
Court of Appeal refuses to recognize tort claims in employment relationship – slashes \$500,000 damages award

Employers across Canada breathed a sigh of relief May 28, 2010 when the Ontario Court of Appeal released its decision in *Piresferreira v. Ayotte*. The decision is important for all employers because the Court refused to recognize the tort of negligent infliction of mental suffering in employment law cases. A tort is a civil wrong other than a breach of contract. The Court of Appeal overturned the groundbreaking decision of the trial judge who awarded damages against the employer on tort principles instead of on the traditional basis that the employer breached the employment contract when it constructively dismissed the employee.

This was significant partly because the trial judge's damages award for tort far exceeded what the employee was entitled to for breach of the employment contract. In allowing the employer's appeal, the Court of Appeal noted that no Canadian appellate court has ever recognized such a tort in the context of the employer-employee relationship. It would be a radical shift in the law to recognize such a tort in the workplace. Therefore the Court of Appeal said the Legislature should be left to decide whether to create such a new basis for suing.

Readers of Focus may recall that the trial judgment awarded more than \$500,000 in damages (see "[Ontario Court awards \\$500,000 damages for manager's assault on employee](#)"). The case arose when Piresferreira, a Bell employee of ten years, was shoved by her supervisor, Richard Ayotte, and subsequently constructively dismissed by Bell. As a result, Piresferreira was diagnosed with post-traumatic stress disorder and symptoms of anxiety that left her permanently unable to work. In August 2005, Piresferreira sued Bell and her former supervisor for assault and battery, negligent and intentional infliction of emotional suffering, past and future loss of income, and wrongful dismissal.

At trial, Ayotte was held personally liable for the torts of battery, and intentional and negligent infliction of mental suffering. Bell was also held vicariously liable for Ayotte's torts, and directly liable for negligence and constructive dismissal. Piresferreira was awarded tort damages totalling \$500,955, including approximately \$450,000 for past and future loss of income. In addition she was awarded \$225,000 for her legal costs. On appeal, Bell challenged the trial judge's tort findings and her calculation of damages for the tort of assault and battery.

TORT OF NEGLIGENT INFLECTION OF MENTAL SUFFERING NOT AVAILABLE IN THE EMPLOYMENT CONTEXT

The Court of Appeal said that the trial judge found that an employer's duty of care for the tort of negligent infliction of mental suffering rests "squarely on the contractual relationship between the parties." The contractual relationship between Bell and Piresferreira incorporated Bell Mobility's Code of Business Conduct, which guaranteed employees the right to work in an environment free from violence and harassment. She ruled that Bell and Ayotte's failure to provide a workplace free from violence and harassment fundamentally breached the terms and conditions of employment. On that basis she also found that the tort of negligent infliction of mental suffering was established, said the Court.

But the Court of Appeal pointed out that “a breach of a contractual duty cannot be the basis for the recognition of a common law tort.” Since the tort could not be based on a contractual obligation, the Court of Appeal considered whether there could be a free-standing tort cause of action against an employer for the negligent infliction of mental suffering on an employee. The Court of Appeal applied the traditional two-part test for determining whether to recognize a new duty of care:

- Is the relationship between the parties sufficiently close or “proximate” to make the damages reasonably foreseeable and justify imposing a duty of care; and
- Are there any countervailing policy reasons to limit or deny a duty of care?

The Court of Appeal agreed that the first part of the test was met because the trial judge found that Piresferreira’s damages were foreseeable.

Turning to the second part of the test, the Court of Appeal examined whether there were any policy considerations which should foreclose the recognition of the duty of care in the employment relationship context. The Court considered the seminal 1997 decision of *Wallace v. United Grain Growers Ltd.* In *Wallace*, the Supreme Court of Canada refused to impose what would have been a less onerous duty of care on employers because to do so would be a radical shift in the law and a policy decision better left to legislators. The Court of Appeal also noted that employers can be ordered to pay damages for mental suffering they cause by carrying out terminations in a bad faith or unduly harsh manner, as stipulated by the top court in *Honda Canada Inc. v. Keays* [2008].

The *Honda* decision says that if an employee can prove that the manner of dismissal caused him or her mental distress that would have been contemplated by the employer and employee at the time of hiring, the employee should be compensated for his or her actual damages and not by arbitrarily extending the notice period. The Court of Appeal set aside the trial judge’s tort findings stating:

“Recognizing the tort in the employment relationship would overtake and supplant that [*Honda*] framework and all of the employment law jurisprudence from which it evolved. In other words, in the dismissal context, the law already provides a remedy in respect of the loss complained of here. The recognition of the tort is not necessary.”

INTENTIONAL INFLICTION OF MENTAL SUFFERING

Canadian courts have recognized the tort of intentional infliction of mental suffering in the employment law context in circumstances that range from ongoing sexual harassment in the workplace to a confrontational and contradictory management style. These precedents were synthesised by the Ontario Court of Appeal in *Prinzo v. Baycrest Centre for Geriatric Care* [2002] (“*Prinzo*”), where the Court awarded \$15,000 for intentional infliction of mental suffering.

The *Prinzo* case involved a hairdresser with nearly 18 years of service with Baycrest when she was terminated. She had been a “model employee” until the arrival of a new supervisor who was less positive in her assessment of Prinzo’s performance. The supervisor recommended to senior management that Prinzo’s position be eliminated. Before this recommendation could be acted upon, Prinzo injured herself in a fall in the employer’s parking lot. Prinzo’s physician advised Baycrest that she was medically unfit for any form of work. The day before Prinzo went off work, Baycrest sent her a letter advising her that she was to be laid off, but without providing the effective date.

Over the next few months the supervisor contacted Prinzo repeatedly, asking that she return to work on modified duties. Later Prinzo received a letter from her supervisor which misleadingly implied that Prinzo’s physician had agreed that she was fit for modified duties, and advising her to make arrangements to return to work. Upset by the letter, Prinzo phoned the supervisor and was told that, unless she returned to work immediately, her conduct would be treated as a “work refusal and we will address that.”

When Prinzo finally returned to work, Baycrest management met with her and suggested to Prinzo that her conduct was harming Baycrest's elderly residents. Prinzo's employment was terminated weeks later, and she sued for wrongful dismissal. The Ontario Court of Appeal ultimately ruled that the requirements were met for an independent actionable tort of intentional infliction of mental suffering. The three elements of this tort are:

1. flagrant and outrageous conduct;
2. calculated to produce harm; and
3. resulting in a visible and provable illness.

In *Piresferreira*, the trial judge applied the *Prinzo* principles and found that the supervisor's conduct was "flagrant and outrageous" because he issued a performance improvement plan to the employee as soon as she returned to work after the assault, without first having assumed responsibility for his abusive behaviour. The Court of Appeal expressed considerable unease with the emphasis that the trial judge placed on the supervisor's failure to apologize.

But the Court overturned the trial judge's decision on the different basis that the second element of the tort was not established.

The *Prinzo* decision describes the second element of the tort as follows:

"[F]or the conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow."

The trial judge found that the supervisor's reckless disregard for the employee's well-being was sufficient to meet the second element of the tort. However the Court of Appeal disagreed, noting that "reckless disregard" is not part of the *Prinzo* test. The Court further noted that the law treats those who commit intentional torts more severely than those who are negligent. Therefore before an employer can be held liable for intentionally inflicting mental suffering on an employee, that employer must be subjectively (*i.e.* actually) aware that harm of the kind that resulted *was certain to follow*. The Court of Appeal explained:

"Accepting an objective sense of 'recklessness' dependent on whether the harm ultimately suffered was foreseeable or likely to result should be rejected.... Essentially, permitting liability on such a reduced standard would unduly interfere with the settled principles of employment law."

DAMAGES FOR BATTERY

The Court of Appeal then addressed the trial judge's calculation of the damages caused by the supervisor's tort of battery. It disagreed with the trial judge's reasoning that the battery started a chain of events that collectively caused Piresferreira's emotional health to deteriorate and made her unable to work. The Court of Appeal noted that Piresferreira suffered no physical injury, psychological harm, or other ill effect from being physically pushed by her supervisor, and that she was initially willing to work with him after he pushed her. Rather the evidence showed that the decline in Piresferreira's mental health was linked to her perception that she was treated unfairly after the battery and that Bell failed to provide her with a safe working environment. Her inability to function in any work environment did not inevitably flow solely from the battery. The Court of Appeal said it was assessing the damages from the battery "generously" at \$15,000.

DAMAGES FOR WRONGFUL DISMISSAL

The Court of Appeal accepted the trial judge's finding that Piresferreira had been constructively dismissed, and the judge's assessment of damages based on a 12-month period of notice. The Court also accepted that there was a solid foundation for her assessment of \$45,000 damages for mental suffering. The trial judge calculated these amounts, but did not award them, because the judge had already compensated the employee for her injury with the damages for the torts of negligent and intentional infliction of mental suffering. However because the Court of Appeal set aside the tort findings, including the \$450,000 award for the past and future loss of income, it reinstated the 12-month notice period for wrongful dismissal, as well as the \$45,000 award for mental suffering caused by the manner in which Piresferreira was dismissed.

DAMAGES FOR LOSS OF GUIDANCE, CARE AND COMPANIONSHIP

In addition to Piresferreira's main action, her same-sex partner, Judy Scott, sued Bell under s. 61 of the *Family Law Act* (Ontario). This provision permits dependent family members to recover amounts to compensate for "the loss of guidance, care and companionship that the claimant might reasonably have expected to receive ... if the injury or death had not occurred". The trial judge found that because of Ayotte's and Bell's conduct, Piresferreira was less able to participate in social, recreational, and companionship activities with Scott. Scott was awarded \$15,000 to compensate her for the loss of Piresferreira's care and companionship. However the Court of Appeal set aside that award because Piresferreira was not entitled to damages for negligent or intentional infliction of mental suffering, and suffered no actual damage from the battery itself. The Court of Appeal explained:

"The right of dependents to sue in tort for loss of guidance, care and companionship under s. 61(2)(e) of the *Family Law Act* is purely derivative and dependent on Piresferreira's entitlement to damages after being injured by the fault or neglect of another."

In Our View

The Court of Appeal's decision restores contract law analysis to the employment relationship, and thereby curbs the potential for runaway tort damages. The Court made it clear that the recognition of the tort of negligent infliction of mental suffering in the employment context would supplant the existing conventional contract law. The Court did recognize that it is often called upon to review the work performance of employees as well as the content and manner of their supervision in dismissal cases. But the Court also said that expanding its role in this way would substantially intrude into the workplace and could constrain employers' efforts to make their businesses more efficient. Therefore the Court of Appeal preferred to leave the Legislature to determine whether it is necessary or desirable to create the tort in the employment context.

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