

TORT LAW BULLETIN

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PUNITIVE DAMAGES

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Punitive damages are used to punish egregious conduct by a defendant. Awards of punitive damages often arise from relationships where one party has another party at a significant disadvantage, such as in the employment or insurance context. However, the recent decision of the Supreme Court of Canada in *Honda Canada Inc. v. Keays* has reaffirmed that restraint must be used in making awards of punitive damages.

BACKGROUND

The case arose from a wrongful dismissal claim. The Plaintiff, a long time employee of Honda Canada, had been diagnosed with chronic fatigue syndrome in 1997. The Plaintiff had stopped working at that time and started to receive disability benefits from a third party insurer. However, these benefits were cut off in 1998 due to a determination by the third party insurer that the Plaintiff could return to work full-time. The Plaintiff then recommenced working for Honda under a disabled employees program. However, the Plaintiff continued to experience attendance problems. From late 1999 to early 2000, Honda tried to have the Plaintiff examined by independent physicians to determine the extent of the Plaintiff's disability and any means by which it could be accommodated. The Plaintiff eventually retained counsel, and refused to attend any further independent medical examinations until the nature of them was fully explained to him, which Honda refused to do. The Plaintiff's absenteeism continued and Honda proceeded to terminate his employment.

At trial, Justice McIsaac held that Honda had failed to demonstrate that it had just cause to terminate the Plaintiff's employment, and was therefore liable to pay damages equal to the Plaintiff's wages for the proper notice period under the common law (approx. \$73,000). Justice McIsaac also awarded the Plaintiff an additional nine months of wages (approx. \$43,000) as aggravated damages.

This award was based on the “egregious bad faith displayed by Honda in the manner of [the Plaintiff’s] termination” as well as the further medical problems the Plaintiff developed as a result of his termination. Justice McIsaac also made a further award of \$500,000 in punitive damages, based on the discrimination and harassment the Plaintiff had experienced at the hands of Honda.

On an appeal to the Court of Appeal for Ontario, the judgment of Justice McIsaac was upheld, save for the punitive damages award which was reduced from \$500,000 to \$100,000.

The Supreme Court

The Supreme Court overturned both the aggravated damages award and the punitive damages award. The damages for wrongful dismissal were upheld. Much of the court’s decision turned on what were perceived to be significant factual and legal errors committed by the trial judge in his assessment of Honda’s disability program in general, and its conduct towards the Plaintiff in particular. However, the court also took the opportunity to comment at length about the legal basis for damages in the employment context.

The Supreme Court held that an employee will not normally be entitled to damages for the pain and suffering caused as a result of losing one’s employment. Such damages are only recoverable if mental distress on the part of the employee was within the contemplation of the parties at the time the employment contract was formed. However, even if damages for mental distress are available, it is incorrect to set these damages by artificially extending the notice period and awarding the Plaintiff damages based on an arbitrary amount of additional wages. Instead, damages for mental distress should be general in nature, and be related to the actual mental distress suffered.

With respect to the awards of aggravated and punitive damages, the Supreme Court held that there was simply no factual basis for awarding them in this case. The court also pointed out that care must be taken to ensure that a Plaintiff does not receive double compensation for mental distress damages. This is what had happened at the trial in this case, as the aggravated and punitive damages were ostensibly given to compensate the Plaintiff’s mental distress, which should have been incorporated into the regular damages for wrongful dismissal.

COMMENTARY

In *Honda* the Supreme Court maintained the high standard required for awards of punitive damages. The Court made it clear that a Plaintiff is not entitled to a significantly increased recovery simply because there was less than perfect conduct on the part of a defendant.

It is useful to contrast the situation in *Honda* with that in the recent decision of the Court of Appeal for Ontario in *McNeil v. Brewers Retail Inc.* That case involved an action for malicious prosecution by an employee against his former employer. The employer had suspected that the plaintiff was stealing funds from a cash register, and contacted police. However, the employer deliberately withheld exculpatory evidence – security camera footage which supported the plaintiff’s version of events – from the police and the Crown, and deliberately refused to assist the plaintiff in obtaining this exculpatory evidence for the purposes of his criminal trial. The plaintiff was tried and convicted of theft. His employment was subsequently terminated, and his subsequent grievance proceedings against the employer were dismissed. Years later, the security camera footage surfaced. The plaintiff was successful in appealing his conviction, and then sued the employer. At trial, the plaintiff was awarded over \$2,000,000 in damages, including an award of \$500,000 in punitive damages (the same amount as in *Honda*) which was subsequently upheld by the Court of Appeal.

In commenting on the award of punitive damages, the Court of Appeal made specific reference to the intentional, callous and protracted conduct of the employer:

By its verdict, it is apparent that the jury viewed BRI [the employer] as a calculating and insensitive company that was prepared, for its own purposes, to see an innocent man convicted of a crime it knew he did not commit. As counsel for the respondents points out, the duplicity and deception practiced by BRI was not limited to a one-time act of folly that occasioned limited harm; rather, BRI carried on the charade for the better part of thirteen years. Notably, as late as 1995, BRI continued its duplicity at the arbitration hearing and in the process, robbed McNeil [the Plaintiff] of his reputation, his employment, his dignity and his self-respect. Shocked and devastated by his arrest, proclaimed publicly as a common thief, terminated from his employment, forced to go on unemployment insurance, forced to sell the family home and move to an apartment, forced to endure the anguish, stress and uncertainty of a thirteen-year ordeal – these are but some of the consequences McNeil was exposed to by reason of BRI’s callous and malicious conduct.

These factors were clearly not present in the *Honda* case. In *Honda* what the trial judge perceived to have been a five-year period of calculated conduct, which he referred to as a “protracted corporate conspiracy”; was, in the eyes of the Supreme Court, merely a seven month “problem period” between an employer and one of its employees. This problematic relationship, while capable of giving rise to an action for wrongful dismissal, was simply insufficient for an award of punitive damages.