tribunal decision to refuse compensation to a bus driver who claimed he had suffered Post Traumatic Stress Disorder as a result of an undisputed physical threat by a passenger with whom he had had a similar altercation some months earlier. Indeed, over his 32 years of service he had experienced no less than 6 incidents involving violence to his person. As result of the last incident he was off work for 8 months. On the occasion of the altercation with the passenger prior to the event that became the subject of the present claim, the bus driver had been briefly suspended by his employer for chasing the passenger off the bus, striking him and trying to detain him for the police. The employer's decision to suspend him had upset the petitioner greatly and he claimed the present incident resurfaced all the emotions that he had felt around that decision.

The governing legislation concerning compensation for mental stress relevant to *Hill* is found in s.5.1 of the *Workers Compensation Act, R.S.B.C. 1996, c. 492*:

- (1)a worker is entitled to compensation for mental stress that does not result from any injury for which the worker is otherwise entitled to compensation, *only* if the mental stress
 - (a) *is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment, [emphasis added]*
 - (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

¹¹² *Hill v. v. WCB [2007] BCSC 1187*

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

The Board’s policy 13.30, developed as a result of, and to comply with this provision, included the following direction prohibiting compensation for *chronic* mental stress.

“Mental stress” is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include “chronic stress”, which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

Under subsection 5.1 (1)(a), the Act establishes a two-part test:

1. There must be an acute reaction to a sudden and unexpected traumatic event.
2. The acute reaction to the traumatic event must arise out of and in the course of employment.

An “acute” reaction means – “coming to crisis quickly”. It is a circumstance of great tension, an extreme degree of stress, it is the opposite of chronic. The reaction is typically immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and/or fear. It may be the result of:

- a direct personal observation of an actual or threatened death or serious injury;
- a threat to one’s physical integrity;
- witnessing an event that involves death or injury; or,
- witnessing a personal assault or other violent criminal act.

For the purposes of this policy, a “traumatic” event is a severely emotionally disturbing event. It may include the following:

- a horrific accident;
- an armed robbery;
- a hostage-taking;
- an actual or threatened physical violence;
- an actual or threatened sexual assault; and,
- a death threat.

In most cases, the worker must have suffered or witnessed the traumatic event first hand. In all cases, the traumatic event must be

- clearly and objectively identifiable; and
- sudden and unexpected in the course of the worker's employment.

This means that the event can be established by the Board through information or knowledge of the event provided by co-workers, supervisory staff, or others, and is generally accepted as being traumatic. . . .

Examples where there is likely entitlement to compensation for mental stress:

- A person commits suicide by jumping in front of a bus.
- A worker directly witnesses a very serious accident to a co-worker.
- During a prison riot, inmates hold a guard hostage.
- A female worker attends at work and is confronted by her male supervisor who sexually assaults her.

The *Hill* court upheld the WCAT's ruling that the petitioner was not entitled to compensation. It supported the conclusion of the appeals tribunal that the petitioner did not suffer mental stress as a result of a single, sudden and unexpected and traumatic event. In finding against the petitioner, the court deferred to the appeal tribunal's decision as a matter of mixed law and fact¹¹³. The heightened sensitivity of the petitioner because of earlier incidents, particularly the one involving the same aggressive passenger, was found to weaken the claim that the one event in question was traumatic and of a sudden and unexpected nature. An objective standard was used to defend the position of the WCB that the event complained of in itself did not amount to what a reasonable person in the petitioner's place would have experienced as a sudden, unexpected traumatic event.

¹¹³ Such deference is common when a court performing a judicial review of a tribunal's decision recognizes that it lacks the direct experience of witness statements and the capacity to evaluate witness credibility.

The policy reasons behind this decision are fairly transparent. They are well described in a case referred to by both parties in *Hill*, albeit for opposing reasons.

So, in *D.W.*¹¹⁴, the court held that ...

the test for assessing whether an event is traumatic must be an objective one. If it were a purely subjective test or even a modified subjective test, the most innocuous of management decisions could support a claim for psychological injury. It would not be difficult for the skilled advocate to turn a case of “chronic” or “gradual onset” stress into a claim of psychological injury by focusing on a single incident’, the one that broke the camel’s back, so to speak. The overly sensitive employee who is experiencing a severely stressful home or work life might well suffer an acute reaction to a critical management decision.

The message here is a familiar one: WCBs are bound by policy considerations to decline compensation for the cumulative stresses of working conditions. This is seen as a floodgate issue. In other words, if one claim for chronic stress were to be honoured, the floodgate would be breached and the coffers of the WCBs would soon be empty. However, it seems that there are fissures in the floodgate anyway, despite the careful and almost strained reasoning of the court in *Hill*. Four examples will hopefully illustrate this point.

In Ontario, the Workplace Safety and Insurance Appeals Tribunal has at least twice found in favour of claimants who had stressful altercations with others at work and subsequently argued that they suffered mental injuries as a result. In one case¹¹⁵, the Tribunal awarded compensation to an employee who had had a heated argument with the daughter of an owner over attendance at physiotherapy sessions during working hours, resulting in disabling depression for the employee. The Tribunal held that the profanity-laced argument constituted “a sudden and unexpected traumatic event” for purposes of the Ontario legislation.

In another case¹¹⁶, the Tribunal awarded compensation to an employee, a health care worker, who developed aphonia [being barely able to speak above a whisper] as a result of interpersonal conflicts with fellow employees and her supervisor. The Tribunal characterized this conduct as harassment and awarded compensation on that basis even though the harassment was not of a one time nature and did not meet the criteria for a sudden, unexpected traumatic event. It is worth noting that both of these decisions

¹¹⁴ *D.W. v. Workplace Health, Safety and Compensation Commission and Via Rail Canada Inc.*, [2005] JNBCA 70

¹¹⁵ WSIAT Decision #526/05

¹¹⁶ WSIAT Decision #2056/03

appear to stretch the intent of Ontario's policy as reflected in amendments to that province's WC legislation¹¹⁷.

These amendments were specifically introduced in order to rein in what were seen to have been the excesses of the Ontario WC Appeals Tribunal prior to 1996 in which that body had expanded the boundaries of entitlement by allowing claims for stress reactions to normal workplace events based on a modified reasonable person test. In the Appeal Tribunal's pre-1996 view, chronic stress claims should have been compensated in the same way as other gradual process injuries. For example, in a 1992 decision¹¹⁸, the worker claimed that a diagnosed psychiatric condition of phobic anxiety and severe clinical depression was the result of work-induced stress. In allowing the appeal, the Appeals Tribunal held that the workplace stressors need not be unusual or unexpected and that the test should be based on objective evidence of work stressors that a "reasonable person" could plausibly find stressful. The majority concluded that while there were personal stressors and a disposition to a stress-related disability, the evidence did not negate the fact that work was a "significant contributing factor." In a later decision¹¹⁹, the tribunal adopted a modified objective reasonable person test which required balancing objective evidence of stress in the workplace against the worker's perceptions of, and subjective reaction to workplace conditions.

The recent decisions of the Ontario Appeals Tribunal cited above may be seen in this context as a return to more liberal, pre-1996 attitudes toward the compensation of stress-related mental injuries at work that are the result of cumulative pressures and which may even be compounded by pressures from outside work.

In Nova Scotia, the Appeals Tribunal of that Province has held that a claimant was entitled to benefits following an "intense meeting" with a supervisor. However, the meeting was found to have been "personal", "violent" and "aggressive." There was also evidence to support the Appeals Tribunal's inference that there was "a real and imminent threat that the meeting was about to become physically violent." The claimant also adduced a medical opinion that he suffered from work-related post-traumatic stress syndrome¹²⁰.

The chances of compensation in cases of the kind described above may to some extent depend on the intensity of the altercation. In distinguishing the Nova Scotia case from the one he was hearing, Robertson J.A. for the New Brunswick Court of Appeal dismissed a claim by a female employee of Via Rail for compensation for psychological injury as a

¹¹⁷ *An Act to Secure the Financial Stability of the Compensation System for Injured Workers, to Promote the Prevention of Injury and Disease in Ontario Workplaces and to Revise the Workers' Compensation Act and Make Related Amendments to Other Acts*, S.O. 1997, c. 16.

¹¹⁸ 717/88, [1992] O.W.C.A.T.D. No. 713 (QL)

¹¹⁹ 363/91, [1994] O.W.C.A.T.D. No. 83 (QL)

¹²⁰ *Children's Aid Society of Cape Breton-Victoria v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2005] N.S.J. No. 75 (C.A.) (QL).

result of a verbal confrontation in which the appellant's supervisor castigated her in a manner best described as "a bombastic rant, punctuated by yelling, threats and intimidation". The appellant did not return to work and was subsequently diagnosed as suffering from a "major" and "resistant" depression. Although the appellant's physician described the event as "emotionally traumatizing," the court found that the incident and its consequences failed to meet the criteria for a sudden and unexpected traumatic event. Rather, the event was more like the straw that broke the camel's back. Robertson J.A. for the court¹²¹ said

I am left with the impression that the appellant's appeal was dismissed because her inability to work was *the cumulative effect of a number of stressors being experienced within and outside the workplace*, rather than a single incident which caused an acute reaction." [emphasis added]

Later, the court elaborated¹²² as follows:

"Stress is the product of the psychological or emotional pressure that we experience in both our personal and work lives. Often it is difficult to isolate the stress in one situation from that in the other and to determine the impact that stress in one domain has on stress in the other. But there may come a point that the "stressors" encountered in the workplace lead to the inability to function in a work environment. The clearest manifestation of this involves employees who suffer what is commonly referred to as "burnout." A claim for compensation benefits in such circumstances is outside the purview of the definition of accident. This view is reinforced when one turns to the exception to the general rule outlined in the definition of accident. The inability to work must arise from a traumatic event which produces an "acute reaction." The notion that the event must induce an "acute" reaction displaces the notion that a compensation claim based on "chronic stress" qualifies as a compensable accident."

And finally the court laid bare the policy reasons for restrictive interpretations of compensable stress by emphasizing the threat that such claims pose to the exercise of management rights, as noted earlier¹²³, adding

A decision to lay an employee off work or to terminate employment, with or without just cause, may well lead to depression and the inability to find alternative work. But are these the types of claims for which the Legislature intended that compensation benefits would be available? I think not. To hold otherwise would be to sanction a regime in which the exception to the rule would become the rule. In my view, a subjective or modified objective test would be incompatible with the object of the 1992 amendment and its wording. For these reasons, the Commission was correct in imposing an objective test for deciding whether an event is a traumatic one. The question properly formulated is whether the

¹²¹ D.W. supra note 115 at para.18

¹²² Ibid. at para.41

¹²³ Supra note 115 and related text

reasonable person would regard the precipitous event as a traumatic one (out of the usual, expected or ordinary) because it is the type of occurrence that could realistically result in an employee being unable to continue with his or her employment¹²⁴.

In a case discussed earlier in this paper, the Court of Appeal of Newfoundland and Labrador held that a pattern of harassment continuing over years should have been made the subject of a Workers Compensation claim and referred the matter back to the Board for resolution¹²⁵.

The case had come forward as a claim in tort for negligent infliction of mental suffering and had been heard by the court of first instance as such¹²⁶. This court had ruled in favour of the plaintiff. While there is no official record of the decision, the plaintiff was eventually awarded compensation¹²⁷. However, the amount of compensation appears to have fallen far short of what the plaintiff would have been awarded had his tort claim been upheld¹²⁸.

Nonetheless, this case is another example of how chronic stress, here resulting from harassment, has been found to be compensable in some situations.

That said, the mainstream policy of WSIBs and WCBs across the country is probably still more in line with the reasoning in *Hill*¹²⁹ than not.

The “tort bar” in Workers Compensation law that prohibits the use of civil remedies by employees who claim they have been disabled in the course, and as a result of their employment is, from a modern policy perspective, a much beleaguered bastion of the system.

The issue comes to a head in the mental stress area because, as we have seen, the tort bar in WC law is essentially an invitation to use civil remedies available through courts and tribunals.

The lure of torts or contract claims is that a big win can place a plaintiff in a better financial position than if they had been compensated under WC law. However, this attraction is offset by the extreme uncertainty associated with launching a claim in tort or in contract.

Indeed it was this uncertainty in the area of physical injuries that led to the development of Workers’ Compensation legislation in the first place¹³⁰. At that time, however, the concern was as much if not more for the uncertainty faced by employers as it was for the uncertainty faced by employees.

WC legislation in Canada, for example, was introduced in the late 19th and early 20th centuries in the wake of an increasingly large proportion of cases in which employees were being awarded damages for injuries sustained at work¹³¹.

¹²⁴ Ibid. at para.51

¹²⁵ *Rees v. RCMP [2005] NLCA 15; 246 Nfld. & PEIR 79*

¹²⁶ Supra notes 41,59 and related text

¹²⁷ Personal communication with a close relative of the plaintiff

¹²⁸ Ibid.

¹²⁹ Supra note 113

¹³⁰ See: R. Risk This nuisance of litigation: the origin of workers’ compensation in Ontario. In D.H. Flaherty (ed.) *Essays in the History of Canadian Law* (Toronto: University of Toronto Press) 1983.

¹³¹ Ibid.

Some significant parallels between the current situation as it bears upon mental injuries at work and the early history of WC are clearly detectable as employees come away with increasingly large sums in damages from suits in tort, contract and hybrid categories.

The increasing uncertainty of outcome for employers from cases brought against them in tort and contract coupled with the rise in quantum of damages may act as an incentive to allow some form of compensation for chronic stress through amendments to WC legislation.

Mental stress claims are in fact one of the major pressure points in WC law at present. They raise a number of difficult issues concerning the philosophy, policy and practice of WC law that have led to calls for a review of the whole system.

A full treatment of these issues is beyond the scope of the present paper but an excellent discussion can be found in Gunderson and Hyatt¹³².

Some General Observations and Policy Implications

Readers may be struck by the degree of uncertainty that prevails in the area of mental health protection in Canadian law today.

In some cases this uncertainty is compounded by inconsistency in the law across the country. Choice of remedy or legal venue is seriously influenced by where you happen to live in Canada.

To some extent, of course, uncertainty is an intrinsic quality of legal proceedings. If the outcome of a given complaint or prosecution were to be certain in advance of actual proceedings there would be no need for, or point in attracting the costs and bother of legal action.

However, in the area of inquiry here, the uncertainty of outcome is joined by the added uncertainty of what legal venue is appropriate or more likely to lead to success.

For example, in some jurisdictions it is open to an employee who believes that he or she has been mentally injured to instigate proceedings in tort, contract, human rights, occupational health and safety, and/or employment standards. Even the option of proceeding to file a Workers Compensation claim is not clear-cut because in some jurisdictions the employee has a greater chance of success in seeking compensation for stress related disability than in others.

In addition, aggrieved employees may find redress in remedial actions ordered by human rights tribunals or commissions, arbitrators, occupational health and safety officials and others. While such remedial actions are not compensatory in nature they do have the potential to improve the quality of work life of individual complainants if they are able to return to their formerly problematic environments.

Another feature of the current legal landscape is its rapidly changing nature. Many of the legal developments described in the longer paper and intimated here are of very recent vintage. Indeed, the last 5 years have seen quantum leaps in the nature and quality of legal and quasi-legal reasoning with regard to mental injury at work, even though the roots of these developments may be in some cases very old. For example, the very recent

¹³² M. Gunderson and D. Hyatt (eds.) *Workers' Compensation: foundations for reform*. Toronto: University of Toronto Press Inc. [2000]

legal affirmation that the employment contract contains an implicit term assuring basic protections of an employee's mental health springs from jurisprudence first articulated in the mid 19th century. The sprouting of deeply planted legal seeds is very evident in the law today and we can probably expect to see even more unusual patterns of growth in the next few years. This all adds to the uncertainty factor just described.

The rule of law that we rightly cherish is not threatened by gradual evolution in legal reasoning but it can be brought into disrepute by developments that create high levels of uncertainty for parties to legal actions whether as complainants or defenders. This point is fast approaching in Canada in relation to the protection of employee mental health and indeed in relation to the increasingly extensive duties of employers.

Otherwise put, the law abhors radical uncertainty. The credibility of the law rests not only upon public perceptions of its intrinsic ability to render justice but also upon the related perception that it is a stable and reliable system whose officers are not capricious or unprincipled. From this perspective, for example, we can see the stability and relative consistency of the Workers Compensation System across Canada in reference to its treatment of mental stress claims as serving the higher goals of the rule of law. But from another perspective we might want to see some evolution in the public policy thinking that has underpinned the Workers' Compensation System since its inception in the late 19th century. It can be argued with some force that this public policy thinking as reflected in Workers Compensation cases has not kept up with the findings of social scientists that have been accumulating over the last 25 years.

Before uncertainty becomes what some legal critics call "radical indeterminacy", we may want to review our options with regard to whether or to what extent there is a way to reduce the uncertainty that characterizes the field of employee mental health protection in Canada.

The burgeoning legal developments that are detailed in this chapter, even without any further rationalization, consolidation or codification, have profound implications for the future of the employment relationship both in unionized and non-unionized settings.

If the net effect of these developments could be thought of as essentially the creation of a legal super-duty to provide a psychologically safe workplace, such a duty would have major implications for the exercise of management rights.

Let us say for present purposes that a psychologically safe workplace is one that protects employees from negligent, reckless and intentional conduct over which employers have control and that can be reasonably expected to injure the mental health of employees. Should this duty be accepted as a latent obligation underlying the apparently disparate legal developments described here and in the parent document, the implication for management rights would be that governance of the workplace is subject to limits prescribed by the requirement to protect employee mental health from injury.

While this may appear to be no more than an extension of the duty to provide a physically safe system of work, the significance of the requirement to protect mental health for management rights is profound.

This significance can be readily assessed when we consider the implications of legal doctrines and directives that call for employers to make only reasonable demands and require only reasonable effort on the part of employees. How can the reasonableness of such requirements be ascertained other than through consultation with employees and by listening to them? And is this not creating a de facto employee right to participate in the organization and design of work? Even if we accept a very limited view of this legal extension it amounts to another beachhead in the erosion of management's exclusive right to control the workplace and pushes further toward an evolutionary view of the employment relationship that is far more based on a partnership model. These are serious implications indeed that warrant full discussion by all parties in both private and public policy arenas.

This type of speculation, of course, begs the further question of whether or to what extent such a partnership or participative model of employment is, or ever might be consistent with public policy in Canada.

And yet regardless of these more far reaching policy implications we have before us in Canada a legal situation that appears to call even now for some sort of proactive intervention at the highest level of government. The alternative of doing nothing is really one of allowing further drift toward legal indeterminacy, a prospect that may cause shivers down our collective spine.

The problem facing us at present can be restated as one of burden.

Currently, employees in a non-unionized workplace who believe they have been mentally injured by conduct of the employer or its agents have an array of more or less confusing options depending on the exact nature of the complaint and where in Canada they happen to be working.

Some of these options – the private law ones – usually place the economic and mental burden on the employee to navigate the shoals of the legal system to seek redress.

Sometimes this option can be replaced or supplemented by public law options in which a third party intervener helps the employee with claims that have a legislative basis as in occupational health and safety, employment standards and human rights. This has the effect of relieving some of the economic and mental burden on individual complainants but sometimes at the expense of providing them with adequate personal redress in the form of monetary compensation.

In collective bargaining environments, employees have by definition the economic, moral and legal assistance of union representatives who advocate on their behalf, as well as having the public law options just mentioned, except where such options are deemed to be incorporated into collective agreements already. The latter scenario in effect transfers the locus of public law remedies into the quasi-private law venue of arbitration.

In short, the distribution of economic and mental burden in collective bargaining environments is quite different from that in common law environments.

The preceding considerations combine to suggest the need for some kind of regulatory initiative that would at least provide one legal venue and system of redress for all employees regardless of where in Canada they work and of whether they find themselves in a unionized or non-unionized environment.

The most promising framework for such an initiative would appear to be occupational health and safety but the limitation here is that such legislation is under provincial and territorial control except with regard to employees in the public service. A similar objection can be raised to other legislative frameworks such as workers compensation, employment standards and human rights.

That said, this may be an opportunity for discussion about the possibility of federal guidelines that could help other jurisdictions determine the shape and content of specific initiatives. The guidelines would likely be non-binding but have the force of normative pressure.

One limited option might be to develop national guidelines on the measurement of risk to mental health at work. This could parallel many other initiatives of the federal government in the area of health, particularly with regard to physical activity and nutrition.

In this and other regards the UK model for dealing with workplace stress may be of considerable help. The focus of the UK's "Measurement and Standards" approach is on providing resources to all workplaces in the form of methods for risk assessment and measurement, standards for conduct and related educational and training materials. The mandate of an administrative body known as the Advisory, Conciliation and Arbitration Service ("Acas") in the UK has been extended to deal with the implementation of these guidelines and to provide some level of support to workplaces that need help. An important function of this central body is education and training related to understanding and implementing the management standards.

While the UK regulations concerning conduct at work under the Health and Safety at Work Act have no legal weight in themselves, they do require that risks to mental health be assessed by employers and failure to do so can invite interventions by occupational health and safety inspectors. Ultimately, continued failure to comply with measurement requirements could lead to prosecution but so far this appears not to have happened, reinforcing the spirit of the regulations, which is to help employers comply with the law, rather than to penalize them.

In Canada at present, an often-expressed fear of taking further strides down the occupational health and safety road lies in opening the floodgates to claims of mental injury under Workers' Compensation law. While the two developments are not by any means inextricably linked, there is a sense that once "stress" is seen as an OHS issue it may soon be seen as a WSIB issue too. If the front-end prevention of mental injury is a legitimate domain of OHS then so too, potentially, is its back-end compensation in the form of awards predicated on the evaluation of stress as an occupational injury or illness. The "Measurement and Standards" approach used in the UK is more fully described in a companion document to this one. However, it is worth emphasizing here that the M&S approach is fundamentally a legal-educational hybrid model that some commentators have portrayed as a population health strategy. It is so described because its principal intent is to improve the overall mental health of the workforce through the amelioration of relationships at work rather than to provide remedies to individuals that are available already through other legal vehicles. Whether or to what extent the UK policy is a sufficiently comprehensive approach to the reduction of, and compensation for stress-related injuries at work is an unresolved question. That said, we would do well to monitor

the UK situation carefully because it shows considerable promise as a model from which Canada could learn much.

A Final Word

Among the details of the law and considerations of policy it is easy to miss the wood for the trees. What stands out in attempts to engage employers with regard to the need to abate excessive stress as a hazard to mental health is the fact that very few are aware of the storm of legal censure that is brewing in many sectors of our jurisprudence. Indeed, most employers seem to become aware of the threat of legal action only when it has eventuated. This fact points to an overarching need for education and training in this area. As a priority, it might be most efficient to allocate resources to increasing awareness among employers of the legal context within which they are now operating and to providing resources to them that would allow them to self regulate around stress related hazards.

The M&S approach intimated above is in fact consistent with such a strategy. Whether or to what extent we would wish to create a national apparatus to implement such a strategy is the grist of the policy mill that hopefully will begin to grind as more is understood about the burden of stress at work and its legal and social consequences.

Appendix to Chapter 2 : Six Illustrations of the Law in Action.

As noted in the body of the foregoing chapter, the law in Canada is generally not concerned with stress as such, but rather with the extent to which abusive behaviour, excessive pressure or demands from a variety of possible sources lead or contribute to identifiable mental or physical harms that employers have a duty to prevent or for the occurrence of which they must provide compensation in some manner. In that sense, the law is as much concerned with what we may term strain (the result of stress that cannot be managed) as it is with stress (the impetus or excessive stimulus that can lead to strain if not managed).

Even though it is rarely described in so many words, the duty to abate abusive conduct and excessive stress at work (however legally reframed) may originate from a variety of legal sources.

As noted in the foregoing chapter, these sources include the contract of employment itself (including collective agreements), a more general duty of care founded in the law of negligence (in the law of torts) and/or in some statutory provision. The latter includes Health and Safety, Human Rights, Employment Standards and Workers' Compensation Acts.

Some illustrations of how these legal resources may be used by potential litigants or complainants appear in the following scenarios.

The purpose of the scenarios is to illustrate the complexity of the issues surrounding the legal treatment of stress and strain. In particular, readers' attention is directed toward the fact that the types of remedy available to potential litigants or complainants vary considerably across the country, leading to quite different outcomes in terms of individual compensation and systemic remedies.

The impact of this regional variation is compounded by the fact that the range of options available even within jurisdictions is perplexing to potential litigants and complainants. Indeed, this perplexity is mirrored in the uncertainty that employers face with regard to what exactly the law expects of them and what sorts of remedies will be sought at their expense.

From an employee's point of view, much hangs upon what legal route is chosen in terms of the nature and quality of the outcome. There are substantial variations for example in terms of quantum of damages depending on whether litigants or complainants pursue their remedies under one of several statutory provisions, contract law or tort law.

To some extent, perhaps, we might see the current variation as a temporary phenomenon – an expression of natural diversity within which context the most efficient or “fittest” strategies will emerge. But this socio-biological perspective is of little comfort to potential litigants or complainants bewildered by the complexity of the legal landscape that reveals itself once the intent to pursue some form of legal action has been formed.

The Scenarios and Legal Options

Scenario #1

An employee in a non-unionized environment is working under conditions that she feels are highly stressful because she is always being told by her supervisor to do too much, in spite of her repeated pleas for relief. She is showing signs of anxiety and burnout that are clear to her own doctor, her co-workers and her family. She simply wants the stress to be moderated but her manager says that everyone has to do more because of staff cutbacks. She seeks legal advice concerning any remedy she might have.

Legal Options

There is little that the employee can do while she is still functioning and coming to work on a regular basis. She might consider withdrawing from the workplace claiming that she has been constructively dismissed. This means that her employer has made it so difficult for her to do her job properly that the employee can consider the contract of employment to have been terminated unilaterally. This would open the door to damages in lieu of a reasonable period of notice coupled possibly with damages for negligent infliction of mental suffering. To establish negligence in this context, the employee must show that the employer owed her a duty of care that was breached and that led to identifiable mental harm. While every case hangs upon its merits, there is an increasingly strong tendency for courts to recognize that employers owe employees a duty of care to provide what is, in effect, a psychologically safe workplace. The imposition of excessive demands will often constitute a failure to provide such an environment, since it can and does lead to unmanageably high levels of anxiety and depression in some people. Judges will often point out to employers as defendants that they must take employees as they find them and that the test of reasonable foreseeability of mental harm is based on what could or should have been foreseen in the case of specific individuals. This admonishment suggests that employers should be aware of any vulnerability among employees that can be readily discerned without intrusive inquiry. However, this requires that employers walk a very fine line between their duty to avoid reasonably foreseeable harm and their employees' reasonable expectations of privacy, violation of which, in itself, may be actionable.

Negligence in the sense of failure to avoid or prevent harm that could or should have been foreseen is normally the basis of a legal claim founded in the law of torts, which literally means "wrongs".

The negligent infliction of mental suffering is a tort that in theory could be the basis of a claim for damages during the course of employment as opposed to at the end of the relationship when an employee has been actually or constructively dismissed. However, in practice this appears not to happen although the courts have made censorious comments about the conduct of employment relationships in which negligent infliction of mental suffering takes place.

Nonetheless, judicial comments of this kind have the effect of demonstrating to employers that negligence leading to the infliction of mental suffering during the

course of the employment relationship can support a claim for constructive dismissal. This in itself should act as something of a deterrent to negligent infliction of mental suffering.

Practicing lawyers have been heard to say that the real reason for the rarity of negligence cases based on employer conduct in the course of the employment relationship is that it just does not make economic sense either for clients or counsel given the originally small size of damage awards in such cases. This is why negligence claims are usually found as adjuncts to suits for unjust or constructive dismissal where the amount of damages is generally much higher. However, while this economic consideration applies to the law of torts it may not so apply to the law of contracts as described below.

While the law of torts may or may not offer some limited remedy to the employee in the present scenario while she is still employed (as opposed to dismissed or on disability leave) another branch of the law in which there have been some striking new developments opens another possibility for her. This involves claiming that the contract of employment itself implicitly includes the provision of psychological benefits.

The extent of these benefits is less than clear, but it has been held so far to include peace of mind and some level of assurance of a psychologically safe workplace. One way of characterizing such a workplace is to see it as one in which the employer takes all reasonable steps to ensure that no negligent, reckless or intentional harm to the mental health of employees is permitted to occur.

Failure to provide a psychologically safe workplace in these terms can form the basis of a claim that the contract of employment has been broken with all the implications of this for damages.

However, it is questionable whether the effect of such suits would be to restore the employment relationship to its former status or to essentially terminate it since it seems unlikely that the parties to such a dispute could work again in any kind of productive harmony. And in non-union workplaces, once the employment relationship is found to have been terminated, for whatever reason, there is no right to reinstatement. In other words, there is no way of getting your job back even though you may receive damages in lieu.

Scenario #2

An employee in a collective bargaining environment is at his wit's end. He has tried repeatedly to persuade his employer that he cannot continue working under a supervisor who constantly belittles him and makes him feel worthless. He is losing sleep, his close relationships are falling apart and he has become very depressed. And although she does not consider her patient to be clinically depressed, the employee's doctor has put him on a mild anti-depressant medication. He goes to his union representative in the hope of finding some remedy. A grievance is filed on his behalf.

Legal Options

In cases of verbal and emotional abuse or just plain bullying, arbitrators first look to the language of the collective agreement for authority to condemn such behaviour. However, it has become increasingly common for arbitrators to imply terms into collective agreements that call for reasonable and fair conduct on the part of employers. Indeed, it has been held recently that every collective agreement should be deemed to include the provisions of the relevant Occupational Health and Safety Act of the jurisdiction in which the case takes place. This means that the general duty to provide a safe system of work enshrined in OHS legislation becomes part of every agreement whether it is provided for in explicit terms or not. Layer upon this a broad reading of the statutory duty and what we have is an implied duty to provide a psychologically safe workplace in every collective agreement in Canada.

Given the very broad definition of abuse and harassment that has been recently advanced in collective bargaining environments it would appear that the grievor in the present scenario would have a good chance of success. This success would likely include remedial damages and some direction from the arbitrator requiring that the work be so organized as to ensure that the harasser and his victim never encounter one another. Other remedial measures could include the rewriting of policies governing harassment and related training for all staff.

In Quebec, the employee would have the unique bonus of being able to assume that the terms of the recently amended Employment Standards Act, which now includes prohibitions against harassment, are deemed to be included in his collective agreement. Penalties under this act include fines against the employer and remedial provisions for the employee that encompass contributions toward the costs of counseling.

In Saskatchewan, the employee would have the advantage of being able to file a complaint under the recently amended Occupational Health and Safety Act that now includes prohibitions against harassment. Ontario seems headed in the same direction. However, the remedies under the Saskatchewan act are of a systemic nature rather than a personal nature. That is, the employee will benefit from remedial orders to fix the problem and fines to deter the employer from allowing toxic situations to reoccur but will not be eligible to receive damages or other financial awards on a personal basis.

Scenario #3

An employee has been off work on “stress” leave as it is commonly referred to in his workplace, but is now returning to work on what he has been led to believe is a graduated work hardening plan. However, he is immediately plunged back into the same conditions of overwork that he believes led to his having to go on stress leave in the first place. His symptoms of severe mood swings return and become even worse than before. He even

talks to people who are close to him about suicide. His employer appears to think that he should be able to handle the stress “because everyone else can.”

Legal Options

The remedies available to this employee include filing a complaint under Human Rights legislation and, if in a non-unionized environment, suing for intentional or negligent infliction of mental suffering.

In a collective bargaining environment, a parallel remedy would include filing a grievance under specific terms of the agreement or according to the broader implied terms that some arbitrators are importing into such agreements relating to the provision of a psychologically safe workplace.

In the case of a Human Rights complaint almost anywhere in Canada, the basis of the claim would lie in the employer’s failure to accommodate the employee’s disability up to a reasonable standard. However, the employee would first need to establish that he did indeed have a disability.

“Stress leave” is a non-technical, elastic and ambiguous term, which covers a number of situations that may be provided for under an employer’s short and long term illness insurance policies, whether internally financed or externally purchased.

Frequently, the basis for providing sickness benefits under these circumstances is simply a letter to the employer from the employee’s physician stating that he or she needs to be off work for a specified period because of work-related stress. Sometimes the physician’s opinion is contested by the employer or its insurer, but often not. However, if at some point during the period of leave or before it, a diagnosis is rendered by a qualified professional to the effect that the employee has a mental disorder recognized by the American Psychiatric Association he will likely be in a much stronger position to claim failure to accommodate, on his return to work, than if he has been allowed to go on paid sick leave under a more general provision of the policy or indeed according to the discretion of a human resources manager.

The question of whether or to what extent the employer should take pains to inquire into the mental state of employees who are known or should be known to be at risk for further psychological harm on return to work after stress leave has no specific answer in Canada at this time. However, a succession of cases in the UK that is easily accessible to Canadian courts and tribunals avers that if an employee has suffered one mental breakdown resulting in sick leave it should trigger a higher duty of surveillance on the part of the employer once that person returns to work. In other words, the possibility of recurrent illness should be foreseen from knowledge of previous illness. This doctrine, while appearing to favour a certain amount of shortsightedness on the part of employers, actually protects employees from overly zealous inquiries into their mental states, inquiries that could be construed as actionable invasions of privacy.

In non-union environments, the option of suing for negligent or intentional infliction of mental suffering remains, but subject to the limitations described above under scenario #1. An additional consideration with regard to bringing civil suits of this type and particularly in this employee’s case is the stress associated with entering into

legal disputes that can go on for ages with very uncertain outcomes. Courts in the UK have referred to this phenomenon as “litigation anxiety”. It is a real concern in situations where the complainant’s mental health is already compromised.

Scenario #4

An employee in a public transportation organization has finally become incapacitated and is off work as a result of having to deal with several incidents over the years in which he has been abused verbally and threatened physically by members of the traveling public. He is constantly troubled by anxiety attacks and has difficulty sleeping every night. He keeps reliving the incidents that he feels have led to his present state. He believes that he suffers from a stress related disability and should be eligible for Workers’ Compensation, but the Board disagrees.

Legal Options

The employee is likely to have quite a challenge in persuading any Workers’ Compensation Board in the country that he is eligible for an award. The general rule is that if the stress complained of is of a gradual onset variety, any mental disorder resulting from it is not compensable. The only compensable type of stress-related disability is typically one that arises from a traumatic or acute incident during the course of employment.

However, there do appear to be cracks in the rule. These cracks tend to appear in cases that reach the appeals level of the Workers’ Compensation system and occasionally in cases that are referred back to the system after a court has rejected a claim founded in tort. Historically, there has been a tug and pull in the system regarding the compensability of stress related disabilities with policy shifts acting like moon-influenced tides. There is active debate in Canada concerning these policies but in the meantime an applicant faces extreme uncertainty with regard to stress-based claims for disability compensation.

If the employee hits a brick wall with his WCB claim then it is open for him to seek other remedies, but these too are limited. He could claim that his employer was negligent in not providing him a psychologically safe workplace according to the emerging doctrines outlined above but the outcome of such a claim absent a “carrier” claim for constructive dismissal appears highly uncertain. However, the fact that his mental injury is so closely linked to physical threat may help him in aligning his claim with the requirements of a safe system of work that are clearly the responsibility of the employer.

Scenario #5

For months an employee and one of her female co-workers have been subjected to a virtual campaign of sexual and verbal harassment by their immediate supervisor. One of the women feels that her conditions of work have become so psychologically damaging that they constitute a clear threat to her mental health. She decides to invoke her right to refuse to unsafe work until the conditions are ameliorated. Without even considering her complaint, the employer fires her for insubordination.

Legal Options

The only jurisdiction in which claiming the right to refuse unsafe work on the basis that it is psychologically dangerous might stand a chance of success is Saskatchewan. Here, the recently amended OHS Act does include provisions that may extend the concept of the right to refuse unsafe work to embrace the psychologically unsafe workplace. However, the extent of the right remains largely untested and awaits clarification. If the dismissal were to be construed as being an unfair reprisal for exercising rights under the act then the employer would face substantial fines and the employee could be reinstated.

She would not, however, be compensated financially herself except with regard to lost wages and benefits accrued during the period she was out of work.

In a unionized environment the employee might have done better to file a grievance for unjust dismissal based on more general standards of reasonableness and fairness in the workplace and/or on the basis that the provisions of the relevant OHS Act are deemed to be included in the collective agreement and that these provisions require the provision of a psychologically safe workplace.

In a non-unionized environment the employee could sue her employer for unjust dismissal, claiming also that she had been subject to the intentional or negligent infliction of mental suffering. Both of the foregoing remedies could be accompanied by substantial financial awards.

Also, in all jurisdictions in Canada, access to potential redress is available under Human Rights legislation since the complainant's workplace would likely fall under prohibitions against "poisoned environments" resulting from harassment and discrimination. However, the amount of damages available under this type of legislation is typically lower than what is available through claims in either contract or tort.

Scenario #6

An employee is being subjected to constant racial slurs by a fellow employee, but numerous complaints to his supervisor have fallen on deaf ears. He is becoming extremely distraught, tearful and depressed, which encourages even more abuse from his tormentor based on his supposed weakness.

Legal Options

The employee has various options depending upon where in the country he works. In most if not all jurisdictions he has the option to file a complaint under the relevant Human Rights Act or Code. But the remedial powers of Tribunals and Commissions vary from one place to another. In Ontario, the complainant has probably the widest range of remedies because the Tribunal and Commission working together can order both personal and systemic redress that not only

provides the individual with compensation for mental injury but also requires the employer to ameliorate conditions of work that give rise to harassment and discrimination. While most jurisdictions have within their Human Rights jurisprudence some version of the “poisoned environment” doctrine, Ontario has gone the furthest in harmonizing systemic interventions based on the finding of such an environment with personal remedies. While it is in its early days yet, the harmonized model in theory allows the Commission to pick up on individual complaints filed before Tribunals that “red flag” systemic problems of the poisoned environment variety. The Commission then has the authority to issue orders to improve psychosocial conditions of work that are deemed to give rise to cases of individual abuse.

Chapter 3
Management Standards and Stress in the UK Workplace: background and commentary

Introduction

In Canada, considerable interest has been expressed in the UK's policy with regard to the management of workplace stress. While it is difficult to identify its original source, the assumption in Canada appears to be that this policy is based on an approach founded upon Occupational Health and Safety legislation.

In other words, there is a prevalent belief that, in the UK, exposure to stress at work is directly regulated in the same way that exposure to asbestos, or any other hazard to health and safety is regulated.

Perhaps the reason for this assumption is that the Health and Safety Commission (HSC) established in 1974 – the body responsible for OHS policy in the UK – carried out in depth study and consultation with regard to the desirability and practicality of adopting a legislative approach during the late 1990's and early 2000's. But ultimately this approach as such was largely abandoned in favour of a curious hybrid that, while informed and in a sense driven by the law is not a part of it.

Having said that, however, much can be learned from the UK experience in developing its unique legal-educational hybrid for Canadian application.

Key Elements of the UK approach: a legal-educational hybrid

The UK approach is basically this.

Informed by scientific evidence, the gathering and interpretation of which was commissioned by the government, the HSC decided to develop a set of Management Standards to help employers address what are believed to be the most serious sources of work-related stress.

However, these standards in themselves have no legal force and apparently were never intended to have any. Rather they are, as their name suggests, descriptions of “states of the workplace” to which employers are encouraged to aspire to the extent that it is practical for them to do so. They fall short of the status ascribed to “approved codes of practice” under s.17 of the Health and Safety at Work Act of 1974 (HSWA)¹³³.

The standards themselves originate in research that identifies six areas of the organization and design of work that are largely under the control of employers and are known to influence employee mental health through the stress process¹³⁴.

The Health and Safety Executive defines stress as “the adverse reaction people have to excessive pressure or other types of demand placed on them”.

This definition makes an important distinction between *pressure*, which can be a positive state if managed correctly, and *stress* which can be detrimental to health.

¹³³ Health and Safety at Work Etc. Act (Eliz.2 1974 c.37).

¹³⁴ See in particular: Rick, J., Thomson, L., Briner, R.B., O'Regan, S. and Daniels, K. (2002) Review of existing supporting knowledge to underpin standards of good practice for key work-related stressors – Phase 1. Research Report #024 HSE Books, Her Majesty's Stationary Office, Norwich, U.K.

Stress is believed to occur more readily in individuals when the following standards are not met.

The six areas of the organization of work considered as being associated with stress reactions are depicted in the six standards below. They were finally introduced in 2004 after a period of pilot testing. The original vehicle of dissemination appears to have been the Health and Safety Executive (HSE)¹³⁵ website.

The Educational Part of the Hybrid Model: the Management Standards

1.Demands

The standard is that:

- Employees indicate that they are able to cope with the demands of their jobs
- Systems are in place locally to respond to any individual concerns
- The organisation provides employees with adequate and achievable demands in relation to the agreed hours of work
- People's skills and abilities are matched to the job demands
- Jobs are designed to be within the capabilities of employees; and
- Employees' concerns about their work environment are addressed.

2.Control

The standard is that:

- Employees indicate that they are able to have a say about the way they do their work
- Systems are in place locally to respond to any individual concerns
- Where possible, employees have control over their pace of work
- Employees are encouraged to use their skills and initiative to do their work
- Where possible, employees are encouraged to develop new skills to help them undertake new and challenging pieces of work
- The organisation encourages employees to develop their skills
- Employees have a say over when breaks can be taken; and
- Employees are consulted over their work patterns.

¹³⁵ The *HSWA 1974* is enforced by the HSE, which also carries out statutory duties accorded to the HSC. The HSE also advises the HSC on policy matters, and the HSC in turn advises secretaries concerned with matters of health and safety. When HSE officials give advice to Ministers it is done on HSC's behalf and with their concurrence.

3.Support

The standard is that:

- Employees indicate that they receive adequate information and support from their colleagues and superiors
- Systems are in place locally to respond to any individual concerns
- The organisation has policies and procedures to adequately support employees
- Systems are in place to enable and encourage managers to support their staff
- Systems are in place to enable and encourage employees to support their colleagues
- Employees know what support is available and how and when to access it
- Employees know how to access the required resources to do their job; and
- Employees receive regular and constructive feedback.

4.Relationship

The standard is that:

- Employees indicate that they are not subjected to unacceptable behaviours, e.g. bullying at work
- Systems are in place locally to respond to any individual concerns
- The organisation promotes positive behaviours at work to avoid conflict and ensure fairness
- Employees share information relevant to their work
- The organisation has agreed policies and procedures to prevent or resolve unacceptable behaviour
- Systems are in place to enable and encourage managers to deal with unacceptable behaviour
- Systems are in place to enable and encourage employees to report unacceptable behaviour.

5.Role

The standard is that:

- Employees indicate that they understand their role and responsibilities
- Systems are in place locally to respond to any individual concerns
- The organisation ensures that, as far as possible, the different requirements it places upon employees are compatible
- The organisation provides information to enable employees to understand their role and responsibilities
- The organisation ensures that, as far as possible, the requirements it places upon employees are clear; and
- Systems are in place to enable employees to raise concerns about any uncertainties or conflicts they have in their role and responsibilities.

6.Change

The standard is that:

- Employees indicate that the organisation engages them frequently when undergoing an organisational change
- Systems are in place locally to respond to any individual concerns
- The organisation provides employees with timely information to enable them to understand the reasons for proposed changes
- The organisation ensures adequate employee consultation on changes and provides opportunities for employees to influence proposals
- Employees are aware of the probable impact of any changes to their jobs. If necessary, employees are given training to support any changes in their jobs
- Employees are aware of timetables for changes; and
- Employees have access to relevant support during changes

The Management Standards approach has been described as a population health strategy that aims to increase the average level of health among the workforce by reducing its exposure to certain types of stressors known to have adverse health effects¹³⁶. This approach may be distinguished from one that attempts to identify and treat high-risk individuals.

It is predicated on the assumption that reducing a small risk among the many is more socially efficient than reducing a large risk among the few. The converse of this assumption is that small gains among the many are more socially significant than large gains among the few in terms of planned treatments or interventions.

As applied to the employed population, management standards represent “organizational states” that are considered desirable. While such an approach has no direct legal ramifications, efforts to meet the standards may be considered evidence of employer good faith. This may be of particular relevance with regard to the assessment of stress related hazards at work since failure to assess seems to be the only aspect of the legislative duty to provide a psychologically safe system of work that attracts legal attention in the form of inspectors’ Improvement Notices (IN’s).

As Mackay et al. say, “the approach was not intended to be legally enforceable, but to assist employers in complying with their legal duties under the law”¹³⁷.

The standards work by specifying a minimum percentage of the workforce that confirms the existence of a certain state of organizational affairs. This state of affairs is identified by a “platform statement” or “threshold” within each standard. For example, the platform statement or threshold for Demands (as described above) is that 85% of employees indicate that they are able to deal with the demands of their jobs and that systems are in place locally for individuals’ concerns to be raised and addressed.

¹³⁶ MacKay C.J., Cousins R., Kelly P.J., Lee S. and McCaig R.H. (2004) “Management Standards’ and Work-Related Stress in the UK: policy background and science” *Work and Stress* 18(2), 91-112

¹³⁷ Ibid.

These numeric thresholds are derived from the research literature¹³⁸. And it is from this same literature that the Indicator Tools used to assess conformity with the standards were derived. As Mackay et al. say, “Achieving this threshold is considered to indicate that management practices within the organization conform to good practice with regard to preventing the occurrence of work-related stress.”¹³⁹

However, the percentage specifications are meant to be “informative” rather than “normative” suggesting that these are standards require interpretation in specific workplace contexts. And there is still a good deal of arbitrariness to the use of any such percentages, as Mackay et al. point out.

That said, an advantage of this approach is that it is based on employee involvement and the consensus of at least a specified proportion of the workforce. It is essentially a local approach to population health that is based on identification of health determinants at a given time in a given place among a given group.

The Indicator Tool just referred to is basically a series of questions, which allow organizations to measure their performance against the standards. There are many versions of these tools now available, ranging from the so-called “first pass filter” device, to much longer and more precise instruments.¹⁴⁰

“The rationale underlying this approach derives from a number of sources. Health and safety standards in relation to other types of exposures, such as physical or ergonomic hazards, do not always set out to protect 100% of the population from harm, as there is a recognition of the effects of biological variability in the population. The exact percentages will depend on the severity of the consequences, the strength of the evidence, and the ease with which control measures can be applied”¹⁴¹

Based on the observation that approximately 20% of a given population reported high or extremely high levels of stress at work, “it was felt that a reasonable target to aim for with the initial introduction of the Management Standards was a reduction in the prevalence of these headline data by 5%, so that only 15% remain exposed in the first instance, hence the target percentage of 85% in three of the Management Standards.” (Demands, Control and Support).

“For the purposes of the testing of the standards in pilot studies, a lower figure of 65% was specified for the remaining three Management Standards” (Roles, Relationships and Change). “It is recognized that this figure of 65% cannot be justified empirically and that there may be concern that a significant minority of a population may remain exposed even when the Management Standard might be deemed to have been met.” (105)

¹³⁸ See in particular: Smith A., Johal S., Wadsworth E., Davey Smith G. and Peters T. (2000) The Scale of Occupational Stress: the Bristol Stress and Health at Work Study. HSE Contract Research Report 265/2000. Sudbury: HSE Books [the “SHAW” study]

¹³⁹ Supra note 137

¹⁴⁰ For more insight into these devices see Appendices 1,2 and 3.

¹⁴¹ McKay et al. supra note 137 at 104

Enter the “Acas”¹⁴²

Recently, a quasi-governmental agency whose primary role is in the mediation and arbitration of industrial disputes called the Advisory, Conciliation and Arbitration Service (Acas) has expanded its mandate to provide counselling, training and advisory services to employers who are wrestling with how to implement the standards.¹⁴³

The Acas has recently been the subject of an evaluation by the UK’s National Institute of Economic and Social Research¹⁴⁴.

As the introduction to this report says, the Acas is based on the premise and the policy that if disputes and conflicts in the workplace can be reduced there will be a net positive impact on efficiency, productivity and competitive advantage at a national level. Accordingly, the overall goal of Acas is “to reduce the level and impact of conflict in the workplace and to promote good relations at work.”

Stress abatement of the type dealt with in the Management Standards is presumably seen in the broader context of promoting harmonious labour relations, a perspective that is consistent with the population health approach just mentioned.

The evaluation attempted to place currency values on the work of Acas within this broad conceptual framework of improved labour relations.

The overall result of the analysis suggests, subject to numerous methodological caveats, that for every pound invested in Acas activities, 16 pounds worth of value were earned in 2005-2006, the year of the study.

The net economic benefits are given as £787,000,000 for an investment of £49,000,000 in funding from the government in the study year.

¹⁴² The title of this organization is always given in lower case in UK documents

¹⁴³ On Monday, 12 March 2007, Lord Jones of Cheltenham (Liberal Democrat) asked Her Majesty's Government: “what measures they are taking to reduce stress levels in the United Kingdom; and what advice is given to (a) employers, and (b) employees on reducing stress levels?” The following response was given. “The Government recognizes the importance of tackling work-related stress (WRS) to both the economy and the health of the nation, with the topic also being covered in both the Health Work and Wellbeing Strategy and the Department for Work and Pension's work on welfare reform. WRS is also one of the priority topics identified in the Health and Safety Commission's strategy for workplace health and safety 2010. In 2004, the Health and Safety Executive (HSE) launched the management standards for tackling work-related stress (MS) and is supporting organisations through the process.

Nearly 1,500 organisations in the HSE's target sectors (central government, local government, health, education and financial services) have received support via sector implementation plans (SIPs). The first (SIP1) saw nearly 80 organisations provided with direct support from an HSE inspector and access to nearly £300,000 of Advisory, Conciliation and Arbitration Service (ACAS) adviser time. SIP2 started with a series of 69 workshops in late 2006/early 2007 with more than 1,400 organisations represented. Support for SIP2 organisations is provided via a telephone helpline, a series of *master classes* and guidance on how to choose professional assistance if required.”

¹⁴⁴ Meadows P. (2007) A Review of the Economic Impact of Employment Relations Services Delivered by Acas. National Institute of Economic and Social Research. 2 Dean Trench Street, Smith Square London SW1P 3HE.

The study's author, Pamela Meadows, points out that, methodological caveats notwithstanding, the value of improved relationships at work has been probably significantly underestimated in her calculations.

Acas activities fall into the following major categories.

1. Individual conciliation
2. Collective conciliation
3. Website and publications
4. Workplace projects (including worksite-specific training)
5. Open access training (meaning events that are open to representatives from various workplaces)
6. Acas Helpline

Of these activities, the last four appear to be of particular relevance to the promotion of Management Standards in so far as clients of the service can and do solicit advice, training and other forms of consultation in connection with them. However, according to the report, sometimes conciliation services can trigger further interest in the Standards also.

The HSE website and the Acas website are closely linked in this respect. As the report notes, however, the impact of these four sets of activities is difficult to measure because one is attempting to assess the absence of something rather than its presence, a problem endemic to the evaluation of prevention activities. In this context, Meadows draws attention to the caveats associated with this type of study where attribution of causality is always problematic when there is, by definition, no comparator.

From statements made recently in the UK Parliament in response to MP requests for information, it appears that Acas is playing an increasingly significant role in the implementation of the Management Standards through customized workplace projects, training and advice provided through the web, publications and the Helpline.¹⁴⁵

Acas also uses an ideal model of the workplace as a type of vision, towards which employers can direct their energies.

The Legal Part of the Hybrid Model: measurement requirements

While the management standards themselves are not legally enforceable, the measurement of risks associated with failure to meet them is at least on paper mandatory and violation of these provisions can in theory lead to prosecution.

The assessment and measurement aspect of the UK's workplace stress management policy represents the "legal" part of the legal-educational hybrid model.

It is possible, indeed likely that this hybrid situation is a result of the UK's somewhat ambivalent position within the European Union (EU). There is strong reason to believe, for example, that the legal basis for the measurement requirements found in the 1999

¹⁴⁵ Supra note 144

Regulations to the HSWA 1974 originates in no small part in pressure from the European Commission (EC), which indeed continued to pressure the UK through the European Court.

The EC's complaint was that the UK's legislative approach to stress fell short of the EU's Directive 89/391 because it had wrongly included a proviso under the 1974 act (HSWA) that subjected the general duty to provide a safe workplace to the condition, "so far as is reasonably practicable". This proviso was thought to have been intended to subject the health and safety of workers (including their mental health) to considerations of finance and efficiency found unacceptable to the EC.

The case was finally resolved in favour of the UK¹⁴⁶ but the process set in motion by the lengthy litigation led eventually to the 1999 Regulations, in particular Number 3

Management of Health and Safety at Work Regulations 1999

The 1999 regulations were created to unify existing regulations to the *HSWA*, and to meet the standards of the EU Framework Directive 89/391/EEC (above), which the 1992 regulations had failed to do.

Regulation #3 requires every employer to *'make a suitable and sufficient assessment of ... the risks to the health and safety of his employees to which they are exposed whilst they are at work ... for the purpose of identifying the measures he needs to take to comply with his obligations under the 1974 Act and any health and safety regulations'*

It is a *criminal* offence under s.33(c) of the HWSA to contravene any health and safety regulations.

In addition, breach of a duty imposed by health and safety regulations is actionable in so far as it causes damage [HWSA s.47 (2)] which, as noted above, includes the death of, or injury to, any person, including any disease and any impairment of a person's physical or *mental* condition [HWSA s.47(6)]. [emphasis added]

It is the 1999 Regulation #3 that inspectors invoke when issuing Improvement Notices.¹⁴⁷

When we search for legal activity in the framework of the 1999 regulation, however, we find little except the use of these improvement notices, which are issued by inspectors in connection with failure to measure or otherwise assess stress-related risks.

¹⁴⁶ Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland 2007

¹⁴⁷ The following are examples of wording found in IN's. 1. "You have failed to make a suitable and sufficient assessment of the risks to the health and safety of your employees from exposure to work related stressors including demands at work for staff nurses."
2. (You) "have failed to make a suitable and sufficient assessment of the risks to the health & safety of your employees from exposures to work related stressors including shift fatigue for employees working at check-in."

While many such notices have been issued, there is scant reason to believe that inspectors' enforcement goes much beyond the requirement to assess. What employers do after meeting this requirement appears to be up to them.

That said, it is in theory possible that an individual litigant in a stress related claim could point to either failure to assess or failure to act on an assessment as support for the argument that the employer was failing in its duty to maintain a [mentally] safe system of work.

Conversely, but so far theoretically, employers could use the facts of having done an assessment and of having tried in good faith to act on the results to defend themselves against individual employee claims of negligence leading to mental harm. However, there may be limits to such defenses simply because the law of negligence takes note of individual wrongs even if they occur in relatively benign environments.

Theory apart, no actual case could be found in which a link between failure to implement the 1999 regulation #3 and support for an individual litigant's case was made by a court or tribunal.

Indeed, it appears that the statutory system governing stress at work in the UK and the common law and collective bargaining law pertaining to the same issue do not overlap and are essentially parallel forms of redress that are used for different purposes. The Measurement and Standards approach, informed as it is by legislation and public policy, aims to create a more harmonious and less stressful workplace as a consequence of actions that provide little or no redress to individuals and that are based on interventions at a systems or population level within organizations. Parallel to this is the law of torts and contracts that continue to provide remedies to individuals who have been mentally injured at work. Indeed, the M&S approach is directed at the general improvement of relationships within the workplace while the remedies available under private law are directed at compensation of wronged individuals. Further, the M&S approach is based on research that identifies general stressors inherent in the organization and design of work: there is little or no interest in assignment of blame for adverse conditions once they are identified. The private law approach, on the other hand, is based on determining the extent to which harm to individuals has resulted from culpable actions or omissions on the part of another. And in the UK a highly sophisticated jurisprudence has grown up around the conditions under which liability will attach to those whose actions or omissions are claimed to have resulted in mental harm to others.¹⁴⁸

¹⁴⁸ See, in particular, the careful reasoning in *Sutherland v. Hatton* CA 2002 ICR 613 and *Barber v Somerset County Council* HL 2004 ICR 457. (See Appendix 4). The 15 principles in *Hatton* are of signal importance to any court or tribunal that wishes to clarify the grounds on which liability for mental injury can be attracted.

With regard to the hybrid legal educational model, we are left then with a situation in which there is some, albeit weak, statutory incentive to assess risks to mental health at work and little or no statutory incentive to act upon the results. And this appears to have been the intention of the HSC and the HSE.

So, beyond the basic legal requirement that there should be an assessment of risks to mental health arising from a largely pre-designated set of stressors, the law falls silent on what employers are meant to do with the results.

However, the government does provide, at this legal drop off point, fairly substantial advisory, educational and training resources to help employers in their efforts to meet the standards to which the assessments are keyed.

These resources were provided initially just through the HSE but now additionally through Acas. The two agencies work hand in hand, with multiple cross- referencing to each other's resources.

Indeed, as noted earlier, the advisory, conciliatory approach to the reduction of workplace stress and conflict seems to be gathering strength in the UK, supported by evidence of its economic and social value.

How might the UK experience apply to Canada?

Occupational Health and Safety law in Canada is largely under provincial and territorial jurisdiction save as it applies to federal and federally regulated workplaces. So if we wished to use the UK model as any kind of example, the following policy initiatives suggest themselves.

1. Consider making the federal government and federally regulated agencies test beds for the development, implementation and evaluation of measurements and standards akin to those in the UK. There is already much to build upon with regard to such standards in the form of the HR renewal plan for the federal government and the routine use of top line metrics to assess upstream organizational risks to mental and physical health.
2. Establish a National Centre for Workplace Mental Health that operates on four of the six practice bands characteristic of Acas in the UK. This would exclude arbitration and conciliation services but would include training, education, consultation and advice. Generally, the role of the Centre would be to provide guidance and resources to employers with regard to the measurement and abatement of risks to mental health at work. It would also be a hub of knowledge and networking for academic institutions, agencies and departments across

Canada whose mandates include measurement and abatement of risks to mental health at work.

Another role of the Centre might be as a policy think tank to analyze and evaluate the outcomes of existing and future initiatives both legal and non-legal across Canada. For example, we have noted the plethora of different legal approaches across this country to the pursuit of remedies for claimed mental injury.

Some remedies can be claimed by individuals, while others are more systemic in nature. Sometimes multiple remedies are available.

There are ongoing questions about private versus public remedies and the philosophical assumptions of each. We need a coherent set of criteria by which to judge the effectiveness of these approaches both for employees and employers and for society at large.

Part of the answer no doubt lies in the extent to which, with the UK, we see work-related stress as a population health issue. If we do see it this way, even in part, then we will be interested in the net transfer of mental health or harm from the workplace to society, with all the ramifications for social policy that this entails.¹⁴⁹

Within a population health framework, the use of a Measurement and Standards (M&S) approach makes initial sense because, although it leaves much autonomy in the hands of individual employers, it raises social expectations about the ways in which the workplace can and should contribute to the public good by maximizing wellbeing or by at least doing no harm that can be reasonably foreseen.

The M&S approach is in no way obstructive of the pursuit of individual remedies for stress related harm through courts and tribunals, even if we may hope in the future for more juridical coherence and consistency among such remedies across the country.

One thing seems certain, though: a Canadian solution will be unique and tailored to our own values and needs.

¹⁴⁹ For a discussion of the transfer of health from workplace to society see: Shain M. and Suurvali H. (2006) Work-induced risks to mental health: conceptualization, measurement and abatement. *International Journal of Mental Health Promotion* 8, 2, 12-22

Appendix 1: Background to the Filter Tools

Introduction

The Health and Safety Executive (HSE) has been working with partners to develop standards of good management practice, which will provide a yardstick against which employers can gauge their performance in tackling a key range of stressors.

Following publication of an evaluation of scientific evidence to support standards for the stressors Demand, Control and Support in summer 2002 (HSE Research Report 024), a first draft of a possible standard was prepared for discussion with partners. These discussions concluded that the standard needed to be much simpler to understand and apply.

Revised approach

In the light of the discussions with partners, HSE radically revised its approach and developed a second draft for the Management Standards. At a subsequent meeting, partners agreed that these were suitable for piloting. For each of the stressors identified in HSE's guidance publication *Tackling work-related stress* (HSG 218) HSE sought to establish as a standard the percentage of workers exposed to conditions which reflect those stressors at the workplace. This is the current condition of stress management.

Given the prevalence of occupational stress and resulting time off work, the Health and Safety Commission's Priority Programme to reduce prevalence and incidence require this current condition to be improved. An increase in the percentile for the standard would set the target to bring about widespread organizational change to meet the standard and improve stress management at work.

The HSE Methodology

In response to partners' earlier requests for an approach that was simple to understand and apply, HSE has developed an approach or methodology to assist pilots in testing out the Management Standards within their organizations. The HSE methodology aims to assist organizations in defining their current state against the Management Standards and investigating any problem areas further. The approach consists of First and Second Pass Filter Tools (questionnaires) and a process of consultation with employees.

Usefulness, ease of use and simplicity of operation

The approach suggested in the Piloteers' Pack of using the Filter Tools and Analysis Tools has been developed with an emphasis on usefulness, ease of use and simplicity of operation. The suggested approach acknowledges and builds on the success of the Health Education Board for Scotland's (HEBS) *Work Positive* pack. Although primarily aimed at small businesses, the HEBS pack was presented in a clear, user-friendly format and informal feedback from users has been extremely positive.

A developmental approach – not a finished product

The approach is developmental and does not represent a fully validated methodology or finalised process. The pilot exercise offers an opportunity for piloteers to test out the approach. It is envisaged that the approach will be modified and adapted in the light of feedback from piloteers on the practical usefulness of the approach and the ease of use of the tools.

Pros and cons of using questionnaires based on HSE sponsored research

A critical review of psychosocial hazard measures (CRR 356/2001) has highlighted the issues of existing questionnaire-type stressor measures and HSG218 lists the pros and cons for organizations of using questionnaires to assess their current state in managing work-related stress. It is worth reiterating the caveat in HSG218, that employers should not rely on just one single measure of work-related stress and, in particular, should try to avoid using questionnaires in isolation. It is important to formulate an overall picture by considering data from several sources, including sources which emphasise direct dialogue and consultation with staff.

Research underpinning question sets and cut-offs

The question sets in the Second Pass Filter Tools and the cut-off points are based on two key pieces of HSE funded research – *The Scale of Work Related Stress* (the Bristol study: CRR 265/2000) and *Work-related factors and ill health* (the Whitehall II study: CRR 266/2000).

Question sets

Both studies highlighted the connection between workplace stressors and health outcomes. The Bristol study demonstrated that as many as one in five employees reported that they were either 'very' or 'extremely' stressed by their work. The Whitehall II studies provided powerful evidence that the Demands placed upon employees, the Control employees have over their work, and the amount of Support employees receive are associated with health outcomes. We have therefore used the question sets from the Whitehall II study for the stressors Demands, Control and Support, in the Second Pass Filter Tools.

Cut-off points for stressors

For the purposes of the pilot exercise, we have made the assumption (based on the findings of the Bristol study), that 20% of employees within your organisation may be either very or extremely stressed by their work.

In order to improve on this situation, we have set cut-off points for the stressors Demands, Control and Support (where the Whitehall II research evidence for links with ill health outcomes is strong) at 85%. This means that the organisation will only achieve the standard if at least 85% of employees indicate that they are satisfied with the way these elements of work activity are managed. The First Pass Filter and Second Pass Filter cut-off points for Demands, Control and Support are set at 85% to reflect this.

At the time of writing, the evidence linking the stressors 'Relationships', 'Role' and 'Change' to health outcomes is not as robust. We have therefore set the cut-offs for these stressors at 65%. That is to say that the organization will only achieve the standard if at least 65% of employees indicate that they are satisfied with the way these elements of work activity are managed.

Other relevant research

In addition to the research mentioned above, recent HSE funded research *Interventions to control stress at work in hospital staff* (CRR 435/2002) provides examples of how sources of work stress were identified and managed in a number of hospital settings. The report provides an account of the risk management process using case study examples, which include the use of focus groups, to illustrate the process.

The HSE funded research *Effective teamworking: reducing the psychosocial risks* (CRR 393/2001) describes existing teamworking research, as well as reporting on the results of three studies conducted by the authors. The report describes how employers introducing team working can make positive choices that enrich work characteristics and thereby enhance employees' mental health.

References

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CRR 435/2002 Interventions to control stress at work in hospital staff. T. Cox, R. Randall, A. Griffiths: Institute of Work, Health and Organisations, University of Nottingham.

CRR 393/2002 Effective teamworking: reducing the psychosocial risks. S. Parker and H.M. Williams. Institute of Work Psychology, University of Sheffield.

Work Positive: prioritising organisational stress. Health Education Board for Scotland, Health and Safety Authority.

All the HSE research reports above are available HSE website
<http://www.hse.gov.uk/research/dissemination.htm> under Research Reports or Contract research reports.

Appendix 2: First Pass Filter Tool for Sources of Stress at Work

Introduction

This 'Sources of Stress at Work' questionnaire forms part of a pilot programme that HSE is running to test out new Management Standards for work related stress (see covering note). It is a brief set of questions based on the Management Standards and is designed to establish the basic levels of stress within your workplace. Your employers will use the information from this questionnaire to establish if there is a problem with stress in your workplace. The questionnaire will also help them establish if there are any particular problem areas that may require further investigation. This questionnaire is called the 'First Pass Filter Tool' because it is the first stage in establishing if your organisation is performing at an acceptable standard. The filters are based on the best available evidence linking (poor) work design to ill health outcomes.

NB: Your responses to this questionnaire will remain anonymous and only group data will be presented. It **will not** be used as an evaluation of your work or capabilities.

The following six questions cover the areas that have been found to be the main sources of stress for people at work. Please tick the box that most accurately reflects how you feel about your job at the moment. **Please only tick ONE box for each question.**

Demands

1. I am able to cope with the demands of my job

Often	Sometimes	Seldom	Never / Almost never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Control

2. I am able to have a say over the way I do my work

Often	Sometimes	Seldom	Never / Almost never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Support

3. I believe that I receive adequate support and information from my colleagues and superiors

Often	Sometimes	Seldom	Never / Almost never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Relationships

4. I am subjected to unacceptable behaviours (e.g. bullying) at work

Often	Sometimes	Seldom	Never / Almost never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Role

5. I understand my role and responsibilities within the organisation

Often	Sometimes	Seldom	Never / Almost never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Change

6. The organisation engages staff frequently when undertaking organisational change

Often	Sometimes	Seldom	Never / Almost never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Thank you for completing this questionnaire. Please return it to the place specified on the covering note by the date requested.

Appendix 3: Evaluation of the UK's Pilot Study of Psychosocial Standards for Management– Edited from the HSE website

Background

The pilot study commenced in April 2003. Twenty-four organizations agreed to take part and evaluation began in December 2003 and continued into early March 2004. A full evaluation report will be published as an HSL research report to coincide with the planned launch of the public consultation exercise around May 2004. This Annex summarises the main findings of the evaluation study. This is 'work in progress' and will be updated to reflect feedback from pilot organisations that are currently involved in taking forwards key aspects of the pilot process.

In addition to the 'official' pilot, a small group of organisations undertook an 'unofficial' pilot of the Stress Management Standards using the materials posted on the HSE website in June 2003. The results of this 'unofficial' pilot, which are in line with the results from the 'official' pilot, will be reported on in the full HSL report and are not reported on separately in this Annex.

The pilot organisations

Twenty-two organisations actually piloted the HSE Stress Management Standards, including HSE itself. Pilot organisations included one Charity and 14 public sector organisations, comprising 4 Government Departments, 6 city and metropolitan borough councils, 2 educational establishments, an NHS Trust and a Police Force. Private sector pilots included 2 manufacturing / production companies, 2 involved in energy production and supply, 1 from the railways sector and 2 financial / insurance companies (see attached list of pilot organisations).

Feedback

Feedback was collected from the pilots by means of e-mailed questionnaires, face-to-face interviews, telephone interviews and, in two instances, from the pilot team's report back to management in the form of organisation's in-house reports. Feedback was collected from 21 of the pilot organisations (one had not piloted our approach but gave feedback on their existing work). One of the pilot organisations was later in starting the pilot and had yet to provide detailed feedback.

In piloting and providing feedback on the pilots, pilot organisations were encouraged to consider all aspects of the pilot study as 'draft' and open to improvement / amendment. In the words of one of the pilot organisations: *"The findings come with an overall health warning that this is a pilot in every sense ie the process, actual questionnaires, the evaluation tools and the management standards themselves are all under scrutiny."*

Parts of organisation selected

Pilot organisations were able to choose which parts of their organisation would take part in the pilot study. Parts of the organisation (or staff) selected to take part included:

- ___ a mixture of business units from across the whole company from engineering to retail;
- ___ a manufacturing plant;
- ___ one office of a large government organisation;
- ___ 2 different districts and 3 separate business units of a large government organisation;
- ___ all the teachers within a local authority education sector;
- ___ rural and urban staff;
- ___ first and second line management;
- ___ an area office and sub-office of a local council;
- ___ front desk staff and social services staff of a local council;
- ___ a wide range of line operative, office-based and supervisory staff;
- ___ occupational health and safety and HR Directorate;
- ___ 2 departments / directorates within each of 2 local councils;

Two organisations (of 145 staff and 488 respectively) ran the pilots across the whole of their organisation, while one local council made use of their existing staff survey data to gather information equivalent to running the first pass filter tool across the whole organisation (excluding schools).

Participants in the pilot included supervisors, managers, factory operatives, administrative staff, front line office staff, teachers, lecturers, doctors, nurses, council employees and policemen.

Why these parts were selected

The individual pilot organisations each took very different approaches to selecting the groups to take part in the pilots. Some asked for volunteers, one selected parts of the organisation to give a “diagonal slice”, some selected a part of the organisation that represented “*a self-contained unit*”, while one organisation selected first line staff as they “*would be most affected by stress issues*” and another selected staff:

“based on identified areas where staff are known to have a varied and busy workload”.

Interest of senior managers was quoted as a reason by three pilot organisations, one citing as the reason for selecting that part of the organisation:

“because the executive leadership was engaged and championed the roll out”.

Two pilot organisations selected parts of the organisation because they were currently going through, or had recently gone through, significant organisational change, while one pilot organisation selected a part of the organisation:

“as there were no major changes happening at the time of selection”.

One organisation selected an office where staff were all located in one

building, since this:

“helped the logistics, i.e. handing out the paper questionnaires, communications etc.”;

while another chose an office because it was a multi site operation and:

“the satellite office offered the opportunity to explore physical remoteness from the senior managers”.

One of the two smaller organisations that had included all staff noted that they did not wish to leave any part out *“to prevent suspicion”*.

Number of employees participating

The total number of employees participating in the pilot exercise was approximately 11,000, ranging from 26 in one organisation to 6,000 in another (where the organisation made use of its own employee survey data).

Pilot organisations reported response rates to questionnaires ranging from 30% to over 80%, and 95% in one part of a public sector organisation. The two organisations with the highest response rates were both public sector and had both implemented an electronic version of the questionnaire.

General reactions

General reactions to the pilot of the Management Standards expressed by piloteers were largely positive:

“OK. It’s going well. The process seems to be straightforward and easy to do.early indications are that it seems to work quite well.”

“Well, although it’s early days – this is the initial stage and there’s a lot of work for us to do afterwards, I’m particularly pleased with how it went.”

“YES, the standards gave excellent information and provided useful links to other areas such as information on Focus Groups etc.”

One organisation highlighted the fact that they hadn’t known where to start in conducting a risk assessment for stress and that the Management Standards and associated process had helped them to get started:

“We’d struggled with what a stress risk assessment looked like..and this helps give us some structure – It’s welcome in that sense..... And there’s a method there that seems logical and that people can relate to.”

The general reaction of others was to welcome the opportunity to be involved in the Management Standards pilots:

“We were trying to progress work in this area and the pilot provided the opportunity to be seen to be doing something positive. It also helped inform ongoing work.”

“If HSE implements this, it was nice to be able to influence with others in a small way what can be expected to be delivered.”

General reservations and caveats

Some organisations, while endorsing the general Management Standards approach, expressed reservations about aspects of the pilot process, and the amount of time the process took:

“There was more work than I anticipated and it generated an awful lot more

conversation – which is positive really. But actually, from my point of view, I probably underestimated the amount of time it would take to do. Partly because it looks very simple and I think it is a simple tool, which is good. But it does raise an awful lot of issues. It's the simplicity belies what it is that you are going to find. So it went very well really."

"I think if we went to hundreds and hundreds we may have a different view [than their current positive view] but because we've used existing data for a large number for a first pass across the organisation, and we've only done your questionnaires with small groups, it's been manageable. But if I had to enter all X thousand in manually, then I think it would be a big problem."

Another noted that the simplicity of parts of the process had made it more difficult to secure senior management commitment:

"They were regarded by some at that meeting, the Chief Exec's and the Directors, as being too simple.... the questions ...so there was some criticism of that."

Securing Senior Management commitment

When asked specifically about the factors which were significant in securing senior management commitment, virtually all of those who responded to this question (16) cited as significant factors an *"existing commitment to tackle work-stress"* in their organisation and (15) *"the desire to be recognised as a good employer"*. Many of them went on to cite:

___ HSE's reputation / regulatory role (13);

___ The simplicity of the draft standards (12);

___ The package of risk assessment tools provided for pilot organisations (12).

The offer of support from HSE / ACAS was noted as a significant factor by 8 of the pilot organisations. "Information on costs and benefits" did not appear to be a significant consideration for many organisations, only 2 organisations citing this as a significant factor.

For several of the pilot organisations, securing senior management commitment was a 'non-issue' as there was already commitment from senior management to address work-related stress:

"Stress has been an agenda item for our board for some time as we have been working on it since before the draft standards were issued. Therefore this was not a problem for us."

Other pilot organisations noted that taking part in the pilot study fitted in with existing plans and represented a natural progression from their earlier work on stress:

"[The organisation] had already undertaken Stress Management risk assessments, Management and employee training and more recently an employee climate survey. It was a natural progression to participate in the HSE Stress Pilot Study. "

Two public sector pilot organisations, however, had to spend some considerable time and effort to secure commitment from senior management.

Assessing their organisation's performance against the standards

HSE had developed its own approach or 'methodology' to assist the pilots. The methodology included a 'first pass' filter tool and a 'second pass' filter tool (questionnaires), associated guidance and specific guidance on running focus groups.

Seventeen of the pilots made use of the HSE first pass filter tool to assess their organisation's performance against the Management Standards, 18 organisations used the second pass filter tool. One organisation used its own questionnaire instead of the HSE tools. Two pilot organisations made use of equivalent questions in their own in-house staff surveys as substitutes for the HSE first pass question set, while one pilot made use of such questions in its own survey as substitutes for first and second pass question sets. One of the above pilots used an adapted version of the HSE analysis tool to analyse their in-house survey data.

HSE helped several organisations to adapt the tools to meet their specific requirements (for example, where existing survey data were used) and several other organisations adapted the HSE tools themselves (for example, by developing electronic versions of the questionnaires).

How well did the process integrate with existing HR policies and processes?

Most pilots considered that the Management Standards approach was consistent with or integrated well with their existing HR policies and risk assessment processes:

"Very well. Our stress policy was issued in 2002 and was written by HR and Occupational Health"

"Generally in line with them."

Others were reviewing their current policies in the light of the management standards work.

"We are still formulating our policy on stress, but the process seemed to fit with other HR policies, e.g. H&S, Performance Management, Bullying etc"

Was the percentage statement helpful?

When asked if the percentage statement in the Management Standards was helpful in deciding whether the state to be achieved had been met, most pilot organisations considered that it was:

"Yes, Managers seem to like to have a definite number to measure against."

"Yes, this allowed positive feedback in the areas where few concerns were reported and allowed a focus on the borderline / priority areas."

"Percentage statement – to be honest, if there hadn't been some sort of standard, I'm not sure that we would have got anywhere. It wasn't helpful for us really, it was essential. You know, if you haven't got some sort of yardstick to measure against, then we wouldn't have been able to move on it at all I think."

However, there were significant criticisms. Several organisations questioned whether the findings on the first pass filter tool were a true reflection of stress-related

issues within their pilot group of respondents:

“Yes, with the codicil that all standards were (comfortably) met and I had some reservations about that given the population of teachers and the evidence base around teacher stress, and the unique make-up of teaching in the [particular local authority] environment”.

There was also criticism of the lower level percentages (65%) for three of the stressor areas, in particular, criticisms from trade unions and others of the lower percentage for relationships:

“In terms of the criticisms from the groups who participated and our unions as well... they had no problem with the 85% as the standard...but this 65% for the standard for relationships, role and change... everyone was really unhappy with. They felt it was too low...And particularly for relations..they felt “well, it’s not really good enough that 1/3 of you staff have got poor relations, are bullied etc.””

Ease of use of the supporting tools

The pilot materials and supporting tools were presented as ‘early prototypes’ to be adapted and improved on during, and as a result of, the pilot process.

Several pilots welcomed the simplicity of the process and supporting tools:
“I like it because it was very simple, and the basic question set I could actually pin onto stressors. I’ve certainly done a lot of research on various stressors and tools and whatever, and they just got so complicated that at the end of the day you’d just end up with so much information, like where do you go to from here.”

In terms of the mechanics of the process or the usability of the analysis tools, most respondents reported that they had found it easy to know whether their organisation met the states to be achieved:

“By using the traffic light system and the percentages it was easy to see if the standards were achieved – according to the questionnaires”

“Easy using the scoring tool”

“Straightforward use of the excel analysis tool gave both numeric and graphical representation of the results.”

During the course of the pilots, and in their feedback, pilot organisations provided a range of comments on the ‘ease of use’ and / or functionality of the supporting tools and made suggestions for improvements. These included:

___ the need for a facility to enable organisations to obtain results broken down by sub-groups;

___ the need for a facility or procedure for handling incomplete forms, missing data, multiple submissions;

___ the need for an electronic, rather than paper based, questionnaire to enable organisations to deal with large numbers of respondents;

___ the linked requirement for electronic processing of questionnaires.

“staff preferred the simplicity of [an] electronic system”

As noted above, during the course of the pilot study, HSE had helped several organisations to adapt the tools to meet their specific requirements. Several other pilot organisations had adapted the HSE tools themselves. This

included developing electronic versions of the questionnaires. Two of the organisations using electronic versions of the questionnaires had recorded high response rates and one reported that:

“even those less IT literate colleagues, liked the electronic submission of returns”.

The accuracy of the supporting tools in identifying key risk areas

There was a range of views expressed by piloteers on how accurate the supporting tools were in identifying key risk areas. Some suggested that they were accurate:

“I think the tools were accurate in identifying key risk areas but perhaps would have liked more specifically on time management side of things, long hours, but we’ve resolved it by putting an additional question in.”

“They were fairly accurate but the end result may be different if we expand the pilot exercise to a larger audience.”

while one piloteer noted that they were:

“helpful in highlighting broad areas and facilitating debate”

However, several piloteers expressed reservations about the reliability of the process and the accuracy of the tools in identifying key risk areas.

“In a sense, the actual mechanics of it are easy, but I’m not sure, in terms of giving out information at staff meetings and the pass filters,I’m just myself not sure how reliable that is.”

“We found some false positives and some false negatives.”

During the course of the pilots, and in their feedback, pilot organisations made a range of specific comments on the first pass and second pass filter tools, noting questions that were ambiguous:

“Some questions were ambiguous and/or open to interpretation eg on Relationships, Questions 1&2 asked whether the organisation had “effective” policies and procedures relating to behavioural issues. It was also clear, from informal feedback, that staff were making different judgements about the word “effective” on the basis of little personal experience and what constituted “organisation” was also being differently interpreted.”

They also highlighted questions that were misleading or badly phrased or that they considered failed to address the relevant stressor:

“Whether the questions themselves were the right ones eg because staff had to work fast and intensively did not necessarily lead to stress, for example if they had significant control over their work and good support. It would seem more appropriate to question the effects of working at speed or indeed slowly along the lines of “are you comfortable with the pace at which you have to work?”

Piloteers commented on aspects of the scoring and weighting systems:

“the HSE questionnaire evaluation tool may need some adjustment given the number of 100% scores achieved (it seems likely that insufficient weight has been given to the two moderating response options).”

First pass filter versus second pass filter

There was a good deal of debate during the course of the pilot exercise on the advantages and disadvantages of having separate first pass and second pass tools. The advantages were expressed in terms of convenience and ease of use:

“The advantages of having a first pass and then a second pass is that you cut down on the amount of resource it takes and it looks less onerous, which is ideal for organisations..very practical.”

Disadvantages related to a number of factors including lack of sensitivity of the first pass tool:

“The downside will be if, well, that you will not get the same response to the second pass ones in terms of response size, the number of people completing it, because they’ve already done one questionnaire..... And also, it’s only an advantage to have them separately if the first pass is sensitive enough to pick up everything. Overall, [all things being equal], I’d prefer to have them separately.”

While some organisations found that first pass and second pass results were consistent:

“Second pass results support the findings in the first pass”

a number of organisations reported that they had found the first pass results potentially misleading:

“There are some interesting differences between the outcomes of the first and second pass questionnaires, which seem to vindicate [the organisation’s] decision to probe further even when the first pass results showed that the standards had been met.”

“But this approach can be misleading as we found. In certain parts of the organisation we were green, but when using the second pass this revealed red on the more probing questions. So the first pass can give you a false sense of security as it really does not drill down far enough.”

Engaging with employees

Pilot organisations described a wide range of approaches that they had taken in engaging with employees. The approaches demonstrated varying degrees of staff involvement and included:

- ___ training sessions;
- ___ debriefing sessions;
- ___ internet and poster briefings;
- ___ information cascaded from senior management briefings;
- ___ presentations to staff;
- ___ team meetings;
- ___ one-to-one discussions;
- ___ working parties set up to address specific topics.

Piloteers reported that these efforts to engage with staff had been largely successful.

Use of focus groups

Ten pilot organisations had used focus groups to engage with their employees and 5 pilot organisations had focus groups planned. Most of the latter had focus groups planned for the near future, as they had only now reached that stage in the pilot process, or the focus groups had been delayed for other reasons.

Pilot organisations adopted a number of different approaches to running focus groups. Some ran them using in-house staff as facilitators, others made use of ACAS or external consultants. One pilot organisation opted to run two different types of focus group. They first ran focus groups comprising members of peer groups. The plan was then to follow these up with ‘teambased’ focus groups.

Reactions to focus groups

The reactions to the experiences of running focus groups was generally positive, though several organisations had yet to provide feedback as the focus groups had only recently taken place. One piloteer, who had begun with some anxieties at the prospect of running focus groups, found that they had learned a lot from running the first two of a series of focus groups:

“And we ran it as two separate ones and we learned a lot from that. About how we do things in future..but I think they went reasonably well.”

The piloteer subsequently reported that both groups had gone well, particularly the second series of groups, and that they had felt confident in running them.

One pilot organisation had asked focus groups members for feedback on the groups and reported that:

“The general feedback from the focus groups were that they were useful as long as something was done about the actions that have come out. I asked for feedback at the end of the focus groups about the process and they’ve said that the process is good so long as ...the same thing...so long as something is done with the results...`with the actions.”

Several pilot organisations emphasized the requirement for training for facilitators to run focus groups. One felt that, in terms of who should run them, it should be someone with background skills in training and group work and group facilitation, rather than the traditional one-to-one occupational health skills. In fact, they felt strongly that people who had been trained in the traditional occupational health route, for example, nursing staff, would be more likely to focus on the individual rather than the organisational issues. Several organisations commented on issues of logistics and long timescales involved in setting up focus groups:

“Unfortunately the focus group process has been long and drawn out, we started the focus groups in mid-September, but just finished last week (end November) I would have liked to do them closer together but “logistics would not allow”. “But yes it’s worked quite well”

Employee involvement

Pilot organisations reported few barriers or concerns around ensuring employee involvement. While some reported a relatively low response rate to questionnaires and invitations to attend focus groups, others reported high response rates (95% in one case) and groups of employees volunteering to take part in the pilot exercise.

“Full support from management, TU and employees”

“We believe [the] method used was successful. We achieved an 81% response rate in the 1st Filter and 76% in the second”

“NO [barriers or concerns about getting employees to engage in the process]; the opposite was true in [our organisation]. We had staff groups volunteering to participate and offer workable solutions.”

Involvement of trade unions

Many of the pilot organisations said that they had involved trade unions in the process. Some had encountered initial reservations on the part of trade unions, though these had subsequently been resolved. Most reported that those consulted were satisfied with the process or, at least, had not raised any major issues:

“I think the trade unions were very happy with it and the comments were “well I’ve been wanting this for ages and I’m pleased it’s happening.”

Others involved

While only 3 organisations reported that they had made use of ACAS support, at the time of reporting, several more planned to do so and another found the offer of such support very welcome. Pilot organisations also reported making use of the services of external consultants / facilitators and had used staff from other pilot organisations / stress partners to help facilitate focus groups.

Action plans and interventions

While several organisations had followed up their focus groups by identifying interventions and developing action plans, few had yet reported on this stage of the process and a significant number of the pilot organisations were at earlier stage of the process. As noted earlier, several were currently running focus groups or had plans to run them in the near future. Feedback on these will be collected and included in the full evaluation report.

One pilot organisation, which had used the focus groups to identify interventions, noted that many of the interventions were not particular ‘stress’ interventions, as commonly envisaged:

“A lot of the interventions were not ...particular ‘stress’ interventions in the sense that ...we’ll bring in a lifestyle coach or whatever. It was about undoing some of the blockages that meant they could get on and do some of the work faster.”

HSE’s Interventions Guide “Real Solutions, Real People” (which HSE originally envisaged would support the pilot process) was published at the end of October 2003 when the official pilot period was virtually complete. One pilot

organisation that had still to run focus groups reported that they planned to use the guide. Another piloteer reported that, though they had a copy of the guide and thought that it was useful to have it available to fall back on, they didn't need to use it as they had come up with their own solutions:

“But it was useful to know that it was available if you needed to use it.”

In similar vein, one pilot organisation remarked:

“Well I think it's sensible if you've a bit of a blank canvas and you don't know where you're going..and you need some suggestions.”

Costs

Many organisations were not yet in a position to estimate the costs of the pilot process. One noted that they would not expect the costs to be very great as they had made use of the existing data in their in-house staff survey for the first pass filter.

Summing up

In summing up, most of the organisations considered that the draft management standards had been helpful to them and rated the Standards as 7 or 8 out of 10 in terms of how helpful they had been.

“It was not a painful process. I would not do anything differently. Quite a positive experience.”

Appendix 4

Considerations for employers in predicting liability for mental injury to employees: lessons from the U.K. courts

Introduction

These considerations have been edited from a UK case¹⁵⁰ that was approved at the highest appeals level in that country.

This UK case has been chosen simply because it is a very succinct review of the considerations relating to liability for mental injury to employees. There is no one Canadian case that provides the same overview in one place in such a measured way.

However, that said, the following considerations can be found spread out across a number of Canadian cases and therefore represents our law very well.

While the considerations are described in terms of the law as it applies to non-union environments, the considerations are sufficiently generic to apply to collective bargaining environments as well.

The Considerations

The *Hatton* court set out the following considerations to help establish grounds for liability for mental injury to employees.

(1) There are no special considerations applying to claims for mental or psychiatric illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.

(2) The “threshold” question [*answers to which determine whether there may be liability, subject to other conditions being met*] is whether the kind of harm complained of to *this particular employee* was *reasonably foreseeable*.

This has two components (a) a mental injury, which (b) is attributable to stress at work as distinct from other factors.

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in

¹⁵⁰ *Sutherland v. Hatton* [CA 2002 ICR 613]

the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

(4) The test is the same whatever the employment: there are no occupations that should be regarded as intrinsically dangerous to mental health.

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee.

- Is the workload much more than is normal for the particular job?
- Is the work particularly intellectually or emotionally demanding for this employee?
- Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs?
- Or are there signs that others doing this job are suffering harmful levels of stress?
- Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health.

- Has he or she a particular problem or vulnerability?
- Has he or she already suffered from illness attributable to stress at work?
- Have there recently been frequent or prolonged absences which are uncharacteristic of him or her?
- Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or her or others?

(6) Employers are generally entitled to take what they are told by employees at face value, unless they have good reason to think to the contrary. They do not generally have to make searching enquiries of employees or seek permission to make further enquiries of their medical advisers.

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he or she should do something about it.

(8) Employers are only in breach of their duty if they have failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.

(10) An employer can only reasonably be expected to take steps, which are likely to do some good: the court is likely to need expert evidence on this.

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

(12) In all cases, therefore, it is necessary to identify the steps, which the employer both could and should have taken before finding him in breach of his duty of care.

(13) The claimant must show that that breach of duty has caused or materially contributed to the harm that he or she suffered. It is not enough to show that occupational stress has caused the harm.

(14) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his or her wrongdoing, unless the harm is truly indivisible. It is for the defendant employer to raise the question of apportionment.

(15) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event.