CITATION: McNeil v. Brewers Retail Inc., 2008 ONCA 405
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COURT OF APPEAL FOR ONTARIO

WEILER, MOLDAVER and JURIANSZ JJ.A.

BETWEEN:

DOUGLAS MCNEIL AND TERRY MCNEIL

Plaintiffs
(Respondents)

and

BREWERS RETAIL INC., STEPHEN MACFARLANE,
PAUL MURRAY, GEORGE DEGUIRE AND BARRY MILNE

Defendants
(Appellant)

Roderick S.W. Winsor and Julia Anagnostakis for the appellants

Jerome R. Morse, Kirk F. Stevens and Erica Toews for the respondents

Heard: March 17 and 18, 2008

On appeal from the judgment of Justice Linda M. Walters of the Superior Court of Justice, sitting with a jury, dated June 30, 2006.

BY THE COURT:

Nature of Appeal

[1] Following a seventeen day jury trial, the appellant, Brewers Retail Inc. (BRI), was found liable for malicious prosecution and ordered to pay damages in the global amount of $2,078,120.27, including interest and costs to the respondents, Douglas and Terry McNeil. The action was dismissed against all the individual defendants.

[2] BRI appeals and seeks an order that the respondents' claim be dismissed, or in the alternative, that a new trial be ordered. In the further alternative, BRI seeks to have the damages reduced.

[3] The respondents seek leave to cross-appeal the trial judge's award of costs. If leave is granted, the respondents ask that the amount awarded to them for substantial indemnity fees be increased from $225,000 to $293,226.

[4] For reasons that follow, we would dismiss both the appeal and the cross-appeal.

Background

[5] In order to appreciate the context of the legal issues raised, a review of the rather lengthy background to this case is essential.

[6] BRI is the former employer of the respondent, Douglas McNeil (McNeil). McNeil worked at the BRI store located at Lundy's Lane in Niagara Falls. In the summer of 1993, the Lundy's Lane store records indicated ongoing shortages of cash and inventory. As a result, from October 31, 1993 to November 22, 1993, BRI had covert surveillance cameras installed in the store above the cash registers and manager's desk to monitor the conduct of employees.

[7] BRI management reviewed the tapes and developed the view that various practices by certain employees were the cause of the store losses. In respect of McNeil, the evidence from the tapes revealed the following:

> 1) November 3, 1993: At 16:32, McNeil is shown removing $140US from the till, which is placed into his wallet (the "first inculpatory segment" of the tape). Approximately forty minutes later, McNeil exchanges the $140US with a customer in return for the Canadian equivalent. McNeil then pays the Canadian equivalent back into the till (the "second exculpatory segment" of the tape);

2) November 16, 1993: At 15:06, McNeil is shown taking $22.00 from his pocket and putting that money into the till (the "first exculpatory segment" of the tape). At 15:37, McNeil's co-worker, Tony Vacca, is shown making a sale of a Northern Brewery sweatshirt in the approximate amount of $24.99. At 15:41, McNeil is observed reversing the sale of the sweatshirt and removing two tens and two loonies from the till which is then split with Vacca (the "second inculpatory segment" of the tape).

The Criminal Proceedings

[8] On November 29, 1993, Stephen MacFarlane, Assistant Manager in the Hamilton Region, prepared a witness statement describing the alleged criminal activities captured by the surveillance tapes. However, the statement only referred to the specific, inculpatory segments on the videotape and omitted reference to the exculpatory segments.

[9] On November 30, 1993, certain members of BRI management held a meeting in which the surveillance tapes were reviewed. Paul Murray, BRI's operations manager for the Hamilton region, stated that there was insufficient evidence from the tapes to terminate any of the employees. Other BRI management expressed the view that there was insufficient evidence of theft of US currency.

[10] It is apparent that BRI management reviewed and was aware of *both* the inculpatory and exculpatory segments of the tape in order to reach these conclusions. In fact, a summary of the tapes developed by BRI in late November 1993 demonstrates clearly that, from the outset, BRI had full knowledge of the exculpatory segments of the US currency transaction. According to the summary, McNeil sold the $140US and paid the Canadian equivalent back into the till. Murray conceded at trial that no one would have charged McNeil for this theft after viewing the entirety of the tape and seeing the exculpatory evidence.

[11] Despite this apparent knowledge, on November 30, 1993, BRI proceeded to hand the tapes over to the police. In doing so, BRI failed to draw to the attention of the police the exculpatory segments of the videotapes.

[12] After receiving MacFarlane's statement and the tapes, the officer in charge of the investigation, Detective Kane, concluded that a number of BRI employees had participated in criminal activities. On December 4, 1993, six employees were arrested and charged. The arrests included McNeil. Four of the employees pleaded guilty to the criminal charges. Charges against one employee were withdrawn.

[13] The only information Detective Kane had in support of his decision to lay charges emanated from BRI. Kane relied heavily on BRI and its security company to operate the videotapes in the course of the investigation since special equipment and expertise were required and it had to be played by someone familiar with it to retrieve the relevant passages. In the course of this review, Kane was never told about, nor was he shown the exculpatory segments of the videotapes.

[14] After the arrests, BRI management notified McNeil and the other charged employees of their suspension without pay. The targeted employees also became the subject of media attention. Newspaper articles, one of which specifically named each employee arrested, reported that they were involved in a "fraudulent" scheme. Local radio and television evening news reported McNeil's arrest and the charges against him.

[15] In early 1994, prior to McNeil's criminal trial, a memorandum was exchanged between members of BRI management expressing concern about the information that was provided to the police in relation to the criminal investigation and calling for an "internal review" of that information. The memo also addressed the possibility of bringing the charged employees back to work, but acknowledged that "full reinstatement would cause long lasting damage to [BRI's] credibility". Instead, a solution was offered to use the criminal charges "as a lever to obtain some kind of non-grievable admission of guilt", in which a "schedule of discipline" could be administered for each involved employee. The discipline recommended for McNeil was termination. The results of this recommended "internal review" were never produced. In fact, it is unclear whether such a review even occurred.

[16] McNeil's criminal trial commenced in December 1994. In respect of the charge relating to theft of the US money, McNeil explained that the removal of $140US was part of a sale of US cash for a family friend. McNeil maintained that the second segment of the tape corroborated this explanation, indicating that he paid the Canadian money into the till in return for the sale. However, at trial, only the first inculpatory segment showing McNeil removing US currency from the till was shown.

[17] In respect of the Northern Brewery sweatshirt incident, McNeil explained at trial that the tape depicting him removing money from the till was unrelated to the sweatshirt sale. He stated that $22.00 had been put into the till to make change for a football pool with his co-worker, Vacca. McNeil and Vacca habitually each bought a card to play in a weekly football pool. Each card cost $11.00. McNeil and Vacca took turns paying the $22.00 for the two cards on alternate weeks.

[18] On the date in question, Vacca expressed uncertainty about whether he wanted to bet that week. This explanation is supported by the first exculpatory part of the surveillance tape, which shows McNeil putting a $20.00 bill and a $2.00 bill into the till. McNeil explained that he did this in order to make change for two tens and two loonies

for the two $11.00 bets. He did not take the change immediately because of Vacca's indecision. This first exculpatory part of the tape was not shown at the criminal trial.

[19] The second, inculpatory part of the surveillance tape that was shown demonstrates that, later in the day, Vacca sold a Northern Brewery sweatshirt in the approximate amount of $24.99. McNeil explained that Vacca had entered the wrong size for the sweatshirt and asked him to assist in correcting the error. He stated that when they got to the till to correct the error, Vacca decided that he did not want to bet in the pool that week and McNeil removed two tens and two loonies (the $22.00) from the till to give Vacca his $11.00 back and to get the change for his own $11.00 bet. In doing so, while he reversed the sale of the sweatshirt, he forgot to enter the revised sale. He argued that his explanation was substantiated by the low and unusual amount removed, that did not match the alleged theft of the $24.99 sweatshirt sale and that would also have created an overage in the register and a record of missing inventory.

[20] At the end of the first day of trial, McNeil and his counsel, together with the Crown, viewed the tape and attempted to find the exculpatory evidence that supported McNeil's explanation. No assistance in operating the tapes was offered by BRI management who retained the expertise and familiarity needed to retrieve the relevant passages. The parties failed to recover the exonerating passages. McNeil was subsequently convicted of theft of US money ($140US) and theft of the shared proceeds of the sale of the Northern Brewery sweatshirt (approximately $11.00), and acquitted of two other charges.

Arbitration

[21] The convictions were swiftly followed by McNeil's termination from BRI on December 13, 1994. McNeil grieved his dismissal pursuant to the collective agreement. The grievance did not reach arbitration until 1997. Throughout this period, BRI management maintained their original position in respect of McNeil and failed to draw any attention to the exculpatory portions of the videotape that they were aware of and that corroborated McNeil's explanation.

[22] The arbitrator rejected McNeil's evidence and upheld the discharge on the basis that McNeil and Vacca had falsely indicated a refund for the return of a sweatshirt, thus creating an "overage" in the cash register, and then McNeil split the proceeds with Vacca. The issue relating to the theft of the US money was not asserted as a ground for discharge at the arbitration. However, inasmuch as the arbitrator's decision rested on McNeil's credibility, McNeil's criminal conviction for theft was highly damaging evidence at the arbitration.

The Appeal and Subsequent Proceedings

[23] The existence of the US money exculpatory segment emerged during the grievance procedure when the original tapes were provided to the union. When its existence came to light, McNeil successfully sought an extension of time to appeal his convictions. On May 6, 1997, McNeil's convictions were quashed. The appeal judge cited the absence of the second portion of the tape at trial, which was consistent with the explanation provided by McNeil respecting the US money incident, as the basis for his decision.

[24] A second trial proceeded with only one count against McNeil in relation to the Northern Brewery sweatshirt allegation. He was found not guilty following his motion for a directed verdict.

Civil Action – Malicious Prosecution

[25] McNeil commenced a civil action for malicious prosecution in 1999. As part of that action, his wife, Terry McNeil, claimed damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, for loss of her husband's care, guidance, and companionship. The trial took place in 2006. McNeil alleged that BRI, having brought the matter to the attention of police, intentionally failed to disclose the exculpatory evidence with respect to the criminal charge relating to the removal of US money and that in maintaining that position, BRI fulfilled the requirements of an action for malicious prosecution.

[26] In the civil action, BRI's position was:

1) It presented evidence against McNeil to the police in good faith leaving it to the authorities to decide whether or not to prosecute (i.e. BRI did not make the decision to lay charges or prosecute McNeil; Detective Kane did).

2) BRI advised Detective Kane about the evidence on the videotape that was consistent with McNeil's story regarding the US funds removal. Detective Kane maintained that McNeil's counsel had a number of opportunities to view the tapes and they could appeal the case.

3) Detective Kane took the position that, even if there was no reasonable cause to continue pressing the US currency allegation, there was still reasonable cause to

> pursue the theft charge from the sale of the sweatshirt, for which the amount involved was $11.

BRI's position was belied in a number of respects.

[27] Detective Kane testified that, after reviewing the tape from November 3 disclosing the removal of US money, he specifically asked Milne, the BRI store manager, to check if the exculpatory segment that McNeil claimed to exist, did, in fact, exist. Milne did not honour this request. Kane was clear that BRI never showed him the exculpatory segment. MacFarlane also admitted in the malicious prosecution proceedings that the exculpatory segment was not disclosed to the police until after the criminal trial.

[28] BRI's position was rejected by the jury. In answer to the questions posed, the jury made the following findings: (1) BRI initiated the criminal proceedings against McNeil for theft of $140US; (2) the criminal proceedings were terminated in McNeil's favour; (3) BRI, MacFarlane and Murray did not have reasonable and probable grounds to cause to initiate or continue the criminal proceedings for theft of $140US against McNeil; and (4) BRI, MacFarlane, Milne and Murray acted with malice or with a primary purpose other than that of carrying the law into effect in relation to the criminal proceedings against McNeil.

[29] In addition to the award of damages, the McNeils were awarded a total of $363,154.61 in costs, including partial and substantial indemnity fees, disbursements and applicable GST. The costs decision was largely guided by the Rule 49.10 offers to settle that were made by the McNeils prior to trial.

Issues

Appeal

[30] A number of issues were raised by BRI in this appeal. However, in oral argument, we called upon the respondents' counsel to address only the following issues:

1) Is McNeil's action within the exclusive jurisdiction of the collective bargaining regime?

2) Did the trial judge err by refusing to allow the defendants to present evidence related to the earlier arbitration proceedings involving the parties?

3) Did the plaintiffs satisfy the onus to prove that the proceedings were *initiated* by the defendants – a requisite element of malicious prosecution?

4) Is the jury's award of damages supported by the evidence?

[31] As we did not see any merit in the other grounds of appeal raised by BRI, they are not addressed in this judgment.

Analysis

Jurisdiction

[32] BRI pleaded want of jurisdiction in its statement of defence to the action for malicious prosecution. However, during the seven years leading up to trial and during the trial itself, BRI never moved to dismiss the action on jurisdictional grounds.

[33] BRI now disputes the jurisdiction of the court to entertain the respondents' malicious prosecution action on the basis that the essential character of their claim arises in the context of employment and is governed by the collective agreement. Relying on the Supreme Court's decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para. 54, BRI argues that a labour arbitration tribunal has exclusive jurisdiction over all differences between an employer and employee that "expressly or inferentially arise out of the collective agreement". BRI submits that, as exclusive jurisdiction lies with the labour arbitrator, it can argue, after the fact, that the court acted without jurisdiction.

[34] We reject this submission for two reasons. First, this is not a matter where the court acted without jurisdiction. The court has plenary jurisdiction over actions in tort. This tort action proceeded to judgment without the court's jurisdiction being displaced by the invocation of the *Weber* principle. The judgment rendered by the court is not a nullity based on an excess of jurisdiction *ab initio*. After having defended and lost the action, BRI cannot now vitiate the result by seeking to displace the court's plenary jurisdiction in tort matters.

[35] Second, BRI's belated argument that *Weber* applies is without merit. This view is supported by the decision in *Piko v. Hudson's Bay Co.* (1998), 41 O.R. (3d) 729 (C.A.), in which this court decided that the employee's malicious prosecution action against his employer fell outside the scope of the collective bargaining regime. Perhaps BRI proceeded to trial without objecting to the court's jurisdiction because it was aware of the *Piko* decision; in any event, BRI now seeks to distinguish *Piko*.

[36] BRI says *Piko* is a different case because the BRI collective agreement, unlike that in *Piko*, contains a clause that requires the employer to treat its employees fairly.[1] In

[1] Section 13 of the collective bargaining agreement addressing the "Employer/Employee Relationship" expressly provides that management shall exercise management rights and treat employees in a fair, non-arbitrary and non-discriminatory manner.

Piko, Laskin J.A. did acknowledge that the collective agreement in *Weber* had such a clause whereas the agreement in *Piko* did not (pp. 735-36). However we do not regard that observation as necessary to his ultimate determination. The crux of Laskin J.A.'s reasoning that the court retained jurisdiction over the action was that the employer itself had gone outside the collective bargaining regime when it resorted to the criminal process. The action by the employer was neither a prerequisite to nor a necessary consequence of its dismissal of the employee.

[37] Whether a dispute must be arbitrated depends on whether "its essential character, arises from the interpretation, application, administration or violation of the collective agreement": *Weber* at para. 52. The employer's act in initiating criminal proceedings may well raise fairness concerns that touch on the employer's treatment of the employee in the employment relationship. However, it is the "essential character" of the dispute that matters. As Laskin J.A. said in *Piko,* once the employer takes its dispute with the employee to the criminal courts, it is no longer just a labour relations dispute (p. 735). It is not enough that the subject matter of the criminal process and malicious prosecution action could conceivably be relevant in a workplace dispute. In our view, this is not a dispute which in its "essential character" arises from the fairness of the employer's application or administration of the collective agreement. Rather, this dispute, as in *Piko,* is centered on the employer's resort to the criminal process.

[38] BRI goes on to advance a more focused jurisdictional argument. It argues that at least McNeil's claim for lost wages arises from the collective agreement and falls within the exclusive jurisdiction of the labour arbitrator. BRI points out that the arbitrator dismissed McNeil's termination grievance, thus implicitly deciding that he had no entitlement to lost wages.

[39] At first glance the argument is alluring. The employee's entitlement to wages lies at the heart of the employment relationship. However, on reflection, we think that once it is decided that the essential character of the dispute is the tort of malicious prosecution, the plaintiff is entitled to claim the full range of damages available in that action. The "essential character" analysis must be applied to the dispute as a whole and not to its constituent elements. Human rights cases, for example, routinely relate to occurrences in the workplace and involve claims for lost wages. However, once it has been decided that a human rights proceeding has a separate essential character, it may proceed even with a claim for lost wages. See *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4th) 465 (Ont. C.A.), leave to appeal to S.C.C. refused, 29073 (February 12, 2002).

[40] In addition, we observe that the tort of malicious prosecution does not provide the remedy of lost wages to which the employee was entitled under the collective agreement. It provides the remedy of damages, and the quantum of "lost wages" is relevant to the quantification of damages.

[41] We conclude that BRI may not raise the *Weber* principle to oust the court's jurisdiction for the first time on appeal. In any event, because of the principles expressed by this court in *Piko*, BRI's objection is without merit.

The trial judge's decision to exclude the arbitrator's award and references to the arbitration

[42] At trial, BRI sought to introduce the arbitrator's ruling and to make references to the arbitration as a consideration for the jury in making its own finding of fact. The trial judge refused to admit such evidence, ruling that the arbitration was not relevant, as the issue of the US money was not before the arbitrator, and that, in any event, the evidence was inadmissible as its prejudicial effect outweighed any possible probative value that might arise from its admission.

[43] We agree. The ruling could not have been introduced into evidence before the jury without first going through a detailed discussion of what issues and evidence were before the arbitrator so that the basis for the ruling could be understood. There was no transcript of that hearing. The risk of the jury being sidetracked and getting bogged down in the minutia of that hearing was high.

Malicious Prosecution

[44] There are four necessary elements that must be proved for a plaintiff to succeed in an action for malicious prosecution:

a) The proceedings must have been initiated by the defendant.

b) The proceedings must have been terminated in favour of the plaintiff.

c) The absence of reasonable and probable cause; and

d) Malice, or a primary purpose other than that of carrying the law into effect.

See *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 193.

[45] The focus of BRI's argument is on initiation. The trial judge's charge to the jury on the requirement of initiation was as follows:

> The first question of fact for you to determine is whether the plaintiff has proven that the criminal proceedings against

> Doug McNeil were initiated by one or more of the defendants. The plaintiff must prove that the defendant or defendants were the persons who set the criminal proceedings in motion against the plaintiff or the person or persons who aided or encouraged the prosecution as its real instigator. It is not necessary for the plaintiff to prove that the defendant or defendants actually laid the information, as long as you are satisfied on the preponderance of evidence that the defendant or defendants were the ones who were actively instrumental in setting the criminal proceedings in motion.
>
> If you find that the defendant or defendants fairly and truthfully disclosed to the police or to the Crown Attorney all matters within their knowledge that a reasonably prudent person would believe material to the question of the plaintiff's guilt or innocence and that the determination to prosecute was made by the police or the Crown Attorney or some other responsible person, then the defendant or defendants are not responsible for that prosecution. If, however, you find that the defendant or defendants directed or interfered with the prosecution or insisted that the Crown Attorney or police prosecute, then you would find the defendant or defendants responsible for the prosecution. If the defendant or defendants knowingly provided the police with false information with the intention that the police would take action, this does not necessarily amount to setting the law in motion as to make the defendant or defendants responsible. You must consider the nature of the allegations, the circumstances in which they were made, and the effect it had on the eventual prosecution. In other words, you must determine whether the defendants by providing the false information were actively involved and instrumental to the prosecution. If you find that none of the defendants are responsible for initiating the prosecution, your verdict will be for the defendant and you will proceed no further.

[46] BRI made no objection to the trial judge's charge on initiation perhaps because the instructions provided were favourable to the defence. The charge left the jury with the impression that a finding of initiation required them to accept the respondents' position that the defendant instigated the prosecution by supplying false evidence in circumstances where the police had to wholly rely on it and did rely on it.

[47] BRI's principle submission on this issue is that initiation and malice are separate watertight compartments and that, in deciding whether a person has initiated a prosecution, no qualitative assessment may be undertaken as to whether a person has provided false information or deliberately withheld information from the police. No authorities were submitted by BRI to support this submission and in fact, the jurisprudence suggests a contrary view. The relationship between falsely and maliciously providing information and initiation of a prosecution was described in the House of Lords decision of *Martin v. Watson* [1996] A.C. 74 at 86:

> Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant.

[48] This governing principle from *Martin v. Watson* has been followed and applied in Ontario law in the assessment of the initiation element. See *Scintilore Explorations Ltd. v. Larche* (1999), 90 A.C.W.S. (3d) 109 at para. 238 (S.C.J.); *Wood v. Kennedy* (1998), 165 D.L.R. (4th) 542 at para. 50 (Ont. Gen. Div.). Thus, BRI's principle assumption that the truth of the information provided or the misconduct of the individual providing that information should not be considered at the initiation stage must be rejected.

[49] BRI further suggests that a private party who goes to the police with a criminal allegation initiates the prosecution *only* if it is "virtually impossible" for the police to independently exercise discretion or judgment as to whether to lay an information. BRI submits that this test has not been satisfied because it gave the entire tape containing the exculpatory evidence to the police and Detective Kane confirmed that an independent evaluation was conducted prior to laying charges.

[50] In contrast, the respondents argue that the law recognizes that there may be a variety of ways to satisfy the initiation requirement, apart from simply the "virtual impossibility" test. Reliance is placed on the decision in *Martin v. Watson*, which accepted the view that a person may be regarded as the prosecutor or the individual who initiated the action if "he puts the police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the police by supplying false information in the absence of which the police would not have proceeded;

or if he withholds information in the knowledge of which the police would not prosecute." *Martin v. Watson* at 84, referring to *Commercial Union Assurance Co. of N.Z. Ltd. v. Lamont* [1989] 3 N.Z.L.R. 187 at 207-08. See also *Berman v. Jenson* (1989), 77 Sask. R. 161 at 166 (Q.B.), in which the court articulates a similar view of initiation.

[51] The respondents also point out that BRI did not object to the charge on the basis that it lacked an instruction to apply the "virtual impossibility" test.

[52] In our view, this is not a case in which we must decide all the factors that could, in any particular case, satisfy the element of initiation. On the facts of this case, it was open to the jury to find that BRI knowingly withheld exculpatory information from the police which the police could not be expected to find and indeed did not find upon their review of the tapes. But for the withholding of this essential information, McNeil would not have been charged.

[53] The facts here confirm that the police and the Crown relied wholly on BRI, which actively and deliberately misled them. Only a trained operator of the video monitor could properly review the tapes. The police were unable, through their own due diligence, to uncover the exculpatory evidence available to BRI prior to laying charges.

[54] As a result, the police did not have all the information available to BRI prior to laying charges. The appellant's November, 1993 summary of the tapes identifying the exculpatory evidence and Detective Kane's evidence that he was never told about the exculpatory evidence until after the criminal trial is strong evidence that BRI deliberately withheld information when it went to the police.

[55] Further, contrary to the appellant's submission, the jury had evidence that Detective Kane did not conduct an independent investigation. Kane claimed that he used MacFarlane's witness statement as the basis for his report, only to be confronted with the fact that he used it verbatim. Furthermore, there was evidence from which the jury could find that it was virtually impossible for Kane to perform an independent investigation before laying charges. Perhaps the best evidence is the fact that neither he, nor McNeil's counsel, nor McNeil himself could locate the exculpatory portion of the alleged US money theft on the videotape.

[56] On this basis, there was ample evidence from which the jury could conclude that BRI initiated the prosecution.

Damages

[57] The jury awarded the respondent $100,000 for general damages and $188,000 for aggravated damages. In addition, the jury awarded punitive damages against BRI in the amount of $500,000. Other aspects of the award included pecuniary damages in the amount of $240,000 for future loss of income, and special damages in the amount of

$308,000 for past loss of income and legal expenses. Finally, the jury awarded *Family Law Act* damages to Terry McNeil in the amount of $50,000.

(1) Past and Future Loss of Income

[58] In oral argument, BRI did not take issue with the amount of damages awarded under these heads; rather, it contended that the court had no jurisdiction to award them. We have already addressed and rejected that argument in our reasons dealing with jurisdiction. Nothing more need be said about it.

(2) *Family Law Act* Award to Terry McNeil

[59] The award of $50,000 to Terry McNeil for loss of care, guidance and companionship may be generous but in our view, it does not warrant appellate intervention.

[60] Mrs. McNeil saw her husband transferred from a "happy-go-lucky" companion into a man who was "eaten up inside" and who felt that he must hide his feelings from her. The conduct of BRI exposed Mrs. McNeil to her husband's anguish, pain, grief and altered persona for a period of thirteen years. While it is true that the ordeal ultimately strengthened their marriage, it is equally true that Mrs. McNeil was deprived of her husband's care, guidance and companionship for a considerable period of time. In the circumstances, the award was one that the jury could make and we see no basis for interfering with it.

(3) General, Aggravated and Punitive Damages

[61] BRI takes no issue with the trial judge's instructions on these heads of damages – nor could it. The instructions were exemplary.

[62] BRI's overriding complaint is that the global award of $788,000 for the three heads of damages is so inordinately high that it warrants appellate intervention.

[63] In particular, BRI maintains that the total sum of $288,000 awarded for general and aggravated damages was sufficient to compensate McNeil. BRI argues that amount adequately reflects the principles of denunciation and general and specific deterrence needed to teach BRI and others that the improper initiation and use of the criminal process against employees is unacceptable and will attract severe penalties when proved.

[64] We would not give effect to BRI's submission. The aggravated and punitive damages awarded by the jury reflect the jury's sense of outrage at BRI's conduct and the enormity of the harm it concluded McNeil had suffered.

[65] By its verdict, it is apparent that the jury viewed BRI as a calculating and insensitive company that was prepared, for its own purposes, to see an innocent man

convicted of a crime it knew he did not commit. As counsel for the respondents points out, the duplicity and deception practiced by BRI was not limited to a one-time act of folly that occasioned limited harm; rather, BRI carried on the charade for the better part of thirteen years. Notably, as late as 1995, BRI continued its duplicity at the arbitration hearing and in the process, robbed McNeil 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.

[66] Viewed from that perspective, as we must in light of the jury's verdict, we see no basis for interfering with the quantum of damages or the heads under which they were awarded. In this regard, we are guided by the principles enunciated in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, and the circumstances giving rise to the award of general, aggravated and punitive damages in that case.

[67] Accordingly, the appeal from the jury's award of damages is dismissed.

Conclusion on the Appeal

[68] For the reasons given above the appeal is dismissed.

The Cross-appeal

[69] The respondents seek an order increasing the amount awarded for substantial indemnity fees from $225,000 to $293,226 in order to reflect the hours allowed by the trial judge but at the hourly rates of respondents' counsel.

[70] The respondents claimed $519,520.04 for substantial indemnity fees, comprised of a $200,000 premium and $319,520.04 based upon hourly rates of counsel, students and law clerks. The trial judge held that no premium was payable by the appellants. The trial judge then found that the substantial indemnity fees claimed by the respondents should be reduced by assessing all substantial indemnity rates at 1.5 times the allowed partial indemnity rates.

[71] The respondents submit that the full rates claimed are fair and ought to be awarded in light of the complexity of the matter which demanded the time, experience and expertise of the counsel involved. They argue that trial judge's reduction of the substantial indemnity rates to 1.5 times the partial indemnity rates does not reflect the list of factors under rule 57.01, which allow the court, in exercising its discretion to award costs, to account for the principle of indemnity, including the experience of the lawyer involved, the rates charged and the hours spent by that lawyer.

[72] The costs of a proceeding are within the discretion of the court: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1). An award should not be set aside unless the trial judge made an error in principle, the award is plainly wrong, or the trial judge considered irrelevant factors or reached an unreasonable conclusion: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 at para. 27. None of those factors exist here.

[73] In this case, the award of costs is consistent with the specific rates and definition of substantial indemnity costs set out in the rules, which provide that substantial indemnity costs means costs awarded in an amount that is 1.5 times the partial indemnity rates: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 1.03(1). Substantial indemnity costs are not the same as what a party pays or may agree to pay to a lawyer.

[74] Here, the trial judge recognized that she had the discretion to award costs representing full indemnity, but concluded that it was not appropriate. In exercising this discretion, the trial judge accounted for the defendants' objections to the bill of costs, including that they defended the action in good faith and were justified in pursuing a defence in these circumstances; that the hourly rates claimed are excessive and fail to comply with the rates established by the rules; and that the number of hours claimed is unreasonable in all of the circumstances.

[75] The trial judge also accounted for the relevant factors set out in rule 57.01. She determined that there was "no reason to depart from the definition of substantial indemnity costs as set out in the *Rules of Civil Procedure*." She also noted that certain conduct on behalf of the respondents' counsel had unnecessarily lengthened the trial, including the continuance of a claim against a named defendant even after the respondents had conceded that the defendant was not liable in the action and the adjournment at the outset of the trial because the respondents attended without the proper video equipment. Overall, the trial judge's costs award constitutes a fair and reasonable assessment within the reasonable expectations of the parties.

[76] Accordingly, the cross-appeal is dismissed.

Costs

[77] We have reviewed the costs submissions of the parties. We fix costs on a partial indemnity scale in the amount of $35,000.00 including disbursements and G.S.T, which we consider to be fair and reasonable in the circumstances.

RELEASED: May 22, 2008
"RGJ"

"Karen M. Weiler J.A."
"M. Moldaver J.A."
"R.G. Juriansz J.A."