

**“I’m Being Sued For What?!”
Deconstructing the Different Damages in an
Employee’s Statement of Claim**

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*Special thanks to James Fu, student-at-law, for his assistance in preparing this paper.

Introduction

In the employment law context, statement of claims brought by current or former employees commonly contain demands for “excess” damages, damages that are in addition to common law reasonable notice of termination (For example, \$500,000 for mental suffering, \$300,000 for punitive damages etc.). Unlike claims for reasonable notice, for which risk can be estimated with a fair degree of certainty, the availability and amount of excess damages that will be awarded by a court can be less predictable. Also, the amount of the excess damage demands can be higher than the reasonable notice claims, posing a significant financial risk for employers.

To reduce the risk of liability arising from claims for excess damages, a familiarity with the types of excess damages available to plaintiffs is necessary. For this purpose, this paper reviews the legal principles applicable to a selection of high-risk “excess” damages claims: *Wallace/Honda* damages (damages for bad faith), aggravated damages, punitive damages, damages for intentional infliction of mental suffering, damages for *negligent* infliction of mental suffering (questionable whether an employee can claim damages for this), and special damages. The final section of this paper sets out the quantum of awards by courts and tribunals across Canada for the above mentioned categories of excess damages.

A. Differences between *Wallace/Honda* (“Bad Faith”) Damages, Aggravated Damages and Punitive Damages

***Wallace/Honda* (Bad Faith) Damages**

In the leading case of *Wallace v United Grain Growers Ltd* (“*Wallace*”)¹, the Supreme Court of Canada (“SCC”) established that damages resulting from the *manner of dismissal* are available where the employer has engaged in conduct during the course of dismissal that is substantially “unfair, or in bad faith by being untruthful, misleading or unduly insensitive” (“*Wallace* damages”).² This is significant as it is the only award of damages that does NOT require a separate independent actionable wrong (unlike aggravated and punitive damages); an examination of the employer’s conduct in the dismissal itself is only needed. *Wallace* damages (often referred to as “bump-ups”) were awarded by extending the reasonable notice period.

Recently, in *Honda v Keays* (“*Honda*”),³ the SCC confirmed the availability of bad faith damages but clarified the legal principles applicable.

Firstly, in *Honda*, the SCC eliminated the distinction between “aggravated damages” (arising from an independently actionable wrong) and moral damages (arising from the conduct in the manner of termination).⁴ Both are now to be considered using the *Hadley* principle⁵. The applicable rule from *Hadley* is that losses are to be awarded when they are reasonably to have been in the contemplation of the parties, at the time they made the contract, and are the probable result of the breach of said contract. Accordingly, *Honda* establishes that *Wallace* damages will still be available where the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties. In *Wallace*, the court

¹ *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 (“*Wallace*”).

² *Honda v Keays*, 2008 SCC 39 at para 57 (“*Honda*”), quoting from *Wallace*, *supra* note 1 at para 98.

³ *Honda*, *supra* note 2.

⁴ *Honda*, *supra* note 2 at para 59.

⁵ *Hadley v Baxendale*, (1854), 9 Exch 341, 156 ER 145 (“*Hadley*”).

determined that employers have an implied contractual obligation to act in good faith and fair dealing when dismissing employees.

Secondly, the SCC now requires the courts to fix the dollar amount to the damages suffered by the employee rather than arbitrarily extend the notice period by some indeterminate amount. The manner in which *Wallace* damages are to be awarded is in the form of a monetary award that reflects actual proven damages. “Bump-ups” to the notice period are no longer allowed.

It is important to note that the SCC emphasized that *Wallace* damages are compensatory in nature, intended to compensate the employee, and are not intended to punish the defendant employer.⁶ The manner of dismissal must have been unfair, or in bad faith by being untruthful, misleading or unduly insensitive and the mental distress suffered by the employee must be beyond the ordinary that results directly from the loss of the job, and actually flow instead from but the manner in which the employer dismissed the employee.

Examples of conduct that will give rise to *Wallace* damages include an employer attacking the employee's reputation by declarations made at the time of dismissal, making misrepresentations regarding the reason for the decision to terminate, or dismissing the employee with the purpose of depriving the employee of a pension benefit or other right, such as permanent status.⁷

Recent Examples of Awards of Wallace/Bad Faith Damages

In *Beggs v Westport Foods Ltd*,⁸ the plaintiff was a clerk in the meat department of a grocery store. In February 2009, her mobile home burned down. She phoned her supervisor the following day to advise of the fire and that she would be unable to attend her shift scheduled for that day, and that she was unsure of when she would be able to return to work.

There was no contact between the plaintiff and the defendant for a month. The defendant then prepared an ROE, marking it as “quit”. The defendant did not advise the plaintiff of the existence of the ROE.

The plaintiff began to suffer from depression. She received a doctor's note, and sought an ROE so that she could apply for EI medical benefits. She then learned of the “quit” ROE. The defendant took the position that it was fair to assume the plaintiff had quit because she had not contacted them for a month.

At trial, the judge held that the employer had failed to act in good faith, and awarded *Wallace* damages in the amount of \$20,000 in addition to damages for reasonable notice of termination:

The employer did not act in good faith and with a sense of fair dealing with this employee. Given that she was a long-term employee with a good record, there should have been a genuine attempt by the employer to contact the employee, knowing that she was in a very emotional state when she called the morning after the fire. The two attempts made by management to telephone Ms. Beggs in the week following the fire were minimal and inadequate. There were no further attempts.

⁶ *Honda*, *supra* note 2 at para 60.

⁷ *Honda*, *supra* note 2 at para 59.

⁸ *Beggs v Westport Foods Ltd*, 2010 BCSC 833 (BC Sup Ct).

Then the conduct of the employer following the dismissal exacerbated the anxiety and depression of the plaintiff. The evidence of the plaintiff seeking and receiving medical help is not disputed. The lack of sensitivity by the employer to the plight of the plaintiff was not commendable. Similar to the finding in the *Bru* case, the employer seemed not to put their mind to this employee's situation and her circumstances. The court in *Bru* found that the employer was obligated to do so, and I find that same obligation in this case.

By maintaining that the plaintiff had quit, the defendant continued to put her in peril with regard to employment insurance benefits.

In *Cooke v HTS Engineering Ltd*,⁹ the plaintiff was hired as a sales assistant in January 2007. She soon began to receive criticisms from one of her male superiors, and comments that were held to constitute bullying and personal harassment. The plaintiff already suffered from anxiety, and self-increased her prescription of Paxil as a result of the harassment.

The trial judge held that the bullying and personal harassment was to the extent that the workplace environment was intolerable. While her supervisor may well have raised legitimate performance issues, the degeneration of those discussions into shouting matches in which he was an active participant was held to be unwarranted. The superior's other outbursts of anger in the office, albeit directed at customers, suppliers or a shelf of books, would reasonably have contributed to the intimidation of Ms. Cooke, particularly given the very close physical proximity in which they were working. His demeaning statements and references to Ms. Cooke and her boyfriend were also held to be unacceptable. No employee should have to tolerate such conduct in the workplace, and it was held to constitute constructive dismissal.

In addition to reasonable notice of termination, the plaintiff was awarded \$3500 in *Wallace* damages. The trial judge stated at paragraph 70:

In my view Ms. Cooke suffered mental distress which went beyond what might reasonably be considered normal distress and hurt feelings arising upon dismissal. It is also my view that such mental distress would reasonably be in the contemplation of the parties. The workplace is most often an extremely important aspect of a person's life. Aside from its obvious role in providing a source of funds with which to live, it also provides a sense of value and self-worth. Those senses suffer enough when performance issues are brought to an employee's attention in a calm and rational manner accompanied by assistance to resolve the issues. 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. I am satisfied that this is what happened to Ms. Cooke and I am satisfied that there ought to be compensation to her. However, I am also satisfied that HTS was not the sole source of her mental distress and that Ms. Cooke has exaggerated the impact of these events on her life. Her testimony that she was "destroyed as a human being" and "still lives today in shame" and that she "hasn't smiled since this happened" I find to be hyperbolic and holding an element of self-pity. I do accept that the mental distress occasioned by her dismissal resulted in her attending with her doctor and that for a relatively short period of time she suffered severe anxiety, episodes of

⁹ *Cooke v HTS Engineering Ltd*, 2009 CanLII 73907 (Ont Sup Ct).

crying, low mood and affect and depression. It is to be noted that she was able to obtain a new job by December 10, 2007 and by February, 2008 her doctor is noting that her mood is better, that she is happier in her workplace, that the dosage of Paxil has been decreased and that she is “well overall”. Accordingly, it would appear that the mental distress she suffered was reasonably short in duration. In all of the circumstances, an appropriate award in this regard is \$3,500.

Aggravated Damages

Aggravated damages take account of intangible injuries, such as distress and humiliation that may have been caused by the defendant’s (employer’s) behaviour. They are compensatory in nature and may only be awarded for that purpose¹⁰ (Unlike punitive damages which are meant to punish behaviour). Aggravated damages are to be awarded where the defendant’s conduct “has been particularly high-handed or oppressive, thereby increasing the plaintiff’s humiliation and anxiety.”¹¹ In order to award aggravated damages, there must be an “independent actionable wrong” something beyond the employer’s failure to give reasonable notice of termination.

In most cases, the conduct underlying an award of aggravated damages will be the same conduct underlying the tort of intentional infliction of mental distress (discussed below). In such circumstances, a court will not make an award of damages for tortious conduct as well as an award for aggravated damages.

In *Fidler v Sun Life Assurance Co of Canada (“Fidler”)*,¹² the SCC stated that the courts have awarded two types of aggravated damages arising from breach of contract. One type of aggravated damages described by the court is mental distress damages that arise out of the contract breach, such as *Wallace* damages. According to the SCC, these types of damages are “not truly aggravated damages.”¹³ Instead, these types of damages are to be awarded under the rule in *Hadley* as discussed above. The appropriate test for such damages are discussed in the previous section on *Wallace* damages.

The second type of aggravated damages are damages arising out of aggravating circumstances and rest on a separate cause of action, usually in tort such as defamation. These damages do not arise out of the breach of employment contract itself. However, the common thread between both types of aggravated damages is that they are compensatory in nature and are not intended to punish the wrongdoer.

Examples of where Aggravated Damages are Awarded

In *MacDonald v Trustees of the Kirkfield Park Baptist Church et al*,¹⁴ 2008 MBQB 82, the plaintiff was the minister of a church and Chief Executive Officer of its related school. In 2001, the plaintiff took an 8 week sabbatical, and hired Mr. Garrow to assume his position during his absence. During his sabbatical, Mr. Garrow made many comments to individuals in the

¹⁰ *Voris v Insurance Corporation of British Columbia*, [1989] 1 SCR 1085 at 1099 (“*Voris*”).

¹¹ *Hill v Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (“*Hill*”).

¹² *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 (“*Fidler*”).

¹³ *Fidler*, *supra* note 12 at para 54.

¹⁴ *MacDonald v Trustees of the Kirkfield Park Baptist Church et al*, 2008 MBQB 82.

community that attacked the plaintiff's credibility, suggested that he had engaged in fraudulent behavior, and stated that the plaintiff had stolen \$80,000 while working in another jurisdiction.

The defamatory comments circulated around the community, and the plaintiff and his family were ostracized. The plaintiff intended to return to work when his sabbatical concluded, however, as a result of the defamatory comments, the Church refused to renegotiate the plaintiff's contract, effectively terminating his employment. The Church finally admitted that the defamatory comments were not true in 2004, some 3 years after they were made. The plaintiff eventually moved to the United States to find a new job.

The court held that it is reasonable to conclude that the actions of the trustees of the Church and the School contributed, as did Mr. Garrow's conduct, to the plaintiff's emotional distress, loss of income, harm to his reputation, and to his leaving the community in which he had been a prominent and well respected leader for seven to eight years. They determined that an award of aggravated damages was warranted. The damages were assessed at \$25,000. The following factors were held to support the aggravated damages award:

- Mr. Garrow was motivated by malice, based on the false statements he made without proof of their truth, and based on his bias against the plaintiff for what he perceived to be an injustice against himself personally;
- Mr. Garrow's position as administrator of the School and assistant pastor of the Church lent some credence to his statements within the particular religious community;
- during a period of three to four weeks Mr. Garrow made defamatory statements to seven persons, attacking the plaintiff's honesty within the Church and the School community, which resulted in widespread publication and ultimately contributed to the plaintiff losing his employment as a minister and School administrator;
- the plaintiff and his family were forced to move away from that community;
- these statements by Mr. Garrow were based, to his knowledge, solely on gossip without proof of their truth;
- his conduct amounts to recklessness;
- at no time has Mr. Garrow ever offered an apology to the plaintiff, or admitted that his statements were untrue;
- the plaintiff's position and standing within this religious community was one of some prominence;
- his reputation, standing and livelihood were seriously affected;
- the plaintiff suffered mental anguish due to the negative effect on his reputation and livelihood, but also due to witnessing the mental anguish suffered by his wife and teenaged son;
- the award of damages should reflect the complete lack of truth of the statements defaming the plaintiff's character and attacking his honesty;

- Mr. Garrow ultimately ignored the court proceedings, failed to comply with his undertakings, and required his legal counsel to seek leave to withdraw, thereby showing disdain or nonchalance in respect of the court proceedings.

In *Tannous v Donoghue*,¹⁵ the plaintiff was an executive assistant to Donoghue, the president. Donoghue had warned her in the past that he was unhappy with the manner in which she spoke to clients on the phone and took messages. On the occasion at issue, Donoghue walked into the plaintiff's office and expressed his concern about the manner in which she gave clients "the third degree." She just sat there, and did not respond, which angered Donoghue. He attempted to dictate a new telephone policy to the plaintiff, directing her to write it down. She responded that he was treating her like a kid. He again attempted to have her write it down, to which she replied "no." Donoghue terminated her for insubordination. Donoghue then assaulted the plaintiff, resulting in her scraping and bruising her elbow.

Given that an assault was committed on the plaintiff at the time of her termination, this was not merely a wrongful dismissal case, there was also an independently actionable wrong, namely the tort of assault. The trial judge held that this satisfied the prerequisites for an award of aggravated damages, and awarded them in the amount of \$15,000.

Punitive Damages

Whereas aggravated damages are designed to compensate, punitive damages are designed to punish. Punitive damages are imposed to *punish* the defendant, not to *compensate* the plaintiff. The conduct must be, in the words of the SCC, "so malicious, oppressive and high-handed that it offends the court's sense of decency... It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant."¹⁶ As such, the focus when allocating punitive damages is on the employer's conduct, not the employee's loss.

Like aggravated damages, there must be an "independent actionable wrong" to award punitive damages i.e. something beyond the employer's failure to give reasonable notice of termination. There must be conduct on the part of the employer, in addition to the wrongful dismissal, in order for the court to award punitive damages. Punitive damages are awarded only in exceptional cases to meet the goals of retribution, deterrence and denunciation in cases for conduct that is deserving of punishment because of its harsh, vindictive, reprehensive and malicious nature.¹⁷

Recently the SCC in *Honda* (2008) affirmed that the rules developed by the court in its previous jurisprudence on punitive damages are to be applied rigorously. To summarize, punitive damages are recoverable where the employer's conduct is itself a separate actionable wrong and the employer's conduct was highhanded, malicious, harsh, vindictive, arbitrary or highly reprehensive such that it can be said to depart to a major degree from the *ordinary standards of decent behaviour*.¹⁸

Examples of independent actionable wrongs on the part of the employer has been found where there is a breach of a distinct and separate contractual provision, a breach of another duty such as a fiduciary obligation and breach of the implied contractual duty of good faith in the manner of

¹⁵ *Tannous v Donoghue*, 1995 CanLII 7293 (Ont. Sup. Ct.); aff'd 1998 CanLII 4627 (CA).

¹⁶ *Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 36, 69 ("*Whiten*"); *Hill*, supra note 12 at para 199.

¹⁷ *Whiten*, supra note 16 at para 69.

¹⁸ *Vorvis*, supra note 10 at 1108.

dismissal.¹⁹ *Honda* has affirmed that a breach of the human rights legislation will not amount to an independent actionable wrong for purposes of awarding punitive damages. However, it could be awarded as a separate head of damages as a result of changes to the Ontario Human Rights Code. To date, there have been no cases on this.

How much will a court award in punitive damages? The court has indicated that punitive damages are to be assessed always keeping in mind the concept of proportionality. The question becomes what *additional* punishment should be imposed on the employer, given that other sanctions may have already been imposed on the employer in the form of more standard economic damages. In the case of wrongful dismissal cases, *Wallace* damages for manner of dismissal may also have been awarded. As discussed in *Honda*, one of the potential traps in wrongful dismissal cases is the risk of an excessive penalty being imposed on the employer.

In assessing punitive damages in the wrongful dismissal context, factors that are to be taken into account are the harm caused; the degree of misconduct; the relative vulnerability of the employee; and any advantage or profit gained but the employer. With respect to blameworthiness of the employer, the court will consider whether the misconduct was planned and deliberate; whether the employer persisted in its improper conduct over a lengthy period of time; the intent and/or motive of the employer; whether the employer concealed or attempted to cover up its misconduct; the employer's awareness that it was doing wrong; whether the employer profited from its misconduct; and whether the interests violated by the employer's conduct were known to be personal to the plaintiff. For example, in *Boyd v Wright Environmental Management Inc.*,²⁰ the Ontario Court of Appeal affirmed the trial judge's award of \$25,000 for punitive damages based on the facts that the employer had orally promised the plaintiff shares in the employer's business for about ten years but terminated the employee just before a meeting arranged between the employee's counsel and the defendant's counsel to address the agreement for shares. This case is an example where the interest violated, the shares promised to the plaintiff, was important to the plaintiff and the intent of the employer in dismissing the plaintiff was to attempt to prevent the plaintiff from gaining shares of the company.

Examples of where Punitive Damages are Awarded

In the Court of Appeal's judgment in *Honda v Keays*,²¹ the Court of Appeal awarded Keays \$100,00 for punitive damages, reducing the trial judge's award of \$500,000 in punitive damages. Keays had been diagnosed with chronic fatigue syndrome. The court found that the company had committed a number of acts of discrimination and harassment in relation to Keays' attempts to resolve his accommodation difficulties. The court found that the company's termination of Keays avoiding the company's duty to accommodate Keays' disability. The court described the company's conduct as "outrageous" and deserving of significant denunciation.

The Court of Appeal's award of punitive damages, however, was reversed by the SCC. The SCC held that the company's conduct was "not sufficiently egregious or outrageous" to award punitive damages.²² In particular, the SCC noted that the company's disability program did not stereotype against Keays and was not arbitrary. The company's decision to cancel accommodation for Keays was justifiable because the doctor's notes justifying accommodation

¹⁹ *Honda*, *supra* note 2 at para 62.

²⁰ *Boyd v Wright Environmental Management Inc.*, 2008 ONCA 779.

²¹ *Honda v Keays*, (2006), 82 OR (3d) 161.

²² *Honda*, *supra* note 2 at para 59.

became “cryptic”, and the company took steps to confirm the disability. The SCC further noted that although the company’s comments to Keays that hiring outside counsel was a mistake was ill-advised and unnecessarily harsh, it did not justify an award of punitive damages. *Honda* is a useful example of conduct by an employer that will not be found to attract punitive damages. More importantly, *Honda* also demonstrates that different courts may view the same conduct differently, thus emphasizing the importance of best practices for employers.

In the recent case of *Macdonald-Ross v Connect North America Corp*,²³ the plaintiff had worked for the employer for five and a half years before being dismissed. No cause for termination was initially alleged. After the plaintiff commenced the action against the employer for wrongful dismissal, the employer alleged cause for the first time. The allegation was that the plaintiff had engaged in the unauthorized use of company funds.

The trial judge awarded the plaintiff \$50,000 in punitive damages as well as damages for wrongful dismissal. In the trial judge’s reasons, the judge emphasized that that the employer concocted cause after-the-fact based on unfounded allegations of misappropriation of funds. Furthermore, the trial judge found that the employer knowingly communicated the unfounded allegations to the police. The court found this behaviour to be “reprehensible and egregious” and merited an award of punitive damages.

Another recent case in which punitive damages were awarded is *Nishina v Azuma Foods (Canada) Co*.²⁴ In that case, the plaintiff worked in Canada for the employer for about two and a half years before being dismissed. The plaintiff was a foreign national who worked in Canada on a work permit. The plaintiff was previously employed by the United States branch of the employer, who had its headquarters in Japan. The employer alleged cause when it dismissed the plaintiff. Four incidents were relied on by the employer to justify cause: a shouting incident between the plaintiff and the production manager of the employer, a refusal by the plaintiff to attend a meeting with the vice-president and corporate secretary of the employer, an instance where the plaintiff sent documentation by email to an external address and an instance where the employee removed certain documents.

The trial judge found that the allegations of cause were not established and awarded the plaintiff \$20,000 in punitive damages for breach of the duty of good faith in dismissal. The court also awarded damages for wrongful dismissal. The court found that punitive damages were justified based on the following acts by the employer: the employer failed to investigate each of the incidents it relied on to establish cause; the employer jumped to conclusions without asking the plaintiff for some of the incidents; even where the plaintiff was asked about her conduct, the employer discounted seemingly reasonable explanations provided by the plaintiff; the employer’s conduct displayed a disregard for the plaintiff’s vulnerability as an employee; the employer drew exaggerated conclusions; the employer pressured the plaintiff to accept a demotion; the employer engaged in these acts aware of the fact that the plaintiff’s immigration status made the plaintiff vulnerable in the event of dismissal. The trial judge also noted that the employer was not entitled to simply assume that the employee was wrong and assert that it had grounds for dismissal.

²³ *Macdonald-Ross v Connect North America Corp*, 2010 NBQB 250.

²⁴ *Nishina v Azuma Foods (Canada) Co*, 2010 BCSC 502.

Based on the authorities, common patterns emerge from the type of conduct that the court will deem to attract punitive damages. Some examples of acts that have attracted the imposition of punitive damages across Canada include:

- Lying about the reason for termination, including making unfounded allegations for cause;
- Communicating unfounded allegations to the police;
- Terminating the employee to avoid an employer's obligation from a prior agreement with the employee;
- Unreasonable conduct during the termination process, including withholding wages owing and vacation pay.
- Assuming the employee is dishonest and has engaged in the wrongful behaviour without justification; and
- Defaming an employee.

B. Differences Between Intentional Infliction of Mental Suffering and Negligent Infliction of Mental Suffering

Intentional Infliction of Mental Suffering Damages

In the employment context, the tort of intentional infliction of mental suffering (also referred to as "mental distress") is available to employees.²⁵ Like aggravated and punitive damages, the employee must prove that the employer's conduct constituted a separate independent independently actionable wrong. The seminal case for this tort is *Rahemtulla v Vanfed Credit Union* ("*Rahemtulla*").²⁶ More recently, the Ontario Court of Appeal in *Prinzo v Baycrest Centre for Geriatric Care* ("*Prinzo*")²⁷ confirmed the availability of the tort of intentional infliction of mental distress in the employment context. In order to succeed, an employee must prove the following:

- (1) flagrant or outrageous conduct;
- (2) calculated to produce harm; and
- (3) resulting in a visible and provable illness.²⁸

In terms of whether the conduct was calculated to produce harm, it suffices if there is a reckless disregard as to whether or not harm would ensue from the conduct. Furthermore, the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow. There is no requirement that there be a malicious purpose to cause the harm or any motive of spite. Acts which have satisfied this standard include "reckless

²⁵ This tort is also known as intentional infliction of mental distress, intentional infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability.

²⁶ *Rahemtulla v Vanfed Credit Union* (1984), 51 BCLR 200 (BCSC).

²⁷ *Prinzo v Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (CA) ("*Prinzo*").

²⁸ *Prinzo*, *supra* note 26 at para 48.

and untruthful accusations as to an employee's honesty which will foreseeably inflict mental shock and suffering".²⁹

For the requirement of visible and provable illness, the absence of expert medical evidence is not necessarily fatal to a plaintiff's pleading on this tort,³⁰ although the lack of expert medical evidence can be used by an employer to challenge whether there is a visible and provable illness.

In *Prinzo*, the plaintiff employee was awarded \$15,000 for intentional infliction of mental suffering where an employer persistently urged the plaintiff to return to work and at one point falsely implied that the plaintiff's doctor had agreed that she was fit to return to work. Although the trial judge had characterized his award of damages for mental suffering as aggravated damages, the Court of Appeal stated that the damages were to be characterized as damages for intentional infliction of mental suffering since the damages did not rise from the dismissal itself but rather from the defendant's conduct before the dismissal.

Many decisions prior to *Prinzo* simply awarded damages for "mental distress" without expressly considering whether the conduct in question amounted to a separate, actionable wrong. These earlier decisions are included in the Damages Chart (below) for the purpose of illustrating damage amounts.

Examples of where Damages for Intentional Infliction of Mental Suffering are Awarded

In *Downham v Lennox & Addington (County)* ("*Downham*"),³¹ the plaintiff worked for the employer as the manager of the county's non-profit housing project. The plaintiff was not given a job description and was essentially instructed to educate himself. During this time when he was educating himself, the plaintiff was, unrelated to his employment, a support person for a convicted pedophile who was released on parole into the plaintiff's supervision (not as an employee). The offender lived with the plaintiff. On one of his trips as county manager, the plaintiff became aware of a rent-geared-to-income apartment available in one of the county's non-profit community housing buildings. The plaintiff introduced himself to the property manager of that community housing building. The plaintiff later picked up an application which the offender filled out. The plaintiff did not prepare the application forms but signed a form indicating that he had been the offender's landlord. A few days later, the plaintiff accompanied the offender to view the rent-geared-to-income apartment of the community housing building he had visited earlier. The property manager, to whom the plaintiff had previously introduced himself, showed the apartment to the plaintiff and the offender and gave them a tour of the building. After the tour, the property manager was presented with the application forms and a letter written by the offender. The property manager became concerned about its contents and no decision was made on that day for the unit. Based on these events, the employer alleged just cause in dismissing the plaintiff, citing the plaintiff's behaviour as a breach of trust for alleged attempts to secure preferred treatment and accommodation for the offender.

The trial judge awarded \$20,000 to the plaintiff for "damages to his physical and mental health" under the tort of wrongful infliction of mental suffering. The trial judge also awarded damages for

²⁹ *Ibid*, at para 44.

³⁰ *Ibid*, at para 46.

³¹ *Downham v Lennox & Addington (County)*, [2005] OJ No 5227 (QL) (Ont Sup Ct) ["*Downham*"].

wrongful dismissal, aggravated damages, punitive damages, damages for defamation, and special damages. Of interest, the court concluded that the employer's behaviour in this case was outrageous; in particular, the court found that the investigation into the alleged breach of trust was biased and substantially undocumented, the report was recklessly prepared and contained a number of unfounded facts and conclusions, the only focus of the employer was to minimize political fall out and to justify his dismissal as opposed to assisting the plaintiff as an employee, and the letter for dismissal was intended to cause the plaintiff personal distress and destroy his professional career based on serious allegations which were essentially groundless. Further, the court held that the employer intended to cause mental distress and the plaintiff's health was significantly worsened by the circumstances of his dismissal. The court emphasized that the employer's conduct had permanently damaged the plaintiff self-esteem, his position in the community and his prospects of re-employment.

In *Sandy v Beausoleil First Nation*,³² the plaintiff worked for about fifteen years for the defendant employer in various positions, was dismissed, and was reemployed by the same employer for about two months as a property manger and executive assistant to the administrator before being dismissed a second time. The events of the second dismissal were at issue before the court. The plaintiff thought an error had been made with regards to Christmas bonuses and vacation pay and confronted the Band Chief and some councilors about the error. The discussion was mainly between the Band Chief, another councilor and the plaintiff. The Band Chief alleged that the plaintiff publicly stated that the Band Chief made \$70,000 and that was the reason he was not concerned about the decision not to grant Christmas bonuses. From this five to ten minute discussion, the employer dismissed the employee for breach of confidentiality, presenting false information and insubordination.

The trial judge awarded the plaintiff \$25,000 for "mental distress and intentional infliction of shock" (same concept as intentional infliction of mental distress) as well as damages for wrongful dismissal. The trial judge found that the defendant failed to prove its serious allegations on the balance of probabilities. The trial judge also held that the letter stating reasons for just cause was very general, the letter and its reasons did not make much sense when examined in detail with the actual incident, there was no real explanation for the defendant's dismissal and the dismissal was "unreasonably excessive". The court placed a strong emphasis on the fact that at the time of dismissal, all the plaintiff would have known was that her long period of work was suddenly terminated without notice because of the five to ten minute discussion in which she raised the possibility of an error. Further, there was no attempt to resolve the conflict in a cooperative or open manner as mentioned in the employer's administrative policy manual and there was no progressive discipline or corrective measures in this case.

Other examples of cases where the courts have awarded damages for the tort of intentional infliction of mental suffering include where an employee was severely harassed by a superior who had knowledge of her fragile mental state,³³ an employee was sexually harassed by her colleagues and supervisors,³⁴ and an employee was subjected to a confrontational, brash and contradictory management style.³⁵

³² *Sandy v Beausoleil First Nation*, 2003 Carswell Ont 1482 (WL Can) (Ont Sup Ct).

³³ *Boothman v Canada (TD)*, [1993] 3 FC 381 (TD).

³⁴ *Clark v Canada (TD)*, [1994] 3 FC 323 (TD).

³⁵ *Bogden v Purolator Courier Ltd.*, [1996] AJ No 289 (ABQB) (QL).

Negligent Infliction of Mental Suffering Damages

In contrast to the availability for plaintiffs to advance a claim for damages based on the tort of the *intentional* infliction of mental suffering in the employment context, the Ontario Court of Appeal's recent decision in *Piresferreira v Ayotte* ("*Piresferreira*")³⁶ established that there is no tort of "*negligent* infliction of mental suffering"³⁷ available in the employment context.³⁸ This tort had become a common cause of action in wrongful dismissal actions and employees more frequently began to claim damages for "mental suffering" allegedly experienced during the course of their employment. For now, the Ontario Court of Appeal's decision effectively closes the door on this tort in the employment context, which plaintiffs have advanced in recent wrongful dismissal claims as a cause of action. However, it must be noted that Piresferreira has recently sought leave to appeal the Ontario Court of Appeal's decision to the SCC. A decision on the Piresferreira's application for leave is not expected until the end of this year.

Since the findings of the Ontario Court of Appeal in *Piresferreira* are not settled due to the outstanding application for leave to the SCC, it is necessary to consider the Ontario Court of Appeal's reasons in its ruling. In its decision, the Ontario Court of Appeal applied the recasted two-part *Anns* test³⁹ to determine whether the employer owed a duty of care to the employee in the circumstances of the case. The Ontario Court of Appeal noted that no appellate court in Canada has recognized a free standing cause of action for the tort of negligent infliction of mental suffering in the employment context.⁴⁰ In this case, the impugned conduct of Ayotte, the plaintiff's supervisor, consisted of swearing at and physical shoving of the plaintiff. The plaintiff alleged that she had suffered prolonged and severe psychiatric illness and remained unable to work as a result of Ayotte's conduct. The Ontario Court of Appeal determined that the plaintiff satisfied the first part of the *Anns* test but failed to pass the second part of the *Anns* test; specifically, while the damages suffered by the employee at the hands of her supervisor were reasonably foreseeable and the relationship was sufficiently close or "proximate" to render such damages reasonably foreseeable, policy considerations foreclosed the recognition of a duty of care in the context of negligent infliction of mental suffering in the employment context.

Among the policy considerations militating against a recognition of such a duty was that a tort of negligent infliction of mental suffering in the employment could lead to indeterminate liability for employers and reduce productivity in the workplace. Further, the Ontario Court of Appeal noted that the SCC in *Wallace* had rejected the notion that a tort existed for breach of good faith and fair dealing by employers when dismissing employees. More recently, the SCC confirmed in *Honda* that wrongful dismissal damages are confined to the loss suffered from an employer's failure to give proper notice and that damages are not available for mental suffering, unless the employer and employee contemplated at the time of the employment contract that a breach of the contract might cause mental distress to an employee. The *Honda* decision also addresses mental suffering that arises from the manner of termination. The tort of negligent infliction of mental suffering would have the effect of expanding an employee's claim to mental suffering that results from mistreatment during the employment relationship.

³⁶ *Piresferreira v Ayotte*, 2010 ONCA 384 ("*Piresferreira*").

³⁷ This tort is also known as negligent infliction of mental distress, negligent infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability.

³⁸ *Piresferreira*, *supra* note 35.

³⁹ *Anns v Merton London Borough Council*, [1978] AC 728 (HL) ["*Anns*"]. *Anns* was adopted and recast by the SCC in *Nielsen v Kamloops (City)*, [1984] 2 SCR 2, at pp 10-11 and reiterated in *Childs v Desormeaux*, [2006] 1 SCR 643, at para 11.

⁴⁰ *Piresferreira*, *supra* note 35 at para 50.

For dismissed employees who believe an employer has engaged in abusive conduct causing mental suffering, the Ontario Court of Appeal noted that they may bring such a claim within the existing constructive dismissal framework. Where the dispute falls short of constructive dismissal, the court noted that whether an employee could bring a claim in those situations may, for example, depend on whether it was foreseeable that an employee could suffer mental distress from legitimate criticism of poor work performance, an activity in which employers are routinely engaged.

It will be interesting to see if the SCC considers Bill 168 and changes to occupational health and safety legislation that requires employers to develop, implement and properly enforce anti-harassment/anti-violence policies in determining whether an employer has a duty to protect employees in the workplace, which would create a cause of action in negligent infliction of mental suffering.

C. Special Damages

Statement of claims may also contain demands for special damages, such as claims for reasonable expenses incurred by a wrongfully dismissed employee in his/her attempts to obtain new employment (“mitigation expenses”). Employees who are found to have been wrongfully dismissed will be entitled to claim mitigation expenses if the expenses reasonably and naturally flow from the wrongful dismissal.⁴¹ Examples of mitigation expenses that have been allowed by the courts include:

- costs of starting up a business where such an action is a reasonable course of mitigating conduct;
- long distance phone calls;
- cost of preparing a resume;
- postage;
- career counseling;
- retraining;
- expenses arising from travel to out-of-town interviews;
- gas;
- parking;
- business lunches;
- and necessary professional fees such as a law society membership.⁴²

⁴¹ CED (Ont 4th), vol 22, title 58 at para 596 [citations omitted] [“CED”].

⁴² *Ibid* at paras 597-598 [citations omitted].

An example of a recent decision awarding mitigation expenses is the Ontario Superior Court of Justice's decision in *Dennis v Barr* ("*Dennis*")⁴³. In that case, the court held that the plaintiff was wrongfully dismissed. The plaintiff eventually found employment in another town. The mitigation expenses that the court awarded included: mileage; rent and housing; moving expenses; and storage expenses.⁴⁴ The mitigation expenses that were awarded in *Dennis* totalled around \$9,000.

However, the courts have placed limits on the types of special damages that will be available to plaintiffs. Some examples of special damage claims that the courts have not granted include:

- loss of investment income on collapse of an R.R.S.P.;
- interest paid on a personal loan needed to cover personal expenses while between jobs;
- lost interest or loss from cashing in savings; and
- compensation for living expenses incurred in the course of employment.⁴⁵

An example of a recent decision in which some mitigation expenses were denied is the Ontario Superior Court of Justice's decision in *Downham*.⁴⁶ The court found that the plaintiff was wrongfully dismissed but limited the mitigation expenses submitted. The court denied two mitigation expenses: the purchase of clothing, which the trial judge held the plaintiff would have had to purchase even if he continued working; and the replacement of a computer, because there was no evidence the computer broke down as a result of being used for his job search.⁴⁷ The court, however, awarded special damages for the mitigation expenses of mileage, postage, paper, ink, ads, criminal record checks, long distances charges and four courses.⁴⁸

While *Wallace* damages, aggravated damages, punitive damages and damages for negligent infliction of mental suffering will generally pose a higher risk to employers, *Dennis* demonstrates that special damages can be significant. Accordingly, employers and counsel should be prepared to address such expenses when faced with a statement of claim in the employment context.

D. Quantum of Damages

A chart is attached with a large sampling of *Wallace*, aggravated, punitive, and intentional infliction of mental suffering damage awards in courts and tribunals across Canada between 1984 and September 2010 ("*Appendix A*").

Since the *Honda* decision, the courts and tribunals have generally limited the quantum of damages awarded for *Wallace* damages, aggravated damages, punitive damages, and damages for intentional infliction of mental suffering to around \$50,000 for each type of excess damages award under each head of excess damages. One of the exceptions to this general trend is a jury

⁴³ *Dennis v Barr*, 2010 ONSC 4057.

⁴⁴ *Ibid* at paras 14-18.

⁴⁵ *CED*, *supra* note 40 at para 593 [citations omitted].

⁴⁶ *Downham*, *supra* note 30.

⁴⁷ *Ibid* at paras 306-310.

⁴⁸ *Ibid* at para 310.

trial case, which is on appeal, in which the jury awarded \$200,000 in aggravated damages and \$300,000 in punitive damages to a wrongfully dismissed employee. Aside from that anomalous award, the range of *Wallace*, aggravated, punitive, and intentional infliction of mental suffering damages awards since the decision of *Honda*, included in Appendix A are as follows:

- *Wallace* damages: \$100-\$50,000
- Aggravated damages: \$1,000-\$75,000 (the \$75,000 award was a global award for intentional infliction of mental suffering and aggravated damages)
- Punitive damages: \$7,500-\$50,000
- Intentional Infliction of Mental Suffering: \$7,500-\$75,000 (the \$75,000 award was a global award for intentional infliction of mental suffering and aggravated damages)

A review of the decisions show that *Wallace* damages are the most “common” type of damages awarded by courts and tribunals in comparison to the other excess damages. Punitive damages are rare. Similarly, there are a limited number of recent decisions which have awarded intentional infliction of mental suffering damages in the employment context.

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Appendix A: Chart of Selected Decisions where Excess Damages Awarded (1984-2010)

Decisions are organized in descending order according to the date of decision.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|--|--|--------------------|-----------------------|--|
| <i>HSAA v Alberta Health Services</i> , 2010 ABQB 555. | | | | \$2,000 ¹ |
| <i>Macdonald-Ross v Connect North America Corp</i> , 2010 NBQB 250. | | | \$50,000 ² | |
| <i>Pagliaroli v Rite-Pak Produce Co</i> , 2010 CarswellOnt 5175 (WL Can) (Ont Sup Ct). | | | | \$25,000 ³ |
| <i>Beggs v Westport Foods Ltd</i> , 2010 BCSC 833. | | | | \$20,000 ⁴ |

¹ The court affirmed an award of an arbitration board awarding *Wallace* damages on the grounds that the defendant employer acted in bad faith when it dismissed an employee. The bad faith of the employer consisted of the employer's admission that it did not want to go through the process of discussing whether the grievor could return to work after a period of innocent absenteeism, the employer acting without updated medical information even though it knew the request for this information was misplaced, the employer did not inform the grievor that a termination letter was to be delivered and the employer did not follow its standard practice of face-to-face meetings at the time of layoff.

² The court found that punitive damages were warranted because the defendant employer concocted just cause for termination after-the-fact based on unfounded allegations of misappropriation of funds and the employer also knowingly communicated the unfounded allegations to the police.

³ The court agreed with the arbitration decision that aggravated damages could be awarded on the grounds that an employer's speech made one month after the employee was constructively dismissed was defamatory and demonstrated "unfair dealing" to use the terminology of *Wallace*. The speech was made to 100-120 attendees at the employer's group holiday celebration and was held to be a thinly veiled and wide-ranging attack on the employee's character. Although there was an absence of medical evidence establishing mental distress, the court held that there was factual support for the arbitrator's conclusion that the speech caused mental distress.

⁴ The court found that *Wallace* damages were appropriate because the employer did not genuinely attempt to contact the employee, who was a long-term employee with a good record, after the employee notified the employer that her mobile home was destroyed due to a fire and she was not certain when she would return to work. The employee did not return to work for a month but provided a note a few months later notifying the employer that she was suffering depression. The employer maintained that the employee had quit.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post-Honda Wallace Damages (July 2008 – September 2010) Wallace Damages (1997 – June 2008) |
|---|--|--------------------|-----------------------|--|
| <i>Nishina v Azuma Foods (Canada) Co</i> , 2010 BCSC 502. | | | \$20,000 ⁵ | |
| <i>Elgert v Home Hardware Stores Ltd</i> , 2010 ABQB 220. ⁶ | | \$200,000 | \$300,000 | |
| <i>Public Service Alliance of Canada, Local 0004 v Greater Toronto Airports Authority</i> (2010), 191 LAC 4th 277 (Shime) (Ont Arb). ⁷ | | | \$50,000 | \$50,000 |
| <i>Prabhakaran v Fort Macleod</i> , 2010 ABPC 35. | | | | \$3,000 ⁸ |
| <i>Cooke v HTS Engineering Ltd</i> , 2009 CarswellOnt 8326 (WL Can) (Ont Sup Ct). | | | | \$3,500 ⁹ |

⁵ The court concluded that punitive damages were warranted because the defendant employer did not adequately investigate the incidents it relied upon to establish cause for dismissal, constructively dismissed the employee, and pressured the employee to accept the demotion.

⁶ In a jury trial, the jury awarded \$200,000 in aggravated damages and \$300,000 in punitive damages to an employee who was terminated for alleged acts of sexual harassment and insubordination. The jury found that the employee did not sexually harass other employees and the employee was wrongfully dismissed. It must be noted that the decision has been appealed. As of October 5, 2010, a decision on the appeal has not been rendered.

⁷ The arbitrator found that *Wallace* damages were appropriate because the employee's anxiety and depression was a reasonably foreseeable result of the defendant employer's actions of terminating the employee without cause, without a proper investigation and with regard to her record of service. Punitive damages were awarded as the employer was found to not have consulted the employee's superiors to consider the employee's work performance and did not consider her lengthy seniority and service before assuming dishonesty and dismissing the employee. Please note that the employer filed an application for judicial review on March 24, 2010. As of October 5, 2010, a decision on the judicial review had not been rendered.

⁸ The court concluded that *Wallace* damages were appropriate because the defendant employer locked the employer out of her office without explanation or notice, told individuals that worked below her that she had been locked out and not to permit entry and did not give reasonable responses to the employee when the employee made inquiries. The court found that the employee suffered "significant stress, embarrassment and humiliation" from the employer's conduct.

⁹ The court found that the employee was subjected to "yelling, abusive insults, and biting criticism" when performance issues arose, which resulted in mental distress and illness.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|--|---|-----------------------|------------------|---|
| <i>Pate v Galway-Cavendish & Harvey (Township)</i> , 2009 CarswellOnt 7885 (WL Can) (Ont Sup Ct). ¹⁰ | \$75,000 (“global” award for intentional infliction of mental suffering damages and aggravated damages) | | \$25,000 | 4 months (wrongful dismissal claim was settled by the parties) based on an annual salary of \$34,100 at time of dismissal |
| <i>Stastny v Dependable Turbines Ltd</i> , 2009 BCSC 1648. | | \$1,000 ¹¹ | | |
| <i>Poulos v Toronto & Region Conversation for The Living City</i> , 2009 CarswellOnt 8989 (WL Can) (Ont Sup Ct). | | | | \$1,000 ¹² |
| <i>Slepenkova v Ivanov</i> , 2009 ONCA 526. | | | | 2 months (6 months total) ¹³ |
| <i>Bishop v Cragg</i> , 2009 NSSM 6. | | | | \$100 ¹⁴ |

¹⁰ The court concluded that *Wallace* damages were appropriate because the defendant employer accused the employee of theft and the employee was acquitted in a criminal trial, there was a lack of notice and discussions with the employee in relation to the allegations, and the defendant employer relied on allegations up to and including the trial of the matter. The court concluded that damages for the intentional infliction of mental distress and aggravated damages (combined) were appropriate because the employee had to undergo a four-day criminal trial over a number of months, was subjected to wide media attention in the small community in which he resided, and his business and marriage ended. The court awarded punitive damages because the employer’s conduct, which were the same acts as discussed in the *Wallace* damages and aggravated damages, “cry out for a punitive award”.

¹¹ In justifying its award of aggravated damages, the court found that allegations of theft, made after dismissal, were an attempt by the defendant employer to avoid paying the employee severance pay; further, the allegation of theft was not based on a reasonable interpretation of the facts.

¹² The court awarded *Wallace* damages on the grounds that the employer did not allow the employee to explain his side of the facts in an investigation of alleged misconduct before terminating his employment. The court found that the employee suffered mental distress beyond the mere distress arising from the loss of one’s job.

¹³ The Court of Appeal upheld the trial judge’s decision to award two months of *Wallace* damages to an employee for the employer’s act of sending an unfounded and damaging pager message to other agents at the workplace informing them that the employee had not adequately performed her duties.

¹⁴ The court held that *Wallace* damages were appropriate because of unfounded allegations of theft and the decision by two supervising employees to involve the police. The court only awarded \$100 because that is the limit prescribed by the small claim court’s rules regarding general damages.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post-Honda Wallace Damages (July 2008 – September 2010) Wallace Damages (1997 – June 2008) |
|---|--|--------------------|------------------------|---|
| <i>Simmons v Webb</i> , 2008 CarswellOnt 7874 (WL Can) (Ont Sup Ct). | | | | \$20,000 ¹⁵ |
| <i>Peoples v Ontario (Ministry of Training, Colleges and Universities)</i> , 2008 CarswellOnt 7706 (WL Can) (Ont Sup Ct). | | | | 4 months (28 months total) based on an annual salary of \$71,240 at time of dismissal ¹⁶ |
| <i>Bru v AGM Enterprises Inc</i> , 2008 BCSC 1680. | | | | \$12,000 ¹⁷ |
| <i>Boyd v Wright Environmental Management Inc</i> , 2008 ONCA 779. | | | \$25,000 ¹⁸ | |
| <i>Lapointe v Gaz Speciaux MEGS Inc</i> , 2008 CarswellOnt 6959 (WL Can) (Ont Sup Ct). ¹⁹ | \$7,500 | | \$7,500 | \$15,339.96 |

¹⁵ The court determined that moral damages were warranted due to the insensitive manner of dismissal; specifically, the manner of dismissal was insensitive because the employee had been a key employee for 20 years and the employer handed him a letter informing him of his termination and directing him to remove his effects from the premises immediately. Further, the court found that the employer did not comply with the dismissed employee's requests after termination for materials needed to start a new business and to have his personal effects returned.

¹⁶ The court found that the defendant employer did not afford the employee an opportunity to respond to an investigator's report criticizing her management style, did not grant the employee the option of addressing perceived shortcomings of her management style, did not follow a generally progressive disciplinary approach, did not wait the outcome of the employee's grievance process before taking further action, did not consider other possible employment option for the employee and limited the plaintiff's notice period to an amount which was not in line with the employee's 28 years of service.

¹⁷ The court held that the defendant employer did not treat the employee fairly when the employer stonewalled the employee's explanations that she had not quit from her job, failed to communicate in meaningful way after the employee asserted that she did not quit from her job, did not consider the employee's financial, emotional and situational vulnerability, and issued a stern rebuke to the employee over the telephone. The court found that the employee suffered from acute mental distress and anxiety.

¹⁸ The Court of Appeal agreed with the trial judge that the punitive damages were merited because of the "heinousness" of the defendant's conduct. The defendant had orally promised the employee shares in his business for about ten years but terminated the employee just before a meeting arranged between the employee's counsel and the defendant's counsel to address the agreement for shares.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|--|--|------------------------|------------------------|---|
| <i>Evangelista v Number 7 Sales Ltd</i> , 2008 ONCA 599. | | | | 3 months (18 months total) ²⁰ |
| <i>Brien v Niagara Motors Ltd</i> , 2008 CarswellOnt 4936 (WL Can) (Ont Sup Ct). | | | | 2 months (26 months total) ²¹ |
| <i>Ross v 413554 Ontario Ltd</i> , 2008 CarswellOnt 5116 (WL Can) (Ont Sup Ct). | | | | 2 months which resulted in the sum of \$11,424.02 ²² |
| <i>MacDonald v Kirkfield Park Baptist Church</i> , 2008 MBQB 82. | | \$25,000 ²³ | | |
| <i>Mastroggiuseppe v Bank of Nova Scotia</i> , 2007 ONCA 726. | | | \$25,000 ²⁴ | 4 months (26 months total) |

¹⁹ The court refused to set aside default judgment, rendered by Roy J. dated August 21, 2007 (unreported), granting an employee damages for lost overtime, lost vacation pay, notice, *Wallace* damages, damages for intentional infliction of mental suffering and punitive damages in a wrongful dismissal suit. The judgment granting default judgment is not reported so the facts are not clear; nevertheless, it appears from the court's decision not to set aside default judgment that the excess damages awards were based, in part, on the fact that the employer took advantage of a short leave, taken by the employee to attend to the funeral of his niece and to support his family, to refuse him a return to work.

²⁰ The Court of Appeal agreed with the trial judge that the defendant employer's actions of subjecting the employee to undue pressure when the employee was in poor health (reducing the employee's compensation) warranted an award of *Wallace* damages.

²¹ The court held that *Wallace* damages were warranted given the employer's untrue statement that the employee made an improper allegation of just cause against the employee which caused the employee distress, the lack of progressive discipline and warnings before dismissal and dishonesty about the reasons for termination.

²² The court awarded *Wallace* damages on the ground that the employer dismissed the employee without explanation and did not give the employee an opportunity to remedy or correct any alleged misconduct.

²³ The court awarded aggravated damages based on defamatory statements made by the defendant employer which was found to have harmed the employee's reputation and employment and resulted in emotional suffering of the employee.

²⁴ The Court of Appeal agreed with the trial judge that the employer bank's conduct had the effect of blacklisting the employee's relatives. Also, the defendant's deducting of funds from the employee's account with another bank was found to be oppressive and high-handed and necessitated a minimum punitive award of \$25,000 so as to deter and denounce the conduct.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|--|--|--------------------|--|---|
| <i>Mercey v Consolidated Recycling Inc (cob Metro Recycling)</i> , [2007] OJ No 3608 (Ont Sup Ct). | | | \$10,000 ²⁵ | 6 months (7 months total). ²⁶ |
| <i>Rittinger v Nacel Properties Ltd</i> , 2007 BCPC 249, 59 CCEL (3d) 246. | | | | Approx. 5 weeks (15 weeks total). |
| <i>Benko v. Scott</i> , 2007 SKQB 176, 57 CCEL (3d) 254. | | | | 4 weeks (8 weeks total) |
| <i>Budhram v. 1257229 Ontario Ltd</i> , 2007 CarswellOnt 2874 (WL Can) (Ont Sup Ct). | | | 1 month's wages (\$3,163.62) ²⁷ | |
| <i>Stuart v Navigata Communications Ltd.</i> , 2007 BCSC 463, 80 A.C.W.S. (3d) 1029. | | | | 2 months (20 months total) |
| <i>Solomon v Alexis Creek Indian Band</i> , 2007 BCSC 459. | | | | 3 months (8 months total) |
| <i>Spinks v Altec/Carlisle, Division of Carlisle Corp of Canada</i> , 2007 CarswellOnt 1626 (WL Can) (Ont Sup Ct). | | | | 1 month (4 months total) |

²⁵ The \$10,000 award of punitive damages award was in part based on the fact that the action had been brought under the simplified procedure. The court determined that no award for mental distress damages could go ahead in light of the lack of an independently actionable wrong, but then went ahead to award punitive damages.

²⁶ The court adopted the position that damages for intentional infliction of mental suffering and *Wallace* damages were mutually exclusive (para. 21). The court explained that the disproportion between the notice period and the *Wallace* damages was justified because of the defendant employer's conduct of trying to get a victim of a sexual assault out of the company while trying to get the "rainmaker", who was also the perpetrator of the sexual assault, back to work.

²⁷ The court indicated that the punitive damages award was based on the poor treatment of the employee upon dismissal. The employer had initially refused to pay wages owing, including accumulated vacation pay.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|---|--|--------------------|------------------|---|
| <i>Perewernycky v National – Oilwell Canada Ltd.</i> , 2007 ABQB 170, 57 CCEL (3d) 222 | | | | 2 months (12 months total) |
| <i>Emergis Inc v Doyle</i> (2007), 56 CCEL (3d) 303, 2007 CarswellOnt 1478 (WL Can) (Ont Sup Ct). | | | | 2 months (12 months total) |
| <i>Askitch c Canadian Pacific Railway</i> , 2006 QCCA 931. | | | | \$20,000 “moral damages” awarded for circumstances surrounding dismissal. Notice period was 15 months, or \$159,000 ²⁸ |
| <i>Patriquin v Pan Pacific Holdings Inc.</i> , 2006 BCPC 308, 50 CCEL (3d) 206. | | | | 2 weeks (8 weeks total) |

²⁸ The Court of Appeal upheld the trial judge’s award of 15 months (discounted to \$103,072 for mitigation), but allowed a claim for a five-year “bridge” to pension program that would have been available after 14 months. The total award was thus \$427,677.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|---|--|--------------------|-----------------------|---|
| <i>Stone v SDS Kerr Beavers Dental</i> , 2006 CarswellOnt 3831 (WL Can) (Ont Sup Ct), aff'd by 2007 ONCA 543. | | | | 13 months total (including “not significant” Wallace bump up of unclear amount). ²⁹ |
| <i>Chaudhry v Beck Taxi Ltd.</i> (2006), 50 C.C.E.L. (3d) 138 (Ont Sup Ct), aff'd by [2007] OJ No. 867 (QL) (Ont Sup Ct Div Ct) | | | \$7,500 ³⁰ | |
| <i>Hill v Johnson Controls LP</i> , 2006 BCSC 826, 50 CCEL (3d) 238. | | | | 12 months total (unclear how much due to Wallace bump up). ³¹ |
| <i>Manoni v Powell</i> (2006), 209 OAC 69 (Ont CA). | | | | A “modest enhancement” (7 months total) |
| <i>Fanous v Total Credit Recovery Ltd.</i> , 2006 CarswellOnt 4527 (WL Can) (Ont Sup Ct). | | | | 1 month (2 months total) *Note: this was referred to as “aggravated damages,” but the |

²⁹ The court considered the *Wallace* factor as one of the considerations in setting the overall notice period. The employer had argued that 12 months was appropriate, and the court considered the employer to have acted in bad faith but not egregiously so, so it would seem the Wallace bump up was 1 month.

³⁰ This was not an employment case, but the contract for services between the parties was one that was held to include the implied term that it would not be terminated without cause or sufficient notice. The independent actionable wrong, although not clearly expressed at trial, was taken by the Court of Appeal to be breach of statute in attempting to interfere with the formation of a union.

³¹ It would appear that the *Wallace* bump up was minimal. The court found that the conduct of the employer had been appropriate except when it sent a letter indicating its offer was as good as the law would afford the employee (at para. 42).

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post- <i>Honda Wallace</i> Damages (July 2008 – September 2010) <i>Wallace</i> Damages (1997 – June 2008) |
|---|--|--------------------|------------------|--|
| | | | | court analyzed under <i>Wallace</i> . |
| <i>Sommerard v IBM Canada Ltd</i> (2006), 265 DLR (4th) 485, 208 OAC 291 (Ont CA). | | | | 4 months (8 months total) |
| <i>Jessen v CHC Helicopters International Inc.</i> , 2006 NSCA 81, 271 DLR (4th) 659. | | | | 9 months ³² (13 months total) |
| <i>Mullaly v Global Television Network</i> , 2006 NBQB 99, 297 NBR (2d) 66. | | | | 2 months (shortened from 4 months on account of employee's bad behaviour; total of 18 months) |
| <i>Morland v Kenmara Inc</i> (2006), 48 CCEL (3d) 308 (Ont Sup Ct). | | | | 1 month (4 months total) |
| <i>Federowicz v Pace Marathon Motor Lines Inc.</i> (2006), 48 CCEL (3d) 260 (Ont Sup Ct), aff'd by 2007 ONCA 868. | | | | 2 months (10 months total) |
| <i>Lowndes v Summit Ford Sales Ltd.</i> (2006), 47 CCEL (3d) 198 (Ont CA). | | | | 4 months (28 months total) |

³² The jury at trial had awarded 48 months of *Wallace* damages, and the court overturned this as excessive on the grounds that (1) the SCC in *Wallace* considered 24 months to be toward the high end of the range, (2) the relevant factors to consider did not indicate this case was particularly grievous, and (3) the average *Wallace* award to date was in the range of 3.5 months. In its reasons the court refers to an article by Gavin Hume, Q.C. and David Wong entitled "Wallace Damages: What Constitutes Bad Faith?" Annual CBA National Administrative Law and Labour/Employment CLE Conference, Ottawa, November, 2005 [unpublished] which surveyed 99 cases up to 2005.

| Case Citation | Mental Distress Damages/Intentional Infliction of Mental Suffering | Aggravated Damages | Punitive Damages | Post-Honda Wallace Damages (July 2008 – September 2010) Wallace Damages (1997 – June 2008) |
|---|--|--------------------|-------------------------|--|
| <i>Downham v Lennox & Addington (County)</i> , [2005] OJ No 5227 (QL) (Ont Sup Ct). | \$20,000 | \$50,000 | \$100,000 ³³ | Approximately 9 months (approximately 29 months total). ³⁴ |
| <i>Rae v Attrell Hyundai Subaru</i> , [2005] OJ No 4917 (QL) (Ont CA). | | | | 7 months total damages including Wallace ³⁵ |
| <i>Lavinskas v Jacques Whitford & Associates Ltd</i> , [2005] OJ No 4580 (QL) (Ont Sup Ct). | | | | 6 months total damages including Wallace. ³⁶ |
| <i>Chiang v Kejo Holdings Ltd (cob Steveston Collision)</i> , [2005] BCJ No 591 (QL) (SC). | | | \$5,000 | |
| <i>Zadorozniak v Community Futures Development Corp of Nicola Valley</i> , 2005 BCSC 26. | | | | 6 months (12 months total) ³⁷ |
| <i>McCulloch v Iplatform Inc</i> , [2004] OJ No 5237 (QL) (Ont Sup Ct). | | | | 3 months (6 months total) ³⁸ |

³³ When it came to assessing punitive damages the court stated that the conduct to be censured by the punitive award “includes the intentional and negligent infliction of emotional distress and economic harm, the malicious handling of the investigation and termination and appeal, and the position maintained by the employer through trial.”

³⁴ The court found that the investigation and dismissal process unfair. The employee was also not given opportunity to state his side. There were unfounded allegations circulated to community and maintained throughout trial. The court did not distinguish between aggravated and Wallace damages, but assigned \$50,000 for conduct covered by either.

³⁵ The court found that the employer sent notice of termination 2 weeks before employee was to give birth.

³⁶ The court found that the investigation carried out behind employee’s back. Employee not given reasonable chance to change to meet criticisms.

³⁷ The court found that the employee was purposely fired during working hours, pinned down by others and taken away via police car on main street, and held in jail for the day. Employer attempted to deprive employee of insurance benefits and painted him in as bad a light as possible asserting wrongdoing and misconduct throughout.

³⁸ The court disapproved of the “hardball tactics” adopted by the employer: “The defendants maintained just cause allegations throughout the trial of this matter on the basis of undocumented performance-related complaints. They failed to provide a letter of reference. They failed or refused to provide insurance claims forms to him. They delayed in

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|--|--|--------------------|------------------|---|
| <i>Antidormi v Blue Pumpkin Software Inc</i> (2004), 35 CCEL (3d) 247 (Ont Sup Ct) | | | | 2 months (12 months total) |
| <i>Schmidt v AMEC Earth & Environment Ltd</i> , 2004 BCSC 1012. | | | | 1 month (22 months total) ³⁹ |
| <i>Smith v Casino Rama Services Inc.</i> , [2004] OJ No 3098 (QL) (Ont Sup Ct). | | | | 2.5 months (3 months total) ⁴⁰ |
| <i>Schimp v RCR Catering Ltd</i> , 2004 NSCA 29. | | | | 3.5 months (4.5 months total) ⁴¹ |
| <i>Montague v Bank of Nova Scotia</i> (2004), 30 CCEL (3d) 71 (Ont CA). | | | | 4 months (16 months total) ⁴² |
| <i>Zorn-Smith v The Bank of Montreal</i> , [2003] OJ No 5044 (QL) (Ont Sup Ct). | \$15,000 | | | 16 months total, including Wallace |
| <i>Sandy v Beausoleil First Nation</i> , [2003] OJ No 1579 (QL) (Ont Sup Ct). | \$25,000 | | | |
| <i>Prinzo v Baycrest Centre for Geriatric Care</i> , [2002] OJ No 2712 (CA) | \$15,000 | | | |

paying statutory entitlements. They created hurdles regarding their own identity by only conceding that Mr. McCulloch was an employee of a corporate entity that Mr. Ricketts testified no longer existed, except on paper, iPlatform Inc.” (at para. 45).

³⁹ The court found that the employer failed to provide requested and promised letter of reference.

⁴⁰ The court found that the employee breached procedure and deserved warning but instead was dismissed. The employer's rush to judgment was found to have been in bad faith.

⁴¹ The court found that the employer made unsubstantiated accusation of theft, and removed the employee from its premises in view of other employees. No letter of recommendation and employee banned from premises for 6 months. The regular notice period was shortened on account of mitigation.

⁴² The court found that the employer treated employee as having abandoned position when it was aware that she had medical reason for absence.

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|---|--|------------------------|------------------|---|
| <i>Sweetland v Newfoundland (Minister of Development)</i> (2002), 22 CCEL (3d) 122 (Nfld& Lab SCTD) | | \$20,000 ⁴³ | | 7 months (17 months total) ⁴⁴ |
| <i>Stamos v Annuity Research and Marketing Service Ltd</i> , [2002] OJ No 1865 (QL) (Ont Sup Ct). | \$2,500 | | | |
| <i>Marshall v Watson Wyatt & Co</i> , [2002] OJ No 84 (QL) (CA) | | | | 3 months (12 months total) |
| <i>Baranowski v Binks Manufacturing Co</i> (2000), 49 CCEL (2d) (Ont Sup Ct). | | | | 6 months (36 months total) ⁴⁵ |
| <i>Rady v Canadian Medical Laboratories Ltd.</i> , [1999] OJ No 5858 (QL) (Ont Sup Ct). | | | | 6 months (12 months total) |
| <i>Singh v British Columbia Hydro & Power Authority</i> , 2001 BCCA 695. | | | | 6.5 months (27 months total) ⁴⁶ |
| <i>McKinley v B.C. Tel</i> , [2001] 2 SCR 161. | | | | 4 months (26 months total) ⁴⁷ |

⁴³ The court stated that “I conclude the discrimination and termination on grounds of alleged political affiliation meets the test of being ‘independently actionable’” (at para. 37).

⁴⁴ The court found that the employee treated less favourably than others because of political affiliation.

⁴⁵ The court stated that this was an exceptional case where more than 24 months would be awarded as the plaintiff was employed with the company for 29 years and was its President.

⁴⁶ The court found that the employee was repeatedly told job was secure and induced not to search for other employment. Employee was dismissed while struggling in his return from sick leave. The apportionment of the *Wallace* damages was not made explicitly.

⁴⁷ The court found the employee was dismissed while on short term disability and suffering from hypertension and depression. Employee had difficulty obtaining copy of long term disability plan from employer. Employer reduced severance offer during negotiations over employee’s termination.

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| <i>Galbraith v Acres International Ltd</i> (2001), 8 C.C.E.L. (3d) 66 (Ont Sup Ct). | | | | 3 months (18 months total) |
| <i>Clendenning v Lowndes Lambert (B.C.) Ltd.</i> , 2000 BCCA 644. | | | | 12 months total, including Wallace. ⁴⁸ |
| <i>Sjerven v Port Alberni Friendship Center</i> , 2000 BCSC 106. | | | | 6 months (13 months total) ⁴⁹ |
| <i>Squires v Corner Brook Pulp & Paper Ltd</i> (1999), 44 CCEL (2d) 246 (Nfld CA). | | | | 6 months (21 months total) ⁵⁰ |
| <i>Noseworthy v Riverside Pontiac-Buick Ltd</i> (1998), 39 CCEL (2d) 37 (Ont CA). | | | | 3 months (13 months total) |
| <i>Tannous v Donaghue</i> , [1998] OJ No 2311 (QL) (CA). | | \$15,000 | | |
| <i>Whiting v Winnipeg River Brokenhead Community Futures Development Corp</i> (1998), 159 DLR (4th) 18 (Man CA). | | | | 6-7 months (12 months total) ⁵¹ |
| <i>Ditchburn v Landis and Gyr Powers Ltd.</i> , [1997] OJ No 2401 (QL) (CA). | \$15,000 | | | |

⁴⁸ The court found that the employer passed on unfounded allegations regarding fraudulent behaviour of employee to all potential employers. The trial award of 36 months' Wallace damages was overturned at the C.A. in part because there was no evidence of prejudice to the employee and because the employer had a bona fide belief that the allegations were true. The trial judge had awarded 6 months notice and 36 months Wallace. On appeal the employee was awarded 12 months total damages including Wallace.

⁴⁹ The court found that the employer did not follow its own discipline procedures denying the employee procedural fairness as guaranteed in contract and in law.

⁵⁰ The court found that the employee was given no warning of dismissal and no opportunity to defend himself. Termination letter contained threat to maintain that termination was for just cause if employee did not accept offer of settlement when there was clearly no just cause.

⁵¹ The court found that the employee was put on probation and not told why. Employee went on sick leave and while on it told that pursuant to a policy change her sick leave would be dismissed without explanation.

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| <i>Hughes v Gemini Food Corp</i> (1997), 27 CCEL (2d) 204 (CA). | | \$75,000 ⁵² | | |
| <i>Gilbert v TS Realty Inc</i> , [1996] OJ No 3044 (QL) (Gen. Div). | | \$10,000 ⁵³ | \$15,000 | |
| <i>Russell v Nova Scotia Power Inc</i> , [1996] NSJ No 178 (SC). | \$40,000 ⁵⁴ | | | |
| <i>Tremblay v Goddard</i> (1996), 23 CCEL (2d) 315 (Ont Ct Gen Div). | \$15,000 | | | |
| <i>Bogden v Purolator Courier Ltd.</i> , [1996] AJ No 289 (QL) (QB). | \$20,000 | | | |
| <i>Gordon v Abbott Laboratories Ltd</i> , [1995] OJ No 2672 (QL) (Gen Div). | \$5,000 | | \$20,000 | |
| <i>Jeffrey v Purolator Courier Ltd</i> , [1995] OJ No 110 (QL) (QL) (Gen Div). | \$6,000 | | | |
| <i>Dixon v British Columbia Transit</i> (1995), 13 CCEL (2d) 272 (BCSC). | | \$50,000 ⁵⁵ | \$75,000 | |
| <i>Clark v Canada (TD)</i> , [1994] 3 FC No 323 (QL) (TD) | \$5,000 | | | |
| <i>Francis v Canadian Imperial Bank of Commerce</i> , [1994] OJ No 2657 (QL) | | | \$40,000 ⁵⁶ | |

⁵² The court found that the employer sent letter to the Premier of P.E.I. providing reasons for the employee's dismissal which the employer knew were false. The letter was read in the Legislature the same day and reported widely in the press.

⁵³ Damages were awarded as the summary dismissal without notice and cause, caused the plaintiff to be depressed which had an adverse impact on his income and damaged his reputation as a manager among other real estate agents.

⁵⁴ Although defamation was not established, the award was based on an e-mail sent to the entire company stating that the employee was dismissed because he was incompetent.

⁵⁵ Award based on the tort of deceit. The employer dismissed Dixon for cause and maintained allegations of criminal conduct until trial despite knowing the allegations were false.

⁵⁶ Damages for mental distress not awarded because the plaintiff led no medical evidence of harm. In spite of the failure to make out an independently actionable wrong the court nevertheless awarded punitive damages. It viewed the employer's conduct, which included, among other things, allegations of cause that were dropped just before trial, as worthy of punishment.

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| (CA). | | | | |
| <i>Boothman v Canada</i> , [1993] FCJ No 400 (QL) (TD). | \$5,000 | | \$10,000 | |
| <i>Ribeiro v Canadian Imperial Bank of Commerce et al</i> , [1992] OJ No 2471 (QL) (CA) | \$20,000 | | \$50,000 ⁵⁷ | |
| <i>Rahentulla v Vanfed Credit Union</i> , [1984] DCJ No 2790 (QL) (BCSC) | \$5,000 | | | |

⁵⁷ Employer dismissed employee based on allegations of fraud which were totally groundless.