



Weiler, Maloney, Nelson

Thunder Bay Health and Safety Conference  
WSN & PSHSA

# “Workplace Violence and Harassment: Then and Now”

Weiler, Maloney, Nelson  
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## Outline

- Pre Bill 168
- Bill 168 and 132
- Employer liability to victims
- Employer liability to perpetrators



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## Theresa Vince

Theresa Vince worked at the Chatham Sears Store

Theresa reported she was being sexually harassment by Russel Davis, her supervisor

When the harassment did not stop, Theresa was going to retire to get away from the harassment

On **June 2, 1996**, one month from retirement, Russel Davis walked into the Sears store and shot Theresa and then himself



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## Theresa Vince

**Inquest** held September to December 1997

### **Recommendation:**

The ongoing study into the Health and Safety Act to include Sexual Harassment needs to be made a priority to get the results and answers required **to make an informative decision about including Harassment and Sexual Harassment into the current system**



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## Lori Dupont

Lori worked as a nurse at the Hotel-Dieu Grace Hospital in Windsor, Ontario

She had a relationship with a doctor, Marc Daniel, that ended in February 2005

Marc Daniel attempted suicide and had some of his hospital privileges removed then re-instated

Lori and Marc Daniel were scheduled to work together in **November 12, 2005.**

Lori was killed when stabbed 7 times by Marc Daniel in the recovery room at the hospital. Marc Daniel then killed himself



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## Lori Dupont

Inquest September to December 2007

### Recommendation:

It is recommended that there be a review of the *Occupational Health and Safety Act* to **examine the feasibility of including domestic violence (from someone in the workplace), abuse and harassment as factors warranting investigation and appropriate action by the Ministry of Labour** when the safety and well being of an employee is at issue. Specifically, the review should consider **whether safety from emotional or psychological harm, rather than merely physical harm, ought to be part of the mandate of the Ministry**. In this regard, the review should be directed to include an examination of the legislation and policies in place in other comparable jurisdictions, in Canada and elsewhere.



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**2010**



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***Occupational Health and Safety Act***

Bill 168 – June 15, 2010

Bill 132 – September 8, 2016





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## **Occupational Health and Safety Act**

Added to the Act:

- Workplace violence
- Workplace harassment
- Workplace sexual harassment

## Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance), [2011] O.L.A.A. No. 393

- First decision interpreting Bill 168
  1. Vexatious **language** is **harassment** and very serious. Language to end a person's life or impending danger is **violence**.
  2. Employers must **react quickly and with gravitas**; must have a clear **policy** in place; follow the **procedure**; must **investigate**. Not “zero tolerance”. **Discipline** must be thoughtful and proportionate to the misconduct and to the impact of that behaviour.



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**Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance), [2011] O.L.A.A. No. 393**

3. Give **increased weight** to the seriousness of the incident; and
4. Relevant whether Employer can **provide a safe workplace**, employment incapable of **reparation**, offending employee is likely to **repeat**.



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## **Liability for Workplace Harassment**



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## Using Harassment as a Sword

## ***Sweeting v Mok*, 2015 ONSC 4154**

“Dr. Mok treated Ms. Sweeting with **condescension**. He **shouted** at her. He **pointed at her**. His behaviour was **aggressive**. His language was **hostile** and he used **profanity**. He **accused her** of being resistant to change. He told her to **get out**. He said he was **sick of her presence** and made an **insulting personal reference** ... effect of diminishing Ms. Sweeting’s stature and dignity in the office ... that treatment made future performance of her work impossible and her continued employment intolerable. The employment relationship was effectively destroyed in that meeting. **Ms. Sweeting was quite entitled to treat the employment relationship as constructively terminated**”

## *Sweeting v Mok*, 2015 ONSC 4154

“An employer owes a **duty** to its employees **to treat them fairly, with civility, decency, respect and dignity**. An employer who subjects employees to treatment that renders **competent performance of their work impossible, or continued employment intolerable**, exposes itself to an action for **constructive dismissal**. Where the employer’s treatment of the employee is of **sufficient severity and effect** ... The employee is entitled to treat the employment contract as at an end, and to recover at least **damages in lieu of reasonable notice**. ”

## ***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*** 2016 ONCA 520

- Strudwick suddenly lost her hearing – completely deaf
- The GM and her direct supervisor started a campaign of abuse
  - Publically belittling, harassing and isolating
  - Denied accommodation
  - Abuse designed to increase her difficulty
  - Fired Strudwick “in a manner to cause maximum embarrassment”





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## ***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*** 2016 ONCA 520

- Compensation
  - 20 months pay in lieu of notice (15 year employee)
  - Additional 4 months for bad faith
  - \$40,000 for harassment
  - \$35,294 for intentional infliction of mental distress



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## ***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*** 2016 ONCA 520

- Compensation
  - \$70,000 for aggravated damages
  - \$55,000 for punitive damages
  - Would have been higher if Strudwick had claimed more

***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*** 2016 ONCA  
520

- Section 46.3(1) of the Code provides for the **vicarious liability** of corporations for the acts of their officers, employees or agents.
- Except
  - harassment in employment - section 5 (2)
  - Sexual harassment - section 7(2)



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***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*** 2016 ONCA 520

“While a corporation cannot be held vicariously liable for the acts of its employees, agents or officers when it comes to harassment, **the failure of management to deal with the harassment**, thereby creating a **poisoned work environment**, is a violation under s. 5(1) of the Code for which the corporation can be held vicariously liable”



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***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*** 2016 ONCA  
520

“An employer is **jointly and severally liable for the tortious conduct of an agent** acting with express, implied or apparent authority”



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*Strudwick v. Applied Consumer & Clinical Evaluations Inc.* 2016 ONCA 520

“if the individual responsible for the harassment is a **directing mind of the corporation**, then the corporation can also be held liable for the individual acts of harassment: ”

## ***Harriott v. National Money Mart*, 2010 HRTO 353**

- Harriott filed a complaint with the Ontario Human Rights Tribunal alleging she was discriminated in employment on the basis of sex, sexual solicitation and reprisal
- The Tribunal concluded that Harriott, a CSR, was discriminated against by the Branch Manager

***Harriott v. National Money Mart*, 2010 HRTO 353**

Sexual harassment under the Code is

- (i) a course of vexatious conduct or comment,
- (ii) by an employer or employer's agent,
- (iii) unwelcome or ought to be known to be unwelcome and
- (iv) related to sex or gender



## *Harriott v. National Money Mart*, 2010 HRT0 353

- Examples of sexual harassment
  - **unwelcome sexual flirtation**, advances, propositions or gestures
  - verbal harassment such as **sexist jokes and innuendos** causing embarrassment or offence, told or carried out after the joker has been advised that they are embarrassing or offensive, or that they are, by their nature, clearly embarrassing or offensive
  - **Leering**
  - **sexually degrading words** to describe a person
  - **graphic, verbal comments** about an individual's physical characteristics or clothing
  - inappropriate display of **sexual pictures or materials** that are considered offensive
  - verbal abuse, **reprisal or threat of reprisal** for rejection of a sexual solicitation or advance

## *Harriott v. National Money Mart*, 2010 HRTO 353

- Employer argued that no sexual harassment because there was little or no objection
  - Rejected by Tribunal

“the general law which is that the **employer bears an obligation to ensure a harassment-free workplace** exists, regardless of whether employees tolerate it.”

## *Harriott v. National Money Mart*, 2010 HRTO 353

### Employer's Duty to Investigate

“... the **employer's obligation**, once aware of the possibility of harassment occurring in the workplace, to undertake a **prompt, serious and thorough investigation** which, in the appropriate case, will lead to consequences for the harasser”

The standard is not correctness but reasonableness



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## Harassment as a Shield



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### ***Reign II Productions Inc. v. IATSE, Local 873*** 2017 CanLII 26154 (Ont.Lab.)

- Complainant stated the grievor confronted the Complainant, stared him down and made derogatory and racist comments
- Grievance of termination was dismissed

## ***Reign II Productions Inc. v. IATSE, Local 873* 2017**

CanLII 26154 (Ont.Lab.)

“Angrily confronting others in their workplace, raising one’s voice to them, violating the personal space of others, staring and glaring, shunning or ignoring others, name calling and speaking ill of others, and doing things to make others feel uncomfortable in their workplace constitutes workplace harassment. This is not a minor matter - it is, as a matter of law, **serious misconduct**. It causes serious hurt to its victims. It upsets people, makes them uncomfortable, and makes them feel unsafe. It has potential to make people stay away from work, and has potential to make victims genuinely ill. No one should be made to feel this way in their workplace. No one should be victimized by a workplace bully. An employer is responsible for ensuring that workplace harassment is eliminated from the workplace. Just as an employer is obligated to rid a workplace of toxic substances, an employer is obligated to rid the workplace of toxic human behaviour”

***Reign II Productions Inc. v. IATSE, Local 873*** 2017  
CanLII 26154 (Ont.Lab.)

“**Workplace harassment** is intended to make others feel uncomfortable. It is intended to make the victim feel small, humiliated, and embarrassed. It is intended to disrupt another employee’s ability to feel welcome, at ease, and safe in the workplace. It **is an insidious form of dangerous behaviour** – designed to damage the victim’s emotional state, rather than his or her physical state. It is often, by nature, an act committed by subtle acts such as looks, stares, glares, physical posturing, or utterances. It is committed by ignoring, shunning, refusing to address, or giving the victim the silent treatment. It is often committed on the sly, and frequently without eyewitness to the behaviour.”

***Simpson v. Consumers' Association of Canada* (2001),  
57 O.R. (3d) 351 (C.A.)**

- Simpson dismissed for sexually harassing female employees
- Simpson sued his employer and his court action was dismissed on the basis the employer had cause for termination
- Key issue was whether conduct outside of regular office location and regular office hours could be harassment



***Simpson v. Consumers' Association of Canada* (2001),  
57 O.R. (3d) 351 (C.A.)**

- Incidents occurred at meetings or retreats at hotels and Simpson's cottage
- Perceived by staff as job related
- Those invited were either employees or volunteers and the function was paid by the employer

***Simpson v. Consumers' Association of Canada* (2001),  
57 O.R. (3d) 351 (C.A.)**

*Conclusions:*

- **Consent does not mean the conduct is not unwelcome**
- Those affected by sexual harassment is not limited to the direct victims but includes others who receive less favourable treatment and work in a sexually charged atmosphere

***Simpson v. Consumers' Association of Canada* (2001),  
57 O.R. (3d) 351 (C.A.)**

*Conclusions:*

- The workplace may be broader than the office property or regular office hours. It included Simpson's cottage, a hotel room or hospitality suite because employees attended for business reasons
- Although the incidents “**did not take place within the physical confines of the office, they occurred in the context of the work environment**”



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**Protection from Whom**

***British Columbia Human Rights Tribunal v. Schrenk,***  
2017 SCC 62

- SM was harassed by S
- SM worked for Omega
- S worked for Clemas and subordinate to SM
- Omega supervised the work of Clemas
- SM and S were not in an employment relationship
- The key issue was whether the Canadian Human Rights Act applied to SM and S

***British Columbia Human Rights Tribunal v. Schrenk,***  
2017 SCC 62

*Conclusion*

- Discrimination does not have to be perpetrated by a person in an employment relationship

*Test*

- Was there **sufficient nexus** between the discrimination and the employment

***British Columbia Human Rights Tribunal v. Schrenk,***  
2017 SCC 62

“non-employers can exercise economic power over employees”

“Men can exercise gendered power over women, and white people can exercise racialized power over people of colour. The **exploitation of identity hierarchies** to perpetrate discrimination against marginalized groups can be just as harmful to an employee as economic subordination”

***British Columbia Human Rights Tribunal v. Schrenk,  
2017 SCC 62***

Whether a server is harassed by the restaurant owner or the bar manager, by a co-worker, or by a regular and valued patron, the server is nonetheless being harassed in a situation from which there is no escape by simply walking further along the street.”



***British Columbia Human Rights Tribunal v. Schrenk,***  
2017 SCC 62

“while the person in control of the complainant’s employment may be primarily responsible for ensuring a discrimination-free workplace ... the aspirational purposes of the Code require that individual perpetrators of discrimination be held accountable for their actions. This means that, in addition to bringing a claim against their employer, the complainant may also bring a claim **against the individual perpetrator.**”



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# Social Media

## ***Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re (2017), 270 L.A.C. (4<sup>th</sup>) 341 (Ont. Arb.)***

- TTC maintained a Twitter account which was monitored and responded to by its employees
- Public used the twitter account to complain about TTC employees
- Some tweets from members of the public were harassing and threats of violence

## ***Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re (2017), 270 L.A.C. (4<sup>th</sup>) 341 (Ont. Arb.)***

### *Conclusion*

- The employer's obligations are triggered if its employee is discriminated/harassed by a non-employee third party (e.g. visitor or guest)
- **Social media** sites operated by TTC can constitute **part of the workplace**

***Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re (2017), 270 L.A.C. (4<sup>th</sup>) 341 (Ont. Arb.)***

*Conclusion*

- TTC failed to **take all reasonable and practical measures** to protect employee from harassment by members of the community
- TTC has to deter offensive tweets; advise it does not condone offensive tweets; request tweeters to delete and if do not, block the tweeter

## ***Toronto (City) and IAFF, Local 3888 (Bowman), Re*** 2014 CarswellOnt 19312, [2014] O.L.A.A. No. 507

- Firefighter made sexist, misogynist and racist tweets
- On his personal account
- Directed at members of the public
- Identified himself as a Toronto firefighter

***Toronto (City) and IAFF, Local 3888 (Bowman), Re***  
2014 CarswellOnt 19312, [2014] O.L.A.A. No. 507

- No individual complaint
- Firefighter did not intend to hurt
- Firefighter grieved his termination for cause

## ***Toronto (City) and IAFF, Local 3888 (Bowman), Re*** 2014 CarswellOnt 19312, [2014] O.L.A.A. No. 507

### *Conclusion*

- Terminated for breaching human rights and anti-harassment policy

“It is my view that circulating and disseminating slurs, derogatory comments, insults, in the form of jokes, **even if created by someone else**, constitute serious acts of discrimination.”



***Toronto (City) and IAFF, Local 3888 (Bowman), Re***  
2014 CarswellOnt 19312, [2014] O.L.A.A. No. 507

*Test*

- Applied accepted test for off duty conduct (e.g. damages to employer's reputation)
- Modified one element: Employee guilty of **serious breach** of Criminal Code or a **Human Rights Policy or Code**

***Toronto (City) and IAFF, Local 3888 (Bowman), Re***  
2014 CarswellOnt 19312, [2014] O.L.A.A. No. 507

“But when engaging in social media use, it is my view that the user must accept responsibility when the content of his or her communications is disseminated in exactly the manner promoted by the social media provider. This is what social media is intended to do. Once we use these devices, once we load that gun, it is potentially dangerous.”



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### ***USW v. Tenaris Algoma Tubes Inc.*, 2014 CanLII 26556**

- Male crane operator worked with a female co-worker
- Operator complained about co-worker during shift
- After shift, operator went home and complained about co-worker on Facebook

***USW v. Tenaris Algoma Tubes Inc.*, 2014 CanLII 26556**

- Although not named, co-worker readily identifiable
- Operator suggested a violent and humiliating sex act be inflicted on the co-worker; used a cruel nickname
- The crane operator grieved his termination



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### ***USW v. Tenaris Algoma Tubes Inc.***, 2014 CanLII 26556

#### *Conclusion*

- Not "off duty" conduct because it was directed at poisoning the co-worker 's work environment.
  
- Grievance dismissed



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### ***USW v. Tenaris Algoma Tubes Inc., 2014 CanLII 26556***

“Making nasty comments on Facebook is not an acceptable response to frustration with a co-worker. Furthermore, the viciousness of the comments is completely out of proportion to the issue between D and X. In addition, the grievor's comments were **not made in the heat of the moment** during an altercation with X. They were made after his shift ended when he was at home and had time to consider his words. The worst comment came two hours after the first one.”



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***USW v. Tenaris Algoma Tubes Inc.***, 2014 CanLII 26556

“... it would be highly unreasonable for him to claim that he did not know that publicizing such comments about a co-worker was harassment and contrary to the company's policies.”



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### ***USW v. Tenaris Algoma Tubes Inc., 2014 CanLII 26556***

“When men “joke” about the sexual violence they should inflict on a woman she can reasonably be concerned that they may actually hurt her ... the grievor sexually harassed X and created a poisoned work environment ... The company is responsible under the Human Rights Code, OHSA and the collective agreement for maintaining a workplace free of harassment”





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**What does the Future Hold?**

## ***Fox v Narine*, 2016 ONSC 6499**

- Fox was resident at women's shelter operated by A Inc. – had a mandate to support Aboriginal women and their children who reside there
- Narine broke in and sexually assaulted Fox
- Fox started court action alleging A Inc. was negligent

## ***Fox v Narine*, 2016 ONSC 6499**

### *Conclusion*

- The general 2 year time limitation does not apply to an action for sexual assault nor to a claim for **negligence** arising from the sexual assault

## ***Jane Doe v. Weinstein*, 2018 ONSC 1126**

- Doe alleged she was assaulted by Weinstein
- Schneeweiss worked for Miramax and assistant to Weinstein
- Doe alleged Schneeweiss facilitated the assaults by Weinstein and sued Schneeweiss for negligent failure to warn, intentional infliction of mental injury, negligence, negligent misrepresentation and negligent infliction of nervous shock

## *Jane Doe v. Weinstein*, 2018 ONSC 1126

### *Conclusion*

“The clear objective of this provision is to ensure that victims of sexual assault may pursue **civil claims**, not just against the perpetrators of the assaults but also **against others who may be civilly liable in connection with the assaults**, regardless of when the claim is commenced”

“This encompasses proceedings against third parties (i.e. persons other than the perpetrator of the sexual assault) regardless of the nature of the claim, whether for breach of duty, vicarious liability or otherwise, provided that the connection with a sexual assault is established”



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**Questions**



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**Send me an email, [basmith@wmnlaw.com](mailto:basmith@wmnlaw.com), if you want a copy of this presentation or any of the cases.**



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# “Workplace Violence and Harassment: Then and Now”

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