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Violence & Harassment in the Workplace August 23, 2017

Violence & Harassment in the Workplace

Presented by:

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Disclaimer

- Nothing in this presentation is or should be seen as legal advice
- This presentation is meant to explore and discuss some of the legal issues around workplace harassment and workplace violence
- The purpose is general education – NOT legal advice
- Should you need further advice, consult your employer, professional practice leaders, or a lawyer

Road Map

- Bill 168/OHSA Overview
- Which forum?
- Case Law
 - What **IS** “workplace violence” and “workplace harassment”?
 - Legal outcomes of Workplace Violence and Harassment

Bill 168: Amendments to OHSA

- Bill 168 added Part III.0.1 to the OHSA, titled “Violence and Harassment”
- Obligates employers to create policies relating to “workplace violence” and “workplace harassment”, and a program to implement these policies

Bill 168: Amendments to OHS/A

- There are potentially hefty fines for failure to create these policies
- In one case, a company was fined \$70,000 for failure to create the necessary policies and programs as required by the Act

OHSA: Workplace Violence

Workplace Violence Program

- Employers must assess “assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work”.
- This assessment must be shared with the Health & Safety Committee, or if there is none, the workers

OHSA: Workplace Violence

Workplace Violence Program (5< Employees)

- The program shall:
 - Include measures and procedures to control the risks identified in the assessment as likely to expose a worker to physical injury
 - Include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur
 - Include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor
 - Set out how the employer will investigate and deal with incidents or complaints of workplace violence
 - Be reviewed annually

OHSA: Workplace Violence

- Domestic violence:
 - “If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.”

OHSA: Workplace Violence

- In general, employers and supervisors must take every precaution reasonable in the circumstances for the health and safety of its employees, including as it relates to workplace violence

OHSA: Workplace Harassment

Workplace Harassment Program

- The program must be developed with the Health & Safety Committee or a representative

OHSA: Workplace Harassment

Workplace Harassment Program

- The program must:
 - Include mechanisms to report incidents of workplace harassment to the employer
 - Include mechanisms to report incidents of workplace harassment to someone other than the alleged harasser
 - Set out how incidents or complaints of workplace harassment will be investigated and dealt with
 - Set out how confidentiality will be maintained (unless the disclosure is necessary for the purposes of investigating or taking corrective action, or is otherwise required by law)
 - Set out how those affected will be informed of the outcome of the investigation, along with any corrective action that has or will be taken

OHSA: Workplace Harassment

- To protect workers from workplace harassment, employers must ensure that:
- An appropriate investigation is conducted into incidents and complaints
- The complainant and respondent are informed of the investigation's outcome and any action that will follow
- The program is reviewed annually



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Outside of OHSA...

- Separate and apart from, and in addition to the rights under OHSA, there may be rights and obligations under an employer's/organization's workplace violence and harassment policies
- Or under Collective Agreements for unionized employees

Which Forum?

- Where are the legal rights enforced?

Which Forum: MOL, OLRB

- OHSA investigations are conducted by Ministry of Labour (“MOL”) Inspectors
 - Investigate, issue orders where required
- Appeals of Inspector’s Orders are adjudicated upon by the Ontario Labour Relations Board (“OLRB”)

Which Forum: MOL, OLRB

- MOL Inspectors and the OLRB may issue orders in relation to workplace violence and health and safety
- Neither the OLRB nor MOL Inspectors will adjudicate upon individual complaints of harassment
- They will determine whether or not the employer complied with the OHSA – did they have a harassment policy in place and follow the steps in OHSA
- An MOL inspector also has authority to order that the employer conduct an investigation into a complaint of workplace harassment
 - By either the employer
 - Or an impartial third party

Which Forum: The Courts

- Charges may be laid by the Crown/MOL in relation to breaches of the OHSA and adjudicated before the Courts

Which Forum: The Courts

- The case law is mixed, uncertain and tenuous as to whether or not harassment can give rise to a “tort” claim
- No published court cases where a tort claim of “battery” (the intentional infliction of unlawful force on another person) has been made in respect of workplace violence

Which Forum: The Courts

- At least one wrongful dismissal case held that an Admin Assistant had been constructively dismissed due to personal harassment
- The judge found that the harassment made her workplace so intolerable that she had been constructively dismissed

Which Forum: HRTO

- The Human Rights Tribunal of Ontario deals **ONLY** with claims that someone has been harassed or discriminated against based upon a prohibited ground:
 - race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability

Which Forum: HRTO

- The Human Rights Tribunal will not hear complaints of “personal” or “general” or “non-code-ground” harassment, nor workplace violence

Which Forum: Grievance Arbitration

- Arbitrators appointed to hear grievances of unionized employees have consistently held they have jurisdiction to consider claims of “general”/“personal” harassment, and claims that employers have failed to take adequate measures for health and safety
- Arbitrators have also been guided by the OHSA, and the amendments brought about by Bill 168

Case Law

- Themes:
 - What **IS** “workplace violence” and “workplace harassment”?
 - Legal outcomes of Workplace Violence and Harassment
- Types of Cases:
 - CNO case
 - Discipline Cases
 - Complaints of workplace violence, harassment
 - OHSA court fines

Legal Definition of Workplace Violence

- OHSA defines “workplace violence” as:
 - The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker
 - An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, OR
 - A statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker

Legal Definition of Workplace Harassment

- OHSA defines “workplace harassment” as: “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome or workplace sexual harassment.”



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Legal Definition of Workplace Harassment

- Section 1(4) of OHSA: A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- The Committee found that a Nurse engaged in sexual harassment and unwanted touching of 4 different coworkers
- The conduct included:

Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- Asked a coworker on a date and if she had a boyfriend
- Attempted to place a name tag on coworker's chest
- Touched the coworker on her shoulder and thigh
- Blocked a coworker from exiting the medication room



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Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- Brushed his body against another coworker in the medication room and placed his arms around her
- Offered another coworker a message and touched her shoulders and breasts
- Touched another coworker on the shoulders several times

Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- The CNO took into account the fact that the facility had a workplace harassment policy, and was guided by the policy's definition of the term
- The CNO also took into account the fact that the Nurse had undergone the relevant training in relation to the policy

Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- The Panel found that this conduct constituted conduct that would “reasonably be considered by members [other Nurses] to be disgraceful, dishonourable, and unprofessional.”

Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- “It is clearly unprofessional, as this sort of conduct falls below members’ expectations of appropriate workplace conduct.”

Case Law - CNO

P.G. – CNO Discipline Committee Case, 2013

- “It is dishonourable because there is a definite element of moral failing. The Member ought to have known that his conduct was unwanted and made the complainants uncomfortable. They showed this through their actions and certainly by telling him to stop.”

Case Law - CNO

P.G. – CNO Disciple Committee Case, 2013

- “Finally, it is disgraceful because sexual harassment has a significant element of moral failing and is shameful to the Member and, by extension, the profession. Nurses are held to a high standard of conduct, not only towards their [clients] but towards their coworkers as well. Sexual harassment falls well below the expectations of the profession and the public.”

Case Law - CNO

P.G. – CNO Discipline Committee Case, 2013

- Penalties:
- Five month suspension
- Reprimand before the Committee
- Notify all employers of the decision
- Employers required to confirm they received the decision



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Case Law - CNO

P.G. – CNO Discipline Committee Case, 2013

- Penalties, con'td:
- Nurse had to attend two meetings with an expert approved by the College at his own expense
- Review a number of documents, standards prior to meeting
- Develop a learning plan with the expert
- The expert had to assess the Nurse's learning and advise the College of same

Case Law – Discipline Cases

City of Kingston & CUPE

- One of the first cases in any forum to deal with the amendments that Bill 168 brought about to OHSA regarding workplace violence and harassment
- Grievance arbitration regarding the termination of a long-service (28 years) unionized employee with a poor discipline record (2 prior terminations and reinstatements)

Case Law – Discipline Cases

City of Kingston & CUPE

- The grievor was terminated for uttering a death threat against a coworker.
- The coworker and grievor were in a heated argument that involved the coworker's friend, who was deceased.
- The coworker said "Leave my friend out of it, he's dead."
- The grievor's response: "Yes, and you will be too".



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Case Law – Discipline Cases

City of Kingston & CUPE

- The coworker, who testified, was upset by the comment but did not believe the grievor could or would carry through on the comment
- The coworker was not afraid for his life or fearful as a result of the comment
- But the arbitrator concluded that the comment nonetheless constituted a “threat”

Case Law – Discipline Cases

City of Kingston & CUPE

- The arbitrator went on to consider the impact of the then-recently-passed Bill 168
- “The Bill 168 amendments to the Occupational Health and Safety Act have changed the law of the workplace in a significant way...”

Case Law – Discipline Cases

City of Kingston & CUPE

- “These [existing obligations under the OHSA] now extend beyond ensuring safety from hazardous substances and dangerous machinery and equipment. I interpret the legislation to mean that an employer must protect a worker from a hazardous person in the workplace...”



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Case Law – Discipline Cases

City of Kingston & CUPE

- “The Bill 168 amendments...are intended to require the workplace parties to heighten their awareness, to sharpen their antennae, and to refuse to ignore the warnings of violence that puts employees in peril.”
- “The amendments, if effectively implemented, have real potential to protect the emotional health of workers who are the victims of violence. They also have real potential to save human life. They are, most obviously, to be taken seriously.”



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Case Law – Discipline Cases

City of Kingston & CUPE

- The arbitrator went on to identify four ways in which the Bill 168 amendments applied to a case such as the one before her involving the uttering of a death threat:

Case Law – Discipline Cases

City of Kingston & CUPE

- First, the amendments made clear that a *threat* of violence *is* violence
- “... [L]anguage that is made in direct reference the end of a person's life or that suggests impending danger, falls into a category of its own. This is not just language, it is violence...”

Case Law – Discipline Cases

City of Kingston & CUPE

- Second, it changed the way that workplace parties must react to a threat
- “The utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act.”

Case Law – Discipline Cases

City of Kingston & CUPE

- Third, the amendments affect how arbitrators and decision-makers interpret and adjudicate upon cases involving threats of workplace violence

Case Law – Discipline Cases

City of Kingston & CUPE

- Fourth, the Bill 168 amendments added a new factor for arbitrator to consider in assessing the justness of a disciplinary penalty involving a threat: workplace safety

Case Law – Discipline Cases

City of Kingston & CUPE

- The arbitrator upheld the termination, as the grievor failed to recognize or admit to her wrongdoing, and the arbitrator believed that in all the circumstances, termination was the just response

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- 2012 grievance arbitration decision involving the termination of an RN
- Hospital made decision to replace 20% of the RNs in the dialysis unit with RPNs
- Not long after being hired, two RPNs resigned, citing persistent bullying and harassment on the unit

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- The employer conducted an investigation
- The investigation discovered a number of instances of harassment
- Relying on that investigation, the employer terminated the grievor for “harassment, bullying and unprofessional conduct with respect to RPNs in the Dialysis Unit”

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- The Arbitrator found that the grievor had engaged in the following types of conduct that constituted harassment:

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- Embarrassed an RPN by not allowing her the opportunity to give a report on a patient
- Brushed up against the shoulder of another RPN as they were walking by each other
- The grievor came up behind an RPN who was washing her hands, and tried to pull the RPN's hair into a ponytail saying "patients do not want hair in the way"
- Questioned an RPN's qualifications in front of coworkers

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- Made one comment that RPNs are not welcome on the unit
- On numerous occasions rolled her eyes at RPNs and/or comments made by RPNs
- Was non-communicative with RPNs
- Stared hostilely at RPNs
- Yelled a patient care instruction at an RPN in front of coworkers and patients
- Mocked an RPN for asking if she [the RPN] had the correct piece of equipment

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- “... [A]s a senior Registered Nurse...involved with the nursing bargaining unit, the grievor would have been in a position of leadership and authority in the [Dialysis] Unit and in particular would have significant perceived power and authority with respect to the RPNs...”

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- The Arbitrator concluded that the employer had just cause to discipline the grievor, but struggled with what the appropriate penalty should be

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- “In this matter the grievor's actions were extremely subtle, and in that sense were extremely insidious. Bullying and harassment can consist of a single incident, or a series of repeated incidents both of which can have great impact upon the victim of the behaviour.”

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- The arbitrator ultimately concluded that termination was too harsh
- The employer had not done enough to ensure the transition and introduction of RPNs would go smoothly – there was a sense of “chaos” in the unit
- The grievor was not the only person who was unwelcoming to the RPNs
- The issue was not brought to her attention in a prompt and formal manner

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- BUT – the Arbitrator determined that the grievor should not be reinstated to employment, and ordered damages in lieu thereof

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- “The grievor's behaviour was entirely inappropriate and demonstrated the extenuating factors which indicate that the grievor should not be returned to the workplace:
 - “The workplace is a hospital which requires teamwork in order that patient care is not compromised.”
 - “The grievor's actions were a direct challenge to management's authority to staff the Dialysis Unit as management saw fit.”
 - “Her behaviour at the very least contributed to the destabilization of an entire department, and contributed to the resignation of at least two RPNs.”

Case Law – Discipline Cases

P.R.H.C. v. O.N.A.

- “The grievor was in a position of authority at least with respect to the RPNs and used that authority to bully and harass them.”
 - “There was no suggestion from the grievor that she understood the seriousness of her bullying and intimidation”
 - “...[I]f reinstated to employment, I have no confidence that she would not continue with her efforts to prevent or at least discourage RPNs from working on the Dialysis Unit.”
-
- “I have therefore concluded that there is no reasonable expectation that a viable employment relationship can be re-established...”

Case Law – Discipline Cases

Children's Hospital of Eastern Ontario

- A social worker was terminated for allegedly bullying and harassing coworkers
- The social worker had a long, clean service record

Case Law – Discipline Cases

Children’s Hospital of Eastern Ontario

- The conduct in question:
 - Socially-excluding coworkers (not saying hello, turning back during meetings when coworkers spoke)
 - Referring to a coworker as the “anti-Christ”
 - Raised voice during disagreements
 - Rolling eyes
 - Dirty looks

Case Law – Discipline Cases

Children's Hospital of Eastern Ontario

- “The conduct the Grievor engaged in this case is not the usual sort of yelling or name calling that is commonly recognized as personal harassment. However, the subtle nature of the conduct does not militate against a finding of harassment. Whether the comments or conduct are overt, or whether it is passive non-verbal behavior, a finding of harassment is only dependent on whether the conduct is vexatious and was known or ought to have been known to be unwelcome. In the present case, I find the Grievor's conduct was vexatious.”



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Case Law – Discipline Cases

Children's Hospital of Eastern Ontario

- “With respect to the assertion that the Grievor did not intend to engage in this conduct, or that [the Grievor] was unaware [of] being perceived this way, intention is not required. The issue is only whether the behavior was known or ought to have been known to be unwelcome.”

Case Law – Discipline Cases

Children's Hospital of Eastern Ontario

- The Arbitrator found the Grievor had engaged in personal harassment that merited discipline, but that termination was excessive
- The Grievor was a long-service employee with a clean record, and this was the first time this issue had been formally brought to the Grievor's attention

Case Law – Discipline Cases

Children's Hospital of Eastern Ontario

- However, the Arbitrator also found that the Grievor failed to take any responsibility or acknowledge the misconduct
- The Arbitrator accordingly declined to reinstate the Grievor as the employment relationship had been irreparably damaged
- She highlighted the intraprofessional team dynamic required in the workplace
- Damages in lieu of reinstatement were ordered



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Case Law - Harassment

- An OLRB Vice Chair held that “workplace harassment” covers behaviour such as:
 - Comments or remarks that demean, ridicule, intimidate or offend;
 - The display or circulation of offensive pictures or printed material
 - Bullying
 - Requests, suggestions or advances of a sexual nature.

Craiglee Nursing Home Ltd. (2012), 2012 CarswellOnt 11897 (Ont. L.R.B.) at para. 12.

Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- Leading case on workplace harassment
- Supervisor was alleged to engage in “personal” or “non-Code” harassment of the grievor
- Arbitrator found that the supervisor had harassed the grievor by:

Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- Repeatedly told the grievor to get back to work, but not other employees
 - Even where the other employees had approached the grievor
- Scrutinized and micromanaged the grievor's work constantly, which he did not do to other coworkers

Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- Reprimanded the grievor for overuse of the telephone but not other employees
- Followed the grievor to the washroom to monitor him
- Refused to allow the grievor to leave early for vacation when other employees were so allowed
- Held the grievor to a higher standard of performance than other employees



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Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- The impacts on the grievor
 - Had to seek medical attention, take medication, was referred to a psychiatrist and counselor
 - Was diagnosed with a major depressive disorder
 - Trouble sleeping
 - Panic attacks
 - Lost his appetite
 - Nausea
 - Did not have pre-existing mental health issues

Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- “For many people, apart from family, workplace relationships are the most meaningful relationships in their lives. The abuse and harassment in this case not only publicly humiliated [the grievor] but also isolated him from his co-workers; [the grievor] was perceived as a lightning rod for trouble and therefore his co-workers stayed away from him.”



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Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- The arbitrator determined that the grievor “was publicly humiliated on a regular and continual basis. This form of humiliation was akin to placing him in the public stocks. It isolated him from his co-workers, humiliated him publicly and stripped him of his dignity to the point where he felt “like I was a nobody”. The treatment by [the supervisor] also negatively affected his relationship with other employees and negatively affected his sense of identity, self worth and his health, including his emotional and psychological well-being.”



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Case Law - Harassment

TTC and ATU – Grievance Arbitration, 2004

- Remedies. The arbitrator ordered that:
 - The employer and the supervisor pay to the grievor \$25,000 as damages
 - The arbitrator held that the employer and the supervisor were “jointly and severally liable”
 - That the supervisor have no future communication with the grievor
 - The supervisor had to be removed from any worksite where the grievor worked

Case Law - Harassment

- In at least two cases, it has been held that a single instance of an employee being yelled at by a coworker or manager was not workplace harassment: *Craiglee Nursing Home*; *Simcoe County District School Board*.

Case Law - Harassment

- The workplace harassment provisions do not normally apply to the conduct of a manager that falls within his or her normal work function, even if in the course of carrying out that function a worker suffers unpleasant consequences.

Craiglee Nursing Home Ltd. (2012), 2012 CarswellOnt 11897 (Ont. L.R.B.) at para. 12.

Case Law – Workplace Violence

R.O.H.C.G. v. O.N.A.

- A nurse working on a psychiatric care unit was stabbed in the neck and head with a pen by a patient while escorting him from the washroom
- An MOL Inspector attended the worksite and issued a number of orders

Case Law – Workplace Violence

R.O.H.C.G. v. O.N.A.

- The union appealed aspects of those orders and sought broader protections
- ONA sought, as an interim measure, and the OLRB ordered that there be an adequate number of trained security guards for the unit, to be staffed 24 hours per day, seven days per week.
- The role of the security guards would be to escort nurses whenever and wherever a nurse is required to accompany a violent patient.
- If necessary, the security guards would be authorized to place hands on and detain a patient.

Case Law – OHSA Fines

R. v. C.A.M.H., 2016

- A patient grabbed an RPN who was doing rounds and kicked her repeatedly in the head
- The patient had a lengthy history of violence and severe psychiatric issues
- The RPN suffered a number of lasting physical and psychological injuries

Case Law

R. v. C.A.M.H., 2016

- The Hospital pleaded guilty to the charge that it had failed to take every reasonable precaution in the circumstances for the protection of its workers

Case Law

R. v. C.A.M.H., 2016

- The Hospital/defendant agreed to the following facts:
- The Hospital did not develop, establish, or put into effect necessary measures and procedures in the circumstances to insure staff performed a round safely on the night shift.
- They dimmed lights on the unit at night
- Staff performed rounds alone in the presence of a non-compliant patient who had a history of violence and who had previously reported hearing voices telling him to hurt staff.

Case Law

R. v. C.A.M.H., 2016

- In determining the fine, the judge hearing the case listed the factors to take into account in deciding on the appropriate amount

Case Law

R. v. C.A.M.H., 2016

- The size of the company involved
- The scope of the economic activity at issue
- The extent of actual and potential harm to the public
- The maximum penalty prescribed by statute
 - \$25,000 for a person; \$500,000 for a corporation
- The need to enforce regulatory standards by deterrence

Case Law

R. v. C.A.M.H., 2016

- The judge took into account the fact that:
 - The Hospital was a public organization relying on public funds
 - The Hospital had made changes since the incident (e.g. night rounds in twos)
- Ordered the Hospital to pay \$80,000 within 60 days

Case Law – OHSA Fines

C.A.M.H. - 2009

- In a 2009 decision (predating Bill 168) of the Ontario Court of Justice, a large hospital was charged with failing to take every reasonable precaution to protect its workers from workplace violence
- Three nurses in a secure observation and treatment unit were physically assaulted by a patient before the nurses could lock the door to the security station. The patient began punching the nurses
- Security staff arrived but could not enter the area as they did not have a key
- Months later, another nurse was sexually assaulted by a patient in the same unit

Case Law – OHSA Fines

C.A.M.H. - 2009

- The Hospital had a personal alarm system in place in the building, but it was not in use in the unit in question
- There was no written policy in place regarding the use of personal alarms
- The Hospital pleaded guilty and was fined \$35,000 for each incident

Conclusions, Q&A

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