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DAMAGES IN Small Claims Court

CHAIR

Catharine Buie
Buie Cohen LLP

November 10, 2016

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DAMAGES IN SMALL CLAIMS COURT

Chair: Catharine Buie, *Buie Cohen LLP*

November 10, 2016

12:00 p.m. to 1:30 p.m.

Total CPD Hours = 1 h Substantive + 30 m Professionalism 


130 Queen St. W.
Toronto, ON

SKU CLE16-01107

Agenda

- | | |
|-------------------------|--|
| 12:00 p.m. – 12:05 p.m. | Welcome and Opening Remarks

<i>Catharine Buie, Buie Cohen LLP</i> |
| 12:05 p.m. – 12:30 p.m. | Damages-General, Special and a Potpourri of Types of Issues before the Court

<i>Catharine Buie, Buie Cohen LLP</i> |
| 12:30 p.m. – 12:45 p.m. | Professionalism before the Courts (15 minutes )

<i>Catharine Buie, Buie Cohen LLP</i> |

12:35 p.m. – 1:00 p.m.

Punitive and Aggravated Damages

Thora Espinet, *Barrister & Solicitor*,
Deputy Judge, *Small Claims Court, Superior Court of Justice*

1:00 p.m. – 1:25 p.m.

**Damages in Employment Law-Managing Your Client's
Expectations and Effective Advocacy before the Court
(15 minutes^P)**

Carla Bocci, *Barrister & Solicitor*,
Deputy Judge, *Small Claims Court, Superior Court of Justice*

1:25 p.m. – 1:30 p.m.

Go Ahead & Ask Us – Question and Answer Session

1:30 p.m.

Program Ends



DAMAGES IN SMALL CLAIMS COURT

November 10, 2016

SKU CLE16-01107

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Deputy Judge, Small Claims Court, Superior Court of Justice*

TAB 1



Damages in Small Claims Court

Why Did I Ever Accept This Retainer

Catharine Buie, *Buie Cohen LLP*

November 10, 2016

WHY DID I EVER ACCEPT THIS RETAINER¹

REAL ESTATE - THE SAGA OF THE MOULDY BASEMENT BATHROOM

Factual Basis

Dr. Malcom Lee and Mrs. Guy Yee Lee retained real estate agent Susan Campbell of *Happy Home Realty Ltd.*, who advertises herself as being Number 1 in the Business, to assist them in finding a suitable residence. The Lees told her that Dr. Lee's elderly mother would be residing with them in the next 2 years and it was their intention to create an in- law suite in the basement.

On April 1, 2014, Dr. Lee entered into a Purchase and Sale Agreement with Joseph Smith with a closing date of June 1, 2014 and was conditional upon a satisfactory home inspection.

As neither Dr. Lee nor Mrs. Guy Yee Lee had not previously owned a single dwelling, Susan Campbell, who was seeking future referrals, told them that she knew of an excellent home inspector and agreed to contact him and arrange for him to perform the inspection at her cost. The inspection was carried out by *We Inspect Homes Inc.* and the report was sent to Dr. Yee. Based upon the report the condition was waived and the transaction closed on September 1, 2013 and ownership was registered as Malcolm Lee and Guy Yee Lee as joint tenants.

The Lee's did not use the basement and in fact, it was only in contemplation of Dr. Lee's mother imminent arrival scheduled for October 1, 2015, that they investigated renovating the basement. On August 1, 2015, on a walk through with a contractor, the Lee's were informed that the basement's bathroom had possible mold-water issues. On the rare occasions that the Lee's had gone into the basement prior to August 1, 2015, while Mrs. Guy Yee Lee had notice a musty odour she had ignored it.

Upon the advice of the employee from *Number 1 Contractor Limited*, the dry wall behind the toilet was removed and upon his further advice a Mold Company was called to inspect the area. Mold was discovered and it was recommended that all of the dry wall in the bathroom should be removed to determine if mold was present.

The Lee's decided to follow the recommendation and agreed that all of the dry wall should be removed. Upon inspection, it was found that only the area behind the toilet contained mold. Since, the bathroom was now in a state of complete chaos requiring new dry wall, rather than re installing the toilet, sink and tub, they decided to renovate the bathroom in its entirety which included installing a heated slate floor, a tiled shower with a pebble floor and 6 jets, a fully automated water saving toilet, a new sink, a new vanity with a granite counter top, new

¹ Catherine M. Buie October 2016

fixtures and custom built in storage. The total cost was \$35,000.00. The work was finished on October 1, 2015 and the Lee's retain you to advise them if they have a legal action.

Identifying the Parties

1. The Agreement of Purchase of Sale was signed by Dr. Lee, but title was taken as Dr. Malcom Lee and Guy Yee Lee as joint tenants. Are both parties named as plaintiffs or is Dr. Lee as he signed the Agreement of Purchase and Sale the plaintiff? Is there a professional obligation to confirm who holds legal title prior to issuing a claim or filing a defence?
2. Is Joseph Smith a defendant?
3. Is Susan Campbell a defendant?
4. Is *Happy Home Realty Ltd.* a defendant?
5. Is *We Inspect Homes Inc.* a defendant?

Legal Framework

1. Susan Campbell was aware that the basement would become an in-law suite. She chose the home inspector, arranged for his inspection and paid his invoice. Is she liable if the court finds the home inspector to be negligent and / or has committed a breach of contract?
2. Is *Happy Home Realty Ltd.*, the employer of Susan Campbell, responsible for her actions under this factual situation?
3. *We Inspect Home Inc.* contracted with Susan Campbell, but performed the work on behest of the Lees. Is there a contractual arrangement between it and the Lees or is the claim to be framed as a tort action? If so what is the tort?

Damages

The Lees are seeking the cost of their renovation to wit, \$35,000 plus any and all monies expended, including your fees and disbursements. Leaving aside the issue of managing client's expectation and the litigation education process, what are the heads of damages?

1. If the Lees had not renovated the bathroom, your research shows the following:
 - a) The cost of removal of the dry wall section behind the toilet was \$1,000. To install new drywall in that area, paint the entire bathroom and re install the toilet was \$1,000 with the total cost being \$2,000;
 - b) The cost of removing all of the bathroom drywall and the bathroom fixtures was \$4,000. Installing new dry wall, painting the entire bathroom and re installing all of the bathroom fixtures was \$5,000, a total of \$9,000; and
 - c) The mold company's invoice did not change, it was \$1,000.

Question - Are the Lees entitled to a) \$35,000 plus the mold's company invoice, b) \$2,000 plus the mold company's invoice or c) \$9,000 plus the mold company's invoice.

Professionalism

1. Is it part of your duties pursuant to the Rules to explore the possible defences, including the Limitation Act prior to issuing a Claim? If yes, are you obligated to write to the Lees explaining the above and the effect it may have upon their litigation and the possible costs involved if the defence is raised and is successful?
2. Prior to embroiling your clients into litigation, what investigation should you undertake before issuing the Statement of Claim?
3. Upon receipt of a Statement of Defence, should you contact the defendant's representative or the defendant if he/she/it does not have a representative to discuss the merits of the case including the evidence?
4. Would you serve an Offer to Settle and if so, in what amount and at what stage of the action? Are you obligated to inform your client of the cost consequences of Offers to Settle and at what point in the Litigation do you advise them?
5. Are you obligated to advise the Lees of potential Defendant's claims and the resulting time and cost?

CONSTRUCTION - WHY DID I EVER WANT TO BUY A SKI CHALET

Factual Basis

In January 2015, GJ Raiz, a keen skier purchased unit D in Natural High Chalet Inc. a 4 plex located at Blue Mountain which was built in 2005. Sandy Kim, the owner of unit C, had self-appointed herself as the collector of the condominium dues and none of the owners including Mr. Raiz objected.

During February, Patty Smith, the owner of unit A and Jerry Joseph, the owner of unit B discovered leaks in their unit. As it didn't affect GJ, he paid little attention and focused on enjoying his unit and skiing.

Sandy Kim, who takes her responsibilities very seriously, immediately arranged for a contractor to enter the units and determine the cause of the leaks. An employee from *We Fix All Ltd.* inspected the area and recommended that *Rely On Us Roofing Company Inc.* be contacted. Unbeknownst to Sandy, the sole shareholder of both companies was the same individual.

An employee from *Rely On Us Roofing Company Inc.* came and inspected the interior of Unit A and B and the roof. He told Ms. Kim that an entire new roof was needed as a patch job was not possible.

Sandy who was anxious to solve the problem and keep her fellow owners happy approved the work and the cost. As the condominium contingency fund had insufficient monies,

being that the cost of the new roof was \$32,000 and the fund only had \$20,000, each unit owner was assessed \$3,000. At that time, a claim was also filed under the Insurance Policy for repairs to the interior and damage to contents. The Insurance Company pursuant to the Condominium's policy paid for the repairs and for the replacement of contents.

Everyone was happy and eagerly anticipating a worry free 2016 ski season. However, by February 2016, unit A and B were reporting leakage. Ms. Kim immediately contacted *Rely On Us Roofing Company Inc.* who sent out an employee. Upon inspection of the roof, the employee indicated that some of the shingles were incorrectly installed and were blown off during a fall storm leaving that area unprotected. Ms. Kim was assured that the problem had been resolved and a claim was not made to the Insurance Company.

However, much to GJ Raiz's dismay, as he just wanted to ski, he was being deluged with angry emails from unit owners and *Rely On Us Roofing Company Inc.* However, by chance, at the end of April 2016, he attended an après ski cocktail party and learnt from a fellow guest that the adjacent building to his which had been built by the same contractor at the same time had had a similar problem. The problem was not with the roof, but occurred because the insulation and vapor barrier had been improperly installed. It was an easy and inexpensive fix costing only \$2,000. Mr. Raiz immediately brings this information to Ms. Kim's attention and demands a return of his assessment money and angrily informs her that she must reimburse the contingency fund the sum of \$20,000 as the new roof had not been necessary.

Identifying the Parties

1. Is GJ Raiz a plaintiff?
2. Is Sandy Kim a defendant
3. Is Natural High Chalet Inc. the Plaintiff?
4. Is *We Fix All Ltd.* a defendant
5. Is *Rely On Us Roofing Company Inc.* a defendant?

Legal Framework

1. On what basis would Mr. Raiz have a claim against Sandy Kim or *We Fix All Ltd.* or *Rely On Us Roofing Company Inc.*? Did Sandy have the express or implicit authority to contract with *Rely On Us Roofing Company Inc.*?
2. Does Mr. Raiz have the legal standing to issue a claim against *Rely On Us Roofing Company Inc.*? If so, on what basis, is it a tort action or a contractual action? And if it is a tort, identify the tort?

Damages

1. If there is a claim against *Rely On Us Roofing Company Inc.* is it for \$32,000? Does a betterment issue exist?
2. Is the information that the adjacent unit paid \$2,000 relevant?

Professionalism

1. Do you advise Mr. Raiz that you need to examine the by-laws of the Condominium Corporation before taking any future steps? In addition to undertaking legal research?
2. Do you advise Mr. Raiz the knowledge which he obtained at the après ski cocktail party needs to be investigated and that a claim should not be issued pending the results of the investigation? The fact that the adjacent building had a vapour barrier problem is this evidence that this condition existed on his building and was the cause of the leakage?
3. Do you advise Mr. Raiz of the provisions of the Limitation Act?
4. Do you have any obligation towards Sandy Kim?



Damages in Small Claims Court

Aggravated and Punitive Damages

Thora Espinet, *Barrister & Solicitor,*
Deputy Judge, *Small Claims Court, Superior Court of Justice*

November 10, 2016

THORA ESPINET

AGGRAVATED AND PUNITIVE DAMAGES

DATE: November 10, 2016

Although often interrelated, and easily confused, aggravated and punitive damages are two distinct heads of damages that serve two fundamentally different purposes¹. Aggravated damages are compensatory in nature and are awarded to take into account damages caused to the party, due to the conduct of the Defendant, whereas punitive are awarded to punish the defendant for actions which offends the court's sense of decency.

AGGRAVATED DAMAGES

(1) Definition

Aggravated damages are awarded to take into account pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant².

¹ Hodgkin v. Aylmer, 1996 CarswellOnt 4343 (Gen. Div.), at paragraph 58, and Dogan v. Pakulski, 2007 CarswellOnt 3085 (S.C.J.), at paragraph 91, citing the eight addition of Linden, Canadian Tort Law.

² Gravelle v. A1 Security Manufacturing Corp., 2014 ONSC 5472, at paragraph 38, citing paragraph 51 of Huff v. Price, 1990 CarswellBC 267 (C.A.).

Aggravated damages are **not** awarded in addition to general damages, but instead the general damages are to be assessed taking into account any aggravating features of the case and to that extent increasing the amount awarded³.

(2) Requirements

As aggravated damages are compensatory in nature, the plaintiff must provide evidence that he or she has suffered, foreseeable and compensable mental distress or psychological damage⁴. Consequently, a corporation, who obviously cannot suffer mental distress or psychological damage, cannot recover aggravated damages⁵.

In addition, the plaintiff must also show that the defendant acted in bad faith⁶ or, malice. In **Kumar v. Khurana**, the court stated: “Aggravated damages may be awarded to take into account the additional harm caused to the plaintiff’s feelings by the defendant’s outrageous and malicious conduct. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the Plaintiff.”⁷

³ McIntyre v. Grigg (2006), 83 O.R. (3d) 161 (C.A.), at paragraphs 50 to 51.

⁴ Alan Clausi Professional Corp. v. Bullock, 2016 ONSC 3033, at paragraph 39.

⁵ Ibid and Barrick Gold Corp. v. Lopehandia (2004), 1 O.R. (3d) 416 (C.A.), at paragraph 49.

⁶ Alan Clausi, supra, at paragraph 39.

⁷ Kumar v. Khurana, 2015 ONSC 7858, at paragraph 21.

Although the Supreme Court's decision in Vorvis v. Insurance Corp. of British Columbia⁸ seemed to say that a plaintiff in a wrongful dismissal case, and perhaps any breach of contract case, was required to prove that the defendant had committed an independent actionable wrong. In order to obtain aggravated damages, the Supreme Court's subsequent decisions in Fidler v. Sun Life Assurance⁹ and Keays v. Honda Canada Inc.¹⁰ states that a plaintiff may recover damages for mental distress in the absence of an independent actionable wrong, if he/she can show that such damages were in the reasonable contemplation of the parties at the time the contract was made. The requirement that the defendant committed an independent actionable wrong still plays a role, however, where such damages were not in the reasonable contemplation of the parties, claims for aggravated damages have been dismissed, on [these] ground, in at least one wrongful dismissal case¹¹, and at least two other breach of contract cases¹², released since Keays was decided.

⁸ [1989] 1 S.C.R. 1085.

⁹ [2006] 2 S.C.R. 3.

¹⁰ [2008] 2 S.C.R. 362.

¹¹ *Chopra v. Easy Plastic Containers Ltd.*, 2014 ONSC 3666, at paragraphs 112 to 115.

¹² *Angel v. Beepat*, 2016 ONSC 2016, at paragraphs 113 to 115 and *Pietrangelo v. Gore*, 2010 ONSC 568, at paragraphs 121 to 124.

(3) Pleading Requirements

Pursuant to Rule 25.06(9) of the Rules of Civil Procedure¹³ claims for Aggravated damages should set out the particulars of the independent actionable wrong or wrongs upon which they are relying, and the material facts in support of them¹⁴ . Because aggravated damages are compensatory, the plaintiff must also plead the injuries that they have suffered as a result of the defendant's conduct. In *Wedde*, the plaintiff did not set out the injuries he suffered in the statement of claim, consequently, the statement of claim was struck. The Court stated that "The plaintiff does not assert in his statement of claim that he has suffered any such intangible damages. I do not see, therefore, that the necessary facts have been pleaded upon which the claim for aggravated damages can rest."¹⁵

(4) Quantum

¹³ R.R.O. 1990, Reg. 194, amended to O. Reg. 218/16.

¹⁴ *Sommerard*, [2006] O.J. No. 1209 (C.A.), at paragraph 25, *Di Giorgio v. Smardenka*, 2004 CarswellOnt 3701 (S.C.J.), at paragraph 37, and *Cohen v. Cambridge Mercantile Corp.*, 2007 CarswellOnt 3704 (S.C.J.), at paragraph 41.

¹⁵ *Wedde v. Janna Systems Inc.*, 2000 CarswellOnt 4769 (S.C.J.), at paragraphs 14 to 15.

As aggravated damages are properly part of general non-pecuniary damages they are subject to cap set out by the Supreme Court of Canada and which adjusted for inflation

currently is around \$350,000¹⁶. This of course is the maximum amount that can be awarded and normally awards for mental distress usually range from \$10,000 to \$50,000¹⁷.

PUNITIVE DAMAGES

(1) Definition

In contrast with aggravated damages, the aim of punitive damages is not to compensate the plaintiff, but rather to punish the defendant for “malicious, oppressive and high-handed” misconduct that “offends the court’s sense of decency”¹⁸. They are in the nature of a fine, which is meant to act as a deterrent to the defendant and to others from acting in this manner¹⁹.

¹⁶ McIntyre, *supra*, at paragraph 48, and Sorochan v. Bouchier, 2015 ABCA, at paragraph 22.

¹⁷ Rowe v. Unum Life Insurance Co. of America, 2006 CarswellOnt 7785 (S.C.J.), at paragraph 47.

¹⁸ Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at paragraph 199, and Whiten v. Pilot Insurance, [2002] 1 S.C.R. 595, at paragraph 36.

¹⁹ Hill, *supra*, at paragraph 199.

(2) Requirements

To obtain an award of punitive damages, a plaintiff must meet two basic requirements²⁰.

FIRST, the plaintiff must show that the defendant's conduct is reprehensible, in that it is "malicious, oppressive and high-handed" and a marked departure from ordinary standards of decent behaviour; and

SECOND, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation.

When the claim against the defendant is for breach of contract, the plaintiff faces an additional requirement of having to show that the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract²¹

(3) Pleading Requirements

²⁰ Boucher v. Wal-Mart, 2014 ONCA 419, at paragraph 79.

²¹ Ibid, at paragraph 80.

Although there was case law that held that a claim for punitive damages need not be specifically pleaded, as it is included conceptually in a claim for general damages. The Court stated in Whitten,²² "... the suggestion that no pleading is necessary overlooks the basic proposition in our justice system that before someone is punished they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be assured if the

claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages. This principle, which is really no more than a rule of fairness, is made explicit in the civil rules ..."

The Supreme Court of Canada made it clear in Whiten v. Pilot Insurance²² that a claim for punitive damages must be expressly pled and that the facts, said to justify punitive damages should be pleaded with some particularity. Justice Binnie in his majority decision stated: "The time-honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious" or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory." and, consequently, the statement of claim needs to describe the actual conduct that is said to justify an award of punitive damages. In the event that it is necessary to prove that the defendant committed an independent actionable wrong, In Sommerard, the court stated:

²² Footnote 18, supra, at paragraphs 86 to 87.

“Plaintiffs who seek aggravated and/or punitive damages should particularize, in their pleadings, the independent actionable wrong or wrongs upon which they are relying and the material facts in support of them. They should do the same in relation to the conduct they seek to portray as "harsh, vindictive, reprehensible, malicious" and the like. See *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at paras. 86 to 92. “Proper pleadings serve several purposes. Defendants are made aware of the case they have to meet and trial judges are better able to determine whether a so-called "independent actionable wrong" is indeed "independent" and "actionable" and if so, whether it is supported by the evidence. The same applies to conduct of the employer said to justify aggravated and punitive damages.”²³

(4) Quantum

As was held by Justice Binnie at paragraph 74 of *Whiten*, which is the leading case on punitive damages, the governing rule in determining the quantum of punitive damages is proportionality and the overall award, (i.e. compensatory damages plus punitive damages plus any other punishment related to the same misconduct), should be rationally related to the objectives for which the punitive damages are awarded, which are retribution, deterrence and denunciation. He also added that punitive damages should be awarded

²³ Sommerard, *supra*, at paragraph 25 - 26.

if, and only if, compensatory damages are inadequate to punish the defendant. Justice Binnie then went on to hold that in determining proportionality the court should consider;

FIRST The blameworthiness of the defendant's conduct, which includes such factors as:

1. Whether the misconduct was planned and deliberate;
2. The intent and motive of the defendant;
3. Whether the defendant persisted in the outrageous conduct over a lengthy period of time;
4. Whether the defendant concealed or attempted to cover up its misconduct;
5. The defendant's awareness that what he or she was doing was wrong;
6. Whether the defendant profited from its misconduct; and
7. Whether an interest violated by the misconduct was deeply personal to the plaintiff or a thing that was irreplaceable.

SECOND, The degree of vulnerability of the plaintiff; such as:

1. The harm or potential harm directed specifically at the plaintiff;
2. The need for deterrence;

3. The other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct; and

4. The advantage wrongfully gained by the defendant from the misconduct;

In *Whiten*, the defendant had denied the plaintiff insurance coverage after her house burned down, on the grounds that she had burned it down herself. This was despite the fact that the local fire chief, its own investigator, and its initial expert had advised it that

there was no evidence of arson. At trial the jury awarded the plaintiff \$1 million in punitive damages, but that award was later reduced to \$100,000.00 by the Ontario Court of Appeal. Although Justice Binnie stated that he would not have awarded \$1 million, Justice Binnie reversed the Court of Appeal and restored the jury's award on the grounds that it was within the rational limits in which a jury must be allowed to operate.

In conclusion, Aggravated damages require proof of injuries which the Plaintiff suffered, while punitive damages are to punish the offender. Punitive damages, however are the exception rather than the rule and are only to be awarded if and only if the behaviour of the defendant is such that if the behaviour offends the court sense of decency having regard to other penalties suffered by the plaintiff. Its purpose is to punish and not to compensate.

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Damages in Small Claims Court

Damages in Employment Law

*Carla Bocci, Barrister & Solicitor,
Deputy Judge, Small Claims Court, Superior Court of Justice*

November 10, 2016

DAMAGES IN EMPLOYMENT LAW

The focus of this paper is to provide a brief overview of the type of damages available in a wrongful dismissal action.

It is a well settled principle at common law that an employer is permitted to terminate an employee from his job even without just cause provided that he is given reasonable notice or payment in lieu thereof.

An action for wrongful dismissal is based upon an employer's obligation to give reasonable notice to terminate the employment relationship in the absence of any just cause. It is an implied term of an employment contract that reasonable notice be provided of an intention to terminate the employment relationship. The employer must provide either working notice or payment in lieu of reasonable notice period.¹

In *Taylor v. Brown*, 2004 CanLII 39004 (ON CA), (2004), 73OR (3D) 358, the Court of Appeal held that while reasonable or "proper" notice is an implied term of an employment contract, payment in lieu of notice is not. It is an attempt to compensate the employee for the employer's breach of the employment contract. The Court held at paragraph 15 of its decision:

Proper notice of termination is an implied term of the contract of employment; payment in lieu of notice is not. We agree with the opinion of Lambert J.A in *Dunlop v. British Columbia Hydro and Power Authority* (1988), 1988 CanLII 3217 (BC CA), 32 B.C.L.R. (2d) 334, [1989] 2 W.W.R. 518 (C.A.), when he states at pp. 338-39 B.C.L.R., that payment in lieu of notice is seen as "an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment". The quantum of a payment in lieu of notice, therefore, is not calculated in accordance with the terms of the contract, but rather is a means by which an employer may terminate an employee contrary to its common law duty to give reasonable notice of termination, without incurring any liability.²

¹ *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701

² *Taylor v. Brown*, 2004 CanLII 39004 (ON CA), (2004), 73OR (3D) 358

As there is a presumption at common law that an employer is entitled to terminate a contract of employment provided that he is given reasonable notice then an action for wrongful dismissal only arises if the employer fails to give an employee reasonable notice of the termination.

In order for an employee to be successful in a wrongful dismissal action he must establish both liability, i.e. that the employer failed to provide reasonable notice and secondly, that as a result thereof he has suffered losses. The standard of evidentiary proof is on a balance of probabilities. The dismissed employee must lead evidence to substantiate the losses allegedly suffered as a result of the loss of employment. In the case *Garcia v. 1162540 Ontario Inc.*, 2013 ONSC 6574 (CanLII), Justice Wilton-Siegel, sitting as a divisional court judge, cited the following passage from the Supreme Court of Canada decision in *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 at paragraph 29:

[29] For ease of reference, I will restate the relevant statement of Laskin C.J. in *Michaels v. Red Deer College*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324, at para. 11, referred to by the Deputy Judge in his reasons: In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences. From this passage, the following is clear. First, the plaintiff must demonstrate that he suffered damages in the form of a loss of income. Second, if the plaintiff has established damages, the defendant has the onus of demonstrating a failure to mitigate. Third, if the defendant asserts a mitigation defence, the plaintiff has no legal onus to demonstrate mitigation but, in most circumstances, self-interest would dictate that a plaintiff adduce such evidence. ³

³ *Garcia v. 1162540 Ontario Inc.*, 2013 ONSC 6574 (CanLII)

TYPES OF DAMAGES IN WRONGFUL DISMISSAL ACTIONS:

Damages in a wrongful dismissal action are not limited to loss of wages. In general the types of damages that are recoverable in a wrongful dismissal action include those for lost income, lost benefits, intangible losses and aggravated and punitive damages.

Damages pertaining to lost income are comprised of salary, wages, unpaid commissions, bonuses and gratuities.

An employee who is terminated without cause is entitled to be compensated for the income he would have earned during the period of reasonable notice including commissions, bonus plans, profit sharing plans and other benefits, entitlement and allowances.

IACOBUCCI J. writing on behalf of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 stated at paragraphs 65-67:⁴

65. As I see the matter, the underlying nature of the damages awarded in a wrongful dismissal action is clearly akin to the “wages” referred to in s. 68(1). In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options: either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice: D. Harris, *Wrongful Dismissal* (1989 (loose-leaf)), at p. 3-10. There can be no doubt that if the employer opted to require the employee to continue working during the notice period, his or her earnings during this time would constitute wages or salary under s. 68(1) of the Act. The only difference between these earnings and pay in lieu of notice is that the employee receives a lump sum payment instead of having that sum spread out over the course of the notice period. The nature of those funds remains the same and thus s. 68(1) will also apply in these circumstances.

66 In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled: *Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay

⁴ *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701⁴

in lieu of notice. Therefore, in accordance with the exception which is carved out in s. 68(1) for “salary, wages or other remuneration”, this money is not divisible among a bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.

67 In support of this finding, I note that several courts have interpreted the phrase “salary, wages or other remuneration” broadly. It has been held to include disability benefits (*Re Ali* (1987), 62 C.B.R. (N.S.) 64 (Ont. S.C.)), severance pay (*Re Giroux* (1983), 1983 CanLII 1731 (ON SC), 45 C.B.R. (N.S.) 245 (Ont. S.C.)), and *Re Greening* (1989), 73 C.B.R. (N.S.) 24 (N.B.Q.B.)) and income tax refunds (*Marzetti v. Marzetti*, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765). In *Re Giroux*, Smith J. stated at p. 247:

Speaking generally, one should experience no difficulty including in the definition of salary, wages and other remuneration virtually all benefits accruing to employees. Unless the context requires a restricted meaning, any reward should normally qualify, if not as “salary, wages”, at least as “remuneration”, whether the reward takes the form of sick pay allowance, bonuses, vacation with pay or pay in lieu of notice. [Emphasis added.]

Compensation for Lost Income - Salary and Wages:

In assessing damages for lost income the courts have attempted to calculate what the employee’s salary would have been over the notice period. In cases where the employee is a salaried employee this exercise is not a difficult task and the courts have generally, taken the employee’s income at the date of termination and applied it over the course of the notice period. The assessment of damages will also include any salary increases that the employee would have received during the notice period.⁵

In instances where the dismissed employee’s earnings fluctuates from year to year, the task is somewhat more complex and the cases have held that the best way to determine the employee’s income over the notice period was to calculate an average in light of what he had earned in the past. *Oyama v. IBM Canada Ltd. 2011 QCCS 1078 (CanLII)*.⁶

⁵ *Johnson v. Global Television Network Inc.*, 2007 BCSC 981(CANLII)

⁶ *Oyama v. IBM Canada Ltd. 2011 QCCS 1078 (CanLII)*

Overtime:

In instances where the employee earns overtime, it has been held that such wage forms an “integral part” of the employee’s calculation of earnings. *Olivares v. Canac Kitchens*, 2012 ONSC 284 (CanLII), Lederman, J. stated at paragraphs 17 – 19:⁷

[17] Overtime pay had become an integral part of the anticipated income of the terminated employee and should be considered as compensable damages. If overtime has been paid in years immediately preceding the termination, it is appropriate to take that overtime into account when assessing damages for wrongful dismissal (see *Guitierrez v. Canac Kitchens Ltd.* 2009 CanLII 593 (ON SC), 2009 CanLII 593 (Ont. S.C.J.) at paragraphs 12-14; *Munoz v. Canac Kitchens*, 2008 CanLII 63151 (ON SC), 2008 CanLII 63151 (Ont. S.C.J.) at page 23).

[18] Calculation of damages in wrongful dismissal actions is based on the global compensation that the plaintiff was receiving. That is what is determinative in this case and the fact that his overtime hours were declining is irrelevant.

[19] These annual totals included overtime pay, and notwithstanding that he worked less overtime hours from 2006 to May 2008, his total compensation over the years remained relatively constant.

Commissions:

The issue of assessing lost income becomes somewhat more complex when dealing with an employee that in addition to a base salary may also receive commissions. In such instances the dismissed employee is entitled to receive all unpaid commissions earned to the date of dismissal as well as compensation for the loss of opportunity to earn such commissions over the notice period. In the case of *Prozak et al. v. Bell Telephone Co. of Canada*, 1984 CanLII 2065 (ON CA),⁸ Goodman, J. on behalf of the Ontario Court of Appeal in finding that the trial judge erred in the manner of calculating the commissions owed to the dismissed employee stated as follows:

In my opinion, the appellant is right in its submission that the respondents were entitled to commissions only upon such sales as the respondents had made or might have made during the appropriate period of notice of termination of employment to which they were entitled under their contract, subject to the qualification hereinafter set forth with respect to the right to be compensated in damages for loss of opportunity in making sales during such period. The appellant, by its actions in November, 1978, in removing Prozak, without notice, from the account and in assigning it to Docherty as a "non-commission"

⁷ *Olivares v. Canac Kitchens*, 2012 ONSC 284 (CanLII)

⁸ *Prozak et al. v. Bell Telephone Co. of Canada*, 1984 CanLII 2065 (ON CA)

account, breached its agreement with the respondents. In my view, it is irrelevant as to whether or not the respondents treated this breach as a termination of their employment. Their damages for the breach must be assessed by reference to the appropriate period of notice of termination. The trial judge did not direct his attention to the question of the appropriate period of notice of termination and, accordingly, it is necessary for this Court to decide it.

It is important to remember that onus of establishing on a balance of probabilities the amount of lost commissions rests on the dismissed employee. The employee is required to adduce evidence that commissions would likely to have been earned during the notice period. The type of evidence that may be adduced to establish a claim for lost commission includes evidence of past commission earnings, anticipated sales revenues, market conditions etc. during the relevant period.

Bonuses:

A dismissed employee may also be entitled to compensation for lost bonus monies that he would have earned during the course of the notice period. Generally, whether or not a bonus is payable, absent any employment agreement to the contrary, depends on whether the bonus has become an integral component of the dismissed employee's compensation or whether it is essentially a gift payable at the employer's *sole* discretion.

It appears from a review of the jurisprudence on this issue that generally, the courts have found the dismissed employee to be entitled to a bonus payment in such instances where the bonuses both formed an integral part of the employee's salary structure and were non discretionary.⁹ Additionally, in instances where the bonus is paid each year over the course of the employee's employment, such payments have been found to have become an integral part of the employee's salary structure.

In the case of *Gillies v. Goldman Sachs Canada Inc.*, 2000 BCSC 355 (CanLII), affirmed, 2001 BCCA 683 (CanLII), the court considered four factors to determine whether a bonus had become "an integral part" of the dismissed employee's

⁹ *Turner v. Can. Admiral Corp*(1980)1 C.C.E.L. 130

compensation.¹⁰ The Honourable Justice Skipp states as follows at paragraph 63:

I have accepted the submission of counsel for the plaintiff that the bonuses in question here must be considered to be an integral part of the plaintiff's compensation. Amongst the factors submitted by counsel for the plaintiff as germane to this issue are the following:

1. A bonus is received each year although in different amounts;
2. Bonuses are required to remain competitive with other employers;
3. Bonuses were historically awarded and the employer had never exercised his discretion against the employee;
4. The bonus constituted a significant component of the employee's overall compensation.

In some cases there is a term in a bonus policy that requires active employment when the bonus becomes payable. A recent case has held that a bonus policy with such a term, without more, is insufficient to deprive a dismissed employee of a claim for compensation for the bonus that he would have received during the notice period. *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618¹¹, the court applied a two step test citing the Honourable Justice Sharp in *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163 (Ont. C.A.) at paragraphs 30 - 31:

[30] The first step is to consider the appellant's common law rights. In circumstances where, as here, there was a finding that the bonus was an integral part of the terminated employee's compensation, Paquette would have been eligible to receive a bonus in February of 2015 and 2016, had he continued to be employed during the 17 month notice period.

[31] The second step is to determine whether there is something in the bonus plan that would specifically remove the appellant's common law entitlement. The question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant's common law rights: *Taggart*, at paras. 12, 19-22.¹²

LOST BENEFITS:

The dismissed employee is also entitled to loss of benefits for the period of reasonable notice. Included in this category are such items as Medical/Dental insurance benefits,

¹⁰ *Gillies v. Goldman Sachs Canada Inc.*, 2000 BCSC 355 (CanLII), affirmed, 2001 BCCA 683 (CanLII)

¹¹ *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618

¹² *Ibid*

life insurance benefits, disability insurance, CPP (value of employer's contributions), RRSP, profit sharing/investment plans and vacation/holiday pay. While some courts in other jurisdictions have held that a wrongfully dismissed employee's benefits are limited to the amount that the employee has actually incurred to replace the benefits, Ontario has held that the dismissed employee can claim the value of all benefits that he would have received during the notice period, regardless of whether he has incurred the expense of its replacement.¹³The Honourable Justice Blair on behalf of the Ontario Court of Appeal stated:

Counsel for Allelix candidly acknowledged that there was conflicting jurisprudence on this point. In my opinion the British Columbia decisions do not apply in Ontario where the law is settled that a wrongfully dismissed employee may claim, in addition to lost salary, the pecuniary value of lost benefits flowing from such dismissal. This principle was referred to with approval by this court in *Peck v. Levesque Plywood Ltd.* (1979), 1979 CanLII 2055 (ON CA), 27 O.R. (2d) 108, 105 D.L.R. (3d) 520, where Dubin J.A. said at pp. 113-14 O.R., pp. 525-26 D.L.R.:

In a successful action for wrongful dismissal, an employee is entitled to damages for the breach of his contract of employment.

In *Batt*, Law of Master and Servant, 5th ed. (1967), at p. 263 the following proposition is enunciated:

. . . in *Savage v. British India SS. Co.*, (1930), 46 T.L.R. 294, Wright, J., appears to have given the plaintiff twelve months' salary as damages because the plaintiff was entitled to twelve months' notice. But clearly the servant's damages ought not to be so limited; the master has committed a breach of contract and so all damages naturally flowing therefrom ought to be recoverable.

In the case of *Lawson v. Dominion Securities Corp.*, June 30, 1977 and September 30, 1977, unreported, this Court held:

The recovery of lost income is not limited to salary. In this case the appellant conceded that pension plan benefits should also be included. . . . other income items should be admitted including contractual profit-sharing, a share purchase option, and many fringe benefits such as a company car, club membership, pension, disability and medical plans . . . *McGregor on Damages* (13th ed.), para. 885 at 595.¹⁴

N.B. It is possible for the employer to provide a waiver of any entitlement to a bonus. In the case of *Kielb v. National Money Mart Company*¹⁵ the court held that although the

¹³ *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.)

¹⁴ *Ibid.*

¹⁵ *Kielb v National Money Mart Company*, 2015 ONSC 3790 (CanLII)

dismissed employee's bonus was an integral part of the compensation package, he was not entitled to payment of the bonus in light of the terms of the employment agreement.

COMPENSATION FOR MENTAL DISTRESS:

It is well settled case law that an employee is *not* entitled to damages for mental distress as a result of having lost his or her job. However, dismissed employees may be entitled to an award for damages for mental distress resulting from the employer's manner of handling the dismissal. In cases where the employer has acted in bad faith in terminating the employee's contract thereby causing the employee mental distress, the dismissed employee has been entitled to received compensation.¹⁶ The Honourable Justice Iacobucci on behalf of the Supreme Court of Canada stated at paragraph 103:

It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. *Addis, supra*. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, 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 damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

These type of damages became known as "Wallace damages" or "Wallace bump up" and when awarded served to extend the reasonable notice period.

In 2008 the *Keays v. Honda* case decision was released by the Supreme Court of Canada. The Supreme Court held that an extension of the notice period was not an appropriate manner in which to compensate the employee for the fashion in which he had been dismissed. As a result of this case damages are no longer awarded by way of an extension of the notice period but rather as an award for aggravated damages.

[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount

¹⁶ *Wallace v United Grain Growers*, [1997] 3 SCR 701, 1997 CanLII 332 (SCC); *Keays v. Honda*[2008] 2 S.C.R. 362.

is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99- 100).¹⁷

Punitive Damages:

Punitive damages are awarded for the purposes of “retribution, deterrence and denunciation.” They are not compensatory in nature.¹⁸ The Supreme Court of Canada in *Whiten v. Pilot Insurance Co.* stated at paragraph 31:

Punitive damages are awarded against a defendant in exceptional cases for “malicious, oppressive and high-handed” misconduct that “offends the court’s sense of decency”: *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

HUMAN RIGHTS DAMAGES:

Since June 2008, the Court has had jurisdiction to award damages for breach of Human Rights Code violations. Section 46(1) of the *Ontario Human Rights Code* was amended to permit an employee to include a claim for discrimination under the Code in a claim for wrongful dismissal. Section 46(1) provides as follows:¹⁹

Civil remedy

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary

¹⁷ *Keays v. Honda*[2008] 2 S.C.R. 362 at paragraph 59.

¹⁸ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595

¹⁹ Human Rights Code, RSO 1990, c H.19

compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 2006, c. 30, s. 8.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, c. 30, s. 8.

It is important to note that the court still lacks jurisdiction to deal with a claim that is based **solely** on a violation of the Human Rights Code, pursuant to section 46.1(2) of the Code. The section was considered in the case of *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799 (CanLII)²⁰, wherein the Honourable Justice Grace allowed the plaintiff's claim for damages for Human Rights Code infringement finding that the plaintiff's right to be "free from discrimination" had been infringed upon by the defendant employer.

²⁰ *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799 (CanLII)

PROFESSIONALISM

Managing Your Client's Expectations:

As lawyers and paralegals we are expected to manage our client's expectations so as to enable him or her to make informed and reasonable decisions in the pursuit of their respective cases. In order to manage our client's expectations it is important consider the following:

1. At the initial meeting and throughout the course of your relationship with the client, ascertain his expectations as they may change from time to time upon receipt of additional information, advice etc.
2. Explain to your clients the costs associated with reaching their expectations.
3. Discuss various strategies and options available to him for resolution of the issues. Secondly, discuss the associated risks involved in each option/strategy. Conduct a risk/benefit analysis at each step of the litigation process.
4. Discuss relevant time lines applicable to pursuing litigation or it's alternatives e.g. mediation.
5. Make recommendations to your client.
6. If your client makes a decision to commence and pursue litigation be sure to discuss his or her potential liability for court costs if ultimately unsuccessful in the court proceeding.
7. In the event that a court proceeding is commenced discuss making an Offer to settle pursuant to Rule 19 of the Small Claims Court Rules.

* Most importantly, **BE REALISTIC** about your client's likelihood of success, point out both the strengths as well as the weaknesses of his case.

Rules of Professional Conduct - Settlements:

Rule 3.2-4 of the Rules of Professional Conduct provides:

A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall

discourage the client from commencing or continuing useless legal proceedings.²¹

The *Small Claims Court Rules* impose a mandatory mediation on the parties pursuant to Rule 13.

If you appear before the Small Claims Court you need to be aware that Rule 13.02(1) of the Small Claims Court Rules require you to bring your client to a settlement conference even if you believe there to be no chance of a settlement.

Rule 13.02(3) imposes an obligation on the parties and their representatives to openly and frankly discuss the issues involved in the litigation. The obligation is not simply to attend but to put forth a bona fide effort to discuss the issues. The Rule states as follows:

The purposes of a settlement conference are,

- (a) to resolve or narrow the issues in the action;
- (b) to expedite the disposition of the action;
- (c) to encourage settlement of the action;
- (d) to assist the parties in effective preparation for trial; and
- (e) to provide full disclosure between the parties of the relevant facts and evidence.

N.B.: Rule 13.03(2), deals with a licensee's disclosure obligations prior to the date of the settlement conference and provides:

Disclosure

(2) At least 14 days before the date of the settlement conference, each party shall serve on every other party and file with the court,

(a) a copy of any document to be relied on at the trial, including an expert report, not attached to the party's claim or defence; and

(b) a list of proposed witnesses (Form 13A) and of other persons with knowledge of the matters in dispute in the action. O. Reg. 78/06, s. 27.

(3) At the settlement conference, the parties or their representatives shall openly and frankly discuss the issues involved in the action. O. Reg. 78/06, s. 27.

²¹ *Small Claims Court Rules*

Documentary disclosure at this stage is of particular importance as there is no opportunity afforded pursuant to the Small Claims Court for the conduct of examinations for discovery. Moreover, compliance with the disclosure obligation facilitates more fruitful settlement discussions as each party has a better understanding of the strengths and weaknesses of both his case as well as that of the opposing party.

It is important to attend the settlement conference well prepared and having complied with the documentary disclosure obligations imposed by the Rules as aforesaid. Costs sanctions for inadequate preparation or failure to file material are set out in Rule 13.02(7) that states as follows:

Inadequate Preparation, Failure to File Material

- (7) The court may award costs against a person who attends a settlement conference if,
- (a) in the opinion of the court, the person is so inadequately prepared as to frustrate the purposes of the conference;
 - (b) the person fails to file the material required by [subrule 13.03 \(2\)](#). O. Reg. 78/06, s. 27.

The settlement conference allows a client to obtain an impartial view of his or her case and hear recommendations of the presiding Deputy Judge.