A Brief Survey of Some Related Torts in Wrongful Dismissal Actions

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Introduction

A plaintiff employee has a variety of intentional torts at his or her disposal that may accompany a contractual claim for wrongful dismissal. Recent case law appears to confirm that plaintiffs continue to make use of some intentional torts in claims against former employers. This paper will attempt to highlight some issues that arise in the context of wrongful dismissal actions when the following torts are pled: Intentional Infliction of Mental Distress, Defamation, Inducing Breach of Contract and Conspiracy. The success of a given claim will, of course, largely depend on the material facts, and which version thereof a Court ultimately accepts.

In addition, this discussion will canvass some recent developments in the law relating to the aforementioned intentional torts, in the context of a wrongful dismissal action, or breach of contract claim. This paper does not purport to have a global thesis. The discussion that follows is merely a survey of some recent case law drawn largely from Ontario. In addition, some observations about the cases and the intentional torts referred to therein will be made.

Intentional Infliction of Mental Distress

The tort of Intentional Infliction of Mental Distress appears to have emerged in the late nineteenth century, in the case of *Wilkinson v. Downton, [1897] 2 Q.B. 57, [1895-7] All E.R. Rep. 267.* The tort remains a viable cause of action in employment situations. The elements of the tort of Intentional Infliction of Mental Distress are as follows:

1. The conduct complained of must be flagrant and outrageous.

2. The conduct must be calculated to produce harm. A reckless disregard as to whether or not harm would ensue from the conduct, a desire to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow, will all meet the intent requirement: *Geluch v. Rosedale Golf Assn., Ltd., [2004] O.J. No. 2740 (S.C.J.) Para. 192.*

3. The conduct results in a visible and provable illness/injury. It appears that no medical report is necessary to support such an illness or injury: *Rahemutulla v. Vanfed Credit Union, [1984] 3W.W.R. 296, 29C.C.L.T. 78 (B.C.S.C.).*

The tort figured largely in the case of *Prinzo. V. Baycrest Centre for Geriatric Care [2000] O.J. No. 683(S.C.J.) varied [2002] O.J. No. 2712* (C.A.) *("Prinzo")* in which the Plaintiff, employed with the Defendant for 17.5 years at its hairdressing shop, was

successful in obtaining damages *inter alia* for Intentional Infliction of Mental Distress[1]. She had ongoing problems with a new supervisor. The Plaintiff injured herself in the Defendant's parking lot and then went on disability leave. During her disability leave, the Plaintiff was repeatedly telephoned by the Defendant's representatives urging her *inter alia* to return to work. She returned to work and requested her duties be altered and shortly thereafter was dismissed by the Defendant. The Trial Judge in his Judgment, commented that he found the Plaintiff to be "straightforward and guileless in her demeanour and testimony".[2] The Plaintiff's credibility was not therefore in issue.

The Trial Judge in *Prinzo* characterized the damages awarded to the Plaintiff for mental distress as *aggravated*. He further referred to the "acts of harassment" by the employees of the defendant being "so extreme and insensitive" that they would amount to an independent actionable wrong: namely Intentional Infliction of Mental Distress. It does not appear that the actual elements of Intentional Infliction of Mental Distress were pled in the Prinzo statement of claim. However, the Court of Appeal conducted its discussion of the issue on the basis that the plaintiff was claiming damages for the Intentional Infliction of Mental Distress[3].

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[1] See also *Zorn-Smith v. Bank of Montreal (2003), 31 C.C.E.L. (3d) 267 (Ont. S.C.J.)* The plaintiff employee was successful in establishing her employer had intentionally inflicted mental suffering. In that case the Court found that the employer was well aware that the employee "had suffered burnout" and put excessive demands on her as they knew she was "totally committed" to the employer. The Court found the employer's conduct in disregarding the employee's health was flagrant and outrageous and that it was foreseeable that the burnout would cause mental suffering. The Plaintiff was awarded $15,000.00 in mental distress damages "in keeping" with the award in Prinzo.

[2] *Prinzo. V. Baycrest Centre for Geriatric Care [2000] O.J. No. 683(S.C.J.),* Para. 33.

[3] *Prinzo. V. Baycrest Centre for Geriatric Care [2002] O.J. No. 2712* (C.A.), Paras. 49-53

The Court of Appeal for Ontario clarified the characterization of the damages for mental distress and in particular drew a distinction between aggravated damages and damages that might be awarded as a result of a finding of Intentional Infliction of Mental Distress. In this regard the Court of Appeal referred to the decision in *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press), [1997] S.C.J. No. 94 (S.C.C.)* and in particular that any award of damages beyond the compensation for breach of contract for failure to give reasonable notice of termination must be founded on a separately actionable wrong.

Furthermore, the Court of Appeal referred to *Vorvis v. Insurance Corp. of British Columbia [1989] 1 S.C.R. 1085 ("Vorvis")* and the oft cited principle that aggravated damages serve the purpose of compensation for intangible injuries. *Vorvis* set out the necessary elements to found an award of aggravated damages: (1) an employer's conduct is independently actionable; (2) it amounts to a wrong that was separate from the breach of contract for failure to give reasonable notice of termination; and (3) *it arose from the dismissal itself, rather than the employer's conduct <u>before or after</u> the dismissal.*

The Court of Appeal concurred with the Trial Judge that the acts of harassment by the employees of the Defendant were so "extreme and insensitive" that they constituted a reckless and wanton disregard for the health of the Plaintiff. It referred to the finding of the Trial of Judge regarding the specific acts of the Defendant, which amounted to a separate actionable wrong, namely[4]:

[4] Prinzo, supra, at Paragraph 56

1. The Plaintiff was medically unfit for work but the Defendant (eg. their representatives) accused her of malingering;
2. The Defendant kept calling the Plaintiff to urge her to perform her modified duties;
3. The Plaintiff's doctor was told by the Defendant the Plaintiff had to return to work in order to be terminated;
4. The Defendant sent the Plaintiff a letter, which implied that her doctor had agreed to her return to work;
5. The Defendant advised the Plaintiff that the refusal to perform modified work was a refusal to work;
6. The emotional upset caused to the Plaintiff as a result of the repeated telephone calls from the Defendant was or ought to have been apparent to the Defendant. The Defendant had been advised by the Plaintiff's lawyer not to call the Plaintiff directly but continued to do so; and
7. The Defendant was not obligated at law to contact the Plaintiff with respect to her ongoing Workplace Safety and Insurance claim and therefore the exacerbation of her condition as a result of those calls had been avoidable.

The Court of Appeal accepted the Trial Judge's factual findings with respect to the elements of the tort. The "almost sadistic resolve" of the Defendant in persisting with the harassment of the Plaintiff was conduct that could be "fairly described" as flagrant and outrageous. The second requirement that the conduct be calculated to produce harm was also met. The Trial Judge had found that the Defendant was "well aware of the physical

and emotional health of the plaintiff and would realize the detrimental effect their harassment would have on the plaintiff and yet they persisted". With respect to the last element of the tort the Court of Appeal confirmed that the evidence of the Plaintiff and her doctor was sufficient in establishing a visible and provable illness. The illness was not "temporary or transient" the Court found but was an "emotional distress which manifested itself in physical illness documented by a physician."[5]

The Plaintiff was awarded at Trial 18 months reasonable notice, $15,000.00 aggravated damages for mental distress and $5,000.00 in punitive damages. On appeal the judgment at Trial was varied to 12 months reasonable notice, $15,000.00 for intentional infliction of mental distress, and the punitive damages award was set aside. With respect to Wallace damages, the Court of Appeal stated *obiter* that the plaintiff would have been "entitled to compensation by way of an extended notice period". However, the Court acknowledged that since an independent actionable wrong had been found there was "[no] need to address this alternative submission."[6].

It appears that the intentional conduct must be of an ongoing nature, and of a type that the actors should reasonably know, will cause harm. In addition, though it has been stated that a medical report may not be necessary the absence of a medical report to document a visible and provable illness may, it is suggested, weaken the case for a finding in favour of a plaintiff. The option of claiming Wallace damages remains and should be exercised,

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[5] Prinzo, supra, at Paragraphs 60-62.

[6] Prinzo supra, at Paragraphs 65-72.

if justified by the facts. The recent case law regarding Intentional Infliction of Mental Distress in wrongful dismissal actions is instructive in this regard.

Recent Case Law

Geluch v. Rosedale Golf Assn., Ltd., [2004] O.J. No. 2740 (S.C.J.) ("Geluch")

The Plaintiff was hired as a General Manager of the Defendant Club and employed for 12 years. At the time of his dismissal by the defendant no specific allegations of cause were made, only that the Defendant had "lost confidence" in the Plaintiff's management. Subsequent to his termination the Defendants alleged that the Plaintiff had engaged in fiscal impropriety, theft of the Defendant's property, abusive conduct towards his staff, sexual harassment, and had withheld information from the Defendant's Board of Directors[7]. The Court found that the allegations of cause were not sufficient to justify dismissal.

The Court in *Geluch* awarded the Plaintiff 15 months in lieu of reasonable notice and a further **2 months** as so-called "Wallace damages" for the manner in which he was dismissed[8]. Furthermore, the Court referred to its ability to extend the notice period of a given plaintiff employee if an employer engaged in conduct that was unfair (eg. by awarding Wallace damages). The Plaintiff in *Geluch* claimed aggravated damages. The Court set out the constituent elements of the tort of intentional infliction of mental

[7] *Geluch v. Rosedale Golf Assn., Ltd., [2004] O.J. No. 2740 (S.C.J.), P*aras. 23-25.

[8] *Geluch,* supra, at Paragraphs 183 to 188.

distress but found that there was no separate actionable wrong on which those damages could be founded.

It appears from *Geluch* that no medical evidence was advanced by the Plaintiff and the Plaintiff did not testify as to any visible illness or injury suffered as a result of the dismissal or otherwise. There was no evidence of harassment of the Plaintiff in *Geluch* by the Defendant similar in pitch or frequency to the harassment suffered by the Plaintiff in *Prinzo*. Wallace damages were used by the Court to compensate the Plaintiff in *Geluch* for unfair treatment of the Defendant relating to his dismissal.

Rinaldo v. Royal Ontario Museum [2004] O.J. No. 5068 (S.C.J.) ("Rinaldo")

The Plaintiff worked for the Defendant museum for 15 years in various capacities and at the time of his termination was an Assistant Director of the Defendant. The Plaintiff had started to suffer from a major depressive illness just prior to his termination. He commenced an action for wrongful dismissal, punitive, aggravated, and mental distress damages. The Plaintiff alleged that the Defendant created a hostile working environment that permitted and fostered discriminatory treatment on the basis of his sexual orientation.

The Court in Rinaldo awarded the Plaintiff 16 months in lieu of reasonable notice and a further **3 months** as "Wallace damages" for the manner in which he was dismissed[9]. The Court stated that "the manner of dismissal was particularly insensitive" to the plaintiff's medical condition: namely the precipitous cutting off of the Plaintiff's salary

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[9] *Rinaldo v. Royal Ontario Museum [2004] O.J. No. 5068 Paras.138 to 144*

and benefits while he was on medical leave. Furthermore, the Court found that the Defendant had viewed the Plaintiff's medical condition as a "hoax". The Defendant's advice to the Plaintiff that he was deemed to have resigned his job further exacerbated the Plaintiff's condition. The Court found at Trial that the Plaintiff remained ill and his "prognosis was poor".

The Court did not award aggravated or punitive damages to the Plaintiff and referred to the fact that the Plaintiff had not established that he had suffered discrimination based on his sexual orientation. The Court determined that the *Vorvis* test had not been met, and by inference, no independent actionable wrong was found by the Court.

With respect to the claim for Intentional Infliction of Mental Distress the Court reviewed the constituent elements of the tort. It found that the actions of the Defendant would not constitute an independent actionable wrong and as such could not ground a claim for Intentional Infliction of Mental Distress including mental distress caused by discriminatory conduct based on sexual orientation and disability.

Both the *Geluch* and *Rinaldo* cases share an interesting similarity: Wallace damages are used to redress the respective Defendants insensitive conduct towards the respective plaintiffs. In both cases, aggravated damages and damages for intentional infliction of mental distress were not awarded as the respective Courts found no factual underpinning to make such orders. Wallace damages then remain a useful tool to increase the damages for a given Plaintiff in circumstances where the manner of the Plaintiff's dismissal is

found by a Court to warrant further damages. They appear to be a possible option for a litigant, where the employer's impugned conduct does not, in the Court's view, amount to an independent actionable wrong.

By focusing on a claim for Wallace damages, a litigant may avoid the necessity of pigeon holing the facts to make out an independent actionable wrong in order to obtain aggravated damages or damages for intentional infliction of mental distress. A Plaintiff may wish to focus on a Wallace damage claim (where justified[10]) and the salient material facts which may lead a Court to increase the notice period. The *Gismondi v. Toronto (City), [2003] O.J. No. 2457 (C.A.)* case re-affirms that Wallace damages are not limited to acts of the employer at the very moment of dismissal, and can in appropriate circumstances, include the *employer's conduct pre and post termination.* However, a plaintiff may still wish to be prudent and plead claims for aggravated damages and Intentional Infliction of Mental Distress, where there is an arguable case. This allows for possible alternative claims if other aspects of the claim fail.

The Wallace damages therefore have a "broader application" then a claim for aggravated damages, which are limited to acts of the employer at the time of dismissal. In contrast, the tort of Intentional Infliction of Mental Distress is similar to the Wallace damages in terms of the scope of acts of the employer that can be reviewed (eg. pre, during, post-

[10] Loreta Zubas & Anusha Alikhan, Where's Wallace? Searching for an understanding of recent Wallace awards!(Paper presented to Ontario Bar Association, 2004). Please also see: Brian D. Mulroney and Paul F. Attia, Recognizing When Employees Counsel Can Make a Successful Claim for Wallace Damages or Inducement, October 30, 2004, Fifth Annual Employment Law Summit, The Law Society of Upper Canada, C.L.E. The foregoing articles can be of great assistance in assessing the success of a proposed Wallace damage claim.

termination). The success of claims for aggravated damages and/or Intentional Infliction of Mental Distress are somewhat uncertain given that an independent actionable wrong must be made out or the elements of the intentional tort must be met.

Prinzo appears to set out a threshold to which Courts may refer when addressing the issue of whether an employer has intentionally inflicted mental distress on an employee. It seems that ongoing acts of harassment amounting to a "sadistic resolve" which continue after warnings to stop and which result in a visible provable ongoing illness meet the threshold. One point to note in the *Prinzo* case is that the tort was most useful in that it could be applied to the acts of the employer *before* the dismissal. Furthermore, there appeared to be no extensive discussion at the Trial of awarding Wallace damages. In both *Geluch* and *Rinaldo* claims for Wallace damages had been made by the plaintiffs and were addressed in detail by the respective Courts.

DEFAMATION

Justice Sproat in his *Employment Law Manual* has set out the essence of defamation:

"A defamatory statement is an untrue statement which harms the reputation of another and lowers his or her esteem in the community or exposes him or her to hatred, contempt or ridicule. In order for a defamatory statement to be actionable, it must be published. A statement is published when it is communicated to a third person other than the defamed individual. There are two modes of publication: libel and slander. Libel is generally comprised of either written words or pictures. It is actionable without proof of damage because it is presumed that the damages will result from a libel having regard to the fact that the writing or pictures have a certain permanence and are subject to being reproduced and circulated. Slander, on the other hand, is published through the spoken word, which tends to be transitory in terms of its likely impact. In order to maintain an action for

slander, it is generally necessary to prove that the slander has caused material or pecuniary loss. There are, however some exceptions to the necessity of proving special damages in slander suits. One of these exceptions is slander of a person in connection with that person's business, trade, profession, office or other employment activity. This type of slander is actionable without proof of damage because it is clearly calculated to cause pecuniary damage to the employee".[11]

There are several defences available to a defendant in a defamation claim, including justification (e.g the statement was true), absolute privilege, qualified privilege, and fair comment. An important point for the purposes of this discussion is where a court makes a finding of malice the defence of qualified privilege will fail. In the employment context, cases involving defamation tend to involve employers libeling former employees.

Defamation: Recent Case Law

Murphy v. Alexander [2001] O.J. No. 5465 (S.C.J.), varied Murphy v. Alexander, [2004] O.J. No.720 (C.A.)

The Plaintiff real estate agent brought an action for inter alia breach of contract and defamation against the defendant Real Estate Agency, the agency's owner and the Plaintiff's former supervisor. The Plaintiff was dismissed after a raucous meeting at which the Plaintiff accused his supervisor of diverting potential clients to other agents. The supervisor then subsequently told third parties, including the Plaintiff's new employer that the Plaintiff had made gun and bomb threats against him. The Plaintiff became known as the "madman" within the real estate industry as a consequence of his

[11] Sproat, John R.(as he was then), Employment Law Manual (Looseleaf),2nd ed.,Toronto : Carswell,

supervisor's allegations against him. The Court found that the supervisor's statements regarding the gun and bomb threats of the Plaintiff were defamatory given the pre-existing animosity between the two individuals. Furthermore, the Court found that the statements were uttered with malice by the supervisor. The Real Estate agency was also found vicariously liable for the statement of the supervisor about the Plaintiff. The Plaintiff was awarded special damages arising from the defamation in the amount of $45,000.00, general damages for defamation for $30,000.00, and aggravated damages for defamation in the amount of $15,000.00. The Plaintiff was awarded $15,000.00 in special damages relating to the termination.

The Defendants appealed and obtained a reduction of the defamation damages on the basis the first statements made by the Supervisor were statute barred and should not have been considered in the assessment of damages. The awards for special and aggravated damages were set aside and the award for general damages for defamation were reduced to $10,000.00.

The following damage issues relating to defamation actions are some points a potential litigant may wish to note[12]. Damages for defamation may be awarded as compensatory damages (general and special), aggravated damages, and punitive damages. General compensatory damages are presumed once defamation is made out and they arise by inference of law and do not require proof of actual injury. The entire conduct of the

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2000) at page 7-4.3.

[12] *Murphy v. Alexander [2001] O.J. No. 5465 (S.C.J.) See paras. 110 to 164 for discussion of defamation damages.*

alleged defamer before and after the action is commenced, as well as at the Trial of an action, can be considered by a court in assessing damages for defamation. Therefore additional defamatory remarks will be taken into consideration but as set out in Murphy above there are applicable limits for bringing damage claims arising from defamation.

Fedele v. Windsor Teachers Credit Union [2000] O.J. No. 2755 (S.C.J.) ("Fedele")

A former bank teller of the Defendant credit union brought an action for *inter alia* Wrongful Dismissal, Defamation, and Intentional Infliction of Mental Distress. The Plaintiff while still employed at the Defendant had continued to sign withdrawal slips in her mother's name on behalf of her parents (in whose names the accounts were held) in order to make withdrawals. The Defendant suspended the Plaintiff and hired an investigator to conduct an investigation regarding the withdrawals. After the investigation was completed the Defendant offered the Plaintiff the opportunity to resign with three months pay in lieu of notice. The Plaintiff rejected the offer and was terminated.

On the issue of defamation the Court found that the Defendant had investigated the Plaintiff's activities at a local casino and that the information and allegations of fraud, dishonesty, and misappropriation were revealed to third parties. These included her fellow employees, board members of defendant, and the allegations continued to be raised repeatedly in the course of the litigation. The Trial Judge found that if the

defendant had contacted the Plaintiff's parents at the outset of the investigation the allegations could not have been maintained.

Furthermore, the Court found that while the conduct of the Plaintiff might be characterized as "wrong" the Defendants knew or could have known that the plaintiff had not engaged in fraud, dishonesty, and misappropriation as alleged. Furthermore, the Court found that the allegations were not sincere and were motivated by the Defendant's desire to terminate the Plaintiff. It determined that there was a separate cause of action in slander against the Defendant. The Plaintiff was awarded $15,000.00 for damages for libel.

The Defendant's appeal was dismissed on the basis their defence of qualified privilege was negated by a finding of malice made by the Trial Judge. The Plaintiff's claim for Intentional Infliction of Mental Distress appeared to fail on the basis of a medical report filed by the Plaintiff that "did not indicate emotional distress of any substance".

Seaton v. Autocars North (1983) Inc. (c.o.b. North Toronto Mazda) [2000] O.J. No. 161 (S.C.J.) ("Seaton")

The Plaintiff auto-body manager brought an action *inter alia* for wrongful dismissal and defamation against the Defendant. The Plaintiff was accused of sexual harassment and a search of his office resulted in pornographic material being found by the Defendant's representatives. The Defendant asked the Plaintiff for a satisfactory explanation relating to the possession of the pornographic material and the allegations of sexual harassment.

The Plaintiff denied he had sexually harassed an employee and knowledge of the pornographic material. The Defendant then gave the Plaintiff a termination letter[13].

The Court found that the Plaintiff had been dismissed for cause as the allegations against him were grounded in fact. The Plaintiff called no other witnesses to support his allegations and no evidence was adduced as to what was said or to whom it was said in support of the alleged defamation. Furthermore, the Court found that the Plaintiff's pleadings with respect to the claim for defamation were deficient. In particular, the material facts were not set out in the required detail to support a claim for defamation. The Court determined that the Plaintiff was asserting a separate cause of action and the strict rules of pleading defamation had to be followed. Accordingly, this was not a circumstance where a plaintiff was merely alleging that the defamation was an aggravating factor to be considered in the wrongful dismissal claim. In the latter case the Court referred to the fact that the strict rules of pleading do not apply in those circumstances[14].

As such a litigant or his/her counsel must be sure to set out with particularity the material facts to support a cause of action for defamation. The exact words used must be set out fully and precisely in the statement of claim. In addition, a plaintiff must plead words were published to a third person, specifying the occasion upon which and the person to whom they were spoken. A deficient pleading could result in it being struck or the claim dismissed at Trial. In the *Seaton* case the court's finding that the plaintiff's evidence was

[13] Seaton v. Autocars North (1983) Inc. (c.o.b. North Toronto Mazda) [2000] O.J. No. 161. Paras. 14-17.

to be given little weight was also a fundamental reason why he failed to make out his claim. The Court's assessment of credibility of a given litigant remains a crucial consideration in whether a claim will succeed.

INDUCING A BREACH OF AN EMPLOYMENT CONTRACT

The elements of the tort of inducing a breach of contract have been set out by Mr. Justice Gale in *Posluns v. Toronto Stock Exchange, [1964] 2. O.R. 547, 46 D.L.R. (2d) 210 (H.C.), affirmed [1966] 1 O.R. 285, 53 D.L.R. (2d) 193 (C.A.), affirmed [1968] S.C.R. 330, 67 D.L.R. (2d) 165*, as follows:

> " A person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervenor has acted in order to harm his victim for a bad motive, does not per se convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others".[15]

The following are some instances where the intentional tort might be used in the employment context[16]:

1. inducing an employee to quit his/her employment without reasonable notice to the employer;

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[14] Seaton, supra, at Paragraphs. 25 and 26.

[15] Sproat, supra, at page 7.9

[16] Sproat, supra., at page 7.9

2. inducing an employer to terminate an employee without reasonable notice;
3. inducing an employee to breach the fiduciary obligation the employee owes the employer, such as obtaining confidential information of the employer for a competitor.

Recent Case Law

Mark v. Westend Development Corp., [2002]O.J. No. 2702 (S.C.J.) ("Mark")

The Plaintiff, a three year employee of the defendant, commenced two actions for wrongful dismissal as against the Defendant Corporation and then subsequently against the sole shareholder and director of the corporation and the comptroller of the Corporation. The Plaintiff was dismissed from the Defendant Corporation after she raised concerns about the defendant corporation's contravention, in her view, of the Rent Control Act (eg. that it was overcharging its tenants).

Subsequent to the overcharging issue being raised by the Plaintiff, the Defendant and the comptroller made "unreasonable" demands of the plaintiff by requesting a report within a patently insufficient amount of time. The production of the report would have required a large amount of overtime at no remuneration to the Plaintiff. Furthermore, the Defendant's representatives excluded the Plaintiff from her workstation without explanation and would not address the Plaintiff's concerns about the actions of the Defendant Corporation. Just before her termination the Plaintiff received a bonus and an excellent job appraisal.

The Court found that the corporation was liable for wrongful dismissal of the Plaintiff. Furthermore, it found that the sole shareholder and director of the Defendant Corporation had engineered and induced a breach of the plaintiff's employment contract on the basis of the concerns raised by the plaintiff regarding the potential "illegality" of the Corporations' actions *vis a vis* its tenants. The Defendant's principal had not, in dismissing the plaintiff, "acted with the bona fides in the best interests of the Defendant Corporation". The comptroller was found to have acted on the principal's orders and therefore was not liable but the Court said she had been justifiably joined to the action as the comptroller.

The plaintiff was awarded 5 months reasonable notice plus a further 2 months for Wallace damages as against the Defendant Corporation. Furthermore, the Court awarded damages for inducement of breach of contract, against the corporation and the principal jointly and severally. As the Court noted [per *Kepic v. Tecumseh Road Builders [1987] O.J. No. 890 (C.A.)],* the measure of damages for inducing breach of contract, is the same as the damages recoverable for the breach of the employment contract.

Another case of a greater vintage, is *Ribeiro v. Cdn. Imperial Bank of Commerce (1989), 24 C.C.E.L. 225, 67 O.R. (2) 38, 89 C.L.L.C. 14, 033(H.C.) varied (1992),44 C.C.E.L. 165, 13 O.R. (3d) 278 (C.A.), leave to appeal to S.C.C. refused (June 10, 1993),* where the plaintiff brought an action against the Defendant bank and one its security division inspectors. The latter accused the Plaintiff of fraud and caused criminal charges to laid against the Plaintiff even though there was no evidence to support the allegations. The

Court concluded, on the evidence, that the security inspector was not acting "bona fide and in good faith" and that he was "malicious and spiteful" towards the Plaintiff. Furthermore, that he went so far as to "on several occasions to fabricate information in order to support his unfounded allegations of criminal activity on the part of the plaintiff"[17]. The Court found the security inspector was personally liable to the Plaintiff for having induced a breach of the latter's employment contract.

It appears that in order to be successful in a claim for breaching an employment contract by a third party principal of an employer company, the Court must find some *mala fides* on the part of the third party accused of inducing the breach. If the third party is found to be acting in the best interests of an employer corporation then a claim may not succeed. In each case the Court must also find the requisite intention of the third party to induce the breach of employment contract.

CONSPIRACY

Madam Justice McLachlin (as she was then) summarized the applicable legal principles in *Nicholls v. Richmond, 52 B.C.L.R. 302, [1984] 3 W.W.R. 719 (S.C) additional reasons at 60 B.C.L.R. 320, 50 C.P.C. 171, [1975] 3 W.W.R. 543 (S.C.)*:

> "There are two categories of civil conspiracy: (1) where the predominant purpose of the defendants conduct is to injure the plaintiff; and (2) where the defendants effect their agreed end by unlawful means knowing that the plaintiff may be injured. The requirements of conspiracy to injure the plaintiff are an agreement

[17] Sproat. Supra., page 7-10 to 7-10.1

> between two or more persons whose predominant purpose is to injure the plaintiff and which when acted upon results in the damage to the plaintiff. The conspirators conduct in effecting their agreement need not be unlawful."

The requirements of the second type of conspiracy (as per *Nicholls*, supra), conspiracy by unlawful means, are an agreement between two or more persons which is effected by unlawful conduct. Furthermore, the defendants should know in the circumstances that damage to the plaintiff is likely to ensue and such damage does in fact ensue as a consequence of the agreement. A constructive intent is derived from the fact that the defendants should have known that damage to the plaintiff would result from their conduct. In both types of conspiracy there must be actual damage suffered by the plaintiff.[18]

Recent Case Law

The following recent case illustrates the second type of conspiracy in the employment context. In *Chahal v. Khalsa Community School, 2 C.C.E.L. (3d) 120, 2000 CarswellOnt 2267 (S.C.J.), additional reasons at, 2000 CarswellOnt 3444 (S.C.J.)*, the Court found that three members of a governing school committee directed a plan to terminate the employment of the plaintiff. It found further that they had done so by various unfounded allegations including accusing the Plaintiff of mistreatment of staff members, financial impropriety and poor performance. There was also an intention by the conspirators, and found by the Court, to injure the Plaintiff and to intentionally effect his wrongful

[18] *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452 per Estey J. at S.C.R. pp. 471-72.*

dismissal on false grounds. The Court determined that there were a series of actions by the conspirators including slander of the Plaintiff to third parties that amounted to independent actionable wrongs.

The conspirators were found personally liable, as they could not establish that they were acting *bona fide* in the interests of the Defendant school. In particular, they were liable for having defamed the Plaintiff and having induced a breach of the Plaintiff's employment contract with the school he worked for. Given that the Plaintiff had been hired pursuant to a fixed term contract the damages were found by the court to be "pre-estimated" and the balance of the contract salary was awarded to the Plaintiff: namely 18 months salary. The damages for inducing the breach of contract were included in the assessment of the "pre-estimated" damages.

Punitive damages were assessed at $25,000.00 for the "harsh and brutal conduct of the defendants" and a further factor considered in the amount awarded was the slander of the Plaintiff by the Defendants. The Plaintiff had requested that the punitive damages take into consideration the slander of the Plaintiff by the Defendants and damages for the defamation not be assessed or awarded.

In circumstances where there are unlawful acts it appears a Court will award damages for the unlawful acts themselves and not necessarily for the tortious conspiracy. As such, Professor G. H. Fridman in his book *The Law of Torts in Canada* sets out what should be an important consideration for a potential plaintiff:

> "If the object of a conspiracy is the commission of tortious acts, or the achievement of its purpose requires the commission of such acts there is little point or advantage in bringing an action for conspiracy against the conspirators. They may be sued for the specific tort or torts, which have been committed. Indeed it may be inappropriate for a claim in conspiracy to be joined with a claim in respect of such specific tort or torts."[19]

Another consideration for a plaintiff is the necessity to prove that the damage suffered by him or her was caused or brought about by the acts of the conspirators. It appears further that the Plaintiff must allege actual loss before the action will be allowed to proceed to trial and proof of such loss must be given before the action will succeed. Once the proof is established then damage will be at large, to take into account the foreseeable consequence of the conspiracy.[20] As was seen in *Chahal* punitive damages may also be awarded.

A defendant conspirator may defend on the basis of legitimate self-interest since the dominant object of those who, by acting in combination, cause injury to another is crucial in fixing liability in the absence of unlawful means. The plaintiff has the burden of proving that the conspirators predominant purpose was to inflict injury and as such this is a consideration a potential plaintiff or their counsel must keep in mind in assessing the viability of an action for conspiracy. It is also worth noting that self-interest does not justify the use of unlawful means to carry the agreement into effect. Another

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[19] *Professor G.H. Fridman, Law of Torts in Canada (2d.) 2002, Carswell, at page 761*
[20] Fridman, Supra at pages 771-772

consideration is the existence of a statutory or other type of immunity precluding an action for conspiracy against an individual conspirator.[21]

A conspiracy claim must be pled with care and detail and is thus similar to a defamation claim. An action for tortious conspiracy may therefore be subject to attack on a motion to dismiss or at Trial if not pled carefully. One advantage to pleading conspiracy is the potential to hold conspirators jointly and severally liable. As such a potential plaintiff would have a wider pool of defendants from whom to attempt to collect if a judgment is obtained.

CLOSING OBSERVATIONS

The torts considered in this paper share a commonality and a weakness: the facts as applied to the elements of the given torts must be sufficient for the tort to be made out and to succeed. The above cases are examples where each of the torts have succeeded, or in some instances not succeeded. The ultimate judgment is with the individual lawyer when advising clients as to whether a realistic chance of succeeding with a given tort is possible. *Prinzo* appears to be the measure against which counsel can assess the success a potential claim for Intentional Infliction of Mental Distress. As was seen above, the plaintiffs in *Geluch* and *Rinaldo* were not successful in establishing independent actionable wrongs that would support claims for Intentional Infliction of Mental Distress and as such the *Prinzo* threshold was not apparently met. However, the plaintiffs in those

[21] *Lewis Klar et. al., Remedies in Tort, [2000]: Thomson Professional Publishing Company: Toronto, at*

cases were successful in receiving Wallace damages whereas in *Prinzo* there appeared to be no in depth consideration of that issue at the Trial level[22], though the Court of Appeal would have awarded them.

In defamation cases, the need to plead the cause of action with meticulousness is evident from the *Seaton* case where the claim failed. Moreover, the evidence must be sufficient and credible to support a claim by an employee as against an employer who has defamed him or her. A potential litigant must keep in mind the range of defences available to the alleged defamer and their chances of success. With respect to inducing a breach of an employment contract, the evidence is key and must establish an intention on the part of the third party contract breaker to do just that without any defensible *bona fide* reason. The tort of conspiracy has its own rigorous pleading requirements and may not add to the damage awards if the court only awards damages for the unlawful acts and not for conspiracy. The Plaintiff also faces a somewhat onerous burden of proof: namely to establish the defendants' predominant purpose was to injure him or her. Once the elements of the tort are met then damages also must be actual and proved for a Court to award them.

In closing, it is worthy to note that there are advantages to some damages awarded in tort: namely that mitigation of those damages does not appear to be required[23]. A potential

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Page 3-26 Vol. 1.

[22] *Prinzo,supra (S.C.J.), at Paragraph 19.*

[23] Janice Rubin and Michelle Johal, New Heads of Damages: What Can You Sue For?, 3rd Annual Employment Law Forum, The Law Society of Upper Canada, C.L.E. at page 1-7.

litigant and their lawyer while possibly wishing to cover all potential claims may not want to plead claims that are clearly not going to succeed. The arguably "catch all" Wallace damage claim is worth pleading, again where justified, together with strong claims for the intentional torts referred to above. The material facts pled, in support of any torts claimed, may also be factors to consider and plead in relation to a Wallace damage claim.

A potential litigant and their counsel may wish to avoid attempting to claim everything "but the kitchen sink".[24] The chief drawback of unjustified claims is that they tend to weaken the pleadings in the eyes of a Court. There is also the risk of creating unnecessary expense and wasting the Court's time on issues that are not really worthy of examination in a Court's view. In this regard, a potential litigant and their counsel should be mindful of Rule 57 of the Rules of Civil Procedure. The foregoing should be considered when a litigant is contemplating the use of the aforementioned intentional torts as "companions" to a wrongful dismissal claim.

[24] Anonymous