

Extraordinary Damages in 6 Minutes – The Crash Course

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TABLE OF CONTENTS

Moral Damages.....	1
Aggravated Damages	3
Punitive Damages.....	4
Negligent Infliction of Mental Suffering/Intentional Infliction of Mental Suffering	6
Defamation	7
Invasion of Privacy	8
Inducing Breach of Contract	9
Other Available Relief to Consider.....	10
Conclusion	11

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Despite the frequency with which these damages are claimed by plaintiffs, the types of damages we are concerned with here are truly awarded in extraordinary circumstances. It is important to understand the essential elements of each and the potential value they represent; but remember, these are not “boilerplate” causes of action.

Extraordinary events justify the award of extraordinary damages.

Moral Damages

“Moral damages” was the term used by the Supreme Court of Canada in the 2008 decision of *Keays v. Honda*¹ to refer to the type of damages which had come to be referred to and even plead as “Wallace” damages². The “Wallace bump” was claimed where the employer acted in bad faith in connection with the termination of the employee’s employment in some respect such as to justify an increased notice period. Wallace damages had become by 2004 a routine plea leading the late Honourable Randal Echin to chastise the profession and offer a stern warning against continuing on in this practise.³ The Supreme Court of Canada in *Honda* “clarified” what had been intended in *Wallace*. It held that moral damages were justified where “it is reasonably foreseeable that the employer’s breach of the duty of good faith and fair dealing in the manner of dismissal caused the employee to suffer mental distress.” The former Wallace bump on the period of reasonable notice was removed by the court in favour of a more conservative approach where the court held a bump would only be awarded where there was a connection between the period of notice and the wrongful conduct (i.e. it took the

¹ 2008 SCR 39 (CanLII) (hereinafter “Honda”).

² As they had arising from the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.* 1997 CanLII 332 (SCC).

³ *Yanez v. Canac Kitchens*. 2004 CanLII 48186 (ON SC).

employee longer to get a job as a result). Notwithstanding, we have seen few such awards where such direct relationship is cited in the reasons for the decision.

The result of Honda was that the duty of good faith and fair dealing by an employer in the context of discharge was left significantly without teeth. The award of moral damages as they are now termed required a loss before damages were to be awarded.

The court in Honda made it clear that moral damages required more than the usual mental distress cause by hurt feelings which are anticipated and expected to result from the fact of termination of employment. Where the manner of dismissal caused mental distress, moral damages could be awarded. The Supreme Court of Canada cautioned the need to avoid duplicitous damage awards, as punitive damages and Wallace damages had both been awarded in a fair number of cases by that time, and had been the case in the lower court decisions in Honda.

The court in Honda did not add any requirement to provide medical evidence of the mental distress suffered by or the impact on the employee. The damages still stem primarily from the conduct of the employer. Notwithstanding, we have seen many decisions in which medical evidence was relied upon as supporting the award. There have still been many cases awarding damages without support though. The evidence of mental distress is often the employee's own. Severity may dictate the need for something more substantive. However, from reviewing the case law summary prepared by Mark Fletcher in a paper entitled "What is Required to Prove Moral or Bad Faith Damages: A Practical Perspective"⁴, which analyzed the evidence presented and the quantum of moral damages awarded, there has been no correlation between submitting medical evidence and the quantum of a damage award.

⁴ OBA PD – September 23, 2013, Fundamental of Employment Law.

Grounds for an award of moral damages are thought to include similar grounds to those awarded for Wallace damages which have included:

- i allegations of just cause not proven and not reasonably held or where allegations included fraud, theft, or serious misconduct in particular with respect to the later when humiliation was caused to the employee
- i misrepresentation as to the reason for a termination
- i timing of a termination with the intention to deprive the employee of a benefit which would imminently vest (pension, bonus, etc.)
- i conduct by the employer which caused harm to the employee's reputation and therefore resulted in a longer period of unemployment
- i termination of an employee returning from medical leave
- i failing to conduct a proper workplace investigation
- i failing to pay employment standards minimums⁵

Moral damage awards have averaged in the \$20,000 range since Honda. More recently however, the jury in *Boucher v. Wal-Mart Canada Corp.*⁶ saw fit to award \$200,000, a sum which the Court of Appeal refused to overturn on appeal finding the jury to have been properly instructed and hence no error was made which would justify the court's interference.⁷

Aggravated Damages

Aggravated damages have merged conceptually with moral damages post-Honda. Aggravated damages are an award of compensation for mental distress taking into account damages suffered as well as intangible injuries. The court in Honda expressly removed the distinction:

⁵ MacDonald, Natalie C., *Extraordinary Damages in Canadian Employment Law*, Carswell 2010, pp. 72-150.

⁶ 2014 ONCA 419 (CanLII).

⁷ *ibid*, par 74.

“There is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the Hadley principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages.”⁸

While there is some confusion over these terms from time to time, the Ontario Court of Appeal used the terminology of aggravated damages as opposed to moral damages in the *Boucher v. Wal-Mart* case.

Punitive Damages

The purpose of punitive damages is punishment and deterrence. These are non-compensatory damages awarded where the other damage heads available will not be sufficient to achieve the objectives of punishing the employer for what they have done and of deterrence of similar conduct in the future. At the same time, the courts have been cautious in the award of punitive damages with appeal courts bringing down significantly the awards of punitive damages made at trial by judges and juries. The quantum of awards against major corporations with sizable assets rarely fall into a range where it will be noticed on the company’s balance sheet. One question is whether the achievement of either purpose is being met by the current level of damage awards.

The quantum of punitive damages which may ultimately be awarded however remains unpredictable. The writer properly characterizes this as the “going to Vegas” of damage claims. The award, if any, will depend upon how terrible the case goes for the employer at trial.

⁸ Honda at par 59.

The Court of Appeal in *Alman v. Steve's Music Store Inc.*⁹ awarded \$20,000 in punitive damages where a 30 year employee was seriously mistreated following a medical absence associated with cancer treatment and alleged cause for the termination of her employment without justification.

The requirements for an award of punitive damages are:

1. the employer's conduct must be so harsh, vindictive, reprehensible and malicious or high handed as to offend the court's sense of decency;
2. The employer must have committed a separate independent actionable wrong causing the employee damages; and,
3. the compensatory damages awarded are not sufficient to express the court's repugnance at the employee's conduct and to punish and deter the employer.¹⁰

The Court of Appeal in *Pate Estate v. Galway-Cavendish and Harvey (Township)*¹¹ commented that the range for punitive damages in wrongful dismissal cases historically has been wide, \$25,000-\$500,000.¹² The court reviewed damage awards in such cases generally and commented that these were observation; it ultimately found no reason to interfere with the award of \$550,000 in punitive damages, marking the largest award of punitive damages in wrongful dismissal case law. The facts were egregious and not likely to repeat; however, a new watermark is set and this may have marked a movement towards higher punitive damage awards in the future.

However, more recently in *Boucher v. Wal-Mart Canada Corp.*¹³, when the Court of Appeal next considered a punitive damage award in the employment context, it reduced the award of

⁹ 2011 ONSC 1480 (CanLII).

¹⁰ *ibid* at para. 133.

¹¹ 2013 ONCA 669 (CanLII).

¹² *ibid* at par. 139.

¹³ 2014 ONCA 419 (CanLII).

\$150,000 in punitive damages as against the individual perpetrator of the acts to \$10,000 and from \$1,000,000 to \$100,000 against Walmart, finding that given the significant award of damages for intentional infliction of mental distress, and constructive dismissal damages, being \$150,000, a sizeable punitive damage award was not required to achieve the principles of punishment or deterrence.¹⁴

Negligent Infliction of Mental Suffering/Intentional Infliction of Mental Suffering

Negligent infliction of mental suffering may be available where there has been a wrongful dismissal/breach of contract and the behaviour of the employer falls below an acceptable standard of care such that the employee suffers from a visible and provable illness as a result.¹⁵ It lacks the “intentional” element of the tort of intentional infliction of mental suffering. Intentional infliction of mental suffering shall be found where the employer takes a calculated act to cause harm to the employee where harm does in fact result (this in intentional whereas a claim for moral damages does not have the same requirement of willfulness).

Such damages should be considered in instances of workplace harassment in which injury is suffered. It can be a mechanism to extend the claim for wage loss beyond a reasonable notice period as would be available in simple constructive dismissal claims. Past and future wage loss can be awarded and this head of damages can be very significant¹⁶. As with personal injury claims, in addition to wage loss, the court has jurisdiction to award general damages for assault, batter, emotional distress and mental suffering, and the Family Law Act claims special damages to compensate out-of-pocket costs for treatment and care.

The quantum of such awards will depend upon the losses which flow from the actions. \$15,000 in damages were awarded in *Prinzo v. Baycrest Centre for Geriatric Care*¹⁷, for the employer’s

¹⁴ *ibid* at par. 64.

¹⁵ *Piresferreira v. Ayotte* 2010 ONCA 384 (CanLII).

¹⁶ in *Piresferreira* *ibid* it was \$594,000.

¹⁷ 2002 CanLII 45005 (ON CA).

intentional bombardment of the employee with calls after she has commenced medical leave and was known to be medically not fit to work. \$15,000 was also awarded by the court in *Zorn-Smith v. Bank of Montreal*¹⁸ in which the employer was found to have acted with callous disregard for an employee's health where it was known that the employee was suffering from "burnout".

However, the sum of \$100,000 under this head of damages was awarded against the individual perpetrator of the unlawful acts in *Boucher v. Wal-Mart Corp.*¹⁹ with respect to which Wal-Mart was found to be vicariously liable.

Defamation

The term defamation includes both libel (which is written) and slander (which is verbal). In Ontario the right of action is set out in the Libel and Slander Act²⁰. In the context of termination of employment, employers need to be careful as to what is said about the employee on departure and what press releases are issued as these statements frequently give rise to claims of defamation. Where statements are defamatory to a person in respect of their professional calling, damages are presumed. A key point often missed and which bears mention right at the outset, a statement will not be defamatory if it is true.

There are also a plethora of defences to defamation and damages are highly contextual. The highest damage award in relation to defamation has been that in *Hill v. Church of Scientology*²¹ of \$300,000, the vast majority of damage awards fall at less than \$50,000.

¹⁸ 2003 CanLII 28775 (ON SC).

¹⁹ 2014 ONCA 419 (CanLII).

²⁰ RSO 1990, C.L.12.

²¹ 1995 CanLII 59 (SCC).

Invasion of Privacy

Invasion of privacy remains a “developing tort”. The decision of the Supreme Court of Canada in the case of *R. v. Cole*²², though arising outside the employment context, opened the doors to the claim of “intrusion on seclusion”/invasion of privacy by finding an employee’s reasonable expectation of privacy with respect to his work computer was influenced by the lack of any policy which stated to the contrary (and which in that case arguably in fact created an expectation of privacy by permitting incidental personal use and stating that employee email was private). The implication of this decision was that employers are well advised to have express policies. The employee expectations of privacy or the lack thereof in respect of their use of technology in the workplace in order to ensure employer review of the employee computer is not tortious.

We saw the first such damage award in Ontario in the appeal decision of *Jones v. Tsige*²³. This also was not an employment case but rather a claim by a third party, who also happened to be an employee, against its bank, the employer and its employee who had perpetrated the acts, for invasion of privacy. The employee of the bank had accessed the plaintiff’s bank records outside of the scope of duty associated with her position on over 100 occasions.

The court held that there can be liability for this tort in the following circumstances:

“One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.”²⁴

²² 2012 SCC 53.

²³ 2012 ONCA 32 (CanLII).

²⁴ *ibid* at par 70.

The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action."²⁵

The court held that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. It would fix the range at up to \$20,000.²⁶ In this case, the court made a finding of intrusion upon seclusion and awarded damages of \$10,000.

We can expect there will be further developments of note in this area in the years ahead.

Inducing Breach of Contract

Though this tort has a wide variety of applications, it arises where the actions of one party to induce or entice a party to a contract to breach it. There are a handful of applications which arise more commonly than others, namely:

- i the wrongful accusations by a former employer communicated to a current employer causing the termination of the employee's employment or cancellation of an employment agreement about to commence;²⁷ and,
- i the actions of one employee to cause the "wrongful" resignation of one or more employees²⁸.

²⁵ *ibid* at par 71.

²⁶ *ibid* at par 86.

²⁷ It is for this reason that communications concerning alleged breaches of restrictive covenants should be undertaken with great care.

²⁸ Such as occurred in the case of *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* 2008 SCC 54 (CanLII).

The damages to be awarded will depend upon the nature and scope of damages associated with this damage caused by the breach.

Other Available Relief to Consider

The scope of this topic was already far more than six-minutes can bear. However, a few other torts justify mention to be as comprehensive as possible in outlining the extraordinary damage awards in employment matters. Therefore, also to be considered, though in the experience of the author, arise far less often, are the following:

- i malicious prosecution: where the employer falsely or intentionally caused criminal charges to be laid against the employee
- i a variety of personal injury torts for which the employer may depending upon circumstances be vicariously liable, including: assault, sexual battery/assault, negligence²⁹
- i passing off: where the employer uses the employee's name under false pretenses to secure a competitive advantage for their business post termination³⁰
- i deceit: a form of detrimental reliance based upon a false representation known to be fraudulent when made and with the intention of deceiving the other party. This "independent actionable wrong" can be used to sustain an aggravated damages award such as in the case of a misrepresentation as to having cause for an employee's dismissal³¹

²⁹ (requiring breach of a standard of care and may develop further in relation to breach of OHSA).

³⁰ see: *Stenner v. Scotia McLeod*, 2007 BCSC 1377 (CanLII) and 2009 BCSC 1093 (CanLII).

³¹ MacDonald, Natalie C., *Extraordinary Damages in Canadian Employment Law*, Carswell 2010, pp. 436-440.

- i unlawful interference with economic relations: a form of causing loss by unlawful means (such as breach of contract). This is a mechanism to claim damages in relation to such matters as interference with business interests of an employee (i.e. an investment advisor's loss of sale of portfolio opportunity when there is a wrongful dismissal³²). This tort requires that there be an intention to injure, that unlawful means were used and that the plaintiff suffered an economic loss.³³ The threshold is therefore high.

Conclusion

It is more than academically intriguing to see where we will go from here as this area continues to develop in the years ahead. We may see a move in employment cases towards jury trials, a common occurrence south of the border, where counsel feel that the facts are outrageous and may emotionally motivate a high award of extraordinary damages from a jury. We may continue to see movement beyond trivial extraordinary damage awards in appropriate circumstances. An employer may adopt a more conservative approach to employee relations or damage awards may decrease again and the wild west will be upon us.

³² See: *Albayrak v. Nesbitt Burns Inc.*, 2000 BCSC 1082 (CanLII).

³³ *Drouillard v. Cogeco Cable Inc.* 2007 ONCA 322 (CanLII).

APPENDIX 1

1. Keays v. Honda 2008 SCR 39 (CanLII)
2. Wallace v. United Grain Growers Ltd. 1997 CanLII 332 (SCC)
3. Yanez v. Canac Kitchens. 2004 CanLII 48186 (ON SC)
4. OBA PD – September 23, 2013, Fundamental of Employment Law
5. MacDonald, Natalie C., Extraordinary Damages in Canadian Employment Law, Carswell 2010
6. Boucher v. Wal-Mart Canada Corp. 2014 ONCA 419 (CanLII)
7. Alman v. Steve’s Music Store Inc. 2011 ONSC 1480 (CanLII)
8. Pate Estate v. Galway-Cavendish and Harvey (Township) 2013 ONCA 669 (CanLII)
9. Piresferreira v. Ayotte 2010 ONCA 384 (CanLII)
10. Prinzo v. Baycrest Centre for Geriatric Care 2002 CanLII 45005 (ON CA)
11. Zorn-Smith v. Bank of Montreal 2003 CanLII 28775 (ON SC)
12. Libel and Slander Act RSO 1990, C.L.12
13. Hill v. Church of Scientology 1995 CanLII 59 (SCC)
14. R. v. Cole 2012 SCC 53
15. Jones v. Tsige 2012 ONCA 32 (CanLII)
16. RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. 2008 SCC 54 (CanLII)
17. Stenner v. Scotia McLeod, 2007 BCSC 1377 (CanLII) and 2009 BCSC 1093 (CanLII)
18. Albayrak v. Nesbitt Burns Inc., 2000 BCSC 1082 (CanLII)
19. Drouillard v. Cogeco Cable Inc. 2007 ONCA 322 (CanLII)