Are we Trending Toward US-Scale Punitive Damages Awards?

By: Jeremy Schwartz

The Canadian courts, especially appellate courts, have consistently taken a conservative, cautious approach to awards of punitive damages in employment law cases. Recent high-watermark awards suggest a disturbing trend toward larger, US-scale punitive awards. But on closer inspection, perhaps, the trend is less disturbing than meets the eye.

The Ontario Court of Appeal's decision in **Pate Estate v. Galway-Cavendish and Harvey (Township),** which reduced a trial award of punitive damages from $550,000 to $450,000, is the second largest punitive damages award to survive review by an appellate court in an employment law case. It is significant both because of its size, but also because the original award was by a trial judge and not a jury. This belies the common perception that jury awards outstrip awards by judges in cases with bad facts.

Pate at Trial

Mr. Pate was a building inspector at the Township. Acting on the instructions of the Township's Chief Administrative Officer, Mr. Pate's employment was terminated for cause, on the basis of discrepancies with respect to building permit fees. Mr. Pate was never provided particulars of these allegations. The Township threatened to go to police unless he resigned. Mr. Pate refused.

After terminating Mr. Pate's employment, the Township conducted an investigation and turned some information over to the Ontario Provincial Police (OPP). Apparently the OPP were initially reluctant to lay charges and so the Township exerted pressure on more senior OPP personnel. Mr. Pate was later charged but acquitted at his criminal trial. As one can imagine, his trial was the talk of the town for years. According to the decision, Mr. Pate did not obtain employment in the municipal field again and passed away in January 2011.

The litigation history is also far from straightforward. After the Trial Judge initially found Mr. Pate was wrongfully dismissed, the Ontario Court of Appeal sent the matter back for trial on the Township's liability for malicious prosecution and punitive damages, which claims had been dismissed at trial. After re-trying those issues the Trial Judge found the Township liable for malicious prosecution and separately awarded Mr. Pate $550,000 in punitive damages.

Pate on Appeal

The Ontario Court of Appeal unanimously upheld the trial judge's findings on liability for malicious prosecution and that a significant punitive damages award was appropriate to punish, denounce and deter. The court was split 2:1 on whether to uphold the punitive award of $550,000, with the majority holding that $450,000 was sufficient to meet the objectives while the minority would have upheld the award as-is. Time will tell whether the case finds its way to the Supreme Court.

Pate in Context

Boucher v. Wal-Mart

The current talk of the town in legal and HR Professional circles on punitive damages in employment cases is **Boucher v. Wal-mart Canada Corp. and Jason Pinnock**, in which a jury awarded $1 Million in punitive damages. According to reports of the trial, in that case, the jury heard that Pinnock, a Wal-Mart supervisor, was mentally abusive toward Boucher, criticizing, demeaning and humiliating her in front of other staff. Apparently, Wal-Mart didn't take action against Pinnock. This is, by far and away, the largest punitive award in an employment law case in Canada. Wal-Mart is, not surprisingly, appealing that award.

Higginson v. Babine Forest Products Ltd. and Hampton Lumber Mills Inc.

Prior to **Boucher**, the largest punitive damages award in an employment law case was **Higginson v. Babine Forest Products Ltd. and Hampton Lumber Mills Inc.** In late June 2012, a jury handed down an award of $573,000 in punitive damages against the employer.

Mr. Higginson, a sawmill manager, alleged that the new American owners of Babine Forest Products in B.C. had engaged in a scheme to avoid paying severance costs to long-service employees, ultimately creating a poisonous work environment and terminating him on trumped up allegations of cause.

The employer appealed the case but we understand the parties then settled out of court for an undisclosed amount. As such, this significant award has not been tested on appeal.

McNeil v. Brewers Retail Inc.

Prior to **Pate**, the largest punitive jury award in an employment law case to survive appeal was **McNeil v. Brewers Retail Inc**. Strictly speaking this was a malicious prosecution (tort) case and not an employment law case – because Mr. McNeil was a unionized employee and so the termination aspect of the matter was dealt with at arbitration. But the facts and litigation history are so intertwined as to make that distinction effectively moot.

The facts in **McNeil** are remarkably similar to those in **Pate**. In **McNeil**, BRI terminated Mr. McNeil for alleged theft. BRI sent damning surveillance evidence to police, on the basis of which McNeil was charged and convicted. As it turned out, BRI had intentionally withheld surveillance evidence that may have exonerated Mr. McNeil of wrongdoing. That evidence only came out through a subsequent arbitration and it eventually led to the overturning of Mr. McNeil's criminal conviction.

BRI maintained its allegations through the arbitration over his termination. The Court of Appeal remarked that in doing so BRI, "continued its duplicity at the arbitration hearing and in the process, robbed McNeil of his reputation, his employment, his dignity and his self-respect. Shocked and devastated by his arrest, proclaimed publicly as a common thief, terminated from his employment, forced to go on unemployment insurance, forced to sell the family home and move to an apartment, forced to endure the anguish, stress and uncertainty of a thirteen-year

ordeal – these are but some of the consequences McNeil was exposed to by reason of BRI's callous and malicious conduct."

In **McNeil**, the jury awarded $500,000 in punitive damages. The Court of Appeal unanimously upheld the award. As such, **MacNeil** is the current, high watermark for punitive awards in employment law cases in Canada, at least of those which survived appeal.

(A discussion as to why the tort claim was not arbitrated instead of prosecuted in the courts is beyond the scope of this update. In some cases courts have sole jurisdiction, in others the jurisdiction overlaps, and still in others arbitrators alone can hear the tort claim. Suffice it to say that the law on whether an arbitrator can/should/must take jurisdiction over a tort claim involving a unionized employee is complex and nuanced.)

Honda v. Keays

The saga that is the legal battle between Mr. Keays and Honda is by now well known. The case was important because it all but eviscerated the concept of "Wallace Damages" (somewhat arbitrarily awarded and quantified extensions to reasonable notice awards premised on an employer's bad faith in the manner of dismissal).

The case was interesting on the issue of punitive damages as well. At the time, in 2006, the trial judge's award of $500,000 in punitive damages was the highest ever punitive award in an employment law case in Canada. The Ontario Court of Appeal subsequently reduced the punitive award to $100,000. The Supreme Court of Canada eliminated the punitive award entirely, finding that Honda's conduct, while wrongful, was not harsh, malicious and reprehensible so as to justify punishment and denunciation.

Perhaps notably, the Ontario Court of Appeal released its decision in **MacNeil** almost two months before the Supreme Court released its decision in **Keays**.

Looking Ahead

Employer counsel and HR Professionals took at least some solace in the fact that, previously, large punitive awards tended to be jury awards, and appellate courts, for the most part, have either significantly reduced or eliminated punitive awards entirely in employment cases. **Pate** and **McNeil** are unsettling from that perspective.

That said, the facts in **Pate** and **McNeil** are so far beyond the pale of typical employment law cases, each involving serious instances of malicious prosecution and severe consequences to the victims. Given those facts, it would be fair to characterize **Pate** and **McNeil** as malicious prosecution cases which happen to involve allegations of wrongful termination.

Boucher, of course, is something very different. It is arguably more akin to **Keays**. The Supreme Court of Canada ultimately vacated the **Keays** punitive award entirely. However, when the Court of Appeal reduced the punitive award from $500,000 to $100,000 it drew a distinction between employment cases in which the employer's wrongdoing was during the course of the employment relationship and those cases in which "after the wrongful dismissal, the employer embarks on a course of conduct, such as slander, to injure the employee."

In light of the divergence in the caselaw on the issue, **Boucher** will no doubt be a bellwether decision on the appropriate case for punitive damages in employment and perhaps more importantly, whether US-scale punitive damage awards will become more common in Canadian employment litigation.

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