THE FUTURE OF COMPENSATORY, AGGRAVATED
AND PUNITIVE DAMAGES POST-HONDA

Earl A. Cherniak, Q.C., Jasmine T. Akbarali and Roslynn (Rosie) Kogan

Introduction
Since the Supreme Court of Canada’s decision in United Grain Growers v. Wallace, Canadian courts have struggled with damages for bad faith in the manner of dismissal, finding difficulty distinguishing bad faith conduct from that which warrants punitive damages. The courts have also faced jurisdictional hurdles when allegations of discrimination and harassment become intertwined with other employment-related claims.

Keays v. Honda has clarified some of these issues, dramatically altering the nature of damages for bad faith in the manner of dismissal in the process. In this article, we consider the Supreme Court of Canada’s decision and identify the post-Honda implications for compensatory, aggravated and punitive damages in the employment context.

What is the impact of Keays v. Honda on proving and quantifying Wallace damages?
The Court’s decision in Honda has made it clear that what came to be known as Wallace damages are essentially damages awarded for reasonably foreseeable mental distress caused by the manner of dismissal. In so holding, the Court has maintained its decision in Wallace that an employer is entitled to terminate an employee for reasons other than cause, while still imposing an obligation on an employer to terminate an employee in a “candid, reasonable, honest and forthright” manner, and of course to pay damages for a wrongful termination. However, the Court has changed the way in which damages relating to the manner of dismissal are awarded, requiring employees to prove their losses, rather than adding an arbitrary number of months to the award in lieu of notice. This result may lead to fewer such awards, but the outcome is more consistent with the expectations inherent in the employment relationship and the concept of foreseeability, both of which had been addressed by the Court in Fidler v. Sun Life Assurance Co. of Canada, and will be discussed, infra.

1 Of Lerners LLP. The writers were counsel for Honda in the S.C.C.
2 1997 CanLII 332 (S.C.C.) [Wallace].
3 2008 SCC 39 (CanLII) [Keays v. Honda].
4 2006 SCC 30 (CanLII) [Fidler].
In *Wallace*, the Court was called upon to consider the nature of an employment contract and addressed the rights and obligations it encompasses. The plaintiff in *Wallace* had worked in the printing industry for 25 years. He was offered a position with the defendant, which was expanding its operation to include the sort of work done by the plaintiff’s employer at that time. When the offer was made, the defendant gave the plaintiff assurances of job security until retirement, provided that the plaintiff performed to the defendant’s expectations. The plaintiff accepted the defendant’s offer. Fourteen years later, when the plaintiff was 59 years of age, the defendant dismissed the plaintiff without notice or explanation.

At trial, the plaintiff was awarded 24 months notice plus aggravated damages. The aggravated damages award was based on the trial judge’s finding that it was reasonably foreseeable that the plaintiff would suffer mental distress as a result of the breach of the plaintiff’s contract.5 On appeal, the Manitoba Court of Appeal held that an employment contract was not a contract for peace of mind, so there could be no breach for causing mental distress.6

On further appeal to the Supreme Court of Canada, Justice Iacobucci, writing for the majority, held that an employment contract is not one for peace of mind, and accordingly, the fact that an employee is distressed by an employer’s failure to give reasonable notice does not constitute an independent actionable wrong. He further held that the recognition of a duty of good faith as an implied term of an employment contract would “be overly intrusive and inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment.”7

Despite finding that there was no implied duty of good faith, the majority recognized that an employment contract is unlike other contracts, because of the unequal bargaining position of the parties and the vulnerability of the employee upon termination. In light of this special relationship, the majority held that an employee may be entitled to an extension of the notice period when an employer engages in bad faith conduct in the manner of dismissal.8

5 *Supra* note 2 at paras. 17-19.
6 *Supra* note 2 at para. 73.
7 *Supra* note 2 at para. 76.
8 *Supra* note 2 at para. 95.
In *Honda*, the Court explained the rationale for compensating bad faith in the manner of dismissal by reference to its approach in *Fidler*. In that decision, McLachlin C.J.C. and Abella J., writing for the Court, explained aggravated damages and damages for mental distress from a foreseeability perspective.

The plaintiff in *Fidler* was a bank employee who had claimed long-term disability benefits after being diagnosed with chronic fatigue syndrome and fibromyalgia. The defendant was the bank’s insurer. The defendant terminated the plaintiff’s benefits after hiring investigators who videotaped the plaintiff performing activities that, according to the defendant, were inconsistent with the claimed disability. A week before the trial, the defendant offered to reinstate the plaintiff’s benefits and to pay all outstanding amounts. As a result, the trial only dealt with the issues of aggravated and punitive damages.

The decision of McLachlin C.J.C. and Abella J. made it clear that damages which flow from a breach of contract must be considered in the context of the reasonable expectations of the parties based on the circumstances under which the contract was formed - regardless of whether it is a contract for peace of mind or an ordinary commercial contract. If the circumstances under which the contract was formed were such that it was foreseeable for a breach of the contract to cause mental distress, the plaintiff is entitled to recover accordingly:

> It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v. Baxendale*. The Hadley test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: [see *Wallace*, discussed above]. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. They are not true aggravated damages awards.\(^9\)

They pointed out that these damages should not actually be referred to as "aggravated" because they arise out of the contractual breach itself, as opposed to an independent actionable wrong that is separate and apart from the breach complained of.\(^10\)

\(^9\) Supra note 4 at para. 54.

\(^10\) Supra note 4 at paras. 54 - 55.
Applying these principles in *Keays v. Honda*, the Court has affirmed that the nature of an employment contract is such that it is subject to cancellation for any reason, provided that payment is made in lieu of notice. Since both the employer and the employee are aware of this possibility when the contract is formed, it is not reasonably foreseeable that damages for mental distress would result from termination. It is, however, reasonably foreseeable that these damages would result if the termination is carried out in a manner that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive", in keeping with the obligation earlier identified in *Wallace*:

The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).

Given the Court’s earlier decision on the inapplicability of an implied duty of good faith, it will be interesting to see whether the courts will recognize expectations apart from those associated with the manner of dismissal that may nonetheless give rise to foreseeable damages for mental distress. For example, is there a reasonable expectation that the workplace be free from harassment or bullying?

Also significant is the Court’s approach to awarding damages for the manner of dismissal. The Court has now determined that these damages are no longer to be calculated as an extension of the notice period. Rather, their quantum is dependant on proof of actual loss, as is the case with other forms of compensatory damages.

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11 *Supra* note 3 at paras. 54-57.
12 *Supra* note 3 at para. 58.
13 *Supra* note 3 at para. 59.
This approach is preferable for several reasons. Firstly, awarding damages based on a dollar figure as opposed to an extension of the notice period clarifies that these damages are in no way related to one’s ability to find alternative employment, which is what damages calculated in terms of notice are meant to reflect. If, however, the mental distress caused by the manner of dismissal impedes one’s ability to find alternative employment, the gap in employment can still be taken into account.

Second, it compensates for actual damages suffered by an individual without tying those damages to that person’s salary. Prior to the Court’s decision in Honda, a clerical employee falsely accused of theft leading to termination could have been awarded less Wallace damages than a management employee, even if both employees were treated equally badly and suffered to the same extent as a result.

Finally, by taking this approach, the Court has also made it clear that employees who seek damages for mental distress arising from the manner of dismissal will be required to prove those damages. In making this determination, the Court has specified that the damages are compensatory, rather than punitive, in keeping with the reasonable expectations addressed above.

This is already evident in the decisions which have followed Honda. In an August 2008 decision released by the Court of Queen’s Bench in Saskatchewan, the court held that an employer had acted in bad faith by orchestrating a budget cut that resulted in the termination of an employee who was instead targeted for personal reasons. In spite of this finding, the court declined to award damages to the employee for the manner in which he was dismissed because

[h]e did not require counselling. He received a letter of reference, and there is no evidence that the manner of his termination, or events surrounding his termination, affected his ability to obtain further employment.

Employees hoping to obtain such damages post-Honda should expect to be held to similar standards.

15 Ibid at para. 39.
How will section 46.1 of the *Ontario Human Rights Code* affect claims for compensatory damages for discrimination and harassment?

The Court, in *Honda*, declined the invitation by Mr. Keays to overturn its decision in *Seneca College of Applied Arts and Technology v. Bhadauria*\(^1\) so as to recognize a tort of discrimination. Had the Court accepted the invitation, claims of discrimination would no longer be within the exclusive jurisdiction of human rights tribunals and would become actionable before civil courts.

The plaintiff in *Bhadauria* was a woman of East Indian origin with a Ph.D. degree in mathematics. Over approximately four years, she was repeatedly rejected for positions advertised by the defendant and alleged that she had been discriminated against based on her origin. She brought an action against the defendant for breach a common law duty not to discriminate and for breach of the *Ontario Human Rights Code (OHRC)*. A motion was made by the defendant to strike out the statement of claim for failing to disclose a reasonable cause of action. The order was granted, but set aside by the Ontario Court of Appeal, which would have allowed the claim for a tort of discrimination to proceed.

On appeal to the Supreme Court of Canada, the Court held that a claim for discrimination could not give rise to a reasonable cause of action, because the *OHRC* contained a comprehensive enforcement scheme for violations of its substantive terms. Allowing a civil court to entertain a claim for discrimination by way of tort or breach of statute would be contrary to legislature’s intention that human rights claims be adjudicated before human rights tribunals.\(^2\)

In *Honda*, the Court upheld its decision in *Bhadauria* and declined to recognize a tort of discrimination, but provided little analysis on the issue, given its finding that Honda did not discriminate against or harass Mr. Keays.\(^3\)

The Court may have also found it unnecessary to elaborate in light of the recent amendments to the *OHRC*, which came into effect on June 30, 2008. As a result of these amendments, civil courts in Ontario can now consider claims for discrimination and harassment, provided that the

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claims are brought in connection with a cause of action otherwise within the courts’ jurisdiction. This expanded jurisdiction is provided for in section 46.1, which states:

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 2006, c. 30, s. 8.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, c. 30, s. 8.19

Prior to the enactment of this section, conduct which may have also constituted discrimination or harassment under the OHRC could only be pursued before the courts if it was incorporated into existing causes of action by other means. For example, in the constructive dismissal context, courts have considered allegations of discrimination or harassment by an employer in order to determine whether the employer’s conduct fundamentally altered the employment relationship so as to give rise to termination.20 Courts have also considered conduct amounting to discrimination in order to determine whether an employer had just cause for the termination of an employee.21 In such circumstances, the conduct alleged to be discriminatory is relevant to the reasons for the employee’s dismissal and is not compensable in and of itself.

As a result of section 46.1, it is no longer necessary for plaintiffs to “disguise” their allegations of discrimination and harassment within the elements of constructive or wrongful dismissal because the courts can consider OHRC violations as they are, and award damages accordingly. It is important to remember, however, that where an action is “based solely on the infringement

of a right", the legislature continues to intend that the infringement be adjudicated pursuant to the \textit{OHRC}. Section 46.1 is a mechanism designed to avoid a multiplicity of proceedings, but is by no means meant to diminish the place of human rights tribunals.

The amendment raises the issue of whether a court can award damages for \textit{OHRC} violations if the civil cause of action which allows for the \textit{OHRC} violation to proceed before the court fails. The concern is a legitimate one, given that a plaintiff could resort to pleading a civil cause of action for which there is little basis in order to bring an \textit{OHRC} violation before the court, rather than the tribunal. A plaintiff might do so believing the courts to have a more advantageous or faster procedure. A plaintiff might also perceive that a court would offer the potential for greater damages or a broader range of available remedies. There is no jurisprudence on this issue to date, but a sound approach to the question of whether the \textit{OHRC} violation alone can support a court award of damages is that it can, if the civil cause of action that allowed the plaintiff to proceed before the court, but failed, was reasonably and not colourably, brought.

Consider, for example, a situation where a plaintiff seeks damages for the tort of intentional infliction of mental distress and claims that it was caused by a course of conduct which also constitutes discrimination pursuant to section 5 of the \textit{OHRC}. In order to obtain damages for the tort of intentional infliction of mental distress, the plaintiff would have to establish (1) an act or statement by the defendant that is extreme, flagrant, or outrageous; (2) the act or statement is calculated to produce harm; and (3) the act or statement causes harm.\textsuperscript{22} The plaintiff may lack evidence on each of these points, while still managing to demonstrate that the conduct at issue was discriminatory. We suggest that the court could decline to award damages for the discrimination if the claim for the tort of intentional infliction of mental distress was not reasonably brought. The court’s objective in declining to make the award in such circumstances would be to discourage the circumvention of the legislature’s intention that human rights disputes should be dealt with in that system, unless the concern about multiplicity of proceedings is legitimately engaged.

Defence counsel faced with a claim that does not appear to have been “reasonably brought” could also take a pro-active approach by bringing a motion to strike the civil cause of action advanced on the basis that it is frivolous or vexatious and discloses no reasonable cause of

\textsuperscript{22}Prinzo v. Baycrest Centre for Geriatric Care, 2002 CanLII 45005 at para. 48 (ON C.A.).
action. If such a motion succeeds, the claim under the OHRC would likely fail as well. In the event that the pleading survives the Rule 21 motion, the “reasonably brought” argument could still be available at a later stage in the proceeding, as the standard on the Rule 21 motion is arguably lower.

If a plaintiff is prevented from obtaining damages for an OHRC violation because the civil cause of action was not reasonably brought, or was otherwise struck out by the court, the plaintiff could still seek a remedy from the human rights tribunal. This scenario appears to be contemplated by section 34(11) of the OHRC, which provides that a plaintiff can seek a remedy from the tribunal so long as there has been no final determination on whether a right has been infringed in the proceeding brought under section 46.1.23

The one year limitation period imposed by section 34(1) of the OHRC could be problematic.24 However, section 34(2) provides that the complaint may proceed after the expiry of the limitation period if the plaintiff is acting in good faith and no prejudice will result if the complaint is allowed to proceed.25 The lack of prejudice requirement is unlikely to pose a problem, since the defendant would have already been familiar with the human rights allegations by virtue of the

23 Section 34(11) states:

A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,

(a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or

(b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled. 2006, c. 30, s. 5.

24 Section 34(1) states:

If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series. 2006, c. 30, s. 5.

25 Section 34(2) states:

A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. 2006, c. 30, s. 5.
section 46.1 proceeding. The good faith requirement, however, may be more difficult to overcome if the civil claim that proceeded along side the OHRC claim was struck for being vexatious, or otherwise on a preliminary motion. Plaintiffs should carefully consider the possibility that they will be prevented from obtaining any relief whatsoever if they choose the wrong forum. Full disclosure of any potential risk should be made to the plaintiff client.

In the event that the civil cause of action was reasonably brought but was simply unsuccessful, we see no reason for the court to decline to make an award for the OHRC violation without requiring the plaintiff to resort to another proceeding pursuant to section 34(11). To do otherwise would require the plaintiff to pursue a claim the court has already considered, leading to the very sort of multiplicity of proceedings the amendment is designed to alleviate.

Can discrimination and harassment be independent actionable wrongs under section 46.1 of the Ontario Human Rights Code?

Both the trial and Court of Appeal decisions in Honda held that discrimination and harassment could constitute independent actionable wrongs and therefore supported an award of punitive damages in a breach of contract case. On appeal, Honda argued that the Court's decision in Bhadauria, discussed above, prevented a civil court from entertaining human rights claims for the purposes of punitive damages or at all, because to do so would be contrary to legislature’s intention that human rights claims be adjudicated before human rights tribunals. The claim might be “independent”, so the argument went, but it could not be “actionable”. Using discrimination and harassment as independent actionable wrongs would also go against the purpose of the OHRC, which emphasizes a remedial rather than punitive approach to human rights violations.

The Court agreed with these arguments:

The Court of Appeal, relying on McKinley, concluded that Bhadauria only precludes a civil action based directly on a breach of the Code – but does not preclude finding an independent actionable wrong for the purpose of allocating punitive damages. It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and Bhadauria established that a breach of the Code cannot constitute an actionable wrong; the legal requirement is not met.26

26 Supra note 3 at para. 64.
Despite the Court’s views on the issue as it stood at the trial, legislative intention has shifted, by virtue of section 46.1, also discussed above. By allowing the courts to consider discrimination claims provided they are brought in conjunction with a civil cause of action, the legislature has made it clear that human rights claims have a place outside the OHRC, its adjudicators and its remedies. Now that claims of discrimination and harassment can, if coupled with another cause of action, be brought before the courts, these claims may qualify as “actionable”, because they now fall within the (Ontario) court’s jurisdiction.

The approach is also consistent with the way in which section 46.1 is worded. Although it allows the courts to award damages for discrimination in addition to damages for the civil cause of action advanced, its reference to finding an OHRC infringement in a civil proceeding appears to recognize that the human rights complaint may be factually connected to the civil cause of action. This reflects the courts’ overall approach to the independent actionable wrong requirement in punitive damages cases, where the facts involved in the independent actionable wrong may be a component of the cause of action in contract that is advanced.

In Honda, the Court emphasized that the courts must be alert to this factual overlap and should take a hard look at whether punitive damages are necessary when the conduct involved in the wrong at issue has already been taken into account by way of a compensatory damage award:

The majority of the Court of Appeal upheld the award of punitive damages, but reduced the quantum to $100,000. The findings supporting this decision are demonstrably wrong and, in some cases, contradict the Court of Appeal’s own findings. Before delving into the factual analysis, however, it is worth mentioning that even if the facts had justified an award of punitive damages, the lower courts should have been alert to the fact that compensatory damages were already awarded, and that under the old test, they carried an element of deterrence. This stems from the important principle that courts, when allocating punitive damages, must focus on the defendant’s misconduct, not on the plaintiff’s loss (Whiten, at para. 73). In this case, the same conduct underlies the awards of damages for conduct in dismissal and punitive damages. The lower courts erred by not questioning whether the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded. Be that as it may, we now have a clearer foundation to distinguish between damages for conduct in dismissal and punitive damages.27

27 Supra note 3 at para. 69.
The issues associated with factual overlap, as demonstrated in Honda, beg the question as to why an independent actionable wrong is required at all in breach of contract cases. If a wrong is both "independent" and "actionable," it presumably gives rise to a separate right of compensation, unless it is directed at the same harm as the primary claim. If the so-called independent actionable wrong itself were compensable, the damages awarded for it could lessen the need for punitive damages, by additionally compensating the plaintiff, which could suffice to achieve the objectives of retribution, deterrence and denunciation. In many insurance cases where punitive damages have been awarded, the "independent actionable wrong" has been the breach of the implied obligation of good faith in the same contract. Such a breach may cause mental distress or aggravated damages, which are compensable. Or breach of the obligation to pay the claim may have caused such damages, in a peace of mind contract, also compensable. Breach of the terms of the contract, express or implied, may have met the test for punitive damages, discussed below. If so, why shouldn’t punitive damages be awarded irrespective of whether there was the breach of the express terms or the implied term? It is hard to see why the existence of an "independent actionable wrong" should make a difference one way or the other. As well, if the damages for the independent actionable wrong are the same or substantially overlap the main basis of the claim, why should that alone be a basis for a punitive award?

The independent actionable wrong requirement originated with McIntyre J.’s decision in Vorvis v. Insurance Corporation of British Columbia. Prior to that decision, punitive damages were unavailable for breach of contract cases in Canada because of the traditional view that contractual damages should be restricted to losses flowing directly from the breach itself. In Brown v. Waterloo Regional Board of Commissioners of Police, Linden J. explained that if courts accept that there can be consequences of breach of contract beyond pure financial loss, they should be able to award damages accordingly, either for compensatory purposes or for punitive purposes:

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 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...Punitive damage awards should be part of the judicial arsenal in the same way as they are in tort cases. I can see no sound reason to differentiate between them...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.30

Justice Linden ultimately determined that the defendant’s conduct was not callous, high-handed or outrageous, and he accordingly declined to make a punitive award. On appeal, the Court of Appeal rejected the argument that damages could be awarded simply because they flowed from a breach of contract, explaining that:

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.31

In Vorvis, the Court picked up on the phrase “actionable wrong” and turned it into an “independent actionable wrong”. Justice McIntyre, writing for the majority, explained that an independent actionable wrong was required because one should not be punished in the absence of behaviour that could be viewed as wrongful on an independent legal basis separate from the breach of contract:

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] 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:

30 Brown (H.C.J.), supra note 29 at 292.
31 Brown (C.A.), supra note 29 at 736.
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.\(^\text{32}\)

In *Honda*, the Court suggested that the independent actionable wrong is required so as to ensure that punitive damages are only awarded in rare cases involving egregious behaviour. Having found that Honda did not engage in conduct that warranted punitive damages, the Court re-iterated the need for a cautious approach:

> Even if I were to give deference to the trial judge on this issue, this Court has stated that punitive damages should “receive the most careful consideration and the discretion to award them should be most cautiously exercised” (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be “harsh, vindictive, reprehensible and malicious”, as well as “extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment” (*Vorvis*, at p. 1108). The facts of this case demonstrate no such conduct. Creating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction.\(^\text{33}\)

These comments make it clear, however, that there are important considerations aside from the independent actionable wrong that must be taken into account before punitive damages can be awarded. We are of the view that there seems to be no principled reason why a court could not look to these other, important considerations and simply conclude, in a proper case, that the compensatory damages awarded for the wrong (or wrongs) were not sufficient to satisfy the public policy objectives that underlie the availability of punitive damages, such that an award of punitive damages is required. Justice Binnie’s guidelines in *Whiten v. Pilot Insurance Co.*\(^\text{34}\) reflect these considerations and provide sufficient safeguards for the imposition of punitive damages for every kind of action, without the need to resort to the requirement of an independent actionable wrong. These guidelines are designed to emphasize the exceptional nature of punitive damages, in keeping with the Court’s decision in *Honda*, such that the

\(^{32}\) Supra note 28 at 1106.

\(^{33}\) Supra note 3 at para. 68.

\(^{34}\) 2002 SCC 18 (CanLII) [*Whiten*].
rationale for the independent actionable wrong requirement, if it ever existed, no longer serves any useful purpose: \(^{35}\)

1. Punitive damages are the exception rather than the rule.

2. Punitive damages should be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs markedly from ordinary standards of decent behaviour.

3. Punitive damages are generally given where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.

4. Punitive damages are awarded only where compensatory damages are insufficient to accomplish these objectives.

5. A punitive damage award should be proportionate to the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant.

6. An award of punitive damages must take into account any fines or penalties suffered by the defendant for the misconduct in question.

7. The quantum of a punitive damage award should be no greater than necessary to rationally accomplish its purpose.

8. While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a “windfall” in addition to compensatory damages.

9. Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. \(^{36}\)

The court could also take into account other indicia, not themselves determinative, but which assist in setting parameters for the imposition of punitive damages in the absence of an independent actionable wrong requirement. One category is the blameworthiness of the defendant, which is also addressed by Binnie J. in \textit{Whiten}, and requires the court to consider:

1. whether the misconduct was planned and deliberate;

2. the intent and motive of the defendant;

\(^{35}\) Counsel did not make any arguments in support of this approach because it wasn’t an issue on the appeal, but believe it is preferable.

\(^{36}\) This is a paraphrased list of Binnie J.’s factors as they appear in \textit{Whiten}. See supra note 34 at para. 94.
3. whether the defendant persisted in the outrageous conduct over a lengthy period of time;

4. whether the defendant concealed or attempted to cover up its misconduct;

5. the defendant’s awareness that what he or she was doing was wrong;

6. whether the defendant profited from its misconduct; and

7. whether the interest violated by the misconduct was personal to the plaintiff.\textsuperscript{37}

The relationship between the parties is another appropriate consideration. Where a defendant has taken advantage of the vulnerability of the plaintiff, or has breached a fiduciary duty owed to the plaintiff in a particularly egregious manner, an award of punitive damages is more likely to be needed to accomplish the objectives of denunciation, retribution and deterrence.

The cause of action advanced may also be relevant to the analysis. The tort of defamation, for example, may be more likely to attract a punitive damage award because it is often intentional and results in harm that is especially personal. Negligence, on the other hand, is less likely to do so because of its non-intentional nature. Where contract claims are involved, the courts may take into account whether the contract was for “peace of mind” or whether it was an ordinary commercial contract. Punitive damages would be more appropriate in claims for breach of the former rather than the latter, to the extent that aggravated damages fail to address the harm at issue. But, given the development of the jurisprudence since Vorvis, it seems to the writers of this paper time to lay to rest the necessity for there to be an independent actionable wrong in contract cases to found a claim for punitive damages.

\textbf{Conclusions}

We predict that aggravated and punitive damage awards in the employment context post-\textit{Honda} will be fewer and farther between, and when made, will be on a principled basis. \textit{Honda} holds that an employee must now prove that his or her losses were caused by foreseeable mental distress that can be tied to the manner of dismissal and not the loss of employment itself.

\textsuperscript{37} This is a paraphrased list of considerations related to the blameworthiness of a defendant as they appear in \textit{Whiten}. See supra note 34 at para. 113.
Although legislative intention still dictates that human rights violations be adjudicated in the human rights system, we believe the approach embodied in section 46.1 will be a useful tool in overcoming the issue of multiplicity of proceedings. It must be emphasized, however, that section 46.1 should not become a tool to circumvent legislative intention. A “reasonably brought” standard will assist in maintaining this position.

By reiterating the principled standards for punitive damages from Whiten in Honda, the Court has signalled that punitive damage awards have been made too liberally in the past. Courts will be reluctant to make such awards going forward where the facts do not meet the stringent standards articulated in the jurisprudence. In the meantime, time will tell whether the Court’s next decision on punitive damages in contract cases will analyze whether the concept of independent actionable wrong has outlived its usefulness.