



Global Paramedic Leadership Mental Health Summit

Chesford Grange, Kenilworth, UK

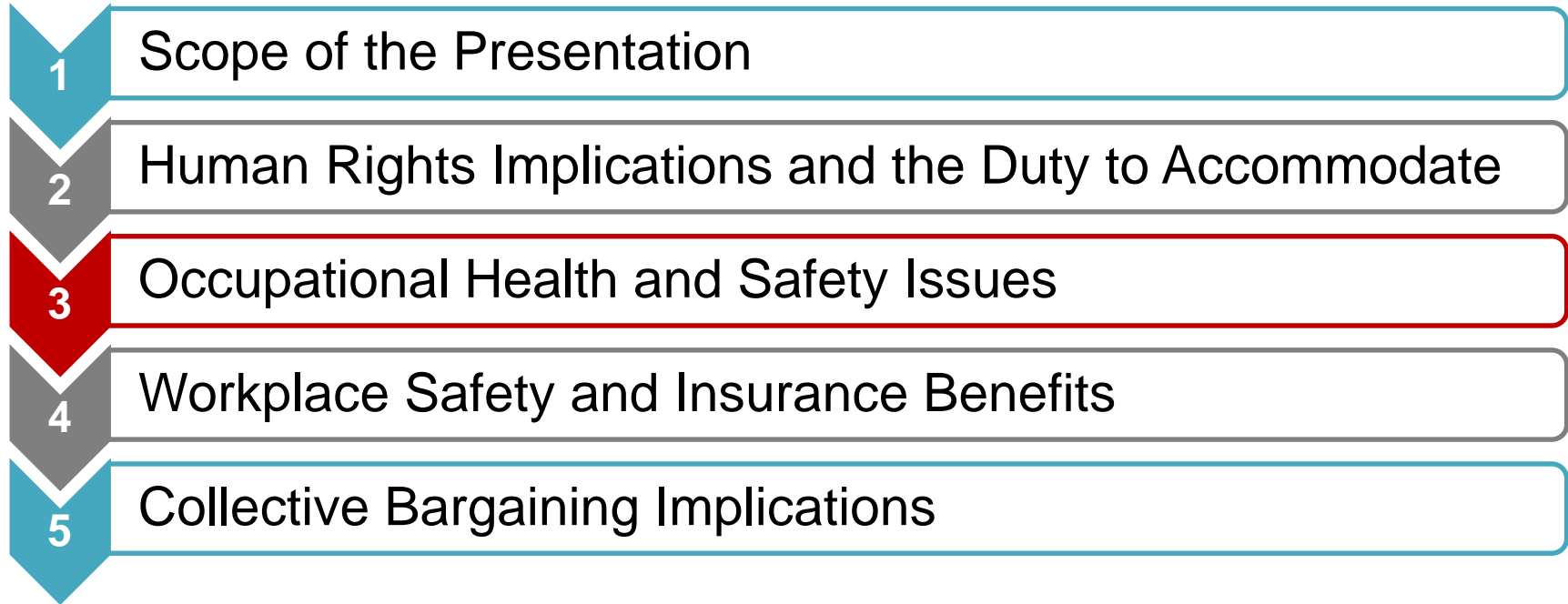


Legal Implications and Management of Responder Mental Health Issues

Mark H. Mason, Partner – Toronto Office

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Roadmap of Presentation



Scope of Presentation

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- Hicks Morley Hamilton Stewart Storie LLP – Canada's largest "Labour and Employment" law firm
- Offices exclusively in Ontario – predominant work is in Ontario but we service clients across Canada
- Scope – predominantly Ontario but the legal principles are transferrable and relevant elsewhere

Human Rights Implications and the Duty to Accommodate

Ontario Human Rights Commission Policy

- OHRC policy on “Preventing Discrimination Based on Mental Health Disabilities and Addictions” was released June 2014
- Detailed discussion of the duty to accommodate
 - Procedural and substantive
- Stresses the importance of respect for dignity, individualization and participation in the accommodation process
- Policy, not law - but it is a helpful starting point

The Duty to Accommodate - The Fundamentals

- When is the duty triggered – on request or Employer initiative?
- Multi-party obligation – Employer, Employee, and Union
- Procedural and substantive components
- Individual assessment
- Extent of the duty
 - Undue hardship
 - BFOR
 - Duration

Accommodating Disabilities – Basic Outline

- Identification
 - Physical and psychological
- Understanding medical evidence
 - Restrictions
- Modification
 - Current job or other roles
- Ongoing assessment

Definition of Disability

- Ontario *Human Rights Code* definition of disability is expansive:
 - s. 10(b) - condition of mental impairment or developmental disability
 - s. 10(d) - a mental disorder
- Common examples:
 - Depression
 - Bipolar disorder
 - Stress/anxiety, including PTSD, chronic mental stress, etc.

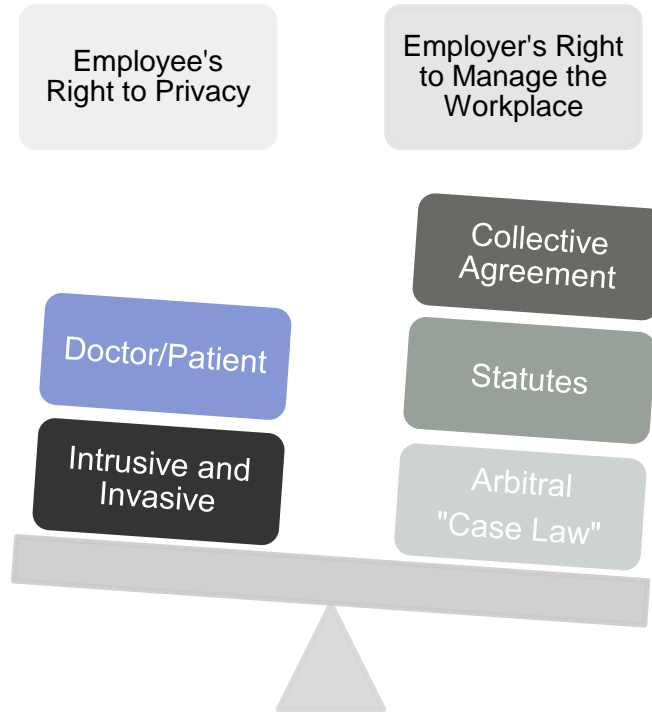
Psychological/Mental Health Disabilities

- Among the most difficult to identify and address in the workplace
 - Often invisible
 - Differential effect of particular illness, treatment regime and the individuals ability to cope
 - Subjective assumptions and stereotypes
- Presents a unique set of challenges

Accommodating Invisible Disabilities

- Information required to trigger the duty to accommodate:
 - Low-threshold – whether the employer knew or ought to have known that the employee has disability-related needs that require accommodation
- Obligations on all parties involved; employer, employee and union (if applicable)

Access to Medical Information



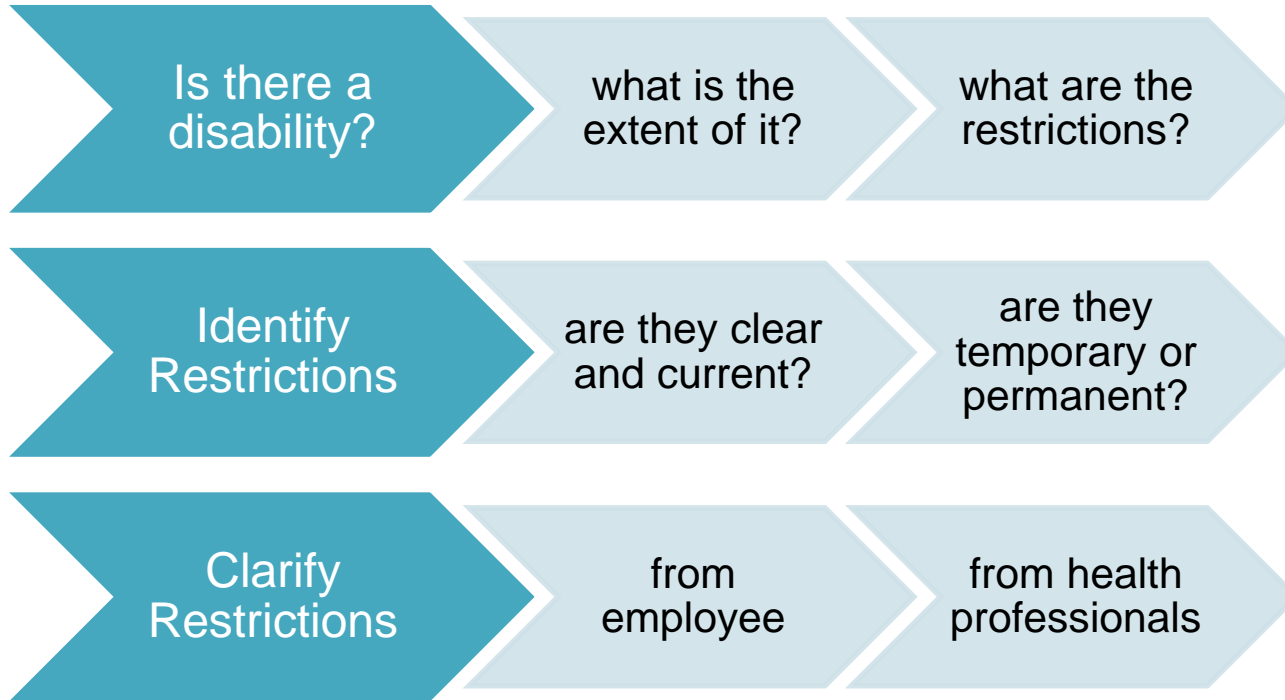
What Medical Information Can Be Requested?

- Typically uncontroversial:
 - Nature of the illness
 - Duration/Prognosis
 - Restrictions/Limitations
 - Basis for medical conclusions
- More controversial:
 - Diagnosis? Unlikely
 - Treatment Plan? Possible, including medication and side effects which may impair job performance or other legitimate employer interests

Extent of the Obligation to Accommodate

- Reasonable accommodation *short* of undue hardship
- Cannot impose "no risk" standard
- Must explore all reasonable options that would assist to reduce or manage potential risks
- Consider behavioural agreements requiring compliance with recommended course of treatment
- Ultimately, not required to expose employee, other employees or members of the public to undue risk

The Practical Steps



Occupational Health and Safety Implications

Occupational Health and Safety Act

- Administered through the *Ministry of Labour*, enforced through legal proceedings in court
- Obligations for Employers and Supervisors/Managers
 - s.25(2)(c) – appoint competent persons as supervisors
 - s.25(2)(h) – “take every precaution reasonable in the circumstances for the protection of a worker”
 - Similar obligation on individual manager/supervisors

Workplace Violence and Harassment Protection

- Amendments in past years to specifically capture workplace violence and harassment within the scope of the *OHSA*
- Various employer obligations
- Mental health issues



Workplace Safety and Insurance Benefits Related to Mental Health

Workplace Compensation Provisions

- Governing legislation in Ontario is the *Workplace Safety and Insurance Act* (commonly referred to as “WSIB” benefits)
- Compensation mechanism for employees injured or who suffer illness in the line of their duties
 - The WSIB is funded entirely by the employers of Ontario through assessments based on their industry risk and actual experience rating
 - Similar provisions in other Canadian jurisdictions

Traumatic Mental Stress

- *Workplace Safety and Insurance Act* has provided for benefit coverage for “Traumatic Mental Stress” for years
- Amended to recognize “Post Traumatic Stress Disorder” as a “presumptive entitlement”
 - If diagnosed, it is *presumed* to arise out of and in the course of the first responder’s employment
 - Rebuttal presumption – Employer bears the onus

Rebuttable Presumption

Section 14(6): the posttraumatic stress disorder is presumed to have arisen out of and in the course of the worker's employment, unless the contrary is shown.



WSIB Policy: PTSD



- Diagnosis by psychologist or psychiatrist
- On or after April 6, 2014
- Rebuttable presumption
 - Must establish that employment was not a significant contributing factor to PTSD

WSIB Policy: PTSD



- Exclusion for work-related decision or actions
 - i.e. termination, demotion, discipline, etc
- Time limit for filing
 - Except for diagnosis by April 6, 2016

Post Traumatic Stress Disorder

- Definition - persistent mental and emotional stress which is the result of a psychological shock
- Symptoms can include - depression, anxiety, insomnia, and vivid recall of the event that triggered the PTSD
- A condition where symptoms evolve in the aftermath of an extreme traumatic stressor that overwhelms the individual's coping capabilities
- Can result from direct or indirect trauma

Post Traumatic Stress Disorder

- Common causes:
 - Exposure to sudden or unexpected death of others
 - Witnessing or participating in rescues to prevent death or injury
 - Highly emotional events
 - Extreme fatigue, weather exposure, or hunger
 - Extended exposure to danger or emotional/physical strain
 - Exposure to environmental hazards

Entitlement to Traumatic Mental Stress - WSIA

- Section 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
 - A 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

Entitlement to Traumatic Mental Stress – WSIB Policy

Adjudicators must identify a **sudden and unexpected traumatic event** which:

- ✓ Arises out of or occurs in the course of employment
- ✓ Is clearly and precisely identifiable
- ✓ Is objectively traumatic
- ✓ Is unexpected in the normal course of the worker's employment or work environment

Entitlement to Traumatic Mental Stress – WSIB Policy

- Workers will be entitled to benefits where they have suffered or witnessed the sudden and unexpected traumatic event, or heard the traumatic event first hand through direct contact with the traumatized individual

Entitlement to Traumatic Mental Stress – WSIB Policy

Acute Reaction:

"An acute reaction is a significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric/psychological response. Such a response is generally identifiable and must result in an Axis I Diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)"

Chronic Mental Stress: How We Got Here

**Previously:
Entitlement limited
to traumatic mental
stress**

**2014: WSIAT ruled that
limiting entitlement to
traumatic mental
stress is
unconstitutional**

**2017: New legislation
amends WSIA to allow
entitlement to chronic
mental stress**

Chronic Mental Stress

- *Workplace Safety and Insurance Act* amended effective January 1, 2018 to provide for entitlement to benefits for injury caused by “chronic mental stress”
- Significantly expanded scope of benefit coverage
- Anticipated this will challenge employers to limit and address stressors in the workplace and to create modified work opportunities that take into account psychological (as opposed to purely physical) restrictions

Bill 127, *Stronger, Healthier Ontario Act*

- Amended the *Workplace Safety and Insurance Act* to allow entitlement to chronic mental stress for workplace injuries that occur on or after January 1, 2018
- WSIB has responded with a Draft Policy
- New policy would replace the existing policy on traumatic mental stress and address both issues

Proposed Draft Policy



- Would allow initial entitlement for chronic mental stress if the stress is caused by a **substantial work-related stressor**,
 - Including **workplace bullying or harassment**
 - **Substantial:** excessive in intensity and/or duration in comparison to the normal pressures and tension experienced by works in similar circumstance

WSIB Policy: Chronic Mental Stress



- DSM diagnosis by physician, nurse practitioner, psychologist, psychiatrist
- Causation: predominant cause
- Exclusion for work-related decision
- Interpersonal conflict

New Policy Comparison Traumatic Vs. Chronic

Traumatic Mental Stress

Involves work-related events that are generally accepted as traumatic in nature

Examples

- A bank teller is held up at gunpoint or is a witness to the event
- An emergency care worker attends a horrific accident site
- A police officer is placed in a life-threatening circumstances or witnesses horrific events over a period of time

VS.

Chronic Mental Stress

Involves work-related events that are non-traumatic in nature

Examples

- An employee is subjected to humiliating jokes, demeaning conduct, and persistent criticism by a co-worker
- A store clerk is consistently berated by the store manager in front of staff and customers
- Generally, the exposure must be over time to be accepted

Collective Bargaining and Employer Policies

Collective Bargaining

- Paramedics in Ontario represented predominantly by two large public sector bargaining agents
- Firefighters represented by Local affiliates of the larger Provincial Association and International Association
- Unions very conscious of mental health issues, workplace insurance claims and management of stress for paramedics

Collective Bargaining

- Employers are recognizing the need for benefit coverage and the potential gains associated with same
 - Ex. Frontenac County – last round of bargaining introduced new benefits targeting mental health
 - Introduction of psychologist and psychotherapist coverage (\$1000 per practitioner per year)
 - Introduction of cognitive behaviour therapy of \$1000 per year maximum
 - Introduction of Employee Assistance Plan

Collective Bargaining

- Peterborough County:
 - “The parties agree to meet to discuss the effect of a critical incident when an employee experiences an unusually strong emotional reaction to an extraordinary situation that interferes with their ability to function at work”
 - The purpose – supporting the paramedic in dealing with the effects of the incident whereby support could include access to paid and unpaid leave time, access to EAP, discussion regarding *WSIB* obligations and entitlements

Questions & Answers





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