

The National Standard of Canada on Psychological Health and Safety in the Workplace Legal Developments between 2013 and 2019

A summary of the 2019 Shain report: Getting ahead of the Perfect Legal Storm – toward a basic legal standard of care for workers' psychological safety



**Workplace Strategies
for Mental Health**

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Overview

This overview is a summary of the key points from “Getting ahead of the Perfect Legal Storm – toward a basic legal standard of care for workers’ psychological safety: analysis and commentary” which is available as a separate document at workplacestrategiesformentalhealth.com.

The question addressed by the longer document is whether or to what extent it’s possible to identify a basic duty of care which employers may owe to workers to protect their psychological safety among the various rules set in cases and legislation.

This overview is intended to help employers through what must sometimes be seen as overwhelming rules and regulations.



Employers who adopt a standard of care for workers’ psychological safety that goes above the minimum legal requirement may avoid many of the worst legal entanglements regarding psychological injury.

Additional takeaways from the report:

- Awards for failing to provide a psychologically safe workplace are significantly increasing.
- Employers are increasingly responsible for protecting employees from harm caused by clients, patients and contractors, as well as from other employees.
- Recruit, hire and promote leaders trained to provide a psychologically safe workplace and effectively resolve workplace issues. Workers’ compensation legislation in Ontario holds employers to a higher standard than tort law. Negligence rather than recklessness is the threshold to determine compensability (but not liability) for harassment.

The overview includes:

- A review of the impact from the National Standard of Canada on Psychological Health and Safety in the Workplace (the Standard)
- Practical lists to help employers consider real-world application
- A timeline of legal developments beginning after the publication of the Standard

The standard of care in the National Standard on Psychological Health and Safety

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

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

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

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

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

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

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

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

Through the workplace lens

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

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

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

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

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

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

The distinctions made above are not absolute in any sense. This is why courts and tribunals often go to such lengths to come to decisions. Potential harm gradually progresses from one level of risk to another. This makes any absolute distinction impossible.

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

From avoiding liability to supporting psychological safety

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

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

The following are foundations of the 10 points above:

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

After the standard: Changes in the legal landscape

Legal developments between 2013 and 2019

The publication of the Standard on Jan. 16, 2013 was intended to give employers a framework to protect the psychological safety of employees. It's uncertain whether or to what extent the Standard has been an impetus for the changes to the law that followed. However, it seems safe to say both the Standard and the subsequent legal developments reflect a rising social consciousness about the impact the workplace can have on workers' psychological safety.

The following developments that came after the implementation of the Standard are particularly noteworthy developments in the law relating to the prevention of psychological injury in the workplace:

2014 - 2015 Two arbitration cases in British Columbia and Ontario **extend the scope of psychologically injurious behaviour** to include what was at one time considered merely “shop talk”¹. Speaking in derogatory or belittling terms is no longer considered “just the way it is here”. These cases suggest we're changing what we feel is acceptable in the workplace.

2015 - 2017 First indications of the **Standard being incorporated as an actionable part of collective agreements**, including in the collective agreements of the Public Service Alliance of Canada and the British Columbia Nurses' Union.

2015 Occupational Health and Safety Act amendment (Bill 132), the Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment) in Ontario requires the introduction of policies to prevent and deal with harassment but stops short of requiring assessments of risk aimed at this level of behaviour.

2016 Two cases² demonstrate that using legal process to determine how to accommodate vulnerable employees can result in **solutions that please no one and cost everyone**. Creating processes for reasonable accommodation can help avoid this.

2016 Occupational Health and Safety amendment (Bill 163), Supporting Ontario's First Responders Act (Post-traumatic Stress Disorder) follows similar initiatives in Alberta and Manitoba introducing a legal presumption that **if PTSD is diagnosed, it's assumed to be work related** for certain first responders.

2017 The Supreme Court of Canada rules that evidence of mental injury in a civil suit doesn't have to be of a medical or psychiatric nature if key witnesses, such as family and friends, can credibly attest to the harm suffered³. When applied to employment law, it's predicted this evidence will lower the threshold of liability for psychological injury making it easier for the claims of workers to succeed.

2017 The Supreme Court affirmed a positive duty upon employers to maintain a discrimination-free workplace and **be accountable for conduct by those in its workplace, even if they are there only on a temporary consulting basis**⁴. This extends the duty beyond employees to consultants and possibly to customers and patients.

2017 Workplace Safety and Insurance Board in Ontario joins British Columbia, Alberta, Saskatchewan and Quebec in **allowing claims for mental injuries arising from chronic stress**⁵. The Stronger, Healthier Ontario Act (Budget Measures), 2017 (Bill 127) amendment to Ontario's Workplace Safety and Insurance Act (WSIA) led to fear there would be an overwhelming flood of claims. Given the strict policies governing compensability in this area, many claims have been denied and the fears appear unfounded.

2018 Occupational Health and Safety amendment (Bill 30), the Government of Alberta's Act to Protect the Health & Well-being of Working Albertans, at s.1 (v) provides that **"health and safety" includes physical, psychological and social well-being**⁶. Policies flowing from this legislation impose new duties for joint occupational health and safety committees relating to the assessment of psychological risks arising from the organization of work and management or people.

2019 Revisions to Canada Labour Code part 1 (Bill C65)⁶, define harassment and violence as "any action, conduct or comment, including of a sexual nature, **"which can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment"**. Prevention strategies must now include assessments of psychosocial risk as the basis for planning abatement measures.

This report was commissioned by **Workplace Strategies for Mental Health** (workplacestrategiesformentalhealth.com) to keep us up to date on the evolution of the law as it relates to an employer's responsibility under the law to provide a psychologically safe workplace.

¹ Lilydale Inc. v United Food and Commercial Workers International Union Local 1518 (2014) CanLII 26399 (BC LA) <<http://canlii.ca/t/g706p>>, retrieved on 2019-09-11; Hendrickson Spring – Stratford Operations v. United Steelworkers and its Local 8773(2015) CanLII 60008 ONLA

² Hamilton-Wentworth District School Board v. Fair (2016) ONCA 421; Emond v. Treasury Board (Parole Board of Canada) 2016 PSLREB 04

³ Saadati v Moorhead 2017 SCC 28

⁴ British Columbia Human Rights Tribunal v. Schrenk [2017] 2 S.C.R. 795

⁵ Workplace Safety and Insurance Act 1997 S.O. 1997, CHAPTER 16 Schedule A

⁶ An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1 (S.C. 2018, c. 22).

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