

The Duty to Prevent Emotional Harm at Work: Arguments From Science and Law, Implications for Policy and Practice

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Although science and law employ different methods to gather and weigh evidence, their conclusions are remarkably convergent with regard to the effect that workplace stress has on the health of employees. Science, using the language of probability, affirms that certain stressors predict adverse health outcomes such as disabling anxiety and depression, cardiovascular disease, certain types of injury, and a variety of immune system disorders. Law, using the language of reasonable foreseeability, affirms that these adverse outcomes are predictable under certain conditions, typically defined in relation to what a reasonable person should know. Society is arguably in a position to establish standards for the abatement of certain types of workplace stress. As part of this process, we need to conceptualize an ideal form of conduct that exemplifies the standards to which both law and science urge us to aspire. For this purpose, the concept of the neighbor at work is proposed.

Keywords: *workplace stress abatement; duty of care; policy; standards; neighbor principle*

Sufficient evidence exists in science, law, and practice for the establishment of a standard of care according to which all denizens of the workplace would be held accountable for preventing foreseeable harm to the emotional or mental health of their neighbors at work.

This is the claim of the present article, which will be analyzed as three sets of propositions. These are as follows:

1. Scientific and legal evidence converge on several key factors that are now known to promote harm to emotional health at work.

These factors can be summarized as follows:

- excessive demands and requirements of effort;
- refusal to allow reasonable discretion regarding the means, manner, and method of everyday work;
- deliberate withholding of materially important information; and
- patterned and sustained failure to acknowledge or credit contributions and achievements to their rightful sources.

In the area of emotional health, evidence from science and law, although historically presented in different languages, increasingly uses convergent methods of conceptualizing and measuring potential for harm. For example, science and law are showing signs of convergence around the use of so-called agency language in giving accounts of how workplace stressors affect the mental and, consequently, the physical health of employees. (The term employee can be understood to include all levels of people subject to employment contracts. So, for example, it embraces the CEO as well as the youngest, most junior secretary.) Agency language means attributing conditions or states to human agents, rather than avoiding questions of human causality. Although such attribution has always been the bailiwick of common law, it has only recently become part of scientific discourse, at least in the area of workplace stress.

2. The fact that science and law now both provide metrics for the quantification of risks associated with the factors listed above places harm to emotional health in the same empirical and legal

framework as harm to physical health or integrity. This framework is *occupational health and safety*.

Within the OHS context, it becomes useful, feasible, and necessary to create a standard of care according to which quantified levels of demand, effort, information supply, and reward are prescribed or proscribed.

The key to the new standard is human decision making and discretion. Human agency is behind all the factors described above: Human actors choose to create, or, at a minimum contribute to, the development of excessive demands, requirements of effort, and the withholding of control, reward, and, information.

3. We require, therefore, a model of human agency that illustrates the desirable qualities of the careful person at work. To this end, the concept of the *neighbor at work* is introduced. The neighbor at work is a personification of the new standard of care of fairness and reasonableness in the workplace.

The neighbor at work represents a cluster of behaviors that can be modeled and taught in the workplace.

Scientific and Legal Convergence

Science

The scientific evidence on stress and health has concentrated in recent years on two paradigms: the Demand/Control Model (Karasek & Theorell, 1990) and the Effort/Reward Imbalance Model (Siegrist, 1996). The essence of these models is the empirically verified proposition that too much demand coupled with too little job control, and too much effort coupled with too little reward, are stressors complicit in the production of numerous types of illness and injury. These harms range from depression, anxiety, and the common cold to cancer and include various types of injury such as repetitive strains and back problems. An important aspect of the research on the two models is that the amount of stress required to produce harmful outcomes is increasingly quantifiable and measurable.

Because the health outcomes attributed to high-effort/low-reward conditions are very similar to those attributed to high-demand/low-control conditions, they are summarized together below. Increasingly, it seems that both pairs of conditions are likely to coexist

in the same workplaces, although not all adverse outcomes are simultaneously observed, given differences in type of work and means of production.

There is strong evidence to suggest that many of the adverse health conditions listed below are linked. The processes responsible for the link can be traced often to the functions of the psychoneuroimmunological (PNI) system (Kiecolt-Glaser & Glaser, 1995). Mind-body connections can be found, for example, in the etiology of infections, cardiovascular diseases, certain types of cancers, injuries, and hard-to-diagnose pain (Cohen, Tyrrell, & Smith, 1991; Courtney, Longnecker, Theorell, & Gerhardsson de Verdier, 1993; Kiecolt-Glaser & Glaser, 1995; Polanyi et al., 1997; Shannon, Mayr, & Haines, 1997; Smith, 1997; Step-toe, Evans, & Fieldman, 1997; Theorell et al., 1997)

Health effects of adverse working conditions: Summary.

1. High-demand/low-control conditions, at the extreme (highest, 25%, demand level; lowest, 25%, control level), compared with high-demand/high-control and low-demand/high-control conditions are associated with the following:
 - more than double the rate of heart and cardiovascular problems;
 - significantly higher rates of anxiety, depression, and demoralization;
 - significantly higher levels of alcohol and prescription or over-the-counter drug use; and
 - significantly higher susceptibility to a wide range of infectious diseases (Gardell, 1982; Greenberg & Grunberg, 1995; Johnson, Stewart, Hall, Fredlund, & Theorell, 1996; Karasek & Theorell, 1990; Matthews, Cottingham, Talbott, Kuller, & Siegel, 1987; Theorell et al., 1997).
2. High-effort/low reward conditions, at the extreme (highest, 33%, effort level; lowest, 33%, reward level), compared with high-effort/high-reward conditions are associated with the following:
 - more than triple the rate of cardiovascular problems; and
 - significantly higher incidence of anxiety, depression, and conflict-related problems

(Bosma, Peter, Siegrist, & Marmot, 1998; Siegrist, 1996).

3. High-demand/low-control conditions and high-effort/low-reward conditions are associated with the following:
 - higher incidence of back pain (up to 3 times the rates found in high-demand/high-control and high-effort/high-reward conditions); and
 - higher incidence of repetitive strain injuries (excess rates of up to 150% have been reported; Polanyi et al., 1997; Shannon et al., 1996; Shannon et al., 1997; Smith, 1997).
4. A combination of high-demand/low-control and high-effort/low-reward conditions are implicated, along with other more general workplace stressors in the precipitation of colorectal cancer. People experiencing such adverse conditions had more than 5 times the rate of colorectal cancer in one recent well-conducted study (Courtney et al., 1993).

In addition to the health effects just described, a variety of so-called capacity deficits have also been associated with sustained low control conditions. These include the following:

- reduced ability to cope with change,
- reduced adaptability,
- impaired learning,
- impaired memory,
- increased helplessness,
- increased passivity, or
- increased aggression or conflict.

Recently, it has been proposed that one of the key factors linking psychotoxic conditions of work to physical harm is the common perception and feeling among employees that such conditions are unfair. This sense is thought to arise from a predisposing belief that, to a significant extent, such conditions of work come about not by chance but by choice—the choice of managers and supervisors in particular. Employees often believe that alternative choices could be made that reduce demand and effort and increase control and reward without economic loss to the employer (Shain, 1999).

To understand how fairness at work affects both the chances of getting sick and of getting injured, we need

to look more closely at what is coming to be called the *sociobiological translation* (Tarlov, 1996). This metatheory of mind-body interactions describes the sociobiological mechanisms through which human beings receive messages about their social environment and convert these messages into biological signals that trigger the processes of disease development or health promotion. Key to the sociobiological translation is the biochemistry of emotions. In recent years, much has been learned about emotions and their effects on the body (McEwan 1997, 1998a, 1998b, 1999). For present purposes, our interest lies in what we might call the *biochemistry of fairness*. *Fairness* is a term we encounter or use just about every day, but it is nonetheless invested with many different meanings. Here, I want to focus on *fairness* as keeping promises and on *unfairness* as breaking promises. In particular, I want to characterize the employment contract as a set of promises (Tyler, Boeckmann, Smith, & Huo, 1997).

When employees perceive that one or more of these express or implied promises have been broken, they are likely to experience a range of negative emotions. If it is correct, as it appears to be, that conditions of work characterized by high-demand/high-effort and low-control/low-reward conditions are seen by many employees as breaches of the employment contract (“I did not sign on for this: This is unfair”), then a cascade of emotions can be predicted to flow from this perception that include feeling, to one degree or another,

- excluded;
- tricked;
- rejected or abandoned;
- disliked;
- unworthy or worthless;
- diminished or humiliated;
- shamed;
- anxious, agitated, or insecure;
- depressed;
- angry or enraged;
- suspicious; or
- helpless.

These mental states are unpleasant and undesirable in themselves, and beyond a certain point, they can turn into mental disorders that keep people from functioning normally. Even worse, if sustained over a lengthy period, or if there are one or more acute episodes of unfairness, these feelings, among some people, can lead to a sense that

- nothing and no one can be trusted;
- there is no order, purpose, or meaning in life;
- the world, and events in it, make no sense; and
- all is not right with the world.

Antonovsky (1993) describes this set of perceptions and emotions as a lack of “sense of coherence.” A simpler way of saying this is that when people feel they have been treated in a seriously unfair way, they no longer feel quite whole and crave some kind of remedy that will make them feel whole again.

Law

Although this sense of wholeness is the heart of the fairness-health connection, in so far as we can determine it from scientific method, it is also the nexus at which the law converges with science because the purpose of legal remedies in the area of torts is to restore the injured party to the state they were in prior to their being wronged. This is often referred to by lawyers and judges as a process of *making whole again*.

However, whereas science tends to use the language of probability to describe the likelihood that a certain harm will result from an action or set of conditions, the law tends to use the language of reasonable foreseeability to describe the same relationship. As noted earlier, there is increasing convergence between the two forms of evidence around the idea of human agency as the connective process with regard to how conditions of work affect health outcomes. That said, the law uses a different method of inquiry and a different method of presenting evidence. When seen in the context of a judicial decision, the evidence is told as a kind of story. In the following discussion of how the law treats relationships between psychotoxic conditions of work and harm to health, examples are presented that are illustrative of legal reasoning in this area. These examples are meant to show that the law is ready, under certain circumstances that vary from one jurisdiction to another, to acknowledge the robustness of the relationship that can exist between stress induced by one person and harm to the mental and physical health of another. This is not in any way meant as a review of legal literature or case law—that is far beyond the purview of this article. Rather, the intent is to show that the law confirms the predictability of harms in ways that parallel the ways of science and that both law and science support the notion of benchmarks or standards that can be used to identify

behavioral thresholds beyond which harm is likely to occur.

Because storytelling is the basis of the factual part of legal decisions, it is useful to have before us an example of this genre. One such example is from Canada. This case is given in some detail to show the elements of modern legal reasoning that support (without referring to it) the scientific evidence connecting stress induced by one person to health-harm experienced by another. This case has given rise to considerable perturbation among some employers and their legal counsel because it is seen as a harbinger of things to come. Some fear it is a floodgate case that will unleash a torrent of psychotoxic workplace suits; others believe it was a case waiting to happen and that sooner or later the law would have to acknowledge the emergence of a class of psychosocial wrongs long since known to science, if without the attribution of human culpability. This case could have been heard in almost any developed country, and certainly in any common-law country. However, different jurisdictions might come up with different legal conclusions based on the same set of facts. Presently, we might expect to see similar legal results in the United Kingdom and Canada, but different results depending on in which state of the United States the case is heard. Nevertheless, it is fair to say that the results of the following case could be the same in all three jurisdictions, depending on a multiplicity of contextual variables.

Zorn-Smith v. Bank of Montreal (ONSC847/01; 2003) C. Aitken J.¹

The plaintiff (hereafter, *plaintiff*) had worked 21 years for the bank. She was, by all accounts, a diligent, loyal, compliant, and well-liked employee. These facts were not in dispute.

She had moved around a lot, at the bank’s request, and worked extremely long hours in spite of having a young family at home. She would often return to work after dinner and sometimes worked on Sundays.

There came a point, after some years of trying to upgrade her skills, where she began to burn out. The demands of the job were exacerbated by ongoing training requirements to formally qualify for the managerial position that she occupied. She succumbed to one episode of depressive illness, then eventually to another, on the basis of which she was placed on disability leave.

After several weeks, while still on leave, the bank gave her an ultimatum: Either come back to work in her former managerial position, come back part-time in a junior position, or do not come back at all. She declined to return, and the bank dismissed her.

She sued for wrongful dismissal, the intentional infliction of mental distress, loss of disability benefits, and punitive damages for callous disregard.

One of the plaintiff's key supervisors testified that he had no idea of the negative effect the severe stress of the workplace, particularly that associated with chronic, severe understaffing was having on her (§ 42). He was found to have trivialized her health concerns, which she brought to him on numerous occasions. The court noted the testimony of the plaintiff's physician that she was sleep deprived, exhausted, irritable, and burned-out (§ 27-28). This physician (whose testimony clashed with that of the bank's own doctor) opined that the solution to the problem was to provide plaintiff with adequate study time and to have realistic expectations for her with regard to her current level of training, a view that the court appears to have accepted, further characterizing the employer's lack of concern for plaintiff's health as "reckless" (§ 43).

There was a notable lack of support from plaintiff's superiors with regard to technical matters (§ 44). Plaintiff's marriage began to suffer, and finally, she was diagnosed as having "an adjustment disorder with depressed and anxious mood" (the technical term for burnout; § 48). Plaintiff's physician saw this result as a workplace issue, rather than as a personal issue, with regard to potential solutions (§ 50).

By this stage, plaintiff had "loss of appetite, memory loss, lack of concentration, mood swings, exhaustion, a loss of self-worth and a loss of self-esteem. . . . She was angry and impatient" (§ 41). In her physician's view, this amounted to total incapacitation (§ 55). He made frequent reference to the "excessive demands" to which she was subjected (§ 56) and to the "disastrous" consequences of the employer's proposal that she return to work part-time: "It will translate into being paid half as much to do 3 times as much" (§ 56).

Plaintiff told her supervisor, in the context of refusing the bank's final offer, that returning to an unmodified workplace "would kill her. She felt mistreated, abused and forced out because of unreasonable job requirements" (§ 58).

The court determined that plaintiff was terminated without cause, given that she was legitimately on disability leave at the time of her dismissal (§ 109, § 111). Aitken J. said,

I find that Ms. Zorn-Smith continued to suffer from exhaustion, poor concentration, an inability to think straight, lack of confidence and self-doubt to the extent that she could not have functioned in the role of Financial Services Manager, or for that matter, in any other role at the Bank. (§ 74)

Her energy, initiative and stamina had been drained out of her by too many months of unreasonable work demands relating not only to the normal work day but also nights and weekends. (§ 76, italics added)

In weighing the evidence concerning the role of plaintiff's domestic situation in her burnout, the court dismissed the bank's contention that this was the real cause of her problem. Indeed,

there was nothing in the evidence to suggest that Ms. Zorn-Smith could not cope with everything, *had her work demands been within some reasonable parameters. They simply were not. . . .* I find that Ms. Zorn-Smith's adjustment disorder with depressed and anxious mood was *caused predominantly by unreasonable work demands*, and not by family stresses. (§ 94, italics added)

At paragraph 103, the court noted that "*it was the responsibility of the Bank to ensure a safe workplace for its employees, a workplace that was not making them ill and unable to work* [italics added]." And at paragraph 116, it noted that

Ms. Zorn-Smith had worked for the Bank since she was 15, and her father had been a Vice President of the Bank until his death. She was devoted to the Bank, and considered the Bank employees her family. The multitude of feelings which she would have experienced upon not being supported by the Bank in regard to her continuing disability and then being terminated from the Bank could not help but to have compounded her feelings of loss and inadequacy, and to have hindered her normal functioning.

Aitken J., in assessing damages, referred to Dickson C.J.'s remarks in the Canadian Supreme Court's *Reference Re: Public Service Employee Relations Act* (Alta.), 1987, 1 S.C.R. 313 at 368, where he says, "A person's employment is an essential component of

his or her sense of identity, self-worth and emotional well-being.”

The court held that the Bank’s behavior in the manner of dismissal was unfair and in bad faith, justifying a longer notice period (in this case, damages in lieu; ¶ 138). The court entertained “no doubt that the way in which Ms. Zorn-Smith was treated at the time of her dismissal worsened her psychological state” (¶ 138).

At paragraph 146, the court characterized plaintiff’s lack of confidence in her own ability to function as “*a foreseeable result of the Bank’s improper actions*” (¶ 146, italics added).

With regard to the claim for damages in connection with intentional infliction of mental distress, the court held that reckless disregard of consequences is sufficient to meet the *Wallace* criteria (¶ 166) and the criteria laid down in *Prinzo v. Baycrest Centre for Geriatric Care* (2002) 60 O.R. (3d) 474 (C.A.) at paragraph 48, where the elements to be proven are

1. flagrant or outrageous conduct;
2. calculated to produce harm; and
3. resulting in a visible and provable illness.

The court interpreted Element 2 to embrace “reckless disregard” (¶ 167) as to whether or not harm would ensue. Essentially, this results in interpreting “calculation” to include “reasonable foreseeability.” Indeed, the court said,

the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow. There is no requirement of malicious purpose to cause the harm or any motive of spite (see Prinzo ibid., and Rahemtulla v. Vanfed Credit Union [1984] 3 W.W.R. 296 (B.C.S.C.) per McLachlin J. (as she then was). (¶ 167)

The court held that the tort of intentional infliction of mental suffering was proven (¶ 168) because of the following:

1. The bank knew that plaintiff was exhausted and worn out as a result of chronic understaffing.
2. The bank was well aware that plaintiff suffered burnout on a previous occasion (2000), requiring a short leave of absence.

3. Supervision knew that plaintiff had been requesting relief from her workload.
4. Despite this knowledge, the bank continued to reduce staffing levels, thus increasing the workload on plaintiff.
5. Despite plaintiff’s pleas for relief, the bank continued to keep on the pressure.
6. The bank knew of her history of long hours and missed lunches.
7. The bank took advantage of plaintiff’s generous nature “*in total disregard to* [italics added] the toll its demands were taking on her health, and the health of her family” (¶ 168).

This callous disregard for the health of an employee was flagrant and outrageous. That Susanne Zorn-Smith would suffer a further burnout was *predictable* [italics added]—the only question was when it would come. It was *foreseeable* [italics added] that such a burnout would cause her mental suffering. I find that the Bank’s conduct was the *primary cause* [italics added] of Susanne Zorn-Smith’s adjustment disorder with depressed and anxious mood. (¶ 169)

However, the court did not award punitive damages because the elements of malice and oppression were not present. (¶ 170)

The significant judicial principles of this case are quickly apparent, but for ease of recognition, they have been italicized in the foregoing account of the case. Essentially, they amount to the proposition that where harm to employee mental health is reasonably foreseeable in a context where there is a duty of care to provide a safe system of work, the employer or its agents may be liable for such harm. Reasonable foreseeability is held to exist when everyone knows that demands are too unreasonable and that they pose a threat to health, if not on general principles of dangerousness (which might be sufficient in themselves), then on evidence that such demands have already given rise to harm, as they had in the plaintiff’s case.

Strikingly similar reasoning can be found in an English case (*Walker v. Northumberland County Council* 1995 1 All E.R. 737 at 74. In this case the judge held that

where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pres-

tures of his workload, the employer was under a duty of care, as part of the duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform. (*Walker v. Northumberland County Council*, 1995, Sec. 737).

In this same case, the court (addressing the vexed issue of excessive employee vulnerability) noted that in spite of his “very considerable reserves of character and resilience,” what broke the plaintiff was, among other things, “the mounting but quite uncontrollable workload” and “a feeling of frustrated helplessness because he found himself in a deteriorating situation which he was powerless to control” (*Walker v. Northumberland County Council*, 1995, at 754). Note the unambiguous references to powerlessness, frustration, helplessness, and lack of control as stressors in this case.

The judge noted (addressing the question of whether protection from mental or emotional damage is contemplated as an aspect of a safe system of work) that “there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employers’ duty of care” (*Walker v. Northumberland County Council*, 1995, at 737).²

The two cases cited above rely on community standards for their designation of what constitute unreasonable demands and what is reasonably foreseeable. Both say that the common-law duty of care to provide a safe system of work embraces a duty to avoid reasonably foreseeable harm to the emotional or mental health of employees.

This common-law assertion now forms the basis of the United Kingdom’s statutory approach to the regulation of psychosocial hazards at work. This approach draws on the best advice from scientific evidence to create standards for the abatement of certain psychosocial hazards that are now believed to be sufficiently quantifiable for the purpose. Although the designated hazards of excessive demands and inadequate control and inadequate social support are not measurable in parts per million like toxic airborne substances, United Kingdom legislators believe that science allows us to define thresholds above and below those at which harm is likely to occur in terms of increased odds ratios.

In the United States, the general legal situation with regard to the intentional or negligent infliction of emotional distress is well summarized by Work-

place Fairness, a nonprofit organization affiliated with the National Employment Lawyers Association, the country’s only professional organization consisting exclusively of lawyers who represent individual employees in cases involving employment discrimination, wrongful termination, employee benefits, and other employment-related matters. On their Web site, Workplace Fairness (www.workplacefairness.org) provides the following general overview of the relevant U.S. law (text edited for space):

Intentional infliction of emotional distress [italics added] is sometimes referred to as the *tort of outrage* [italics added]. In certain instances, it is unlawful for an employer to deliberately cause an employee serious emotional harm. You might have been treated unlawfully if the employer’s conduct toward you was

- extreme and outrageous, beyond the bounds of acceptable conduct in a civilized society;
- intended to, or could reasonably be foreseen to, cause a reasonable person serious emotional trauma; and
- actually the cause of severe and serious emotional distress for you.

The law does not protect against so-called mere insult. The focus for this kind of claim is on the outrageousness of the conduct and the severity of the emotional distress that results. Being fired on the spot and escorted out of the building by security in front of all of your former coworkers is probably not enough, alone, to constitute intentional infliction of serious emotional distress. Being handcuffed without justification or being subjected to repeated racial slurs, or severe sexual harassment, may constitute an outrage that can be remedied.

Most states do not impose a general duty of care on companies concerning the employment relationship. Thus, an employer who mistreats, harasses, improperly evaluates, or wrongfully dismisses an employee is not liable for a claim of negligence. However, in many states, negligent misrepresentation of material facts, negligent hiring, supervision or retention of a dangerous employee, negligent infliction of emotional distress, and negligent failure to provide a safe workplace may be grounds for a lawsuit. Separate from the question of employer negligence, an employee may be able to sue independent contractors such as doctors, polygraph examiners, detectives, and drug testing agencies

for negligent performance of their duties when acting as the employer's agents.

The U.S. Supreme Court has surveyed the jurisprudence in the various states in the leading case of *Gottshall v. Consolidated Rail Corporation* 114 S.Ct. 2396 (1994). The Court determined that nearly all states have permitted claims for emotional injury in one form or another, reinforcing the general statement of Workplace Fairness summarized above.

However, the likelihood of success in claims of this nature is highly unpredictable because the context of the suit is all important, as is the fact situation. For example, in *Gottshall*, the context was the Federal Employers' Liability Act, 45 U.S.C. ¶ 51-60 (1988). In this instance, the question of liability had to be resolved within the framework of a long established but still vague doctrine called the Zone of Danger Test, which is invoked when the emotional harm claimed is a result of exposure to some physical threat or apprehension of threat to health or safety. To this writer's knowledge, there is no U.S. case that directly addresses the fact situation found in the Canadian case of Zorn-Smith. It would be of great interest to know whether the Zone of Danger Test would be found relevant to Zorn-Smith's situation, where she had reasonable apprehension of harm to her health as a result of unreasonable working conditions. Nevertheless, the Supreme Court did confirm a plaintiff's right to recover under the Federal Employers' Liability Act for negligently produced emotional distress as a function of the employer's duty to provide a safe workplace. This places U.S., U.K., and Canadian jurisprudence more or less on the same page, albeit on a heavily footnoted page. In other words, a claim for negligent infliction of (serious) emotional injury will find support in all three countries under circumstances that vary by jurisdiction but that all invoke some version of a reasonable foreseeability test.

Questions of Quantification and Standards

In spite of the fact that the United States, Canada, and the United Kingdom all approach the subject of foreseeability from a similar legal perspective, the United Kingdom is as yet the only country of the three to advance the issue on a legislative front. The rationale for this advance is clear: U.K. legislators believe that the scientific evidence linking excessive demands, inadequate control, and insufficient social support to adverse health outcomes is strong enough and measurable enough to warrant the inclusion of these hazards

under the Occupational Health and Safety Act of that country. In the background rationale for the legislation, there is heavy reliance on a vast compendium of research compiled by Rick, Thomson, Briner, O'Regan, and Daniels (2002) from the Institute for Employment Studies that makes the case for the inclusion of at least these three psychotoxic hazards in the occupational health and safety statute.

Although this view of the strength of the evidence is not universally shared among social scientists, there is increasing discussion of the need to consider the development of reference values against which the toxicity of psychosocial hazards can be measured. For example, Benavides, Benach, and Muntaner (2002) state, "current evidence justifies a deep discussion to establish reference values to facilitate decisions in the occupational risk evaluation process, such as often happens with physical or chemical risk factors" (p. 245). However, they go on to warn that "changing work environments across time and place plus heterogeneity of psychosocial work environments within occupations make this an elusive goal. In fact, it has not been easy for chemical and physical risk factors" (p. 245). Nevertheless, they conclude, "but this is the way to go if we want to use the knowledge that we already have . . . [for] practical prevention inside our workplaces" (p. 245).

In Canada, there is movement afoot to at least bring the matter of measurement within the parameters of a workplace standard that can be discussed and debated among industry and business leaders. Specifically, The Global Business and Economic Roundtable on Addiction and Mental Health has included the rationale for measurement of psychosocial hazards in its groundbreaking charter for the advancement of mental health in the workplace to which several prominent Canadian and multinational companies are signatories.

Possible content for such a standard, focusing on the need for measurement as opposed to focusing on the delineation of specific thresholds above or below which liability will be attracted, is proposed below.

A Proposed Standard for Measurement

The duty of care to avoid reasonably foreseeable harm can be discharged to a standard of diligence through a process characterized by the following:

1. Regular collection of information at a branch or work-unit level on the prevalence of psycho-

social hazards seen as arising from managerial practices and their perceived impacts on mental health. The focus in this regard should be on the dimensions of demand, information adequacy, exercise of discretion, and psychological rewards.

2. Establishment of decision rules for determining at what point executive action must be taken to abate psychosocial hazards related to unacceptable levels of demand, information adequacy, discretion, and psychological rewards should be undertaken.
3. Use of scientifically valid and reliable instruments for this purpose is needed (such instruments should have been widely tested and have generated a significant body of normative or reference data).
4. Commitment from senior management is needed to act on the results of such surveys.
5. Making the process (Steps 1 through 4) part of the central accountability procedures of the organization so that it is overseen and invigilated by at least one senior officer who reports to the CEO and whose job description includes this function is necessary.
6. Specifically linking the duty of diligence regarding information collection and use as it bears on the prevalence of psychosocial hazards to the occupational health and safety surveillance and monitoring system should be included.
7. Adequate financial resources should be allocated to the pursuit of this process through a dedicated cost center.

As suggested earlier, this approach stops short of defining absolute psychotoxic thresholds and contents itself with challenging workplace leaders to address the potential for harm through benchmarking their own organizational situations against known referents. Although this approach is predicated on the assumption that employers will regulate their own behavior, it is clear that it could also be used in the context of implementing a statutory regime in which liability rather than responsibility becomes the dominant incentive for harm avoidance.

From Measurement to Action

Whether the challenge of rendering our employment relationships more healthy is approached from

an ethical or a legal perspective, there is a need to develop a language and a code for the kind of conduct consistent with the duty to avoid reasonably foreseeable harm to emotional and physical health. As an example of such a language and code, the concept of the neighbor at work is proposed.

For these purposes, the neighbor at work represents the following:

- a symbol and a standard for fairness and reasonableness in employment relationships;
- a philosophy that says the quality of employment and other contractual working relationships are crucial to the production and maintenance of social benefits including health, vitality, productivity, justice, harmony, and democratic competence;
- a common language and a “superidentity” that enables parties with potentially conflicting views to communicate with each other (e.g., management and union); and
- a language of conciliation and reconciliation.

The neighbor at work as another person is

- everyone in your environment or sphere of influence whom you affect through your actions, words, and expressed attitudes, particularly those with whom you interact on a regular basis. This includes people who report to you and those to whom you report, as well as customers, clients, and suppliers of goods and services who may be both internal and external to your immediate workplace.

Being a neighbor at work yourself means

- determining who is affected by your actions, words, and expressed attitudes (those within your sphere of influence) and how they are affected;
- actively trying to understand their legitimate needs, interests, and points of view;
- sharing and gathering information of material importance that will assist in this process in a timely and adequate manner;
- in light of this knowledge, making every reasonable effort to avoid foreseeable harm to these people; and last but not least,
- expecting the same of them.

A working environment or culture characterized by neighborliness in this sense is therefore one in which

- the neighbor at work is accepted and honored as a symbol and a standard of reasonable and fair behavior in the organization (in other words, it is virtually a personification of these values);
- the principles and practice of the idea are integrated into the central accountability structures and processes of the organization;
- ways are sought to identify the legitimate needs and interests of all participants on a routine basis, either through surveys, focus groups, or other forms of intervention such as open space workshops;
- ways are sought to find common ground between different interest groups on a routine basis;
- information of material importance to this process is shared in a timely and complete manner; and
- action in regard to the neighbor-at-work philosophy is monitored routinely by senior management.

Such an environment or culture requires the active involvement and support of everyone who works within it and requires, in particular and without exception, the strong leadership of senior managers and senior labor officers where present.

The essence of the neighbor at work idea is that for certain purposes, all denizens of the workplace owe one another the same duty of care regardless of their official rank or title. This is not simply about being nice to one another, although this may be a welcome by-product. It is actually about the avoidance of reasonably foreseeable harm, a duty that falls on all of us not only as a requirement of ethical conduct but also as a legal imperative that forms the backbone of the modern law of negligence.³

Conclusion

Science, law, and emerging best practices in human resource management all point to the ascendance of a duty of care to avoid reasonably foreseeable harm to the emotional or mental health of others within our spheres of interest at work.

The strength of the evidence is such that the duty to avoid reasonably foreseeable harm can be considered to have the weight of law behind it, the foundations of

science beneath it, and the beacon of common sense ahead of it.

Notes

1. In presenting this case and others as examples of legal reasoning in this area, it is recognized that some organizations appear to be singled out for scrutiny and judicial castigation. The fact is, however, that any large organization is likely to have blind spots that may be invisible to the directing minds of the corporation as a whole. That said, cases like this one are a stark reminder of the challenges faced by large and otherwise beneficent companies in maintaining a consistent approach, across all divisions and work units, to the management of human relations.

2. The U.K. Court of Appeal has adopted a more conservative test of foreseeability in *Bonser v. UK Coal Mining Ltd* (2003) EWCA Civ 1296 (09 June 2003). In this case, foreseeability of psychiatric harm was held to be established only by virtue of the plaintiff having suffered a psychiatric breakdown on an occasion prior to the one currently at issue (i.e., the stress complained of must have already harmed the plaintiff for subsequent episodes of illness to be reasonably foreseeable).

3. The so-called neighbor principle is essentially the foundation of the modern law of negligence. The principle was developed by Lord Atkin in the leading case of *Donoghue v. Stevenson* (1932) A.C. 562. Until that date, the law of negligence lacked a general principle of liability. The following excerpt from Lord Atkin's speech frames the issue perfectly:

Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (at 580)

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