COURT OF APPEAL FOR ONTARIO

CITATION: Pate Estate v. Galway-Cavendish and Harvey (Township), 2013 ONCA 669
DATE: 20131105
DOCKET: C56406 and C54717

Doherty, Cronk and Lauwers JJ.A.

BETWEEN

The Estate of John Gordon Pate

Respondent

and

The Corporation of the Township of Galway-Cavendish and Harvey

Appellant

George Avraam and Mark Mendl, for the appellant

Jeffrey D. Ayotte and David J.M. O'Neill, for the respondent

Heard: April 29, 2013

On appeal from the orders/judgments of Justice D.S. Gunsolus of the Superior Court of Justice, dated November 16, 2011, reported at 2011 ONSC 6620, [2011] O.J. No. 5318, and December 3, 2012, reported at 2012 ONSC 6740, [2012] O.J. No. 5691.

Lauwers J.A. (Dissenting):

[1] The appellant municipality wrongfully dismissed John Gordon Pate in March 1999 after almost ten years of employment. It appeals the outcomes of two re-trial decisions in which the trial judge awarded $550,000 in punitive damages and found the municipality liable for malicious prosecution.

[2] For the reasons that follow, I would affirm the trial judge's decision that the appellant is liable to the respondent for malicious prosecution. I would dismiss the appeal on the quantum of punitive damages.

Overview

[3] In March 1999, the appellant, the Corporation of the Township of Galway-Cavendish and Harvey (the "Township"), fired the respondent, John Gordon Pate, after he had worked for the Township for almost 10 years. Mr. Pate sued the Township for damages for wrongful dismissal, malicious prosecution and reputational injuries, among other matters.

[4] During the first civil trial, the Township conceded that Mr. Pate was wrongfully dismissed and agreed that he was entitled to pay in lieu of notice of termination. The trial judge awarded damages under several additional heads, including $25,000 for punitive damages. He dismissed the malicious prosecution claim. Mr. Pate appealed and this court ordered a new trial on both the dismissal of the malicious prosecution claim and the quantum of punitive damages.

[5] The parties agreed that the two issues would be retried separately by the same judge who had presided over the first trial. They also agreed that the re-trials would proceed on the record from the first trial and that no new evidence would be heard. On the re-trials, the trial judge awarded punitive damages in the amount of $550,000 and held that the Township was liable to Mr. Pate for malicious prosecution. The Township appeals both judgments.

Factual Background

[6] Mr. Pate was Chief Building Official of the Corporation of the Township of Galway-Cavendish from 1989 until December 31, 1998. The Township then amalgamated with the Township of Harvey, forming the appellant, the Corporation of the Township of Galway-Cavendish and Harvey. Mr. Pate became a building inspector in the newly created Building Department under John Beaven, who was Chief Building Official of the amalgamated township.

[7] Acting on the instructions of John Millage, the Township's Chief Administrative Officer, Mr. Beaven terminated Mr. Pate's employment on March 26, 1999, on the alleged basis that his employer had uncovered discrepancies with respect to building permit fees. Mr. Pate was never provided particulars of these allegations, but Mr. Beaven told him that if he resigned, then the Township would not contact the police. He refused to resign.

[8] After terminating Mr. Pate's employment, Mr. Beaven conducted an investigation and turned some information over to the Ontario Provincial Police. As will be described below, in the face of the reluctance of the investigating officers to lay charges, the Township exerted pressure on those higher in command within the Ontario Provincial Police organization. Charges were then laid and after a four-day criminal trial, Mr. Pate was acquitted in 2002.

[9] The local media reported extensively on the criminal proceedings and Mr. Pate remained in the public spotlight from March 26, 1999, when he was

wrongfully dismissed, until his acquittal on December 17, 2002. Mr. Pate did not obtain employment in the municipal field again and passed away in January 2011.

Detailed Litigation History

[10] The litigation history of this case is somewhat unusual. In December 2003, after his acquittal on the criminal charges, Mr. Pate sued the Township for damages for wrongful dismissal ($100,000), malicious prosecution ($1 million), and reputational injuries ($1 million). He also sought special damages for his criminal trial defence costs, punitive damages ($1 million), and aggravated damages ($1 million).

(1) The First Civil Trial

[11] By judgment dated December 16, 2009, the trial judge awarded Mr. Pate: (1) "*Wallace* damages" in an amount equal to four months' income - $23,413 on account of the manner of Mr. Pate's dismissal; (2) special damages for Mr. Pate's criminal trial defence costs - $7,500; (3) "general and aggravated" damages - $75,000 (this award did not include damages for wrongful dismissal, which the parties had settled on at 12 months and which had been paid outside of the trial process); (4) punitive damages - $25,000; and (5) pre-judgment interest -$74,032. In so doing, the trial judge stated, without elaboration, "I would order more, however, I am bound by the principles of proportionality."

[12] The trial judge rejected Mr. Pate's malicious prosecution claim. In his view, Mr. Pate had failed to establish malice on the Township's part or that it had "initiated" the criminal prosecution against him, as initiation is understood in the malicious prosecution caselaw: *Pate v. Galway-Cavendish (Township)*, [2009] O.J. No. 5382 ["First Trial"].

[13] The trial judge awarded Mr. Pate his costs of the action, on a substantial indemnity basis, in the sum of $61,791, inclusive of disbursements and GST. He also awarded Mr. Pate a costs premium of 20%, in the sum of $12,358, yielding an overall costs award of $74,149. See *Pate v. Galway et al*, 2010 ONSC 482 ["Cost Endorsement"].

[14] Mr. Pate's total award after the First Trial, including special damages, costs, the costs premium and prejudgment interest, but excluding the amount paid by the Township in the wrongful dismissal settlement, was $279,094.

(2) The First Appeal

[15] Mr. Pate appealed, arguing that the trial judge erred in failing to hold the Township liable for malicious prosecution and in assessing his punitive damages at only $25,000. This court allowed the appeal, set aside the dismissal of Mr. Pate's malicious prosecution claim and the punitive damages award, and ordered a new trial on malicious prosecution and the quantum of punitive damages: *Pate v. Galway-Cavendish (Township)*, 2011 ONCA 329 ["First Appeal"]. The Township's application for leave to appeal to the Supreme Court, solely on the

malicious prosecution issue, was dismissed: *Galway-Cavendish and Harvey (Township) v. Pate*, [2011] S.C.C.A. No. 293.

(3) The Re-trials

[16] The parties agreed that the two issues on the re-trials should be adjudicated separately, before the same trial judge who presided at the First Trial and based on the existing trial record. Although the parties were entitled to lead new evidence on the re-trials, they decided to argue both issues on the existing evidentiary record.

[17] The re-trial of the quantum of punitive damages proceeded first, while the Township's leave application on the malicious prosecution issue was pending before the Supreme Court. By judgment dated November 16, 2011, the trial judge awarded Mr. Pate punitive damages in the amount of $550,000, thereby increasing the quantum awarded at the First Trial by $525,000: *Pate v. Galway-Cavendish and Harvey (Township)*, 2011 ONSC 6620, [2011] O.J. No. 5318 ["Punitive Damages"].

[18] About one year later, by judgment dated December 3, 2012, the trial judge found the Township liable to Mr. Pate for malicious prosecution. As agreed by the parties, he awarded Mr. Pate damages for malicious prosecution in the sum of $1.00, plus costs in the total amount of $20,000: *Pate (Estate) v. Galway-Cavendish (Township)*, 2012 ONSC 6740, [2012] O.J. No. 5691 ["Malicious Prosecution"].

The Issues

[19] There are two issues:

> (1) Did the trial judge misapprehend the evidence and/or fail to apply the proper legal principles in determining that the Township was liable to Mr. Pate for malicious prosecution?
>
> (2) Did the trial judge fail to apply the proper legal principles in awarding punitive damages of $550,000 or is the award so excessive as to demand appellate intervention?

[20] I consider liability for malicious prosecution and then punitive damages.

Malicious Prosecution

[21] The test for malicious prosecution was set out by the Supreme Court of Canada in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 192-193:

> There are four necessary elements which must be proven 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 terminated in favour of the plaintiff;
>
> c) the absence of reasonable and probable cause;
>
> d) malice, or a primary purpose other than that of carrying the law into effect.

[22] In the First Appeal reasons, this court found that the trial judge had made three errors in dismissing Mr. Pate's claim for malicious prosecution. First, the trial judge relied on *Mirra v. Toronto Dominion Bank,* [2004] O.J. No. 1804 (S.C.)

and on *Miazga v. Kevello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339 in setting the test for malice. Simmons J.A. observed, at para. 38, that in so doing he had set the threshold for proving malice too high.

[23] Simmons J.A. identified, at paras. 40, and 43-45, the trial judge's second error as inconsistency between his finding that the Township engaged in "reprehensible conduct" when he assessed damages for wrongful dismissal, and his finding, when he considered liability for malicious prosecution, that malice was absent.

[24] Simmons J.A. identified the trial judge's third error as applying the wrong test to the determination of whether the Township had initiated the prosecution. I return to this below.

(1) The Decision under Appeal

[25] On the malicious prosecution re-trial, the trial judge found the Township liable for malicious prosecution. He found all four *Nelles* elements to be present, specifically that: the criminal proceedings were "initiated" by the defendant; they ended in Mr. Pate's favour; there was no reasonable and probable cause for the prosecution; and the Township showed "malice, or a primary purpose other than that of carrying the law into effect, in its actions."

[26] The Township has focussed this appeal on the first element, initiation, and argues that its conduct did not amount to initiation of Mr. Pate's criminal prosecution.

(2) The Initiation of the Prosecution

[27] In relation to the initiation element, the trial judge instructed himself by considering this court's analysis in the First Appeal reasons, and also took into account this court's decisions in *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, [2008] O.J. No. 1990 and *Kefeli v. Centennial College*, [2002] O.J. No. 3023, 23 C.P.C. (5th) 35.

[28] In his analysis, the trial judge pointed specifically to the fact that the Chief Building Official had failed to disclose "the fact that files relating to the issues in question had been lost during a move of municipal offices, and the fact that at least one of the cases had already been determined by a committee of council to be without foundation…" The trial judge found this had undermined the independence of the investigation and was "reprehensible conduct." He also considered the testimony that investigating Officer Stokes "would not have laid charges" if he had been aware of the withheld evidence: Malicious Prosecution reasons, at paras. 26-27.

[29] The trial judge eventually concluded: "In the case before me, the police were not given all of the information, and by failing to provide the exculpatory evidence, I find that the Defendant initiated these proceedings": Malicious Prosecution reasons, at para. 32. After a review of more evidence, he repeated this conclusion: Malicious Prosecution reasons, at para. 38.

[30] The Township submits that: "The Trial Judge made errors of law, errors of mixed fact and law, and palpable and overriding errors of fact and mixed fact and law in finding that the Township initiated the malicious prosecution of Mr. Pate." The Township makes three substantive complaints: first, the trial judge erred in holding that withholding exculpatory evidence was sufficient to meet the initiation test for malicious prosecution; second, the trial judge failed to give due weight to the inadequate nature of the police investigation; and third, the trial judge considered irrelevant factors in concluding that the Township initiated the prosecution. I will address each complaint in turn.

(3) The Test for Initiation

[31] In my view, it is necessary and fair to read the First Trial reasons and the Malicious Prosecution reasons together in considering this ground for appeal, since the trial judge does not repeat all his findings in both decisions, although there is significant repetition. The interposition of the First Appeal did result in an important shift in the trial judge's assessment of the evidence from the First Trial reasons to the Malicious Prosecution reasons. That shift responds to this court's First Appeal reasons and to the arguments of the parties to the trial judge at the re-trial. In the First Appeal reasons, Simmons J.A. discussed the application of the malicious prosecution test to the facts in this case, at para. 47:

> It is well-established that a defendant may be found to have initiated a prosecution even though the defendant did not actually lay the information that commenced the

> prosecution. Although this court has not determined "all the factors that could, in any particular case, satisfy the element of initiation", it has held that a defendant can be found to have initiated a prosecution where the defendant knowingly withheld exculpatory information from the police that the police could not have been expected to find and did not find and where the plaintiff would not have been charged but for the withholding: *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 at para. 52.

[32] Simmons J.A. identified four elements that are required in this case to determine malicious prosecution: (1) whether Mr. Beaven “knowingly withheld exculpatory information from the police”; if so, (2) “whether the conduct of Mr. Beaven undermined the independence of the police investigation”; (3) “whether Mr. Beaven prepared his statements in a manner that misled the officers into not conducting their own search of the relevant records”; and (4) whether Mr. Beaven undermined “the independence of the decision-making process… to lay charges and prosecute”: First Appeal reasons, at paras. 51-53. There is no doubt that the trial judge was aware of these elements, since he cited para. 51 of the First Appeal reasons in the Malicious Prosecution reasons, at para. 33.

[33] A fair reading of the trial judge’s First Trial reasons and the Malicious Prosecution reasons shows, in my view, that the trial judge considered adequately all four elements specified by Simmons J.A. I observe that these elements are somewhat overlapping and interrelated. Care must be taken not to de-contextualize them, or to turn them into unrelated factual silos of equal weight.

[34] I will address each of the elements in turn.

(4) Applying the Test for Initiation

[35] The first element specified by Simmons J.A. was whether Mr. Beaven knowingly withheld exculpatory information from the police. The Township engages this element in the first of its three substantive complaints, that: "The Trial Judge found that the Township's decision to withhold exculpatory evidence, in and of itself, was sufficient to satisfy the element of initiation."

[36] This is not, in my view, an accurate description of the test that the trial judge actually applied to the evidence. The Township relies on too selective a reading of the Malicious Prosecution reasons, as I explain below.

(a) Withholding Exculpatory Evidence

[37] In the First Trial reasons, at para. 69, the trial judge found that: "the defendant Municipality, through its former chief building official Mr. Beaven, failed to disclose information to the police which the evidence now shows, would have resulted in no charges being leveled against the Plaintiff." He concluded that the Township: "mounted an investigation in order to build a case to justify the termination" only after terminating Mr. Pate.

[38] Perhaps the most damning finding of the trial judge was the following, at para. 51(q) of the First Trial reasons:

> In the end, this witness [Mr. Beaven] admitted that exculpatory evidence was held back and he either could not or would not explain why. For example, in relation to the Parker property, exhibit four, he had knowledge of

> the 1995 building committee investigation and he had knowledge that many Municipal files had gone missing after the move to new offices. He could not explain why he did not tell police these facts. When asked if this would have been exculpatory toward Mr. Pate, he agreed. He was not able to explain why he did not include this information in his statements, (exhibits four through eight). He acknowledged that such information should have been included in his statements and disclosed to the police.

[39] The trial judge repeated this finding in the First Trial reasons, at para. 60, and added this observation: "I find it very troubling that he could give no explanation, satisfactory to this court, which would justify this withholding of what appeared to be exculpatory information."

[40] Both investigating officers, Officer Stokes and Officer Vrbanic, confirmed that no one from the Township advised them of the 1995 Building Committee investigation or that files were missing: First Trial reasons, at paras. 16-17 and 39.

[41] One key piece of evidence that was withheld was Mr. Pate's journal. The trial judge found that Mr. Beaven retained the journal, including Mr. Pate's notes relating to building permit applications and building permit application fees, although he did show the journal to the police. The trial judge noted that Mr. Beaven "could not tell the court what happened to the journal, nor could he produce it": First Trial reasons, at para. 51(a). Surprisingly, however, two pages of the journal showed up at trial, which led to the Crown withdrawing charges in relation to one property reflected in those pages: First Trial reasons, at para. 28.

In the Malicious Prosecution reasons, at para. 37, the trial judge repeated his view of the importance of the missing journal that Mr. Beaven had retained.

[42] The trial judge's ultimate finding, at para. 23 of the Malicious Prosecution reasons, that the Township, through its representative, Mr. Beaven, knowingly withheld exculpatory information from the police, is amply made out on the evidence.

(b) The Role of the Police Investigation

[43] The second element of the malicious prosecution test specified by Simmons J.A. was whether the conduct of Mr. Beaven undermined the independence of the police investigation. The third and related element was whether Mr. Beaven prepared the statements that he provided to the police in a manner that misled the officers into not conducting their own search of the relevant records. These elements are both engaged by the Township's second complaint: "The Trial Judge failed to consider, or give appropriate weight to, the fact that if the OPP conducted a proper investigation, which would have included putting the statements and allegations to Mr. Pate when it interviewed him on two occasions, it could have discovered the information that was withheld by the Township."

[44] The Township argues that the police investigation was incompetent or negligent, and that this must absolve the Township of liability for malicious prosecution. Allied to this argument is the Township's assertion that the proper

legal test requires the court to find that the withholding of the exculpatory evidence put the OPP "in a situation of reliance where they could not exercise independent discretion and judgment in their investigation." The Township asserts that: "To satisfy the element of initiation, the Township's conduct must have effectively robbed the investigating officers of their ability to conduct a meaningful investigation." The Township relies on this court's decisions in *Oniel v. Toronto (Metropolitan) Police Force*, [2001] O.J. No. 90, [2001] 195 D.L.R. (4th) 59, at para. 7, in *Kefeli*, at para. 24, in *McNeil*, at paras. 48-54, and in *Mirra*, at para. 40.

[45] In my view, the Township sets the test far too high. The authorities that the Township relies upon do not support its position.

[46] In *Mirra*, an employee of the Toronto-Dominion Bank conducted an investigation into credit card theft and reported the results to the police who eventually laid charges. The charges were dropped when two other people were found to be the culprits. The Toronto-Dominion defendants moved for partial judgment to dismiss the claims of the plaintiffs against them for malicious prosecution and negligent investigation. Wilton-Siegel J. stated, at para. 40:

> The fact that the Police may have chosen to rely heavily on the results of Sheluk's investigation, because they believed he had conducted a credible investigation, also does not affect the legal result. That was a decision of the Police over which the T-D Defendants had no control. If the Police investigation is demonstrated to have been negligent, it may well result in liability of the

> Police for the plaintiffs' damages. It should not, however, affect the potential liability of the T-D Defendants.

[47] I note that, in *Mirra,* the motion judge made a critical finding. He said, at para. 41: "Nor is there any suggestion that the T-D defendants falsely and maliciously provided the Police with the results of Sheluk's investigation. On the contrary, the parties agree that the mistake was honest." The motion judge accordingly dismissed the claim for malicious prosecution. By contrast, the trial judge here made no finding that such honesty was demonstrated by the Township or its representative; he found the exact opposite, that the Township's actions were malicious: Malicious Prosecution reasons, at para. 49.

[48] In *Oniel*, the police themselves were accused of malicious prosecution since they persisted in the plaintiff's prosecution, and "deliberately or recklessly" ignored "available evidence of the unreliability of a complainant's information," as Borins J.A. noted, at para. 51. While the police did not deliberately or recklessly ignore evidence in Mr. Pate's case, on the trial judge's findings, Mr. Beaven may well have done just that.

[49] In *Kefeli*, Simmons J.A., sitting in chambers, decided a motion by the plaintiff for an extension of time to file a notice of appeal. He had been a teacher at Centennial College, and was arrested, tried and acquitted of offering to take a secret commission. He then brought an action against Centennial College alleging slander, malicious prosecution and conspiracy. Simmons J.A. dismissed

the plaintiff's motion for an extension of time to appeal the dismissal of his action. She addressed the merits of the action, and accepted, at para. 24, the test, proffered by the respondent, that in an action for malicious prosecution an informant or complainant other than a police officer:

> … may be treated as the prosecutor in exceptional circumstances, including the following:
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> > -the complainant desired and intended that the plaintiff be prosecuted;
> >
> > -the facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment; and
> >
> > -the complainant procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both. [Emphasis added.]

[50] The Township focuses and relies on the expression "virtually impossible". But, some years later, this court rejected the "virtual impossibility" test in *McNeil*, at paras. 49-51, and concluded, at para. 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. [Emphasis added.]

[51] In my view, the element of initiation can be satisfied if the defendant knowingly withheld exculpatory information from the police that the police could not be expected to find in all the circumstances.

(i) The Trial Judge's Factual Findings

[52] At the First Trial, the trial judge noted Mr. Beaven's evidence that he assumed the police would undertake their own investigation based on the information that he provided. Mr. Beaven's evidence was that the statements he provided to the police were "thumbnail statements" and that he had asked the police to "conduct a full and thorough investigation": First Trial reasons, at para. 46.

[53] The trial judge observed that: "The police were not in any way hindered or obstructed in relation to the nature and extent of the investigation that it undertook": First Trial reasons, at para. 58. He added, at para. 59, that: "There was no evidence that the Municipality in any way obstructed or intentionally interfered with the conduct of the police investigation."

[54] The trial judge found, in the First Trial reasons, at paras. 60-61, that the police had the ability to undertake a meaningful investigation. He noted that if the police had questioned other municipal employees or officials they would have discovered the evidence of the 1995 Building Committee investigation and the fact that municipal files were missing. On the basis of this evidence, the trial judge concluded that the case for malicious prosecution had not been made out.

[55] The trial judge's evaluation of the evidence on this issue changed after the decision of this court on the First Appeal and the Malicious Prosecution re-trial.

[56] As noted, Simmons J.A.'s third element relating to malicious prosecution was whether Mr. Beaven prepared his statements in a manner that misled the police officers into not conducting their own search of the relevant records. The trial judge's conclusion in the Malicious Prosecution reasons at para. 49, was that: "But for the statements provided by Mr. Beaven and but for his failure to provide the police with the exculpatory evidence in his possession, it is clear from the evidence of the investigating officers, that no charges would have been laid against Mr. Pate." He found that the Township's conduct was the "proximate cause of this prosecution." See also para. 39.

[57] The trial judge pointed to the evidence that Mr. Beaven went to "great lengths" to show the police that his investigation was comprehensive. He stated, at paras. 34-35:

> A review of the written statements provided by Mr. Beaven to the OPP indicate that either he himself or someone in the municipal office, pursuant to his instructions, checked to determine whether or not there existed a file in relation to each building permit at issue. He had Juenne Simpson, an employee of the Municipality, review these statements.
>
> Most troubling, is the fact that Mr. Beaven, in most of the statements, went to great lengths to indicate that he had conducted "comprehensive searches of the files and records in building office and cannot locate any evidence of an application for a permit or an issued building permit". Everyone employed by the Defendant

> was well aware that records of this nature had gone missing as a result of the municipal office move. This was never disclosed and should have been disclosed by the Municipality to the investigating officers.

[58] The trial judge noted, at paras. 30 and 31, that Officer Stokes relied on Mr. Beaven as a former police officer:

> Again, Officer Stokes gave information at the trial of this action, that had he known that the Parker matter had already been investigated by the 1995 Galway-Cavendish Building Committee, he would not have laid charges in relation to the Parker property. Further, he advised the court that had he known about the missing municipal files, he would not have laid charges in relation to the Pruenster, Robertson, Miller, Barillaro and Hottot properties. Officer Stokes knew that Mr. Beaven was a retired police officer, having been a staff sergeant for many years prior to his retirement. It was clear from Officer Stokes' evidence that he accepted the statements provided by Mr. Beaven as forming the foundation for the reasonable and probable grounds he developed in order to lay charges against Mr. Pate.
>
> Officer Stokes gave evidence that when he reviewed the statements as prepared by Mr. Beaven, he was told that the case against Mr. Pate was "going to be very big". He confirmed that he formed reasonable and probable grounds to lay charges on each of these matters "when he received and read the statements" as authored by John Beaven.

[59] Officer Stokes acknowledged that Mr. Beaven's statements "provided the reasonable and probable grounds for laying the charges against Mr. Pate." The trial judge found, at para. 28:

> Mr. Beaven told the police that he had searched the records of the Municipality looking for an indication that the permits had been issued concerning the relevant

> properties and found that no such records existed. He did not go on to advise the police that many files and records had been lost during a move of the municipal office in question. Further, the evidence of Juenne Simpson, a municipal employee, was that she had, at the request of Mr. Beaven, reviewed the statements that he had prepared. While Mr. Ayotte argued that she could have, at that point in time, ensured that the police were aware that files were lost during the move, her evidence was that this fact concerning the missing files was "common knowledge" and clearly that was within Mr. Beaven's knowledge even though, in evidence, he came across as being unclear on this point.

[60] This evidence led the trial judge to the conclusion, discussed above, that the Chief Building Official's conduct undermined the independence of the police investigation and was reprehensible: Malicious Prosecution reasons, at para. 26.

(ii) The Township's Challenges to the Trial Judge's Factual Findings

[61] The Township challenges the trial judge's findings that Mr. Beaven withheld the journal from the police and that he did not disclose the results of the Township's Building Committee investigation in 1995 to the police.

[62] The Township also asserts that the OPP could easily have found out about the journal and discovered the results of the Township's 1995 Building Committee investigation if they had simply met with another employee, Ms. Simpson. Finally, the Township pointed out that the Officers also did not put the allegations to Mr. Pate when they interviewed him, and it was his evidence that he would have been able to explain any discrepancies.

[63] These are, the Township asserts in its factum: "key pieces of evidence that specifically related to whether the Township's conduct undermined the ability of the OPP to conduct an independent investigation"; the trial judge's failure to review and consider them amounts to a palpable and overriding error. I address each challenge in turn.

The Journal

[64] The trial judge was well aware that Mr. Beaven had the journal and that he had shown it to the police. This is evident in both the First Trial reasons, at paras. 28 and 51(a), and in the Malicious Prosecution reasons, at paras. 33(a) and 37.

[65] Officer Stokes testified that Mr. Beaven showed him the journal, and he recalled reviewing it, but he said that he did not see the dates to which Mr. Beaven referred in the journal. The journal was not part of the evidence package that Mr. Beaven gave to him. Mr. Beaven stated in cross-examination that he indicated to the police that he was in possession of the journal. That said, at no time did he give the police any indication of the journal's importance.

[66] There is no basis on which to conclude that the trial judge's evaluation of the evidence about the journal was erroneous.

The Building Committee's 1995 Investigation

[67] The trial judge discussed the 1995 Building Committee investigation of the Parker property in both the First Trial reasons, at paras. 39, 51(q), 60 and 70, and in the Malicious Prosecution reasons, at paras. 33(q) and 47. It is noteworthy

that the statement provided to the police by Mr. Beaven about the Parker property did not refer to the 1995 investigation.

[68] The evidence of Officer Stokes was that he was primarily responsible but was replaced on the file. Officer Vrbanic explained his involvement by saying that "the Township wasn't satisfied with some of the investigations" Officer Stokes was doing. Officer Vrbanic did some investigation, including meeting with some witnesses and with Mr. Beaven at least twice. His best recollection was that he was assigned to the file in April 1999.

[69] Mr. Beaven met Officer Vrbanic in early 2000. He testified that the officer wanted to look at some building permit record files. He added that Officer Vrbanic "asked me some questions about the Parker one." Mr. Beaven then added:

> He was informed that it was subject to an examination by the officials of the former Township and that it was my understanding that there was no conclusive – no conclusive end to it, is as I guess the only way I can describe it. I'm pulling this – it was a long time ago, but there was some discussion about Vrbanic about this, about this Parker business.

[70] Officer Vrbanic testified that it was his practice to make notes on things that were noteworthy and that he had no notes of a conversation with Mr. Beaven about the Parker property, or about "an investigation completed by the Galway–Cavendish Building Committee back in 1995 or 1996."

[71] It is plain from the trial judge's reasons that he did not accept Mr. Beaven's evidence that he disclosed the information about the 1995 investigation to the

police. His evaluation of the evidence attracts considerable deference from this court.

Lapses in the Investigation

[72] The Township makes two specific complaints about the competence of the police investigation. The first is that the police failed to interview Juenne Simpson, who would have told them about the 1995 Building Committee investigation that absolved Mr. Pate, and about the files that were lost when the townships amalgamated. The second is that the police failed to provide Mr. Pate with the details of the allegations against him, despite two interviews; if they had done so, he would have disabused them and they would have done a more fulsome investigation of Mr. Beaven's statements.

[73] The trial judge's reasons explain how Mr. Beaven, with his police credentials, experience and credibility with the investigating officers, went to "great lengths" to manage his contacts with the police, and to encourage them to lay charges against Mr. Pate, while discouraging as unnecessary any additional investigation. There is no basis for concluding that the trial judge's assessment of this evidence is tainted by error.

(5) The Independence of the Decision to Prosecute

[74] The fourth element of the malicious prosecution test set by Simmons J.A. was whether the conduct of Mr. Beaven or the Township undermined the

independence of the process leading to the decision to lay charges and prosecute Mr. Pate.

[75] The trial judge's assessment of this issue also shifted between the First Trial reasons and the Malicious Prosecution reasons. In the First Trial reasons, the he reached the following conclusion, at para. 62:

> Mr. Beaven provided the information which placed the police investigation into play. However, the decision to prosecute was that of the police. Even where false information is provided to the police, even in circumstances where the complainant knows it to be false, this does not necessarily constitute "initiation". (See: *Mirra v. Toronto Dominion Bank, supra)*.

As discussed above, the trial judge's reliance on the test in *Mirra* was misplaced, as this court observed in the First Appeal reasons, at para. 37.

[76] The trial judge recited Mr. Beaven's evidence that he contacted the O.P.P. Staff Sergeant to determine the status of the investigation: First Trial reasons, at para. 48. From the perspective of the officers involved, the Township brought significant pressure to bear, and Officer Vrbanic replaced Officer Stokes: First Trial reasons, at paras. 18-20, and 39.

[77] The trial judge's assessment of the evidence was more comprehensive in his Malicious Prosecution reasons, at para. 47; the additional detail is telling:

> The evidence of Mr. Beaven was that he had been instructed by his superior to dismiss Mr. Pate and offer clemency from criminal charges if he, Mr. Pate agreed to resign. He further gave evidence that he had been instructed to build a case against Mr. Pate, subsequent

> to this wrongful dismissal. Therefore, there is evidence that the Township initiated proceedings for "a reason other than simply bringing the law into effect." We also have the evidence of Officer Stokes that pressure was brought upon him by his superiors to lay charges. In fact, Officer Stokes described a very odd turn of events. He indicated that the criminal matters were turned over to another investigating officer, which he confirmed was very unusual, but it was done because "The Township had complained that I took too long to lay charges in this matter." He again confirmed that he laid the charges based upon the package of statements provided by Mr. Beaven as he believed the statements "would stand up in court". It was his evidence that the Municipality wanted charges laid, as this civil action had already been commenced. In fact, he was removed from the prosecution of this matter and was "written up", allegedly for his tardiness in deciding whether to lay charges.

[78] The impact of this assessment of the evidence is important, as the trial judge noted, at para. 42 of the Malicious Prosecution reasons:

> If the Plaintiff can establish that the Defendant either lacked a *bona fide* belief in the existence of such cause, or that the grounds for initiating the prosecution were objectively unreasonable, the Plaintiff will have established this element. In this case, I accepted the evidence of Officer Stokes when he said that had he known:
>
> > (a) The Building Committee of the Defendant in 1995 had investigated the Parker permit issue and decided that no charges were warranted;
> >
> > (b) The Defendant knew that no building permit was required for the Hottot renovation; and
> >
> > (c) Knew that many files had been lost or gone missing after the closing of the Defendant's Cavendish satellite office;

> he would have not laid the charges against Mr. Pate.

[79] It is plain that the trial judge turned his mind to whether the conduct of Mr. Beaven or the Township undermined the independence of the process leading to the decision to lay charges and prosecute Mr. Pate. This is no basis for this court to interfere with the trial judge's factual findings on this issue.

(6) The Consideration of Irrelevant Factors

[80] The Township's third substantive complaint is that: "[T]he Trial Judge considered irrelevant factors in determining that the Township initiated the malicious prosecution of Mr. Pate, namely, the events leading up to, and including, the Township's decision to terminate Mr. Pate's employment."

[81] The focus of this complaint is para. 33 of the Malicious Prosecution reasons. The trial judge's preamble to this lengthy paragraph states:

> Much has been made as to what Mr. Beaven did or did not do on behalf of the Defendant. The Corporation of the Township of Galway-Cavendish and Harvey is the Defendant, not Mr. Beaven. The Municipality put into motion this investigation and Mr. Beaven, an officer of the Defendant Municipality, withheld information as follows…

The paragraph then goes on to list seventeen evidentiary points. The Township does not dispute the accuracy of these points, but does dispute the relevance of seven of the seventeen to the issue of whether the Township withheld information from the police. Some of those points relate to what Mr. Beaven did, not in relation to withholding evidence from the police, but in accomplishing the

Township's goal of dismissing Mr. Pate. The implication is that the trial judge might have been overborne by his disgust with the way that the Township treated Mr. Pate.

[82] But a paragraph in a judgment is not the equivalent of a mathematical equation in which an error in a sub-calculation produces an error in the outcome; reasons are not to be scrutinized in this manner, but are to be considered in whole and in context: *R. v. R.E.M*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16.

[83] One of the listed items which the Township criticizes is that: "Mr. Beaven advised Mr. Pate that he would contact the OPP if Mr. Pate did not resign from his employment." While this does not relate to the withholding of evidence, it surely underlines the respondent's main argument, which was accepted by the trial judge, that a malicious prosecution at the instance of the Township was afoot.

[84] In my view, the Township has not demonstrated that the trial judge's findings to which it objects are tainted by palpable and overriding error, even if some of the evidence may have been irrelevant to his immediate task of evaluating the evidence on the issue of initiation. I would not give effect to this ground of appeal.

(7) Conclusions on Liability for Malicious Prosecution

[85] The accumulated evidence led the trial judge to state, at para. 48 of the Malicious Prosecution reasons:

> All the foregoing leads one to the conclusion that there was more than ample evidence to conclude that the Township initiated the criminal proceedings against Mr. Pate without reasonable and probable grounds to believe that he had committed the thefts and it did so maliciously in order to avoid civil liability for the termination of his employment. The Defendant offered no evidence to refute this. Indeed, Officer Stokes indicated that he reviewed the matter with a local Crown attorney, who did not recommend that charges be laid, and who allegedly opined, that the Township should "undertake its own dirty work". While I do not make my decision based upon such a statement, it underlines the backdrop against which the Defendant's actions were taken through its authorized officer, Mr. Beaven.

[86] In my view, the trial judge adequately addressed the evidence, as he notes by using the expression, “all the foregoing”; he made findings on all four elements of the test for initiation of malicious prosecution set out by Simmons J.A. in the First Appeal reasons.

[87] I note that the trial judge found as a fact, at para. 22 of the Malicious Prosecution reasons, that “it would be next to impossible for the O.P.P. to have uncovered this withheld information, given the statements prepared by Mr. Beaven, which indicated that a careful search had been undertaken and that files relating to these issues did not exist.” He added, at para. 23, citing *Kefeli*, that: “[I]t would be virtually impossible for investigating police to exercise independent judgment” where the complainant had provided information known “to be false and withheld information which the complainant knew to be true, or both.”

[88] This is not the appropriate test, but the use of the "virtual impossibility" test by the trial judge does not affect the outcome. As noted above, at para. 51, the element of initiation can be satisfied if the defendant knowingly withheld exculpatory information from the police that the police could not be expected to find in all the circumstances. The trial judge's findings amply satisfy that test.

[89] The Township has not demonstrated that the trial judge committed any palpable and overriding errors in respect of his evaluation of the evidence on the malicious prosecution issue, or any material errors in respect of the law. I would therefore reject these grounds of appeal.

(8) Damages for Malicious Prosecution

[90] Simmons J.A. pointed out, at para. 56 of the First Appeal reasons, that: "If Mr. Pate's claim for malicious prosecution succeeds at the new trial, it will be necessary for the trial judge to consider all heads of damages arising from the conduct giving rise to that claim."

[91] Instead of doing so, the trial judge accepted the agreement of counsel that the damages for malicious prosecution should be set at $1. The trial judge noted in the Malicious Prosecution reasons, at para. 11, that the $1 figure was inserted as a placeholder, on the agreed basis that the damages to be assessed on this appeal would not exceed the punitive damages award of $550,000 that he had made a year earlier at the Punitive Damages re-trial.

[92] The parties made no submissions to this court on how damages for malicious prosecution, as a free-standing tort, should be set. For the purpose of this decision, I read the arrangement as an implicit concession by the Township that the malicious prosecution claim could buttress the respondent's claim to punitive damages, if it was made out. Further, considering the sequence of the re-trials, I view the later Malicious Prosecution re-trial as the respondent's effort to support the quantum of punitive damages awarded by the trial judge at the earlier Punitive Damages re-trial, which at that point had already been appealed.

[93] Counsel requested this court not to order a new trial even if it found fault with the trial judge's re-trial decisions, but instead to substitute its own decision based on the trial record.

Punitive Damages

[94] For convenience in setting the context, I note again that after the First Trial, Mr. Pate appealed the trial judge's award of $25,000 in punitive damages to this court, contending that the quantum was too low. This court allowed the appeal and directed a new trial on the issue. After the re-trial, the trial judge increased the award of punitive damages from $25,000 to $550,000. The Township appeals the quantum.

(1) The Positions of the Parties on Punitive Damages

[95] The Township concedes that punitive damages are warranted, since, as its factum notes: "the compensatory damages awarded to Mr. Pate did not fully

satisfy the objectives of retribution, deterrence, and denunciation." The Township submits, however, that the trial judge misapprehended and misapplied the legal test for setting the quantum of punitive damages. The Township's core complaint is that the award of punitive damages, when added to the other awards, "is so inordinately large that it exceeds what is rationally required to punish the defendant," and is therefore "irrational."

[96] The Township argues that the trial judge made four errors in setting the amount of punitive damages. First, he failed to take into account the overriding principle of proportionality. Second, the trial judge took into account the same evidence in assessing both punitive and mental distress damages. Third, he failed to take into account the amounts that he had already awarded for aggravated damages, substantial indemnity costs, and the costs premium. Fourth, the Township asserts that the new punitive damages award is out of line with the cases and is therefore excessive.

[97] The respondent submits that the extreme misconduct of the Township justifies the large award of punitive damages.

(2) The Standard of Review

[98] Simmons J.A. said, in the First Appeal reasons, at para. 60:

> The standard of appellate review applicable to punitive damages is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct.

[99] This was the test specified by the Supreme Court in *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595, at para 107. The Supreme Court noted, at para. 108, that an appellate court owes a lesser degree of deference to a jury award of punitive damages than to a compensatory award. This standard also applies, by inference, to a punitive damages award made by a judge sitting alone. The award of punitive damages need not be so large as to shock the appellate court's conscience before it may interfere; it is sufficient if the award's size offends the court's sense of reason.

(3) Discussion

[100] For the reasons set out below, it is my opinion that the trial judge did not err in his self-instructions on proportionality, or on the differing purposes for punitive and compensatory damages. He did not err by taking into account the same evidence in assessing both punitive and mental distress damages. He did not make the error of failing to take into account the amounts that he had already awarded in compensatory damages. I would not find that the trial judge's award of punitive damages at $550,000 is unreasonable.

(a) Proportionality

[101] The Township argues that the trial judge failed to take into account the overriding principle of proportionality in setting the award of punitive damages. As explained by the Supreme Court in *Whiten,* proportionality is related to the blameworthiness of the defendant's conduct, the degree of vulnerability of the

plaintiff, the harm or potential harm directed specifically at the plaintiff, the need for deterrence, other penalties paid by the defendant, and the advantage wrongfully gained by the defendant: *Whiten*, at paras. 110-114, 116-119, and 125-126.

[102] The trial judge was alive to the principle of proportionality. He commented in his First Trial reasons, at para. 81: “I would order more, however, I am bound by the principles of proportionality." This court interpreted his comment as referring “to punitive damages - after all, proportionality in several dimensions is the ‘key to the permissible quantum of punitive damages’": First Appeal reasons, at para. 59, quoting para. 111 of *Whiten*.

[103] In awarding punitive damages at the First Trial, the trial judge considered, at some length, the blameworthiness of the Township's conduct, Mr. Pate’s degree of vulnerability, and the harm that he suffered.

[104] The trial judge went over much of the same ground in the Punitive Damages reasons. He quoted his First Trial reasons and, at para. 7, set out the re-trial argument of counsel for the Township that alerted him again to the relevant issues:

> Counsel for the defendant municipality suggested that the original amount that I ordered was sufficient in order to address the purpose of punitive damages which I already found to be applicable to the facts of this case. He relied upon *CivicLife*, suggesting that there was no rational purpose to impose punitive damages in order to

> deter the conduct in issue and denounce it as in the *Hill* and *Whiten* cases.

[105] The trial judge reminded himself of the principles at para. 8:

> In *Whiten v. Pilot Insurance Co*., the Supreme Court of Canada set out that any award of punitive damages, when added to compensatory damages, must produce a total sum which is rationally required to punish the defendant. The amount of the award must be proportionate to the blameworthiness of the defendant's conduct such that the more reprehensible the conduct, the higher the rational limits to the potential award.

[106] In my view, the trial judge properly instructed himself on the principles for setting punitive damages.

(b) The Relationship between Punitive Damages and Compensatory Damages

[107] The purpose for an award of aggravated or mental distress damages is different from the purpose for an award of punitive damages. In fixing mental distress damages, the court focuses on compensating the plaintiff for his or her mental distress relating to the manner of dismissal: *Honda*, at para. 60. In fixing punitive damages, the court focuses on punishing the defendant's wrongful acts "that are so malicious and outrageous that they are deserving of punishment on their own": *Honda*, at para. 62. See also *Hill*, at para. 196, and *Whiten*, at para. 73.

[108] The trial judge was well aware of the different purposes for each head of damages, as his First Trial reasons reflect, at paras. 71-72:

> The purpose of punitive damages is not to compensate the Plaintiff. They are only to be awarded where compensatory damages are insufficient to accomplish the objectives of retribution, deterrence and denunciation.
>
> Punitive damages are to be imposed only if there has been highhanded, arbitrary or highly reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour. Punitive damages are to be awarded only where compensatory damages are otherwise insufficient to accomplish these objectives.

[109] The trial judge referred to the same principles in his Punitive Damages reasons. His reasons confirm that he instructed himself properly on the distinction between punitive and compensatory damages.

(c) Using the Same Factors Twice

[110] The Township argues that the trial judge relied on many of the same factors to make the compensatory damage awards to Mr. Pate as he did to justify his punitive damages award. The result, contends the Township, is "double compensation" to Mr. Pate, and "double punishment" to the Township.

[111] These factors were, specifically: "[T]he Township's unfounded allegations of theft, the Township's failure to provide Mr. Pate with any particulars of the allegations or an opportunity to respond, and the Township's defences in the civil proceedings, up to and including the trial of the matter."

[112] The Township submits that the trial judge considered many of the same factors in his award of aggravated damages, specifically: "[T]he damage to Mr.

Pate's reputation, the Township's unfounded allegations of misconduct, the Township's failure to provide Mr. Pate with particulars of the allegations or an opportunity to respond, and Mr. Beaven's statement that he would not contact the police if Mr. Pate resigned from his employment."

[113] Bastarache J. commented, at para. 60 of *Honda*, that: "The Court must avoid the pitfall of double-compensation or double-punishment." Binnie J. referred, in *Whiten*, at para. 116, to: "a danger of 'double recovery' for the plaintiff's emotional stress, once under the heading of compensation and secondly under the heading of punishment." Robins J.A. noted that the court must not "over-compensate the plaintiff and provide him or her with duplicate monetary recovery," particularly in a defamation action, in *Walker v. CFTO Ltd.*, [1987] O.J. No. 236, 59 O.R. (2d) 104 (C.A.), at p. 121.

[114] The Township urges this court to draw the logical inference from the idea of "double compensation" that a trial court should not take account of an element of misconduct in fixing damages under more than one head of damages. In other words, misconduct that would justify an award of mental distress damages cannot be relied upon to justify an award of punitive damages as well, for example.

[115] With respect, this inference does not follow. In my view, the word "double" or "duplicate" in these cases is no more than a figure of speech. It gets at the

issue of real concern, which is to avoid over-compensating the plaintiff by way of an excessive award of punitive damages.

[116] Everything turns on the specific facts of the case. The defendant's misconduct might have caused mental distress that substantiates an award of mental distress damages; that same conduct could well also be deserving of punishment and thus justify an award of punitive damages. This would be true in the cases where both aggravated and punitive damages were awarded. See, for example, *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 and *McNeil*. On the other hand, the defendant's conduct might be worthy of punishment even though it might not have been found to have caused mental distress, as in *Whiten*. The same factual matrix is considered in setting all the heads of damages.

[117] It does not follow, simply from the trial judge's repetition of the facts in explaining his various awards, that he necessarily erred in principle.

(d) Failing to Take into Account the Amounts Already Awarded

[118] Conceptually, as the Supreme Court noted at para. 94 of *Whiten*, punitive damages are aimed at punishing the wrongdoing defendant for misconduct, but only where the other awards against the defendant are found to fall short of adequate punishment. The trial judge was therefore obliged to take into account the amounts that he had already awarded in compensatory damages.

[119] Compensatory damages including wrongful dismissal damages have a punitive element, which must be taken into account assessing punitive damages: *Honda*, at para. 69, *Whiten*, at paras. 94 and 123, and *Walker*, at p. 121. In the context of a wrongful dismissal case, aggravated damages also have a punitive element, even though they are compensatory in nature. In this case, that would include the wrongful dismissal damages even though they were paid outside of the trial process as noted below

[120] It would be helpful to review the breakdown of the amount awarded by the trial judge after the First Trial. The trial judge explained, in a footnote to the Cost Endorsement, that his award of $75,000 for "general and aggravated damages" did not include damages for wrongful dismissal, which the parties had settled on at 12 months plus benefits, pension and interest, and which had been paid outside of the trial process. A review of the relevant submissions at the First Trial makes it clear that counsel were addressing aggravated damages only, and not general damages. I therefore conclude that the amount of aggravated damages set by the trial judge after the First Trial was $75,000.

[121] The "Wallace bump up" damages came to about $25,000. This expression refers to damages flowing from the manner of wrongful dismissal set out in the Supreme Court's decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. At the First Trial the parties did not draw the trial judge's attention to the Supreme Court's qualification of "Wallace damages" in *Honda Canada Inc. v.*

Keays, 2008 SCC 39, [2008] 2 S.C.R. 362. There was no appeal of the trial judge's award of aggravated and "Wallace damages."

[122] For analytical purposes, I would add the "Wallace bump up" damages to the aggravated damages and conclude that, conceptually, the trial judge awarded Mr. Pate a total of about $100,000 as "mental distress damages." I do this in view of the Supreme Court's decision in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 53, where the court urged that the term "mental distress damages" be adopted in preference to the term "aggravated damages," which should be abandoned as confusing.

[123] The trial judge awarded substantial indemnity costs as an element of punishment, noting the success of the plaintiff in this matter and the conduct of the defendant, in the Cost Endorsement, at para. 6. He also awarded a costs bonus.

[124] As noted above, Mr. Pate's total award after the First Trial, including special damages, costs, the costs premium and prejudgment interest, but excluding the amount paid by the Township in the wrongful dismissal settlement, was $279,094.

[125] The Township argues that the trial judge, despite his self-instructions: "engaged in no analysis, and therefore provided no explanation about why pay in lieu of notice, *Wallace* damages, aggravated damages, substantial indemnity costs, and a costs premium were insufficient to punish the Township."

[126] I disagree. Near the outset of his Punitive Damages reasons, the trial judge referred to some of the key principles underlying the assessment of a punitive damages claim. He cited the requirement that an award of punitive damages, "*when added to compensatory damages*, must produce a total sum which is rationally required to punish the defendant" (emphasis added). Although the trial judge did not mention in the Punitive Damages reasons the actual amounts that he awarded to Mr. Pate as the result of the First Trial, I am not prepared to draw the inference from that omission that he did not take account of them in quantifying punitive damages.

(e) The Award is Not Out of Line with the Caselaw on Punitive Damages

[127] It would be helpful to recall the way in which the argument about the quantum of punitive damages developed, and the trial judge's reasoning. There is a marked contrast between the way that the case was argued by the Township before the trial judge and before this court.

(i) The Argument before the Trial Judge at the Punitive Damages Re-trial

[128] The trial judge explained that the parties agreed that no new evidence would be admitted at the Punitive Damages re-trial, and noted, at para. 6 of his Punitive Damages reasons, that the quantum of punitive damages was re-argued based on the trial record, within the parameters of a set of "leading cases": *Hill, Whiten, McNeil* and *CivicLife.com Inc. v. Canada (Attorney General)*, [2006] O.J. No. 2474, 215 O.A.C. 43.

[129] The respondent sought punitive damages within the range set by *McNeil* at $500,000, *Hill* at $800,000, and *Whiten* at $1,000,000, as the trial judge noted at para. 7.

[130] Trial counsel for the Township submitted at the re-trial that the $25,000 amount the trial judge had awarded after the First Trial was sufficient, relying on *CivicLife,* in which this court set aside an award of punitive damages. He argued that the Township was a small municipality and should not be treated as harshly by the court as an insurance company; the trial judge noted, at para. 14, that counsel did not provide authority for this proposition. Counsel for the Township submitted to the trial judge that "an amount of no more than $75,000 [would be] sufficient in order to punish the defendant municipality": Punitive Damages reasons, at para. 19.

[131] The trial judge rejected this argument, at para. 13, and distinguished *CivicLife*. He noted that in *CivicLife*, awarding punitive damages would have punished taxpayers for the actions of one "rogue" employee over a short period of time. By contrast, in this case the misconduct was, or should have been, "within the knowledge of the Chief Administrative Officer, council or a council committee, and occurred over a period in excess of ten years": Punitive Damages reasons, at para. 17.

[132] The trial judge also observed, at para. 18:

> To date, no evidence has been put before me whereby it would appear that the municipality has apologised or in any way accepted responsibility for the conduct of its municipal officer, nor has it in any way accepted responsibility for the result of these actions. Indeed, viewed through the eyes of the average citizen, no doubt they would view the conduct of the municipality as offensive and morally repugnant.

[133] The trial judge found that the facts of this case were "strikingly similar" to the facts in *McNeil*, and concluded, at para. 20:

> In *McNeil* $500,000 was awarded for punitive damages. Given my findings of significant misconduct on the part of the defendant municipality; the fact that such misconduct lasted over approximately a ten year period; the municipality's actions in this case and in the criminal proceedings that had a devastating impact on the appellant's life, including his employability, his marriage, and the fact that these were intentional and foreseeable actions undertaken by the municipality, I have reconsidered the case law with the guidance of the appeal court and now fix punitive damages in the amount of $550,000.

[134] The trial judge found "this defendant's conduct to be, perhaps in some aspects, worse than the actions of the defendants in the aforementioned cases": Punitive Damages reasons, at para. 11.

(ii) The Argument before this Court

[135] The Township resiles from the $75,000 punitive damages figure put to the trial judge at the Punitive Damages re-trial by previous counsel, and submits that the original award of $25,000 was sufficient. The Township argues that the $550,000 punitive damages award is out of line with the caselaw, which shows

that the trial judge erred in principle in failing to give effect to the Supreme Court's instruction, at para. 94 of *Whiten*, that: "Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient." The Township submits that the broader sweep of the cases (none of which were put to the trial judge), does not support a high award of punitive damages.

a. Awards Cited by the Township

[136] The Township submits that, even before *Honda* was decided, Ontario courts were reluctant to award large punitive damage amounts in employment cases. The highest award before *Honda* in an employment matter was $100,000: *Downham v. Lennox and Addington (County)*, [2005] O.J. No. 5227, 56 C.C.E.L. (3d) 112 (S.C.). The Township asserts that the awards were considerably more "modest." It cites cases setting a range of between $15,000 and $50,000: *Bouma v. Flex-N-Gate Canada Co.*, [2004] O.J. No. 5664, 37 C.C.E.L. (3d) 301 (S.C.), ($15,000 for aggravated and punitive damages); *Mastrogiuseppe v. Bank of Nova Scotia*, 2007 ONCA 726, [2007] O.J. No. 4052, ($25,000 for punitive damages); *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75, [1994] O.J. No. 2657 (C.A.), ($40,000 for punitive damages); *Ribeiro v. Canadian Imperial Bank of Commerce*, [1992] O.J. No. 2471, 13 O.R. (3d) 278, (C.A.), ($50,000 for punitive damages).

[137] The Township argues that, since *Honda*, punitive damage awards in Canada have continued to be "modest." It cites cases setting a range of $5,000 to $75,000: *Lounsbury v. Dakota Tipi First Nation,* 2011 MBQB 96*,* [2011] M.J. No. 138, 264 Man.R. (2d) 172*,* (Q.B.), ($10,000 for punitive damages); *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112, [2011] A.J. No. 560, 336 D.L.R. (4th) 313, ($75,000 for punitive damages), leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 294; *Altman v. Steve's Music Store,* 2011 ONSC 1480, [2011] O.J. No. 1136, 89 C.C.E.L. (3d) 120, ($20,000 for punitive damages); *Brito v. Canac Kitchens, a Division of Kohler Canada Co.*, 2011 ONSC 1011, 87 C.C.E.L. (3d) 184, ($15,000 for punitive damages), overturned on appeal since punitive damages were not claimed, 2012 ONCA 61, [2012] O.J. No. 376; *MacDonald-Ross v. Connect North America Corp.*, 2010 NBQB 250, [2010] N.B.J. No. 250, 364 N.B.R. (2d) 222, ($50,000 for punitive damages); *Pawlett v. Dominion Protection Services Ltd.,* 2008 ABCA 369, [2008] A.J. No. 1191, 302 D.L.R. (4th) 336, ($5,000 for punitive damages); *Coppola v. Capital Pontiac Buick Cadillac GMC Ltd.*, 2011 SKQB 318, [2011] S.J. No. 548, 382 Sask.R. 125, ($20,000 aggravated, not punitive, damages), affirmed 2013 SKCA 80, [2013] S.J. No. 454; *Kelowna Flightcraft Air Charter Ltd. v. Buchanan,* 2010 BCSC 1650, [2010] B.C.J. No. 2290, ($8,500 for aggravated or punitive damages (not specified)); *Nishina v. Azuma Foods (Canada) Co.*, 2010 BCSC 502, [2010] B.C.J. No. 663, ($20,000 for punitive damages).

[138] The Township points out that in *Elgert,* the Alberta Court of Appeal reduced a $300,000 punitive damages award to $75,000 in part because the plaintiff had received substantial compensatory damages. In *Pawlett*, the Alberta Court of Appeal reduced a $50,000 punitive damages award to $5,000 in part because the general damages award had denounced the defendant's conduct.

b. Awards Considered by this Court

[139] The range of punitive damages in wrongful dismissal cases in this court is wide. There was a low average award of about $25,000 in a number of cases: *Boyd v. Wright Environmental Management Inc.,* [2007] OJ. No. 1236, 57 C.C.E.L. (3d) 101 (S.C.), amount aff'd 2008 ONCA 779, [2008] OJ. No. 4649 ($25,000 exemplary damages); *Mastrogiuseppe v. Bank of Nova Scotia*, [2005] O.J. No. 5417 (S.C.), ($25,000), amount aff'd, 2007 ONCA 726, [2007] O.J. No. 4052; *Fedele v. Windsor Teachers Credit Union Ltd.*, [2000] OJ. No. 2755 (S.C.), aff'd, [2001] OJ. No. 2951, 10 C.C.E.L. (3d) 254, (C.A.), ($15,000); *Lukowski v. Hatch Associates Ltd.*, [1996] OJ. No. 4246, 25 C.C.E.L. (2d) 17 (Gen. Div), aff'd in [1998] OJ. No. 5345, 118 O.A.C. 147, ($25,000); and *Ribeiro v. Canadian Imperial Bank of Commerce*, [1992] O.J. No. 2471, 13 O.R. (3d) 278 (C.A.), ($50,000), leave to appeal to S.C.C. refused, [1993] S.C.C.A. No. 5. The mid-range amount was $150,000: *Kagal v. Tessler*, [2004] O.J. No. 3799, 190 O.A.C. 77, leave to S.C.C. refused, [2004] S.C.C.A. No. 508. The high amount of damages was $500,000 in *McNeil.*

[140] Moving beyond the wrongful dismissal cases, there have been punitive damages awards in this court in relation to a number of other causes of action. Again, the range is wide. The average has been $50,000 in cases of breach of contract, fraudulent misrepresentation, intentional interference with economic relations, wrongful conversion, failure to provide an accounting of funds, and the denial of statutory accident benefits: *McQueen v. Echelon General/Insurance Co.*, 2011 ONCA 649, 107 O.R. (3d) 780, ($25,000); *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 334 D.L.R. (4th) 714, ($30,000); *Barber v. Vrozos*, 2010 ONCA 570, 322 D.L.R. (4th) 577, ($50,000); *Modern Niagara Group Inc. v. Armstrong Thomson Tubman Leasing Ltd.*, 2009 ONCA 877, ($50,000); *Panapers Inc. v. 1260539 Ontario Ltd.*, 2007 ONCA 3, 219 O.A.C. 338, ($30,000); *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), ($50,000); and *Gu v. Tai Foong International Ltd.* (2003), 168 O.A.C. 47 (C.A.), ($50,000). The mid-range was $250,000 in respect of fraud by a lawyer and breach of fiduciary duty: *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62, ($250,000) and *Manufacturers Life Insurance Co. v. Ward*, 2007 ONCA 881, 288 D.L.R. (4th) 733, ($250,000). The high award for punitive damages was in respect of the denial of an insurance claim, in the total amount of $450,000: *Plester v. Wawanesa Mutual Insurance Co.* (2006), 213 O.A.C. 241, amended in 215 O.A.C. 187, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 315.

c. Awards in the Supreme Court of Canada

[141] Although the Supreme Court of Canada stated in *Whiten* that "moderate awards of punitive damages … are generally sufficient," it nonetheless upheld the jury award in that case of $1 million.

[142] In *Hill*, a much earlier case, the court upheld an award of punitive damages in the amount of $800,000 in a libel case, in addition to an award of $300,000 for general damages and an award of $500,000 for aggravated damages.

[143] Most recently, in *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, the court reduced an award of punitive damages from $100,000 to $15,000 in respect of a commercial misrepresentation and a violation of the *Consumer Protection Act* of Quebec. I do not see the case as a bellwether, because the trial court had awarded the appellants only $1,000 in compensatory damages. In my view, the original disproportion in the amounts awarded by the trial judge explains the outcome on appeal.

[144] I also note in passing that in *RBC Dominion Securities v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, the Supreme Court essentially confirmed, without comment, a punitive damages award of $250,000 for conversion of client records, although the quantum of punitive damages was not in issue.

[145] It is difficult to draw much of assistance here from this review of the cases, beyond a few obvious observations. There is a spectrum of punitive damage

awards reflecting a spectrum of misconduct. It is hardly surprising that especially vile misconduct by someone in a position of power seriously impacting an individual tends to draw larger punitive damages awards.

(iii) Analysis

[146] The standard of appellate review applicable to a trial judge's award of punitive damages is whether "a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct": *Whiten*, at para. 96 and see para. 107. The Supreme Court acknowledged in *Whiten*, at para. 108, that an appellate court's "supervisory powers over punitive damages […] are more interventionist than in the case of other jury awards."

[147] Did the trial judge rightly place this case towards the high end of the punitive damages spectrum or, as the Township argues, would the award be better placed towards the low end of the spectrum?

[148] In my view, the trial judge did not err in principle by placing the award of punitive damages towards the high end of the spectrum, even with a large award of $100,000 by way of mental distress damages. This placement towards the high end of the spectrum is appropriate and does comport with the principles and the outcomes in *Hill*, *Whiten* and *McNeil*. Further, in my view, the range of damages set by the cases referred to by the Township only confirms the

comparative fitness of the specific cases on which the trial judge based his punitive damages award.

[149] As noted, the trial judge instructed himself properly on the principles involved in assessing punitive damages – that proportionality is a function of the blameworthiness of the defendant's misconduct, the vulnerability of the plaintiff, the harm to the plaintiff, the total amounts awarded, and the warrant for punishment. He carefully assessed blameworthiness and found that: the Township's conduct was "reprehensible," "offensive and morally repugnant," and "a departure to a marked degree from ordinary standards of decent behaviour"; that Mr. Pate was vulnerable; and that the misconduct caused him great personal harm.

[150] The trial judge relied on the jury award of $500,000 in *McNeil* as the appropriate benchmark, but considered the Township's conduct in this case to be worse than the defendant's conduct in *McNeil*, which led him to a larger award of punitive damages at $550,000.

[151] The Township submits that the trial judge was wrong to rely so heavily on *McNeil*, pointing out that he assessed punitive damages "even before he rendered any decision on the malicious prosecution matter." I reject this submission for three reasons. First, the trial judge carefully considered the Township's acts of misconduct in setting the quantum of punitive damages. Second, there is no inconsistency in his factual findings about the Township's

acts of misconduct between the Punitive Damages reasons and the Malicious Prosecution reasons. Third, this submission is inconsistent with the Township's agreement at the Malicious Prosecution re-trial to treat damages flowing from the finding of liability for malicious prosecution as rolled up into the overall award of $550,000.

[152] The employer in *McNeil*, justified termination on the basis that the employee had taken money from the till, and relied on inculpatory video tapes. There were, however, exculpatory videos showing that the employee replaced the funds taken. The employer gave the inculpatory but not the exculpatory video segments to the police, and the employee was convicted of theft and terminated. The conviction was later reversed when the exculpatory video segments surfaced in a labour arbitration. A jury found the employer liable for malicious prosecution and awarded $288,000 for general and aggravated damages, and $500,000 in punitive damages. Following the Supreme Court's lead in *Hill*, this court dismissed the appeal.

[153] As in this case, the employer in *McNeil* argued that the amounts awarded for general and aggravated damages were sufficient deterrence and denunciation. This court disagreed, noting, at para. 64, that "the aggravated and punitive damages awarded by the jury reflect the jury's sense of outrage at [the employer's] conduct and the enormity of the harm it concluded McNeil had suffered." This court added, at para. 65, that the jury clearly saw the employer

"as a calculating and insensitive company that was prepared, for its own purposes, to see an innocent man convicted of a crime it knew he did not commit." This court described the employer's "duplicity and deception" as a long term "charade" that caused great harm to the plaintiff. In my view, on the facts there is not much relevant difference between *McNeil* and this case.

[154] I also agree with the trial judge that *CivicLife* is distinguishable. Mr. Beaven was not a "rogue employee." Rather, as the trial judge noted, he was operating under the instructions of his superiors, and had operated in this fashion for a period of over 10 years.

[155] In my view, the trial judge did not err in principle in placing the award of punitive damages towards the high end of the spectrum.

[156] The trial judge's characterization of this case as worse than *McNeil* is not one that I would have made; the two cases are roughly comparable. But, in my view, in light of the Supreme Court's approach in *Whiten,* this court should not interfere with a punitive damages award where the difference on a sizeable base of $500,000 is only $50,000.

[157] I note that in *McNeil* the plaintiff was awarded $288,000 for general and aggravated damages in addition to the punitive damages award of $500,000. In this case, proceeding on proper principles, a trial judge or jury would have granted Mr. Pate a sizeable figure for mental distress damages in view of his

suffering, as in *McNeil*, quite apart from the quantum of punitive damages. (The Township did not appeal the mental distress damages award.)

[158] It is appropriate, given the unusual sequence of the trials in this case, to consider whether the punitive damages award should have been adjusted in light of the element of punishment in the award of substantial indemnity costs and the costs premium; the amount in question is about $74,000. It could be argued that the trial judge might not have awarded such costs at the First Trial if he had believed he was free to set a higher punitive damages award; in the First Appeal reasons, this court clarified that the trial judge had the ability to increase the punitive damages award.

[159] That said, I see no reason to make an adjustment to reduce the punitive damages award in some way to account for the costs award, for the following reasons. First, I am of the view that the costs award should stand independently as something uniquely within the trial judge's discretion. Costs are not usually an element that the trier of fact would take into account in fixing punitive damages. He committed no error in principle in awarding substantial indemnity costs.

[160] Second, cases in which a punitive damages award is made often carry a substantial indemnity costs award. I note that the plaintiffs in *McNeil* and *Whiten* received substantial indemnity costs at trial, in addition to the punitive damages awards. (In *Hill* the plaintiff also received substantial indemnity costs, but as the result of an offer to settle that was not accepted.)

[161] Third, as a matter of principle, substantial indemnity costs are "generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, [1993] 4 S.C.R. 3, at p. 17. The overlap between damages and costs awards is described by M.M. Orkin in the *The Law of Costs*, looseleaf, 2d ed. (Aurora: Canada Law Books Inc., 2011) at 2-248.2:

> The better view appears to be that the two issues are legally distinct or, putting it another way, the issue of indemnifying a plaintiff for legal costs is sufficiently distinct from punishing a defendant for misconduct that an award of punitive damages should not automatically preclude the awarding of solicitor-and-client costs. As has been said in this context, the awarding of costs is a discretionary matter which by definition is not governed by a rigid set of rules. Consequently, depending on the circumstances, courts have not hesitated to award solicitor-and-client costs in addition to an award of exemplary, or aggravated, or punitive damages.

[162] In *Hughes v. Gemini Food Corp.*, [1997] O.J. No. 414 (C.A.), this court upheld a judgment for aggravated and punitive damages in an action for wrongful dismissal, as well as costs on a substantial indemnity basis. At trial, [1992] O.J. No. 2556 (C.J.), McMurtry A.C.J.O.C. had awarded aggravated damages because the dismissal of the plaintiff by the defendants "was a very public affair as the defendant's Board of Directors knew it would be" that "could only have resulted in a form of public humiliation." The same conduct appears to have grounded the award of costs on a substantial indemnity basis: McMurtry A.C.J.O.C. pointed to the "highhanded and cavalier fashion in which the plaintiff

was treated by the defendants' Board" and the fact that the defendants maintained untenable allegations of conflict-of-interest against the plaintiff until the end of trial. On appeal, this Court also awarded costs on a substantial indemnity basis, determining that "this is one of those unusual cases where it is appropriate to award solicitor and client costs on appeal, as well as trial": [1997] O.J. No. 4453, at para. 1.

[163] This court has upheld a trial award of costs on a substantial indemnity basis in addition to an award of aggravated damages for libel. In *Leenen v. Canadian Broadcasting Corp.* (2001), 54 O.R. (3d) 612 (C.A.), the appellants argued that the trial award of aggravated and punitive damages as well as substantial indemnity costs was double punishment for the same conduct. Austin J.A. stated, at para. 38:

> The impact on the appellants may be the same but the fact is that the conduct in question may quite properly be the origin of both an award of aggravated and/or punitive damages and an award of solicitor and client costs. The intent of the trial judge was that Leenen be fully indemnified with respect to his legal costs. In the circumstances, that intention was properly founded and the accepted way to give effect to it is by an award of solicitor and client costs.

[164] Although Austin J.A. was dealing with a case in which there was a Rule 49 settlement offer, he made it clear that his comment applied quite apart from the application of the rule. His comment, in my view, explains why substantial indemnity awards are often found in conjunction with punitive damages awards.

[165] I have had the benefit of reading the reasons of my colleague, Cronk J.A. in draft. I take a different approach, for the following reasons. My view is that this is an error correction decision. In considering whether a trial judge made an error that warrants correction, an appellate court can really only look to what the trial judge said and what he or she did in the specific factual context, the legal context and the larger context.

[166] As I have already discussed, the trial judge was well-briefed on the applicable principles. He had the reasons of this court in the First Appeal to consider, and he had full argument. He had obviously read *Whiten*, *Hill* and *McNeil*; no purpose would have been served by him extensively quoting from them, since he got the principles right.

[167] Since the trial judge heard full argument, self-instructed properly, and cited the right cases, an error is not plain on the face of the reasons. As noted earlier, I do not view the fact that the trial judge did not recite the actual amounts that he already granted as a reasonable basis for inferring that he erred in his reasoning. I do not think that there is a warrant for imputing to the trial judge the error that he somehow forgot what he had already awarded despite reciting the operative principles.

[168] Where the error is not express, an appellate court must look at the result. Arguably the trial judge erred in setting the award of punitive damages $50,000 above the jury award in *McNeil*. As I said earlier, there is no material difference

between these cases, in my view. *McNeil*, being a jury decision, is a reasonable basis for comparability, according to *Whiten*, at paras. 96 and 107; it sets a reasonable punitive damages number, in a case where wrongful dismissal damages and aggravated damages in a significant sum were also awarded. If the trial judge had seriously departed from *McNeil* I would have found a basis for inferring that he made a reasoning error, but he did not.

[169] Cronk J.A. takes the position that the trial judge did make a reasoning error on the face of the decision. She cites para. 15 of the Punitive Damages reasons, which consists of a single line: “Rather, the question to be asked is whether punitive damages serve a rational purpose.” She argues that in expressing the issue this way the trial judge asked himself the wrong question.

[170] I am unable to agree that the trial judge asked himself the wrong question or that he saw determining whether punitive damages serve a rational purpose as the task that he actually set for himself in the re-trial or that he undertook.

[171] I set out below paras. 13-17 of the Punitive Damages reasons:

> In light of those findings and in light of the aforementioned cases, I have reconsidered the quantum of punitive damages that should be awarded in this case. I do not find that *CivicLife* applies to the facts of this case.
>
> *CivicLife* does not stand for the proposition that a smaller amount of punitive damages should be awarded where the taxpayers' dollar is at stake. Indeed there do not appear to be any leading cases requiring that

punitive damages be reduced against government entities in general.

Rather the question to be asked is whether punitive damages serve a rational purpose.

To quote *CivicLife*:

> That rational purpose is achieved when punitive damages are required to deter the conduct in issue and to denounce it: *Hill* at para. 197; *Whiten*, at para. 103. Two of the factors the court is to consider in deciding whether an award of punitive damages is rational are the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant. However, the wisdom of *CivicLife's* business plan in choosing to put most of its "eggs in one basket" by entering into the portal contracts cannot be laid at the feet of Industry Canada. *CivicLife's* vulnerability was largely self-imposed. Moreover, there is no evidence that Mr. Casselman's misconduct (i.e. his secret was deliberate encouragement of SmartSources to provide its own portal) was part of the general culture at Industry Canada, or that Industry Canada profited from the misconduct as in *Whiten*, *supra*. To punish Industry Canada and, ultimately, the Canadian taxpayer for the actions of a rogue employee over a relatively short time frame would not serve a rational purpose in such a case as this where substantial compensatory damages have already been awarded. Furthermore, I do not think an award of punitive damages is necessary to deter such conduct in the future. Accordingly, I would allow the appeal with respect to punitive damages and set aside the award of punitive damages.

This is not a situation where one is punishing taxpayers for the actions of a rogue employee over a relatively

> short time frame. The evidence disclosed that the conduct of municipal employees and officials was, or in the very least, should have been within the knowledge of the Chief Administrative Officer, council or a council committee, and occurred over a period in excess of ten years.

[172] I make the following observations.

[173] Paragraph 15 sits within the trial judge's extended discussion of the cases starting at para. 6 and ending at para. 20. Before and after his discussion of *CivicLife*, he reviewed the decisions in *Whiten*, *Hill* and *McNeil* and discussed their applicability. The trial judge showed plainly that he understood his task to be to determine what higher amount of punitive damages would be appropriate; this was the message sent by this court in the First Appeal reasons. That is the task that the trial judge undertook.

[174] The specific context for paragraphs 13-17 is the Township's argument that the trial judge should apply *CivicLife*, which he rejects. This court reversed the trial judge in *CivicLife*, and dismissed the claim for punitive damages. The Township relied on *CivicLife* to invite the trial judge to award punitive damages in as low an amount as possible. By citing the case, the Township might be taken to have been inviting the trial judge to eliminate the award of punitive damages on the basis that it was not rational, although in the oral argument at the re-trial counsel did not go that far.

[175] In the lead-in to the discussion in para. 13, the trial judge expressly sets his task as reconsidering the quantum of punitive damages that should be awarded by him.

[176] In para. 15 the trial judge expressed his understanding of the issue in *CivicLife,* not his understanding of his overall task, which he had already done in para. 13. He accepted that in this case "punitive damages" serve a rational purpose, a point that he underlined by drawing a contrast with the words from *CivicLife* that he set out at length in para. 16. He distinguished *CivicLife* even though it was a case in which, quoting the words of this court, "substantial compensatory damages have already been awarded." The trial judge was of the view that, in contrast to the outcome in *CivicLife*, in this case "an award of punitive damages is necessary to deter such conduct in the future."

[177] Given this chain of logical reasoning on the trial judge's part, I am unable to agree that he asked himself the wrong question.

[178] As I construe the Township's re-trial strategy, it was to low-ball as much as possible any award of punitive damages. That is why re-trial counsel argued that the original award of $25,000 was sufficient, despite this court's clear signal in the First Appeal decision that the trial judge could increase the award. At the re-trial, Township counsel went to $75,000 as the largest reasonable punitive damages award. This was against the range of $500,000 from *McNeil* to $1

million from *Whiten* put by Mr. Pate's counsel. The spread between the parties was large.

[179] The Township's argument was that the important message of disapproval sent by the court via the various awards was sufficient. This was belied by its own conduct in the defence of this case, as observed by the trial judge, at para. 18 of the Punitive Damages reasons: "To date, no evidence has been put before me whereby it would appear that the municipality has apologised or in any way accepted responsibility for the conduct of its municipal officer, nor has it in any way accepted responsibility for the result of these actions."

[180] I note that before this court the Township pursued the same strategy, even resiling from the $75,000 put by its counsel at the re-trial, and pulling back to $25,000 as the right punitive damages award. The Township still does not get the point. I see no reason to step back from the higher award of $550,000 set by the trial judge; it is reasonably close to the $500,000 award set by the jury in *McNeil* and approved by this court.

[181] I would therefore dismiss the Township's appeal of the quantum of punitive damages. I would award costs of the appeal to the respondent in the agreed amount of $10,000, all-inclusive.

"P. Lauwers J.A."

Cronk J.A.:

[182] I have had an opportunity to review Lauwers J.A.'s draft reasons in these appeals. I agree with his proposed disposition of the malicious prosecution appeal. In particular, I agree with his conclusion that the trial judge's holding that the appellant municipality is liable to the respondent for malicious prosecution is sustainable on this evidentiary record. I also substantially agree with my colleague's reasoning in support of that conclusion.

[183] I further agree with most of my colleague's description of the legal principles applicable to the assessment of a punitive damages claim. However, I respectfully disagree with his conclusions regarding the trial judge's application of those principles and the quantification of an appropriate quantum of punitive damages in this case. Unlike my colleague, I conclude that the trial judge erred in his analysis of punitive damages by fixing those damages in the amount of $550,000.

[184] Accordingly, these reasons address two issues: the trial judge's assessment of punitive damages and the amount of an appropriate punitive damages award.

I. Background

[185] In his reasons, Lauwers J.A. reviews the background facts and the history of the litigation between the parties in considerable detail. It is unnecessary to

repeat those matters here. It is helpful, however, to set my reasons in context by reference to the following.

[186] As my colleague indicates, after his acquittal on the criminal charges, Mr. Pate sued the Township for damages for wrongful dismissal, malicious prosecution, and reputational injuries. He also sought special damages for his criminal trial defence costs, aggravated damages, and punitive damages.

[187] By the time the action first proceeded to trial (the "First Trial"), the Township had conceded that Mr. Pate's employment was wrongfully terminated, without notice. The Township agreed that he was entitled to compensation for wrongful dismissal in an amount equal to 12 months' wages. It appears that the agreed settlement amount was at least $34,100.[1]

[188] In addition, by judgment dated December 16, 2009, the trial judge awarded Mr. Pate: (1) "*Wallace* damages" in an amount equal to four months' income ($23,413) on account of the manner of Mr. Pate's dismissal: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; (2) special damages for Mr. Pate's criminal trial defence costs ($7,500); (3) "general and aggravated" damages ($75,000); (4) punitive damages ($25,000); and (5) prejudgment interest.

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[1] It is unclear from the trial judge's description of the settlement amount for wrongful dismissal damages ("twelve months wages, inclusive of interest and costs"), whether the settlement amount was equal to 12 months' wages *including* interest and costs, or whether the settlement amount was equal to 12 months' wages *plus* interest and costs. In either case, the settlement amount was at least equal to 12 months' wages ($34,100). In these reasons, I have treated the agreed settlement amount as at least $34,100.

[189] The trial judge also awarded Mr. Pate his costs of the action, on a substantial indemnity basis, in the aggregate amount of $61,791, inclusive of disbursements and GST. He further awarded Mr. Pate a costs premium of 20%, in the sum of $12,358, yielding an overall costs award in the sum of $74,149.

[190] Mr. Pate's total compensation after the First Trial, including costs and the costs premium but excluding special damages and prejudgment interest, was $206,662: *Pate v. Galway-Cavendish (Township)*, [2009] O.J. No. 5382.

[191] On Mr. Pate's appeal of the $25,000 punitive damages award, this court allowed the appeal, set aside the trial judge's punitive damages award, and ordered a new trial on the quantum of punitive damages: *Pate v. Galway-Cavendish (Township)*, 2011 ONCA 329 (the "First Appeal"). The Township did not appeal from this part of the First Appeal decision.

[192] As my colleague notes, this court also allowed Mr. Pate's appeal from the trial judge's initial malicious prosecution ruling and ordered a new trial on that issue as well. The parties agreed that the two retrials should proceed separately, before the same trial judge who presided at the first trial and based on the existing trial record. The retrial regarding punitive damages proceeded first, while the Township's application for leave to appeal to the Supreme Court, solely on the malicious prosecution issue, was pending. That leave application was eventually dismissed: *Galway-Cavendish and Harvey (Township) v. Pate*, [2011] S.C.C.A. No. 293.

[193] On the retrial regarding the quantum of punitive damages, the trial judge awarded Mr. Pate punitive damages in the amount of $550,000, thereby increasing the quantum awarded at the First Trial by $525,000. He did not vary any of the other damages awards made at the First Trial, or his earlier costs and costs premium awards in favour of Mr. Pate: *Pate v. Galway-Cavendish and Harvey (Township)*, 2011 ONSC 6620, [2011] O.J. No. 5318.

[194] About one year later, at the subsequent and separate retrial of the malicious prosecution claim, the trial judge found the Township liable to Mr. Pate for malicious prosecution. He awarded Mr. Pate damages for malicious prosecution in the sum of $1.00, as agreed by the parties, plus costs in the total amount of $20,000: *Pate (Estate) v. Galway-Cavendish (Township)*, 2012 ONSC 6740, [2012] O.J. No. 5691.

II. The Trial Judge's Errors

[195] The Township accepts that an award of punitive damages was appropriate in this case. However, it argues that the trial judge's $550,000 punitive damages award was neither warranted by the Township's misconduct nor rationally necessary to satisfy the well-established objectives of punitive damages: retribution, deterrence and denunciation. The Township submits that the trial judge erred in his application of the governing principles by failing to consider whether a $550,000 punitive damages award was rationally required to punish

the Township when regard is had to the compensatory damages and costs otherwise awarded to Mr. Pate.

[196] In Lauwers J.A.'s view, the trial judge properly instructed himself on the principles applicable to an assessment of punitive damages and made no error in his application of those principles to the facts as he found them. My colleague would uphold the trial judge's punitive damages award on the basis that it is consistent with the principles identified and the punitive damages awarded in the governing authorities.

[197] With respect, I disagree. In my view, the trial judge erred by failing to consider whether, in light of the total compensation and costs otherwise awarded to Mr. Pate, a lower quantum of punitive damages would satisfy the requisite objectives of retribution, deterrence and denunciation. By failing to undertake this essential inquiry, the trial judge erred in principle. I say this for the following reasons.

[198] As Lauwers J.A. notes, the trial judge's reasons on the punitive damages retrial indicate that he appreciated the purpose and objectives of punitive damages, as explained by the Supreme Court in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 and *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 and by this court in *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, [2008] O.J. No. 1990. After referring to these cases and the

positions of the parties on the appropriate quantum of punitive damages, the trial judge stated, at para. 8 of his reasons:

> In *Whiten v. Pilot Insurance Co.*, the Supreme Court of Canada set out that any award of punitive damages, when added to compensatory damages, must produce a total sum which is rationally required to punish the defendant. The amount of the award must be proportionate to the blameworthiness of the defendant's conduct such that the more reprehensible the conduct, the higher the rational limits to the potential award.

[199] This was a correct, albeit succinct, recitation of the core principles that govern the assessment of the quantum of a punitive damages award. Justice Lauwers, in his reasons, examines these principles and the leading authorities in greater detail. I generally agree with his description of the applicable principles.

[200] I would stress, however, the following principles that guide the quantification of punitive damages, as outlined in *Whiten*, at para. 94: (1) punitive damages must be assessed "in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant … having regard to any other fines or penalties suffered by the defendant for the misconduct in question"; and (2) where compensatory damages are insufficient to accomplish the objectives of retribution, deterrence of the defendant and others from similar misconduct in the future, and the community's collective condemnation (denunciation) of what has occurred, punitive damages will be given "in an amount that is no greater than necessary to rationally accomplish"

these objectives. As the *Whiten* court indicated, at para. 95, underlying these principles is "the need to emphasize the nature, scope and exceptional nature" of the punitive damages remedy, and "fairness to both sides".

[201] In this context, it must be borne in mind that the standard of appellate review applicable to a trial judge's award of punitive damages is whether "a reasonable jury, properly instructed, could have concluded that an award in that amount, *and no less*, was rationally required to punish the defendant's misconduct" (emphasis added): *Whiten*, at paras. 96 and 107.

[202] This standard emphasizes an appellate court's supervisory obligation to ensure that an award of punitive damages is "the product of reason and rationality": *Whiten*, at para. 108. Consequently, the Supreme Court held in *Whiten*, at para. 109:

> If the award of punitive damages, *when added to the compensatory damages*, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it will be reduced or set aside on appeal. [Emphasis added.]

[203] As I have already mentioned, the trial judge refers near the outset of his reasons to some of the key principles underlying the assessment of a punitive damages claim. However, after referring to the requirement that an award of punitive damages, "*when added to compensatory damages*, must produce a total sum which is rationally required to punish the defendant" (emphasis added), the

trial judge never again mentions or considers in his reasons the other damages and costs to which Mr. Pate was already entitled as a result of the First Trial.

[204] Unlike Lauwers J.A., I do not regard the fact of this omission as a matter of inference-drawing, or of imputing error to the trial judge. When fixing the quantum of punitive damages, the trial judge simply does not allude to the damages and costs earlier awarded to Mr. Pate, or to the wrongful dismissal damages agreed upon by the parties. At no point, does the trial judge factor this overall compensation into his quantification of punitive damages. That he did so cannot simply be assumed.

[205] Consequently, in my view, it cannot be said that the trial judge's analysis of punitive damages took account of the punitive aspects of these substantial awards. To the contrary, in my view, it did not.

[206] Consider, first, that the parties agreed that Mr. Pate was entitled to compensatory damages for dismissal without notice, in the approximate sum of at least $34,100. Second, by the time of the punitive damages retrial, the trial judge had already awarded Mr. Pate the additional amounts of four months' income ($23,413) as a "*Wallace* bump up"[2] on account of the manner of Mr.

[2] Like Simmons J.A. in the reasons of this court on the First Appeal, I do not wish to be understood as endorsing the proposition that, despite *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, a damages award in the form of a "*Wallace* bump up" was available or appropriate in this case.

Pate's dismissal, $7,500 for his criminal defence costs, and $75,000 for what the trial judge termed "general and aggravated damages".[3]

[207] Thus, when the trial judge was called upon by this court to reconsider his original punitive damages assessment by applying the proper analytical framework to that assessment, Mr. Pate was already entitled to other damages, by agreement of the parties or judgment of the court, in the aggregate amount of $132,513, apart from his proven special damages.

[208] But the trial judge does not advert to these damages or their significance when attempting to quantify a rational and proportionate punitive damages award. Instead, in his fresh analysis of punitive damages on the retrial, the trial judge remarked, at para. 15, "[t]he question to be asked is whether punitive damages serve a rational purpose." With respect, this question was not the pertinent inquiry. Mr. Pate's entitlement to punitive damages was conceded by the Township at the retrial. The only issue was the appropriate quantum of those damages.

[209] Justice Lauwers, at paras. 170-77 of his reasons, disagrees with this interpretation of the trial judge's reasons. He concludes that the trial judge's quoted comment was directed at what the trial judge regarded as the issue

[3] In his reasons, Lauwers J.A. concludes, at para. 120, that this award was intended by the trial judge as an award for aggravated or mental distress damages. For the purpose of this appeal, I accept this characterization of this award.

before the court in *CivicLife.com Inc. v. Canada (Attorney General)*, [2006] O.J. No. 2474, 215 O.A.C. 43.

[210] I am unable to agree. It is true that the trial judge expresses the question quoted above in the course of his discussion of *CivicLife*. However, when that discussion is read as a whole, I conclude that the trial judge, at para. 15, was articulating the core inquiry that, in his opinion, he was obliged to undertake in respect of Mr. Pate's punitive damages claim. He did so in a manner that contrasted that inquiry with what he understood to have been at issue in *CivicLife*. As I see it, the trial judge's focus was on whether punitive damages would serve a rational purpose *in this case*.

[211] The necessary inquiry, however, was not whether punitive damages would serve a rational purpose in this case but, rather, what amount of punitive damages, taken together with the other compensation to which Mr. Pate was already entitled, was rationally required to meet the objectives of retribution, deterrence and denunciation. The trial judge did not address this question. Instead, by focusing on the wrong issue, he misdirected himself on the fundamental inquiry he was obliged to undertake.

[212] It is important to emphasize that compensatory damages have a punitive element. The Supreme Court said so in *Whiten*. Justice Binnie put it this way, at para. 123:

> Compensatory damages also punish. In many cases they will be all the "punishment" required. To the extent a defendant has suffered other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question, the need for additional punishment in the case before the court is lessened and may be eliminated…. *The key point is that punitive damages are awarded, "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation*. [Emphasis added.]

See also *Hill*, at paras.182-83; *Honda*, at para. 69.

[213] And, in *Hill*, a majority of the Supreme Court stressed, at para. 196: "It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence."

[214] It is therefore incumbent on trial judges, when considering whether to award punitive damages and quantifying those damages where such an award is justified, to have regard to the punitive components of the compensation otherwise awarded to the plaintiff and the penalties otherwise imposed on the defendant. This did not occur in this case.

[215] Unfortunately, the matter does not end there. As I have said, the trial judge awarded Mr. Pate his costs of the First Trial, on the substantial indemnity scale, in the amount of $61,791, plus a costs bonus of 20%, in the sum of $12,358, for a total costs award of $74,149. The trial judge's reasons for his costs award confirm that the scale of awarded costs and the costs premium were

premised in part on the Township's misconduct. Hence, both components of the trial judge's overall costs award had a punitive element.

[216] Justice Lauwers concludes, at para. 159, that there is "no reason to make an adjustment to reduce the punitive damages award in some way to account for the costs award". With respect, I again disagree.

[217] I recognize that an award of substantial indemnity costs may be appropriate in a case where punitive damages are also awarded. The trial judge made no error in deciding, in the exercise of his wide discretion concerning costs, to award substantial indemnity costs in this case. And, of course, substantial indemnity costs are directed in part at the misconduct of a defendant. But that is not the critical point. In this case, the costs of the First Trial and the costs premium were awarded to Mr. Pate before the retrial on punitive damages and were undisturbed by the decision of this court on the First Appeal. Both the costs award and the costs premium had punitive elements.

[218] In these circumstances, it is my view that the trial judge was obliged to take the punitive components of his prior costs award and costs premium into account when quantifying a fit punitive damages award. To do otherwise would be to ignore the full scope of the penalties imposed on the Township for its misconduct. The trial judge failed to do so.

III. A Rational and Proportionate Punitive Damages Award

[219] In light of the trial judge's errors in his analysis of punitive damages, the deference otherwise owed to his assessment of those damages is displaced. It therefore falls to this court to fashion an appropriate punitive damages award based on the trial judge's factual findings and having regard to the punitive aspects of the total compensatory damages and costs otherwise awarded to Mr. Pate.

[220] The trial judge found that the Township had engaged in serious misconduct in relation to Mr. Pate, conduct which the trial judge variously described as "high-handed", "oppressive", "reprehensible", "offensive" and "morally repugnant". On the trial judge's findings, the conduct at issue was of a sustained nature, occurring over a period of approximately 10 years. It also had a profound and life-changing impact on Mr. Pate, to devastating and permanent effect. In addition, the Township, a public body, never apologized to Mr. Pate for its misconduct. I accept these key, unchallenged findings. They were open to the trial judge on the evidentiary record.

[221] In light of the trial judge's findings regarding the nature, duration and impact of the Township's conduct, I agree with Lauwers J.A. that the trial judge did not err by setting a punitive damages award in this case at the higher end of those awards previously affirmed by this court and the Supreme Court. The

Township's conduct was sufficiently egregious or outrageous to warrant significant punitive damages under the *Whiten* criteria.

[222] However, it does not automatically follow that a $550,000 award, viewed in all the circumstances, is rationally required to punish the Township's misconduct and achieve the accepted purposes of the punitive damages remedy. In my opinion, based on the trial judge's factual findings and, especially, Mr. Pate's other compensation in this case, a punitive damages award in this amount cannot be justified.

[223] I begin with *McNeil*. Justice Lauwers reviews the facts of *McNeil* in his reasons. I need not repeat those facts here. The important point is that, in *McNeil*, punitive damages in the amount of $500,000 were awarded by the jury at trial and sustained on appeal to this court.

[224] The trial judge in this case held, at paras. 11 and 20, that the facts here are "strikingly similar" to those in *McNeil* and, further, that the Township's conduct, "perhaps in some aspects" was worse than the actions of the defendants in *Hill*, *Whiten* and *McNeil*. Relying especially on *McNeil*, the trial judge fixed Mr. Pate's punitive damages award in the amount of $550,000, some $50,000 more than the award in *McNeil*.

[225] Justice Lauwers suggests, at paras. 153 and 168 of his reasons, "[O]n the facts there is not much relevant difference between *McNeil* and this case". He goes on to conclude, at para. 156, that *McNeil* and this case "are roughly

comparable" and that this court should not interfere with a punitive damages award "where the difference on a sizeable base of $500,000 is only $50,000."

[226] I see the matter differently.

[227] Although the Township's conduct in this case was egregious, prolonged, and of great adverse impact, I do not regard it as "worse" than that of the defendant in *McNeil*. It is certainly not comparable, in my view, to the defendants' misconduct at issue in *Hill* and *Whiten*. Further, the amount of $50,000 (the amount by which the trial judge's award exceeded the punitive damages award in *McNeil*) is not insignificant, particularly when viewed from the perspective of the litigants. Nor is it warranted based on *McNeil*. Given these considerations, it follows that I see no justification or necessity in this case for a punitive damages award in excess of the amount of punitive damages awarded in *McNeil*.

[228] I make the following additional comments. First, where, as here, the injured plaintiff is already entitled to significant compensatory damages and substantial costs (including, in this case, a significant costs premium) that have elements directed at punishing the defendant, the proper approach is to take this other compensation into account in fashioning a fit punitive damages award. This requires the trial judge to step back and examine the punitive elements of the other compensation already awarded to the plaintiff to determine, in effect, whether there is a shortfall between the amount of that compensation and the

total amount required to accomplish the objectives of retribution and deterrence and denunciation of the defendant's misconduct. The amount of the shortfall, if any, sets the quantum of the punitive damages to be awarded.

[229] It is in this fashion, in my view, that a trial judge may properly determine, in light of the other compensation awarded to the plaintiff and the penalties otherwise imposed on the defendant, the extent of the "additional punishment [of the defendant] required in the case before the court": *Whiten*, at para. 123. I see no indication that the trial judge evaluated punitive damages in this manner in this case.

[230] Second, the general damages agreed upon by the parties, as pay in lieu of notice, clearly recognized the wrongful nature of the Township's termination of Mr. Pate's employment. While the purpose of those damages was to put Mr. Pate back into the position he would have been in, but for the Township's breach of his employment contract, these compensatory damages also had a punitive element.

[231] Third, I accept the Township's submission that the trial judge's award of "*Wallace* damages" carried an element of deterrence. In *Honda*, the Supreme Court overturned both lower courts on the issue of punitive damages in part because the plaintiff's awards of compensatory damages, on the basis awarded, carried an element of deterrence. The Supreme Court stated, at para. 69, "The lower courts erred by not questioning whether the allocation of punitive damages

was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded." This comment, while directed at whether an award of punitive damages was justified in that case, is also apposite to an examination of the quantum of punitive damages where it is determined that such damages are warranted.

[232] In this case, the trial judge's award of *Wallace* damages was based not only on the Township's conduct in the dismissal of Mr. Pate but, as well, on its conduct of the litigation that followed. This conduct, in the trial judge's view, contributed to a finding of bad faith or unfair dealing by the Township. On the trial judge's reasoning, which incorporated conduct unrelated to the manner of Mr. Pate's termination, the *Wallace* award had both denunciatory and deterrent elements.

[233] Fourth, the same may also be said of the trial judge's award of aggravated damages in the amount of $75,000. In his reasons in support of that award, the trial judge correctly observed, at para. 64, that aggravated damages "are designed to compensate a plaintiff specifically for the additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant". At least initially, therefore, the trial judge recognized that aggravated damages are compensatory in nature and properly focussed his aggravated damages analysis on the harm occasioned to Mr. Pate by the Township's misconduct.

[234] In the balance of his aggravated damages analysis, however, the trial judge reverted to consideration of the Township's conduct of the litigation. He also took specific account of the Township's withholding, through the actions of Mr. Beaven, of exculpatory information from the police – the very conduct that he subsequently relied on to ground his finding of malicious prosecution. In fashioning his aggravated damages award, he thus took account of both the harm occasioned to Mr. Pate and the reprehensible nature of the Township's conduct. In the latter respect, the trial judge's focus contemplated punishment of the Township for actions that the trial judge termed "highhanded", "oppressive", "unfair" and "insensitive".

[235] And, as I have earlier indicated, the trial judge explicitly justified his awards of substantial indemnity costs and a significant costs premium in part on the basis of the need to address the Township's wrongful conduct in its dismissal of Mr. Pate and its conduct of the litigation. To this extent, therefore, these awards also contemplated denunciation of the Township's past conduct and deterrence.

[236] As is apparent, there was considerable duplication or overlap among the considerations factored by the trial judge into his calculus of compensatory damages, costs and punitive damages. Consequently, in my view, the quantum of punitive damages to be awarded should have been materially discounted to avoid the risk of an inordinately high award and "double-compensation" to Mr.

Pate, having regard to the punitive elements of the penalties already imposed on the Township: see *Honda*, at para. 60.

[237] Finally, I note that the trial judge's finding that the Township was liable to Mr. Pate for malicious prosecution played no part in his quantification of punitive damages. That finding was made at a separate retrial, following the punitive damages retrial. No doubt for this reason, the parties agreed that damages awarded for malicious prosecution should be fixed at $1.00. While this concession sought to reduce the risk of over-compensation of Mr. Pate, it cannot save an otherwise irrational and excessive punitive damages award.

[238] The task of a trial judge in quantifying a punitive damages award is not an easy one. It is far from an exact science. It must be guided, however, by the Supreme Court's repeated cautions to avoid "double-compensation" and that court's clear warning that, in most cases, a moderate award will generally suffice to adequately punish a defendant for its misconduct. This is especially so where, as here, the total penalties otherwise imposed on a defendant have a clear punitive component: *Whiten,* at para. 94; *Honda,* at paras. 60 and 69.

[239] When the full circumstances of this case are considered, including the total compensation to which Mr. Pate is already entitled under the trial judge's other damages awards, his costs award and the costs premium, and by the parties' agreement concerning wrongful dismissal damages, I conclude that a punitive damages award in the amount of $450,000 is sufficient to meet the need for

additional punishment of the Township. An award in this amount amply denounces the Township's conduct and achieves the additional objectives of retribution and deterrence.

IV. Disposition

[240] For the reasons given, I would dismiss the appeal from the trial judge's malicious prosecution judgment. I would allow the appeal from his punitive damages judgment, set aside his award of punitive damages, and substitute in its stead an award of $450,000. I would award Mr. Pate his costs of these appeals, as agreed by the parties, in the amount of $10,000, inclusive of disbursements and all applicable taxes.

Released:

"DD" "E.A. Cronk J.A."
"NOV -5 2013" "I agree Doherty J.A."