THE "PSYCHOLOGICALLY SAFE" WORKPLACE

by Patricia L. Janzen and Magdalena A. Wojda, Harris & Company LLP

Introduction

In his paper, "Tracking the Perfect Legal Storm: Converging systems create mounting pressure to create the psychologically safe workplace" (attached as *Appendix 1*), Dr. Martin Shain states that a legal duty exists in Canada to provide and maintain a "psychologically safe" workplace. Dr. Shain bases his conclusions on what he describes as major trends in seven areas of law: human rights, workers' compensation, torts, employment, labour, occupational health and safety and employment standards. Dr. Shain examines recent case law and legislative amendments in these areas, positing that the respective developments in the law reveal a trend of affording employees with more avenues of redress for psychological harm in the workplace. On this basis, Dr. Shain concludes that Canadian employers effectively have a legal duty to maintain workplaces that are "psychologically safe".

The implications of such a legal duty would be expansive and onerous and the duty itself would be practically impossible to discharge. However, it is our view that Dr. Shain has misconstrued some of the case law and has overstated the support for his thesis.

In this paper, we examine "Tracking the Perfect Legal Storm" and argue that, contrary to Dr. Shain's conclusions therein, there is no recognized legal duty on employers to maintain a psychologically safe workplace. We base our argument on two key grounds. First, many of the cases Dr. Shain cites apply established legal principles to "hard cases", and do not create or rely on this new legal duty. Secondly, higher courts have reversed initiatives toward the recognition of such a duty and, most recently, the Ontario Court of Appeal in *Piresferreira v. Ayotte*, 2010 ONCA 384 ("*Piresferreira*"), expressly rejected the proposition that a duty to provide a psychologically safe work environment exists or ought to be recognized at common law.

Legislation / Case Law

At the outset, we note that Dr. Shain is misguided in arguing that there is one general "legal duty" on employers to protect the psychological safety of their employees based on various sources of law, including the common law and legislation in various areas of the law. Rather, the developments related to each of these sources are the result of separate and distinct legal doctrines or legislative mandates that are aimed at a variety of specific objectives.

Legislation

Dr. Shain cites various legislative enactments to support his thesis. While some of the legislation he cites requires employers in certain jurisdictions to take certain measures to minimize the risk of potentially harmful incidents in the workplace, it is an overstatement to say that such obligations amount to a legal duty on employers to maintain a psychologically safe work environment.

Employment Standards

We first address Dr. Shain's use of Québec's *An Act Respecting Labour Standards*, RSQ, c N-1.1, (at page 19) to support his thesis.

The Québec *Act* places a duty on employers to make reasonable efforts to prevent "psychological harassment" in the workplace and, "whenever they become aware of such behaviour, to put a stop to it." The *Act* provides that "every employee has a right to a work environment free from psychological harassment" as it is defined in the *Act*.

"Psychological harassment" is defined as:

> …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 employee.

A single serious incident of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

Under the Québec *Act*, employers face liability to victims of workplace harassment for lost wages, punitive damages, compensation for loss of employment, and the cost of psychological support.

The provisions entitling employees to a workplace free of psychological harassment in the Québec *Act* only apply in Quebec and are limited to only prohibiting conduct that is encompassed by the definition in the *Act.*

Dr. Shain also cites Ontario's *Accessibility for Ontarians with Disabilities Act*, SO 2005 c. 11 (the "*AOD Act*") in his paper at page 19. We agree that the *AOD Act* sets accessibility standards in order to break down barriers for people with disabilities in areas such as customer service, transportation and employment. We note that such standards for employers remain to be established. In any event, we fail to see how the requirement to ensure workplaces in Ontario are accessible to employees with disabilities would support the existence of a legal duty on employers across Canada to protect the psychological safety of all of their employees.

Occupational Health and Safety Legislation

In his analysis of occupational health and safety law, Dr. Shain asserts that recent amendments to Ontario's *Occupational Health and Safety Act*, R.S.O. 1990, c O-1 (the "*OH&S Act*") imply that "the duty of due diligence should now be understood to embrace mental as well as physical safety" (at page 18). In our view, this assertion does not accurately capture the effect of the amendments.

As a result of the changes to the *OH&S Act*, employers in Ontario are now required to, *inter alia*, develop policies to address workplace violence and harassment and to assess the risk of violence in their workplaces. The amendments included redefining "workplace violence" to clarify that a threat of workplace violence could be either a statement or a behaviour that is interpreted by a worker as a threat to exercise physical force against the worker in the workplace. To meet this definition, there must be physical force, an attempt to exercise physical force or a statement or behaviour that could be interpreted as a threat to exercise physical force.

The amendments in Ontario also included redefining "workplace harassment" to mean "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome." There is no reference to psychological harm.

While it may be said that these amendments require employers in Ontario to take certain measures in an effort to reduce the risk of workplace violence or harassment as defined by statute, it is an overstatement to assert that the basic implication of these amendments is "that the duty of due diligence should now be understood to embrace mental as well as physical health and safety".

While OH&S legislation in Ontario, Saskatchewan and Manitoba impose on employers obligations to minimize the risk of potentially harmful legislatively proscribed behaviour in the workplace, we argue that it is an overstatement of the current state of the law to say such responsibilities create a legal duty requiring employers to insulate each employee from any form of "psychological harm" in the workplace.

Jurisprudence – Established Legal Principles

A number of the cases upon which Dr. Shain relies in support of his conclusions represent higher awards granted in response to egregious employer behaviour. Even if we accept that courts and adjudicators are more likely and willing in these circumstances to order increased damage awards, they do so by applying existing legal principles, not by creating a new legal duty on employers, as discussed below.

Human Rights Law

In his analysis of trends in human rights law, Dr. Shain discusses (at pages 3-5) two cases, *Bertrend v. Golder Associates*, 2009 BCHRT 274 ("*Bertrend*") and *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 ("*Lane*"), in which human rights tribunals awarded remedies against employers for failing to accommodate employees with mental disabilities, contrary to human rights legislation. The Tribunal in each case clearly rooted its award in the employer's breach of its duty to accommodate, which was and continues to be a recognized legal duty owed to employees who are discriminated against based on the prohibited grounds, only one of which is mental disability. Neither Tribunal purported to create or even discussed the potential development of a new legal duty requiring employers to ensure the psychological safety of their employees in the workplace.

In *Bertrend*, *supra*, the complainant alleged discrimination in employment based on, *inter alia*, a mental disability, contrary to section 13 of the BC *Human Rights Code* after being dismissed from her position as an environmental technician. The employer denied the allegations, saying its decision to terminate the complainant's employment was made prior to any knowledge that she suffered from depression and that it dismissed the complainant for non-discriminatory reasons.

The Tribunal accepted that the complainant suffered from a mental disability at all times material to the complaint, that the dismissal constituted adverse treatment and that the complainant's mental disability was a factor in the adverse treatment.

The employer argued that it did not know, nor should it have known, about the complainant's mental disability because, *inter alia*, there was no medical evidence to substantiate the complainant's condition at the time. The Tribunal rejected this argument, finding that the employer failed in its duty to accommodate by failing to inquire about the complainant's condition after she disclosed that she suffered from depression. The Tribunal commented as follows (at paras. 219-220):

> In my view, Golder had sufficient information to know, or to make any inquiries it felt necessary, about Ms. Bertrend's depression both at the time it made the decision to withdraw the Surrey Offer and also when it terminated her employment. Ms. Bertrend had personally disclosed her depression to Ms. Kwok and Mr. Orth, and Ms. Kennington had been informed of it from other sources. Mr. Goldbach had been advised of Ms. Bertrend's disclosure that she suffered from depression prior to implementing the termination. Golder was aware that Ms. Kwok had made a "tears up" comment and that Ms. Bertrend was alleging Ms. Kwok had also made a "cry a lot" comment. Golder was also aware that Ms. Bertrend felt discriminated against, hurt and that she had complained the trust relationship between herself and Ms. Kwok had broken down because of these comments, their relationship to her depression and the offered terms and conditions of employment.

As a result, the Tribunal found that the employer had discriminated against the complainant on the basis of mental disability. The complainant was awarded $12 500 for injury to dignity, $ 12 000 for lost wages and $ 2000 for expenses.

We do not agree with Dr. Shain's assertion that the decision in *Bertrend* is particularly significant in terms of the employer's duty to accommodate. It is well established that as part of their duty to accommodate, employers have a duty to inquire whether employees have a mental disability that may require accommodation when employees engage in bizarre or uncharacteristic behaviour or disclose that they have a mental health challenge.

In *Lane v. ADGA Group Consultants Inc*., 2007 HRTO 34, the complainant had been recently hired as a software program tester. He did not reveal on his application form or during the interview that he suffered from bi-polar disorder.

Two days after being hired, the complainant told his superior about his bi-polar disorder. He also told her that he might need time off work to avert his condition deteriorating from a pre-manic stage into full blown mania. A few days later, the employer dismissed him on the basis that it believed he would not be able to perform the essential duties of the job and that it could not afford to have him taking periods of time off work. The employer also told the complainant that he should have disclosed his condition in the interview and that if he had, it would not have hired him.

Almost immediately after his dismissal, the complainant went into a severe state of mania and was hospitalized for 12 days. He then suffered serious depression, financial difficulty and marital breakdown resulting in unemployment for several years.

The Ontario Human Rights Tribunal found that the employer discriminated against the complainant and failed to take any of the steps it could and should have taken to consider whether it could accommodate the complainant. Instead, the employer acted precipitously in dismissing the complainant without conducting an appropriate assessment of the situation to enable it to reach an informed conclusion about whether it could accommodate the complainant's disability without undue hardship.

In the result, the Tribunal awarded the complainant general, mental anguish and special damages totalling $79,278, finding that the employer's lack of awareness of its responsibilities under the *Code* was "particularly egregious".

The Tribunal and subsequently the Court in *Lane* found liability on the basis of the employer's failure to discharge its duty to accommodate. As stated above in relation to the decision in *Bertrend*, the employer's duties to inquire

and accommodate when the prohibited grounds of discrimination are engaged are well established legal principles. Neither of the Tribunals in *Bertrend* or *Lane* establishes a new legal duty requiring employers to ensure the psychological safety of their employees in the workplace. The employer's wrongful act in both cases was to terminate the employment of a person with a mental disability in breach of anti-discrimination legislation.

Finally, on page 6, Dr. Shain raises the policy making powers of the Ontario Human Rights Commission. While the Ontario *Human Rights Code*, RSO 1990, c H-19, requires the Ontario Human Rights Tribunal under certain circumstances to consider a policy approved by the Commission in a given proceeding, such powers do not necessarily lead to the conclusion that employers ought to prepare, implement and monitor "policies that ensure a psychologically safe workplace" (Shain, page 6). The Tribunal is also not bound by the policies of the Commission.

Workers' Compensation

In his analysis of workers' compensation law, Dr. Shain claims that the BC Court of Appeal in *Plesner v. British Columbia (Hydro and Power Authority)*, 2009 BCCA 188 ("*Plesner*") "struck down provisions in the BC Workers' Compensation legislation which allowed compensation for mental stress *only if it was an acute reaction related to* sudden *traumatic workplace events*" (Shain, page 7). This interpretation of *Plesner* is somewhat misleading as the Court of Appeal did not strike down any part of the BC *Workers' Compensation Act*, R.S.B.C. 1996, c 492 (the "*WC Act*") or Regulations. Instead, the Court of Appeal struck down the provisions of the WorkSafeBC Policy Manual which, when read together with the provisions of the *WC Act*, discriminated against workers on the basis of mental disability.

In September 2004, the appellant worker in *Plesner* claimed compensation under the *WC Act* for a workplace mental injury. His claim was refused and the matter proceeded through a number of appeals before being reviewed by the BC Court of Appeal. The issue before the Court of Appeal was whether certain provisions of the *WC Act* and the Policy Manual applied by WorksafeBC were contrary to the guarantee of equality under section 15 of the *Charter*.

The appellant argued that the impugned provisions unlawfully distinguished between mental and physical work-related injuries. Under the Workers' Compensation regime, physical injury was compensable if found to arise out of and in the course of employment. Mental injury was compensable only if the mental injury was an acute reaction to a sudden and unexpected traumatic employment related event. What constituted a traumatic employment related event was described in greater detail in the Policy Manual.

The Court of Appeal found that the requirement of a "sudden and unexpected traumatic event" in section 5.1 of the *WC Act*, when read together with the impugned policies, was contrary to the *Charter* because it discriminated against individuals who suffered from purely mental workplace injuries. In order to obtain compensation, these individuals were forced to meet a significantly higher causation threshold than those who suffered purely physical workplace injuries, or those who suffered mental injuries linked to physical workplace injuries. As a remedy, the Court severed a number of provisions of the WorkSafeBC Policy Manual and declared them to be of no force or effect. The BC Court of Appeal's decision in *Plesner* was not appealed to the Supreme Court of Canada. Section 5.1 remains in force and effect.

From a practical perspective for many employers in BC, the decision in *Plesner* may govern only whether an employee receives employer provided short or long term disability benefits or workers' compensation benefits.

From a legal perspective, *Plesner* does not create a legal duty on employers to protect employees from psychological harm. It also does not Dr. Shain's argument because the workers' compensation regime is a no fault system, based on the "historic compromise". Under the "historic compromise", workers gave up their right to sue employers for workplace injuries and diseases, and employers agreed to fund a no fault workers' compensation system. Therefore, if employees were entitled to receive compensation under the workers' compensation regime for a broader spectrum of psychological harm, they would be prohibited from seeking common law remedies against the employer for the same harm. Therefore, *Plesner* does not create a duty on employers to protect workers from psychological harm. Rather, the case renders certain types of psychological harm compensable under the scheme regardless of whether the employer has breached any legal duties or not or is at fault in any way. Coverage under the *WC Act* also creates a bar to common law actions against employers for breaching any legal duty for the same harm.

Dr. Shain also cites the decision in *Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal),* [2008] N.S.J. No. 133 (Q.L.), in which the Nova Scotia Court of Appeal reviewed a decision of the Nova Scotia Appeals Tribunal refusing a worker's claim for compensation for gradual onset work related stress pursuant to the *Government Employees Compensation Act* (the "*GEC Act*"), R.S.C. 1985, c. G-5 and related Workers' Compensation Board Policy.

Under section 4(1)(a) of the *GEC Act*, workers are entitled to receive compensation for a "personal injury by an accident arising out of and in the course of ... employment". "Accident" is not defined in the *GEC Act*. However, the Nova Scotia Workers' Compensation Board (the "NS WCB"), to which administration of the federal *GEC Act*

has been delegated, issued a Policy which provides that gradual onset stress (as well as traumatic event stress) is compensable under the regime under certain conditions. One of these conditions is a requirement that:

> … work-related events or stressors experienced by the worker are unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.

In *Embanks*, a civilian employee for the Department of National Defence, filed a claim for work-related stress arising mainly from three incidents occurring during a 5 year period: (1) the Department's failure to accommodate him in relation to parking upon his return to work after a back injury; (2) an altercation with a manager over whether he had permission to copy a confidential report, during which the manager pushed him against a photocopier; and (3) a concern that a former supervisor who had previously abused him would become his supervisor once again.

WCB denied his claim, finding that his illness was not an injury resulting from a workplace accident. This decision was upheld by a Board hearing officer. WCAT also upheld this decision, holding that the incidents relied upon by the employee, viewed objectively, did not meet the requirement of "unusual and excessive" work-related stressors to render his condition compensable. The worker appealed the WCAT's decision arguing that the Tribunal erred in adopting an objective approach in its assessment.

The Court of Appeal dismissed the appeal, ruling that the Tribunal did not err in undertaking its assessment of "unusual and excessive" stressors on an objective basis, and that doing so was consistent with previous WCAT and judicial decisions.

We fail to see how the decision in *Embanks* supports Dr. Shain's thesis in any meaningful way. First, the decision was made in the context of specific provisions of a statute applying only to employees of the federal government. Second, the Court confirmed that the assessment of whether an event was sufficiently unusual and excessive to render the claimant's condition compensable should be carried out on an objective, and not subjective, standard. Accordingly, this decision did not lower the threshold a federal government employee in Nova Scotia must meet in order to receive compensation for workplace mental injuries. Finally, the employee's generalized anxiety in *Embanks* was not found to be compensable, which restricts rather than expands the circumstances in which mental injury will be deemed compensable for federal government employees.

Finally, Dr. Shain claims that it is "clear that mental injury as a result of both acute and chronic stress is also being compensated through another process, namely the awards made (usually on appeal) to victims of heart attacks and

their families "(Shain, page 8). Dr. Shain cites one such case as representative of these "heart attack cases": Decision No. 851/09 of the Ontario Workplace Safety and Insurance Appeals Tribunal.

In that case, the Tribunal reviewed the decision of an Appeals Resolution Officer (the "ARO") to deny compensation benefits to the estate of a truck driver with a pre-existing non work-related heart condition who had suffered a heart attack and died while making a long distance delivery. Under the Ontario Workers' Compensation Board's policy, employees may receive benefits for a work-related aggravation of a pre-existing heart condition if the aggravation consists of unusual physical exertion or acute emotional stress with no significant delay in the onset of symptoms. The ARO found that the evidence in this case did not support a finding that the events in question met any of these conditions.

The WCAT allowed the appeal, ruling that the worker's estate was entitled to benefits for the worker's death on the basis that acute emotional stress aggravated his pre-existing condition. As a result of numerous deliveries scheduled by the employer, the driver had effectively been stuck in his truck for the weekend while he waited for the location of his last delivery to open. The evidence showed that it was very probable that the stresses the driver was under played a role in precipitating his death. These stresses included driving in a bad storm, high temperature and humidity leading to dehydration, his anxiety over his diabetic control, and his anger. As a result, the WCAT found that the worker's pre-existing heart condition was aggravated by acute workplace stress which caused an immediate onset of the heart failure which resulted in the worker's death.

The WCAT found that the worker's family was entitled to compensation for the worker's death caused by a heart attack, and not for the anxiety or emotional stress the worker suffered. These factors were considered only in the assessment of whether the aggravation of the worker's pre-existing heart condition was compensable pursuant to the Board's policy. It is a tenuous argument to say that this case, and others like it, demonstrate that employers "can be held accountable for mental injury through indirect as well as direct routes in workers' compensation cases" (Shain, page 9).

In fact, under section 13(5) of the Ontario *Workers' Compensation Act*, workers are entitled to receive compensation for mental stress only if it is:

> an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment.

Under the same provision:

> the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions 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 employment.

All of these cases concern whether an employee (or employee's family) qualify to receive compensation benefits under a "no fault" statutory scheme, not whether the employee has breached a legal duty that attracts liability and damages.

Labour Law

In his analysis of labour law, Dr. Shain cites two cases as examples of "new jurisprudence on the subject of the psychologically safe workplace" (Shain, page 15). We disagree that the cases cited, namely *Manitoba Government Employees' Union v. Manitoba (Department of Family Services and Housing)*, [2009] M.G.A.D. No. 12 (Werier) (Q.L.) ("*Manitoba*") and *U.F.C.W., Local 401 v. Canada Safeway (Pady Shenher Grievance)*, [2008] A.G.A.A. No. 38 (Power) (Q.L.), address the issue of a "psychologically safe" workplace.

In *Manitoba*, *supra*, the employer dismissed the grievor from her position as Vocational Rehabilitation Counsellor with the Province of Manitoba Family Services and Housing after she, while on sick leave, came into her workplace after hours and went through files in her supervisor's office. At the time of her termination, the grievor had been an employee for approximately 26 years.

The grievor had a long medical history of depression and generalized anxiety disorder, and a number of physical conditions which required extensive surgery. Her disciplinary record was comprised of two short suspensions for insubordination, which included conduct similar to that which ultimately led to her termination. She had also been given letters of direction about issues with her performance. At the time of termination, the grievor was on an unpaid leave of absence related to her illnesses. The Union grieved the dismissal. The Union also grieved two separate suspensions for incidents of insubordinate behaviour and a denial of sick leave.

The employer submitted that despite receiving some medical information from the grievor about her condition, it believed that her performance problems were unrelated to illness, and that it had cause to terminate her for insubordination. However, the Arbitrator allowed the grievance in part, finding that (at para. 209):

> Ultimately, when faced with the Grievor's final actions on April 21, I believe, for the reasons set out, the Employer should have paused to reflect on the Grievor's actions, requested further medical information before proceeding to terminate the Grievor's employment and maintained the Grievor on a leave of absence.

Consequently, the grievor was reinstated. A one month suspension was, however, substituted for the termination for the grievor's unauthorized entry into the workplace.

In reaching this conclusion, the Arbitrator applied the hybrid approach, which is the analysis typically applied in discipline cases where the employee's conduct is partially culpable and partially non-culpable because related to a disability. The Arbitrator in *Manitoba* did not create any duty on the employer to maintain a psychologically safe work environment or discuss whether such a duty ought to be recognized.

In *Safeway*, *supra*, the grievor grieved that the employer had not provided a safe workplace after being involved in an altercation with a co-worker that involved a minor assault. After receiving a complaint from the grievor, the employer investigated the matter. During the investigation the other employee continued working at the same store as the grievor. The other employee was ultimately given a written warning for the incident. The grievor brought a grievance claiming that the employer had failed to provide her with a safe work environment and that the its failure to transfer the other employee to a different store had caused her significant emotional trauma. The grievor also sought general damages in tort.

The employer maintained that the discipline imposed on the other employee was sufficient to address the issue. The Arbitrator found that while the actions of the other employee amounted to a minor assault, the employer was not vicariously liable for this assault. In addition, the employer's failure to transfer the other employee did not give rise to the tort of intentional infliction of mental distress or suffering as the grievor did not establish that the stress she suffered met the requisite standard. At paragraph 48, in dismissing the claim that the employer failed to ensure a safe workplace by failing to move the other employee *after* its investigation, the Arbitrator accepted that safety encompasses psychological safety but concluded that the continued presence of the other employee in her workplace did not make that workplace unsafe.

The employer was ultimately found to be liable, however, based on its failure to take steps to minimize the risk of workplace violence, contrary to its health and safety obligations under statute and the collective agreement, for not moving the other employee elsewhere during the investigation of an allegation of workplace violence. An award of $1,000 was made for the breach. This award did not arise from the breach of a free-standing legal duty to maintain a psychologically safe workplace.

We also note that while separating the employees during the investigation was found to be an appropriate measure in *Safeway*, based on the risks associated with allegations of workplace violence (i.e. assault) involved in that particular case, it is an overstatement to assert that the "maintenance of a psychologically and physically safe

workplace requires that parties to a harassment complaint be separated during the course of an investigation into the complaint" (Shain, page 16).

The Employment Contract

In his analysis of the law of the employment contract, Dr. Shain states that courts have recognized that employment agreements contain an implied term for the protection of employee mental health at all stages of the employment relationship as part of the employer's duty to act in good faith. This assertion cannot be supported. First, it is erroneous to state that employers have an implied contractual duty to act in good faith towards their employees *during the entire course of the employment relationship*. In fact, the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 ("*Wallace*") refused to imply such a term into the employment contract. That employers owe employees a contractual duty of good faith only in relation to the manner of dismissal was subsequently affirmed in *Honda Canada Inc. v. Keays*, 2008 SCC 39 ("*Honda*"), which we discuss below.

On this basis, even if it could be said that courts have implied into the employment contract a term for the protection of employee mental health as part of the employer's duty to act in good faith, this term would be restricted to the termination of the employment relationship.

In addition, we argue that, contrary to Dr. Shain's assertion, the recognition that certain damages flowing from the breach of an employment contract are compensable does not amount to the recognition of an implied term in the employment contract requiring employers to protect the psychological well being of their employees. The cases Dr. Shain cites in this section include decisions from the Supreme Court of Canada which involved damages awarded for egregious employer behaviour, including "bad faith" damages relating to the manner of dismissal; aggravated damages and mental distress damages. In particular, Dr. Shain relies upon the principles espoused in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 ("*Fidler*"); *Honda*, *supra*; and *Soost v. Merrill Lynch Canada Inc.*, 2009 ABQB 591 ("*Soost*"). As explained below, we argue that these cases do not create a new legal duty requiring employers to ensure the psychological safety of their employees in the workplace.

We begin our analysis by addressing the decision in *Wallace*, *supra*, by way of background. In that case, the Supreme Court of Canada refused to imply into the employment contract a duty of good faith, but it concluded that where an employer engaged in bad faith conduct in the manner of dismissal, an employee could claim additional "bad faith" damages. These damages took the form of an extension of the reasonable notice period. If an employee wished to claim additional aggravated damages from an employer, he or she had to demonstrate an independent actionable wrong – that is, conduct by the employer which stood apart from the dismissal as a distinct cause of

action. These types of damage awards were subsequently revised by the Supreme Court of Canada in *Honda*, *supra*, as discussed in greater detail below.

While *Wallace* damages were consistently awarded since 1997, the treatment of claims for aggravated damages in the employment law context was clouded by the 2006 decision of the Supreme Court of Canada in *Fidler*, *supra*. In that case, the Supreme Court of Canada concluded that it was no longer necessary in law for there to be an independent actionable wrong before damages for mental distress could be awarded for breach of a contract. It ruled that damages for mental distress in this context may be recovered where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time of contract formation. In order to be successful, a plaintiff must prove his or her loss and the court must be satisfied that the degree of mental suffering caused by the wrongdoing was of a degree sufficient to warrant compensation.

In discussing the principle of reasonable expectation in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, the Supreme Court of Canada in *Fidler* made the following remarks (at para. 54):

> … there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. …

In other words, *Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48).

Dr. Shain cites the *Fidler* decision in the context of discussing the Ontario Grievance Settlement Board's decision in *Ontario (Ministry of Community Safety and Correctional Services) and Charlton* (2007), 90 C.L.A.S. 78 (Carter) ("*Charlton*"), as follows (at page 12):

> So, in *Charlton*, the Board referred to a non-binding part of the Supreme Court's *Fidler* decision where they 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. As applied in a collective bargaining environment, this proposition was interpreted as meaning in Charlton that harassment resulting in injury to an employee's mental health was a breach of the employment contract itself.

> The *Fidler* proposition as applied in *Charlton* therefore opens the door to another basis upon which employees can claim damages for mental injury arising *in the course of* the employment relationship as opposed to at its termination.

We disagree with Dr. Shain's interpretation of *Charlton* and *Fidler* for a number of reasons. First, we do not see any "non-binding part" of the *Fidler* decision cited in *Charlton*. *Charlton* concerned a grievance involving a serious incident of racial harassment. In order to expedite the matter, the parties agreed that the Public Service Grievance Board would determine the appropriate remedy based on agreed upon facts. The grievor, a corrections officer of African Descent, received at her residence a threatening anonymous letter which was rife with racial slurs and linked to the grievor's workplace. After the grievor received the letter, she went on leave and remained off work continuously until the hearing. The Workplace Safety and Insurance Board provided the grievor with benefits after concluding she suffered from "mental stress".

The Settlement Board ordered the employer to make all reasonable efforts to find the grievor a position comparable in responsibility and remuneration to her previous position but in a work environment free of the threat of racial harassment. The Board also ruled that the grievor was entitled to lost earnings as well as $20,000 in damages for mental distress. On the issue of mental distress damages, the Board followed the decision in *Fidler*, *supra*, stating (at paras. 21 – 24):

> 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. The Court in that case made it clear that the term "aggravated damages" had been used in the past to describe two quite different legal situations. The first legal situation involved aggravating circumstances occurring at the time a contract was breached, and not the breach of the contract itself. In this type of case, it was necessary to establish that the aggravating circumstances constituted an independent cause of action, usually in tort. The second legal situation where the term "aggravated damages" was also used involved damages for mental distress arising from the breach of contracts that create the expectation of an intangible "psychological benefit". These damages existed independently from any aggravating circumstances and flowed from the contractual expectations of the parties. They were entirely compensatory in nature, since the conduct of the party in breach was not a factor that determined either the entitlement to mental distress damages or the amount of these damages.
>
> 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.
>
> …

> **Clearly not all terms and conditions of employment create the expectation of a "psychological benefit"**, **and damages for mental distress are only available for breach of this type of contractual term**. (emphasis added)

Thus, in reaching its conclusion, the Board in *Charlton* applied reasoning and principles espoused in *Fidler*. We fail to see how the parts of *Fidler* referenced in *Charlton* are "non-binding".

We also disagree with Dr. Shain's view that either of these two cases suggests 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". Rather, the Supreme Court of Canada stated in *Fidler* that "Wallace bumps" are awarded in the employment context on the basis of fundamental contract principles, namely what was in the reasonable contemplation of the parties at the time of contract formation.

While we agree that a breach of the employment contract will warrant mental distress damages where that contract was formed with the expectation of a psychological benefit, it cannot be said that employment agreements categorically confer a psychological benefit or that the psychological benefit that may be conferred by a particular contract can be equated to a duty in all employment contracts to provide a psychologically safe workplace. In fact, this is reflected in the Board's express comments in *Charlton*, as set out above, that "not all terms and conditions of employment create the expectation of a 'psychological benefit'" (para. 24). In the *Charlton* case, the harm that the grievor endured was egregious racial harassment in breach of human rights legislation and the employer's statutory obligation to provide a harassment free work environment.

The principles of reasonable expectation in the context of the employment relationship were clarified in the 2008 decision in *Honda*, *supra*. In that case, the Supreme Court of Canada altered the analysis courts are to apply to damages arising from cases of wrongful dismissal. The Supreme Court of Canada stated that if the employer fails to comply with its implied obligation to provide reasonable notice of termination, damages are available to compensate the employee for losses that would have been foreseeable by the parties at the time they entered into the contract. In general, such losses are limited to damages for the failure to provide reasonable notice of termination, and psychological harm or mental distress arising from the mere fact of the termination is not compensable.

Damages are available, however, where the employer engages in bad faith conduct in the manner of dismissal. These damages are deemed to be compensable on the basis of the expectation set out in *Wallace* that employers will act in good faith in the manner of dismissal, and that failure to do so can lead to foreseeable damages. Examples of such failures include attacking the employee's reputation, misrepresenting the reason for the dismissal or dismissal

meant to deprive the employee of a pension benefit or other right. The Court in *Honda* stated further that there is no reason to retain any distinction between "true aggravated damages" resulting from a separate cause of action, and "moral damages" resulting from the type of conduct discussed in *Wallace*.

Finally, the Supreme Court of Canada stated that *Honda* type damages are to be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. The Court went on to state that an employee must prove he or she suffered the damages in question.

The Alberta Court of Queen's Bench cited *Honda*, *supra*, in *Soost*, *supra*, to support its decision to award an employee $1.6 million in damages in a wrongful dismissal suit. Dr. Shain cites the trial decision in *Soost* to illustrate that the employer's duty to behave in a fair and reasonable manner in connection with dismissal "has now been typified as a function of a good faith requirement in employment, the violation of which can attract severe penalties" (Shain, page 12).

The Court's "*Honda*" damages award in *Soost* was, however, overturned on appeal. In *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251, the employer successfully argued that there was no legal basis for the trial judge's finding that Mr. Soost, a successful financial advisor, was entitled to a portion of the value of his book of business when he was dismissed from his employment.

Soost, a very high-performing investment advisor with a book of business worth around $150 million, was abruptly terminated by Merrill Lynch when his employer found he had breached various rules and policies. Merrill Lynch alleged it had just cause to dismiss Soost and, although it was agreed both at trial and on appeal that Soost's misconduct was not serious enough to justify dismissal for just cause, it was also accepted that Merrill Lynch had a good faith belief that it did have sufficient grounds to dismiss for cause. Even though Soost was able to find a new job within about three weeks, most of his former clients did not follow him and his income dropped drastically.

At trial, Soost was awarded pay in lieu of notice for a period of 12 months, which came to $600,000. In addition, the trial judge found Soost was entitled to another $1.6 million for "damage to reputation", purportedly based on the principles in *Honda*. It was this second award which was thrown out by the Court of Appeal, which emphasized that *Honda* damages are limited to compensating for loss that results from bad faith conduct in the manner of dismissal, and cannot be used to award damages which flow from the fact of the dismissal itself. An employer has the right to end the employment relationship, provided sufficient notice is given. No matter what loss results to the employee as a result of the fact of termination, the only damages to be awarded are damages in lieu of

the period of reasonable notice. The one exception to this general rule, as set out in *Honda*, is that an employer has a duty not to use methods which are unduly unfair or insensitive in the manner of termination.

The Alberta Court of Appeal concluded that Merrill Lynch's honest but mistaken belief that it had grounds to dismiss Soost for cause was not bad faith conduct, under the principles in *Honda*. There was therefore no basis to award damages over and above damages in lieu of notice for the 12-month notice period.

Based on the foregoing, we say that courts have recognized only that employers have an implied contractual duty of good faith and fair dealing when dismissing an employee that, when breached, can give rise to damages where such damages can be proven. Stating that by deeming such damages to be compensable courts thereby imply into the employment contract a term for the protection of employees' psychological well being throughout the entire employment relationship is a significant misstatement of the law.

The final issue Dr. Shain raises as support for his thesis in the context of his discussion of employment contracts is the certification of class action suits. Dr. Shain claims that "it would not be a great leap to see class actions…extended to mental injury using excessive work demands as the springboard" (Shain, page 13).

Dr. Shain reaches this conclusion on the basis that the particulars in the statement of claim in a case which dealt with underpayment of overtime and was certified as a class action suit (*Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 ("*Fulawka*")) were similar to the findings upon which the Ontario Superior Court of Justice allegedly based a finding of negligent infliction of mental suffering in *Zorn-Smith v. Bank of Montreal*, [2003] O.J. No. 5044 ("*Zorn-Smith*") (discussed later in this paper). In our view, Dr. Shain's conclusion is not sound. The *Zorn-Smith* case involved the tort of intentional infliction of mental suffering in the employment context and makes no mention of negligence. In any event, as we discuss below, the Ontario Court of Appeal has expressly refused to recognize a tort of negligent infliction of mental suffering in the employment context. The Ontario Court of Appeal has not addressed whether the tort of intentional infliction of mental suffering could arise in the employment context. Additionally, leave for appeal of the Court's decision in *Fulawka* to approve the class action lawsuit has been granted in 2010 ONSC 2645. In *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, as cited by Dr. Shain at page 13, which arose from facts very similar to those in *Fulawka*, *supra*, the Ontario Superior Court of Justice denied certification of a class action lawsuit for unpaid overtime.

We note that while the Court in *Fulawka* stated that the employer's duty of good faith is not confined to the termination of the employment relationship (at para. 78), these comments were made in the context of a decision

on an application for certification from which leave to appeal has been granted, not in the context of a decision on the merits.

The Law of Torts

In our view, the most compelling of Dr. Shain's arguments was his identification of the court's recognition of a tort of negligent infliction of mental suffering in the employment context in *Piresferreira v. Ayotte* (2008), 72 C.C.E.L. (3d) 23 (Ont. Sup. Ct. Jus). The existence of such a tort would support that employers have a duty of care to protect employees from psychological harm in the workplace. Despite some recent initiatives of some Tribunals and lower courts to consider such a duty, the Ontario Court of Appeal in *Piresferreira v. Ayotte*, 2010 ONCA 384, expressly rejected the proposition that such a duty exists or ought to be recognized.

The *Piresferreira* case involved an employee who left work after her manager pushed and yelled at her and then immediately placed her on a performance improvement plan. The employee developed post-traumatic stress and major depressive disorder as a result of the supervisor's actions. She never returned to work. The employee sued the employer for constructive dismissal, and her supervisor for battery, intentional infliction of mental suffering and negligent infliction of mental suffering.

In the result, the lower court found the supervisor liable for battery, and intentional and negligent infliction of mental suffering, and the employer vicariously liable for the supervisor's wrongdoing. The court also found the employer directly liable for negligence and constructive dismissal, awarding twelve months' pay in lieu of reasonable notice, $45,000 in general damages and additional damages in excess of $450,000 for future lost wages.

In her ruling, the trial judge found the supervisor and the employer liable for the tort she described as "negligent infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability". She found that the employer and supervisor committed this tort by breaching the duty of care they owed to the employee to ensure that she was working in a safe and harassment-free environment without verbal abuse, intimidation or physical assault. According to the judge, the supervisor breached his duty by yelling and swearing at the employee on numerous occasions, including the incident when he pushed her, and placing her on a performance improvement plan without apologizing to her for the incident. The employer was found to have breached its duty based on shortcomings in its response to the supervisor's mistreatment of the employee, including a failure to convey to the employee its concern about her well being or to seek input from her on what measures could be taken to ensure that she would feel physically and emotionally safe if she returned to work.

The Ontario Court of Appeal overturned the part of the trial decision that provides support for Dr. Shain's thesis. The Court of Appeal found that while damages for mental distress are available to the employee in limited circumstances, damages for negligent infliction of mental suffering were not available in the employment context. The trial judge further erred in finding intentional infliction of mental suffering and in the assessment of damages for the battery.

The Court of Appeal upheld the award of twelve months' pay in lieu of notice. However, it set aside the damages for lost future wages, attributed the $45,000 general damages award to damages for mental distress, awarded $15,000 in damages for the battery, and set aside the award to the employee's partner. As a result, the non-notice damages were reduced from more than $500,000 to $60,000.

An application for leave to appeal to the Supreme Court of Canada was dismissed in *Piresferreira v. Ayotte*, [2010] S.C.C.A. No. 283.

In his analysis of emerging trends in the area of torts law, Dr. Shain correctly cites the trial court's decision in *Piresferreira* to state that there has been some judicial recognition of a duty on employers to keep employees psychologically safe during the course of their employment. In our view, however, the Ontario Court of Appeal's decision in the *Piresferreira* case is virtually a complete answer to the thesis of Dr. Shain's essay, as discussed further below.

Dr. Shain provides two additional cases as support for his thesis: *Zorn-Smith*, *supra*, and *Amaral v. Canadian Musical Reproduction Rights Agency Limited*, 2009 ONCA 399 ("*Amaral*").

Dr. Shain states that in *Zorn-Smith*, "the reasonable foreseeability test was explicitly depicted as the cornerstone of liability for negligent/reckless infliction of mental suffering" (Shain, page 11). This statement is inaccurate. The Court in *Zorn-Smith* found the employer liable for intentional infliction of mental suffering, based on the accepted legal test for this tort. Specifically, the Court found that the plaintiff had proved all of the requisite elements: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness. In terms of establishing that the conduct was calculated to produce harm, the Court stated that "it suffices if there is a reckless disregard as to whether or not harm would ensue from the conduct" (at para. 167).

The plaintiff in *Zorn Smith* did not allege negligent infliction of mental suffering and the Court did not make any mention of such a tort. Finally, the Court discussed the issue of foreseeability in the context of its assessment of damages. Specifically, the plaintiff was awarded damages on the basis that her injuries were a reasonably

foreseeable consequence of the employer's wrongdoing. The Court did not, as Dr. Shain seems to suggest, ground its finding of intentional infliction of mental suffering against the employer on the basis of a "reasonable foreseeability test".

Dr. Shain also cited the decision in *Amaral, supra*, as evidence that there exists in law "a freestanding duty of care to prevent mental suffering in the workplace" (page 10). The plaintiff in *Amaral* commenced the action as a wrongful dismissal action. By the time of trial, the sole causes of action advanced by the appellant were intentional and negligent infliction of mental suffering and negligent supervision. Her claims were dismissed at trial. On appeal, the appellant argued that the trial court erred in concluding that "there is no specific tort of negligent infliction of mental suffering available to the plaintiffs" (para. 19).

The Court of Appeal dismissed the appeal. The comments of the Court of Appeal that Dr. Shain quotes at page 10 were made in the following context (at paras. 19-23):

> The trial judge concluded that "there is no specific tort of negligent infliction of mental suffering available to the plaintiffs" and it is essentially with her finding that the appellants take issue.
>
> The trial judge concluded that such a claim was precluded by the Supreme Court of Canada's decision in *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701.
>
> Contrary to the assertion of counsel in argument in this court, the trial judge did not "fail to analyze" the appellant's claim in negligence. She very clearly did so in paragraphs 326 through 329 of her reasons for judgment; she concluded at para. 329 that there is no specific tort of negligent infliction of mental suffering available to the plaintiffs.
>
> The trial judge said she had not been referred to any case in which the court has found negligent infliction of mental suffering as an independent actionable tort. In the cases to which reference was made where courts found that an employer owes a duty to employees to treat them fairly, with civility, decency, respect and dignity, the breach of that duty is a breach of the employment contract exposing the employer to a claim for constructive dismissal. All of the cases upon which the appellant relies were cases which included claims for wrongful dismissal, as was the case of *Piresferreira v. Ayotte*, [2008] O.J. No. 5187, 2008 CanLII 67418 (Ont. S.C.) released after the judgment in the case at bar. There is no case cited before this court which holds that an employee has a free-standing cause of action, in tort, for negligent infliction of mental suffering against his or her employer absent any allegations of breach of the contract of employment between the two.
>
> In this case it is not necessary to decide that issue. For the purpose of this appeal I assume without deciding, that such a duty does exist in law. Even so, in my view, the appellant cannot succeed in view of the factual findings made by the trial judge. (emphasis added)

Therefore, the Ontario Court of Appeal appeared to be saying that although this type of duty does not exist, the appellant would not be successful in her case even if it did.

In essence, Dr. Shain says that the law obliges employers to take care to shield employees during the entire course of their employment from acts in the workplace that might cause mental suffering or psychological distress. In our view, the Appeal decision in *Piresferreira* is virtually a complete answer to this assertion. The Court of Appeal in *Piresferreira* expressly refused to recognize a duty on employers to take care to shield employees during the entire course of their employment from acts in the workplace that might cause mental suffering or psychological distress, based on a number of policy considerations, which we discuss below.

The Court of Appeal refuted the existence of such a duty when assessing whether or not it ought to recognize a tort of negligent infliction of mental suffering in the context of employment. It began by stating that no Canadian appellate court had recognized a free standing cause of action in tort against an employer for negligent infliction of mental suffering. Therefore, to prove her claim for negligent infliction of mental suffering, the employee had to establish that the employer owed her a duty of care. To do this, the employee had to demonstrate that she and her employer were in a relationship of proximity such that it was reasonably foreseeable that the impugned conduct would cause the employee harm, and that there were no overriding policy reasons which foreclosed the finding of a duty of care.

The Court of Appeal concluded that compelling policy reasons existed for precluding the recognition of a tort of negligent infliction of mental suffering in the employment context. First, it relied on the fact that the Supreme Court of Canada has strongly intimated that the recognition of such a tort in the employment context is better left to the legislature. Specifically, in rejecting the notion that a tort existed for breach of a good faith and fair dealing obligation by employers in dismissing employees, the Supreme Court of Canada in *Wallace, supra*, wrote (at para. 77):

> To create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures.

The Ontario Court of Appeal stated that a general duty to take care to shield an employee during the entire course of his or her employment from acts in the workplace that might cause mental suffering was far more expansive than a duty to act fairly and in good faith during the termination process, which was expressly rejected in *Wallace, supra*. The Court of Appeal wrote (at para. 57):

> The duty rejected in *Wallace* is not exactly the same duty postulated in this case. This, however, provides more, not less, reason to reject a duty in this case. The duty of care put forward in this case is broader than the duty that was rejected in *Wallace*. A general duty to take care to shield an employee during the entire course of his or her employment from acts in the workplace that might cause mental suffering strikes me as far more expansive than a duty to act fairly and in good faith during just the termination process. The duty rejected in *Wallace* would have applied only at the

> time of termination and to the manner of termination. The duty put forward in this case would apply in the course of employment as well as to its termination. The general duty postulated would require employers to take care to shield employees from the acts of other employees that might cause mental suffering.

On this basis, the Court of Appeal reasoned that the asserted duty of care would have a far greater impact on settled jurisprudence than would the duty of good faith and fair dealing that the Supreme Court of Canada in *Wallace, supra,* described as "a radical shift in the law" (at para. 77).

The Court of Appeal also noted that damages for mental distress are already available to employees based on the legal framework outlined by the Supreme Court of Canada in *Honda, supra*. The Court of Appeal in *Piresferreira* commented as follows (at para. 61):

> In a case in which the employer's allegedly tortious behaviour includes the termination of the employee, compensation for mental distress is available under the framework the Supreme Court has set out in *Honda*. In a case in which the employer does not terminate the employee, the employee who is caused mental distress by the employer's abusive conduct can claim constructive dismissal and still have recourse to damages under the *Honda* framework. Recognizing the tort in the employment relationship would overtake and supplant that framework and all of the employment law jurisprudence from which it evolved. In other words, in the dismissal context, the law already provides a remedy in respect of the loss complained of here.

In the Court of Appeal's view, the recognition of a tort of negligent infliction of mental suffering was not necessary on this basis.

The last policy consideration the Court of Appeal addressed concerned the category of cases in which the employee suffers mental distress from employer conduct that would not provide the grounds for a claim of constructive dismissal. On this point, the Court of Appeal stated that recognizing the postulated duty of care was undesirable because it would constitute an overly intrusive and broad constraint on employers, writing (at para. 62):

> …Perhaps it can be said, as the respondents submit, that it is not foreseeable that an employee would suffer mental distress from criticism of poor work performance that is constructive. However, much disagreement can be anticipated as to whether criticism is "constructive", whether work performance is "poor", and whether the tone of the former was appropriate to the latter. The existence of the tort would require the resolution of such disputes. The court is often called upon to review the work performance of employees and the content and manner of their supervision in dismissal cases. It is unnecessary and undesirable to expand the court's involvement in such questions. It is unnecessary because if the employees are sufficiently aggrieved, they can claim constructive dismissal. <u>It is undesirable because it would be a considerable intrusion by the courts into the workplace, it has a real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply indeterminately</u>. (emphasis added)

As a result, the Court of Appeal in *Piresferreira* set aside the trial judge's finding that the employer and supervisor were liable to the employee for committing the tort of negligent infliction of mental suffering as the tort was not available in the employment context. On the basis of this ruling, Dr. Shain's assertion that employers have a duty to ensure the psychological well being of their employees cannot be sustained.

Conclusion

Based on the foregoing, it is our view that Dr. Shain's assertion in "Tracking the Perfect Legal Storm" that employers have a legal duty to maintain a psychologically safe workplace cannot be supported. The existence of such a duty has been expressly rejected by the Ontario Court of Appeal and Dr. Shain is greatly overstating the current state of the law. However, we do agree that adjudicators are increasingly likely to award greater damages for psychological harm if that harm can be attributed to the breach of other statutory duties or results in the constructive dismissal of the employee.

We also agree with Dr. Shain's recommendations that employers are well advised to deal with their employees fairly and take reasonable steps to ensure their employees' well being. By doing so, employers will not only reduce their risk of claims and potential liability for damages but they may also reap other benefits, including increased productivity, decreased rates of absenteeism, greater employee loyalty and an enhanced reputation with job applicants and their communities.

Practical Implications and Next Steps

On September 30, 2010, I was one of "a group of executives, labour leaders, health and safety professionals, government agency representatives and experts in law and policy who came together to look at the implications of Dr. Martin Shain's paper". The group was tasked with considering what employers need to know and/or access to provide a psychologically safe workplace in today's economic environment. The results of this Roundtable are titled *Elements and Priorities for Working Toward a Psychologically Safer Workplace* (attached as *Appendix 2*) and are published on the website of Great West Life's Centre for Mental Health in the Workplace. On the website, the project is described as follows:

> This project was hosted by the Mental Health Commission of Canada with the support of the Great West Life Centre for Mental Health in the Workplace. Production of this document is made possible through a financial contribution from Health Canada. The views represented herein solely represent the views of the Mental Health Commission of Canada.

It should be noted, however, that as of June 30, 2011, *Elements and Priorities for Working Toward a Psychologically Safer Workplace* is not published on the Mental Health Commission's website.

During the course of the discussion at the Roundtable, it became clear that participants preferred to refer to their objectives as the promotion of a psychologically healthy and inclusive workplace, as opposed to a psychologically safe workplace. It should also be noted that most participants at the Roundtable rejected any call for legislation.

Elements and Priorities for Working Toward a Psychologically Safer Workplace is attached to this paper as *Appendix 2*. It contains a wealth of practical suggestions for promoting a psychologically healthy and inclusive workplace that could be of benefit to our clients. It also provides links to other resources online. It can be found at http://workplacestrategiesformentalhealth.com/mhcc/.

On June 16, 2011, the Mental Health Commission of Canada issued a press release indicating that the Mental Health Commission of Canada was championing the development of a voluntary National Standard of Canada for Psychological Health and Safety in the Workplace, working collaboratively with the Bureau de normalisation du Quebec (BNQ) and the CSA Standards. The press release states that:

> A committee of health and safety professionals, labour representatives, executives, government representatives, experts in law and policy and other groups has been created by BNQ and CSA Standards to develop the Standard.

The press release also states:

> Once completed, the voluntary *National Standard of Canada for Psychological Health and Safety in the Workplace* will provide organizations with the tools to achieve measurable improvement in psychological health and safety for Canadian employees.

The press release promises a 60-day public review process in the fall and anticipates that the completed Standard will be scheduled to be released in 2012. A copy of the Backgrounder and the Members List of the committee developing the Standard is also attached as *Appendix 3*.