

Three in 10 (29 per cent) employed Canadians may be experiencing psychologically unsafe and unhealthy workplaces according to a groundbreaking new study produced by Simon Fraser University's Consortium for Organizational Mental Healthcare (COMH – www.comh.ca), a not-for-profit research centre in the Faculty of Health Sciences at Simon Fraser University.

The study was commissioned by the Great-West Life Centre for Mental Health in the Workplace and the survey was conducted by Ipsos Reid (April 20 2009).

The Ipsos Reid results are based on responses to a survey of 6,804 Canadians using the PSR 12, an instrument developed by COMH for Guarding Minds at Work (www.guardingmindsatwork.ca).

Key Question

One key question in the survey reads: 'Overall, my current workplace is a psychologically safe and healthy environment to work in.'

A psychologically safe and healthy workplace was defined for survey respondents as one that promotes employees' psychological well-being and does not harm employee mental health in negligent, reckless, or intentional ways.

Legal Idea

The legal idea of the psychologically safe workplace is fully described in a report entitled 'Stress at Work, Mental Injury and the Law in Canada: a discussion paper for the Mental Health Commission of Canada,' by Martin Shain, with the assistance of Carla Nassar (www.mentalhealthcommission.ca).

In that paper, the term is used to synthesize a number of convergent developments across several areas of the law.

While the term as such is used in some areas of the law, it has yet to be acknowledged as a uniting doctrine across all of them. The use of the term here is based on the author's interpretation of the law as it stands.

A psychologically safe workplace is defined alternatively as:

- ◆ One that allows no significant harm to employee mental health in negligent, reckless, or intentional ways
- ◆ One in which every reasonable effort is made to protect the mental health of employees

The first is a legal statement and each term – 'negligent,' 'reckless,' and 'intentional' – has legal weight and significance.



HEALTHCARE

By: Martin Shain

Psychological Safety At Work: Legal Trends And The Implications

The study is the first to use the concept of the psychologically safe workplace as the basis for a national survey in Canada. It raises some serious questions about the quality of work/life experienced by a significant proportion of Canadian employees and about the potential impact that preventable psychological harm in the workplace might be having on the Canadian economy.

Current estimates place the burden of such preventable harm to employers alone in the realm of \$8 billion to \$11 billion per annum. These losses are experienced in the forms of lost productivity, absenteeism, presenteeism, personnel replacement and retraining, increased healthcare insurance premiums and disbursements including STD and LTD, legal liabilities, and disability accommodation related expenses.

Then, once the harm experienced in the workplace migrates into the broader society, these costs become compounded in the form of lost wages, impact on families, healthcare and social service system costs, and a general deterioration in quality of life in communities.

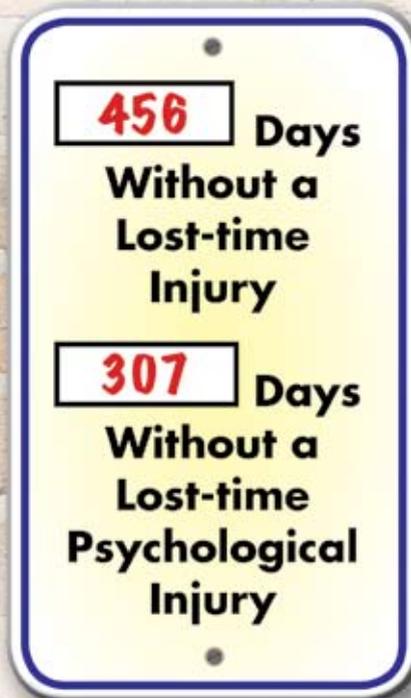
However, in a statement of corporate intent to create a psychologically safe workplace, it would be useful to add the term 'careless' before 'negligent, reckless, or intentional' because if we can avoid carelessness in our interactions at work, we can, most likely, avoid worse things.

The second is more a commonsensical statement that is nonetheless consistent with the law in the sense that it is a basic extension of the existing duty of diligence in occupational health and safety law.

Psychological safety in these terms is, in fact, a new floor standard for conduct in the workplace.

It is a necessary, but not sufficient, condition for a psychologically healthy workplace where every reasonable effort is made to promote the mental health of employees.

Parenthetically, it is worth noting that all too often the well-meaning efforts of workplace health promotion professionals come to grief because they are not founded on the solid ground of psychological safety.



Alleged Harm

Here is a brief synopsis of how the super-duty to provide a psychologically safe workplace is being drawn upon by employees who seek remedies for alleged harm to their mental health.

Whether their claims are based in contract, tort, human rights, employment standards, or occupational health and safety, employees who are seriously depressed, anxious, or burned-out are making increasingly successful legal claims that their condition or disorder is, in whole or in part, the result of bad things that happen to them or are done to them at work.

The focus of these claims is usually some shortcoming or wrongdoing in the organization, management, and supervision of work (people behaving badly toward one another).

The legal basis for these claims is often that their condition or disorder is a type of mental injury.

Increasingly, the subject of these claims is ongoing bad behaviour during the course of the employment relationship, not just at the point where it is falling apart and employees are being, or believe they are being, terminated.

Remedies are taking the form of financial awards and/or remedial orders against employers requiring them to fix conditions of work that are identified as contributing to the injury or harm.

Financial awards made by courts and tribunals are, on occasion, large, although their size is sometimes contested on appeal by higher courts.

The general trend, however, is toward larger settlements. We do not know very much formally about out-of-court or mediated settlements, but anecdotal evidence points to the same trend.

The sources of liability are multiplying as new legal bases for it are articulated by courts, tribunals, and legislatures.

While financial awards are increasingly important, they are dwarfed in comparison with the actual and potential impact that systemic or public interest remedies can have on employers. In such awards, arbitrators and human rights tribunals are using their new found powers to direct how employers should exercise their management rights to prevent the occurrence of conduct that leads or might foreseeably lead to mental injury. While these remedies usually relate to requirements to write or rewrite policies and procedures, they can extend to training requirements and frequently they call for the reappearance of the employer at the tribunal or hearing room at some future date to report on how the remedial orders have been implemented.

Mental injury in this context is not the same as mental illness, although it can be. Certainly, employees do not always, or even very often, have to prove they have a

diagnosable mental illness to win a claim for mental suffering or injury at work.

Excessive Work Demands

These days, even excessive work demands can lead to successful legal action on the part of employees if they can establish that these demands led to mental suffering of a predictable nature. Long gone are the days when only gross acts of violence, harassment, or discrimination could form the basis of such claims.

Indeed, mental injury, according to many modern courts and tribunals, is simply harm to mental health (mental suffering) that significantly affects the ability of employees to function at work and at home. Employers may become liable for such injuries if these are found to result from their negligent, reckless, or intentional acts and omissions.

While there is some uncertainty surrounding where the law will eventually go in this area, there are clear indications and warning signs that employers should aspire to the creation and maintenance of a psychologically safe workplace.

The emerging duty to provide a psychologically safe workplace is really an extension of the existing duty to provide a physically safe system of work that has been evolving in our legal system for more than 150 years.

We are currently at a new frontier in the law as we explore and push the boundaries of what it means to have a psychologically safe workplace. And it is apparent that the current economic imperative to do more with less must be tempered by the duty to do so with reasonable care for the mental health of employees.

Hard economic times are no defence to claims of mental injury, unless the claim is frivolous.

The problem is that stressful economic times create additional pressures on relationships at work.

Additional, but avoidable, problems that increase the risk of legal action during difficult economic times include:

- ◆ *Increased Information Failure* – not sharing information that is relevant to others in a timely manner because everyone is too busy
- ◆ *Increased Participation Failure* – not involving people in decisions when they have a legitimate interest in the outcome, because everyone is too busy
- ◆ *Excessive Demands* – pressures on employees to do more with less beyond the capacity of any normal people in their positions

The consequences of information/participation failure and excessive demands include strong feelings such as resentment, anger, sense of exclusion, depression, and anxiety – any or all of which can contribute to a pervasive and corrosive sense of

injustice that, in turn, becomes a breeding ground for conflict and legal action.

The legal consequences are not just, or even mainly, about money, although obviously that can be significant. They are more about the massive disruptions to productivity and negative impact on morale associated with legal actions of any kind brought by employees against their employers or other employees.

Culture Of Fairness

Creating or restoring a culture of fairness is the best insurance against the occurrence of conduct that can constitute mental injury. In such a culture, people feel involved, valued, and respected. The best way to ensure a culture of fairness is to concentrate on preserving its foundations.

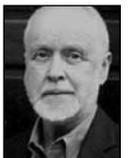
The most essential elements of these foundations are the active maintenance of participation and information flow. These facilitate conditions of awareness, understanding, and carefulness – the building blocks of emotional intelligence:

- ◆ *Awareness* – being aware of how you affect others in your circle of influence and how they affect you
- ◆ *Understanding* – being respectful of one another's legitimate interests and needs
- ◆ *Carefulness* – taking pains to avoid reasonably foreseeable harm to others in your circle of influence

Recruiting, selecting, training, and promoting employees and managers for the key trait of emotional intelligence is the best single measure employers can take to address the legal requirement to provide a psychologically safe workplace in this or any other economic environment.

Essentially, and perhaps surprisingly, the law is calling for emotional intelligence to be the bedrock of conduct at work that is conducive to fairness and reasonableness and the prevention of mental injury. ■

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For assistance with assessing and addressing avoidable risks to the mental health of employees, visit www.guardingmindsatwork.ca.