



# **Mental Injury, Psychological Safety and the Law: 150 Years of Evolution**

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# An Emerging Challenge and Opportunity for Employers

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A new duty of care is emerging in our legal system.....

It is the duty to provide a “psychologically safe workplace,” which is a “super duty” arising from 7 branches of the law

**Sources:**

1. “The Shain Report” - [www.mentalhealthcommission.ca](http://www.mentalhealthcommission.ca)
2. Update, “Tracking the Perfect Legal Storm” forthcoming at [www.mentalhealthcommission.ca](http://www.mentalhealthcommission.ca)



# What is a psychologically safe workplace?

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A psychologically safe workplace is:

- One that allows no significant injury to employee mental health in negligent, reckless or intentional ways.
- One in which every reasonable effort is made to protect the mental health of employees [due diligence]



## Psychological Safety is.....

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- a *prerequisite* for health
- a new *floor standard* for conduct at work



# Psychological Safety in Legal Practice

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The psychologically safe workplace idea, *in law*, is wrapped around the concept of “**mental injury**”



# Mental Injury and Mental illness

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Mental *injury* is **not** necessarily  
the same as mental *illness*



## Mental Injury

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- **Mental Injury** is reasonably foreseeable **harm** to the mental health of another employee resulting from negligent, reckless or intentional conduct that **significantly** affects his or her ability to function at work and at home
- **Harm** is typically debilitating depression, anxiety, or burnout [**The Toxic Trinity**]
- Mental Injury is **not** trivial harm, such as can be rectified by a kind word or coffee with a friend



## What makes a Typical Case?

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The typical Case involves:

- A good person in a bad situation
- Reasonably foreseeable harm
- Work contribution weighed against domestic contribution





# Workplace Psychological Status

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## Ipsos Reid Survey: Key Findings (Mar/Apr 2009)

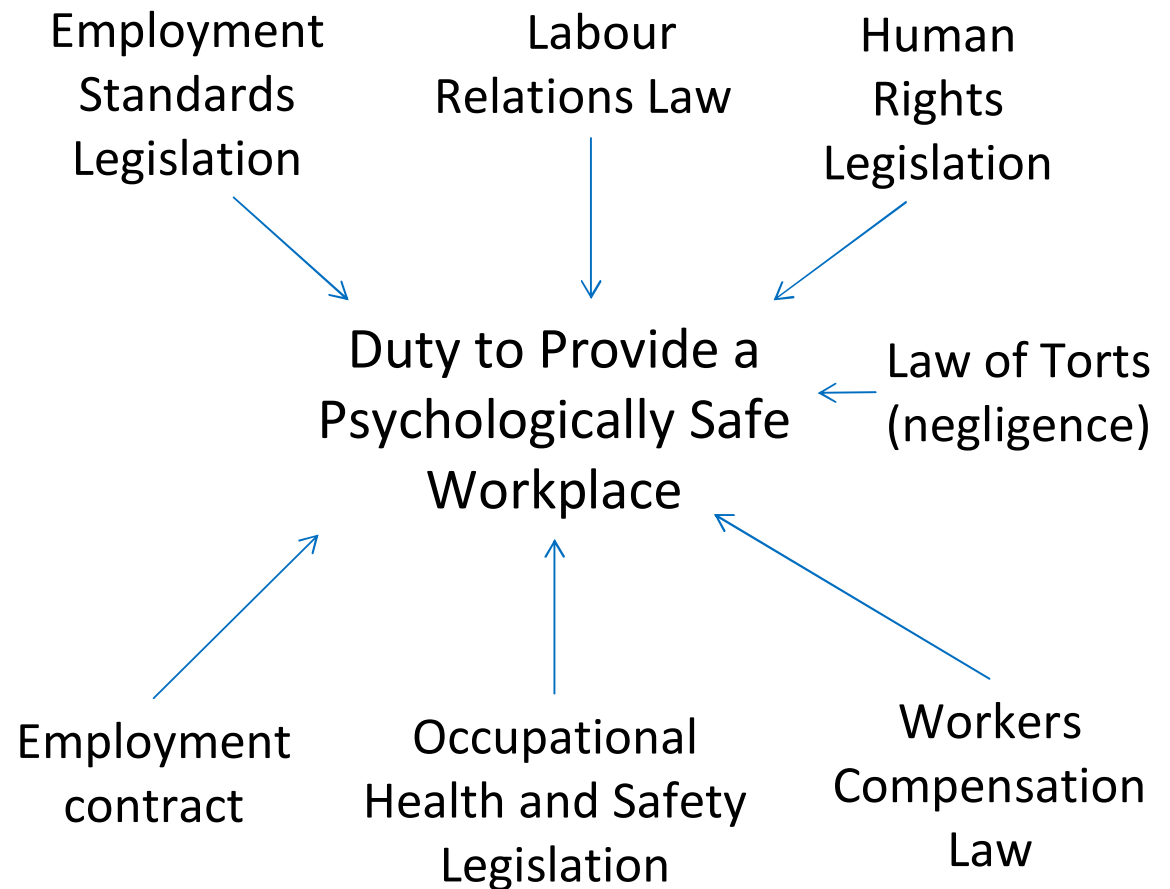
Using the PSR-12, an instrument developed for GM@W:

- 1/5 of respondents reported that their workplace is NOT psychologically safe & healthy.



# 7 Influences on the Duty to Provide a Psychologically Safe Workplace

**“Toward the Perfect Legal Storm”**





# Remedies

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## Remedies include:

- Financial awards
- Systemic, remedial orders

## Remedies are:

- Varied across the country
- Based on tort, contract, collective agreements, statutes
- Headed for the **Perfect Legal Storm**



## Heading for the Perfect Legal Storm

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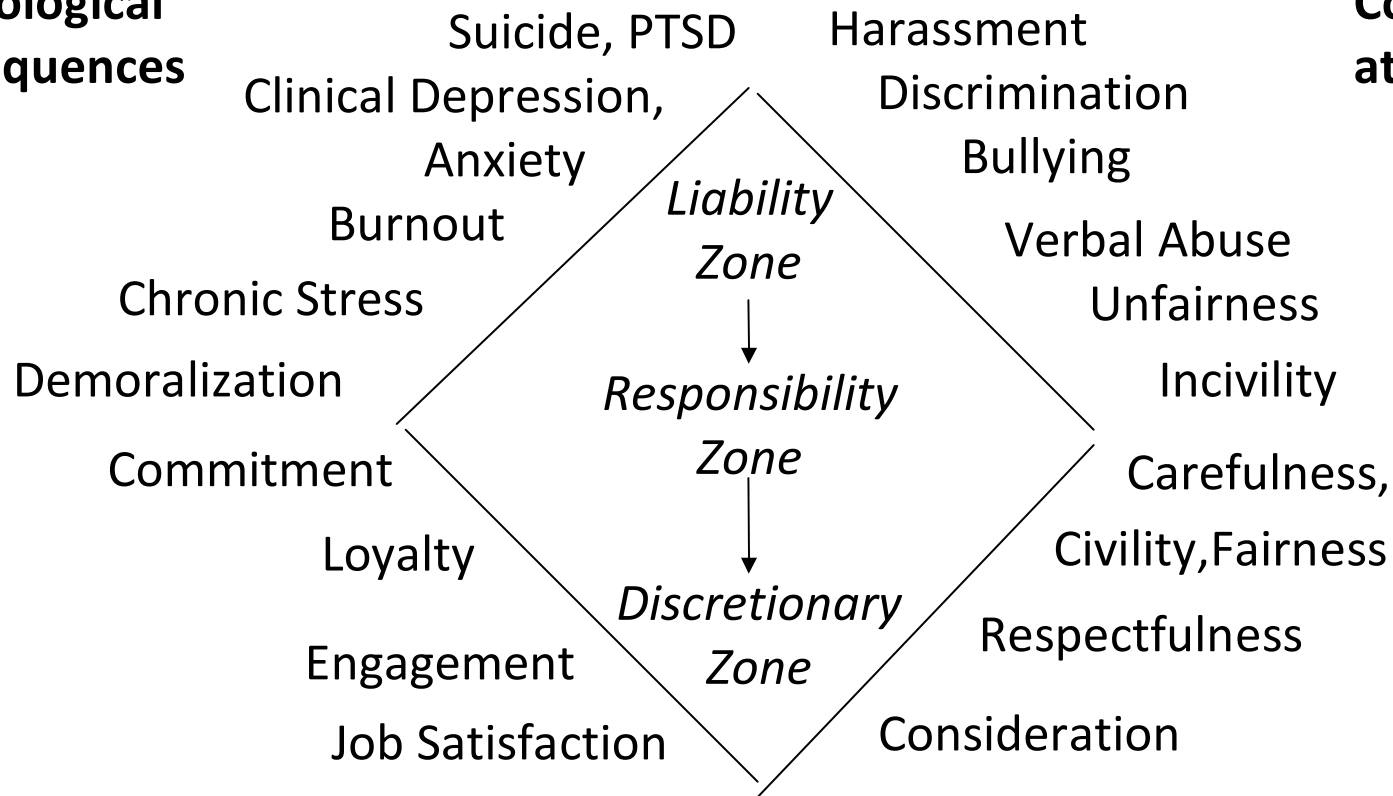
- Why we can't avoid it:
  - Co-evolution of legal definition of employment contract
  - Doctrines of psychological safety and mental injury
- No roll back
- 150 years in the making



# Legal Views of the Psychologically Safe Workplace: 2001-2010

**Psychological  
Consequences**

**Conduct  
at Work**

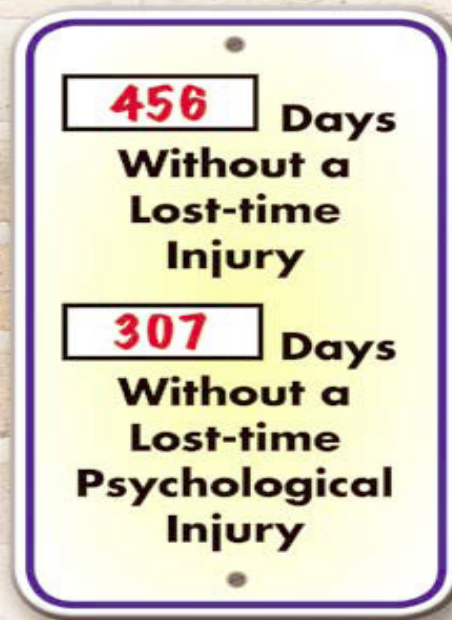


***“lowering the bar on liability”  
creating an atmosphere of uncertainty and unpredictability***



# Road to Zero Mental Injuries at Work

“Everybody goes home safe”



*Image: courtesy of Benefits and Pensions Monitor 2009*



## Basic Implications

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**Psychological Safety at Work is both:**

***a corporate governance issue***

**and**

***a national policy issue***

**It calls for responses at both levels,  
which are connected.....**



# Corporate Policy Response

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- Declare
- Assess
- Address
- Account

**Guarding Minds at Work [[www.guardingmindsatwork.ca](http://www.guardingmindsatwork.ca)]  
provides employers with helpful guidance on this topic**





# National Policy Response #1

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- Declare the protection of mental health at work a *population health* issue
- Preventable mental injury as *social exhaust*
- Net transfer of preventable mental injury = \$8.25 Billion [median estimate]



## National Policy Response #2

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Support corporate “Assess and Address” policies through CSA-type **national standards**

for:

- Measurement
- Management

and provision of:

- Training, education
- Advice, consultation