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Thunder Bay – 715 Hewitson Street Suite 2000 Thunder Bay ON P7B 6B5
807-622-6821 fax: 807-623-3892

Police Services Newsletter, February 2017

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Bill 163: The Presumption of Work-Related PTSD in First Responders

Legislation passed in April 2016 creates a presumption that PTSD diagnosed in first responders is a work-related illness for police officers (including First Nations constables), firefighters, paramedics, emergency response teams, certain workers in correctional institutions and secure youth justice facilities, dispatchers of police, firefighter, and ambulance services. This change means causation no longer has to be established as the new legislation assumes that PTSD arises out of the nature of the work performed by first responders. In the spring of 2016 the Ontario Government enacted the *Supporting Ontario's First Responders Act* (Posttraumatic Stress Disorder) (the "Act"). The legislation amends the *Workplace Safety and Insurance Act* (WSIA), as well as the *Ministry of Labour Act* (MOLA) and is aimed at reducing the significant social impact of PTSD among first responders.

For purposes of the Act "police officers" titled to the benefits conferred by the new legislation include:

> *"…a chief of police, any other police officer or a First Nations Constable, but does not include a person who is appointed as a police officer under the Interprovincial Policing Act, 2009, a special constable, a municipal law enforcement officer or an auxiliary member of a police force."*

The new legislation creates a presumption that PTSD in police officers and other specified First Responders arises out of and in the course of the workers' employment, unless the contrary is shown. Given the recent passing of this legislation, the way in which contrary evidence will be determined remains to be seen. Medical records containing a diagnosis of PTSD prior to a worker becoming employed as a First Responder is an example of evidence that would likely call into question the presumption of work-related PTSD.

Exception to the enhanced benefits for police officers

An exception to the enhanced benefits for police officers is found in subsection 14(7) of the WSIA that excludes benefits for PTSD where PTSD is found to have arisen from employee discipline or the employer's actions or decisions relating to a worker's employment. In other words, if an employee is disciplined, suspended, or terminated and develops PTSD as a result, that employee would not be entitled to benefits under the WSIA.

What do changes to the Act mean to Police Services Boards?

Amendments to the MOLA under Bill 163 allow the Ministry of Labour to direct Police Services Boards to create and report on a plan "to prevent post-traumatic stress disorder arising out of and in the course of employment at the employer's workplace". The Act provides little, however, in the way of detail regarding the scope or nature of a report on PTSD prevention initiatives. Prudent employers in the field of emergency services, Police Services Boards should be proactive and take steps to assess and implement ways to minimize the risk of PTSD among employees and reduce the stigma that all too often prevents first responders from getting the help they may need. Police Services Boards should consider reviewing policies and procedures with a view to preventing highly stressful incidents, managing cases of PTSD through peer support, counselling or psychiatric services, and providing modified work, if available, to ease transition back to work when an employee has been diagnosed with PTSD.

Cheadles LLP has several team members who work in the area of police services with particular focus on labour, management and governance issues. Police law is becoming increasingly complex; however, with our multi-disciplinary team of labour, human rights and litigation lawyers we can assist you in managing challenges your organization may be facing. We offer the advantage of being situated in Northwestern Ontario with a cumulative 120 years in-house experience dealing with relevant areas of law within this context.

We have experience representing management in rights and/or interest arbitration, advising on pay equity issue and complaints, collective bargaining, interpreting provincial and federal legislation with respect to policing, and in the case of First Nation Police Services, the Self-Administered and the Tripartite Policing Agreements among the Federal and Provincial Government and First Nations.

Managing PTSD effectively and putting useful safeguards in place could significantly reduce costs to the Police Services Boards.

In any event, the new legislation creates a duty for Police Services Boards to minimize to the extent reasonably possible the risks associated with work-related PTSD, through prevention and realistic return to work strategies. Regardless of the automatic entitlement to benefits and new presumptions about PTSD, Police Services Boards must be ready, willing and able to have police officers who are suffering from PTSD return to work and have a return to work plan in place to maintain them in or reintegrate them into their workplace. Police Services Boards must also consider what strategies are available for reducing the prevalence and severity of work-related PTSD, including the availability of Employee Assistance Programs (EAPs). PTSD is but one of many mental illnesses that may arise out of the demanding and stressful work environment inherent to the field of emergency services. This legislation only recognizes PTSD and not other work-related mental illnesses but this limitation will likely diminish over time.

What do changes to the Act mean for police officers?

Once a police officer or other first responder is diagnosed with PTSD by either a psychiatrist or a psychologist, as described in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), published by the American Psychiatric Association, the officer or first responder is entitled to WSIB benefits. The WSIB claims process is expedited because causation no longer has to be established as the new legislation assumes that PTSD arises out of the nature of the work performed by first responders.

The new legislation means police officers and other first responders recognized under the Act are entitled to quicker access to WSIB benefits along with resources and timely treatment.

Navigating the legislative and regulatory scheme under the WSIA is complex and each employee's work-related disability is unique. Cheadles LLP has expertise in assisting police services with all areas of human resources law, including providing advice on compliance with applicable federal and provincial legislation.

Author:

Rachael Paquette, J.D.

Informer Privilege in the Civil Context

On January 9, 2017, in *Nissen v. Durham Regional Police Services Board* ("Nissen") the Ontario Court of Appeal ("ONCA") found the Durham Regional Police Services Board liable for $460,000.00 in damages for breaching informant privilege. In *Nissen* the ONCA examined what the required elements are for a claim for damages

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against police for breach of a promise of confidentiality made to a citizen reporting criminal wrongdoing.

Informant privilege is typically associated with criminal law and not civil liability as it is in *Nissen*, which makes that case noteworthy. In criminal law, when an accused requests disclosure from the Crown, information that identifies a confidential informant will only be disclosed where it is necessary to prove innocence, commonly referred to as the innocence-at-stake exception. When a police services board or Crown breach confidentiality that has been promised to an informant, however, the police services board or Crown, as the case may be, can be held civilly liable for damages, as *Nissen* makes clear.

Background

While living on a quiet street in Whitby, Ontario, Ms. Stack—a wife and mother of three—acquired certain knowledge of criminal acts of her neighbour's children; namely, that one son, P.E., broke into another neighbour's house, stole guns, and, along with his brother S.E., took them to school threatening other students. Ms. Stack felt compelled to inform the police, but feared retaliation for doing so. Nevertheless, in an attempt to get the police involved while still remaining anonymous, Ms. Stack had a friend call the police station to inform authorities anonymously of her knowledge. Sometime later, however, Ms. Stack received a phone call from Officer Liepsig, requesting more information. Although frustrated that her friend disclosed her identity, Ms. Stack reluctantly agreed to attend the station for an interview, so long as her identity would never become public.

Trial Decision

At trial, Ms. Stack testified that Officer Liepsig ("Liepsig") provided several assurances that he would keep her identity secret, but never specifically used the term "confidential informer". Although Officer Liepsig did ask Ms. Stack if it was okay if he took notes during the interview, to which she agreed, he failed to inform her that he was video recording the interview the entire time. What's more, in the face of Liepsig's testimony that he at no point provided assurances to Ms. Stack regarding confidentiality, the video clearly showed the officer state: "This is between you and I. Of course, I have to keep records of this for ourselves… That stuff does not get disclosed. It is not made available to the public. You don't have to worry about that."

Shortly after Ms. Stack provided this interview, the two sons, P.E. and S.E., were arrested, and the video of Ms. Stack's interview was provided to Defence Counsel as part of the Crown's disclosure. Officer Liepsig testified that he did not see the disclosure that was furnished to the accused boys, nor did he inform other officers or the Crown attorneys that he had made a promise of confidentiality to Ms. Stack. In the weeks following, the parents of P.E. and S.E. engaged in what could only be described as a campaign of harassment and abuse directed at Ms. Stack and her husband, Mr. Nissen, including nearly hitting Ms. Stack with their truck while she was walking on the side walk and threateningly glaring into their home through the front room window.

As a result, Ms. Stack suffered from feelings of hopelessness, depression, and a diagnosis of post-traumatic stress disorder. Eventually, she and her family were forced to sell their home and move.

Court of Appeal Decision

What is clear from the analysis of Justice Sharpe of the Ontario Court of Appeal is that the legal determination of an informant's status is a matter of substance as to the promises made: if an officer makes a promise of confidentiality and anonymity to a member of the public, in exchange for information, that individual is owed a duty of care with respect to his or her confidentiality, and if a breach is subsequently alleged, the case then "falls squarely within the long-recognized cause of action for breach of confidence."

Accordingly, it is not necessary to specifically refer to the informant as a "confidential informant" for the privilege to attach, nor is it satisfactory to simply follow or not to follow any police board guidelines for dealing with informants. Furthermore, when an informant is furnished with the privilege of confidentiality by way of a promise, a breach of that promise will attract liability for the damage suffered as a result. In the case of *Nissen*,

that liability cost the Durham Regional Police Services Board $460,000.00 plus legal costs.

Justice Sharpe's succinct summary at paragraph 35 of the decision, provides instructive guidance:

> *"It is, of course, for the police to decide whether or not to make a promise of confidentiality. In making that decision, they will no doubt make an assessment of the value of the information the witness may have to offer, whether they can get the information through other means, and the danger the witness may face if his or her identity is revealed."*

Going forward, Police Service Boards must ensure police officers who make any reasonably clear commitment to keeping an informant's identity confidential in a civil matter do so. Not doing so risks liability for damages suffered by the informant from the consequences of wrongful disclosure.

Authors:

Rachael Paquette, J.D.
Mark Doble, Articling Student

Rachael Paquette, J.D.

Areas of Practice:

Police Services

Labour & Employment Law

Aboriginal Law

Don Shanks, LL.M.

Areas of Practice:

Labour Law & Relations

Human Rights Law

Police Services

Lawyers, for more information visit us at www.cheadles.com or call 807-622-6821

Cheadles LLP prides ourselves on providing timely, practical solutions that make good sense in both outcome and cost. We are structured to foster and facilitate maximum interaction among our lawyers, so our clients have complete access to the full spectrum of legal services from our team.

We have four partners and five associates along with twenty-five support staff. The members of our firm are on call twenty-four (24) hours a day, seven (7) days a week, and to the extent that you have legal needs of an urgent nature, we are capable through this process of responding to those needs in an immediate and cost effective manner.

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