

[3] In the Amended Amended Statement of Claim, Michelle claims damages against Olympia as a result of her termination as follows: (i) damages of \$7,475.50, less applicable statutory deductions, for wrongful dismissal, (ii) damages of \$30,000 for mental distress and/or aggravated damages, (iii) punitive damages of \$50,000, and (iv) special damages in an amount to be particularized at or prior to trial.

[4] The plaintiff, Aleisha Silvera (“Aleisha”), is Michelle’s daughter and brings a claim for damages of \$25,000 under the *Family Law Act*, R.S.O. 1990, c. F. 3, as amended (the “FLA”) for the loss of guidance, care, and companionship.

[5] The Defendants did not appear at trial. I granted the motion brought by Michelle and Aleisha (collectively, the “Plaintiffs”) to strike the defence under Rule 15.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Consequently, all of the factual allegations pleaded in the Amended Amended Statement of Claim are taken as admitted.

[6] I also heard the evidence of Michelle and Aleisha. I found them both to be credible, forthright witnesses who responded fully and fairly to the questions put to them by counsel, and I accept their evidence. Consequently, I find that (i) Morris’ Conduct occurred as set out in more detail below; and (ii) there was no basis for Michelle’s dismissal.

[7] The Plaintiffs also led opinion evidence from Dr. Rodney Day, a clinical psychologist who examined Michelle. Dr. Day provided independent expert evidence as to the damage suffered by Michelle as a result of Morris’ Conduct and the termination. I accepted Dr. Day’s opinion as (i) it was based on a thorough examination of Michelle; and (ii) Dr. Day gave fair and balanced evidence at trial.

[8] Consequently, I find in favour of the Plaintiffs and I order damages as set out below.

Facts

a) Michelle’s background

[9] Michelle is currently 47-years-old. As a young child, she was raised in Jamaica by her great-aunt. Michelle’s mother occasionally returned to Jamaica to visit. Michelle never met her stepfather until she came to Canada to live with her mother and stepfather when she was 5-years-old.

[10] Michelle was sexually abused by her stepfather repeatedly between the ages of 5 and 16. The sexual abuse was frequent and included direct genital contact.

[11] Michelle was also the victim of emotional and physical abuse by both her mother and stepfather.

[12] Michelle tried as much as possible to avoid being at home, joining numerous sport and other school programs and spending time in the library reading books, but as a result of the continuing abuse, she left home at the age of 16.

[13] Aleisha is currently 21-years-old. She was born when Michelle was 25.

[14] At the age of 29, Michelle disclosed the sexual abuse to her mother who was still with her stepfather. Michelle's mother initially believed her and said that she recalled an incident when she saw Michelle's stepfather in bed with Michelle.

[15] However, Michelle's mother later accused Michelle of lying and attempting to "steal" Michelle's stepfather from her. This led to Michelle's hospitalization for depression and suicidal thoughts on March 4, 1997.

[16] Upon her discharge from the hospital on March 14, 1997, Michelle was diagnosed with "major depression" and "substance abuse and marijuana smoking".

[17] In her 30s, after suffering a minor stroke, Michelle recovered and gained a will to live and make a better life. During that time, she grew as an individual, enjoyed working with people, and increased in confidence. She was able to pay her bills and rent and began to put her past behind. Michelle was able to provide for herself and Aleisha and they had a "happy" life, with Aleisha considering her mother to be her "best friend" in whom she confided everything.

[18] During that time, Michelle had a stable work life. She was employed as a manager of a clothing store and then had steady employment as a manager of another store until that company shut down in the summer of 2008.

b) Michelle's employment at Olympia until Morris' Conduct

[19] In August, 2008, two weeks after the store closed, Michelle began employment at Olympia as a receptionist/assistant administrator. The position was initially temporary but Michelle was given a permanent position since Morris stated that he liked her work.

[20] Michelle earned approximately \$28,000 per year as a salaried employee at Olympia. She had an extensive list of responsibilities requiring telephone skills, computer background, organizational skills, and calculating employee time cards. While Morris promised her a raise after three months (as Michelle was earning less than she had in her prior job), she never received the raise.

[21] There were 8 to 10 people who worked at Olympia, which manufactured and sold gold and diamond jewellery at its premises in Toronto.

[22] Michelle's hours of employment were stated in her job description to be 8:30 am – 5 pm. The other employees at Olympia left at 4:30 pm except for Friday when they would leave at approximately 1 pm.

[23] In the front of the premises, there was office space for Michelle (who would greet people who entered the premises), with a door leading from Michelle's premises into an area which had offices for Morris and his brother, Raphael Bazik ("Raphael"), who was the sole owner of Olympia.

[24] Raphael's role was to select stones for the jewellery. He was not involved in the day-to-day operations of the business. He would attend at the business in the morning to open the premises, but was not often in the office.

[25] At examination-for-discovery, Raphael did not even know that Michelle had been terminated. He thought she had quit and continued to believe that to be the case even when presented with the termination letter signed by Morris.

[26] Morris was in charge of operations. He had the power to hire and fire employees and made all of the daily managerial decisions. Morris was Michelle's direct supervisor.

[27] At all times at Olympia, Michelle was praised for her work. Morris always spoke highly of Michelle in front of others saying that she went "above and beyond" in her approach to work.

[28] Michelle enjoyed her work at the outset. She was learning new skills, becoming adjusted to her responsibilities, and enjoying her time with her co-workers. She felt that she was continuing to grow as a person and putting her past behind her.

c) Morris' Conduct

[29] Within the first year of her employment at Olympia, Michelle noticed that Morris would make inappropriate racial comments and use derogatory language based on race when describing people, with examples such as taxi drivers, people he encountered on a Grand Cayman holiday, or the U.S. President. Morris told Michelle that the only "black woman" he found attractive was Tina Turner.

[30] Michelle was not aware of any policies on sexual harassment or inappropriate conduct at Olympia. There was no individual at Olympia who could address Morris' Conduct as Morris was the only person with authority.

[31] Starting about a year into her employment, Morris began to ask Michelle to stay late on a regular basis. Morris would wait until the end of the day to bring work to Michelle, so that Michelle was required to stay later in the evening alone with Morris at Olympia. The work required was often not urgent, and her other co-workers began to advise Michelle that Morris had much of the work ready to be done in advance but had waited until late in the day to give it to her to force Michelle to work unpaid extra time (while all of her co-workers left at their proper times).

[32] This conduct caused significant hardship to Michelle's family life, as Michelle was a single mother with her daughter in high school and Michelle had a 2.5 hour commute to return home.

[33] During their evenings together, Morris would initiate conversations about Michelle's personal life, asking about Aleisha and inquiring if Michelle had any boyfriends.

[34] It was during the course of these conversations that Michelle disclosed to Morris that she had no contact with her mother because of her abuse as a child.

[35] In the fall of 2009, Morris approached Michelle with a newly-designed pendant and asked her to try it on. Morris asked Michelle to undo a button on her shirt under the guise of not being able to see the pendant clearly. Michelle undid a single button. Morris grabbed her breasts. Michelle jumped back and told Morris “no” when he told her that he wanted to feel her breasts. After this sexual assault, both Morris and Michelle returned to their office space. Morris apologized profusely when Michelle left and promised never to engage in such conduct again.

[36] Michelle returned home from work that day and her childhood memories of sexual abuse returned. She began to drink alcohol to dull the memories. However, she continued to work because she felt “trapped” as a single mother who needed the job to support her daughter.

[37] After the first assault, Morris acted inappropriately towards Michelle by lavishing her with attention. He brought her food on a regular basis and insisted on taking her for lunch when Michelle had no interest. He insisted on driving her home on several occasions, stopping at the market to buy her gifts.

[38] Morris also insisted that Michelle wear a diamond pendant and studs from his personal safe, and that Michelle take the items back home with her.

[39] In late December 2009 or January 2010, Morris asked Michelle to come into work while everyone else was off for holidays. Under the guise of Morris showing Michelle a tennis bracelet, Morris grabbed Michelle as she stood near a work station desk. Morris grabbed Michelle’s buttocks and Michelle again told him “no”. Morris’ response was that he thought Michelle would like it. On this occasion, Morris did not apologize for his behaviour.

[40] Michelle returned home after the second assault and felt “violated” and “dirty”. She took a prolonged hot shower just to try and remove the feeling of Morris’ hands on her body.

[41] Upon her return to the office, Michelle tried to avoid any further incidents, even wearing her coat at all times in the office under the guise that she was cold. Raphael bought her a heater for her office area since he was concerned that Michelle was always cold at the office.

[42] Morris’ inappropriate conduct continued after the second assault. He left printed e-mails on Michelle’s desk which were both demeaning to women and racist.

[43] Morris called Michelle into his office and showed her computer images of naked women. Morris continued to make racist jokes.

[44] Morris requested that Michelle model jewellery for him since it afforded him an opportunity to touch her.

[45] On February 19, 2010, shortly after the second assault, Morris again sexually assaulted Michelle at the office. On this occasion, Morris came around Michelle’s desk which was in a

corner of her office, preventing her from leaving her desk. He placed himself into a tight space between her chair and the wall and began to give her an uninvited massage. Michelle was wearing a chain that Morris had insisted she wear. The massage was very firm, and Morris was cutting into her neck with the chain. Morris then attempted to put his hands down the front of Michelle's shirt. Michelle said "no" throughout all of this time.

[46] Morris only stopped the assault when Michelle told him that other co-workers could come out from the back at any time and see that Morris was engaged in the assault.

[47] At all times during Morris' Conduct, Michelle was financially dependent on the job to support her family as a single mother. Morris was in a position of authority at all times.

[48] Michelle continued to feel trapped. All she wanted was a "normal workplace" and asked herself "why me?"

d) The dismissal

[49] On Tuesday, February 23, 2010, Michelle had emergency dental surgery for a tooth extraction by her dental surgeon, Dr. Eller. She had no insurance for dental care and had to pay for the cost herself.

[50] As Michelle was walking into her home after the dental surgery, Morris called to ask when she was coming back to work. Michelle was in great pain and could not talk due to the freezing. Michelle gave the telephone to Aleisha who said that Michelle would be away for a week and that Aleisha would take care of her.

[51] A few days later, the pain from the extraction was getting worse, despite Michelle using the painkiller prescribed by Dr. Eller. Michelle returned to Dr. Eller who prescribed another pain killer which also did not work. Dr. Eller then prescribed a third pain killer.

[52] Michelle was diagnosed with "dry socket", which resulted in excruciating pain for prolonged periods of time.

[53] On Monday, March 1, 2010, Michelle spoke with Morris and updated him on the pain. Morris was sympathetic and asked Michelle to provide an update after Michelle's planned visit to Dr. Eller on March 2.

[54] Michelle tried to reach Morris on March 3, but he was not available. They spoke on Friday, March 5, when Morris insisted that Michelle provide Dr. Eller's name, phone number, and address since he wanted to call him to confirm that Michelle was missing work as a result of dental surgery. Michelle provided all of the information requested.

[55] On Monday, March 8, Michelle returned to work. She arrived between 8 and 8:30 am. Raphael let her into the premises along with her co-workers, but then told Michelle to wait downstairs until Morris arrived and someone would advise her to come up. There was no waiting area downstairs and Michelle was not asked to wait in the Olympia waiting area.

[56] Michelle went downstairs to wait and heard nothing until noon, when Michelle called the office and was told by Morris' wife that Michelle could come upstairs. At that point, Michelle gave Morris two notes from Dr. Eller which stated that she had oral surgery. Morris told Michelle that (i) he still did not believe her; and (ii) he believed that she had gone away for the weekend.

[57] Morris accused Michelle of being "on drugs", which was not true.

[58] Morris advised Michelle that he wanted a detailed letter from Dr. Eller and that he wanted to speak with him. Morris stated that until he obtained that information, Michelle should go home.

[59] Michelle went to see Dr. Eller that same day (March 8), using her last two transit tokens to go there and back. Dr. Eller told Michelle that someone had tried to get information from his office about Michelle the week prior, but that Dr. Eller would not disclose patient information due to confidentiality.

[60] Michelle asked Dr. Eller to send the detailed letter and he prepared it while Michelle was waiting. Dr. Eller indicated that he never had such a request after sending signed notes, but he assisted Michelle. Dr. Eller's assistant faxed the letter to Morris while Michelle was still at the office.

[61] In his letter, Dr. Eller told Morris that Michelle would have a "speedy recovery" and "will be feeling much better in the next few days".

[62] The next day, on March 9, Morris' wife called Michelle and asked her to immediately come to the office. Michelle had no money for a transit token and told that to Morris' wife. Michelle also told Morris' wife that Michelle could not get money or a token from anyone near her as they were at work. Morris' wife told Michelle that she would get back to Michelle but never called back.

[63] On Friday, March 12, Michelle called Morris to inquire if her job was still available. Morris told Michelle that she had been fired on March 10 and that he had sent her a letter. Michelle checked her mail box after the conversation and found the termination letter.

e) The termination letter

[64] In the termination letter from Olympia signed by Morris, Olympia purported to terminate Michelle for (i) "your prolonged absence from work", (ii) "our numerous subsequent unsuccessful efforts to establish contact with you", and (iii) Michelle's "completely indifferent predisposition to our request" [that] "you come to the office in order to iron out the specific details of your pending return to work".

[65] Morris added that Olympia was "quite shocked by your ... clearly contemptuous [*sic*] behaviour and attitude".

[66] Finally, Morris added that Olympia had been “willing and ready to address and hopefully alleviate your constant concerns pertaining to your personal financial problems”.

[67] None of the above statements had any factual basis. Michelle’s absence had not been “prolonged” and she had responded promptly to all efforts to contact her. Rather than being “indifferent” to returning to work, Michelle felt that she needed to return to work as it was the only source of her income, and she had to pay for all of the medication out of her own money. There is no evidence that she was contemptuous in any manner. Michelle was prepared to return to work despite Morris’ Conduct as she felt that she had no option.

f) Olympia’s conduct after termination

[68] Michelle was unable to obtain her employment insurance (“EI”) benefits immediately, as EI conducted an investigation into her dismissal. EI advised Michelle that Olympia had raised investigative issues and EI was required to contact her employer to address those issues. It was only after Michelle contacted EI after eight weeks to explain the history of her dismissal that EI called back and said that her EI claim had been approved.

[69] During that time, Michelle could not pay the rent, had difficulty to find funds to buy food for her and Aleisha, and was forced to stay home.

g) Effects on Michelle of Morris’ Conduct and the termination

[70] Michelle was financially dependent on Morris as a result of her job.

[71] As a result of Morris’ Conduct, Michelle suffered significant pain and suffering. She stayed at home and did not want to have contact with anyone. She felt “broken” but did not want to talk about the events.

[72] Michelle gained weight, because she “stopped caring” about how she looked and did not want anyone to look at her physically given her past experiences.

[73] Michelle’s childhood memories of abuse returned. For a year, she drank alcohol “to become numb”. She felt guilt, shame, and self-blame, and could not interact with older men. Michelle had prolonged bouts of crying.

[74] Michelle regularly stayed up late into the night, which happened during the time of Morris’ Conduct and became worse after termination. Michelle had always gone to bed between 9 pm and 10 pm, but was always up after midnight when Aleisha went to bed.

[75] Michelle was unable to look for work due to her psychological condition arising from her termination and Morris’ Conduct.

[76] At trial, which was more than five years after Morris’ Conduct, Michelle still could not work with older men either in close proximity or in a supervisory role. Her memories of her past sexual abuse still come back every day.

[77] She still would “rather stay by herself” and her interaction with people has been affected since she thinks that they will be able to see the difficulties in her life.

[78] Recently, Michelle has tried to regain her life. In 2012, she started to look for work and currently has “permanent part-time work” as a customer service representative where she works from home and she also works part-time in the office of an “all-female” window cleaning company.

h) Effects of Morris’ Conduct and termination on Michelle’s relationship with Aleisha

[79] Michelle still has a good relationship with her daughter, but it deteriorated during the course of Morris’ Conduct and after the dismissal and is still not the same as it was before those events.

[80] Before Michelle started working at Olympia, Michelle and Aleisha had a “happy” relationship. Michelle was Aleisha’s “best friend”, in whom Aleisha confided everything. Michelle was an understanding mother who wanted to have a parental relationship with Aleisha that she did not have with her own mother.

[81] Michelle was always available to provide advice or discipline if required. Michelle and Aleisha would go out together and with friends, and Michelle would take care of Aleisha’s friends who came over to visit. Michelle also provided financially to take care of Aleisha.

[82] After Morris’ Conduct began, Michelle kept to herself in the dark in their basement apartment. Aleisha tried to talk to her but Michelle refused to respond. Aleisha had to speak to others about any school-related or emotional issue. Eventually, Aleisha stopped making attempts to engage with Michelle since Michelle rejected all such efforts.

[83] Aleisha went to her room when she came home and stayed alone. Aleisha stated that Michelle’s depression “rubbed off” on her. Aleisha did not want to go out since that was an activity she had always done in the past with Michelle.

[84] Aleisha also noticed that Michelle began to drink alcohol on a regular basis, starting from the time of Morris’ Conduct and becoming worse after termination.

[85] Michelle did not take Aleisha to school as a result of her depression. Aleisha’s godmother would occasionally pick her up at the apartment or bus stop and provide Aleisha with money if she did not have any for lunch.

[86] Aleisha had many concerns about her mother as a result of her behaviour during the time of Morris’ Conduct and after termination. Aleisha saw that Michelle was in emotional pain, took prolonged showers, lost her enjoyment of life, and could not trust other people. Aleisha noted that Michelle lost motivation, felt helpless, and engaged in self-destructive behaviour through her alcohol abuse.

i) Evidence of Dr. Day

[87] Dr. Rodney Day, a clinical psychologist, was qualified as an independent expert witness in the fields of psychology together with assessments and cognitive behaviour treatment for persons who have experienced trauma.

[88] Dr. Day examined Michelle on September 11 and 20, 2014 for almost 11 hours and Michelle was also examined by another psychologist (Dr. Barnes) whose review was incorporated into a report signed by Dr. Barnes.

[89] Dr. Day was satisfied that (i) Michelle understood all of the questions he addressed during the assessment; and (ii) Michelle gave full information (although she was not comfortable discussing her current sexual activity).

[90] Dr. Day conducted several tests to assess issues such as post-traumatic stress, anger issues, or dissociative experiences. He made the following findings, which I accept:

- (i) Michelle did not have a tendency to minimize or exaggerate symptoms;
- (ii) Michelle had significant symptoms of post-traumatic stress disorder (“PTSD”), including intrusive re-experiencing symptoms such as nightmares and flashbacks, avoidance symptoms (such as lack of concentration), negative alterations in mood and cognition, suicidal thoughts (although Michelle denied any intention or plan), and relational avoidance;
- (iii) Michelle kept her anger internal and would not express it outwardly towards others; and
- (iv) Michelle tested high for depression and anxiety. She presented as dysfunctional to express anxiety and passive and meek with difficulty in trusting others.

[91] As a result of the tests, Dr. Day diagnosed Michelle with chronic PTSD, “major depressive order, recurrent, moderate” and “alcohol abuse in sustained remission”. Dr. Day also diagnosed Michelle with “problems with primary support group, problems related to social environment, [and] occupational problems”.

[92] Dr. Day’s opinion was that Michelle’s PTSD had a detrimental effect on her work functioning, particularly as she was wary of working with an older male supervisor.

[93] Dr. Day concluded that Michelle’s impaired interpersonal functioning affected her relationships with the opposite sex and participation in intimate relations.

[94] Dr. Day concluded that Michelle had coped with her difficult past, which included being taken away from a nurturing home in Jamaica and brought to Canada with an abusive stepfather and then having a minor stroke. Dr. Day noted that while at times Michelle’s psychological functioning was profoundly impaired (such as her hospitalization), it was quite good at other

times, and, in particular, after 2003 when she made a conscious decision to live life in a positive healthy way and entered the labour force with full-time stable employment and a strong relationship with her daughter.

[95] However, Dr. Day concluded that after Morris' Conduct and Michelle's dismissal, Michelle's psychological functioning was poor. She exhibited depressive and PTSD symptoms and she abused alcohol. She became socially isolated.

[96] Dr. Day explained that Michelle's history gave her "predisposing factors" to psychological damage from Morris' Conduct. Individuals with a prior history of depression have increased vulnerability for psychological symptoms after a subsequent stressor. This would particularly apply to Michelle as both instances of sexual assault in her life were perpetrated by older men.

[97] Further, Dr. Day's evidence is that individuals with a pre-existing history of abuse are more prone to quickly develop psychological symptoms and the consequences are likely to be more severe. The effects of Morris' Conduct would be even stronger on Michelle because (i) Morris was a "motivated offender" (as he continued to engage in his conduct even though he knew it was not welcome); (ii) Michelle had no "capable guardian" (someone in the organization who could step in to prevent the conduct); (iii) there were no sexual harassment policies in place or mechanisms to address the issue; and (iv) Michelle had no partner to protect her since she was a single mother.

[98] Dr. Day states that the unpredictable aspect to Morris' Conduct would cause even more distress to Michelle, since it would thwart her ability to take counter-measures.

[99] Dr. Day's evidence was that Michelle's vocational functioning was affected by Morris' Conduct, since she was not able to work with older men in a supervisory role or if they worked in close proximity.

[100] Dr. Day also concluded that Morris' conduct impacted Michelle's parenting abilities, since she had full-blown depression, cried on a daily basis, isolated herself from others, and was less available to interact with Aleisha and execute parental duties. Dr. Day commented that when a mother is overwhelmed by distress and cannot attend to a child's needs, as occurred with Michelle, it has a predisposing effect on the child for potential psychological problems.

[101] Dr. Day also concluded that Michelle felt she did not have a real option to leave the workplace given her financial situation, and that Michelle would be even less likely to leave the workplace when Morris apologized for his behaviour and said that it would not happen again.

[102] Dr. Day's evidence was that treatment would likely show benefits. He recommended a course of treatment for three years which he believed would be effective, including individual and group psychotherapy, vocational assessment and counselling, and medication. The cost of the treatment was \$42,750.

[103] Dr. Day noted that Michelle had displayed the capacity in the past to be resilient if given the opportunity to do so and that she had a “moderate to good” prognosis to improve her interpersonal, parenting, work force, and intimate relationships.

[104] Dr. Day’s opinion was that without such treatment, he believed that Michelle’s functioning would remain in its current state, with persistent PTSD symptoms, social isolation, and restricted employment options. Michelle would also be vulnerable to increased symptom severity and poorer psychological function if faced with adversity in the future.

Analysis

[105] At the end of trial, Plaintiffs’ counsel reviewed the applicable law and provided the court with his assessment of damages, both for Michelle and Aleisha. Michelle claimed damages against the Defendants in relation to Morris’ Conduct as follows:

- (i) general damages for pain and suffering, including aggravated damages, in the amount of \$150,000,
- (ii) punitive damages in the amount of \$75,000,
- (iii) damages of \$33,924.75 for loss of earning capacity,
- (iv) future therapy costs (costs of future care) of \$42,750, and,
- (v) damages of \$40,000 pursuant to the *Human Rights Code*.

[106] With respect to damages arising out of her wrongful termination, Michelle claimed the following damages against Olympia:

- (i) damages for wrongful dismissal in the amount of \$7,475.50, less applicable statutory deductions,
- (ii) aggravated damages of \$30,000,
- (iii) punitive damages of \$50,000, and,
- (iv) special damages for loss of past income of \$57,869.13.

[107] With respect to Aleisha’s *FLA* claim, she sought \$25,000 in damages for loss of guidance, care, and companionship.

[108] I address each of these claims below.

a) Liability and damages related to Morris’ Conduct

[109] I first consider the issue of liability of Morris and Olympia for Morris’ Conduct and then address the law as to damages.

1. Liability of the Defendants for Morris' Conduct

[110] I adopt the analysis of Whitten J., in *K.T. v. Vranich*, 2011 ONSC 683 (SCJ) (“*Vranich*”), and apply it to both Morris and Olympia to find them liable for damages arising out of Morris' Conduct.

[111] In *Vranich*, the plaintiff was employed as a bartender/waitperson at a lounge in Hamilton. The defendant, Vranich, was the manager of the lounge. During closing hours, when only friends of Vranich and the bar staff were present, Vranich trapped the plaintiff against the wall on an outside landing and sexually assaulted her by pulling her top off and touching her breasts and vagina (*Vranich*, at paras. 1-2 and 20).

[112] Whitten J. held that Vranich was liable for (i) the tort of battery as “intentional infliction of an unlawful force on another person”, (ii) breach of fiduciary duty, and (iii) breach of s. 3(1) and 3(2) of the *Occupiers' Liability Act*, R.S.O. 1990, c. O. 2 (*Vranich*, at paras. 66-68, 71).

[113] I find that each of these bases of liability apply in the present case.

[114] With respect to Morris' liability:

- (i) He engaged in several acts of battery. He intentionally inflicted force on Michelle (*Vranich*, at para. 66);
- (ii) Morris was a fiduciary in his relationship with Michelle. He exercised financial power over Michelle. He could unilaterally exercise the power to hire or fire employees at Olympia. Finally, Michelle was particularly vulnerable as Michelle was a single mother who needed her job to support her and Aleisha. Consequently, Michelle “was indeed vulnerable to, and at the mercy of the fiscal power” of Morris (*Vranich*, at paras. 67-68); and,
- (iii) Under the *Occupiers' Liability Act*, Morris did not fulfil his duty to take care as is reasonable to ensure that Michelle was reasonably safe while in the premises as that duty applies to “an activity that was carried on on the premises” (*Vranich*, at paras. 70-71).

[115] I also find Morris liable under the *Human Rights Code* for breaching Michelle's rights (i) under s. 5(1) to equal treatment with respect to employment without discrimination because of race or sex, (ii) under s. 5(2) to freedom from harassment in the workplace by the employer or agent of the employer because of race, and (iii) under s. 7(2) to freedom from harassment in the workplace because of sex.

[116] Under s. 46.1(1) of the *Human Rights Code*, “[i]f, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding”, the court may make “[a]n order directing the party who infringed the right to pay

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

[117] In *Vranich*, Whitten J. also held the corporate defendant vicariously liable based on the decision in *Bazley v. Curry*, [1999] 2 SCR 534 (“*Bazley*”) (*Vranich*, at paras. 74-87).

[118] I agree with the analysis of Whitten J. and rely on the same basis for vicarious liability in the present case.

[119] With respect to Olympia, it is vicariously liable for the acts of Morris since:

- (i) Morris was the “operating mind” of Olympia and as such “is effectively” Olympia (*Vranich*, at para. 81); and,
- (ii) Even if Morris is considered an employee, “the employer’s ... empowerment of” Morris “materially increased the risk of the sexual assault and hence the harm” based on Morris’ “specific duties [which] gave rise to special opportunities for wrongdoing”. There “is a definite link between” Morris operating Olympia “and his ability” to assault Michelle. If Morris was, as Michelle was, a “mere” employee, Morris “would not have the control he had over that situation” (*Bazley*, at 563; *Vranich*, at paras. 82-87).

[120] I now address the quantum of damages sought.

2. The quantum of damages

[121] As in *Vranich*, I find that Michelle is entitled to general damages, as well as aggravated and punitive damages arising from Morris’ conduct.

[122] The factors to be considered for non-pecuniary damages in cases of sexual assault were reviewed by Cromwell J.A. (as he then was) in *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120 (CA) (“*BMG*”). Those factors are non-exhaustive and include (*BMG*, at para. 134; see also *Vranich*, at para. 99):

- (i) the circumstances of the victim at the time of the events, including factors such as age and vulnerability,
- (ii) the circumstances of the assault including their number, frequency and how violent, invasive and degrading they were,
- (iii) the circumstances of the defendant including age and whether he or she was in a position of trust, and,
- (iv) the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.

[123] To determine the appropriate quantum of damages for Morris' Conduct, it is necessary to review case law which has considered such conduct.

[124] In *BMG*, Cromwell J.A. extensively reviewed case law in which the court ordered general damages in sexual battery cases. Cromwell J.A. held (*BMG*, at para. 127):

In the context of sexual assault and battery, the cases have recognized that there are fundamental, although intangible, interests at stake: the victim's dignity and personal autonomy. Thus, the award of damages should take a functional approach in relation to these interests in addition to the more familiar ones of pain, suffering and loss of enjoyment of life.

[125] Cromwell J.A. adopted the language of Cory J., in *R. v. Osolin*, [1993] 4 SCR 595 at 669, that "it cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence ... It is an assault upon human dignity" (*BMG*, at para. 128).

[126] Cromwell J.A. summarized the purpose of an award of general damages for sexual battery cases (*BMG*, at para. 132):

In my view, an award of non-pecuniary damages in sexual battery cases ought to take into account the functions of the award. These are to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts.

[127] Cromwell J.A. then canvassed the existing case law to consider the range of general damages for sexual assault. I review some of those decisions below.

[128] In *V.P. v. Canada (Attorney General)*, 1999 SKQB 180 (CanLII), the abuse consisted of touching, fondling and ejaculating between the victim's legs. There was no attempted intercourse and the assaults occurred on three occasions within less than a one-month period. The general damages award was \$35,000 (*BMG*, at para. 149).

[129] In *Curran v. MacDougall*, 2006 BCSC 933 (CanLII), a prison guard performed oral sex twice on a young adult inmate. The abuser stopped after the victim reacted negatively. The court awarded \$50,000 for general damages but reduced the amount by \$10,000 to account for the victim's pre-existing and intervening disabilities (*BMG*, at para. 150).

[130] In *H.L. v. Canada (Attorney General)*, 2005 SCC 25, the victim was subjected to acts of masturbation on two occasions and to requests for sexual favours by the supervisor of an after-school boxing club. The trial court ordered \$80,000 for non-pecuniary and aggravated damages. The damages award was upheld by the Court of Appeal and was not the subject of the subsequent appeal to the Supreme Court of Canada (*BMG*, at para. 151).

[131] In *BMG* itself, Cromwell J.A. upheld the damages award of \$125,000 for non-pecuniary and aggravated damages. The plaintiff was a young teenager under the supervision of his probation officer. The plaintiff was the subject of repeated abuse, including forced oral sex and anal rape, over several weeks (*BMG*, at paras. 16-20 and 152).

[132] In *Vranich*, the important factors of the assault were set out by Whitten J. (*Vranich*, at para. 101):

The assault on K.T. lasted up to ten minutes. She was groped and digitally penetrated by an employer. This employer had isolated her from her colleagues such that they would surmise that he and she were experiencing intimate (although non-consensual) contact. She suffered the anguish of his control over her person and her means of escape. Her ability to respond to this invasion was inhibited by his financial control over her as her employer. In other words, to complain would invariably mean the end of her employment. Whatever fiscal needs she had as a summer student had to be jettisoned in order for her to be vindicated as a person and for her to demonstrate her autonomy.

[133] Further, in *Vranich*, Whitten J. described the consequences of the assault as follows (*Vranich*, at paras. 102-106):

Psychologically K.T. was impacted upon to the point she could not reveal, and to this day has still [*sic*] been able to reveal to her parents what actually transpired. The closeness between herself and her parents has diminished. She cannot accept the affection of her father. Her ability to be physical with members of the opposite sex has been affected. She has difficulty being intimate with her boyfriend. Her sexual relations are not that of the abandonment and mutual enjoyment that many experience.

Socially K.T. has become more reclusive. She moves in public places in a guarded fashion, ever conscious of the possibility of the presence of her perpetrator.

Dr. Barnes has diagnosed K.T. as suffering from a chronic classical post-traumatic stress disorder which has created problems with family relationships, problems with intimate relationships, loss of employment and delayed career development.

Therapeutic intervention is recommended to educate K.T. with respect to her coping mechanisms. Psychovocational assessment is recommended to aid K.T. with respect to a new career orientation.

K.T. continues to experience her symptomology four years after the fact and has no clear prognosis as to how long it will continue.

[134] On the basis of the above facts, Whitten J. ordered general damages of \$125,000 “which includes \$50,000, representing the aggravated damages arising out of her personal distress and humiliation” (*Vranich*, at para. 113). Whitten J. also ordered punitive damages of \$25,000 “to act as a deterrent to any other like minded employers” (*Vranich*, at para. 121).

[135] In *Pawlett v. Dominion Protection Services Ltd.*, 2007 CarswellAlta 1819 (CA) (“*Pawlett*”), the plaintiff employee suffered sexual harassment by her male supervisor through (i) the display of sexually explicit images on her computer, (ii) unwanted physical contact which included (a) attempting to hold her hand on at least one occasion, (b) putting his hand on her thigh while sitting next to her on several different occasions, and (c) slapping or tapping her buttocks when she stood up from beside him on several different occasions (*Pawlett*, at para. 4). The supervisor also engaged in a serious sexual assault when he grabbed the employee twice, forced his hand under her sweater and touched the employee’s body (*Pawlett*, at para. 4).

[136] The trial court in *Pawlett* ordered general damages in the amount of \$25,000 and punitive damages of \$50,000. The Court of Appeal reduced the punitive damages award to \$5,000, based on the \$10,000 award for punitive damages for sexual assault in *Norberg v. Wynrib*, [1992] 2 SCR 226 (*Pawlett*, at para. 29).

[137] In *J.C. v. Shaw*, [2011] BCJ 2329 (SC) (“*Shaw*”), G.B. Butler J. ordered non-pecuniary damages of \$70,000, less 15% due to the plaintiff’s pre-existing condition, for a total of \$60,000 (*Shaw*, at para. 138). The female plaintiff was the victim of a series of nine assaults by her male supervisor. The assaults included the supervisor putting his hands on the employee’s breasts, buttocks and legs. The supervisor trapped the employee in his vehicle and pressed his body against her with an erection. The supervisor also refused to let the employee leave his home after luring her there and dragged her into his bedroom when he touched her all over her body, lay on top of her, and thrust his body against her. As in the present case, the defendant knew that the plaintiff had been sexually abused by her stepfather (*Shaw*, at para. 10).

[138] In *Shaw*, there was no award for punitive damages.

[139] On the basis of the above cases, I fix general damages at \$90,000, inclusive of aggravated damages.

[140] There are aggravating factors arising from Morris’ Conduct. Morris not only did not comply with his apology and promise to stop, he escalated his assaults at work. In the third assault, he trapped Michelle behind her desk, caused her physical harm by tightening a chain around her neck, and engaged in the conduct even though there were other employees working at that time at Olympia.

[141] Further, Morris engaged in sexual coercion by requiring Michelle to wear particular items of jewellery, and then forcing Michelle to accept rides, gifts, and drinks with Michelle feeling that he was expecting a *quid pro quo* of sexual favours. The unpredictable nature of the assaults meant that Michelle was always on guard for another assault, wearing a coat at all times in the office to try to avoid further incidents.

[142] Finally, Morris' sexual and racial harassment through inappropriate jokes and emails denigrated Michelle based on her gender and the colour of her skin.

[143] The consequences suffered by Michelle were significant. The closeness between her and Aleisha diminished. Michelle's ability to have intimate relations with members of the opposite sex has been affected.

[144] Michelle also became more reclusive. She suffered loss of employment and delayed job development. Michelle, like the plaintiff in *Vranich*, continues to experience her symptomology five years after the incidents and there is no clear prognosis as to how long it will continue.

[145] With respect to punitive damages, I adopt the approach of Whitten J. in *Vranich* and I consider the conduct of Morris to be "high handed, taking advantage of" Michelle who was trying to support herself and her daughter as a single mother (*Vranich*, at para. 120). Morris' "actions were methodical and without a hint of any consideration of [Michelle] as a person in her own right. She was literally reduced to an object under his control, a throwback to a time when the employer dominated his slaves" (*Vranich*, at para. 120).

[146] I also consider the factors of proportionality set out in *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 595 ("*Whiten*"), including (i) the blameworthiness of the defendant's conduct (*Whiten*, at para. 112), (ii) the degree of vulnerability of the plaintiff (*Whiten*, at para. 114), (iii) the harm or potential harm directed specifically at the plaintiff (*Whiten*, at para. 117), (iv) the need for deterrence (*Whiten*, at para. 118), (v) other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct (*Whiten*, at para. 123), and (vi) the advantage wrongfully gained by a defendant from the misconduct (*Whiten*, at para. 124).

[147] In the present case, I find that Morris' conduct is particularly blameworthy, as it occurred on numerous occasions and was engaged in by an older man with tremendous power over a single mother who needed the job. Further, Michelle was particularly vulnerable, given that Morris knew of her past abuse and her status as a single mother. The harm was directed specifically at Michelle, and this case requires a strong need for deterrence.

[148] I also take into account the award of damages I make under the *Human Rights Code* which is for the same misconduct as I discuss below.

[149] Consequently, I fix punitive damages for Morris' Conduct at \$10,000.

[150] I assess damages under the *Human Rights Code* in accordance with the principles set out in *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (Div. Ct.) ("*ADGA*"). Ferrier J., speaking for the court, held (*ADGA*, at paras. 153-54, references omitted):

This court has recognized that there is no ceiling on awards of general damages under the *Code*. Furthermore, Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the

social importance of the *Code* by effectively creating a ‘licence fee’ to discriminate.

Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.

[151] In the present case, Michelle suffered the full list of consequences to be considered: ‘humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment’.

[152] In *Wilson v. Solis Mexican Foods*, 2013 ONSC 5799 (SCJ), Grace J. ordered damages of \$20,000 to a person who was terminated due to a physical disability. The breaches of the *Human Rights Code* in the present case are more significant based on the factors described above.

[153] Consequently, I fix damages in the amount of \$30,000 under the *Human Rights Code*.

[154] With respect to future therapy costs, I find that the costs assessed by Dr. Day of \$42,750 are reasonable and are required as a result of Morris’ Conduct. The future therapy will enable Michelle to attempt to overcome the many consequences which she, Aleisha, and Dr. Day discussed as set out above (*Vranich*, at para. 126).

[155] I also order the Defendants to pay the subrogated claim of OHIP in the amount of \$37.18 (see *Vranich*, at para. 126).

[156] Finally, with respect to the claim for loss of future earning capacity, I find that there is a real and substantial possibility that Michelle’s earning capacity will be impaired because she is not comfortable working with older men in a supervisory role or in close proximity. Michelle’s counsel reasonably limited the claim to a three-year period during which Michelle would receive treatment as recommended by Dr. Day.

[157] There is no precise mechanism to measure Michelle’s future economic loss, as one cannot say what employment she would have held in the future. I accept the approach of Michelle’s counsel as reasonable, in that I apply the average difference between her full-time employment income with Olympia and her part-time income over 2013 and 2014, which are the last two years after Michelle tried to find work (an annual amount of \$11,308.25). I compensate for that loss over the next three years so that Michelle can hopefully return to a full-time position.

[158] Consequently, I fix damages for loss of earning capacity at \$33,924.75.

b) Liability and damages related for wrongful dismissal

[159] The claims arising from the wrongful dismissal are brought against Olympia as Michelle’s employer.

[160] There was no cause for Michelle's termination. At all times, Michelle kept Morris informed of her dental surgery and her intention to return to work. Michelle took all steps requested by Morris to obtain two separate notes from her dentist, and then obtained a detailed letter which was faxed on the day Morris requested it. There is no evidence Michelle was contemptuous, and to the contrary, she acted professionally at all times.

[161] Consequently, I agree with Michelle's counsel that she is entitled to three months' notice and I fix that amount at \$7,475.50, less applicable statutory deductions as requested by Michelle.

[162] With respect to aggravated damages, Michelle is entitled to an amount to reflect the harsh, unfair, and demeaning manner in which she was dismissed. She was treated unfairly, made to wait outside the building for hours on end for Morris, and then had to call the office only to be told by Morris that he did not believe that she was off due to dental surgery (even after Aleisha had told him of the situation on the phone and he received two notes from Dr. Eller).

[163] The indignity of the termination then continued as Morris insisted on a detailed letter from Dr. Eller as well as direct contact information. Olympia then demanded the next day that Michelle attend even though she could not get a token for public transportation (because she had used her remaining transit tokens to obtain the letter from Dr. Eller, as insisted upon by Morris). Morris then did not get back to Michelle and it was left to Michelle to follow up on March 12 when she was told that she was terminated. The letter of termination set out entirely spurious reasons for her termination. Olympia then caused EI to investigate the termination.

[164] In *Honda Canada Inc. v. Keays*, [2008] S.C.J. No. 40 ("*Honda*"), Bastarache J. set out the principle to award aggravated damages. He held (*Honda*, at para. 59):

To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between 'true aggravated damages' resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. **Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle.** Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. **Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.** Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100). [Emphasis added.]

[165] In the present case, based on the factors I discuss above, I fix aggravated damages for the manner of dismissal at \$15,000.

[166] With respect to punitive damages, the court in *Honda* noted the exceptional nature of such a remedy. Bastarache J. held (*Honda*, at para. 68):

Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that **conduct meriting punitive damages awards must be ‘harsh, vindictive, reprehensible and malicious’, as well as ‘extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment’** (*Vorvis*, at p. 1108). [Emphasis added.]

[167] On the facts of this case, I find that the Defendants’ conduct in relation to the wrongful dismissal was “vindictive, reprehensible and malicious”. There was no basis for Olympia to dismiss Michelle. The dismissal came days after the last (and most serious) incident of sexual assault and battery. Michelle’s work was always described as first rate, and she never displayed any attitude towards Morris other than proper respect and courtesy. Olympia’s conduct in terminating Michelle was intentionally designed to harm Michelle, who was particularly vulnerable for the reasons I discuss above.

[168] Consequently, a separate award of punitive damages is appropriate for the manner of Michelle’s termination, and I fix that amount at \$10,000.

[169] Finally, I agree with Michelle that she suffered a loss of income as a result of the Defendants’ conduct. The medical evidence, supported by Michelle and Aleisha’s evidence of her psychological condition, demonstrates that Michelle was not able to work for almost two years as a result of Morris’ Conduct and her termination. She obtained social assistance to survive. When she returned to work in 2012, she was only able to find part-time work.

[170] Consequently, Michelle is entitled to the difference between what she would have earned with Olympia and the amount she received either on social assistance or with part-time work. I agree with the calculations set by Michelle in her exhibit at trial and I fix damages for lost past income at \$57,869.13.

c) Aleisha’s FLA claim

[171] I agree with Aleisha that she is entitled to compensation for loss of care, guidance and companionship. Michelle was not only Aleisha’s mother but her “best friend”. Aleisha shared all of her thoughts and concerns with her mother, and Michelle considers Aleisha to be “my life”. They went out together, Michelle was very involved with Aleisha’s friends and school life, and they were “happy”.

[172] As a result of Morris' Conduct and Michelle's termination, their relationship deteriorated, with Aleisha being required to fend for herself emotionally and often financially through the help of others. Michelle spun into a cycle of alcohol abuse and depression, leaving Aleisha on her own.

[173] The relationship has improved recently, but is still weaker than in the past.

[174] In those circumstances, I fix damages under s. 61 of the *FLA* at \$15,000.

d) The action is not statute-barred

[175] I accept the Plaintiffs' submission that the action is not statute-barred because it is based on a sexual assault and a person with such a claim is presumed incapable of commencing the proceeding earlier than it was commenced unless the contrary is proven (s. 10(2) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B) (the "*Limitations Act, 2002*"). In any event, there is no limitation period since the proceeding arises from a sexual assault and Morris was in a position of authority in relation to Michelle and was someone on whom Michelle was financially dependent (s. 16(h) of the *Limitations Act, 2002*).

Order and costs

[176] For the above reasons, I find in favour of the Plaintiffs. I order (i) the Defendants jointly and severally to pay Michelle damages of \$206,711.93, (ii) Olympia to pay Michelle damages of \$90,344.63, and (iii) the Defendants jointly and severally to pay damages to Aleisha of \$15,000.

[177] The breakdown of damages is as follows:

- (i) Defendants are ordered to jointly and severally pay Michelle damages of \$206,711.93 for Morris' Conduct, broken down as (a) \$90,000 for general and aggravated damages, (b) \$10,000 for punitive damages, (c) \$30,000 for breach of the *Human Rights Code*, (d) \$42,750 for costs of future therapy care, (e) \$37.18 for the subrogated OHIP claim, and (f) \$33,924.75 for future lost income;
- (ii) Olympia is ordered to pay Michelle \$90,344.63 for wrongful termination, broken down as (a) \$7,475.50 less applicable statutory deductions for the three-month notice period, (b) aggravated damages of \$15,000, (c) punitive damages of \$10,000, and (d) \$57,869.13 for lost income; and,
- (iii) Defendants are ordered to jointly and severally pay Aleisha \$15,000 in damages under the *FLA*.

[178] The Plaintiffs shall deliver written costs submissions of no more than three pages (not including a bill of costs), to be delivered within 14 days of this order, with the Defendants to

respond (if there is any response as the action is undefended) within 14 days from receipt of the Plaintiffs' submissions. The Plaintiffs may provide a reply of no more than two pages to be delivered within 14 days of receipt of the Defendants' costs submissions (if any are received). All written costs submissions shall be delivered to my assistant.

[179] The Plaintiffs' counsel will deliver these reasons by mail to the last-known address of the Defendants as set out in the order removing their lawyers of record.

Justice Glustein

DATE: 20150616

CITATION: Silvera v. Olympia Jewellery Corporation, 2015 ONSC 3760
COURT FILE NO.: CV-12-448467
DATE: 20150616

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHELLE ANN FRANCEINE SILVERA and
ALEISHA SILVERA

Plaintiffs

– and –

OLYMPIA JEWELLERY CORPORATION and
MORRIS BAZIK

Defendants

JUDGMENT

GLUSTEIN J.

Released: 20150616