

COMMENT

The Aftermath of United Grain Growers – Time to Revive the Employer’s Contractual Duty to Provide a Safe Workplace?

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I. INTRODUCTION

IN *WALLACE v. UNITED GRAIN GROWERS LTD.*¹, the Supreme Court of Canada recognised that, in appropriate circumstances, a wrongfully dismissed employee could be awarded compensation for mental distress caused by the manner of dismissal. The majority of the Court ruled that mental distress, caused by the employer’s bad faith or unfair dealings in the manner of an employee’s dismissal, could be compensated by an extension of the contract termination notice period, or pay *in lieu* of notice.²

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¹ [1997] 3 S.C.R. 701, [1997] 9 W.W.R. 153, 152 D.L.R. (4th) 1 [hereinafter *United Grain Growers*]. Subsequent references are to paragraphs. For the majority, Iacobucci J. indicates that injuries to an employee — if caused by an employer’s bad faith or unfair dealing in the course of dismissal, such as humiliation, embarrassment, and damage to one’s sense of self-worth and self-esteem — might be worthy of compensation depending on the circumstances of the case (at para. 103). The majority did not seek to alter the law established in *Addis v. Gramophone Co.*, [1909] A.C. 488, that injured feelings and emotional loss flowing from the fact of a wrongful dismissal, itself, are not compensable. The majority also declined to recognize a new tort of “bad faith discharge.” *supra* at paras. 77–78).

² It is important to note that the majority judgment in *United Grain Growers* is not only about the compensation of psychological harm flowing from the manner of a wrongful dismissal. In his update, (G. England, I. Christie & M. Christie, *Employment Law in Canada*, 3^d ed. (Markham: Butterworths, 1998), England *et al.* (at para. 14.159.1) [hereinafter *England*]) suggests there are two policies embodied in the *United Grain Growers* doctrine, over and above the “making whole” of the employee’s psychological and other losses caused by a bad faith dismissal. Those are: (1) treating the right to be terminated in a good faith and

This paper deals with three related matters. First, *United Grain Growers* raises a question of the relationship between the common law and provincial and territorial workers' compensation legislation in Canada. Either by statute or by administrative policy, workers compensation schemes across Canada have elected to exclude, as a compensable injury, mental stress caused by the dismissal or discipline of an employee by an employer. I suggest that, while workers' compensation legislators and administrators have shown little inclination to embrace this sort of workplace injury or disease, there are potential advantages for their inclusion in statutory schemes. However, having excluded this form of mental stress from statutory compensation, the respective legislatures and policy makers open the door for the courts to remedy mental stress in such situations as *United Grain Growers*. The first section of this paper concludes with the observation, to be pursued in the final section, that workers' compensation policy with respect to mental stress caused by dismissal also opens the door for common law action for chronic mental stress, that, although not excluded by workers' compensation legislation, appears to be compensated considerably more rarely than one would anticipate given the evidence of high levels of stress and burnout in Canadian and other North American workplaces.

The second section considers the respective merits of the majority and the minority opinions in *United Grain Growers*. While the majority's approach has some merit, the minority opinion, voiced by McLachlin J. (as she then was), is to be preferred as it reflects a more accurate, realistic paradigm of the contemporary employment relationship. However, for all its superiority in principle, the minority approach in *United Grain Growers* is not the law in Canada. The majority of the Court was unwilling to go as far as the creation of an implied contractual duty of good faith for employers toward employees.

The final section develops the argument that an implied duty of good faith for employers can be applied by the courts to circumstances such as those that arose in *United Grain Growers*, without the need to create a new cause of action. While the common law duty of employers to provide a reasonably safe and healthy workplace has been largely supplanted in practice by both workers' compensation and occupational health and safety legislation, it has not been extinguished even though it does remain largely, but not entirely, dormant. It is observed that, while the issue in *United Grain Growers* was bad faith in the manner of dismissal, the standard of employer conduct required by the common law duty to provide a safe and healthy workplace remains one of reasonableness.

professional manner as worthy of protection as a fundamental human right on account of its intrinsic moral value (see *Noseworthy v. Riverside Pontiac-Buick Ltd.* (1999), 168 D.L.R. (4th) 629 at 637 (Ont. CA), Goudie J.A.); and (2) deterring employers from violating that right (England cites *Cassady v. Wyatt-Ayerst Canada Inc.* (1998), 163 D.L.R. (4th) 1 (B.C.C.A.) at 16 per Esson J.A.). England acknowledges, too, the "make whole" remedial component of the *United Grain Growers* judgment, itself explicitly identified by Iacobucci J. in *United Grain Growers*, *supra* note 1 at para. 101.

It is true that the benefits available under workers' compensation schemes are provided *in lieu* of legal action an option barred by the respective statutes. However, such a bar was neither raised nor enforced in *United Grain Growers*, presumably because the Manitoba workers' compensation scheme explicitly excludes the compensation of such injuries. Accordingly, there appears to be no bar to a judicial remedy in cases like *United Grain Growers* based on a breach of the long-established common law duty of an employer to provide a reasonably safe and healthy work environment.

The final section concludes with a discussion of the role that a revived common law duty to provide a safe and healthy workplace might play in the judicial compensation of workplace victims of chronic mental stress, which has been effectively excluded from the domain of workers' compensation programs in Canada.

II. WORKERS COMPENSATION AND MENTAL STRESS

OCCUPATIONAL STRESS IS UNDERSTOOD by workers' compensation boards across Canada in terms of both the stimuli that contribute to an individual's reactions — job pressure or loss of a close relative — and the reaction of the individual — a nervous breakdown or clinical depression — to those stimuli.³ The literature in the area has generally classified stress-related disabilities into three categories based on the stimulus and response involved. These are:

- (i) *physical-mental* injuries whereby the nature or treatment of a compensable physical injury, such as an amputated limb, has led to a psychological injury, such as severe depression;

³ See *Occupational Disease and Occupational Stress: Legislation and Policies 1998* (Mississauga: Association of Workers' Compensation Boards of Canada, 1998) at 59 [hereinafter *A.W.C.B.C. survey*]. The relevant workers' compensation statutes are as follows: *Workers' Compensation Act*, S.A. 1981, c. W-16 [hereinafter *The Alberta Act*]; *Workers' Compensation Act*, R.S.B.C. 1996, c. 492 [hereinafter *The B.C. Act*]; *Workers' Compensation Act*, S.M. 1991-92, c. 36 [hereinafter *The Manitoba Act*]; *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13 [hereinafter *The New Brunswick Act*]; *Workers' Compensation Act*, S.N. 1990, c. W-11; *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6; *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 [hereinafter *The Nova Scotia Act*]; *Workplace Safety and Insurance Act*, S.O. 1997, c.16 [hereinafter *The Ontario Act*]; *Workers' Compensation Act*, S.P.E.I. 1994, c. 67 [hereinafter *The P.E.I. Act*]; *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q. 1977, c. A-3.001 [hereinafter *The Quebec Act*]; *Workers' Compensation Act*, S.S. 1979, c. W-17.1 [hereinafter *The Saskatchewan Act*]; *Workers' Compensation Act*, S.Y. 1992, c. 16 [hereinafter *The Yukon Act*].

- (ii) *mental-physical* injuries, where the stimulus is mental, for example workplace stress due to overwork, and the resulting injury is physical, for example a heart attack or an ulcer;
- (iii) *mental-mental* injuries, where both the stimulus and the resulting injury are mental rather than physical; for example, an employee may see a fellow worker killed in the workplace and suffer subsequent psychological trauma as a result of witnessing the event.⁴

Categories (ii) and (iii) are typically subdivided by Canadian workers' compensation boards according to whether the mental stimulus is "chronic" or "traumatic." The latter are injuries where the stimuli operate in a dramatic or sudden fashion and cause or contribute to a physical or psychological injury. For example, a worker witnesses a fatal industrial accident and, in consequence, suffers a heart attack (physical) or severe depression (psychological).

Chronic "mental-physical" injuries are those where the stimulus, though mental, takes effect gradually over a period of time. For example, a worker who is constantly under pressure from a foreman to meet high production quotas, and is berated publicly for failing to do so, develops an ulcer related to the pressure of work over several months. An example of a chronic "mental-mental" injury is when the worker develops a condition of emotional exhaustion (burn-out) as a result of exposure to a highly stressful job environment over a period of years.⁵

The A.W.C.B.C. survey indicates⁶ that all workers' compensation boards compensate "physical-mental" claims, provided the requisite legislative and policy conditions are met. In principle, "mental-physical" injuries are also compensable in most Canadian jurisdictions,⁷ but due to the difficulty in demonstrating work-relatedness, successful claims of this nature appear to be rare. Indeed, most of the W.C.B.s' responses to the A.W.C.B.C. survey expressed doubt that such claims would be readily compensable due to the inherent difficulty for a claimant to show that the cause of the physical problems was workplace stress. Nevertheless, if a physical injury, such as a heart attack, were

⁴ *Ibid.* This classification system was adopted by Arthur Larson, *Workers' Compensation Law* (New York: Matthew Bender, 1987) [hereinafter *Larson*].

⁵ These examples are given in the A.W.C.B.C. survey, *supra* note 3 at 60.

⁶ *Ibid.* at 59.

⁷ In New Brunswick, the W.C.B. does not have jurisdiction to compensate for mental-physical injuries unless they are the result of a traumatic event. See W.C.B. of N.B. *Conditions of Entitlement*, Policy No. 276 at 3-4. See also the A.W.C.B.C. survey, *supra* note 3 at 59. One presumes that the W.C.B. is legally bound by its own policies.

caused by a traumatic incident, such as witnessing a fatal accident at work, most Canadian jurisdictions would provide compensation.⁸

With respect to "mental-mental" injuries, most Canadian jurisdictions will provide compensation if the injury is acute and can be linked to a traumatic workplace event. For example, a bank clerk who suffers nervous shock as a result of being present at an armed robbery will receive compensation if there is sufficient evidence of a causal link. It is more difficult for workers to receive compensation in cases of chronic "mental-mental" stress. While no Canadian workers' compensation statutes appear to exclude such compensation, administrative policies render compensation for chronic stress or burnout relatively unusual.⁹

It is evident that, in accordance with the model outlined above, mental stress caused by an employee's dismissal *could* be compensated under workers' compensation schemes as a form of "mental-mental" injury. However, the Manitoba and Ontario statutes explicitly exclude compensation for stress caused by, *inter alia*, the discipline or dismissal of an employee.¹⁰ In the remaining jurisdictions, the respective statutes do not exclude traumatic mental stress caused by an employee's dismissal, but workers' compensation board policies typically exclude compensation in such circumstances.¹¹

While workers' compensation legislation or policies across Canada exclude statutory compensation for mental stress caused by dismissal, it is not entirely clear whether such exclusion could also remove the matter from the jurisdiction of the courts. Provincial workers' compensation statutes across Canada bar legal action by a worker against his or her employer in respect of injuries or illness incurred in the course of employment. For example, Ontario's *Workplace Safety and Insurance Act* provides:

Entitlements to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the

⁸ For example, see Alberta (*Claims Department Policy Manual, Policy Statement ADJ-36*) and Newfoundland (*Client Services Policy Manual, Policy No. CM-06*), which allow cardiac claims where they are the result of workplace factors and there is no significant delay in the onset of the symptoms.

⁹ Policy #02/92 (as amended 04/96) [hereinafter Policy #02/92] established by the W.C.B. under *The Saskatchewan Act*, *supra* note 3, provides definitions and criteria to assist case workers in determining whether a claimant has mental stress or burnout caused by his or her employment. A crucial factor in the establishment of causation is that the claimant works in an occupation viewed by the W.C.B. as "stressful in spite of personality variation." A small number of chronic stress claims are successful per annum in Saskatchewan.

¹⁰ *The Manitoba Act*, *supra* note 3 at s.1 (1.1); and *The Ontario Act*, *supra* note 3 at s. 13(5).

¹¹ For example, see *supra* note 8.

employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.¹²

Accordingly, an Ontario employer defending a common law action for wrongful dismissal that includes a claim for damages for mental stress, might raise the defence that s. 26(2) of the Act bars such an action as compensation for injuries arising in the course of employment falls exclusively within the Act's jurisdiction.¹³

While the Ontario Act excludes a claim of mental stress caused by the manner of an employee's dismissal, it does compensate acute, traumatic mental stress in certain circumstances. Accordingly, it might be argued that the statutory exclusion of mental stress caused by dismissal is merely consistent with the "historic trade-off" that gave rise to, and helps to sustain, the no-fault workers' compensation system. While the trade-off confers significant benefits on employers and employees, it does have the effect of potentially reducing the compensation available to certain injured workers, such as those sustaining non-economic loss from accidents. Arguably, a dismissed employee suffering consequential mental stress could be viewed as one of the "losers" in this "historic tradeoff."

In the *Newfoundland Reference*,¹⁴ the Newfoundland Court of Appeal notes that management and labour representatives intervening in the case were in agreement that the concept of workers' compensation is a good thing, and endorsed the historic trade-off.¹⁵ The Court also acknowledged that, while the workers' compensation scheme confers substantial advantages on workers and employers, certain injured workers might recover more as a result of a court action than they would in a claim under the Act if such legal action were open to them. In particular, the Court noted: "the scope to claim in the field of non-economic loss is more restricted [under workers' compensation] than a claim at common law."¹⁶

In the above example, the Ontario employer might argue that legislative exclusion of compensation for traumatic mental distress caused by an em-

¹² *The Ontario Act*, *supra* note 3 at s. 26(2). *The Manitoba Act*, *supra* note 3 at s. 13(1) contains a comparable bar to legal action, as does the legislation of each jurisdiction in Canada.

¹³ See *Reference Re ss.32 & 34 Workers' Compensation Act (Newf.)* (1988), 67 Nfld. & P.E.I.R. 16, 44 D.L.R. 501 (Nfld. C.A.); *aff'd* (1989), [1989] 1 S.C.R. 922, 235 A.P.R. 181 [hereinafter *Newfoundland Reference*] subsequent references are to paragraphs (D.L.R.). In this case the Supreme Court upheld the statutory bar to common law action in respect of the worker's fatal injuries.

¹⁴ *Ibid.*

¹⁵ *Ibid.* at paras. 37, 38.

¹⁶ *Supra* note 13 at paras. 64-66.

ployee's dismissal is akin to the upper limit placed by the Act on the quantum of damages that may be awarded for non-economic loss in the event of an employee's permanent impairment from an injury.¹⁷ An injured worker might be awarded greater damages for non-economic loss in a law suit, if such a course were available, just as a dismissed worker might be awarded damages by a court for mental stress caused by the dismissal. Arguably, such disadvantages to particular workers or classes of worker can be viewed as a legitimate and inevitable ingredient of the historic trade-off that created and, arguably, helps to sustain the workers' compensation system.

The statutory exclusion of compensation or damages for mental stress caused by dismissal or discipline might be justified as reflecting the view that these are routine personnel and labour relations functions that fall within the normal risks of the workplace that an employee should be expected to bear.¹⁸ Arguably, in the spirit of the historic trade-off, the legislature intended that employers' premiums paid to the workers' compensation scheme should buy them both freedom from such claims under the Act.¹⁹

An alternative argument is that the statutory exclusion of compensation for mental stress caused by dismissal indicates a legislative intention to leave such matters within the jurisdiction of the courts. The statutory bar to law suits in s. 26(2) of *The Ontario Act* — and in comparable articles in other provincial workers' compensation legislation — states that *entitlement to benefits is in lieu of legal action*. Therefore, as s. 13(5) explicitly *disentitles* all workers from benefit for mental stress caused by dismissal, it is a reasonable assumption that the legislative intention of s. 26(2) is not to bar legal action for compensation in respect of such injuries.²⁰

¹⁷ *The Ontario Act*, *supra* note 3 at s. 46.

¹⁸ This is essentially the "assumption of risk" defence of pre-statutory common law, the surviving traces of which are noted by S. Ball, *Canadian Employment Law* (Aurora: Canada Law Book Inc., 1998) at para. 25.10.2, with respect to the limits of an employee's contemporary statutory (and presumably common law) right to refuse unsafe work [hereinafter *Ball*].

¹⁹ If successful, such claims place additional costs on employers, in the form of higher assessments.

²⁰ In Canadian jurisdictions, other than Manitoba and Ontario, the exclusion of traumatic stress caused by a worker's dismissal is a matter of policy of the respective W.C.B.s. Such policies, as opposed to statutory regulation, run the risk of being voided by judicial review. See, for example, *Dowling v. Prince Edward Island (WCB)* (1994), 124 Nfld. & P.E.I.R. 358 (P.E.I.S.C. (A.D.)); and *Poan v. Nova Scotia (WCB)* (1994), 113 D.L.R. (4th) 284 (N.S.S.C. (T.D.)). In these cases the P.E.I. and the Nova Scotia Supreme Courts, respectively, ruled *ultra vires* W.C.B. policies that narrowed the scope of compensable stress injury to less than that implied by the definition of "accident" or "injury" in the statute. As a result of such decisions, the provinces amended their respective workers' compensation legislation to give statutory effect to the impugned policies. Arguably, the provinces whose statutes do not ex-

For the following reasons, it is submitted that the latter interpretation is preferable. First, when *United Grain Growers* went to trial, the defendant employer did not raise the defence that civil action was barred by the Manitoba *Workers' Compensation Act*.²¹ Nor did the Manitoba Workers' Compensation Board intervene to argue a statutory bar to civil action. This contrasts with the *Newfoundland Reference*, where the workers' compensation boards of seven provinces — including Manitoba and the Yukon Territory — along with the Attorneys-General of Nova Scotia, British Columbia, and Newfoundland and Labrador, intervened to support the statutory bar to civil action contained in the workers compensation legislation of all Canadian jurisdictions.

While the absence of intervenors in *United Grain Growers* is not in itself conclusive, it does suggest a significant body of legal opinion favouring the propositions that: (i) workers' compensation legislation was not designed to insure workers and protect employers with respect to mental stress caused by the act of dismissal; and (ii) there was no legislative intention to foreclose common law remedies for such damages.

A second point favouring the latter interpretation is that it would be difficult to justify a law that both excludes mental stress due to dismissal from the list of traumatic stress factors for which statutory compensation is payable, and purports to exclude the courts from the jurisdiction that they exercised in the *United Grain Growers* case.

The standard justification for excluding mental stress, due to dismissal from compensable injury under statutory workers' compensation schemes, is that such injury flows from "routine industrial relations action."²² While such reasoning might be accepted as justification for exclusion from the statutory compensation scheme, it is likely that the courts would require more explicit statutory language to deny individuals access to the courts for compensation, for a type of injury excluded by legislation or policy.

Judicial reluctance to deny individuals access to common law remedies in the absence of clear statutory language is illustrated by the case *Wilson and others v. City of Medicine Hat and others*.²³ In a tort action, the plaintiff employees

clude mental stress caused by dismissal as a compensable injury may be acting illegally by excluding such claims as a matter of policy. Of course, in practice, a W.C.B. may be able to avoid compensating such an injury by failing to accept that a causal connection has been established.

²¹ Larson, *supra* note 4.

²² A.W.C.B.C. survey, *supra* note 3 and *supra* note 8. Arguably, such reasoning is spurious, as it seems perverse to characterise a wrongful dismissal as a "routine industrial relations action."

²³ *John Wilson and Patricia Wilson v. City of Medicine Hat, Robert M. Nicholay, Larry Bonneville, David Gaze, Randy Reiger, 413909 Alberta Ltd., Methaney Corporation, Lubrizol Corporation, Detroit Diesel Corporation, Motor Coach Industries Ltd., Sypher, Muller International Inc., Her*

and dependants alleged that their injuries were caused by the respondents' negligence. The respondents argued that the Workers' Compensation Board has exclusive jurisdiction with respect to the determination of cause and eligibility for compensation. The W.C.B. found that there was no compensation. MacLean J. held that the W.C.B.'s finding of no causation removed the injuries from the scope of the definition of "accident" under the *Workers' Compensation Act* and, thereby, beyond the statutory bar to common law action imposed by the Act in respect of "accidents."

Furthermore, notwithstanding the *Newfoundland Reference*, the statutory exclusion of compensation under both the statute and the common law would raise a potential challenge under s. 15 of the *Charter of Rights and Freedoms*.²⁴ While the courts have demonstrated some reluctance to expand the scope of s. 15(1) beyond the enumerated protected grounds, such reluctance is more than matched by their traditional unwillingness to deny individuals redress in the courts in the absence of "manifestly clear" statutory language.²⁵ Accordingly, it is probable that the courts would view, as a breach of s. 15(2) of the *Charter*, a statutory provision that provided compensation for acute stress caused by a traumatic event at work, but denied compensation under both statute and common law for acute, traumatic mental stress caused by dismissal.

It is concluded that the balance of the argument favours the proposition that, while provincial workers' compensation legislation or policy across Canada exclude statutory compensation for mental stress caused by dismissal, the courts retain jurisdiction at common law to award compensation in such circumstances.²⁶

majesty the Queen as Represented by the Minister of Energy for Canada, Her Majesty the Queen as Represented by the Minister of Environment for the Province of Alberta, Her Majesty the Queen as Represented by the Minister of Labour for the Province of Alberta, (23 February, 1999), Medicine Hat 9608-00513 (Alta. Q.B.) (hereinafter *City of Medicine Hat*). Related actions against the defendants were brought by other plaintiffs in cases 9608-00514; 9608-00515; 9808-00253; 9808-00307; 9808-00332. This judgment has been appealed to the Alberta Court of Appeal. For discussion of issues arising from this case, see I.B. McKenna, "Workers' Compensation: The Historic Compromise Compromised?" (2000) 38 *Alta. L. Rev.* 578.

²⁴ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

²⁵ *The Queen v. Riddle*, [1980] 1 S.C.R. 380 at 390, Dickson J.; *Amato v. The Queen*, [1982] 2 S.C.R. 418 at 443, per Estey J..

²⁶ The survival of the common law duty to provide a safe and healthy workplace is demonstrated by certain workers' compensation statutes which specify a right of common law action by workers excluded from the statutory scheme. For example, the *New Brunswick Workers' Compensation Act* (*supra* note 2), Part II, makes explicit the right of workers excluded from Part I of the *Act* (except farm labourers, domestic or menial servants, or their employers, or fishermen) to take legal action against their employers for injuries caused by

The foregoing conclusion is significant not only for cases such as *United Grain Growers*, but for chronic mental stress and burnout cases which are usually not compensated under Canada's statutory workers' compensation schemes. This will be explored further in the final section.

III. CRITIQUE OF UNITED GRAIN GROWERS

WHILE JUDICIAL RECOGNITION OF A REMEDY for mental distress caused by a bad faith or unfair dismissal is welcome, the manner of such recognition by the majority of the Supreme Court in *United Grain Growers* has been justifiably criticised. John Swan's concerns are that the majority failed to deal with the traditional law of wrongful dismissal and failed to approach the case with any guiding principle.²⁷ Swan favours the approach of the minority as voiced by McLachlin J., who based the award of damages for mental distress²⁸ on the "independent cause of action" — an implied contractual duty of good faith on the part of the employer.

In agreeing with Swan, it is my contention that the majority's approach is defective primarily because it is founded on an obsolete and inaccurate paradigm of the employment relationship. Furthermore, the minority's approach is an appropriate step toward allowing the courts to avert the danger of under-compensating such injuries as chronic stress — a condition workers' compensation schemes have demonstrated some reluctance to compensate.

As Jack and Southren discuss,²⁹ in cases of wrongful dismissal, the courts have traditionally awarded damages only in respect of pay *in lieu* of notice of termination. Until the 1970's and 1980's, a line of English and Canadian authority rejected claims for mental distress caused by the manner of an em-

defects in the workplace or the negligence of the employer or fellow workers; see ss. 86–88 of the Act. Furthermore, while occupational health and safety statutes across Canada provide legal duties and remedies with respect to workplace health and safety, they neither expressly nor impliedly bar common law action. The post-statutory case *Marshment v. Borgstrom*, [1942] S.C.R. 374, [1942] 4 D.L.R. 1, makes it clear that the existence of a statutory duty to provide a safe and healthy workplace does not extinguish common law duties. For discussion of *Marshment* and this issue, see Ball, *supra* note 18 at para. 25:10.3.

²⁷ 6 C.L.E.L.J. 313 at 320 [hereinafter *Swan*].

²⁸ In this paper, mental "stress" and "distress" are used synonymously. See Chambers Twentieth Century Dictionary where "stress" is stated to be aphetic for "distress."

²⁹ 5 C.L.E.L.J. 45 at 48 [hereinafter *Jack & Southren*].

ployee's dismissal.³⁰ Judicial authority indicated, at that time, that plaintiffs seeking damages for mental distress arising from employers' outrageous conduct, with respect to dismissal, would have to seek such damages in tort.

In the 1970's and 1980's, a confusing succession of cases recognised that, in certain circumstances, damages for mental distress — as well as aggravated and punitive damages — might be awarded by virtue of an employer's conduct in the dismissal of an employee.³¹ Seeking, no doubt, to end the confusion, the majority of the Supreme Court in *Vorvis v. Insurance Corporation of British Columbia*³² held that for there to be an award of damages for mental distress or punitive damages in a wrongful dismissal suit, the conduct complained of would have to constitute an "independently actionable wrong." However, in *Vorvis*, the Court appears to have imposed no concurrent requirement on the plaintiff that such an independent wrong be separately pleaded and proven as a separate cause of action.³³

In *United Grain Growers*, Lockwood J., of the Manitoba Court of Queen's Bench, added to the award of 24 months' pay *in lieu* of notice damages of \$15,000 for mental distress.³⁴ Lockwood J. found that "it must have been in the contemplation of [the employer] that, if Wallace was dismissed without cause or warning, he would probably suffer mental distress."³⁵ The Manitoba Court of Appeal rejected the claim for mental distress on the grounds that the Supreme Court's requirement in *Vorvis* was that there had to be an independently actionable wrong and that, on the facts of *United Grain Growers*, there was no basis for such an action.³⁶ Without such independently actionable claim, Scott C.J.M. held the foreseeability of mental stress to be irrelevant.³⁷

³⁰ *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.); *Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673; *Fitzgibbons v. Westpres Publications Ltd.* (1983), 3 D.L.R. (4th) 366 (B.C.S.C.).

³¹ The cases are discussed by Jack & Southren, *supra* note 29 at 50–56.

³² [1989] 2 S.C.R. 1085, 25 C.C.E.L. 81 [hereinafter *Vorvis*].

³³ The majority's and the minority's approaches in *Vorvis* are criticised, justifiably, by Jack & Southren, *supra* note 29 at 57–58.

³⁴ (1993), 87 Man. R. (2d) 161, [1993] 7 W.W.R. 525, 49 C.C.E.L. 71, [1993] M.J. No. 365 (Q.B.), online: QL (MJ).

³⁵ Lockwood J. based his award for mental distress on both contract and tort. In recognising an action in tort, Lockwood J. distinguished this case from *Vorvis*.

³⁶ (1995), 102 Man.R. (2d) 161, 93 W.A.C. 161, [1995] 9 W.W.R. 153, 34 C.B.R. (3d) 153, 14 C.C.E.L. (2d) 41, 95 C.L.L.C. para. 210–046, [1995] M.J. No. 344 (QL); and 107 Man.R. (2d) 227, 109 W.A.C. 227, [1995] M.J. No. 482 (QL).

³⁷ Scott C.J.M. rejected the plaintiff's argument that there is a tort of "bad faith dismissal."

For the majority of the Supreme Court of Canada in *United Grain Growers*, Iacobucci J. held that there was no independently actionable wrong, no implied contractual duty of good faith with respect to the manner of dismissal and no tort of bad faith discharge. However, the majority held that there was bad faith on the part of the employer in the manner of the dismissal and that this is "another factor that is properly compensated for by an addition to the notice period."³⁸

Swan's criticism of the majority's reasoning is appropriate as he notes the inconsistency that

[t]here is no contractual obligation on employers to treat employees in good faith, yet there is an obligation to avoid bad faith conduct ... it would seem to entail at least an obligation to behave decently, but that obligation, either as an implied term of the contract or as a tort duty, is explicitly denied.³⁹

England *et al.* also express concern regarding the majority's decision in *United Grain Growers*. The authors observe that the failure to acknowledge a contractual duty of fairness risks the anomaly that an employee actually fired under the circumstances of *United Grain Growers* would likely be compensated for psychological harm in the form of a longer period of pay *in lieu* of notice. However, an employee quitting and claiming constructive dismissal might have no legal basis for extended pay *in lieu* of notice.⁴⁰

Swan supports the approach of McLachlin J. for the minority,⁴¹ namely being the recognition of an implied contractual duty on the part of the employer to treat employees in good faith. The call for an implied contractual duty of good faith on the part of employers is attractive. As England observes,⁴² recognition of such a duty would create a symmetry in contractual obligations that is lacking in employment law. The existing lack of symmetry is curious as it is clear from their early recognition of an employee's implied duty of fidelity that the courts have recognised that an employment contract embodies not only transactional, but relational and psychological, dimensions.

The test for judicial recognition of an implied contractual duty is captured in the celebrated dictum of Lord Scrutton in *Reigate v. Union Manufacturing Co.*:

³⁸ *United Grain Growers*, *supra* note 1 at para. 75.

³⁹ Swan, *supra* note 27 at 319

⁴⁰ England, *supra* note 2 at para.13.59.

⁴¹ *United Grain Growers*, *supra* note 1 at paras. 111-151.

⁴² G. England, "Recent Developments in the Law of Employment Contract: Continuing Tension between the Rights Paradigm and the Efficiency Paradigm" (1995) 20 *Queen's L.J.* 557 at 586[hereinafter *England, Recent Developments*].

A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case?" they would both have replied, "Of course, so and so will happen; we did not trouble to say so, it is too clear."⁴³

Evidently, judicial recognition of an employee's implied duty of good faith to the employer is founded on the recognition that this is essential for the business efficacy of the contract. Why, then, the reluctance of the majority of the Supreme Court to recognise a reciprocal duty of good faith on the part of employers?

Part of the answer may lie in the continuing attachment of some judges to an obsolete paradigm of the employment relationship. More than a decade ago, Langille criticised the pre-eminence of the zero-sum-game model of labour relations that underpins most judges' and arbitrators' assumption that any advancement of workers' interests must, by necessity, detract from employers' interests. In Langille's view, such attitudes, and the resulting judicial and arbitral decisions, have served as barriers to the goal of employer and employee partnership contemplated by the architects of collective bargaining legislation in Canada.⁴⁴

Langille's concerns appear equally relevant to the common law. Judicial reluctance to recognise an implied employer duty of good faith appears to rest on the assumption that such recognition would amount to the courts' conferring a benefit upon employees at the employers' cost, rather than the acknowledgement that such a term is necessary for the business efficacy of the contract for both parties.

The question remains whether there is sufficient empirical evidence to support the proposition that judicial acceptance of an implied duty of good faith for employers is necessary for the business efficacy of employment contracts. Historically, not all commentators have agreed that sufficient evidence exists. While acknowledging that the valuing of employees' trust and dignity may con-

⁴³ [1918] 1 K.B. 593 at 605 (C.A.) [hereinafter *Reigate*].

⁴⁴ B. Langille, "Equal Partnership' in Canadian Labour Law" (1983) 21 Osgoode Hall L.J. 496 [hereinafter *Langille*]. See, in particular, pp. 508-511, where the author discusses the content of an employer's duty to bargain in good faith enunciated by the U.S. Supreme Court in the influential case *First National Maintenance Corp. v. N.L.R.B.*, 101 S. Ct. 2573, 91 L.C. 12, 805 (U.S.S.Ct.1981). Langille is critical of the Court's portrayal of bargaining between an employer and a union as a *burden* and a *constraint* on the employer and, therefore, *harm* to the employer. Langille is critical of the adoption of such ideology by labour boards and arbitrators in the Canadian domain of collective bargaining in the seminal case *Russelsteel Ltd.* (1966), 17 L.A.C. 253.

tribute to organisational productivity and efficiency, Geoffrey England concluded, as recently as 1995:

Unfortunately, there is a dearth of empirical evidence on the costs and benefits of various alternative paths in employment contract law. Not enough is known, for example, about the effect which longer notice periods or a duty of fairness would have on hiring or compensation practices, on employee discipline and on labour productivity and turnover. Without such information, courts cannot realistically balance considerations of rights and efficiency in adapting the common law to meet new conditions.⁴⁵

England's point is well taken. There was, at that time, a need for more empirical evidence on the relationship between good faith and business efficiency and productivity. However, two observations must be made. First, the courts already assume, presumably with the same lack of empirical evidence to which England refers, that mutual trust and confidence are important factors in promoting business efficiency and productivity. Commenting on the continuing judicial reluctance to grant the remedy of reinstatement for wrongful dismissal, England observes:

The assumption [of the courts] is that *mutual* trust and confidence have been irretrievably destroyed by the dismissal, or that the production process would otherwise suffer if the employee were reinstated. This is the quintessence of the efficiency paradigm.⁴⁶

If the courts are prepared to make such an intuitive assumption in the context of a remedy for breach of the employment contract, it would seem equally valid to apply such an assumption in respect of the discharge of the contract.

Second, since England's observation of a *dearth*⁴⁷ of empirical evidence, there has emerged a body of empirical research and human resources management scholarship lending support to the proposition that good faith on the part of employers toward employees promotes organisational efficiency and productivity. For example, recent research undertaken by Wanberg and others on the subject of the psychological contract suggests that when survivors⁴⁸ of lay-offs

⁴⁵ England, *Recent Developments*, *supra* note 42 at 629.

⁴⁶ *Ibid.* at 605 (Emphasis added).

⁴⁷ As some of the studies predate England's comments, his reference to a *dearth* of evidence was something of an exaggeration. It is notable that by 1998, in *Employment Law in Canada* (*supra* note 2), England recognises the efficiencies that may flow from an implied contractual duty of fairness to employees on the part of an employer. The author (*para.* 10.22) cites a variety of works, e.g. P. Blyton & P. Turnbull, *The Dynamics of Employee Relations*, 2nd ed. (London: MacMillan, 1998) at 76-95.

⁴⁸ Survivors are defined as employees who are retained when others have been laid off.

view lay-off procedures at their organisation to have been unfair, they are likely to exhibit decreased morale, self-esteem, organisational commitment, trust, and productivity.⁴⁹

Contemporary evidence suggests also that employees may respond negatively to perceived acts of bad faith on the part of employers by withholding their full co-operation with, *inter alia*, employers' rules, demands, goals, and targets. For example, Robinson and others⁵⁰ found that employees who believed that employers had violated obligations of good faith toward them⁵¹ curtailed what they considered to be their obligations toward their employers.

A third strand of organisational research explores the nature and role of trust⁵² in the employment relationship. Research indicates that a high level of

⁴⁹ C.R. Wanberg, L. Bunce & M.B. Gavin, "Perceived Fairness of Layoffs Among Individuals Who Have Been Laid Off: A Longitudinal Study" (1999) 52 *Personnel Psychology* 59, see in particular 59-60. Further recent research includes: J. Brockner, et al., "Survivors' Reactions to Lay Offs: We Get By With a Little Help From Our Friends" (1987) 32 *Administrative Science Quarterly* 526; J. Brockner, B.M. Wiesenfeld & C.L. Martin "Decision Frame, Procedural Justice and Survivors Reactions to Lay Offs" (1995) 63 *Org. Behavior and Human Decision Processes* 59; M.A. Konovsky & J. Brockner, "Managing Victim and Survivor Lay-off Reactions: A Procedural Justice Perspective," in R. Cropanzano ed., *Justice in the Workplace* (Hillsdale, New Jersey: Erlbaum, 1993) 133; J. Offri-Dankwa, D.R. Bishop & T. Schrems, "The Effect of Plant Closings on the Survivor Guilt, Self-Esteem, Commitment and Job Satisfaction of Laid-off and Recalled Employees: A Field Study" in *Proceedings of the Midwest Academy of Management Conference* (Cincinnati, Ohio: Midwest Division of Academy of Management, 1991) 61; C. Heckscher, *White Collar Blues: Management Loyalties in an Age of Corporate Restructuring* (New York: Basic Books, 1995); P. Hwang & W.P. Burgers, "Properties of Trust: An Analytical View" (1997) 69 *Organizational Behavior and Human Decision Processes* 67. An anecdotal illustration of the contribution of trust or good faith to organisational efficiency is provided by P. DeMont, "Nice Guys Can Finish First" *Financial Post* (28 March 1998) 18. In January 1996, William Catucci took over as CEO of Unitel Communications (now AT&T Canada Long Distance Services), the fifth CEO in as many years. His predecessor had cut 950 jobs the year before Catucci's arrival and the company was losing one million dollars a day. Upon his arrival, Catucci announced a \$150 bonus for all employees and two years later was greeted at a large gathering of employees with long and enthusiastic applause. Clearly the bonus was symbolic, but it represented attention by top management to issues of employees' morale and a sense of mutual trust between workers and management. It heralded, too, a move from heavy losses to profitability and a sense of having a future.

⁵⁰ S.L. Robinson, M.S. Kraatz & D.M. Rousseau, "Changing Obligations and the Psychological Contract: A Longitudinal Study" (1994) 37 *Academy of Management Journal* 137; and E.W. Morrison & S.L. Robinson, "When Employees Feel Betrayed; A Model of How Psychological Contract Violation Develops" (1997) 22 *Acad. of Management Rev.* 226.

⁵¹ Obligations that the employees perceived to exist.

⁵² While the term "trust" has a variety of shades of meaning in contemporary research, there is consensus on a core meaning of "willingness to reveal one's vulnerability to another with

trust is dependent on the mutual good faith of the parties and the avoidance of actions that provoke a sense of betrayal on the part of the other party. There is also empirical evidence that high levels of trust in the workplace promotes cooperative behaviour,⁵³ adaptive organisational forms such as network relations, rapid formulation of *ad hoc* work groups, and effective organisational responses to crises. Further, high levels of trust appear to reduce both harmful conflict and transaction costs in organisational relationships. In short, high levels of trust contribute to greater organisational efficiency and productivity. Rousseau *et al.*⁵⁴ contend that trust is not a control mechanism, but is rather a *substitute* for control, reflecting an attitude about others' motives. The authors suggest that control comes into play only when adequate trust is not present. This is significant because the traditional employment relationship, while nominally one of contract, is founded on, indeed legally defined by, control of the employee by the employer. Yet, the contemporary research referred to above suggests that higher levels of trust and diminished managerial control are likely to enhance organisational efficiency to the mutual benefit of management and employees.

For the foregoing reasons, the tendency of the minority in *United Grain Growers* in recognising a legal duty of good faith for employers is likely to promote the *mutual* interests of the parties to employment contracts and the public — not merely the interests of employees. Furthermore, while MacLachlin J. did not refer to English authority, the minority's approach is consistent with the development of an implied duty in employment contracts that an employer shall not:

without reasonable cause conduct itself in manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.⁵⁵

the confidence that it will not be exploited." A cross section of contemporary research and scholarship on trust is featured in the *Academy of Management Review*, (July 1998) 23(3).

⁵³ See, for example, G.R. Jones & J.M. George, "The Experience and Evaluation of Trust: Implications for Co-Operation and Teamwork" *Academy of Management Review*, *supra* note 52 at 531–546.

⁵⁴ D.M. Rousseau, S. B. Sitkin, K.S. Burt & C. Camerer, *Not So Different After All: A Cross-Discipline View of Trust*, *supra* note 48 at 393, 394.

⁵⁵ *Malik v. Bank of Credit and Commerce International SA*, [1997] H.L.J. No. 22 [hereinafter *Malik*] at para. 54, online: QL (HLJ) per Steyn L.J.. This was unanimous endorsement by the House of Lords of an implied term of employment contracts that had been developed by lower courts and tribunals in Great Britain over the past two decades. See, for example: *Woods v. W.M. Car Services (Peterborough) Ltd.*, [1981] I.C.R. 666 at 670, *Browne-Wilkinson J.*, *aff'd in Lewis v. Motorworld Garages Ltd.*, [1986] I.C.R. 157; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 1 W.L.R. 589; *Scally v. Southern Health and Social Services Board*, [1992] 1 A.C. 294, 307B. For discussion of the British develop-

While there are cogent arguments favouring the minority's approach in *United Grain Growers*, there may be two redeeming features of the majority's approach. First, by subsuming damages for mental distress under the award of pay *in lieu* of notice for wrongful dismissal, the majority may prevent the possible derogation of such common law remedy by provincial workers' compensation legislation.

This is not to suggest that it would be inappropriate for such matters to be compensated under the no-fault statutory schemes. Indeed, there are good arguments for providing such compensation under the umbrella of workers' compensation. However, as previously discussed, an argument can be made that, as the compensation of workplace injuries is the *exclusive* jurisdiction of workers' compensation schemes, the mere statutory limitation or absence of compensation for particular types of injuries may not be a sufficient ground for overriding the statutory bar to common law action in respect of workplace injuries or illness. Relying on the "assumption of risk" argument, employers and W.C.B.'s might defend successfully both the absence of statutory compensation and the right to civil action.

On the other hand, if the courts characterised mental stress caused by an employer's bad faith or unfair dealing in the manner of dismissal as an inherent element of the law of wrongful dismissal, it would be somewhat easier to defend the courts' exercise of their traditional jurisdiction in the absence of unequivocal subrogation by legislation.⁵⁶ In this respect, the majority's approach in *United Grain Growers* may have a potential advantage over that of the minority.

Secondly, while there may be no *necessary* connection between mental stress and the time required to secure a new job, such connection is no more debatable than the criteria developed by the courts in *Bardal v. Globe and Mail Ltd.*,⁵⁷ namely: the age, seniority, length of service and employment status of the plaintiff. Arguably, as a predictor of the time likely to be required to find a new job, mental distress caused by bad faith in the manner of a wrongful dismissal is no

ment of the implied duty of trust and confidence in employment contracts, see Douglas Brodie, "Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 I.L.J. 121.

⁵⁶ The strength of the traditional common law doctrine of wrongful dismissal in the face of alleged statutory subrogation is illustrated by the cases *Alpaerts v. Obron* (1993), 46 C.C.E.L. 218 (Ont. Gen. Div.); *White v. Bay-Shep Restaurant & Tavern Ltd.* (1995), 16 C.C.E.L. (2d) 57 (Ont. Gen. Div.); *L'Attiboudeaire v. Royal Bank of Canada* (1996), 17 C.C.E.L. (2d) 86, (1996), 88 O.A.C. 70 (Ont. C.A.).

⁵⁷ (1960), 24 D.L.R. (2d) 140, [1960] O.W.N. 253 (H. C.). For a detailed discussion of the various criteria employed by the courts in establishing reasonable notice, see Ball, *supra* note 18 at para. 9:40.

less valid than the job status of the dismissed employee.⁵⁸ Granted, this is rather weak and negative support for the majority's approach in *United Grain Growers*, but combined with the earlier point it may temper the (justified) criticism of that approach.

To conclude, this section of the minority approach in *United Grain Growers* is substantially superior to that of the majority. The latter perpetuates obsolete, untenable paradigms that portray labour as purely a commodity and the employment contract as embodying only a transactional dimension. Such an approach is schizophrenic to say the least, in light of the relational and psychological dimensions of employment contracts judicially recognised in both the implied duty of fidelity of employees to employers and the denial of reinstatement as a common law remedy for wrongful dismissal.

The continuing failure of the common law in Canada to recognise an implied duty of good faith and fair dealing on the part of employers is also problematic. It is especially problematic in light of the contemporary research that suggests that the level of mutual trust and good faith between employers and employees is strongly correlated with organisational productivity and efficiency. The traditional approach also disregards evidence that the efficacy of employment contracts depends not only on "transactional" matters, such as pay and benefits, but on relational dimensions of the contract such as commitment, loyalty, trust and good faith. Finally, the traditional approach takes no account of developments in the English common law, where the House of Lords has recognised an implied duty of trust and confidence on employers as well as employees.

For the above reasons, it is contended that the approach of McLachlin J., for the minority, is to be preferred over that of the majority. Nevertheless, for all its attraction, the minority's approach in *United Grain Growers* does not represent the current law in Canada. In the following section, I explore the proposition that the Court in *United Grain Growers* did not need to resort to the doctrinally unsound expedient of the majority or the innovation of the minority. I suggest that, instead, the Supreme Court had at its disposal an existing contractual basis for compensating mental stress — the employer's implied contractual duty at common law to provide a reasonably safe and healthy place of employment.

IV. DUTY TO PROVIDE A SAFE AND HEALTHY WORKPLACE

⁵⁸ Swan, *supra* note 27 at 325–327, is critical of the judicial recognition of job status as a criterion determining length of notice, and notes the similar criticisms of Weiler J.A. in dissent in *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147 (C.A.), and of the trial judge, MacPherson J., in *United Grain Growers*. Swan argues against the use of both job status and mental distress as criteria for assessing length of notice.

A. Introduction

At first glance, the implied common law contractual duty of employers to provide a safe and healthy place of work may seem an unpromising legal basis upon which to found an action for mental distress caused by bad faith or unfair dealing in a wrongful dismissal. As noted above, provincial workers' compensation statutes have largely replaced common law actions for breach of this common law duty. As observed by Goodridge C.J.N. in the *Newfoundland Reference*,⁵⁹ the statutory scheme for compensating workplace injuries and illnesses is an acceptable trade-off of the workers' right to sue an employer in tort or breach of contract for the benefits of a no-fault insurance system. The value of this trade-off was also endorsed by the Alberta Court of Appeal in *City of Calgary and Marwick v. Budge et al.*⁶⁰ In both cases, the statutory bar on common law actions by injured workers against their employers was upheld and held not to be an infringement of ss.7 and 15(1) of the *Charter*.⁶¹

However, it is not the case that provincial workers' compensation legislation has eradicated the common law duty of employers to provide safe and healthy workplaces or the right of workers to sue their employers under certain circumstances. As England *et al.* observe, the employer's common law duty of care remains important in employment situations where the no-fault workers' compensation schemes do not apply.⁶² In each jurisdiction in Canada, the respective workers' compensation statutes exclude certain industries or categories of worker from their ambit. For example, in Alberta, the *Workers' Compensation Act*⁶³ empowers the Lieutenant Governor in Council to pass regulations to exclude certain industries from the *Act*.⁶⁴ In Ontario, certain casual workers and executive officers of a corporation are excluded from the *Workplace Safety and*

⁵⁹ *Newfoundland Reference*, *supra* note 13 at para.132.

⁶⁰ [1991] 3 W.W.R. 1.

⁶¹ See also England *et al.*, *supra* note 2 at para. 10.41.

⁶² *Ibid.* The authors note, too, that the common law duty may also be of practical application to workers and employers to whom workers' compensation legislation applies. For example, an employer seeking to compel an employee to perform unsafe work is in breach of the duty, and the employee may obtain a remedy at common law if he or she is summarily dismissed for disobeying an order.

⁶³ R.S.A. 1981, c. W-16 (as amended), s.147.

⁶⁴ For example, Alta. Reg. 427/81, s. 3(1)(a) and (b), as am. by Alta. Reg. 71/90, s. 2, excludes most school teachers from the ambit of the *Act*; Alta. Reg. 427/81, Appendix A, also provides a substantial list of excluded industries.

Insurance Act.⁶⁵ In such cases, it would appear that the common law duties of employers to employees and workers' rights of legal action remain intact.⁶⁶

Further, it is a cogent argument that, because workers' compensation legislation in Canada typically excludes, in express terms, mental stress caused by an employee's wrongful dismissal or other routine industrial relations acts, the door remains open for the courts to provide remedies at common law.⁶⁷

Support for this proposition comes from the Alberta Court of Queen's Bench in *Wilson and Wilson and others v. City of Medicine Hat and others*.⁶⁸ Notwithstanding the statutory bar to an action at common law, MacLean J. acknowledged the right of injured workers to sue their employer following a ruling of the Workers' Compensation Board that there was no causal nexus between the workers' injuries and their employment. If MacLean J.'s reasoning is endorsed by the appellate courts, it will be open to workers alleging injury caused by their employers' negligence or breach of duty to provide a safe and healthy workplace to seek a civil remedy in cases where the relevant workers' compensation board finds no causal link between the injury and the employment.

Accordingly, the employer's common law duty of health and safety remains relevant in industries and occupations not covered by the relevant legislation, types of injury not recognised as compensable by workers' compensation boards,⁶⁹ and arguably, in circumstances where a workers' compensation board finds no causal link between an otherwise compensable form of injury and the claimant's workplace.

B. Nature of the employer's common law duty

An employer's contractual duty to an employee at common law requires the employer to take reasonably practicable steps to ensure the health and safety of

⁶⁵ *Supra* note 3 at ss. 11(1) and 11(2).

⁶⁶ See H.W. Arthurs, D.D. Carter & H.J. Glasbeek, *Labour Law and Industrial Relations in Canada*, 2nd ed. (Deventer: Kluwer Law & Taxation Publications, 1984) at 106, para. 258 [hereinafter *Arthurs*]. Provincial and federal occupational health and safety legislation has also largely replaced the common law with specific duties, regulations and remedies applicable to employers and employees. However, such legislation does not expressly extinguish common law obligations or remedies.

⁶⁷ *Supra* note 56. The courts require explicit statutory language for the subrogation of access to common law remedies. This view was expressed to the author in respect of the *Ontario Workplace Health and Safety Act* in a letter from senior legal counsel of the Ontario Workplace Safety and Insurance Board (26 July 1999).

⁶⁸ *City of Medicine Hat*, *supra* note 23.

⁶⁹ Such as mental stress caused by an employee's threatened dismissal (see: *Ontario Workplace Safety and Insurance Board, Operational Policy – Mental Stress*, January 1, 1998, 4).

its employees. Arthurs *et al.* specify employers' common law duty as the obligation to provide:

- a) competent fellow workers;
- b) safe tools, machinery and equipment;
- c) a safe place of work and safe access to that place of work;
- d) a safe system of working.⁷⁰

Arguably, an employer who wrongfully dismisses an employee in a callous or humiliating manner that causes the latter acute mental distress may be in breach of duties (a), (c) and (d) above. While it is true that the common law does not require employers to indemnify employees in respect of the normal risks of employment, an employer is required to take reasonable steps to avoid foreseeable risks of harm to its employees.

With respect to point (a), any basic human resources textbook lists the steps a competent manager ought to take in the discipline or dismissal of an employee in order to comply with both the employer's legal obligations and efficient human resources management practices. For example, in the text *Managing Human Resources*, the authors state:

Regardless of the reasons for a dismissal, it should be done with personal consideration for the employee affected. Every effort should be made to ease the trauma a dismissal creates. The employee must be informed honestly, yet tactfully, of the exact reasons for the action. Such candour can help the employee face the problem and adjust to it in a constructive manner.⁷¹

The authors of *Managing Human Resources* further identify seven guidelines for fairness in dismissal.⁷² The authors note that such guidelines have been developed by collective agreement arbitration, but are also applied by the courts.

⁷⁰ Arthurs *et al.*, *supra* note 66. The authors cite as authority *Wilson v. Tyneside Window Cleaning*, [1958] 2 Q.B. 110 (C.A.); *Wilson and Clyde Coal v. English*, [1938] A.C. 367 (H.L.); *Marshment v. Borgstrom*, [1942] S.C.R. 374. See also, *Ainslie Mining and Railway Co. v. McDougall* (1909), 42 S.C.R. 420.

⁷¹ M. Belcourt *et al.*, *Managing Human Resources*, 2nd ed. (Scarborough, Ontario: ITP Nelson, 1999) at 535 [hereinafter *Belcourt et al.*]. In *United Grain Growers* the manager who fired Wallace provided no reasons at the time of dismissal. The authors of *Managing Human Resources* note that, while there is no single satisfactory way to conduct a dismissal, they offer guidelines for effective practice. It is also noteworthy that the authors recognise the importance of an employer's attention to easing the trauma of a dismissal. Perhaps ironically in light of the majority's reasons in *United Grain Growers*, Iacobucci J. recognises too the vulnerability of employees at the time of their dismissal and the need for the law to "encourage conduct that minimizes the damage and dislocation [both economic and personal] that result from dismissal."

⁷² *Ibid.* at 534.

Furthermore, such guidelines are recognised as consistent with efficient human resources management practice. This is important with respect to an employer's duty to provide a safe and healthy workplace. An employer's implied contractual duty to provide competent fellow workers must surely apply to fellow workers at all levels of the organisation, including, *inter alia*, human resources managers and line supervisors. The ready availability of education and training in the fields of human resources management, communication, organisational behaviour, provides most employers with little excuse not to have competent managers of such functions.

Breach of the duty to provide competent fellow workers does not require bad faith or unfair dealing on the employer's part — the issue in *United Grain Growers*. It merely requires the failure to meet a reasonable standard of managerial competence. It is my submission that when a manager fails to apply such reasonable standards of competence, the employer is potentially in breach of its contractual duty to provide competent fellow employees and is, thus, potentially liable for mental distress that may flow from such breach.⁷³

A dismissal of the sort experienced by the plaintiff in *United Grain Growers* could also be challenged as a breach of the employer's duty to provide a safe place of work or a safe system of working. As noted above, there is a body of academic research and literature in the organisational behaviour and human resources management fields suggesting that unfair, callous, abusive or harassing managerial actions can be harmful to an employee's mental health and well-being.⁷⁴ Recently, there have been a growing number of incidents of serious workplace violence triggered by a sense of grievance of dismissed workers or other perceptions of unfairness.⁷⁵

The experience of Wallace in *United Grain Growers* might arise not simply from incompetent fellow workers, but an unsafe or unhealthy system of work. That is, from one with inadequate procedures of due process, lacking consis-

⁷³ It will be noted that the standard placed on management by the duty to provide a safe and healthy place of work may be somewhat more rigorous than the duty to avoid bad faith or unfairness suggested by the Supreme Court in *United Grain Growers*.

⁷⁴ The sources quoted *supra* note 50 identify the harmful effects of perceived unfairness on employees' morale and self-esteem, to name a few examples, in the context of layoffs.

⁷⁵ The issue of workplace violence was one of the themes of symposia, in a recent conference: C.A. King, "Safe Terminating Procedures;" K.A. Rogers, "Violence at Work: Personal and Organizational Outcomes;" L.L. Cole, "Predictors of Non-Fatal Workplace Violence;" J.G. Kurutz, "Role of a Comprehensive EAP Program in Assessing and Responding to Workplace Violence" (Work, Stress and Health, Washington, D.C., 14-16 September 1995) The conference was sponsored jointly by the American Psychological Association, the National Institute for Occupational Safety and Health, the U.S. Office of Personnel Management, and Occupational Safety and Health Administration (U.S. Department of Labor) [hereinafter The Washington conference].

tency and co-ordination in managerial decision making, having inadequate checks on abuse of supervisory power, or lacking opportunities for professional or technical training of managers and supervisors. Any of the above conditions can cause arbitrariness, unfairness or lack of reasonable competence in dismissal and consequential mental damage to the dismissed employee or to employees not themselves dismissed.

It is entirely appropriate that the traditional common law duty of employers to provide safe and healthy workplaces should be applied to human resources functions, including dismissal and discipline. Indeed, the recent recognition of the importance of the psychological contract of employment and the high costs to employers and workers that can flow from mental stress, low employee morale, high turnover and absenteeism emphasise the importance of managerial competence in identifying the causes and remedies for such phenomena.

C. Constructive dismissal

Thus far, our focus has been on the employer's duty to provide a safe and healthy place of work as it applies to the act and manner of an employee's dismissal. However, it is clear that such duty is also relevant to constructive dismissal. Indeed, the employer's duty to provide a safe and healthy workplace is likely to apply more frequently to cases of constructive dismissal arising from, for example, workplace harassment than actual dismissal.

The precise jurisdiction of workers' compensation schemes in Canada with respect to mental stress injuries is unclear. Generally, compensation can be obtained for mental stress caused by traumatic events — even delayed reaction — provided there is clear and convincing evidence of causation. However, matters are much less clear in the scope of compensation for chronic stress. In Ontario, workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits.⁷⁶ Arguably, therefore, the employee sexually harassed by an overt act of touching could expect to receive compensation for acute stress — even if delayed — caused by such an incident.

On the other hand, policy would appear to exclude compensation for acute chronic stress caused by "hostile environment" sexual harassment.

Furthermore, Ontario policy expressly excludes chronic stress or "burnout" caused by a highly competitive environment in which the employee is "subject to ever-changing deadlines and high performance expectations, all while her company is downsizing."

The position in Ontario regarding chronic stress appears to represent, with one exception, the present position in Canadian workers' compensation

⁷⁶ *Operational Policy*, *supra* note 69 at 1. Policy does permit compensation for delayed acute reactions to a "sudden and unexpected traumatic event."

schemes that chronic mental stress, or "stress over time"⁷⁷ is not recognised as an industrial disease and not normally compensated.⁷⁸

The exception appears to be the *Saskatchewan Workers' Compensation Act* as it does not preclude compensation for chronic stress. W.C.B. policy admits the possibility of "burnout" caused by workplace factors, but notes the great difficulty in distinguishing the results of life stresses outside of employment and those caused by working conditions. The Board policy document on stress claims⁷⁹ differentiates circumstances in which it is: (a) improbable that work injury exists; (b) doubtful that work injury exists; and (c) probable that work injury exists. The distinction between (a) and (c) turns largely upon whether the worker is employed in an occupation in which "burnout" is known to be a problem.

It is submitted that the foregoing examples of W.C.B. policy on chronic workplace stress confirms the need for a revival of the common law duty of employers to provide reasonably safe and healthy workplaces. Recent evidence suggests that chronic workplace stress and "burnout" are prevalent, indeed epidemic, in Canada, the United States and other countries of the industrialised world.⁸⁰

Golembiewski *et al.* conclude that, in contemporary North America and in other industrialised nations, "burnout seems epidemic at least."⁸¹ Stress and

⁷⁷ Referred to as chronic "mental-mental" stress in the *A.W.C.B.C. survey*, *supra* note 3.

⁷⁸ In the USA, compensation for chronic "mental-mental" stress is available in several jurisdictions, namely, California, Hawaii, Kentucky, Michigan, New Jersey, Oregon, and West Virginia. In the remainder, mental-mental stress is compensated only if its source is unusual or a traumatic workplace event. For a discussion of the issues, see, NCCI, *Emotional Stress in the Workplace: New Legal Rights in the Eighties* (New York: NCCI, 1985).

⁷⁹ Policy #02/92, *supra* note 9 at 3.

⁸⁰ While widespread research of mental stress is comparatively recent, the phenomenon is not new. See, Sir William Osler (1849-1919), "The Lumeian Lectures on Angina Pectoris" *The Lancet* (1910) vol. I 698. See also an article by Breay (1913) who wrote of "overstrain" of nurses of that period. Both articles are referred to in C. Spielberger, *Understanding Stress and Anxiety* (New York: Harper & Rowe, 1979) at 7.

⁸¹ C.L. Golembiewski, *Global Burnout: A Worldwide Pandemic Explored by the Phase Model* (Greenwich, Connecticut: JAI Press, 1996). A selection of other research and literature is: C.L. Cooper & Smith eds., *Job Stress and Blue Collar Work* (Chichester: John Wiley & Sons, 1985); T. Newton, J. Handy & S. Fineman, *Managing Stress: Subjectivity and Power in the Workplace* (London: Thousand Oaks, 1995) [hereinafter *Managing Stress*]; J.C. Quick, L.R. Murphy & J.J. Hurrell Jr. eds., *Stress and Well-being at Work* (Washington, D.C.: American Psychological Association, 1992). See, in particular, P. Carayon, "A Longitudinal Study of Job Design and Worker Strain: Preliminary Results" in J. Campbell Quick *et al.* (Eds.) *Stress and Well-Being at Work: Assessment and Interventions for Occupational Mental Health* (Washington: APA, 1992).

"burnout" are not just associated with the volume of work assigned to employees in the era of downsizing, but with the apparent effects of jobs in which employees have lots of responsibility but little power. The research indicates that the costs of chronic stress and burnout are borne not only by employees, but by employers and ultimately by consumers and taxpayers.

Research on sexual harassment indicates that its prevalence in North American workplaces identifies the serious harm that can be inflicted upon employees' health, morale and productivity. Knapp and others⁸² suggest that

there is a growing body of evidence that legal damages are minor when compared with the reduced productivity, absenteeism, turnover, requests for transfers and medical and emotional counselling.

While some sexual harassment involves traumatic events and their mental consequences, much of it is chronic — the trappings of a hostile, and psychologically unhealthy, workplace environment. The research indicates, further, that effective managerial intervention to deal with such matters not only confers benefits on employees, but can improve organisational productivity.⁸³

In spite of the strong empirical evidence of widespread chronic stress and "burnout" caused by a variety of workplace factors, including sexual harassment, victims are either unable to receive workers' compensation due to administrative policy — as in Ontario — or face formidable difficulties in proving that their symptoms are caused by working conditions — as in Saskatchewan.⁸⁴

⁸² Knapp et al., *infra* note 83 at 688.

⁸³ The causes and impact of sexual harassment on organisations were also a theme of the Washington conference. Canadian contributions included: J. Barling et al., "Organizational and Personal Consequences of Workplace Sexual Harassment" and R. J. Burke, "Sexual Harassment in a Professional Services Firm: Incidence and Consequences." For further research and scholarship, see B. A. Gutek, *Sex and the Workplace: Impact of Sexual Behavior and Harassment on Women, Men and Organizations* (San Francisco: Jossey-Bass, 1985); L.F. Fitzgerald & S.L. Shullman, "Sexual Harassment: A Research Analysis and Agenda for the 1990s" (1993) *Journal of Vocational Behavior* 42:5 at 27; B.T. Acken, D. St. Pierre & P. Veglahn, "Limiting Sexual Harassment Liability" *Journal of Accountancy* 171(6) at 42-47; J.G. Frierson, "Reduce the Costs of Sexual Harassment" (1989) *Personnel Journal* 68(11), 79-85; R.H. Faley, et al., "Organizational Costs of Sexual Harassment in the Workplace: The Case of the U. S. Army" (5th Annual Conference of Industrial and Organizational Psychologists, Nashville TN, 1994); D.E. Knapp, et al., "Determinants of Target Responses to Sexual Harassment: A Conceptual Framework" (1997) 22 *Academy of Management Review* 687[hereinafter *Knapp et al.*].

⁸⁴ The difficulties of proof are compounded by extremely high standard of proof of causation required by workers' compensation boards across Canada. Such a standard, bordering on "scientific certainty" is much higher than that required by the courts, which require only that the defendant's act have a material effect, on a balance of probabilities. For judicial opinion on standards of proof of causation, see *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140

In advocating a revival of the common law duty of employers to provide a reasonably safe and healthy workplace, I remain conscious of the serious shortcomings of the courts in compensating workplace injuries. Reflecting on the role of tort law in the compensation of injuries and disease, Ison states:

Even if a system of compensation for disablement was being designed with malice, it would be hard to conceive of any system more inefficient than tort liability.⁸⁵

Ison's point is that the cost to compensation ratio of tort liability, estimated to be in the region of 80 to 130 percent, is significantly higher than that of social security or no-fault injury compensation schemes. Such criticism of tort liability can also be applied to the contractual liability system advocated in this paper. However, Ison acknowledges that there may be other social goals to be pursued by a common law system of disablement compensation. He recognises that one advantage of the common law is that it is relatively free from the "political horse trading" that accompanies statutory systems such as workers' compensation.⁸⁶

Ison recognises further that political pressure can influence the extent to which workers' compensation boards will compensate or externalise the costs of workplace accidents. He contends that while in theory, workers' compensation boards are supposed to be insulated from political interference by the executive branch of government in their policies and practices, in practice, political interference does operate on boards.⁸⁷ Ison notes that the most well known form of political interference on workers' compensation boards in Canada relates to employer assessment rates. He states:

The legislation provides for revenues to be adjusted according to the total cost of benefits, while the political pressures tend to require that benefits should be adjusted to accord with predetermined level of revenues.⁸⁸

I submit that the revival of the employer's common law duty to provide a safe and healthy workplace is justified in order to promote an important social goal, the adequate compensation of chronic mental stress injuries typically not com-

D.L.R. (4th) 235, [1997] 1 W.W.R. 97; *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289; *Mackie v. Wolfe* (1994), 21 Alta. L.R. (3d) 11, 153 A.R. 81 (Q.B.), *aff'd* (1996), 41 Alta. L.R. (3d) 28, 184 A.R. 339 (C.A.). See also the opinion of MacLean J. in *City of Medicine Hat*, *supra* note 23 at 6-7.

⁸⁵ Terence G. Ison, *Compensation Systems for Injury and Disease: The Policy Choices* (Vancouver: Butterworths, 1994) at 123 [hereinafter Ison].

⁸⁶ *Ibid.* at 126.

⁸⁷ *Ibid.* at 188.

⁸⁸ *Ibid.*

compensated or under-compensated by the workers' compensation systems across Canada. In *City of Medicine Hat*, MacLean J. pinpointed why workers' compensation boards cannot be relied upon to do so:

The Board is a statutory body whose primary purpose is to protect employers by bringing uniformity, efficiency, expeditiousness and cost-savings measures to selected accidents which occur in the employer worker relation-ship. It accomplishes this purpose by restricting rights of workers to have their right to compensation and the extent of their compensation determined by the Board. It cannot be said that the Board is independent as far as the worker is concerned. It is a Board set up to protect employers.⁸⁹

Evidence cited in the A.W.C.B.C. publication referred to above⁹⁰ includes a Statistics Canada study estimating that mental disorders caused by stress cost Canadian businesses over \$12 billion annually. The Canadian Mental Health Association estimates the annual cost to businesses caused by stress due to overwork to be over \$13 billion per year.⁹¹

In spite of this, and other, evidence of the high costs of chronic stress to Canadian businesses, workers and society at large, governments and workers' compensation boards have remained steadfast in their commitment to the short run "bottom line" approach to business, personal and social costs. Instead of recognising the existence of such costs in the level of assessments of businesses and in the compensation paid to workers, workers' compensation boards in Canada have pursued policies that essentially ignore the existence of such costs.

While this may create the appearance of fiscal responsibility on the part of governments and workers' compensation boards, it is just an illusion. The preferable policy is for workers' compensation assessments to recognise and reflect the existence of the heavy business, personal and social costs of chronic work-induced stress, and provide a financial incentive for employers to invest in work systems and structures that reduce chronic stress and the substantial related costs.⁹²

⁸⁹ *City of Medicine Hat*, *supra* note 23 at 10.

⁹⁰ *Supra* note 3 at 61-62.

⁹¹ These figures are quoted in *Managing Claims*, 2(2), at 15. The same publication states that American Institute of Stress estimates the annual cost of stress to businesses in the USA to be between \$150 and \$200 billion a year. The American Academy of Family Physicians revealed that stress-related disorders account for two thirds of all visits to general practitioners in the USA. In a study by Northwest Life Insurance Co., conducted in 1991, 35% of the individuals interviewed indicated that their job was extremely/very stressful and 26% said their job was the greatest stressor in their life. The study also found that stress-related disabilities had doubled from 6% to 13% over the period from 1982 to 1991.

⁹² Workers' compensation boards across Canada have developed voluntary claims management programs in which employers accommodate injured workers by job modification. The experience has been generally positive as compensation and sickness payments are reduced,

The revival of the common law duty of employers to provide safe and healthy workplaces would provide the courts with an opportunity not only to compensate the victims of chronic mental stress, but to provide an incentive for employers to take steps to reduce the stressors in the workplace. Once a sufficient number of common law judgments have been handed down against defendant employers, legislatures and workers' compensation boards may have an incentive to include chronic mental stress in the list of industrial diseases.⁹³ This will not only compensate victims and their families, but provide financial incentive for employers to design jobs and organise work in a way that reduces claims for chronic mental stress and reduce premiums paid to no-fault insurance schemes.

It is perhaps ironic that one should seek to turn to the courts to promote enlightenment in the employment relationship. However, recent cases like *United Grain Growers* — particularly the minority reasons — *L'Attiboudeaire*,⁹⁴ and, in England, *Malik*,⁹⁵ suggest that the courts are willing to take a more proactive role than they have in the past to redress the imbalance of power that has existed historically in the employment relationship. Courts' attitudes and judgments in matters of employment law are increasingly influenced by human rights statutes and the decisions of tribunals, by the awards of collective agreement arbitrators, and by academic research and opinion. In developing a revived common law duty to provide a safe and healthy workplace, the courts can be reasonably expected to continue this approach. Indeed, one would expect the development of the common law of health and safety to be influenced significantly by developments in the statutory occupational health and safety regimes across Canada.

Yet, it would be wrong to portray the call for revival of the implied contractual duty to provide a safe and healthy place of work as purely an issue of power relations in the workplace. The danger of this is that policy will become bogged

employer assessments are typically reduced and society bears less of the costs of workers excluded from the workforce for extended periods. It is suggested that similar financial incentives would come into play if the true cost of chronic mental stress were better reflected in workers' compensation assessments and benefits.

⁹³ While such risks appear to have encouraged the inception of workers' compensation schemes in Canada, there is of course no guarantee that contemporary employers and governments will respond to such pressures. Nevertheless, employers have shown themselves responsive to workers' compensation cost pressures by implementing claims management strategies designed to accommodate workers injured on the job who would otherwise collect compensation, causing a rise in their employers' premiums. Ontario has a mandatory accommodation scheme while other jurisdictions such as Alberta operate a voluntary program.

⁹⁴ *L'Attiboudeaire v. Royal Bank of Canada* (1996), 88 O.A.C 70.

⁹⁵ *Malik*, *supra* note 55.

down in the futile ideology, criticised by Langille,⁹⁶ that assumes a gain for workers must produce a commensurate loss for employers. The logic of any implied contractual term is that it is necessary to give efficacy to the contract for the benefit of both parties.⁹⁷

The substantial evidence of costs to employees and employers alike, arising from stressful working conditions, supports the proposition that legal enforcement of the implied duty to provide a safe and healthy workplace is essential for the efficacy of the employment contract for *both* parties, not just for employees. Whether the issue is chronic mental stress or acute traumatic stress caused by an employee's dismissal, there is substantial evidence of negative effects on both employers and employees. However, the mutual benefits can be realised only with the co-operation of employers and employees in the type of partnership visualised by Langille and the drafters of Canadian labour relations legislation.

While the common law duty has been essentially dormant throughout the past century, there is no lack of case law for the reference of the courts in the proposed revival of the doctrine. As has happened in the case of wrongful and constructive dismissal,⁹⁸ the courts can borrow principles and rules developed by collective agreement arbitrators, human rights tribunals and the like. Accordingly, a court hearing a case of alleged sexual harassment based on an alleged breach of the common law health and safety duty would likely be influenced by the approaches to "hostile environment" harassment of the respective human rights tribunals in *DeGuerre v. Pony's Holdings Ltd. And Terry Cox*⁹⁹ and *Curling and Ontario Human Rights Commission v. Torimiro, Victoria tea co. Ltd. and Torrimo Corporation*.¹⁰⁰

It is a valid question, of course, what useful purpose might be served by a common law action for breach of the duty of health and safety when remedies may be obtained through workers' compensation, a human rights complaint, a complaint under occupational health and safety legislation or a civil action for constructive dismissal. The answer is that each of these options may be either unavailable or less attractive to the plaintiff.

Problems associated with human rights actions include responsibility for carriage of the complaint and substantial delays, at times running into several years. The carriage of complaint issue may arise when a respondent makes an offer contingent on confidentiality and no admission of liability. If the relevant

⁹⁶ Langille, *supra* note 44.

⁹⁷ Reigate, *supra* note 43 *per* Lord Scrutton.

⁹⁸ Indeed, case law on wrongful and constructive dismissal may be of relevance to actions for alleged breach of the duty to provide a safe and healthy workplace.

⁹⁹ (1999) 36 C.H.R.R. D/439 (B.C. Trib.) (Harassment based on sexual orientation).

¹⁰⁰ (1999) 36 C.H.R.R. D/468 (Ont. Bd. Of Inq.) [hereinafter *Curling*].

human rights commission considers the offer of settlement acceptable, the claimant will either have to accept it along with the conditions, or see the case dropped.

Workers' compensation is relevant only if there is proof of a workplace compensable injury. Accordingly, if a claim is for compensation for mental stress due to sexual harassment at work, where the harassment is of a low level over a period of time, it is unlikely to be successful in any Canadian jurisdiction. In *Curling*,¹⁰¹ the claimant was subjected to a highly sexualised atmosphere created by the employer who made frequent comments on her clothes and body, excessive demands on her time inside and outside work, discussed the respondent's sexual relationships and those of co-workers, and posed personal questions about her own sex life. The claimant's mental reaction was not acute, but the work environment was clearly hostile. The hostility was escalated when Curling communicated that such actions were unwelcome. It is not clear that, in such circumstances, the claimant would be successful in a workers' compensation claim.

In such circumstances, the employee might quit and sue for constructive dismissal. However, bringing an action for breach of the common law duty of health and safety might be more advantageous to the employee for her or his preference may be to negotiate an out-of-court settlement not involving loss of employment. Indeed, bringing such an action without quitting is consistent with contemporary public policy that employees should take some responsibility for their own workplace health and safety.

V. CONCLUDING REMARKS

THE SUPREME COURT'S DECISION in *United Grain Growers* is to be criticised not for its result,¹⁰² but for the reasoning of the majority that is based on an obsolete paradigm of the employment relationship. Yet, while recognition by a majority of a novel tort of bad faith would have been helpful, it was open to the Court¹⁰³ to invoke the existing common law contractual duty of employers to provide a reasonably safe place of employment. While there is a good case for such traumatic mental stress to be compensated under workers' compensation schemes,

¹⁰¹ *Curling*, *supra* note 100.

¹⁰² In his update of *Employment Law in Canada*, *supra* note 2, England suggests at para. 14.159.1, that *United Grain Growers* has had a major impact on the practice of determining reasonable notice periods." The author does note, however, the absence to date of empirical evidence of the impact of such judgments on employer practices.

¹⁰³ Subject to the plaintiff's pleading.

this is not the law. There is an important role for the courts to play in encouraging and expediting amendments to workers' compensation legislation or policy.

Furthermore, while workers' compensation schemes in Canada continue to exclude compensation for chronic mental stress, the courts would seem to have a legitimate role to play in compensating such injuries where a plaintiff establishes causation and a breach of the employer's duty to provide a reasonably safe place of work. Once more, judicial activism may provide the stimulus for statutory reform to compensate chronic mental stress.

The proposed revival of the common law duty to provide a safe and healthy place of employment contemplates circumstances in which the courts would be asked to rule on a matter already covered by human rights legislation. There is much validity to the argument that such matters are better dealt with by statutory bodies with expertise and an array of remedies not normally available to the courts. That said, difficulties attend exclusive reliance on human rights commissions and tribunals. Human rights administrators have substantial discretion with respect to the carriage of complaints.¹⁰⁴ For example, if the Human Rights Commission considers an employer's offer of settlement fair, a complainant would be obliged to accept the offer or have the case dropped. This might be particularly onerous to the claimant if a condition of the settlement included confidentiality. A further difficulty attending the human rights machinery is substantial delay.

It might also be considered that the statutory machinery of occupational health and safety legislation is preferable to common law actions. Again, for workers and industries covered by such legislation this will normally be true. However, in the modern era of reduced public spending, it is by no means certain that occupational health and safety departments are staffed at levels that would enable them to investigate and supervise conditions giving rise to chronic workplace stress.

It is appropriate that issues of workplace stress be resolved through the application of the law of contract. The premise of contractual relations is the mutual benefit of the parties. There is strong evidence that both chronic and traumatic mental stress are costly to employees and employers alike. Frequently, such costs are externalised to society at large. Accordingly, reasonable steps by an employer to reduce mental stress in the workplace should be characterised not as a cost to, or burden on, employers and a benefit to employees, but as a mutual benefit to both parties. Of course, if the courts are to assume such a role, they must be prepared to embrace fully the paradigm shift urged by Langille, and affirm the spirit of partnership that underpins the rhetoric of con-

¹⁰⁴ See for example, *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at 891, LaForest J.; *Betty M.E. Holmers v. Attorney General of Canada and Canadian Human Rights Commission* (1999), 36 C.H.R.R. D/444 (F.C.A.); *McAllister and Lawson v. Maritime Employers Association and others* (1999), 36 C.H.R.R. D/446 (F.C. T.D.).

temporary human resources management and employment relations. There are recent signs that the courts are well-equipped to assume such a role.