Strengths and Weaknesses of the use of Law to Protect Workers’ Mental Health

Katherine Lippel
klippel@uottawa.ca
Faculty of Law (Civil Law Section)
University of Ottawa
https://droitcivil.uottawa.ca/chaires-recherche/droit-sante-securite-travail/

OHCOW May Day May Day May Day Webinar Series
May 15th, 2020
Outline

• Regulatory approaches to the protection of workers’ mental health
  • Overview
  • Canada:
    • Occupational Health and Safety legislation
    • Workers’ compensation legislation
    • Voluntary standards?
  • ILO Convention 190 on Violence & Harassment
Policy typologies regulating exposure to psycho-social risk factors

Lippel, 2017

Risk assessment

OHS regulation
labour inspection

Anti-harassment/violence legislation

Workers’ Compensation
Acute-Chronic stress

No public policy mechanisms
Legislation in Canada (CFNU/FCSII/LIPPEL, 2018)

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<td>Nunavut</td>
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General duty clauses targeting work organisation (Qc) s. 51 OHS Act, RSQ, c. 2.1

• “Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker. He must, in particular
  – (3) ensure that the organization of the work and the working procedures and techniques do not adversely affect the safety or health of the worker;
  – (5) use methods and techniques intended for the identification, control and elimination of risks to the safety or health of the worker;”

• Orders in Robot-Man case:
  – The technology be adjusted to allow for psychological respite and broader leeway for workers
  – The setting up of a mechanism to monitor mental health problems linked to psychosocial hazards
Justice Institute for British Columbia

WORKERS’ COMPENSATION PRESumptive legislation for public safety personnel

Anderson et al, 2019
Compensation for mental health problems attributable to workplace stress in Canada

- All jurisdictions compensate for mental health problems attributable to acute stress
- Five jurisdictions always accepted to compensate for mental health problems attributable to chronic stress
  - Yukon
  - Nunavut/North West Territories
  - Alberta
  - Saskatchewan
  - Québec
- BC and Ontario have been in a process of transition
Mental health can be compromised by

Acutely stressful situation/traumatic event:
– Armed robbery, hostage taking, attending a motor vehicle accident with fatalities...

• Chronic stress: a series of even banal events that cumulatively undermine mental health
Tribunal decisions in Qc TAT/CLP/CALP
Chronic stress claims will be accepted when:

- an accumulation of events arising out of or in the course of employment,
- events which, when considered individually, may seem banal,
- by their cumulative effect, become significant and meet the legislative requirement for a sudden and unforeseen event (definition of work accident).
- Medical evidence permits the tribunal to conclude that the cumulative events contributed (significantly) to the diagnosed mental health problem.
Chronic stress as work accident

• Necessary to demonstrate that the stressors, individually or cumulatively, go beyond the «normal» workplace stressors to which workers are exposed in the «modern» workplace.

• Claims alleging that legitimate management practices have led to mental health problems are not accepted.
### Prevalence of forms of violence in working population vs in compensated cases

<table>
<thead>
<tr>
<th>Type of Violence</th>
<th>EQCOTESST (2007-2008)</th>
<th>CSST (2015) % accepted claims for violence (n=2011)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Psychological harassment</td>
<td>14.8% [20.6% 2014-2015] EQSP</td>
<td>1.5%</td>
</tr>
<tr>
<td>Sexual harassment</td>
<td>2.5%</td>
<td>0.5%</td>
</tr>
<tr>
<td>Physical violence</td>
<td>1.9%</td>
<td>84.5%</td>
</tr>
<tr>
<td>Other forms of violence (threats, unspecified etc)</td>
<td>N/A</td>
<td>13.6%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>1998-2002</th>
<th>Cited</th>
<th>Cited/Accepted</th>
<th>2007-2008</th>
<th>Cited</th>
<th>Cited/Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excessive workload</td>
<td>97/357</td>
<td></td>
<td>38/97 or 39%</td>
<td>Lack of support: Supervisor</td>
<td>154/287</td>
<td>66/154 or 43%</td>
</tr>
<tr>
<td>Lack of support: supervisor</td>
<td>95/357</td>
<td></td>
<td>54/95 or 57%</td>
<td>Excessive workload</td>
<td>67/287</td>
<td>28/67 or 42%</td>
</tr>
<tr>
<td>Heavy responsibilities</td>
<td>47/357</td>
<td></td>
<td>29/47 or 62%</td>
<td>Lack of recognition</td>
<td>59/287</td>
<td>22/59 or 37%</td>
</tr>
<tr>
<td>Lack of control</td>
<td>46/357</td>
<td></td>
<td>17/46 or 37%</td>
<td>Lack of control</td>
<td>52/287</td>
<td>27/52 or 52%</td>
</tr>
<tr>
<td>Lack of recognition</td>
<td>36/357</td>
<td></td>
<td>13/36 or 36%</td>
<td>Lack of support: colleagues</td>
<td>53/287</td>
<td>23/53 or 43%</td>
</tr>
</tbody>
</table>

Criteria to access compensation: BC

- **Acute stress**
  - "is a reaction to one or more traumatic events arising out of and in the course of the worker's employment"

- **Chronic stress**
  - "is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment"

WCA s. 5.1, BC
Criteria to access compensation: Ontario

- **Traumatic Mental stress**
  - ... the WSIB ... must be satisfied, on a balance of probabilities, that
  - the traumatic event(s), or the cumulative effect of a series of traumatic events,
  - arose out of and in the course of the worker’s employment, and
  - caused, or significantly contributed to, an appropriately diagnosed mental stress injury.
  - WSIB Policy 15-03-02

- **Chronic Mental stress**
  - ... the WSIB ... must be satisfied, on a balance of probabilities, that the substantial work-related stressor
  - arose out of and in the course of the worker’s employment, and
  - was the predominant cause of an appropriately diagnosed mental stress injury.
  - WSIB Policy 15-03-14
Role of legislative presumption

• If PTSD (Ont)/mental disorder (BC) is diagnosed in a first responder from a named category

• «the mental disorder must be presumed to be a reaction to the one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, unless the contrary is proved.»

  (BC WCA 5.1 (1.1))
Diagnostic requirements

• Conditions for application of presumption and compensation
  – BC
  – Ontario

• Conditions for compensation
  – Qc

– PTSD only (Ont) or other diagnoses (Bc)
– Requirement of DSM V diagnoses by psychiatrists or psychologists vs general practitioners
  • Or not (Qc)
– Symptoms vs diagnoses of illness
Voluntary standard: National Standard of Canada

CAN/CSA-Z1003-13/BNQ 9700-803/2013 - Psychological health and safety in the workplace - Prevention, promotion, and guidance to staged implementation
The limits of voluntary standards

• “There is also the suggestion from these findings that organizations most in need of implementing the Standard may be the least receptive. For example, in one large organization, there were a number of suicides that were generally believed to have resulted from psychological injury in the workplace. Despite this egregious possibility, positive change did not occur. There appears to be a tendency to view mental health as an attribute of the individual, to emphasize the importance of the most proximal psychological factors, and to underestimate the impact of the wider social and structural determinants.”

• Kunyk et al, 2016
ILO Convention 190 and Recommendation 206

Adopted in June 2019
Not yet ratified
Definitions of occupational violence

• In the literature
  – Physical violence
  – Psychological harassment/bullying/mobbing
  – Threats of violence
  – Verbal abuse
  – Sexual harassment and gender based harassment
  – Other forms of discriminatory harassment
  – Criminal violence
  – Intimate partner violence in the workplace
  – Technology based violence at work

• Article 1) Convention 190
  – « the term ‘violence and harassment’ in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in or are likely to result in physical, psychological, sexual or economic harm, and includes gender based violence and harassment; »
Determinants of workplace violence identified in the literature

- Psycho-social and organisational risk factors relating to occupational violence
  - Job strain/ISO strain
  - Effort Reward Imbalance
  - Restructuring and job insecurity
  - Precarious Employment
  - ...
Each Member shall adopt laws and regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent violence and harassment in the world of work, including gender-based violence and harassment, and in particular, so far as is reasonably practicable, to:

(a) adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment;

(b) take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health;

(c) identify hazards and assess the risks of violence and harassment, with the participation of workers and their representatives, and take measures to prevent and control them; and

(d) provide to workers and other persons concerned information and training, in accessible formats as appropriate, on the identified hazards and risks of violence and harassment and the associated prevention and protection measures, including on the rights and responsibilities of workers and other persons concerned in relation to the policy referred to in subparagraph (a) of this Article.

- Québec Survey on Working and Employment Conditions and Occupational Health and Safety

- During the past 12 months at your current main job, were you subjected to psychological harassment, that is, repeated verbal harassment or actions that affected your dignity or personal integrity?
EQCOTESST, 2007-2008

Figure 3: Prevalence of psychological harassment by exposure of men and women to organizational demands*, Québec, 2007-2008.

<table>
<thead>
<tr>
<th></th>
<th>Exposed</th>
<th>Not exposed</th>
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<tr>
<td>High psychological</td>
<td>22.0%</td>
<td>29.0%</td>
</tr>
<tr>
<td>demands (a, b)</td>
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<td></td>
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<tr>
<td>Low decision latitude</td>
<td>18.4%</td>
<td>11.8%</td>
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<tr>
<td>(a, b)</td>
<td></td>
<td></td>
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<tr>
<td>Low social support</td>
<td>15.5%</td>
<td>15.5%</td>
</tr>
<tr>
<td>at work (a, b)</td>
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<td></td>
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<tr>
<td>Job-strain (a, b)</td>
<td>29.1%</td>
<td>32.2%</td>
</tr>
<tr>
<td>Iso-strain (a, b)</td>
<td>40.3%</td>
<td>41.1%</td>
</tr>
<tr>
<td>Low recognition</td>
<td>24.8%</td>
<td>29.1%</td>
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<tr>
<td>(a, b)</td>
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<tr>
<td>Effort reward</td>
<td>35.1%</td>
<td>38.4%</td>
</tr>
<tr>
<td>imbalance (a, b)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Chi²-statistically significant, P<0.5, for men.
  a Chi²-statistically significant, P<0.5, for women.
  b Employed as an employee for at least eight weeks working at least 15 hours per week.
  c Source: Institut de la statistique du Québec, Enquête québécoise sur des conditions du travail, sur l’emploi, la santé et la sécurité du travail, 2007-2008
Psychosocial hazards

Association with psychological harassment

EQCOTESST, 2007-2008

* Emloyed as an employee for at least eight weeks working at least 15 hours per week.
Conclusion

• Legislation that promotes risk assessment with the participation of workers is the most effective
  – No need to explicitly include mental health in the legal language but need to not exclude it implicitly
• Workers’ Compensation for chronic stress is a key tool for prevention:
  – Makes visible the working conditions that make workers ill
  – Makes the “business case” for prevention
  – Facilitates appropriate measures for return to work
• ILO Convention 190 on Violence and Harassment may provide an incentive for better language on risk assessment of psychosocial hazards.
Workers’ compensation in Canada: mental health coverage


Presumptive legislation for first responders


https://www.researchgate.net/publication/335404390_Worker%27s_Compensation_presumptive_legislation_for_public_safety_personnel_Stakeholder_Consultation_and_Validation_Workshop_Report
Occupational Health and Safety law in Canada: Protecting workers’ mental health

International Labour Organisation-violence convention

• C190- Convention (no 190) Violence and harassment Convention, 2019

• R-206-Recommandation (no 206) Violence and harassment Recommendation 2019
Preliminary conceptual report

Suggested readings: Mental health voluntary standards


To learn more


- K. Lippel & M. Quinlan (Eds), Regulation of psychosocial risk factors at work, Special issue: (2011) 49 (4) *Safety Science*

- *Swedish Regulation on Organizational and Social Work Environment, 2015*