VORVIS, WALLACE AND KEAYS – IS WALLACE DEAD?

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Presented at the Ontario Bar Association 9th Annual Employment Issues: Developments in Supreme Court Doctrine Conference

April 29, 2010

INTRODUCTION

A trilogy of employment related damages decisions from the Supreme Court of Canada in the past 20 years has resulted in an evolution of the treatment of damages in wrongful dismissal cases. Recognizing the vulnerability of a dismissed employee, commonplace mental distress resulting from termination of employment and the duties of employers, the Supreme Court in *"Vorvis"*, *"Wallace"* and *"Keays"*, has evolved a principled approach to awarding damages resulting from termination of employment. The development of such principles has been particularly difficult, given the unique circumstances of each dismissal and the existing principles governing the law of damages and contract. Perhaps it is this difficulty which explains why the Supreme Court has considered this issue so often, partially overturning its previous decisions.

THE TRILOGY

1. Vorvis v. Insurance Corp. of British Columbia[1]

The Appellant in this case was a solicitor whose employer was dissatisfied with the pace of his work. The employer put immense pressure on the employee resulting in significant distress causing the employee to seek medical attention. Shortly thereafter, the employee was dismissed without any precipitating event. In this case the Supreme Court of Canada considered for the first time "the amount and nature of damages which may be payable in an action for wrongful dismissal from employment."[2] In particular the Court considered whether aggravated and punitive damages were available for wrongful dismissal.

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[1] *Vorvis v. Insurance Corp. of British Columbia,* [1989] 1 S.C.R. 1085
[2] *Ibid.* para. 1

With respect to aggravated damages, the Court held that aggravated damages may be available for breach of contract in appropriate cases.[3] In this case, the Court did not award aggravated damages holding that actions of any player which may have given rise to aggravated damages did not arise from the dismissal itself but from the conduct preceding the dismissal.[4] Therefore, the injury must arise out of the breach of contract, but from a separate independently actionable wrong. However, the court did state while it is has generally been held that aggravated damages are not available for wrongful dismissal, aggravated damages may be available for wrongful dismissal "particularly where the acts complained of were also independently actionable."[5]

With respect to punitive damages, the Supreme Court held that punitive damages are only available where the conduct by the defendant is so harsh, vindictive, reprehensible and malicious in nature that they are deserving of punishment.[6] While punitive damages may be available for a breach of contract, the Court held that this will be extremely rare. This is because in an action of breach of contract, the only link between the parties is the contract, not a greater duty of care. Therefore, the Court held that the plaintiff generally is only entitled to that for which the contract provided.[7] In dismissing the claim for punitive damages, the court noted that the plaintiff was entitled to salary and benefits under the contract, that each party had a right to terminate the contract, that the termination of the contract in this case was not wrong in law and therefore not subject to a consideration of punitive damages. The plaintiff was only entitled to payment in lieu of notice.[8]

With respect to the treatment of the Appellant prior to the dismissal the Supreme Court held that this treatment to not rise to sufficient level to cause an independent actionable harm. While the door was open for aggravated and punitive damages, it was clear the threshold was high.

2. Wallace v. United Grain Growers Ltd.[9]

In this case, the Appellant was recruited from his former employer and was assured the he could continue to work for the company until retirement. Upon working for the company, the Appellant was recognized as the top sales person for each of the years he worked. However, 14 years after being recruited the Appellant was summarily discharged without an explanation. In this decision the Supreme Court considered "issues of compensation in a wrongful dismissal action, … the right to damages for

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[3] *Ibid.* para 21
[4] *Ibid.* para 23
[5] *Ibid.* para. 22
[6] *Ibid* para. 27
[7] *Ibid* para. 26
[8] *Ibid* para. 28
[9] *Wallace v. United Grain Growers Ltd.*

mental distress, whether or not one can sue for "bad faith discharge", and the appropriate length of the period of reasonable notice."[10]

The Court rejected the notion of damages for "bad faith discharge", when it rejected the Appellant's submission that there is an implied term in his employment contract that he could not be fired except for cause or legitimate business purposes. The Court found that it has long been held that the right to terminate an employment contract is a mutual right of both the employer and the employee unless there is an express term to the contrary.11 Further the court held that requiring "good faith" reasons for dismissals would be "overly intrusive and inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment"[12]. The Court also rejected the Appellant's submission that the Appellant could sue in tort for breach of good faith and fair dealing with regard to dismissals. The court held that the Appellant was unable to sue in either tort or contract for "bad faith discharge", holding that "to create such a tort... would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures."[13]

Although the Court rejected the ability of a dismissed employee to sue in contract or tort for "bad faith discharge", the court held that "bad faith conduct in the manner of dismissal is another factor that is properly compensated by an addition to the notice period."[14] While the court recognizes, that previous jurisprudence has held that damages have to arise from the breach itself, the Supreme Court held that a contract of employment has unique characteristics which justify deviation from the standard principles applied to commercial contracts.[15] In particular, the Court recognized the power imbalance and vulnerability of employees and the importance of one's job to their sense of self-identity. As a result of these considerations, the Court held that "the law ought to encourage conduct that minimizes the damage and dislocation that result from dismissal."[16] Consequently, the Court held determined that "employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period."[17]

In determining the scope of harm to be recognized by the courts, the Supreme Court held that "where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and

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[10] *Ibid.* para 1
[11] *Ibid.* para 75
[12] *Ibid* para 76
[13] *Ibid* para. 77
[14] *Ibid* para. 88
[15] *Ibid* paras. 90-91
[16] *Ibid* para. 95
[17] *Ibid* . para. 95

damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case."[18]

The Court held that the obligation of good faith and fair dealing is difficult to determine in a principle way. However the court set out a list of minimums to imposed on employers. The Court held:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being for example, untruthful, misleading or unduly sensitive.[19]

As we know, thereafter pleadings for "*Wallace*" damages also known as the "Wallace Bump" became the de règeur. We saw what has been reported as an average bump of three months to the notice period where such damages were awarded. The pleading became so commonplace that the Honourable Mr. Justice Echlin in *Yanez v. Canac Kitchens*,[20] chastised counsel for overuse of the pleading and gave a stern warning to cease the practice. It turns out the warning was trumped by the next case in the trilogy causing one esteemed member of our profession to coin the term "the damages formerly known as Wallace".[21]

3. Honda Canada Inc. v. Keays[22]

Being the most recent edition of the trilogy in *Keays*, the Respondent worked for the employer for 11 years before taking a leave of absence after being diagnosed with a chronic fatigue syndrome. During his absence the Respondent was receiving disability benefits which were discontinued by the benefits provider who determined that the Respondent was fit to return to work. Upon returning to work he was placed in a disability rehabilitation program in which he was permitted to be absent from work if he provided a doctor's note. As a result of a number of absences, and a change in tone of the doctor's notes, the employers asked the Respondent to attend an occupational medical therapist. and when he refused informed him that he would be dismissed unless he

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[18] *Ibid*., para. 103
[19] *Ibid.* para. 98
[20] *Yanez v. Canac Kitchens*, [2004] O.J. No. 5238, para. 35
[21] Stuart Rudner, "The damages formerly known as *Wallace*", *The Lawyers Weekly*, September 5, 2008 and 9th Annual OBA Current Issues in Employment Law
[22] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362

attended. The Respondent refused to attend the occupational medical therapist and was subsequently dismissed.

The Court held that in cases where damages are awarded for the conduct of the termination, they should not be awarded by extending the notice period.[23] Rather, the Court held that all damages arising out of the manner of dismissal should be recoverable if they arise from the circumstances set out in *Wallace;* however, the damages awarded must reflect the actual damages sustained and not be an arbitrary extension of the notice period. The Court drew upon the decision of *Fidler v. Sun Life Assurance Co. of Canada*[24] in which it concluded that it was no longer necessary that there be an independent actionable wrong before damages of mental distress can be awarded[25]. Therefore, damages for mental distress arising out of a breach of contract will be available, so long as mental distress can be seen as arising naturally from the breach of contract and the manner of dismissal or as may reasonably "be supposed to have been in the contemplation of both parties."[26] The Court concluded that with respect to employment contracts "there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages."[27] "Thus, if the employee can prove that the manner of dismissal caused mental distress that was in contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects actual damages."[28]

In considering the availability of punitive damages, the court cautioned that even though damages for psychological injury are compensatory, the Court must "avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case."[29] Having regard to this consideration, the Court went on to reject the Plaintiff's claim for punitive damages on number of grounds.

Firstly, the Court held that claims for damages arising out of discriminatory conduct, fall within the jurisdiction of the Ontario *Human Rights Code*.[30] Further even if it was found that it was within the court's jurisdiction, there was no evidence to support a claim of discrimination in this case.[31]

Secondly, the Court emphasized that courts should exercise caution in awarding punitive damages. The Court held that while an independent actionable wrong is a requirement

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[23] *Ibid.* para 59
[24] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3
[25] *Ibid.* para 49
[26] *Supra* Note 17. para 54
[27] *Ibid.* 58
[28] *Ibid.* 59
[29] *Ibid.* para 60
[30] *Ibid.* para. 65
[31] *Ibid.* para. 67

for an award of punitive damages, an independent actionable wrong alone will not give rise to punitive damages. Punitive damages only arise where conduct is harsh, vindictive, reprehensible, malicious and extreme in nature. The Court held that "[c]reating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction."[32]

Thirdly, the Court held that the Court of Appeal and Trial Court erred in awarding punitive damages as they failed to adequately take into account that compensatory damages also have the effect of deterrence. The Court emphasized that "[t]his stems from the important principle that courts, when allocating punitive damages, must focus on defendant's misconduct, not on the plaintiff's loss."[33] In this case, it is the same conduct which provides the basis for the awards of damages for conduct in dismissal and for punitive damages. Therefore, the Court held that "[t]he lower courts erred by not questioning whether the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded."[34]

6 POST KEAYS CASES IN WHICH DAMAGES ARE AWARDED

1. Bru v. AGM Enterprises Inc.[35]

Shortly following the release of the decision of the Supreme Court of Canada in *Keays*, the British Columbia Supreme Court had before it a case, which the Honourable Justice Brown determined, merited an award of "*Wallace*" damages. The Judge applied the *Keays* analysis and awarded bad faith and mental distress damages in one of the first such awards post *Keays*.

The employer had taken the position that the employee had resigned her employment following two and a half years of service as a deli clerk at "Mediterranean Market". Following a disagreement with a co-worker, the employee went home, with permission, for a one hour break. Once at home, she called her employer and reported she was too ill to return to work for the rest of the day.

There was contested evidence as to whether the employee had called her supervisor the next day (not a scheduled work day) and advised she was quitting. It was not discussed that the employee did call again the day following and inquired whether she still had a job and stated that she was not quitting. She was told that someone had been hired to replace her already.

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[32] *Ibid.* para. 68
[33] *Ibid.* para. 69
[34] *Ibid.*
[35] *Bru v. AGM Enterprises Inc.* (2008) CarswellBC 2635 (BCSC)

The Judge accepted that the employee had initially advised that she was quitting, but held "this finding does not mean that I also find that [the employee] made a clear and unequivocal resignation of her position at the Market, considering all circumstances."[36]

The Judge held that the supervisor should have made further inquiries of the employee regarding her resignation as the supervisor acknowledged that such an action was not characteristic of the employee and not rationally motivated in view of the employee's financially vulnerable circumstances, of which the supervisor was aware.

The following day, the employee called the principal shareholder of the Market hoping to return to work and said she was calling "to confirm that she no longer had a job". He indicated to her that perhaps it was time for her to move on and offered her a letter of reference.

The employee then began telling her neighbours, who lived across the street from the Market that she had been fired. The principal shareholder then proceeded to call the employee to caution her, in his view, against making false statements.

The Court stated:

> "an employer, faced with a declaration of resignation cannot always take it at face value, but should consider the context and all surrounding circumstances. These are some of the ways in which a resignation can be unclear or ambiguous: in the manner of its expression, or because of conflicting statements made by the employer about resignation; or because of the circumstances it was made in, for example, in a state of strong emotion/mental distress that would raise some doubt in the mind of a reasonable and fair-minded person about the employee's true intention; or because of some other relevant circumstance, such that an employer, as an objective person, acting fairly and reasonably, would seek a clearer understanding of the employee's intention before accepting and acting on it."[37]

It was concluded that the employee had therefore not clearly and unequivocally resigned in view of all surrounding circumstances. The employer acted with careless disregard to the employee's attempts to clarify that she had not resigned and this careless disregard was a breach of the employer's duty to act fairly with regard to the employee's interests. Accordingly, the employee was wrongfully dismissed.

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[36] ibid at para 60
[37] at para. 109

The Court held that, in addition to damages for reasonable notice, the employee was entitled to *Wallace* damages owing to the unfair and insensitive nature in which the employer failed to communicate with her in any meaningful way after she expressed the fact that she was not resigning, especially considering her financial, emotional and situational vulnerability.

As there was no conduct meeting the threshold for such an award, the Court refused to grant punitive damages, nor damages for intentional infliction of mental suffering, finding the employer's conduct not to be outrageous, flagrant nor calculated to cause harm such as to meet the necessary threshold.

Wallace damages of 6 months were awarded to reflect the lost earning capacity suffered by the employee as a result of the stress associated with the termination, adjusted down by 3 months to avoid duplication of the reasonable notice award. Medical evidence showed that depressive illness prevented the employee from looking for work for at least 3 months. The judge concluded there to have been restrictions on finding employment for 6 months. Additionally, the sum of $12,000 was awarded for mental distress (medical evidence was presented).

We are advised that while this decision was appealed, the action was resolved prior to the hearing.

2. Peoples v. Ontario (Ministry of Training, Colleges & Universities)[38]

The employee involved in this case had a middle management role with the Ministry when she was terminated without cause following 28 years of service. The termination, though without cause, had been preceded by critical comments of the employee's management style. Based on the allegations prior to the termination, the Ministry had first reassigned the employee to another project, out of the same office, in circumstances which were consistent with a demotion. It had then transferred her several times to offices at increasingly larger distances from her home, necessitating overnight stays during the work week. The employee grieved the reassignment under the *Public Service Act* and the Ministry commissioned an investigation concerning the complaints.

The investigation concluded that the employee's management style had contributed to a dysfunctional environment. The Ministry did not discuss the report with her, nor did it wait for the outcome of the grievance. Instead, the Ministry terminated her employment and presented her with a "take it or leave it" memorandum of settlement which provided for a lump sum payment equivalent to 18 months base salary. By the time of trial, three and a half years later, the employee remained unemployed.

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[38] Peoples v. Ontario (Ministry of Training, Colleges & Universities) (2008) Carswell Ont 7706 (Ont.S.C.J.) per W.U. Tausendfreund J.

The Court found that the employee had been entitled to 24 months' notice.

Additionally, the Court awarded 4 months of "*Wallace*" damages as a result of the failure of the Ministry to consider any of the following:

- reviewing the findings of the investigator and affording the employee the opportunity to respond
- granting the employee the option of taking courses to improve her management style
- following a progressive discipline approach
- awaiting the outcome of the grievance prior to termination
- considering other possible employment options within the provincial government either immediately or following retraining[39]

It also appears that the Court was influenced by the failure of the Ministry to provide any more than 16 weeks' salary continuance when it should have been apparent that such a payment could not represent reasonable notice.[40]

Interestingly, while the Court indicated that it was considering *Keays*, there is no clear indication as to how it was considered, nor is any rationale provided as to why 4 months was the quantum awarded, nor how that related to any damages actually suffered by the employee.

The case in fact appears to do exactly what the Supreme Court of Canada said should not be done, namely, the awarding of an arbitrary extension of the notice period.

3. Simmons v. Webb (2008)[41]

This is another case in which the award of *Wallace* damages is not tied, with any clear certainty, to any defined economic loss. The Court awarded $20,000 in *Wallace* damages. In this instance, the Court termed the damages "moral damages".

The employee was the founder of the company. Over the years, two other shareholders joined the company and over time had acquired the controlling interest of the company. The employee became a non-voting shareholder and eventually following a dispute, he was terminated.

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[39] ibid at para 18
[40] ibid at para 20
[41] *Simmons v. Webb* (2008), CarswellOnt 7874 (Ont.S.C.J.) per R.M. Pomerance J.

The Court found the manner of the termination was insensitive. He was dismissed after acting as a key employee for over 20 years and was simply handed a letter of termination and directed to remove his effects immediately from the premises. The decision stated:

> "Employees are most vulnerable at [the] very moment of their termination. Given especially the plaintiff's precarious state of health and his valuable, long-term contribution to the company, he was entitled to some degree of courtesy, respect and compassion upon his termination. These elements were notably absent. [The other shareholders] made no effort to cushion the impact of their decision to remove [the employee] from the company."[42]

Further, the other shareholders failed to comply with the employee's requests for return of his files and personal effects, as well as material needed to conduct his business to assist his mitigation efforts.[43]

As a result, the Court awarded $20,000 in damages for "breach of the implied duty of good faith and fair dealing". There is no analysis which connected this figure to any loss.

The Court considered the claim for aggravated, punitive and mental distress damages. However, it held that there were no circumstances to justify the award of aggravated damages, which required some indication of actions which were malicious, cruel or abusive. Additionally, while the employee was depressed following his termination, no medical evidence was called to substantiate his diagnosis, nor the impact on the employee's daily life. Accordingly, the Court held there was no evidence to establish a separate award of damages for mental distress.

We are advised that this decision is under appeal to the Ontario Court of Appeal.

4. Soost v. Merrill Lynch Canada Inc.[44]

The dust had barely settled after the release of the decision in *Keays*, and the articles on the "death of *Wallace* damages" were published, when the Alberta Court of Queen's Bench awarded $1.6 million dollars of *Wallace* damages in this case.

The employee had been employed as a financial advisor by the investment firm earning commission on trades executed for his clients which formed his "book of business". At the time of his termination, allegedly for cause, his book of business had an accumulated asset base of approximately $150 million, which had increased from the $80 million asset

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[42] ibid at para 104
[43] ibid at para 105
[44] *Soost v. Merrill Lynch Canada Inc.* (2009) CarswellAlta 1623 (Alta.Q.B.) per. C.S. Brooker J

base he brought with him when he had jointed the firm less than three years earlier. The employee was one of only five individuals in Canada in the employer's "Ultra High Net Worth Program".

Following his termination, the employee made efforts to find other employment which he did approximately three weeks later. Due to the fact that he could only take approximately $10 million of his book of business with him to the new firm, he had a major drop in income which forced him to leave the industry some 6 months later.

The evidence was that the employee, due to there being no reason attached to his departure from Merrill Lynch, had difficulty joining another firm. The Court however held there to be no cause for his termination. It stated:

> "To terminate for cause someone in Soost's position in the financial industry would forseeably have the effect of mortally wounding that person's ability to successfully carry on as an investment advisor. Merrill Lynch knew or ought to have known that. There was no good reason why, once Merrill Lynch had decided to let Soost go, it could not have done so with some minimal notice or allowed Soost to resign of his own accord."[45]

The Court held that working notice ought to have been given. The fact that the firm had decided to terminate the employee but waited over two weeks to do so lead the judge to conclude that some notice could have been provided.[46]

Defining the respective obligations of an investment advisor and a brokerage firm, the Court held:

> "It is clear that the brokerage firm has the proprietary interest in the client lists and the client information attached thereto. Nevertheless, I am satisfied that the financial advisor is the primary contact with the client and that he creates the 'goodwill' in the dynamic. That is self-evident from the efforts made to recruit financial advisors to a firm and the amount of pay and other incentives offered. It is expected that these financial advisors will bring 'their' book of business with them. In my opinion both the brokerage house, as well as the financial advisor are entitled to compete to keep/attract the client. Indeed, the evidence before me demonstrates that a significant percentage of clients followed their financial advisor to his new brokerage house. Both the brokerage house and the financial advisor are 'free to compete' for the clients."[47]

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[45] ibid at para 113
[46] ibid at para 115
[47] ibid at para 170

The employee did not contact his clients until three weeks later when he was established at a new firm. When the brokerage firm contacted his clients and advised that he had left the firm, it was unable to explain why the employee was no longer with the firm. At least some of the clients elected to stay with the firm while others elected to go with another broker.

The Court awarded 12 months' notice but went on to conclude that while *Keays* dealt with mental suffering, there is no reason it could not be applied to compensate the employee for his true-loss which was far greater than the notice period.

The Court held that it was satisfied that the manner in which the employee was terminated had a significant detrimental affect on his reputation in the industry and his ability to keep his old clients and attract new clients. The brokerage firm knew at the time it hired the employee that if it terminated the employee, purportedly for cause and without notice, the employee would suffer significant damages to his reputation and book of business or goodwill, such as would not be compensated for by an award of damages in lieu of notice. The Court considered the value which had been ascribed to the employee's book of business in the months prior to his termination as well as the production rate of his book of business and awarded damages of $1,600,000.

Owing to the absence of any finding that the brokerage's actions were malicious or outrageous, the Court declined to award punitive damages.

We are advised that this decision is under appeal to the Alberta Court of Appeal.

5. Cooke v. HTS Engineering Ltd.[48]

The employee alleged she had been constructively dismissed as the result of harassment (both sexual and non-sexual in nature), following less than 10 months of employment.

There was much discussion about the credibility of the witnesses and their evidence during the trial of this matter. The Court concluded that there had not been any sexual harassment as alleged. However, it found there was harassment of a non-sexual nature, which a reasonable person in the employee's circumstances was not bound to accept (yelling, degrading comments), and therefore, it concluded the employee had been constructively dismissed.

The Court considered the employee's claim for aggravated damages (mental distress) and held that the mental distress suffered went beyond what might reasonably be considered normal distress and hurt feelings arising from dismissal and that such damages would reasonably be within the contemplation of the parties.

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[48] *Cooke v. HTS Engineering Ltd.* [2009] O.J. No. 5650 (Ont. S.C.J.) per. R.D. Gordon J.

> "When performance issues arise and are accompanied by yelling, abusive insults and biting criticism, those senses suffer far more than need be, resulting in increased mental distress and illness."[49]

The Court found that the employee had, for a short period of time, suffered from severe anxiety, episodes of crying, low mood and depression. The sum of $3,500 was awarded in what the Court characterized as aggravated damages representing additional loss of income as the employee was prevented from looking for work during that time.

This appears to be the clearest type of case considered by *Keays* in updating the *Wallace* doctrine. A strong connection was found between a loss having been suffered as a consequence of the employer's actions which can be quantified, as opposed to compensated with an arbitrary extension of the notice period.

6. Marchen v. Dams Ford Lincoln Sales Ltd.[50]

The employee began work as an apprentice in the company's body shop. He was terminated without cause after his brother, who was employed in the parts department, confessed to stealing parts to support his drug habit. There were rumours that the termination was under suspicion that the employee was also involved in the criminal activity.

The company told the EI office that it had terminated his employment owing to a "police matter". It later changed the story to a "restructuring" which was the reason given at trial.

The Court held that the apprenticeship agreement, as with other types of employment contracts, could be terminated also on reasonable notice.

In relation to the other claims, the BCCA interpreted *Keays* as follows:

> "In my view, the Court in *Keays* broke away from the strictures of *Addis* and the jurisprudence that limited damages in wrongful dismissal cases solely to the period of notice. There is recognition that some employment contracts involve more than the provision of services for remuneration and that damages flowing from a wrongful dismissal may take that fact into account."[51]

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[49] ibid at para 70
[50] *Marchen v. Dams Ford Lincoln Sales Ltd.* [2010] B.C.J. No. 86 (B.C.C.A.)
[51] ibid at para 58

This suggests a very broad interpretation to the *Keays* case as done by the Alberta Court in *Soost*.[52]

Losses associated with the loss of the apprenticeship opportunity on termination would have been within the contemplation of the parties. The Court held that the special circumstances of this case justified an award of $25,000. The employee lost his opportunity to earn a journeyman's wage, as well as his education and steps to qualification, which made it more difficult to complete his apprenticeship successfully. He was in fact unable to secure another apprenticeship.

The Court declined to award punitive damages on the basis that the conduct of the company was not unfair, unfaithful, misleading or unduly insensitive nor did the employee suffer mental distress.

6 POST KEAYS CASES IN WHICH NO DAMAGES ARE AWARDED[53]

1. Smith v. Centra Windows Ltd.[54]

The Plaintiff employee was the Vice-President of the company while also working as a commission sales person. He was dismissed without notice after 14 years of service. In the months leading up to the dismissal, the company continually had "on the fly" meetings with the employee telling him he had to improve his sales numbers. Following these meetings, there were a number of letters exchanged indicating that the employee was not achieving his sales targets. The employee was ultimately terminated by letter with no reason given.

The employee stated that he was shocked by his termination, and that as a result he sought medical attention and was diagnosed with depression. His doctor stated that he believed the depression was a result of his loss of work. The employee brought an action for payment in lieu of reasonable notice and also sought punitive damages alleging that his treatment in the course of his dismissal caused mental distress.

In deciding that the company could not establish just cause to terminate the employee, the Court held that while the employee's performance may not have been satisfactory, this sort of unsatisfactory performance cannot give rise to summarily terminating an employee absent a contractual term to the contrary.[55]

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[52] see footnote 11 above
[53] Cases appear in chronological order
[54] *Smith v. Centra Windows Ltd.*, 2009 BCSC 606, [2009] per D.M. Masuhara J.
[55] *Ibid.* paras. 114-115

The Court considered whether the employee acted in 'bad faith' and held that where such conduct is found to occur and "caused the mental distress then the employee is entitled to an additional award of compensatory damages that reflects actual damages and not through an extension of the otherwise reasonable notice period."[56] The employee alleged that the company's bad faith stems from a desire to drive the employee to sell shares he held in the company. In dismissing the employee's argument, the Court held that the company acted in a manner consistent with past practices regarding company shares and that the key reason for the dismissal of the employee was that his performance was not up to the expected level.[57]

Further the Court held that even if the employee could establish 'bad faith', the employee failed to establish both that the depression was caused by the manner of the dismissal itself and that damages did not rise to the level necessary to be compensable. The Court held that "...the normal distress and hurt feelings including depression resulting from such dismissal are not compensable."[58] This is because while the Court recognized that there are foreseeable consequences to an individual's self-esteem upon being terminated from one's employment, the dismissal is a clear legal possibility as cancellation on notice or subject to payment of damages in lieu of notice is implicit in every employment contract. Therefore, distress normally arising out of loss of one's work is not compensable.

Given the Court's findings with respect to bad faith, the Court held that the company's conduct did not justify an award of punitive damages.[59]

2. Dwyer v. Advanis Inc.[60]

The employee immigrated in 2004 with the help of the employer to become its executive vice-president of sales and marketing in 2004. In June of 2007, the employee suffered a heart attack, but returned to work after 4 weeks. The employee testified that when he returned from his recovery, he felt excluded from the major decision making processes. In a dinner meeting with the employer, the employee was informed that the company had suffered its worst financial year and there were discussions about ending his employment relationship, but keeping him on as an independent contractor. In the beginning of November, this discussion was confirmed in a letter of termination. The employee claimed damages reflecting an extended period of notice and compensatory or punitive damages based on the manner by which he was dismissed and/or the reason for his dismissal.

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[56] *Ibid.* para. 121
[57] *Ibid.* para. 134
[58] *Ibid.* para 141.
[59] *Ibid.* Para. 175
[60] *Dwyer v. Advanis Inc.* 2009 CarswellOnt 2610 (S.C.J.), per D.R. Aston J.

The employee pointed to a number of factors that he submitted were relevant in the damages emanating from the manner of his dismissal. These factors included, that he was immediately cut off from benefits, that the employer failed to consider the fact that he may be unable to stay in the country, that he felt betrayed and misled, that the employer held out the possibility of on-going work as an independent contractor, and that the company knew that the employee was already under stress over his health and did nothing to make the dismissal less stressful. In considering these allegations the Court set out some of the principles to be applied from *Keays:*

> 1. Generally damages are not available for the actual loss of a job or for pain or distress suffered as a consequence of being terminated.
>
> 2. Damages resulting from the manner of dismissal will be available if they result from the circumstances described in *Wallace* where the employer engages in conduct during the course of dismissal, that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive".
>
> 3. These damages should be awarded through an award that reflects actual damages rather than by extending the notice period.
>
> 4. It is no longer required that such damages be independently actionable.
>
> 5. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. Courts should only resort to punitive damages in exceptional cases.[61]

In dismissing the employee's claim for damages arising out of the manner of dismissal the Court held that the employer did not deliberately engage in misconduct. While the Court did note that the employer could have been more sensitive to the employee's circumstances, it acted reasonably in the context of the circumstances.[62]

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[61] *Ibid.* para 48
[62] *Ibid.* para 51

3. Amaral (Litigation guardian of) v. Canadian Musical Reproduction Rights Agency Ltd.[63]

In this decision of the Ontario Court of Appeal, the Appellant initially brought an action for wrongful dismissal and negligent and intentional infliction of mental harm. However, by the time it came to trial, the sole cause of action brought forth by the Appellant was the claim for intentional and negligent infliction of mental harm.

The Appellant employee was employed by the Respondent agency for approximately 23 years. In May 2000, a managerial position was not immediately filled and the employee took on some of the managerial duties. The employee requested the managerial position. However, her request was denied. Following the denial of her request, she refused to write a letter for her superior, stating that this was a managerial duty. The trial judge found that the employee continued to feel resentful of the employer following the denial of her request to be promoted to the managerial position. It was noted that her punctuality and attendance at work began to decline and the employee had several meetings with the employer to discuss her attendance deficiencies. The employee was diagnosed with depression and her doctor wrote a note to the agency stating that she was ill and would be unable to work for a month. The agency informed the employee that her tasks had been reassigned and that they would assign her to appropriate work upon her return. When the agency wrote to the employee to inquire about her status, it received no response, other than a Statement of Claim. While the appellant perceived the plan to redeploy her as a span to force her to quit, the trial judge found that this plan reflected the company's desire to place the employee in a position where she could function. The claim proceeded to trial solely on the claim of negligent infliction of mental suffering.

The Ontario Court of Appeal did not espouse a view as to whether there is a free-standing cause of action in tort for negligent infliction of mental suffering, absent allegations of breach of contract. However, in denying the appeal the Court held that there was good reason to be concerned about the employee's commitment to work, which made the employer's actions reasonable. The Court held that the employee successfully masked the symptoms of her depression and continued to work hard. Therefore, the Court of Appeal held that even if such a cause existed, the agency could not be held liable as it did not know of the employee's disability or mental condition.[64]

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[63] Amaral (Litigation guardian of) v. Canadian Musical Reproduction Rights Agency Ltd., 2009 ONCA 399, per J.C. MacFarland J.A.

[64] *Ibid.* paras. 33-34

4. Dawyidiuk v. Insurance Corp. of British Columbia[65]

The Defendant employer sought summary dismissal of the employee's action for wrongful dismissal including aggravated and punitive damages. The employee worked for the company for 16 years, many of which were in managerial positions. While the employee was on maternity leave, the company experienced restructuring and offered the employee a choice between two managerial positions at the same pay she was receiving prior to going on her maternity leave. When the employee failed to reply to the offer despite a number of phone calls and e-mails, her employment was terminated.

The employee asserted that she was entitled to aggravated and punitive damages because her termination was unfair or in bad faith by being untruthful, misleading or unduly insensitive. These allegations arose out of the filling out of a termination form where the employer checked off "inadequate performance". There was no suggestion in any of the Court material that her performance of her work was inadequate. The Court noted that the question is whether this conduct can be characterized as "malicious and high-handed to a degree which offends the Court's sense decency and is deserving of punishment through punitive damages because of its harsh, vindictive, reprehensible and malicious nature."[66] The Court held that although the actions reflects a lack of decency and fairness, it does not constitute and action worthy of punitive damages.

The Court recognized that while the termination process might result in being upset or experience stress, not all "psychological impact following the termination of employment is compensable".[67] The Court concluded that the Plaintiff did not experience the type of psychological impact which would give rise to a finding of *Wallace* damages.

We are advised that this decision is under appeal to the British Columbia Court of Appeal.

5. Mathieson v. Scotia Capital Inc.[68]

The employee was an investment banker employed by the firm for over 30 years. In 2006, the employee was unsatisfied with the amount of his bonus and vigorously pursued the issue with the firm. The firm alleged that the lower bonus was a result of poor performance and therefore continued to reject the employee's pursuit of a bonus. Ultimately the employee was dismissed when he refused to accept the firm's position.

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[65] Dawydiuk v. Insurance Corp. of British Columbia, 2009 BCSC 1259, [2009] B.C.J. No. 1843, per R.M.L. Blair J.
[66] *Ibid.* Para. 32
[67] *Ibid.* Para. 18
[68] *Mathieson v. Scotia Capital Inc.*, [2009] O.J. No. 4879 (S.C.J.) per M.A. Code J.

With respect to the claim for *Wallace* damages, the Court determined that there was no bad faith on the part of the employer. However, the Court also commented on the nature of such damages. The employee did not adduce any evidence of mental distress or any other non-economic loss caused by the manner of termination. The employee argued that *Wallace* damages include economic damages, and that the employee would have kept his job for 13 more years if not for the bad faith manner in the termination by the firm.[69] In making these submissions, counsel to the employee argued that this interpretation arises out of the principle established in *Hadley v. Baxendale*[70] that any reasonable contemplated adverse consequence of a breach of contract is recoverable. In rejecting this argument the Court held that:

> "Hadley is a case about remedies and not a case about any particular contractual obligation. The judgment assumes that a breach of contract occurred and then turns to a discussion about remoteness of damages claimed. Mr. Morton's argument in the case at bar uses the Hadley principle of "reasonable contemplated" damages – that, the remedy – to rewrite the contractual obligation [of the employment contract]".71

In commenting on *Wallace* and *Keays*, the Court held that these cases recognize mental distress as reasonably contemplated. However, there remains no support for the proposition that the contractual obligations of employment law do not extend employment contracts to promise a job for life.[72] The Court went on to explain that *Keays* holds that the contractual obligation in employment law is to "provide a job for an indeterminate period, subject to termination for cause or on reasonable notice, but that the measure of damages flowing from the manner of breach may include "mental distress".[73]

As a result the Court did not award the employee *Wallace* damages because the nature of the damages claimed in that regard were not legally recognized.[74]

6. Taylor v. Design Plaster Mouldings Ltd.[75]

The company successfully brought a motion to strike various portions of the employee's claim in which it was alleged that the sole owner of the business engaged in improper conduct. The Court neglected to describe the "improper conduct", noting that it was included in the pleadings to embarrass the employer.

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[69] *Ibid.* para. 80
[70] *Hadley v. Baxendale* (1854) 156 E.R. 145 (Exch. Div.)
[71] *Supra* Note 7, para 83
[72] *Supra* Note 7, para 85
[73] *Supra* Note 7, para 86
[74] *Supra* Note 7, para 87
[75] *Taylor v. Design Plaster Mouldings Ltd.*, 2010 ONSC 237, per D.L. Corbett J.

The employee was terminated upon raising the alleged improper conduct with the Defendant and was terminated. He subsequently brought an action for wrongful dismissal and claimed *Wallace* damages. The employee alleged it was an implied term of the employment contract that:

> (i) the defendant would ensure that its representatives acted ethically and with a view to the defendant's best interests;
>
> (ii) where an employee brought forward evidence of improper behaviour by another representative of the defendant, that evidence would be thoroughly investigated and that appropriate measures would be taken to correct any improper behaviour; and
>
> (iii) where an employee brought forward evidence of improper behaviour on the part of another representative of the defendant, the employee would not face retaliation.[76]

The Court held that no such provisions are implied in an employment contract. The Court further held that the circumstances did not justify an award of *Wallace* damages.

The Court commented that "the plaintiff did not like how [the defendant] was running his own business, and told him so. There was nothing wrong with the plaintiff voicing his concerns to [the defendant], of course. If those concerns could not be addressed to the satisfaction of both, it was likely that the employment relationship would come to an end. But this is no basis for *Wallace* damages."[77]

CONCLUSION

These dozen cases since *Keays* provide an overview of jurisprudence in the area.[78] What we gleam:

- *Wallace* is not dead but evolved.
- the quantum of *Keays* damages may be without limit were reasonably foreseeable and resulting from actions of the employer in the manner of a termination.

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[76] *Ibid.* para. 3
[77] *Ibid.* para. 11
[78] Other cases of interest include: *Piresferreira v. Ayotte* [2008] O.J. No. 5187 (Ont.S.C.J.) per C.D. Aitken J., and *Colwell v. Cornerstone Properties Inc.* [2008] O.J. No. 5092 (Ont.S.C.J.) per T.D. Little J.

- mental distress damages are compensable even in the absence of an independent actionable wrong and, additionally, may give rise to *Keays* awards where it results in inability to look for work for a period of time. This is perhaps the most common application we will see in the future.

- ordinary mental distress arising merely from the fact of termination continues not to be compensable.

- appeals are likely where *Keays* damage awards are not connected to a monetary loss.

- "uterior motive" cases founded on theories of conspiracy to push out an employee remain difficult to win.

- counsel are getting creative in the formulation of claims under the *Keays* doctrine.

- punitive damages are available provided such an award would not result in double compensation.

The importance of employment in the lives of members of our society continues to be recognized. The "employer friendly" climate perceived to exist in the after math of Keays may, as the doctrine is applied, earn a completely different perception through its application. This will undoubtedly remain an interesting area in the years ahead.

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