

## News

# Worker comp cases fail to pass the stress test

MICHAEL BENEDICT

When is workplace stress so severe that one is entitled to workers' compensation? Two recent New Brunswick Court of Appeal decisions illustrate the challenges in dealing with such potentially costly claims.

Suggesting that the decisions might not survive a *Charter* challenge, mental health workplace consultant and University of Toronto academic Martin Shain said they "illustrate the confusion across the country when it comes to dealing with gradual onset stress."

Last month, a three-judge New Brunswick high court panel unanimously rejected the workplace stress-related claims in both cases. Even accepting that the workers had suffered from psychological impairment, the court found that they did not satisfy the second judicial requirement to establish their claims in New Brunswick: Would a reasonable person react the same way to such work-related stressors?

Writing for the court, Justice Joseph Robertson said: "...A comparison has to be made with the average worker in the same and/or similar occupation. In turn, this leads one to ask the ultimate question: whether the workplace stressors were unusual and excessive compared to those experienced by an average worker in the same or similar occupation."

In one of the cases, *Canada (Attorney General) v. Robichaud* [2013] N.B.J. No. 8, a manager at a mental health facility learned of an anonymous letter

written by other employees complaining about her role in a poisoned work environment. The claimant, subsequently diagnosed by a psychologist as suffering from acute stress disorder, refused to return to work until her employer formally investigated the allegation. The employer declined and instead suggested a staff meeting on "informal conflict management" that the claimant refused to attend.

In the other case, *Canada (Attorney General) v. Anderson* [2013] N.B.J. No. 3, a correctional officer at a maximum-security prison was accused falsely of smuggling drugs into the institution. The officer learned of the allegation only after the accuser was dismissed. Two psychologists and a psychiatrist agreed these incidents produced psychological stress in the officer while a third psychologist found the stressors "could not be considered traumatic or the result of cumulative stress."

In both cases, the appeals court found the stress was not "unusual and excessive" for their jobs. In so doing, the court upheld the original findings by the New Brunswick Workplace Health, Safety and Compensation Commission that had been overturned by the commission's independent appeals tribunal.

New Brunswick, like five other provinces, including Ontario, has legislation limiting or prohibiting gradual onset stress claims. But the courts in those provinces, according to Shain, are finding ways of recognizing some of those claims. Ironically,



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Martin Shain  
University of Toronto

the New Brunswick Court of Appeal established its two-prong test as a way of granting some claims that otherwise might have been prohibited.

"On the one hand, they have opened the door to treating onset stress as real," Shain says, "but on the other they have set the bar too high."

Shain adds that not only is the standard unreasonable, it could be against the *Charter*. Indeed, the British Columbia Court of Appeal in *Plesner v. British Columbia Hydro and Power Authority* [2009] BCCA 188 struck down parts of that province's workers' compensation legislation that limited claims for mental stress only to situations of an "acute reaction related to a sudden and unexpected traumatic workplace event." The B.C. court said such a restriction violates the *Charter's* equality provision that prohibits discrimination on the grounds of mental or physical disability.

As a result, British Columbia recently amended its legislation to allow for workers' compensation if a mental disorder is caused by "a cumulative series of significant work-related stressors."

These diametrically opposed responses illustrate the patchwork Canadian approach to an emerging issue. Charles LeBlond, who argued unsuccessfully that the New Brunswick high court should not interfere with the appeal tribunal's ruling, acknowledges "it's entirely possible we would have had a different result in another province." He adds that meeting New Brunswick's second

"unusual and excessive" standard will be "very difficult" for anyone to meet.

The federal government, as the employer in both New Brunswick cases, launched the successful appeals. Said a Department of Justice spokesperson: "Both employers and workers in the federal public sector will benefit from a clearer understanding of the test to be met to qualify for benefits for stress-related injuries."

LeBlond adds: "The federal government was very concerned about the financial ramifications. They were worried it would open the floodgates."

Such a concern seems well founded. Several cost-conscious American states and Australia have restricted gradual onset stress claims, while British Columbia estimates that the change in its legislation will potentially cost \$20 million annually in new claims alone.

Shain agrees: "It really is a floodgate issue with serious economic impacts." He suggests that new voluntary workplace standards calling for a "psychologically healthy and safe workplace" offer employers a more economical solution to such issues.

Shain helped develop these guidelines, released jointly last month by the CSA Group, the Mental Health Commission of Canada and the Bureau de normalization du Québec.

In any event, it appears that the Supreme Court of Canada will not have an opportunity soon to weigh in on the issue. None of the losing parties in the New Brunswick decisions says they will appeal.

## How small firms look big by making most of resources

High-tech innovations level the playing field



Luigi Benetton  
Hi-Tech

Innovative small law firms are using widely available technologies to compete with bigger firms. Robert Half Legal noted this trend among the key findings in its recent white paper, "Future Law Office: Technology's Transformation of the Legal Field."

In some cases, small outfits use technology common to firms of

any size. In others, they use insights garnered from other industries. In all cases, they're building big-firm auras using small-firm resources.

Eliminate paper

Mark Hayes, managing director of Heydary Hayes PC, produces professional-looking soft copies of documents using widely available tools for both writing and setup. "When I first started out, I had a dictation program so I didn't need to dictate to a secretary," Hayes recalls. "I dictated direct to my computer and edited everything on-screen."

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From a marketing perspective, the mobile app is the digital fridge magnet of the 2010s.

Garry Wise  
Wise Law Office

Dominic Jaar, national leader in information management and e-discovery with KPMG, honed his technical knowledge during three years as principal of a consultancy (since bought by KPMG). Jaar says Adobe Acrobat Pro is "one of the few tools I can't live without" since it lets users do things like annotate text, sign and encrypt documents and create digital binders.

Real estate lawyer David Feld of Feld Kalia, annotates on-screen when he reviews documents with clients. Documents then "get sent to the builder after we discuss them, to make requests for changes — all done paperlessly."

Feld believes the process helps

him build rapport with clients. "It lets the client get more involved with the file, to connect with it, and to know that we're connected with it too."

Feld has a blanket policy to "scan, PDF and file all incoming correspondence" to help keep his office paperless. "Clients get answers fast because staff can find information fast," he adds.

Faxes never clutter Feld's office, because they arrive and leave via an online fax service.

Cloud systems

Cloud-based services make sophisticated tools accessible to

Protection, Page 10

## News

### Protection: Security an issue with cloud computing

Continued from page 9

lawyers on tight budgets.

They offer other advantages too. People are “no longer tied to a physical server in their offices,” says Dave Iverson, a senior manager, specialist advisory services for Grant Thornton, “so they don’t have to maintain an IT service.” Iverson adds that online services keep software patched and current, and upgrades are usually included in monthly fees.

“Lawyers should be aware of their ethical responsibilities when selecting a technology that will handle confidential client data,” adds Jack Newton, founder and CEO of cloud-based practice management system Clio. “Cloud computing has been approved by a growing list of regulatory bodies, with a general consensus that lawyers must take ‘reasonable care’ to ensure the safety and confidentiality of client data stored in the cloud.”

Hayes recognizes both sides of the argument. “It’ll only take one data breach by a cloud provider popular with lawyers before

people realize the issue. But security is a concern when you have your own servers too. Thousands of hackers try to get into our server every month.”

Because all systems suffer multiple intrusion attempts, Hayes advises that “you need to make sure you’re not the easiest target out there.”

Adding components to cloud systems is getting easier thanks to collaboration between cloud service providers. For example, online legal assistance service My Legal Briefcase integrates with Newton’s Clio to help Clio users with small-claims litigation.

#### Virtual offices

“The use of ‘virtual lawyers’ gives us greater capacity to expand and bring more lawyers into our group, which traditional offices simply cannot do given cost constraints,” says Omar Ha-Redeye, principal at Fleet Street Law. “The two main budget line items for any law firm are rent and salaries and we’re attacking both of those

costs head on.”

Ha-Redeye says the firm currently uses PC Law Practice Suite, which he considers a great resource for small firms because it includes practice management tips for some of the main practice areas.” But he does offer one caveat about the software: “One of its major shortcomings is that it is not cloud-based, and this is becoming increasingly important as we operate out of multiple offices.”

#### Invoicing

Firms generally use computer systems for time capture and billing. Certain systems perform ancillary tasks like sending follow-up emails for unpaid invoices.

Monica Goyal, sole practitioner and founder of My Legal Briefcase, uses the Canadian service FreshBooks. “It helps keep track of who has done what on what files,” she says, “and it automatically generates invoices with everybody’s times. People can pay you online. There’s a polish to it.”

#### Outsource when necessary

Technology can’t scratch every itch. For instance, solos who do a lot of litigation can find it challenging to produce all required documentation. Hayes advises finding “a reliable copy shop that can turn out documents, bind them and make them look professional. Depending on your practice, you may not need these services very often.”

#### Collaborate with colleagues

To improve knowledge management and collaboration, Goyal brought Yammer, an enterprise social network service recently acquired by Microsoft and made part of its Office division, into My Legal Briefcase. She created different groups within Yammer corresponding to groups in the company, but says it’s “also completely open and transparent to everybody.”

#### Digital fridge magnets

Feld’s website features a Resi-

dential Closing Cost Calculator, which quickly tells clients the cost of using his firm’s services. Feld presumes that clients want a clear idea of how much they need to pay. “Everything should be simple from the client’s perspective,” he says.

Law firms have been publishing their own mobile apps for several years, but Garry Wise, founder of Wise Law Office, isn’t impressed by what he’s seen so far. “The law firm app must go beyond being a vanity project or digital business card in order to have staying power,” he says. “An app has to allow users to do something that they want or need to do.”

Wise recently published the WiseLii app, which “permits optimized search and retrieval of all Canadian statutes, regulations and case law on the iPhone or iPad” using CanII, he says, adding:

“From a marketing perspective, the mobile app is the digital fridge magnet of the 2010s.”

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