

34TH ANNUAL ISCEBS
Employee Benefits

Symposium

Workplace Mental Health Laws: What You Need to Know

Patrick Baillie, LL.B., Ph.D.

Psychologist and Lawyer

Alberta Health Services

Calgary, Alberta

The opinions expressed in this presentation are those of the speaker.
The International Society and International Foundation disclaim responsibility
for views expressed and statements made by the program speakers.



International Society
of Certified Employee Benefit Specialists

PARTNERS IN EDUCATIONAL EXCELLENCE

International Foundation
OF EMPLOYEE BENEFIT PLANS 

There Are Reasons Why This Matters

- Each year, one in five Canadians will experience a mental health problem.
- The economic burden of mental illness amounts to \$51 billion per year.
- Of that, \$20 billion relates to workplace losses.

There Are Reasons Why This Matters

- Mental disorders account for up to 1/4 of all disability-adjusted life-years (DALY) and up to 1/3 of all non-communicable-disease DALY.
- Of the five major mental health contributors to DALY, depression accounts for more loss than the other four contributors (alcohol abuse; bipolar disorder; schizophrenia; dementia) combined.

There Are Reasons Why This Matters

- Further, having other forms of disability predicts the onset of depression and depression predicts the onset of other forms of disability. Depression also predicts the exacerbation of problems related to those other forms of disability. In short, if you're not paying attention to depression, things will get worse.
- Depression alone may account for 20,000,000 lost work days each year in Canada.

The Other Costs

- In 2007/08, \$14.3 billion in public funds were spent in Canada on mental health services and supports (amounting to 7.2% of government expenditures on health care), including \$2.8 billion for pharmaceuticals and \$2.7 billion for hospitalization.
- Private sector spending amounted to another \$1.5 billion to cover short-term and long-term disability payments.

The Real Reason This Matters

- Another reason that mental health problems and illnesses should matter in the workplace is because of what courts and legislatures have said about mental health and the law.
- Ultimately, the real reason that mental health problems and illnesses should matter in the workplace is because we are talking about real people with real problems who need real assistance.

Two Kinds Of Discrimination

- Historically, the law looked at workplace policies that can result in two, distinct kinds of discrimination:
- Direct discrimination, where the policy *intends* to make a distinction, with discrimination being evident in the policy (*Etobicoke*, 1982); or,
- Adverse effects, where the policy has the *effect* of causing discrimination (*O'Malley*, 1985).

And, Historically, in the Courts. . .

- Employer could argue bona fide occupational requirement [BFOR] (with a subjective/objective test) for direct discrimination or could argue reasonable accommodation/undue hardship for adverse effects.

But, the Supreme Court Says That's Just Semantics (*PSERC V. BCGSEU [Meiorin], 1999*)

- i. Was the standard adopted for a purpose rationally connected to the performance of the job?
- ii. Was the standard adopted with the employer's good-faith belief that it was necessary for the fulfillment of a work-related purpose? And,
- iii. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose (i.e., impossible to accommodate without undue hardship)?

Ontario Human Rights Code

According to the Code:

The right to “equal treatment with respect to employment” covers applying for a job, being recruited, training, transfers, promotions, terms of apprenticeship, dismissal and layoffs. It also covers rate of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.

People with disabilities have the right to be provided with equipment, services or devices that will allow them to do their job.

When an Accommodation Is Needed, the Employee. . .

. . .is responsible for making his or her needs known, giving information about restrictions or limitations, participating in discussions with the employer about possible accommodations, and working with the employer on an ongoing basis.

When an Accommodation Is Needed, the Employer. . .

. . .is responsible for accepting the request in good faith, obtaining (and paying for) additional information to facilitate accommodation, taking an active role in arranging accommodation, and keeping personal information confidential.

Another Example of “Don’t Ask; Don’t Tell”?

A debate seems to be developing over how much—if any—information about their health status an employee should provide to an employer and how much an employer should ask for.

Ellen Morgan, in *The Guardian*, says tell all.

Ruby Wax, in *The Times of London*, says don’t tell.

* *Obstetrics and Gynecology* says doctors should be very careful with workplace (pregnancy) restrictions and should also discuss what the employee *can do*.

Reasonable Accommodations

Examples of reasonable accommodation for mental health concerns:

- Modified work schedule (to address medication effects, endurance);
- Adaptations in supervision (to address frequency or manner of feedback);
- Modified job duties, possibly shared with other employees;
- Modified training (to allow skills to be more fully acquired); and,
- Modified tools or workspace (to address noise, light, other impingements).

The Employer Has the Burden of Proving “Undue Hardship”

Under the Ontario Human Rights Code, three factors are considered in evaluating if “undue hardship” exists, namely:

- Cost (so high as to threaten the viability of the business or to change nature of the business?);
- Availability of other sources of funding; and,
- Health and safety requirements generally.

National Standard of Canada for Psychological Health and Safety in the Workplace

- Released in January 2013, the National Standard is a joint project of the Mental Health Commission of Canada, the CSA, and the BNQ.
- Not intended to become legislation, the Standard provides guidelines for the establishment and maintenance of psychologically healthy and safe workplaces, for addressing psychological hazards, for assessing workplace risks, for the promotion of psychological health and safety, for the growth of a culture of support, and for measurement to ensure sustainability.

National Standard

- “A psychologically safe workplace is no longer a nice thing to do, but is now a must do.”—Dr. Martin Shain
- Previously, only egregious employer actions warranted findings of liability. Now, courts and tribunals have become less tolerant of workplace factors that endanger psychological safety, have ordered management to change practices that threaten employees, and have imposed larger financial penalties for violations.

National Standard

Subtle factors that may lead to a psychologically unsafe workplace include:

- Excessive job demands and requirements of effort;
- Limited job control or influence;
- Lack of reward (e.g., praise, recognition, credit);
- Lack of fairness; and,
- Lack of support.

Obvious factors include bullying, harassment, and criminal misconduct.

What Is a Psychologically Safe Workplace?

- A workplace that does not allow any (significant) harm or injury to employee mental health in negligent, reckless or intentional ways; and,
- A workplace in which every reasonable effort is made to protect the mental health of employees.

National Standard 4.3.4.2

Factors to assess include, but are not limited to, the following:

Psychological support;

Organizational culture;

Clear leadership and expectations;

Civility and respect;

Psychological job demands;

Growth and development;

Recognition and reward;

National Standard 4.3.4.2

(Continued):

Involvement and influence;

Workload management;

Engagement;

Work/life balance;

Psychological protection from violence, bullying, and harassment;

Protection of physical safety; and,

Other chronic stressors as identified by workers.

Options for Workplace Programs

Road to Mental Readiness (R2MR) has been adapted from DND resources to provide a simple language (and interventions) for addressing workplace mental health.



Options for Workplace Programs

- Mental Health First Aid (MHFA), similar to other “first aid” programs, provides people with skills to identify mental health problems and offer early intervention.
- MHFA is given until appropriate treatment is found or the crisis is resolved.
- MHFA does not teach people how to be therapists, but does reduce stigma and promote intervention.

2012 APEX Work and Health Study

- Association of Professional Executives of PSC is pushing the federal government to adopt the National Standard.
- 2012 APEX Study found 20% of federal executives were taking medication for treatment of insomnia, depression, or anxiety. Rate of physician-diagnosed MH conditions rose from 6% (2007) to 11%, with 21% of execs having accessed professional counselling.
- Negative mental health factors included little control over workflow, little help, and little recognition.

Lloyd v. Imperial Parking (1996)

“A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment. This appears to be part of the trend to establish a duty upon an employer to treat employees ‘reasonably’ in all aspects of the labour process.”

— Justice S.M. Sanderman, Alberta Court of Queen’s Bench

Case Examples

Morgan (2000)—exposure to rude, hostile, obscene, and belittling conduct;

Saunders (2002)—exposure to ongoing anger and to intimidating conduct;

Shah (2000)—exposure to unsubstantiated allegations and warnings about poor job performance; and,

Sulz (2006)—exposure to harassment causing depression (\$950,000).

Note: In each case, the employer was found liable for the actions of the plaintiff's supervisor, not for actions of the employer itself.

Boucher v. Wal-Mart (Canada) (2014)

- Stress from supervisor harassment and abuse causes 10-year employee physical illness. Wal-Mart denies abuse. Employee sues for constructive dismissal.
- Ontario Court of Appeal awards \$200,000 Wallace damages; \$100,000 tort damages (intentional infliction of mental suffering); \$100,000 punitive damages against Wal-Mart; and, \$10,000 punitive damages against supervisor.

Flinn v. Halifax Regional School Board (2014)

- “Hard-working, talented and excellent” teacher sends emails to student criticizing her parents and making gruesome recommendation to kill them (i.e, chain saw). Teacher subsequently diagnosed with Bipolar Disorder. Terminated after 15 years of employment with Board.
- Nova Scotia Court of Appeal concludes monitoring is impractical and accommodation would create undue hardship. Low risk of harm is still too high. Appeal dismissed.

Wright v. College and Association of Registered Nurses of Alberta (2012)

- Nurses appeal findings of unprofessional conduct, stemming from thefts, false records, forged signatures, and other actions related to their access to narcotics. Nurses argue addictions are mental health conditions and disabilities, precluding discipline.
- Alberta Court of Appeal says College's actions are not discriminatory as criminal conduct was distinct from the nurses' personal characteristics; there was no link between thefts and addictions; and, College did not lay charge because of addictions.

Looking Ahead to Service Delivery

A snapshot of issues in service delivery:

- Culturally sensitive treatment;
- Brain imaging;
- New methods of service delivery.

Is Psychological Treatment Culturally Sensitive?

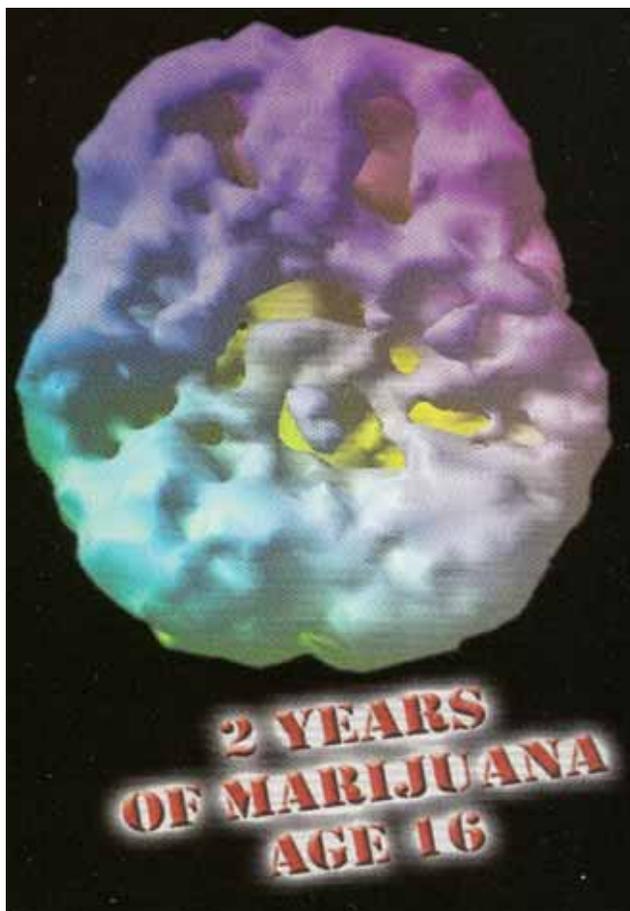
First Nations, Inuit and Metis—along with many immigrants and refugees—may have views on treatment (e.g., willingness to confide in professionals, willingness to use medications, responsiveness to individual treatment (in contrast to community-based interventions), stigma) that differ from Euro-Western views and that may impact on the effectiveness of mental health services.

Brain Imaging

- Is SPECT scanning the answer?
- Can fMRI tell us the likelihood that a first psychotic episode will respond to treatment?
- Can PET scans tell us what depression treatment is best for an individual patient?

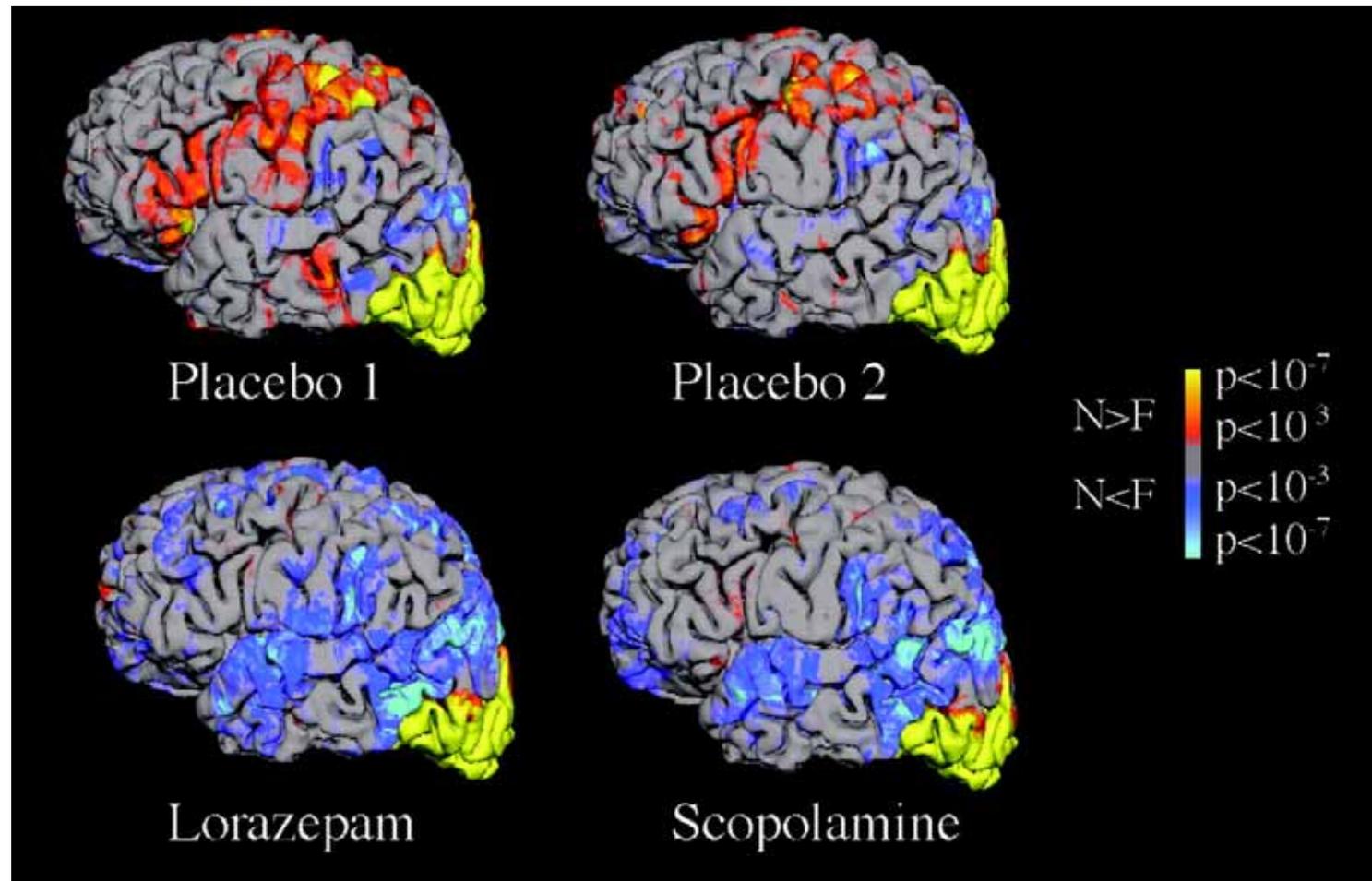
So far, brain imaging research has been very useful in identifying population-based features, but is still struggling to depict mental illness in an individual.

Single Photon Emission Computed Tomography (SPECT)

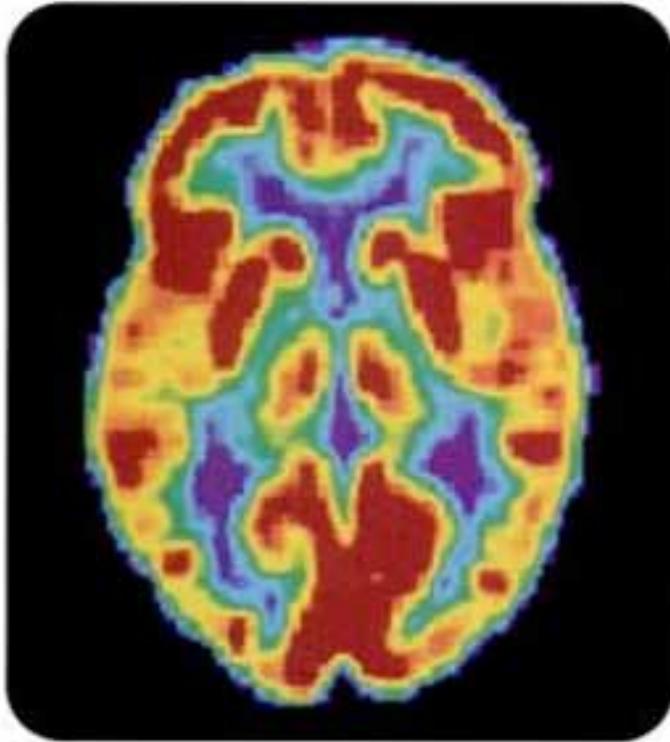


As of 2009, \$170,000,000 spent on SPECT scans at Amen clinics.

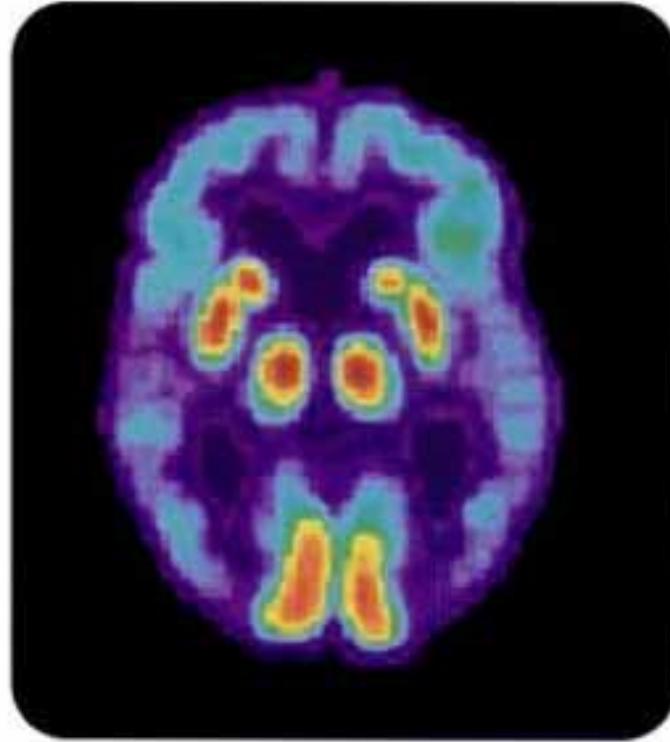
fMRI



PET Scans



PET Scan of Normal Brain



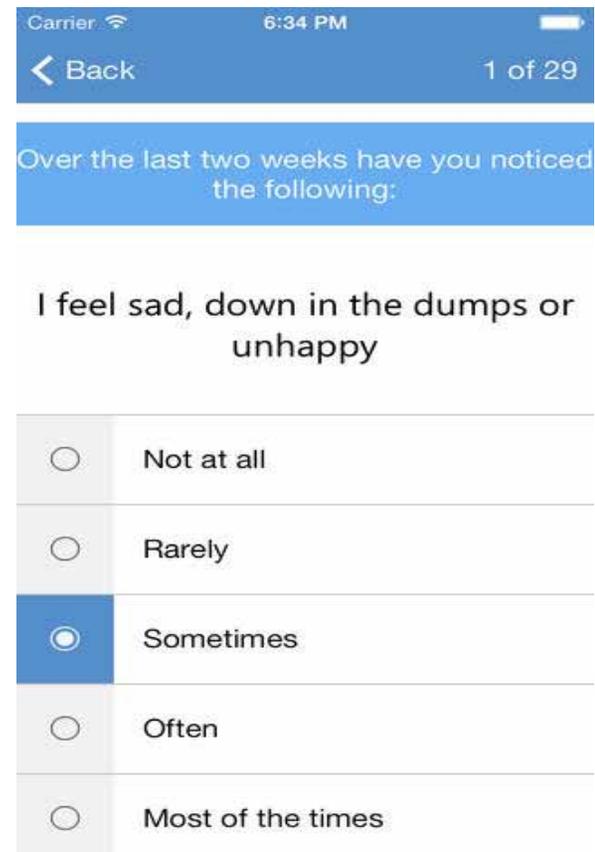
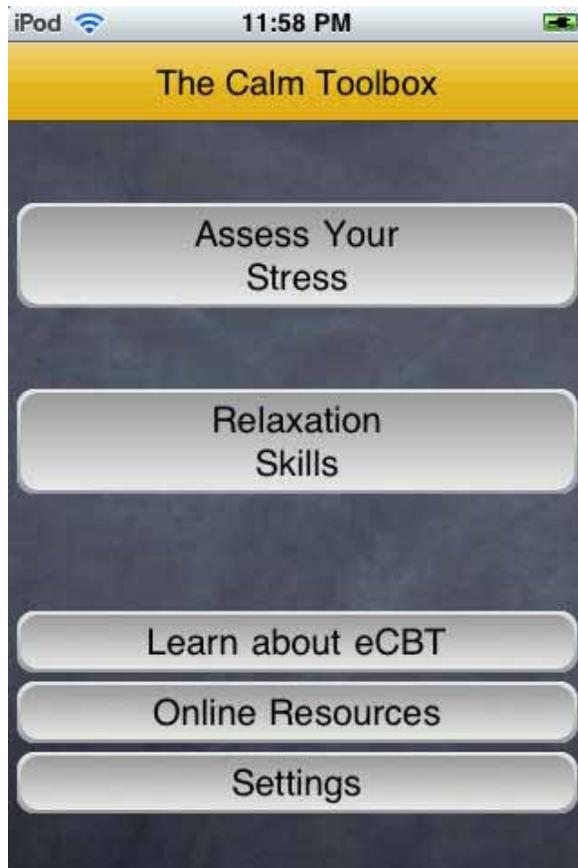
PET Scan of Alzheimer's Disease Brain

Using Technology to Deliver Services

- Is there an app for that? Quite possibly, including those that offer geo-tracking interventions.
- Telemedicine, Skype, FaceTime, and other forms of videoconferencing allow for therapy to happen in remote locations and with patients away from home.
- Computer algorithms may use techniques from Cognitive Behaviour Therapy to deliver automated interventions.

eCBT Calm

WhatsMyM3



The Bottom Line

- Where harm to an employee's mental health is something that the employer could reasonably foresee, in a context where the employer has a duty of care to provide a safe work environment, the employer may be found liable for the harm.
- When job demands or the work environment pose a threat to an employee's mental health, and that threat is reasonably foreseeable by the employer, then the employee may be entitled to compensation.

So . . .

- Paying attention to the mental health of employees is an increasingly important responsibility of employers.
- Many workers are affected by mental health problems—some of which result from the workplace itself. Workplace modifications or other reasonable accommodations may allow workers to increase productivity, to access appropriate supports, and to save on disability costs. Ultimately, employers have a legal responsibility to ensure the well being of their employees.