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Mental Stress in the Workplace

by [Robert B. Reid](#)



Introduction

It is fair to say that mental distress is the workplace epidemic of the day. The last few years have seen a dramatic increase in the number and length of these claims with the related direct cost to employers. Employees who are off work must be replaced. Premiums for disability insurance and sick time costs have soared. Court actions frequently contain claims for mental distress, often based on the stress suffered by an employee before quitting. Probably the biggest cost is the hidden one: the lost productivity from stressed-out workers who *don't* make a claim, but keep working!

In this paper, several different (but often related) aspects of mental stress in the workplace will be reviewed. Whether in relation to Worker's Compensation, Occupational Health and Safety, Human Rights, or common law court claims, the employer must take careful note of the issues because, in each case, the basis of the claim is expanding, not contracting. It is likely that, if unchecked, the incidents will continue to rise, as will the attendant costs.

While it is important to consider the issues to understand the potential claims, prevention is the best pro-active approach, and so some strategies for recognizing and avoiding/correcting stress situations will be reviewed as well.

A Definition of "Stress"

No one will deny feeling under "stress" from time to time, whether in the context of a family gathering, a marriage, or a workplace. Everyone faces deadlines and crises, large and small. Most develop their own methods of handling that stress that suits their personality, and experts tell us that some "healthy stress" is good for us. We thrive on it, and may be energized and motivated by it. The difficulty arises when the level of stress rises to the point that we are overwhelmed by it, and in those situations, the human body may react negatively, both mentally and physically.

For the purposes of this paper, we can consider that the negative stress felt in a workplace occurs when we can no longer "handle" or be energized by the pressure. It is the *harmful physical and emotional response that occurs when there is conflict between meeting job demands and the control that the*

employee has over meeting those demands. When the demands of the job and the effect of the work environment exceed the individual's capacity to adapt, and the person has little control over the situation, workplace stress results.^[1]

When the requirements of the job are beyond the capabilities, resources or needs of the employee, stress occurs. In short, the employee can't cope.

Sources of Stress

It may be that stresses of the past seem to diminish as our memory fades, but it certainly seems that the demands of the workplace in general have increased dramatically over the last decade or so. The pace of work has been increased by communication tools like the internet and e-mail. The opportunity to require longer hours of work was reflected in the *Employment Standards Act, 2000*. Down-loading, off-loading, and the pressure of international competition have increased the pressure on many workplaces, not to mention the results of staff reductions and job consolidation.

The Canadian Mental Health Association^[2] has listed some common sources of workplace stress:

- Fear of job loss
- Fear of layoff in an uncertain economy
- Increased overtime
- Staff cutbacks which increase workload
- Pressure to perform

The resulting stress can show itself in reduced efficiency, lack of job satisfaction, fear of injury, absenteeism, turnover, illness, indifference, lack of creativity, and bad decisions.

The stress at work adds to what may be stressful situations outside the workplace (and beyond the employer's control) such as death of a close relative or marital discord. The outside factors can exacerbate the workplace issues. Women and single parents often feel additional stress based on the need to maintain their "domestic" responsibilities and still develop successful careers.

Signs of Stress

While employers are not required to be qualified as psychiatrists to diagnose unhealthy levels of workplace stress, some symptoms can be identified as signals that an individual is having difficulty coping with the workplace requirements. This is particularly true when the employee has a track record with the employer, and the behavior is a departure from the "norm".

Changes in eating habits (and attendant weight gain or loss), increased use of alcohol, drugs or tobacco, impatience or irritation, poor performance or withdrawal from social contact may all be indicators of stress issues.

Some symptoms are personal to the employee, and not readily obvious, but might be noted if they are reported by the employee. Examples are increased headaches, indigestion, fatigue, insomnia, or frequent non-specific illness.

Stress Claims: Mental Distress

One area of potential liability for employers arising out of stress claims by employees comes through the common law court action alleging mental distress, or its cousin, the intentional infliction of mental suffering. Typically, these claims are added to an existing claim for wrongful dismissal (following a termination) or constructive dismissal, where the employee quits, alleging that he or she was in effect forced to do so by the intolerable work environment, or unreasonable changes to the employment relationship.

In a related variation, employers may be liable for “bad faith damages” if their actions at and before a termination are not appropriate.

For these claims to be successful, courts have required employees to prove that the employer’s actions were unreasonable or oppressive. This usually requires more than just normal workplace pressures. If the demands for production or the method of treatment of an employee are oppressive, or criticism is unreasonable or unjustified, then the claim will succeed. The elements needed for a successful claim of “intentional infliction of mental suffering” are:

- Conduct that is flagrant and outrageous
- Conduct that is calculated to produce harm, and
- Conduct which results in a visible and provable injury

Although the factors seem to be tough to prove, courts have looked at such issues as the persistent contact by the employer with an employee on sick leave, and discipline for failing to perform modified work after return from a leave as indicators of unreasonable conduct.

In a recent Ontario decision^[3], the court reviewed the situation of a long-term bank employee who was pressured to take a promotion, even though she had not been given training in advance. Rather than risk being fired, she took the position with the intent of taking courses after hours to pass the required certification. At work, she was required to perform at a high level (despite not yet being fully qualified) while supervising and training other employees. She complained of burn-out, took a demotion (but then had to cover for her replacement, who went on maternity leave), and eventually just “stopped functioning”. Her doctor told her to take a sick leave, and when she refused to do part-time work required by the employer, she was fired. In effect, she was fired in the midst of a depression, after being forced off her disability leave. The court required the employer to pay damages for creating the work environment that led to her stress, as well as for the usual wrongful dismissal damages, and compensation for loss of disability benefits.

Conduct of an employer that is cavalier or high-handed will result in court-ordered damages. Similarly, employer conduct that fails to treat the employee with decency, respect, civility and dignity will attract the censure of

a court. Where these factors are the stressors which cause the employee to suffer ill health, the employee will be compensated with money.

Even where the stress claim is undiagnosed at the time of termination, the employer may be liable if the symptoms were apparent. A related issue is whether or not the employee could claim access to disability benefits: if it was later established that at the time of termination the employee was actually disabled, then benefits could be given retroactively, and the employee would have access to the insurance coverage. On the other hand, if the disability began during the notice period (after termination), the employee could argue that lack of ability to access the plan – due to the termination – in effect would make the employer the “insurer” in order to provide whatever benefits would have been available had the termination not been “wrongful.”

Stress Claims: WSIB

The Workers’ Compensation system in Ontario has been cautious about developing policy around stress claims, largely because they are more subjective than physical injuries, and more difficult to relate to a single incident or accident. Under the pre-1997 Act, there was no specific policy in place, but some claims for mental stress had been allowed based on jurisprudence developed by the Appeals Tribunal.

When the Act changed in 1997, mental stress was specifically excluded from coverage, except in certain particular situations:

13(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance policy for mental stress.

13(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, 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.

In February, 2002, the WSIB revised its policy^[41] which makes available coverage where the worker witnesses a traumatic event, or was harmed by actual or threatened violence in the workplace. If the worker has been the object of harassment that involves physical violence or threats of violence, coverage will apply. As well, even if the single event did not trigger the harm, it may have been the culminating incident to a series of events which ultimately triggers the stress reaction. As such, and if provable, benefits will be available.

In general, under the policy, the event must arise *out of and during the course of employment* and be:

- Clearly and precisely identifiable
- Objectively traumatic

- Unexpected in the normal course of work, and
- Suffered or witnessed or heard by the worker first hand

Usually, the reaction of the worker is immediate, but the Board is prepared to recognize that in some situations, supported by medical evidence, the reaction may be delayed.

Consistent with the views of the government in 1997 when the new Act was passed, stress arising from employer decisions or actions is not covered. Thus, while courts recognize that the employer may be the source of stress (as in *Zorn-Smith*), the legislation does not. As well, unlike the courts that look at the totality of the workplace conduct and may find “chronic stress”, the Board will not accept stress claims unless they arise from a traumatic event or events, and as such, the Board does not take the place of private short and long-term disability coverage.

Stress Claims: Constitutional Challenge to WSIA

In Nova Scotia, the Workers’ Compensation regime provided that chronic pain was excluded from the regular compensation benefits. Instead, proven claims were allowed temporary benefits capped at four weeks. One could argue that the “special status” for chronic pain benefits is not dissimilar from the Ontario provisions for mental stress where some stress claims (depending on their cause) are excluded from coverage.

The Nova Scotia claimants appealed the denial of their benefits through the courts all the way to the Supreme Court of Canada, based on an infringement of their equality rights under s. 15(1) of the Charter of Rights and Freedoms. The Supreme Court unanimously ruled that there was an infringement of the Charter in that the provisions violated the right to equal protection and benefit of the law without discrimination based on a physical or mental disability.^[5]

The fact that the legislation treated those suffering from chronic pain differently from those who suffered other kinds of injury was not justifiable.

Under the Ontario WSIA, there is an unproclaimed section (s14) proposing to restrict workers’ access to claims for chronic pain. It is now extremely unlikely that the section will ever be proclaimed. The bigger question is whether the existing subsections on traumatic mental stress (13(4) and 13(5)) and the related policy will withstand scrutiny. The person who develops chronic stress over time, possibly by virtue of the employer’s actions, but without fitting the other criteria required by the policy may well be able to rely on the reasoning of the Supreme Court in the *Nova Scotia* case to challenge the restriction in Ontario.

Stress Claims: Ontario Human Rights Code

It is well known that employers have an obligation to provide a workplace free of discrimination based on the enumerated grounds in the Code (age, sex, disability, etc.). While there is no direct prohibition of conduct that causes

undue stress, there is the subsequent obligation to accommodate a stress-related disability. Thus, bringing a worker back to modified work may be required after a medical prognosis requires certain restrictions. This may mean fewer hours, a restriction of shift work, or even a re-assignment of work duties.

The problem can be a difficult one, when there may be an outward impression of failure to co-operate with employer requirements made in good faith, or where the revised job terms may put additional pressure on other employees who must pick up the slack.

The employer has the right to know about the disability and the restrictions that it creates. It then must enter into a discussion about what accommodations are possible: it is not sufficient to simply choose the one that the employer feels is appropriate without input from the employee (and the union, if one is present). Expert opinions may be necessary and functional job evaluations may be called for.

Where the signs of stress-related disability exist, but where no specific acknowledgement has been made by the employee, the employer is well advised to review the matter very carefully before considering steps like termination, lest the Human Rights-related disability be argued later, in a forum where the costs for back-pay and possible reinstatement can be very high.

Mental Stress: Disability Insurance

Many employers offer disability insurance benefits as part of the compensation package. The epidemic of “stress-related” claims are of concern to the insurers, mainly because with the increasing frequency of claims and a lack of objective evidence (like broken bones), there is concern about legitimacy. Most family physicians are quick to sanction time off for stress based on the report of standard symptoms like insomnia, indigestion, irritability, etc., and there is little that the insurer or the employer can do about such matters.

It is worth checking your policy to ensure that there is no restriction on access to benefits (or their duration) where mental stress claims are involved. The Supreme Court held in 1996^[6] that an insurance policy that restricted mental stress claims to a maximum of 24 months was discriminatory, and offended the Charter. The benefits were different for those who were disabled under a mental disability as compared to those with a physical disability, and there was no justifiable reason for treating such people differently, according to the Court.

Mental Stress: Occupational Health and Safety Act

Every employer has the obligation to maintain a safe workplace, which includes the obligation to take appropriate precautions to ensure that sources of injury are removed or contained.^[7] Arguably, if it is known that certain practices or procedures lead to stress-related issues, the employer must do something

about it or risk running afoul of the Act.

Since the courts and tribunals have clearly recognized that the employment relationship is a special one, and deserving of protection, and since the employee is typically the vulnerable of the two in the relationship, it will not be surprising to see greater attention being paid to the non-physical injuries that may occur in the workplace and which constitute a breach of the Act. Although historically the duty to protect employees' health has been considered in the physical sense, the courts in England have clearly recognized that there is no reason why the risk of psychiatric damage should be excluded from the employer's duty of care.^[8] It is not far-fetched to assume that similar concepts will be applied here. "High demand" conditions where excessive hours or short staffing have created stress for employees have already been acknowledged as occupational health and safety hazards in Ontario.^[9]

Similarly, employees may engage in refusal to work under the Act in circumstances where they believe that continuing to work will put them into a position where safety is compromised. An employer may need to think twice before disciplining an employee who refuses to work in circumstances where the employee believes that continuing to work may endanger (mental) health.

An Ounce of Prevention ...

Given that excessive stress is unproductive and can have expensive consequences for the employer as well as significant negative effects on the employees, it makes sense to be alert to symptoms and to take corrective action. The nature of the job may pre-determine many aspects of how it must be done, and when. Over that there may be little employer control. However, stress-related issues can be managed by making managerial decisions in such a way as to prevent greater problems. For example, given that many stressors come from lack of control of work-flow, inviting or requiring participation in the organization and design of the work may help. The goal is better health, more productivity, and lower costs.

Once it is recognized that stress arises from work overload and time pressure, lack of control over workflow, lack of training, too much or too little responsibility, discrimination, harassment, poor communication etc., it is possible to address the issues and resolve many of the problems. In effect, there needs to be an acknowledgement that often, stress comes from choices that are made about how people are treated, the results of which are foreseeable.

The bottom line for employers is that despite the potential for short term gain to be achieved by driving employees for maximum output, the longer term benefit may be found by managing to reduce the causes of stress, and in the meantime keeping an eye out for tell-tale symptoms, so that decisions can be made (and liabilities avoided) accordingly.

- [1] Waddell, Margaret L., "Workplace Stress and Disability", Ontario Bar Association, 2004
 - [2] Canadian Mental Health Association, "Sources of Workplace Stress", Richmond B.C.
 - [3] *Zorn-Smith v. Bank of Montreal*, (2003), 2004 C.L.L.C. par. 210-012
 - [4] Traumatic Mental Stress, policy 15-02-02 (see attached)
 - [5] *Nova Scotia v. Martin and Nova Scotia v. Laseur*, [2003] S.C.J. No. 54. 2003 SCC 54
 - [6] *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566
 - [7] *Occupational Health and Safety Act*, R.S.O. 1990, c.).1, ss 25(2)(h) and 66(3)
 - [8] *Walker v. Northumberland County Council*, [1995] 1 All E.R. 737
 - [9] *St. Thomas Psychiatric Hospital and Ministry of Labour* (unreported, April 26, 1993, Ont. Of. Adj. Docket no. AP01/93-A).
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Lancaster, Brooks & Welch L.L.P.

St. Catharines Office
P.O. Box 790, 80 King Street., St. Catharines, Ontario, L2R 6Z1
Tel: 905.641.1551 Fax: 905.641.1830

Welland Office
P.O. Box 67, 247 East Main Street, Welland, Ontario L3B 5N9
Tel: 905.735.5684 Fax: 905.735.3340

Grimsby Office
55 Main Street West, Grimsby, Ontario, L3M 1R3
Tel: 905.594.1263 Fax: 905.594.1268

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