

# The Latest On Punitive Damages In Wrongful Dismissal Cases

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The recent decision of the Ontario Court of Appeal in *The Estate of Pate v. The Corporation of the Township of Galway-Cavendish and Harvey* provides interesting insights into the current state of the law on awards of punitive damages in wrongful dismissal cases. The rather tragic facts of the case also provide useful guidance to employers inclined to take a heavy-handed approach with terminated employees.

Pate was employed as a building inspector for the defendant Township for almost 10 years until March 1999 when he was fired. The Township claimed that it had uncovered discrepancies regarding building permit fees for which Pate was responsible. Pate was never provided with particulars of these allegations, but the chief building official told Pate that if Pate resigned, the Township would not contact the police. Pate refused to resign.

After the termination, the chief building official turned some information over to the police. The investigating officers were reluctant to lay charges but the Township exerted pressure on the higher-ups in the police organization and charges were laid. Pate had to go through a four-day criminal trial before being acquitted in 2002. He then sued for damages for wrongful dismissal and malicious prosecution and requested punitive damages.

Unfortunately for Pate, the criminal proceedings were the subject of considerable media coverage. According to the Court, he remained in the public spotlight from the date of his dismissal in 1999 until his acquittal in 2002. He never obtained another job in the municipal field again and he died in 2011.

The question as to whether or not Pate had been wrongfully dismissed was never really an issue. The Township acknowledged its liability for this early on and paid Pate damages equivalent to 12 months' pay based on a negotiated agreement. The interesting aspect of the case had to do with the claim for punitive damages.

Punitive damages have always been available in both tort and contract cases in Ontario. Historically, however, they have been very difficult to obtain. The tests

employed by the Court have included words such as "malicious" and "high handed". Historically, such damages have rarely been awarded in straight business disputes. They seem to be awarded much more frequently in two types of cases: claims against insurance companies and wrongful dismissal cases.

An award of punitive damages is unlike any other type of award. Other awards are intended to compensate an injured party for losses suffered because of the wrongful conduct of the defendant. Punitive damages do not involve any aspect of compensation. Instead, they are meant to punish the wrongdoer for behaviour of which the Court strongly disapproves. In the words used in the jurisprudence, the objectives of awards of punitive damages are "retribution, deterrence, and denunciation".

This means that the amount to be awarded for punitive damages, if any, is conditioned on two factors. The first factor, of course, involves the question of just how bad the defendant's conduct actually was. The second factor has to do with the defendant's financial means. After all, if the point of the award is to deter a party from repeating this type of conduct, an award of \$100,000 may be very meaningful (and have a high deterrent value) to a middle class individual but completely meaningless to a major multi-national corporation. In the latter case, a much larger award may be appropriate.

In this case, the conduct of the Township went well beyond its urging the police to take action. The Court also found that the Township had uncovered evidence in the course of its own investigation that was in Pate's favour. The Township deliberately refrained from sharing that information with the police. That fact demonstrated the type of malice that justified not only an award of punitive damages but also an award of damages for malicious prosecution.

At the trial level, Pate was awarded punitive damages of \$25,000. Pate appealed to the Court of Appeal, arguing that this figure was too low. The Court of Appeal sent the case back to the trial judge for a new trial on the issue. After the re-trial, the trial judge increased the award of punitive damages from \$25,000 to \$550,000. The Township then appealed that decision.

On appeal before three Court of Appeal judges, one of the judges saw nothing wrong with the new figure. The other two judges disagreed, although not significantly, and reduced the award to \$450,000.

While there has always been a wide range of punitive damages in wrongful dismissal cases, there has been a low average award of about \$25,000 in most cases although some have exceeded that by a considerable amount. In other cases of breach of contract, misrepresentation or other such torts, the average has been about \$50,000. In cases involving the denial of insurance claims, much higher amounts have been awarded; in one case that was ultimately decided by the Supreme Court of Canada, \$1 million was awarded.

In this case, considering the blameworthiness of the misconduct, Pate's vulnerability, the harm caused to him, the total amounts awarded to him and the warrant for punishment, the Court had no difficulty determining that the award should be towards the high end of the spectrum.

Employers are typically in the driver's seat in these matters. Employees tend to be vulnerable and there are many employers who cling to the idea that they can act with impunity in terminating employment. While it is true that as a general principle, subject to the existence of an employment agreement, an employer can terminate employment at will (provided that the employer provides reasonable notice or pay in lieu of notice), that does not mean that an employer can behave in an outrageous

manner. Employers failing to appreciate this may well find themselves on the wrong end of a substantial punitive damages award.

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