

Appellant was a solicitor in the respondent's legal department who was conscientious to a fault and prone "to produce a Cadillac when a Ford would do". Appellant's supervisor became increasingly dissatisfied with the pace of appellant's work and instituted weekly "productivity meetings" which degenerated into a form of inquisition. As the pressure increased, appellant suffered distress and obtained medical attention. He was dismissed without any precipitating event. Respondent offered pay and benefits for an eight-month period if appellant were to release it from any claim arising out of his employment and its preemptory termination. Appellant, however, was not prepared to admit that he was incompetent and that his employer had just cause for his dismissal.

Counsel agreed that damages should be assessed on the basis of a seven-month notice requirement. Appellant's pension in his employer's pension plan had not vested at the time of his dismissal and he accordingly only received his own contributions to the plan plus interest. Although the pension would not have vested during the notice period, it was argued that, notwithstanding the express wording of the pension plan, an employee should not lose his rights to the plan unless he were dismissed for cause.

The trial judge found that appellant had been wrongfully dismissed and was entitled to damages. He rejected certain other claims for lost pension rights, mental distress, and aggravated and punitive damages. The Court of Appeal, although it made an additional award for loss of overtime, confirmed in result the judgment at trial. Appellant appealed to this Court.

Two issues were raised in this Court: (1) whether the Court of Appeal erred in dismissing the appellant's claim for lost pension rights, and (2) whether the Court of Appeal erred in denying the claim for punitive damages. Damages for mental distress, properly characterized as

aggravated damages, were not claimed in this Court as a separate head but it was argued that they were included in the general concept of punitive damages.

Held (Wilson and L'Heureux-Dubé JJ. dissenting in part): The appeal should be dismissed.

Per Beetz, McIntyre and Lamer JJ.: No term should be implied to the effect that the employee's right to his pension could not be terminated by the unilateral action of the employer in the absence of dismissal for cause. Such a term was contrary to the express provisions of the pension agreement. The vesting would not have occurred within the reasonable notice period.

The claim for aggravated damages -- damages awarded to compensate and take into account intangible injuries in addition to the normally assessed damages -- should be denied here because they are to be limited to earnings lost during the period of notice to which the employee is entitled and cannot include damages for the manner of dismissal. Although aggravated damages can be awarded in a case of wrongful dismissal, particularly where the acts complained of are independently actionable, the conduct complained of here preceded the wrongful dismissal and could not be said to have aggravated the damage incurred as a result of the dismissal.

Punitive damages -- damages which punish extreme conduct worthy of condemnation -- will rarely be awarded in cases of breach of contract for, unlike torts, the contract is the only link between the parties for the purpose of defining their rights and obligations. The injured plaintiff is not entitled to be made whole but only to have either that which the contract provided for him or compensation for its loss.

Appellant on his dismissal was only entitled to reasonable notice or to payment of salary and benefits for the period of reasonable notice. The conduct on the part of the employer, while it

may have caused appellant mental stress and frustration was not sufficiently offensive, standing alone, to constitute actionable wrong and was not therefore of such a nature as to justify the imposition of an award of punitive damages.

Per Wilson and L'Heureux-Dubé JJ. (dissenting in part): In appropriate circumstances aggravated damages for mental suffering may be awarded in breach of contract cases and they are, in distinction to punitive damages, essentially compensatory. Rather than relying on a characterization of the conduct as an independent wrong, the proper approach is to apply the basic principles of contract law relating to remoteness of damage. The issue is whether the defendant should reasonably have anticipated that damages in the form of mental suffering would be a consequence of the breach. Here, mental suffering would not have been in the reasonable contemplation of the parties at the time the employment contract was entered into as flowing from the appellant's unjust dismissal.

In deciding whether punitive damages should be awarded, the conduct of the defendant both before and after the wrongful dismissal should be considered. It should be reviewed in the context of all the circumstances in order to determine if it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. The misconduct need not be in itself an actionable wrong. The duties owed under the law of tort do not differ significantly from the duties breached in contract by the type of flagrant and deliberate misconduct that merits an award of punitive damages. Here, the respondent's conduct towards a sensitive, dedicated and conscientious employee was reprehensible and punitive damages should be awarded.

Cases Cited

By McIntyre J.

Considered: *Addis v. Gramophone Co.*, [1909] A.C. 488; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, aff'g (1965), 56 D.L.R. (2d) 117; **distinguished:** *Gillespie v. Bulkley Valley Forest Industries Ltd.*, [1973] 6 W.W.R. 551; *Ashford v. Laing Construction and Equipment Ltd.*, B.C.S.C., Gould J., Vancouver Registry No. C770710, December 14, 1978, unreported; *Sloan v. Union Oil Co. of Canada* (1955), 16 W.W.R. 225 (B.C.S.C.); *Wilson v. Rudolph Werlitzer Co.*, 194 N.E. 441 (1934); *Kern v. City of Long Beach*, 179 P.2d 799 (1947); *Police Pension and Relief Bd. of City and County of Denver v. Bills*, 366 P.2d 581 (1961); **referred to:** *London Export Corp. v. Jubilee Coffee Roasting Co.*, [1958] 2 All E.R. 411; *Tippett v. International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146; *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233; *Cringle v. Northern Union Insurance Co.* (1981), 124 D.L.R. (3d) 22; *Cox v. Philips Industries Ltd.*, [1976] 3 All E.R. 161; *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711; *Harvey Foods Ltd. v. Reed* (1971), 18 D.L.R. (3d) 90; *Heywood v. Wellers*, [1976] 1 All E.R. 300; *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113, aff'g in part (1982), 37 O.R. (2d) 277; *Pilato v. Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652; *Speck v. Greater Niagara General Hospital* (1983), 43 O.R. (2d) 611; *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8, rev'd on other grounds (1983), 4 D.L.R. (4th) 383 (Ont. C.A.), leave denied, [1984] 1 S.C.R. xiii; *Perkins v. Brandon University and Potter* (1985), 35 Man. R. (2d) 177; *Abouna v. Foothills Provincial General Hospital Board (No. 2)* (1978), 83 D.L.R. (3d) 333; *McMinn v. Town of Oakville* (1978), 19 O.R. (2d) 366; *Rookes v. Barnard*, [1964] A.C. 1129; *McElroy v. Cowper-Smith and Woodman*, [1967] S.C.R. 425; *Paragon Properties Ltd. v. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156; *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118; *Fogg v. McKnight*, [1968] N.Z.L.R. 330; *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228; *H. L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776; *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146; *Meyer v. Gordon* (1981), 17 C.C.L.T. 1.

Not followed: *Addis v. Gramophone Co.*, [1909] A.C. 488; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673; **considered:** *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113, aff'g in part (1982), 37 O.R. (2d) 277; **disapproved:** *Bliss v. South East Thames Regional Health Authority*, [1987] I.C.R. 700; *Hayes and anor v. Dodds*, [1988] N.L.J. 259; **distinguished:** *Cox v. Philips Industries Ltd.*, [1976] 3 All E.R. 161; *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711; *Tippett v. International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146; **referred to:** *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233; *Antonaros v. SNC Inc.* (1984), 6 C.C.E.L. 264; *Gordon v. Saint John Shipbuilding & Dry Dock Co.* (1983), 47 N.B.R. (2d) 150; *Cormier v. Hostess Food Products Ltd.* (1984), 52 N.B.R. (2d) 288; *Pilato v. Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652; *Lightburn v. Mid Island Consumer Services Co-operative* (1984), 4 C.C.E.L. 263; *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8, rev'd on other grounds (1983), 4 D.L.R. (4th) 383 (Ont. C.A.), leave denied, [1984] 1 S.C.R. xiii; *Speck v. Greater Niagara General Hospital* (1983), 43 O.R. (2d) 611; *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; *Victoria Laundry (Windsor Ld.) v. Newman Industries Ld.*, [1949] 2 K.B. 528; *Koufos v. C. Czarnikow Ltd.*, [1969] 1 A.C. 350; *Newell v. Canadian Pacific Airlines, Ltd.* (1976), 14 O.R. (2d) 752; *Heywood v. Wellers*, [1976] 1 All E.R. 300; *Cook v. Swinfen*, [1967] 1 W.L.R. 457; *Guildford v. Anglo-French Steamship Co.* (1883), 9 S.C.R. 303; *Cardinal Construction Ltd. v. The Queen in right of Ontario* (1981), 32 O.R. (2d) 575; *Dale Perusse Ltd. v. Kason* (1985), 6 C.P.C. (2d) 129; *Noranda Mines Ltd. v. Seaboard Surety Co.* (1985), 7 C.C.E.L. 227; *Centennial Centre of Science and Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253; *Delmotte v. John Labatt Ltd.* (1978), 22 O.R. (2d) 90; *Nantel v. Parisien* (1981), 18 C.C.L.T. 79; *Edwards v. Lawson Paper Converters Ltd.* (1984), 5 C.C.E.L. 99; *New Brunswick Electric Power Commission v. IBEW, Local 1733* (1978), 22 N.B.R. (2d) 364; *Makarchuk v. Midtransportation Services Ltd.* (1985), 6 C.C.E.L. 169; *Thom v. Goodhost Foods Ltd.* (1987), 17 C.C.E.L. 89; *Rookes v. Barnard*, [1964] A.C. 1129; *McElroy v. Cowper-Smith and Woodman*, [1967] S.C.R. 425; *H. L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776; *Central Trust Co.*

v. Rafuse, [1986] 2 S.C.R. 147; *Paragon Properties Ltd. v. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156.

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APPEAL from a judgment of the British Columbia Court of Appeal (1984), 53 B.C.L.R. 63, 9 D.L.R. (4th) 40, allowing in part an appeal from a judgment of Macfarlane J. (1982), 134 D.L.R. (3d) 727, 17 B.L.R. 150. Appeal dismissed, Wilson and L'Heureux-Dubé JJ dissenting in part.

F. A. Schroeder, for the appellant.

Robert H. Guile, Q.C., and *D. G. Cowper*, for the respondent.

//*McIntyre J.*//

The judgment of Beetz, McIntyre and Lamer JJ. was delivered by

MCINTYRE J. -- This appeal raises questions concerning the amount and nature of damages which may be payable in an action for wrongful dismissal from employment. The appellant is a fifty-four year old solicitor who commenced employment as a junior solicitor in the respondent's legal department in September of 1973. His employment terminated on January 20, 1981. The respondent initially purported to dismiss for cause, that is, incompetence, but, as the trial judge determined, it had no cause for dismissal. The trial judge therefore found that the plaintiff was wrongfully dismissed and that he was entitled to damages. Upon his dismissal the appellant received salary until February 15, 1981, a period of about one month, and he was able to obtain new employment, but not as a lawyer, on September 15, 1981, some seven months since his last payment. At trial, it was agreed by counsel that damages should be assessed on the basis of a seven-month notice requirement, because the plaintiff was able to mitigate his loss by finding other employment at a similar salary by September 15, 1981.

When the appellant commenced work with the respondent he was assured that in addition to his salary there would be benefits which would include a pension plan. The pension plan was established by the employer with effect from January 1, 1975. The appellant joined the plan at its inception with an effective service credit dating from his date of hiring. The plan had a ten-year vesting period, and pursuant to its terms both the appellant and respondent made contributions. On termination of the employment, the appellant received only his own contributions to the plan, plus interest, which amounted to \$28,971.

In his reasons for judgment (reported at (1982), 134 D.L.R. (3d) 727), the trial judge awarded damages for wrongful dismissal but rejected certain other claims for lost pension rights, mental distress, and aggravated and punitive damages. In the Court of Appeal (reported at (1984), 9 D.L.R. (4th) 40), the appellant alleged error in the rejection of his claim for loss of pension rights; in rejection of his claim for six weeks' additional salary which had been paid to

management employees for overtime work performed during a strike which occurred during the reasonable notice period; and in rejection of his claim for punitive or exemplary damages.

The Court of Appeal allowed the appeal in so far as it related to the six weeks' additional salary, but it unanimously dismissed the appellant's claim for mental distress. Hinkson and Craig JJ.A. disallowed the appellant's claim for punitive damages. On this question, however, although Anderson J.A. would have disallowed the appellant's claim for aggravated damages for mental distress, he would have allowed punitive damages in the amount of \$5,000 because of the conduct of one Reid in terminating the employment contract. In the result, the judgment at trial was affirmed in the Court of Appeal though the appellant was awarded, in addition to the damages awarded at trial, the sum of \$4,308 as compensation for the loss of overtime salary he would have earned during the strike if his employment had continued into the strike period.

In this Court, the appellant raised only two issues. He asserted error in the Court of Appeal in dismissing the appellant's claim for lost pension rights. He also argued that the court was in error in denying his claim for punitive damages. Damages for mental distress, properly characterized as aggravated damages, were not claimed in this Court as a separate head but it was argued that they were included in the general concept of punitive damages.

Pension Rights

As earlier stated, the respondent had established a pension plan for its employees. The appellant joined the plan and agreed to be bound by its terms and conditions. The plan provided for contributions from both employer and employee and provided a vesting period of ten years. The appellant was not in the employment for the required ten-year period, having been employed in September, 1973 and dismissed in January, 1981, nor did the period of reasonable notice,

which was agreed at trial to extend to September, 1981, add sufficient time to create a vesting in the appellant.

Section 6 of the retirement plan deals with the general topic of benefits. Clauses 7(a) and (b) deal with termination of service and are in these terms:

(7) *Termination of Service*

(a) *Refund of Contributions*

If, prior to attaining ten years of Pensionable Service, such service is terminated for any reason other than retirement or death, a Member's contributions will be refunded with interest to the date of termination.

(b) *Vesting of Benefits*

If a terminating Member has ten or more Years of Pensionable Service, the Member's required contributions will not be refundable, except in the event of death, and the terminating Member will receive, commencing at retirement date, monthly payments based on the amount of pension earned under the Plan, plus any pension that may be provided, at the option of the Former Member, in respect of any voluntary additional contributions made, with interest.

The trial judge dealt with a pension claim in these words, at pp. 731-32:

The plaintiff contends that a term should be implied in his contract of employment that, in the absence of dismissal for cause, the right of the employee to his pension cannot be terminated by the unilateral action of the employer. I do not think that argument can succeed in the face of the specific provisions respecting termination of service and vesting contained in cls. 7(a) and (b) above. The plaintiff accepted those terms. They are clear and unambiguous, and in my view they settle the question. *Ashford et al. v. Laing Construction & Equipment Ltd.* (C770710 Vancouver Registry, December 14, 1978, Gould J.) was quite a different case. There, the contract provided options if a "member leaves the service of the Company before pension is payable". It also provided a formula for sharing the contributions made by the company when a "member withdraws after 11 years of service". The contract was silent with respect to the event which did occur, namely, a complete shut-down of the plant. Here the contract clearly covers the situation which has arisen. Another case cited by counsel for the plaintiff was *Gillespie et al. v. Bulkley Valley Forest Industries Ltd.* (1973), 39 D.L.R. (3d) 586, [1973] 6 W.W.R. 551 (affirmed 50 D.L.R. (3d) 316, [1975] 1

W.W.R. 607). In that case the right under an agreement would have vested within the period of reasonable notice and the employee was found to be entitled to the benefits of the agreement when his employment had been wrongfully terminated prior to the vesting. Here, the plaintiff was discharged two years and seven months before the time for vesting, when reasonable notice could not have exceeded one year. It is contended here that the plaintiff had a right to a pension and that the defendant could not unilaterally deprive him of that right. But the right which the plaintiff had, by agreement, was to a pension if his service to the company exceeded 10 years. "If, prior to attaining ten years of Pensionable Service, such service is terminated *for any reason* other than retirement or death" his right was to have a refund of his contributions with interest to the date of termination. To accommodate the argument of counsel for the plaintiff I would have to construe the words "for any reason" as meaning "for cause", and reword the clause excluding the words "other than retirement or by death". Such an interpretation is not justified. The plaintiff's contention must fail. [Emphasis in original.]

This view of the matter was accepted in the Court of Appeal. Hinkson J.A., speaking for the court on the pension issue, agreed that in light of the express provisions of the pension plan it was not possible to imply a term in the contract of employment, that the employer could not prevent the plaintiff from achieving a vested pension except by termination for cause. He disposed of the point with these words, at p. 43:

In addition to the authorities cited to the trial judge, on the appeal the plaintiff relied upon the decision in *Acklam v. Sentinel Ins. Co., Ltd.*, [1959] 2 Lloyd's Rep. 683. Each of these decisions turns upon the terms of the particular pension plan. For that reason each of them is distinguishable. In my opinion the trial judge was correct in concluding that it was not possible to imply the term urged by the plaintiff because it would be contrary to the express provisions of the pension plan.

The appellant's argument under this head of the case is that, having in view the largely unwritten contract of employment, which is relatively fluid in nature and may alter in detail from time to time during the course of employment, a term should be implied to the effect that in the absence of a dismissal for cause the right of the employee to his pension cannot be terminated by unilateral action of the employer. Put against that argument is the fact that the express provisions of the pension agreement, *supra*, provide for the very events which occurred in the case at bar: a termination of employment for a reason other than retirement or death which

would result only in a return to the member of his contributions with interest. The employment was terminated, it was pointed out by the respondent, two years and seven months before the time of vesting, and the vesting would not have occurred within the reasonable notice period.

The appellant argued that the implied term would preclude the employer from frustrating the pension right by a wrongful dismissal prior to the acquisition of a vested right by the employee. Reliance for this argument was placed upon *Gillespie v. Bulkley Valley Forest Industries Ltd.*, [1973] 6 W.W.R. 551 (B.C.S.C.), *per* Berger J. In that case, the employer agreed to repurchase from the employee a company home if the plaintiff occupied it for twelve months prior to giving his notice to repurchase. The employee was wrongfully dismissed eight months after occupation of the home. It was held at trial that the employee was entitled to twelve months' notice of termination and, had he been given proper notice, he would have completed twelve months of occupation and become entitled to the benefit under the repurchase agreement. The *Gillespie* case illustrates the respondent's point that the appellant in this type of case is not entitled to be compensated by his employer for all losses that flow from a termination of a contract of employment but only those which arise from a failure to give reasonable notice of termination.

Other cases were cited where courts found implied terms which supported claims for wrongful dismissal. They include *Ashford v. Laing Construction and Equipment Ltd.* (see B.C.S.C., Gould J., Vancouver Registry No. C770710, December 14, 1978, unreported) where the event giving rise to the pension claim -- an abandonment of the employer's operations -- was neither contemplated by the parties nor provided for in the pension agreement. In the absence of any provision to the contrary the employer's pension contribution was awarded to the employee. The situation at bar, however, is not one in which a term must be implied to cover a situation not within the contemplation of the parties, but rather one where the parties made specific provision for the events which occurred. The appellant cited further cases such as *Sloan v. Union Oil Co. of Canada*

(1955), 16 W.W.R. 225 (B.C.S.C.), *Wilson v. Rudolph Werlitzer Co.*, 194 N.E. 441 (1934) (Ohio C.A.), *Kern v. City of Long Beach*, 179 P.2d 799 (1947), and *Police Pension and Relief Bd. of City and County of Denver v. Bills*, 366 P.2d 581 (1961).

I agree with the submission of the respondent that none of these cases deals with the question raised before us. Certain of these cases will be applicable where the interests of the employer are not defined or where governmental authority intervenes and purports to repeal by legislation the basis of an existing right (*Kern v. City of Long Beach, supra*). Some American cases have implied vesting where there were no express terms concerning the question (*Wilson v. Rudolph Werlitzer Co., supra*). These cases are consistent with *Ashford v. Laing Construction and Equipment Ltd., supra*. None of these cases, however, affords authority for the proposition that a right may be implied to a pension entitlement on dismissal where express provision has been made in the contract of employment to cover the events which have occurred.

The law has long been settled that in assessing damages for wrongful dismissal the principal consideration is the notice given for the dismissal. A contract of employment does not in law have an indefinite existence. It may be terminated by either employer or employee and no wrong in law is done by the termination itself. An employee who is dismissed is entitled to the notice agreed upon in the employment contract or, where no notice period is specified in the contract, to reasonable notice. He is entitled in the alternative in the absence of due notice to payment of remuneration for the notice period. The significance of notice is illustrated by reference to *Gillespie v. Bulkley Valley Forest Industries Ltd., supra*, where vesting of an interest in the plan would have occurred before expiry of the notice period. In this case the employee succeeded. The case at bar is different. Even if due notice had been given, the appellant would not have acquired a vested interest during the notice period and, since specific provision had been made in the pension agreement, the appellant's claim must fail. Whatever may be implied in a case

of ambiguity or absence of a provision, no term may be implied in a contract which is contrary to the clearly expressed intention of the parties: see *Chitty on Contracts* (25th ed. 1983), at p. 460, and *London Export Corp. v. Jubilee Coffee Roasting Co.*, [1958] 2 All E.R. 411, at pp. 417-18, *per* Jenkins L.J.

Aggravated Damages

In his statement of claim, the appellant advanced a claim for mental distress as the result of the termination of his contract of employment in these terms:

The plaintiff makes a claim for mental distress, anxiety, vexation and frustration suffered by the plaintiff as a result of the termination of his contract of employment by the defendant.

Later, in the prayer for relief, in addition to asserting claims for general and special damages for breach of contract, he claimed punitive damages. In pursuit of his claim for mental distress, the appellant argued at trial that the offensive and unjustifiable conduct of Reid, a superior in his employment, was such that it caused great mental distress, anxiety, vexation and frustration as alleged in the pleadings, and in support of his claim he cited several cases. The trial judge reviewed the authorities, including *Tippett v. International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146 (B.C.S.C.), where union members wrongfully dismissed from the Union were awarded damages of \$500 for loss of social prestige and humiliation; *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233 (C.A.), where a breach of contract by a travel agent caused the loss of a holiday with attendant distress, upset and frustration; *Cringle v. Northern Union Insurance Co.* (1981), 124 D.L.R. (3d) 22, where Ruttan J., of the British Columbia Supreme Court, recognized that damages could be awarded for mental distress in an action in contract, citing *Cox v. Philips Industries Ltd.*, [1976] 3 All E.R. 161 (Q.B.), and *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R.

(2d) 711 (H.C.), but suggested that in such cases actual damage should be shown. The trial judge, at pp. 734-35, reached the conclusion upon a consideration of those and other authorities that "The rule expressed in *Addis v. Gramophone Co. Ltd.* as restated in Canada in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper* (1966), 58 D.L.R. (2d) 1 at p. 10, [1966] S.C.R. 673, 56 W.W.R. 641 (S.C.C.), and in *Harvey Foods Ltd. v. Reed* (1971), 18 D.L.R. (3d) 90, at pp. 93-4, 3 N.B.R. (2d) 444 (N.B.C.A.), is unaffected by those decisions."

He, accordingly, refused the general damage claim for aggravated damages for mental distress, and in this he was supported by the Court of Appeal. The trial judge sought to distinguish between damages for mental distress which, as will be explained below, would include cases properly classified as aggravated damages, and punitive or exemplary damages. In respect of punitive damages, he said at p. 735: "If exemplary damages could be awarded in a wrongful dismissal case I would award them here." On his interpretation of *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, he held that the sole measure of damages for wrongful dismissal was the salary which the plaintiff was entitled to during the period of reasonable notice. Therefore, he awarded neither aggravated nor punitive damages.

Before dealing with the question of punitive damages, it will be well to make clear the distinction between punitive and aggravated damages, for in the argument before us and in some of the materials filed there appeared some confusion as to the distinction. Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction

is clearly set out in Waddams, *The Law of Damages* (2nd ed. 1983), at p. 562, para. 979, in these words:

An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in *Cassell & Co. Ltd. v. Broome*, but "punitive" has also been used in many Canadian courts including the Supreme Court of Canada in *H. L. Weiss Forwarding Ltd. v. Omnus*. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

The issue which is faced by this Court is whether punitive damages may be awarded by the Court in an action for breach of contract, based on wrongful dismissal of an employee, and, if so, whether the circumstances of this case would merit such an award. Also, before the Court is a similar question with respect to aggravated damages. This question was not shown in the appellant's factum as a question in issue but much of the argument and many of the cases cited concerned the question, presumably on the theory that aggravated damages were included in the concept of punitive damages, and for that reason this issue will be addressed first.

Consideration of a claim for damages as a result of unlawful dismissal from employment usually commences with *Addis v. Gramophone Co., supra*, and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper, supra*. In *Addis*, the plaintiff was held to have been wrongfully dismissed from his employment with the defendant. The contract of employment provided that he could be dismissed on six months' notice. The employer gave him the appropriate notice, but at once appointed his successor and effectively prevented him from performing his duties and earning his full remuneration during the notice period. The manner in which his dismissal was brought about was injurious to his business reputation and caused significant distress. He brought action for wrongful dismissal. The jury found that he had been wrongfully dismissed and fixed damages at six hundred pounds for wrongful dismissal and three hundred and forty pounds for lost commissions in the period of notice. The damages of six hundred pounds greatly exceeded the salary which would have been payable to him in the notice period. On the appeal, the question was whether the jury could in law award the plaintiff such damages over and above the salary he would have earned had he been permitted to work during the six-month notice period. The majority of the House of Lords determined that the jury could not award more than salary lost during the notice period. This case has long stood as an authority for the proposition that in a case of wrongful dismissal damages are limited to the earnings lost during the period of notice to which the employee is entitled and cannot include damages for the manner of dismissal, for injured feelings, or for loss sustained from the fact that the dismissal makes it more difficult for the plaintiff to obtain other employment. In the *Peso Silver Mines* case, *supra*, a decision of this Court, a director of a corporation was wrongfully dismissed. In dismissing him, the corporation made unsubstantiated charges against him which impaired his reputation in the mining community. He brought action for wrongful dismissal and claimed, in addition to lost salary, damages for injury to his reputation. Damages were awarded at trial on this second heading. In the British Columbia Court of Appeal (1965), 56 D.L.R. (2d) 117, Bull J.A., speaking for the

majority, disallowed the award of damages as it related to damage for loss of reputation with these words at p. 161:

As to the quantum awarded, I consider, with respect, that the learned trial Judge erred in two particulars. First, he increased the damages to \$10,000 (9 1/4 months' salary) from \$6,500 (6 months' salary) which he said he would have awarded had it not been for damage to the respondent's reputation among mining men. There is no evidence of such damage to reputation, and, in any event, I do not consider this that type of contract of employment which involves any collateral or implied agreement the breach of which justifies the awarding of damages for loss of reputation

On the appeal to this Court, Cartwright J. (as he then was) speaking for the full Court, said at p. 684:

I agree with Bull J.A. that the claim being founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. I am also in agreement with Bull J.A. that in view of the respondent's evidence that he remained unemployed for only five months the award should be reduced to \$6,500.

The *Addis* case was not referred to by either Bull J.A. or Cartwright J., but the *Peso Silver Mines* decision discloses a clear application of the *Addis* principle and has been regarded as having followed it.

These two cases have resulted in much judicial comment and the subsequent case law has not been consistent. There is English authority for the proposition that the *Addis* case will not bar a claim for general damages for mental distress in an action for a breach of contract: see *Jarvis v. Swans Tours Ltd.*, *supra*, *Cox v. Philips Industries Ltd.*, *supra*, *Heywood v. Wellers (a firm)*, [1976] 1 All E.R. 300 (C.A.) These cases stand for the proposition that in some contracts the parties may well have contemplated at the time of the contract that a breach in certain circumstances would cause a plaintiff mental distress. This line of authority was followed by

Linden J. in *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277 (H.C.) In the Court of Appeal in that case, *per* Weatherston J.A. writing for the court, (1983), 150 D.L.R. (3d) 729, the award of damages for mental distress was disallowed, but it may be said that the power of the court to award damages upon that basis in an appropriate case was implicitly accepted.

Also, following this line of authority are such cases as *Pilon v. Peugeot Canada Ltd.*, *supra*; *Pilato v. Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652 (H.C.), *Speck v. Greater Niagara General Hospital* (1983), 43 O.R. (2d) 611 (H.C.), and *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.), which case was upheld on appeal in the Ontario Court of Appeal (1983), 4 D.L.R. (4th) 383, (leave to appeal denied, [1984] 1 S.C.R. xiii). Finally, in *Perkins v. Brandon University and Potter* (1985), 35 Man. R. (2d) 177, the majority of the Manitoba Court of Appeal (Hall and Matas JJ.A., Huband J.A. dissenting) refused to strike out a claim for damages for loss of reputation due to wrongful dismissal. Hall J.A. expressed the view that the common law was flexible and that it could comprehend such a claim. On the other hand, the *Addis* case with its stricture against the awarding of damages for mental distress and loss of reputation was followed in *Abouna v. Foothills Provincial General Hospital Board (No. 2)* (1978), 83 D.L.R. (3d) 333 (Alta. C.A.), and *McMinn v. Town of Oakville* (1978), 19 O.R. (2d) 366 (H.C.)

From the foregoing authorities, I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the *Addis* and *Peso Silver Mines* cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always

been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice.

I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here. As noted by Hinkson J.A. in the Court of Appeal, at p. 46:

It was not suggested by the plaintiff that Reid's actions in the months prior to his termination constituted a breach of contract. Upon the basis of the reasoning in the *Brown* case, Reid's conduct was not a separate head of damages in the claim for breach of contract.

His reference to the *Brown* case was to the words of Weatherston J.A. in *Brown v. Waterloo Regional Board of Commissioners of Police, supra*, p. 736, where speaking for the Court, he said:

If a course of conduct by one party causes loss or injury to another, but is not actionable, that course of conduct may not be a separate head of damages in a claim in respect of an actionable wrong. Damages, to be recoverable, must flow from an actionable wrong. It is not sufficient that a course of conduct, not in itself actionable, be somehow related to an actionable course of conduct.

Furthermore, while the conduct complained of, that of Reid, was offensive and unjustified, any injury it may have caused the appellant cannot be said to have arisen out of the dismissal itself. The conduct complained of preceded the wrongful dismissal and therefore cannot be said to have aggravated the damage incurred as a result of the dismissal. Accordingly, I would refuse any claim for aggravated damages in respect of the wrongful dismissal.

Punitive Damages

Problems arise for the common law wherever the concept of punitive damages is posed. The award of punitive damages requires that:

. . . a civil court . . . impose what is in effect a fine for conduct it finds worthy of punishment, and then to remit the fine, not to the State Treasury, but to the individual plaintiff who will, by definition, be over-compensated. [Waddams, p. 563.]

This will be accomplished in the absence of the procedural protections for the defendant -- always present in criminal trials where punishment is ordinarily awarded -- and upon proof on a balance of probabilities instead of the criminal standard of proof beyond a reasonable doubt. Nevertheless, despite the peculiar nature of punitive damages, it is well settled in law that in appropriate cases they may be awarded: see *Rookes v. Barnard*, [1964] A.C. 1129. But all authorities accept the proposition that an award of punitive damages should always receive the most careful consideration and the discretion to award them should be most cautiously exercised. As has been mentioned earlier, punitive damages are not compensatory in nature. The scope of punitive damages was restricted in *Rookes v. Barnard*, *supra*, and, as noted by Waddams, *supra*, Lord Devlin in that case retained two categories for their application, namely, abuse of power by government, and torts committed for profit. In Canada, however, Spence J. stated in *McElroy v. Cowper-Smith and Woodman*, [1967] S.C.R. 425, a defamation case, that the jurisdiction in this country to award punitive damages is not so limited. Though this was said in dissent, the majority did not deal with the point and did not comment on the statement: see, as well, *Paragon Properties Ltd. v. Magna Investments Ltd.* (1972), 24 D.L.R. (3d) 156 (Alta. C.A.), *per* Clement J.A. The courts of Australia and New Zealand have also dealt with *Rookes v. Barnard*, *supra*, and in general have rejected its approach in this connection: see *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118, in the High Court of Australia, and *Fogg v. McKnight*, [1968] N.Z.L.R. 330, in the Supreme Court of New Zealand. It is fair to say that the courts of the Commonwealth, outside of the United Kingdom, have not, in general, accepted the limitations

on the power of the courts to award punitive damages: see Waddams, *supra*, p. 570, para. 996.

I would conclude that the *Rookes and Barnard* limitation should not apply in Canada. The law of British Columbia, then, accords wider scope for the application of punitive damages than that envisaged in *Rookes v. Barnard*.

When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff. This would be consistent with the approach of Weatherston J.A. in *Brown v. Waterloo Regional Board of Commissioners of Police, supra*, and it has found approval in the *Restatement on the Law of Contracts 2d* in the United States, as noted with approval by Craig J.A., at p. 49, where he referred in the Court of Appeal to s. 355, which provides:

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

An example of the application of this principle may be found in the case of *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228 (B.C.C.A.) In that case, the plaintiff, a professional hockey player, suffered severe injury and damage because he was denied proper medical attention, when the defendant was under a duty to provide it, and because he was forced to continue playing and practising until in his weakened condition he suffered serious injury. He was awarded punitive damages in addition to compensatory general damages. The punitive damages were ordered because of the offensive attitude and conduct of the defendant before the

final injury occurred, which conduct in refusing medical care and attention, in addition to its abusive nature, was tortious because of its negligent disregard of a duty to provide care. It was, as well, causative of the injury suffered, for the plaintiff, because of the attitude of the defendant, continued to practise and play. These activities caused or materially contributed to his crippling injury: see, as well, *H. L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776, where the award of punitive damages was based on a finding of the tort of conspiracy which led to the breach of the contract of employment.

Turning to the case at bar, it is clear from the judgments below that the appellant's superior, Reid, treated him in a most offensive manner. As has been noted, the trial judge would have awarded punitive damages had he been of the view that it was open to him to do so. The question before us now is whether the trial judge was right in concluding that it was not open to him to award the punitive damages. In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award. In tort cases, claims where a plaintiff asserts injury and damage caused by the defendant, the situation is different. The defendant in such a case is under a legal duty to use care not to injure his neighbour, and the neighbour has in law a right not to be so injured and an additional right to compensation where injury occurs. The injured party is entitled to be made whole. The compensation he is entitled to receive depends upon the nature and extent of his injuries and not upon any private arrangement made with the tortfeasor. In an action based on a breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant has breached the contract, the remedies open to the plaintiff must arise from that contractual relationship, that "private law", which the parties agreed to accept. The injured plaintiff then is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss. This distinction will not

completely eliminate the award of punitive damages but it will make it very rare in contract cases.

Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment. This view has found expression in Canadian courts: see *Paragon Properties Ltd. v. Magna Envestments Ltd.*, *supra*, where Clement J.A., dissenting on the issue of whether damages should have been awarded but not on the principle governing the award, said at p. 167:

Rookes v. Barnard cannot be said to have been adopted by Canadian Provinces as the common law. It is upon the common law of England prior to 1964 that our Canadian jurisprudence in respect of exemplary damages has been developed, and in its decision the House of Lords has departed very materially from that common law. The case recognizes the principle of exemplary damages, but in restricting its application it, in my opinion, does injustice to the principle. The basis of such an award is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the Court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supra-compensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act. It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction.

In other cases the same principles have been expressed: see *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146 (N.S.S.C.A.D.), where Pace J.A., speaking for the court, made the following statements in respect of the circumstances which will permit the awarding of punitive damages, at p. 152:

Exemplary or punitive damages may be awarded where the defendant's conduct is such as to merit punishment. This may be exemplified by malice, fraud or cruelty as well as other abusive and insolent acts towards the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate to the offender that the law will not tolerate conduct which wilfully disregards the rights of others.

And see as well *Meyer v. Gordon* (1981), 17 C.C.L.T. 1 (B.C.S.C.), where Legg J., in refusing an award of punitive damages, said at p. 53:

The lack of care, the inadequate charting, and the unsatisfactory evidence to which I have referred establish liability for negligence on the defendant Hospital. It is negligence that has caused a tragic outcome for the plaintiffs. To the extent that the law can compensate the plaintiffs for their loss, damages will be assessed and awarded. But I am unable to find in the defendants' conduct that character of high-handedness, maliciousness, contempt of the plaintiffs' rights or that disregard of every principle of decency which is the foundation for an award of exemplary and punitive damages.

In the case at bar, the plaintiff was entitled to have the salary and benefits agreed upon under the contract of employment while he continued in such employment. Each party had the right to terminate the contract without the consent of the other, and where the employment contract was terminated by the employer, the appellant was entitled to reasonable notice of such termination or payment of salary and benefits for the period of reasonable notice. The termination of the contract on this basis by the employer is not a wrong in law and, where the reasonable notice is given or payment in lieu thereof is made, the plaintiff -- subject to a consideration of aggravated damages which have been allowed in some cases but which were denied in this case -- is entitled to no further remedy: see *Addis v. Gramophone Co.*, *supra*, and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, *supra*.

It is argued that the conduct of the defendant, that is, the supervisor Reid, prior to the dismissal was such that it caused mental distress and frustration to the appellant. This conduct, however, was not considered sufficiently offensive, standing alone, to constitute actionable wrong: see

Hinkson J.A., *supra*, and in my view was not of such nature as to justify the imposition of an award of punitive damages. I would, accordingly, dismiss the appeal with costs.

//Wilson J.//

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J. (dissenting in part) -- I agree with my colleague McIntyre J. that the appellant's claim for lost pension rights is without merit. I am, however, in respectful disagreement with my colleague's disposition of the appellant's claim for punitive damages and with his approach to the law on mental suffering as a recoverable head of damage in breach of contract cases. It is necessary for me to set out the facts in greater detail in order to deal with the latter two claims.

The appellant is a solicitor who was employed by the respondent, Insurance Corporation of British Columbia (I.C.B.C.), in its legal department from 1974 to 1981. He had graduated from law school in 1972 after a successful career as an engineer with DuPont of Canada Ltd. He left DuPont to enter law school rather than accept a transfer to eastern Canada. He was Western District Sales Manager for DuPont at the time. He took up his employment with the respondent as a junior solicitor on September 24, 1973 when the respondent was starting up its business. His work initially was of a routine nature and included the preparation of leases and real estate purchases with a view to the establishment of claim centres and other facilities for the corporation throughout the Province. He was promoted from the position of Solicitor I to Solicitor II on July 1, 1976 and given merit increases in salary in 1978, 1979 and 1980. In January of 1981 his employment was abruptly terminated and he was required to vacate his office by February 13, 1981. He was 49 years old at the time.

On October 1, 1979 the respondent had hired as General Counsel a Mr. Reid who was given a mandate to improve the quality of the Corporation's legal work with specific attention to productivity. He became the appellant's immediate superior. Difficulties arose between Mr. Reid and the appellant, Mr. Reid being of the view that the appellant took too long to get his work done. For example, Mr. Reid complained that the appellant wrote in long-hand as opposed to using a dictating machine. There was no complaint about the quality of the appellant's work or that he failed to meet deadlines required for his assignments nor was it alleged that he did not carry his fair share of the workload. He was simply conscientious to a fault, according to the learned trial judge, and, in the words of Mr. Reid, was prone "to produce a Cadillac when a Ford would do".

Mr. Reid became increasingly dissatisfied with the pace of the appellant's work. By November of 1980 he had set up "productivity meetings" each Monday morning in which he reviewed the appellant's work in relation to the number of hours he spent on each project. The trial judge found that these meetings "became an inquisition" and "as the pressure increased the plaintiff became tense, agitated and distressed, finally resorting to medical attention and a tranquillizer".

The appellant was dismissed on January 21, 1981 without any particular precipitating event but simply because, according to the trial judge, he did not fit into Mr. Reid's plans for the department. The trial judge found that the appellant was "an honest, loyal, trustworthy and diligent employee" and was dismissed without cause and without reasonable notice. The respondent offered to pay his salary and certain benefits for an eight-month period if he agreed by January 23, 1981 to release the corporation from any claim arising out of his employment and its peremptory termination. Since the appellant was not prepared to admit that he was incompetent and that his employer had just cause for his dismissal on account of his incompetence, he refused the offer. He left the respondent's employ on January 23, 1981 and

was paid up to February 15, 1981. He obtained other employment in September of 1981 but not as a solicitor.

The points of disagreement I have with McIntyre J. concern the proper test to be applied in determining whether an award of damages for mental suffering and an award of punitive damages may be made in breach of contract cases. Since the law in both areas seems to be in a state of some confusion, as the Court recognized when it granted leave to appeal to this Court, I am setting out my views in each area although I differ in result from my colleague only on the issue of punitive damages.

The trial judge made the following findings which are relevant to the issues under review: see (1982), 134 D.L.R. (3d) 727. He stated at p. 735:

What the plaintiff is really asking me to do in this case is to award additional damages for the harsh and humiliating way in which he was treated by Mr. Reid. If exemplary damages could be awarded in a wrongful dismissal case I would award them here. Mr. Reid must have known that the plaintiff was a sincere, sensitive and dedicated employee. He was indifferent to the plaintiff's feelings, constantly criticized his shortcomings while giving him no credit for his accomplishments. He set up a meeting each Monday, which he called a "productivity meeting" at which he reviewed the work done by the plaintiff during the previous week. He criticized the plaintiff for the number of hours he spent on each project. He criticized him because he did not employ the same work habits as he did. It became an inquisition, and as the pressure increased the plaintiff became tense, agitated and distressed, finally resorting to medical attention and a tranquillizer. That stage was reached almost two months before his dismissal. The plaintiff is a man who would do his utmost to satisfy his employer. I am convinced that he was not treated fairly by the defendant. When he did not bend to the will of his inquisitor he was abruptly terminated, being given an opportunity of reasonable notice only if he agreed to admit that he was incompetent. A colourable attempt was made to find him other employment within the company, but all it did was to emphasize his shortcomings, and damage his reputation. The authorities hold, however, that he is to be compensated only for his financial loss. He is to be put in the same financial position as he would have been in had he been given reasonable notice. [Emphasis added.]

It is clear from the foregoing that the learned trial judge denied the claim for damages for mental suffering and punitive damages in this case only because he thought they could not be

awarded. The Court of Appeal approved his view that neither damages for mental suffering nor punitive damages were available in a breach of contract case. It is to that proposition that I now direct my attention.

Damages for Mental Suffering

I agree with my colleague, McIntyre J., that in appropriate circumstances aggravated damages for mental suffering may be awarded in breach of contract cases and that they are, in distinction to punitive damages, essentially compensatory. However, I take a somewhat different approach from my colleague as to the test to be applied in determining whether or not to award them.

The trial judge in this case applied the absolute rule set out in *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, to the effect that damages for mental suffering are not available in breach of contract cases because contractual damages must be compensatory, tangible and estimable. They are confined to putting the plaintiff in the financial position he would have been in had he been given reasonable notice. With respect, I think this is no longer the law. The absolute rule has been whittled away by the numerous English and Canadian authorities referred to by my colleague in which damages have been awarded for mental suffering in a variety of different contractual situations. It is my view, however, that what binds all these cases together, their common denominator so to speak, is the notion that the parties should reasonably have foreseen mental suffering as a consequence of a breach of the contract at the time the contract was entered into. That this is the true test appears clearly, I believe, from Lord Denning's judgment in *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233 (C.A.), and from the Ontario Court of Appeal's judgment in *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113.

In *Jarvis v. Swans Tours Ltd.*, Lord Denning allowed compensation for "the disappointment, the distress, the upset and frustration" occasioned by a ruined holiday. He viewed this head of damages as compensatory. He dismissed the argument that such damages were difficult to quantify by asserting the well-known principle that difficulty of assessment should not deter the courts when the plaintiff has a just cause. Finally and most importantly, he held that such damages were properly awardable in contract provided they conformed to the normal rules for remoteness of damage in contract. It seems to me that this is the correct approach.

Certainly Weatherston J.A. followed it in *Brown v. Waterloo Regional Board of Commissioners of Police, supra*. He stated at pp. 118 and 120:

Any breach of contract that results in pecuniary loss to the injured party will inevitably cause some mental distress -- rage and frustration at least. But in the ordinary commercial transaction, the reasonable expectations of the parties are that the disappointed party will bear himself with a measure of fortitude, and be satisfied if he can recoup his financial loss. There may be a measure of policy in denying damages for mental distress in cases when there is nothing more than pecuniary loss. But I think this is not so much an exception to the rule in *Hadley v. Baxendale* as a practical application of it. In *Addis v. Gramophone Co., supra*, at p. 495, Lord Atkinson mentioned three exceptions to the general rule that compensation for injured feelings could not be awarded in an action for breach of contract -- actions for breach of promise of marriage, actions against a banker for refusing to pay a customer's cheque when he has funds of his customer to meet it, and actions where the vendor of real estate, without any fault on his part, fails to make title. These actions are all for damages within the reasonable contemplation of the parties. In the case of breach of promise of marriage, the intended bride has been deprived of that conjugal bliss that was the supposed object of the contract; a banker who refuses to honour a draft must surely know that his customer's credit will be affected; and actions for failure to make title were an exception based on the uncertainty of titles in England -- an exception no longer the law of Canada.

Jarvis v. Swans Tours Ltd., [1973] Q.B. 233, and *Jackson v. Horizon Holidays Ltd.*, [1975] 3 All E.R. 92, were cases where the defendants failed to provide holidays, as promised. The object of the contract was to provide pleasure. The breach of contract necessarily resulted in the loss of that pleasure.

...

The cases that I have referred to show that there may be circumstances where a breach of contract will give rise to a claim for damages for mental distress. In my opinion, the correct rule is stated in *Corbin, supra*, vol. 5, p. 429, citing the *Restatement of the Law of Contracts*, para. 341, as follows:

There is sufficient authority to justify the statement that damages will be awarded for mental suffering caused by the wanton or reckless breach of a contract to render a performance of such a character that the promisor had reason to know when the contract was made that a breach would cause such suffering, for reasons other than pecuniary loss.

The availability of damages for mental distress caused by a breach of contract is noted by Professor Fridman in his treatise *The Law of Contract in Canada* (2nd ed. 1986). After discussing the normal measure of damages in contract Professor Fridman points out that "in Canada if not in England" attitudes are changing towards the recoverability of damages for intangible loss (at p. 674). He states at p. 675:

By intangible loss is meant such consequences as loss of reputation, insult, annoyance, aggravation, nervous shock, inconvenience, mental distress, or other emotional or sentimental suffering. In recent years in England and Canada, there has been a growing realization that such results of a breach of contract should also be the subject of compensation, as long as the doctrine of *Hadley v. Baxendale* is applicable. There has been a greater acceptance of the idea that such damages can, and should be awarded in appropriate cases.

Professor Fridman notes that the most important type of contract in which damages for mental distress have been awarded is the employment contract (p. 677). He suggests that this is because of the nature of the relationship it creates which is one of trust and confidence (p. 681). I would add that it may also be because of the vulnerability of the employee to the superior authority of the employer. Brian Grosman and Stephen Marcus note, after a survey of recent cases in their article "New Developments in Wrongful Dismissal Litigation" (1982), 60 *Can. Bar Rev.* 656, at pp. 668-69, that:

... the courts have demonstrated a willingness to disassociate their analysis of contracts from a strict application of remedies available to parties to ordinary commercial contracts. In doing so, the courts are more willing to take a broad view of the *Hadley v. Baxendale* test, linking the concept of "reasonable contemplation of the parties" to the concept of foreseeability.

In *Cox v. Philips Industries Ltd.*, [1976] 3 All E.R. 161 (Q.B.), damages for mental distress were awarded to an employee who was demoted in breach of a promise of promotion made to him by his employer in order to keep him from accepting an attractive offer from a competitor. Lawson J. stated at p. 166:

I now come back to this question of the breach of the contractual term which I find took place when he was relegated to a position of lesser responsibility. I have already said his salary remained the same but there is not the slightest doubt in my mind that the result of this relegation, in breach of contract contrary to the promise that the defendants had made, did expose him to a good deal of depression, vexation, frustration and indeed leading to ill health. The question is: can I give him damages in respect of those matters for that breach of contract?

I have considered *Jarvis v. Swans Tours Ltd.*, which is referred to but I think not particularly helpfully in the later case of *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd.*

In my judgment, this is a case where it was in all the circumstances in the contemplation of the parties that, if that promise of a position of greater responsibility was breached, then the effect of that breach would be to expose the plaintiff to the degree of vexation, frustration and distress which he in fact underwent.

Likewise, in *Antonaros v. SNC Inc.* (1984), 6 C.C.E.L. 264 (Ont. H.C.), it was held that when an employer had induced a middle-aged employee to leave his job, it was in the reasonable contemplation of the parties that the employee would suffer mental distress if terminated without reasonable notice. Similarly, in *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711 (H.C.), damages for mental distress were awarded to a loyal employee who had been led to believe that he had life-time tenure and then was dismissed in a callous and peremptory fashion. In *Tippett v. International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146 (B.C.S.C.), damages for mental distress were awarded when the plaintiff employee was dismissed from membership in his trade union on the basis of false allegations of "ratting". Damages for mental distress caused by a breach of an employment contract have been awarded in a number of other cases: see *Gordon v. Saint John Shipbuilding & Dry Dock Co.* (1983), 47 N.B.R. (2d) 150 (N.B.Q.B.), *Cormier v. Hostess Food Products Ltd.* (1984), 52 N.B.R. (2d) 288 (N.B.Q.B.), *Pilato v. Hamilton*

Place Convention Centre Inc. (1984), 45 O.R. (2d) 652 (H.C.), *Lightburn v. Mid Island Consumer Services Co-operative* (1984), 4 C.C.E.L. 263 (B.C. Co. Ct.), *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.), rev'd. on other grounds (1983), 4 D.L.R. (4th) 383 (Ont. C.A.), leave denied, [1984] 1 S.C.R. xiii, *Speck v. Greater Niagara General Hospital* (1983), 43 O.R. (2d) 611 (H.C.)

I must respectfully disagree with my colleague's view that conduct advanced in support of a claim for damages for mental suffering must constitute a separate "actionable wrong" from the breach itself. I disagree also that because the conduct complained of preceded the wrongful dismissal it cannot aggravate the damages resulting from that dismissal. Rather than relying on a characterization of the conduct as an independent wrong, I think the proper approach is to apply the basic principles of contract law relating to remoteness of damage. These were articulated by Baron Alderson of the Court of Exchequer Chamber in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, at pp. 354-55 and at p. 151, as follows:

Now we think the proper rule in such a case as the present is this: -- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

However, since the decision in *Cox v. Philips Industries Ltd.*, *supra*, the Court of Appeal in England has departed from what in my opinion is the sound proposition that damages for mental distress can be recovered for breach of contract when it can be said to have been in the reasonable contemplation of the parties when the contract was made that its breach would cause such distress. In *Bliss v. South East Thames Regional Health Authority*, [1987] I.C.R. 700, the Court of Appeal reversed the decision of the trial judge to award damages for frustration and mental distress which an employee experienced when his employer breached his employment contract by requiring him to go for a psychiatric examination after an angry dispute with a colleague. Dillon L.J. concluded that the views expressed by Lawson J. in *Cox v. Philips Industries Ltd.* were wrong and that, in the absence of its reversal by the House of Lords, the general rule barring such damages in *Addis v. Gramophone Co.* was the law in England subject to a narrow exception. He said at pp. 717-18:

The general rule laid down by the House of Lords in *Addis v. Gramophone Co. Ltd.* [1909] A.C. 488 is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. Modern thinking tends to be that the amount of damages recoverable for a wrong should be the same whether the cause of action is laid in contract or in tort. But in the *Addis* case Lord Loreburn regarded the rule that damages for injured feelings cannot be recovered in contract for wrongful dismissal as too inveterate to be altered, and Lord James of Hereford supported his concurrence in the speech of Lord Loreburn by reference to his own experience at the Bar.

There are exceptions now recognised where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress: see *Jarvis v. Swans Tours Ltd.* [1973] Q.B. 233 and *Heywood v. Wellers* [1976] Q.B. 446. Those decisions, do not however cover this present case.

In *Cox v. Philips Industries Ltd.* [1976] I.C.R. 138 Lawson J. took the view that damages for distress, vexation and frustration, including consequent ill-health, could be recovered for breach of a contract of employment if it could be said to have been in the contemplation of the parties that the breach would cause such distress etc. For my part, I do not think that that general approach is open to this court unless and until the House of Lords has reconsidered its decision in the *Addis* case.

Subsequently, in *Hayes and anor v. Dodds*, [1988] N.L.J. 259, the Court of Appeal disallowed damages for mental distress suffered when solicitors assured the plaintiff purchasers before they signed a contract of sale that a right of way was available giving access to the rear of the premises when in fact it was not and, as a consequence, the plaintiffs could not carry on their business. The Court affirmed the proposition stated in *Bliss v. South East Thames Regional Health Authority, supra*, that damages for mental distress in contract are as a matter of policy limited to certain classes of cases, namely those in which the object of the contract was to provide peace of mind or freedom from distress. Staughton L.J. stated at p. 259:

Like the judge, I consider that the English courts should be wary of adopting what he called "the United States practice of huge awards". Damages awarded for negligence or want of skill, whether against professional men or anyone else, must provide fair compensation but no more than that. And I would not view with enthusiasm the prospect that every shipowner in the Commercial Court, having successfully claimed for unpaid freight or demurrage, would be able to add a claim for mental distress suffered while he was waiting for his money.

In a sense the wrong done to the plaintiffs in this action, for which they seek compensation under this head, lay in the defendants' failure to admit liability at an early stage. On July 6, 1983 the defendants acknowledged that there was no right of way, but denied negligence. Had they on that very day admitted liability and tendered a sum on account of damages, or offered interim reparation in some other form, the anxiety of the plaintiffs and their financial problems could have been very largely relieved. But liability was not admitted until January 1987. I believe that in one or more American states damages are awarded for wrongfully defending an action. But there is no such remedy in this country so far as I am aware.

I would respectfully reject the narrow approach in *Bliss v. South East Thames Regional Health Authority* and *Hayes and anor v. Dodds* not the least because it would categorically exclude the availability of damages for mental distress in the employment contract context since such contracts do not in the normal course have as their object the provision of peace of mind and freedom from distress.

It is my view that the established principles of contract law set out in *Hadley v. Baxendale* provide the proper test for the recovery of damages for mental suffering. The principles are well-settled and their broad application would appear preferable to decision-making based on a priori and inflexible categories of damages. The issue in assessing damages is not whether the plaintiff got what he bargained for, i.e., pleasure or peace of mind (although this is obviously relevant to whether or not there has been a breach) but whether he should be compensated for damage the defendant should reasonably have anticipated that he would suffer as a consequence of the breach. The Court of Appeal in *Hayes and anor v. Dodds* seems to have been unduly concerned at the prospect of large "U.S.-style" awards for mental suffering, ignoring the fact that the award has to be quantified on a sensible and realistic basis. Indeed, awards under this head have tended to be rather modest in Britain and in Canada. For example in *Cox v. Philips Industries Ltd.* the damages for mental suffering awarded against the corporate employer were assessed at £500. In the Canadian cases of *Antonaros v. SNC Inc.* and *Pilon v. Peugeot Canada Ltd.* the damages (also against corporate employers) were assessed at \$3,500 and \$7,500 respectively. I mention this not to endorse the propriety of the awards in these cases but to point out that the fear of unrealistic or unfair awards for mental distress in breach of contract cases is not really warranted by anything that has happened to date.

The first branch of the rule in *Hadley v. Baxendale* has undergone some modification since the case was first decided. In *Victoria Laundry (Windsor Ld.) v. Newman Industries Ltd.*, [1949] 2 K.B. 528 (C.A.), it was held that damage in the reasonable contemplation of the parties had to be damage that was "on the cards". However, in *Koufos v. C. Czarnikow Ltd.*, [1969] 1 A.C. 350 (H.L.), this formulation was said to be too narrow and was amended to encompass a loss that was "a serious possibility" or "a real danger" or "liable to result". It was stated, however, that the standard for recovery, despite this modification, was still more stringent than the tort test of "reasonable foreseeability".

The need for special circumstances under the second branch has been invoked both to allow and to deny recovery. It was used to allow recovery in *Newell v. Canadian Pacific Airlines, Ltd.* (1976), 14 O.R. (2d) 752 (Co. Ct.), and *Heywood v. Wellers*, [1976] 1 All E.R. 300 (C.A.) In the *Newell* case an elderly couple wanted to send their dogs by plane and went to great lengths to check that it was safe, making it abundantly clear in the process that they would be distressed if anything were to happen to their pets. One of the dogs died in transit and, while mental suffering resulting from such an eventuality would not normally be in the reasonable contemplation of the parties, it clearly was so in the special circumstances of this case. In the *Heywood* case lawyers who negligently failed to provide services to protect their client from molestation by securing an injunction were held liable for the mental distress which they were aware would result from their failure to do so. By contrast, recovery was denied in *Cook v. Swinfen*, [1967] 1 W.L.R. 457 (C.A.), because of the absence of special circumstances. In that case a lawyer, Mr. Swinfen, was held not to be liable for the breakdown of the mental health of his client, Mrs. Cook, after he had agreed to pursue divorce proceedings on her behalf and had then negligently failed to do so. After concluding that the client's mental distress was not reasonably foreseeable, Lord Denning, M.R., stated at pp. 461-62:

It was suggested in this case that there were special circumstances in that Mrs. Cook was peculiarly liable to nervous shock. I am afraid that she was. The history of her life shows one nervous breakdown after another. If this special circumstance was brought home to Mr. Swinfen, it might enlarge the area of foreseeability so as to make him liable. But it was not pleaded. And when Mr. Moloney put questions to Mr. Swinfen, he did not succeed in showing that special circumstances were brought home to him. All Mr. Swinfen knew was that she was a woman obviously high strung and worried as any woman would be in the circumstances. But that does not mean that he should foresee that, if he was negligent, she would suffer injury to health.

It remains then to consider whether the circumstances in this case are appropriate for an award of damages for mental suffering under the rule in *Hadley v. Baxendale*. The facts relating to the appellant's age and second career and the humiliating treatment meted out to him both preceding

and accompanying his dismissal militate in favour of recovery. On the other hand, he was not employed at I.C.B.C. for a particularly long period of time. It was not suggested that he had security of tenure with the respondent. And he is a member of a profession which restricts entry and therefore keeps the job market reasonably buoyant. The employment relationship in this case is clearly distinguishable from that in *Cox v. Philips Industries Ltd.* There were no special circumstances in this case such as the promise of promotion in order to keep the employee from moving to a competitor. Nor did the employment relationship in this case have the special elements of trust and reliance which characterized the promise of employment security in *Pilon v. Peugeot Canada Ltd.*, *supra*, or membership in a trade union in *Tippett v. International Typographical Union Local 226*, *supra*. I am persuaded therefore that mental suffering would not have been in the reasonable contemplation of the parties at the time the employment contract was entered into as flowing from the appellant's unjust dismissal. I would therefore, like my colleague, deny recovery under this head.

Punitive Damages

As in the case of damages for mental suffering in a breach of contract situation, we have again a long-standing prohibition against punitive damages in contract (see *Addis v. Gramophone Co.*, *supra*; *Guildford v. Anglo-French Steamship Co.* (1883), 9 S.C.R. 303) based on the notion that the sole purpose of contract damages is to compensate the plaintiff. If this is true, then punitive damages would unduly harm the defendant and over-compensate the plaintiff: see S. M. Waddams, *The Law of Damages*, at pp. 576-77.

An absolute bar against this head of damages in contract was asserted by the majority of the Court of Appeal in the present case as it was also in *Cardinal Construction Ltd. v. The Queen in right of Ontario* (1981), 32 O.R. (2d) 575 (H.C.), and several others.

However, in *Dale Perusse Ltd. v. Kason* (1985), 6 C.P.C. (2d) 129 (Ont. H.C.), *Noranda Mines Ltd. v. Seaboard Surety Co.* (1985), 7 C.C.E.L. 227 (Ont. Div. Ct.), *Centennial Centre of Science and Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253 (H.C.), and *Delmotte v. John Labatt Ltd.* (1978), 22 O.R. (2d) 90 (H.C.), the courts refused to strike such a claim from the pleadings. Moreover, in *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.), punitive damages were awarded for breach of a lease when the defendants were found to have acted in a "high-handed and shockingly contemptuous manner" and used their superior power to "steam-roll" the plaintiff to acquiesce and surrender her legal rights to the lease. In that case the defendants broke the lease by breaking into the plaintiff's premises, removing her belongings and then demolishing the building even when the plaintiff attempted to occupy the premises as she was legally entitled to do. Galligan J. noted that the defendants were anxious to break their lease with the plaintiff and demolish the premises in order to make way for a shopping centre development and stated at p. 87 that purely compensatory damages for breach of contract would be inadequate in these circumstances:

If this Court were to sanction the conduct of the defendants by awarding the plaintiff her actual monetary loss plus nominal damages, then in my opinion the law would say to the rich and powerful, "Do what you like, you will only have to make good the plaintiff's actual financial loss, which compared to your budget is negligible." The law would say to such persons as the defendants, "Trample on the smaller person's rights, the sanction of that trampling will be only a relatively minor part of the cost of doing business."

In *Edwards v. Lawson Paper Converters Ltd.* (1984), 5 C.C.E.L. 99 (Ont. H.C.), punitive damages were awarded against a defendant who breached his employment contract by incorporating his own company and doing business in competition with his employer while still on staff as a salesman. In *New Brunswick Electric Power Commission v. IBEW, Local 1733* (1978), 22 N.B.R. (2d) 364 (Q.B.), they were awarded when a wildcat strike by a union in winter brought the economy to a halt. Punitive damages were also awarded in *Makarchuk v. Midtransportation*

Services Ltd. (1985), 6 C.C.E.L. 169 (Ont. H.C.), when an employer continued to allege for six years that the plaintiff had engaged in fraud and dishonesty during the period of his employment despite the fact that the police and a bonding company had concluded that there was no evidence of any dishonest behaviour by the plaintiff. Likewise punitive damages were awarded in *Thom v. Goodhost Foods Ltd.* (1987), 17 C.C.E.L. 89 (Ont. H.C.), when an employee was dismissed one week after he informed his employer that he must take a leave of absence on the advice of his doctor to deal with a serious medical problem. In that case the employee was tendered with a letter indicating that his resignation had been accepted when in fact it had never been offered. All his medical coverage was discontinued upon his dismissal and the employer raised allegations of wrongful conduct by the plaintiff which were later abandoned. This is admittedly an extreme case. Within a year of his dismissal the plaintiff took his own life. It does, however, illustrate rather dramatically that punitive damages have a role to play in sanctioning those who callously breach employment contracts.

The availability of punitive damages is clearly another area of the law in which there is considerable uncertainty in the jurisprudence. The once firm prohibition against such awards seems to have fallen by the wayside although some courts continue to proclaim it. It is timely therefore for this Court to determine (a) whether punitive damages are available at all in a contractual setting and, if so, (b) under what circumstances.

Again, we may derive assistance from the judgment of Linden J. in *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277. In that case he approved the approach taken by Galligan J. in *Nantel v. Parisien* to the effect that punitive damages should be available in order to deter the strong from deliberately and callously disregarding the legal rights of the weak whenever it is in their economic interests to do so. In discussing the decision to award punitive damages in *Nantel v. Parisien* Linden J. stated at pp. 292-93:

This philosophy recognizes that there may be special cases, the particularly shocking ones, where punitive or exemplary damages may be awarded for breach of contract.

The desirability of furnishing the courts with such a tool has been pointed out by Cooper-Stephenson and Saunders in their book, *Personal Injury Damages in Canada*, where at p. 63 they wrote:

The general rule that punitive damages are forbidden in claims in contract should be reversed.

Although the *general* principle that punitive damages are not awarded for breach of contract survives, there is no requirement that the general principle be followed invariably. Certainly in the vast majority of situations of contract breach, there would be no possible issue of punitive damages arising. However, just as our courts have recognized the utility of awards for damages for mental suffering caused by breach of contract in appropriate circumstances, so too should punitive damages be allowed where the facts demand that they be awarded. It is clear that such damages would rarely be awarded, but this does not mean that it should *never* be done. To tie the hands of the courts by denying them the power to penalize defendants, who flout contract law in a high-handed and outrageous fashion, is unwise and unnecessary. Punitive damage awards should be part of the judicial arsenal in contract cases in the same way as they are in tort cases. I can see no sound reason to differentiate between them. Canadian courts, unlike English courts, have retained their broad power to award punitive damages in tort cases. Thus, if a high-handed breach of contract also happens to amount to tortious conduct, punitive damages would be awardable pursuant to tort theory. It is said that if this conduct is purely a breach of contract and not tortious, then no punitive damages can be awarded, despite the callousness of the conduct. That makes no sense. It is wrong to treat one contract breach different from another merely because one violates tort principles while the other does not.

The parties submitted that to introduce punitive damages into contract law would narrow the gap between tort and contract. Like Linden J. I do not see this as a problem. Indeed, greater consistency of judicial approach would appear to be desirable. Moreover, Canadian courts, as well as courts in Australia and New Zealand, have not adopted the restrictive approach to punitive damages in tort espoused by the House of Lords in *Rookes v. Barnard*, [1964] A.C. 1129. This Court has affirmed the role of punitive damages in tort including the tort of interference with contracts of employment: see *McElroy v. Cowper-Smith and Woodman*, [1967] S.C.R. 425, *H. L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776. It has also stated in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, that a contractual setting does not necessarily render the parties immune from general principles of tort liability.

The appellant makes a persuasive submission in his factum:

Generally, it is peculiar that the law requires a higher standard of conduct from the tortfeasor, a stranger, than it does from the parties to an established relationship under a contract. This distortion is particularly troublesome when dealing with a contract of employment since invariably there is nothing akin to equality in the relationship, virtually absolute power residing in the employer. In such a situation, the law ought certainly to insist upon proper conduct by the employer. Punitive damages ought to be available to demonstrate to the respondent and to all employers that the law will not allow an employer to abuse the employee, as the Respondent has done here, with impunity.

Linden J. makes the same point in *Brown v. Waterloo Regional Board of Commissioners of Police*, at p. 293:

In recent years, the principles of damages in tort and contract are becoming more consistent. That is good and should be encouraged. By allowing punitive damages for contract breach, that laudable trend will be advanced. Moreover, hopefully those who plan to breach contracts in a callous fashion will think twice.

Consequently, I conclude that it is not beyond the power of this Court to award punitive damages in those rare situations where a contract has been breached in a high-handed, shocking and arrogant fashion so as to demand condemnation by the Court as a deterrent.

In his dissent in the Court of Appeal in the present case Anderson J.A. applied the principles set out by Linden J. in *Brown v. Waterloo Regional Board of Commissioners of Police* and concluded that the conduct of the defendant both before and after the wrongful dismissal should be considered. I agree. This broader approach is required if the court's purpose is to punish high-handed, vindictive or otherwise shocking and reprehensible conduct by the defendant.

I do not share my colleague's view that punitive damages can only be awarded when the misconduct is in itself an "actionable wrong". In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature.

Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not. I respectfully adopt the following statement made by Clement J.A. in *Paragon Properties Ltd. v. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156 (Alta. C.A.), at p. 167:

It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction.

Nor would I draw the wide divergence that my colleague does between the duties owed to a neighbour under the law of tort and the duties that are breached in contract by the type of flagrant and deliberate misconduct that would merit an award of punitive damages. I agree with the appellant that it would be odd if the law required more from a stranger than from the parties to a contract. The very closeness engendered by some contractual relationships, particularly employer/employee relationships in which there is frequently a marked disparity of power between the parties, seems to me to give added point to the duty of civilized behaviour.

In my view, the facts of this case disclose reprehensible conduct on the part of the respondent towards a sensitive, dedicated and conscientious employee. The appellant was harassed and humiliated and, so the learned trial judge found, ultimately dismissed for no cause after a sustained period of such treatment. Anderson J.A. in dissent described the respondent's conduct as follows at pp. 58-59:

In the case on appeal, the defendant engaged in a continuous course of reprehensible conduct for several months prior to the date of termination and persisted in its groundless allegations of incompetence against the appellant up to and throughout the trial. The conduct of the defendant, as found by the trial judge, may be summarized as follows:

- (1) Inquisitorial practices over a substantial period of time;

- (2) Duress - termination with reasonable notice only if the appellant admitted that he was incompetent;
- (3) Colourable attempt to find the appellant other employment with the company in a thinly disguised effort to damage the reputation of the appellant;
- (4) Persistence in groundless allegations of incompetence up to and including the trial.

Anderson J.A. would have allowed the appeal on the punitive damages issue and awarded the appellant punitive damages in the sum of \$5,000. The quantum that Anderson J.A. would have awarded is, I believe, a reasonable one and in keeping with the Canadian experience in the award of relatively modest punitive damages. When the purpose of the award is to reflect the court's awareness and condemnation of flagrant wrongdoing and indifference to the legal rights of other people, the award does not need to be excessive. I would allow the appeal on the punitive damages issue in this Court in order to give effect to Anderson J.A.'s judgment. I would also award the appellant his costs both here and in the courts below.

Appeal dismissed with costs, WILSON and L'HEUREUX-DUBÉ JJ. dissenting in part.

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Solicitors for the respondent: Russell & DuMoulin, Vancouver.