

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

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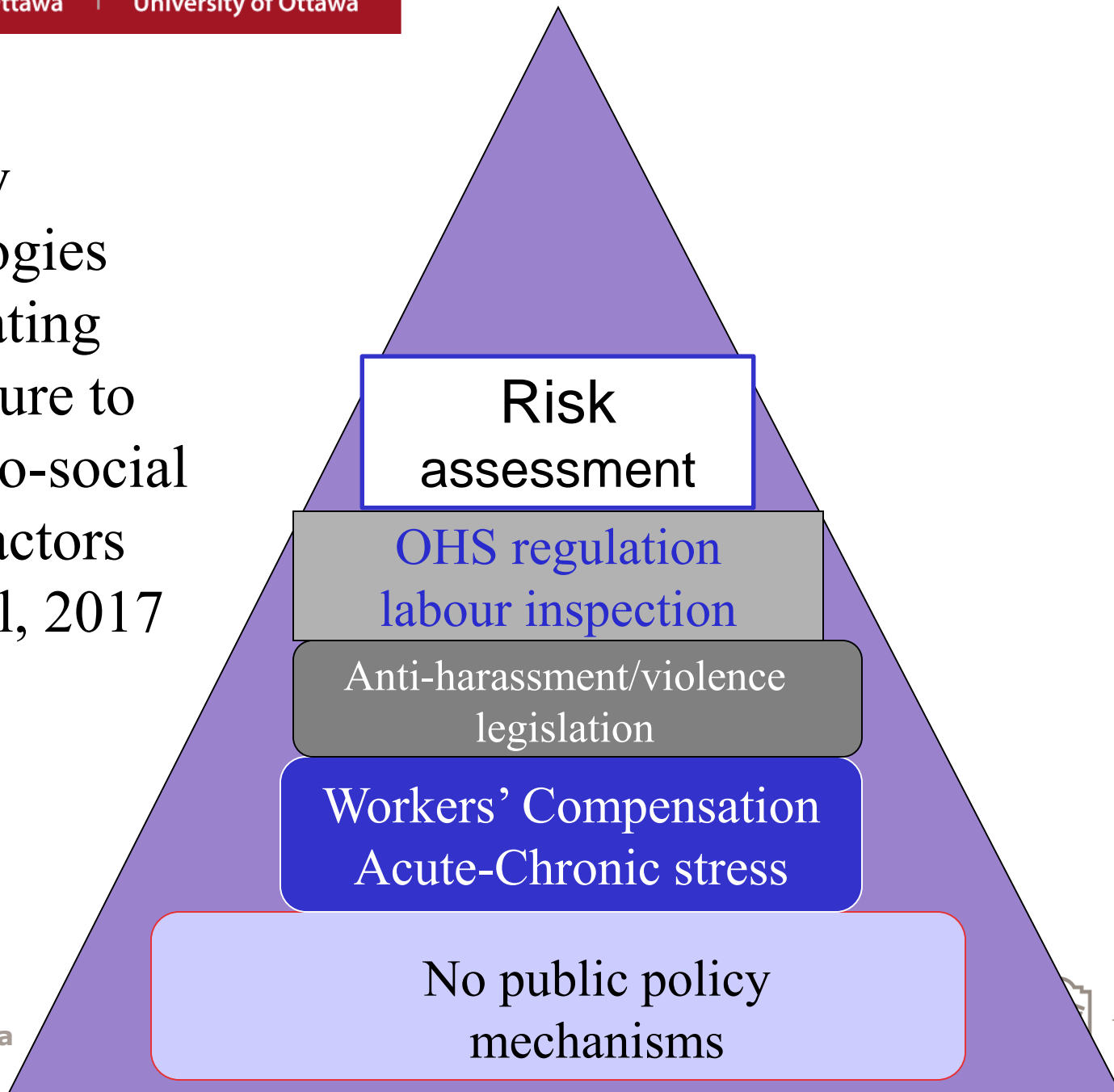
OHCOW May Day May Day Webinar Series

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



Legislation in Canada (CFNU/FCSII/LIPPEL,2018)

Province	Physical Violence	Threats	Psych har.	Sexual har.	Discriminatory har.	Conjugal Violence
AB	X	X	X	X	X	X
BC	X	X	(X)	(X)	(X)	(X)
MA	X	X	X	X	X	X
NB	X	X	X	X	X	X
NL	X	X	X	X	X	X
NS	X	X		X	X	X
NWT	X	X	X	(X)	X	X
ON	X	X	X	X	X	X
PEI	X	X	X	X	X	
QC	(X)	(X)	X	X	X	X
SK	X	X	X	(X)	X	X
Nunavut	X	X	X	X	X	
Federal	X	X	X	X	X	

Robot-Man

Santé au travail, Oct. 2007

K. Lippel, M. Vézina, R. Cox, « Protection of workers' mental health in Québec : Do general duty clauses allow labour inspectors to do their job? », (2011) 49 (4) *Safety Sci.* 582-590



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

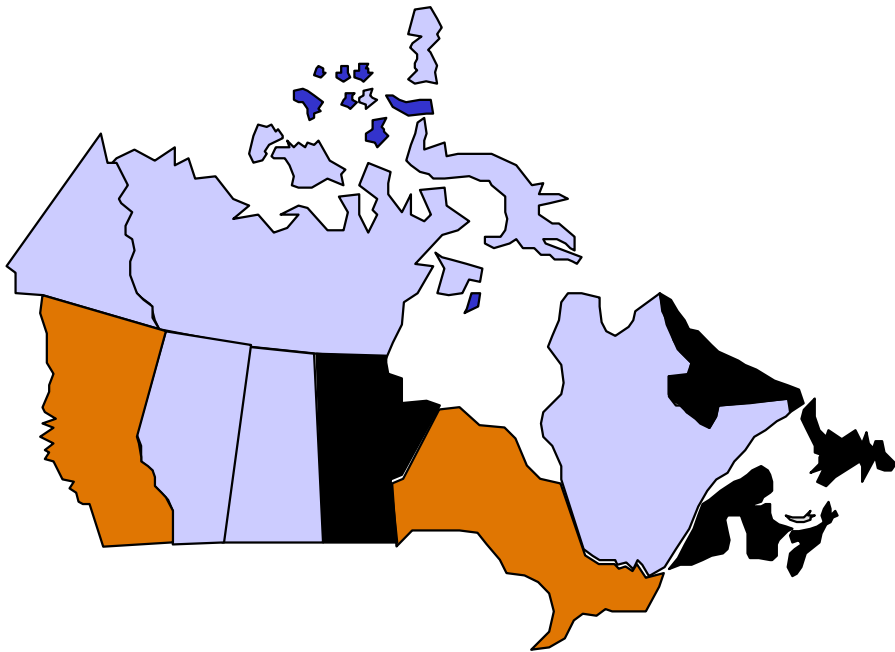
Justice Institute for British Columbia



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 :

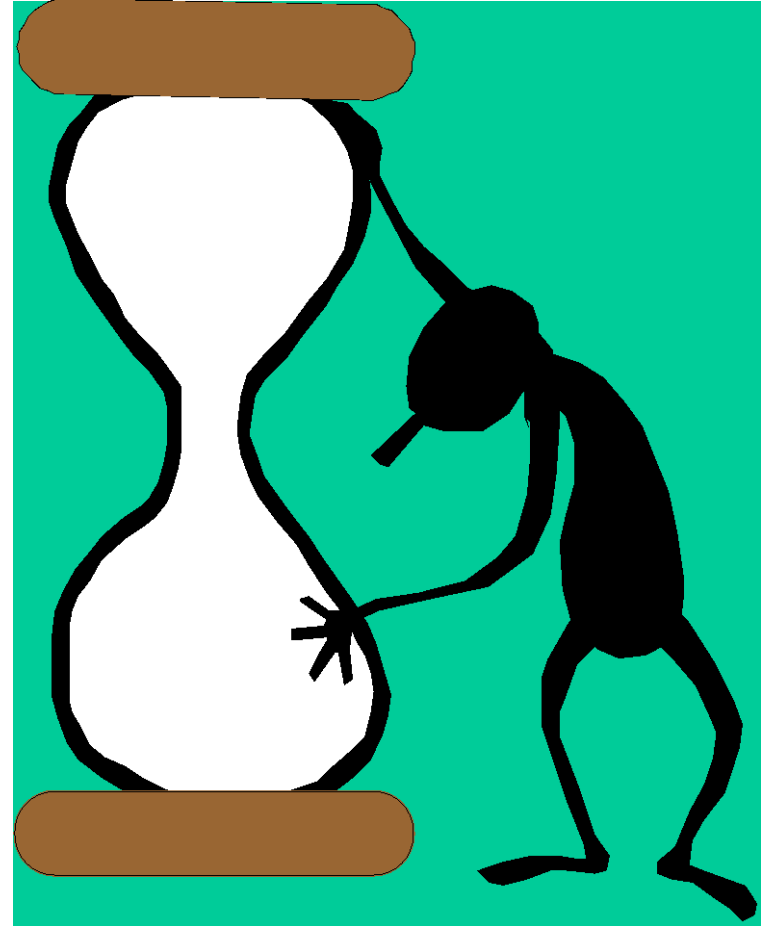
- Armed robbery, hostage taking, attending a motor vehicle accident with fatalities...

- Chronic stress: a series of even banal events that cumulatively undermine mental health

Tribunal decisions in Qc TAT/CLP/CALP

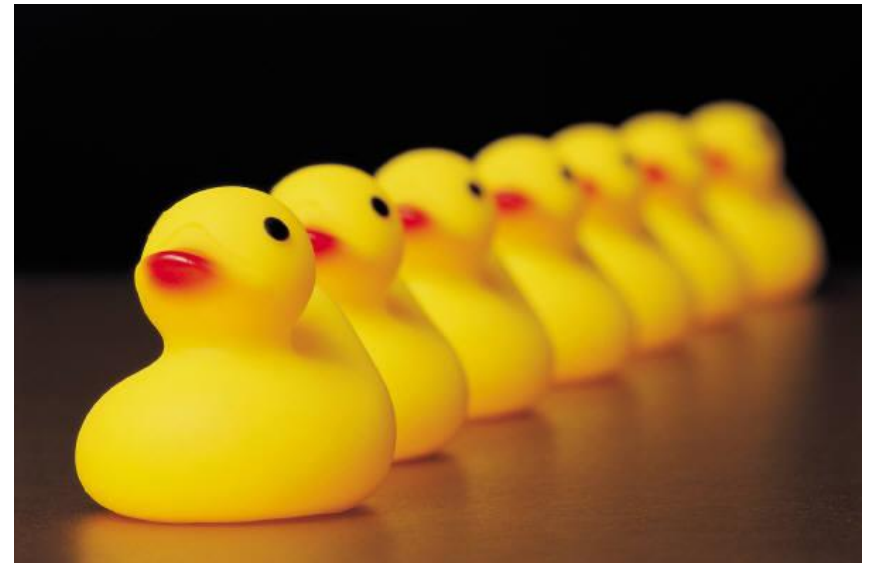
Chronic stress claims will be accepted when:

- 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

	EQCOTESST (2007-2008)	CSST (2015) % accepted claims for violence (n=2011)
Psychological harassment	14,8% [20,6% 2014-2015] EQSP	1,5%
Sexual harassment	2,5%	0,5%
Physical violence	1,9%	84,5%
Other forms of violence (threats, unspecified etc)	N/A	13,6%

Workers' Compensation Appeals Cases (qc) 1998-2002 vs 2007-2008

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

Source K. Lippel, «Workers' Compensation for Work-Related Mental Health Problems: an Overview of Québec Law», in Loïc Lerouge, (ed), *Psychosocial Risks in Labour and Social Security Law: A Comparative Legal Overview from Europe, North America, Australia and Japan*, Springer, 2017, 291-304

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
 - ...

Requirements in Convention 190, art. 9

- 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.

Psychological harassment EQCOTESST 2007-2008, Vézina et al 2011

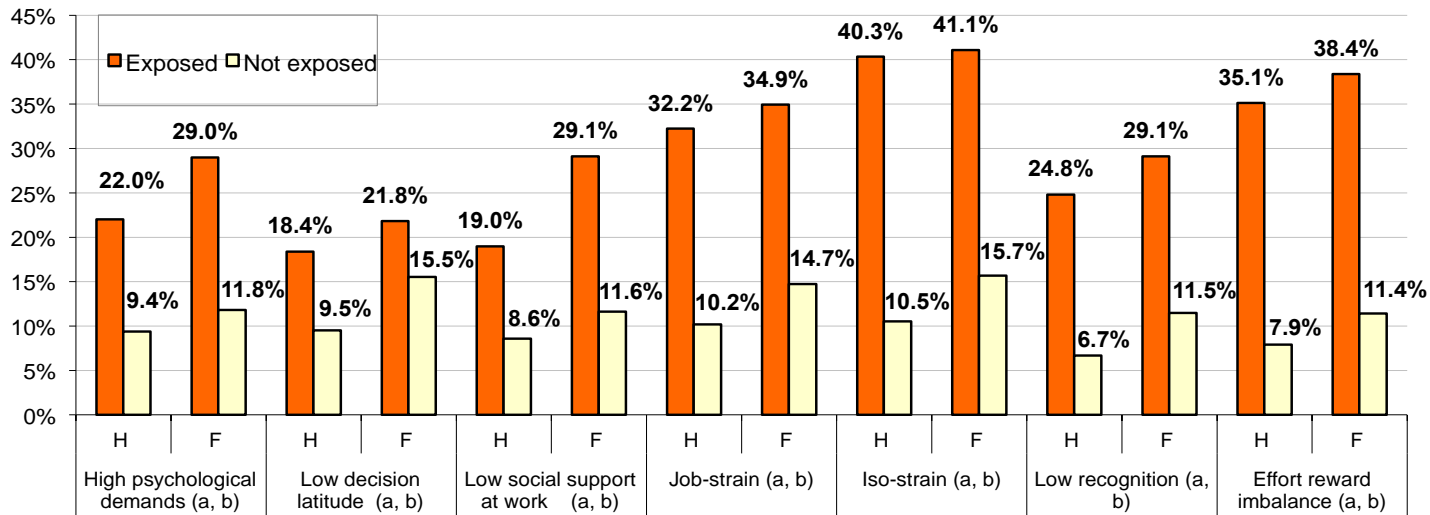
- Québec Survey on Working and Employment Conditions and Occupational Health and Safety



- 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.



^a Khi²-statistically significant, P<0.5, for men.

^b Khi²-statistically significant, P<0.5, for women.

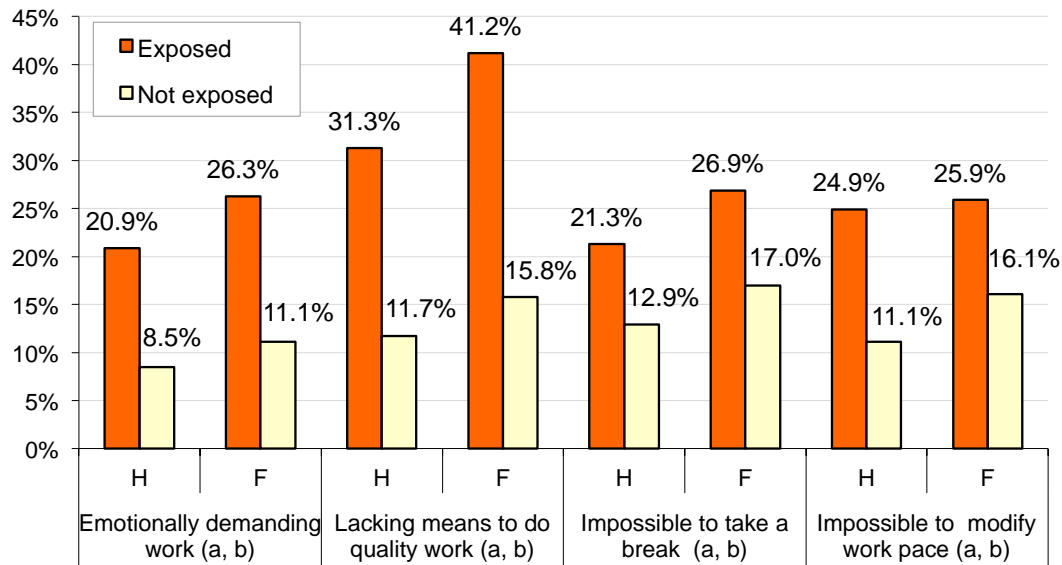
* Employed as an employee for at least eight weeks working at least 15 hours per week.

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



^a χ^2 -statistically significant, $P < 0.5$, for men.

^b χ^2 -statistically significant, $P < 0.5$, for women.

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

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

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

- K. Lippel et A. Sikka, « Access to Workers' Compensation Benefits and Other Legal Protections for Work-Related Mental Health Problems : a Canadian Overview », (2010) 101 (S.1) *Revue canadienne de santé publique/Canadian Journal of Public Health* S-16-S22.
- K. Lippel, «Workers' Compensation for Work-Related Mental Health Problems: an Overview of Québec Law», in Loïc Lerouge, (ed), *Psychosocial Risks in Labour and Social Security Law: A Comparative Legal Overview from Europe, North America, Australia and Japan*, Springer, 2017, 291-304

Presumptive legislation for first responders

- Greg Anderson, Katherine Lippel, Paula Di Nota, Bryce Stoliker, Helene Dragatsi & Adam Vaughan, *Workers' Compensation Presumptive Legislation for Public Safety Personnel: Stakeholder Consultation & Validation Workshop Report*, Justice Institute of British Columbia, New Westminster, 2019 (66 pages).

https://www.researchgate.net/publication/335404390_Worker%27s_Compensation_presumptive_legislation_for_public_safety_personnel_Stakeholder_Consultation_and_Validation_Workshop_Report

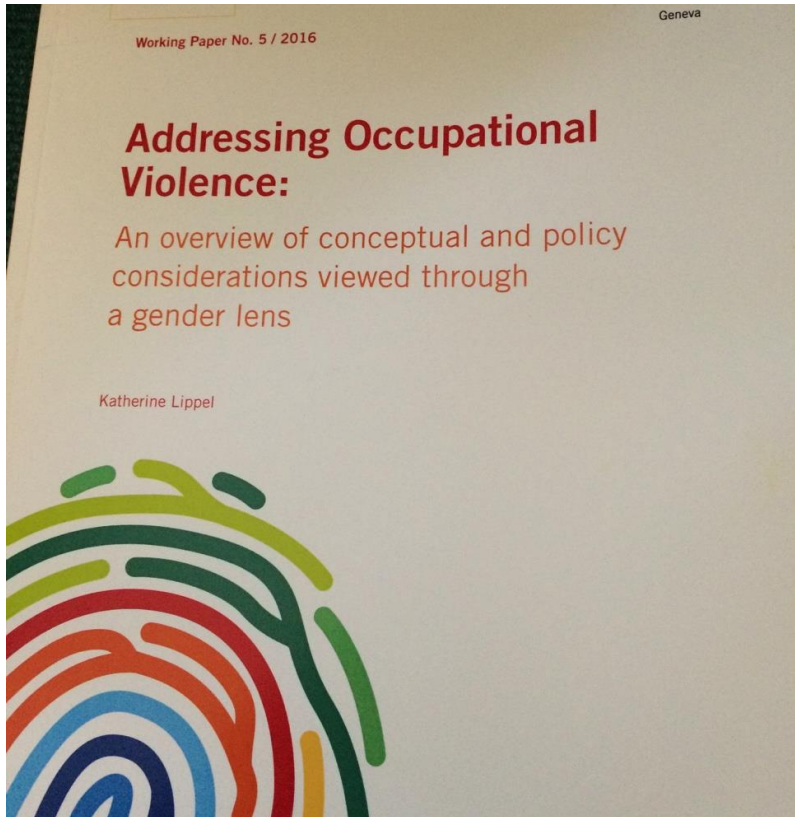
Occupational Health and Safety law in Canada: Protecting workers' mental health

- K. Lippel, « Law, public policy and mental health in the workplace », *Healthcare papers* [HealthcarePapers](#), [11\(Sp\) 2011 20-37](#).
- K. Lippel, M. Vézina, R. Cox, « Protection of workers' mental health in Québec : Do general duty clauses allow labour inspectors to do their job? », (2011) 49 (4) *Safety Sci.* 582-590

International Labour Organisation-violence convention

- C190- Convention (no 190) Violence and harassment Convention, 2019
- https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190
- R-206-Recommendation (no 206) Violence and harassment Recommendation 2019
- https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:4000085:NO

Preliminary conceptual report



- http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_535656.pdf

Suggested readings: Mental health voluntary standards

- Standards Council of Canada (2013). Psychological health and safety in the workplace—prevention, promotion, and guidance to staged implementation. (CSA Group and BNQ Publication No. CAN/CSA-Z1003-13/BNQ 9700-803/2013 National Standard of Canada). Retrieved from <http://shop.csa.ca/en/canada/occupational-health-and-safety-management/canca-z1003-13bnq-9700-8032013/invz/z10032013>
- Diane Kunyk et al, « Employers' Perceptions and Attitudes Toward the Canadian National Standard on Psychological Health and Safety in the Workplace: A Qualitative Study » (2016) 44 *Intl JL & Psychiatry* 41

EQCOTESST

- M. Vézina, M., E. Cloutier, S. Stock, K. Lippel, É. Fortin et al Québec Survey on Working and Employment Conditions and Occupational Health and Safety, 2007-2008(*EQCOTESST*), Québec, Institut de recherche Robert-Sauvé en santé et sécurité du travail - Institut national de santé publique du Québec et Institut de la statistique du Québec, 2011.

<http://www.irsst.qc.ca/en/-irsst-publication-quebec-survey-working-employment-conditions-occupational-health-safety-eqcotesst-rr-707.html>, 2011

To learn more

- K. Lippel, Michel Vézina, Renée Bourbonnais, Amélie Funes, «Workplace psychological harassment: gendered exposures and implications for policy», (2016) 46 (1) *International Journal of Law and Psychiatry* 74-87
- 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*
 - <https://www.av.se/en/work-environment-work-and-inspections/publications/foreskrifter/organisatorisk-och-social-arbetsmiljo-afs-20154-foreskrifter/>