

# COMMENT

## Wrongful Dismissal—Playing Hardball: *Wallace v. United Grain Growers*

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Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.<sup>1</sup>

—Dickson C.J.C.

### I. INTRODUCTION

THE CASE OF *Wallace v. United Grain Growers Limited*<sup>2</sup> underscores Chief Justice Dickson's observations on the meaning of work to a person. Jack Wallace was destroyed when his work was taken from him. An employer may fire any employee, with or without just cause, but it was how Jack Wallace was fired that was so wrong. The decision was made to play "hardball" with him. A case that should have settled was instead litigated. Jack Wallace, dismissed employee, was forced into a legal war with a powerful and wealthy corporation. The result was a trial that should never have been. The legal battles continued for eleven years until the Supreme Court of Canada finally found for Wallace. What happened to Jack Wallace says a great deal about the law of wrongful dismissal and about our system of justice.

This case raises a number of issues. First, there is the personal dimension. Jack Wallace, late in his working career, was summarily dismissed. His story is worth repeating. It highlights the devastation that is wrought upon those workers who are vulnerable to dismissal and who are wrongfully dismissed. Second, there is the lawyer dimension. It is one thing for the defendant to play hardball, but it is quite another matter for defendant's counsel to do so as well. Third,

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<sup>1</sup> *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 368.

<sup>2</sup> (1997), 152 D.L.R. (4<sup>th</sup>) 1 (S.C.C.) [hereinafter *Wallace* Supreme Court Judgment].

there is the legal dimension. The Supreme Court of Canada moved the law to recognise that the manner of dismissal may impact on damages. However, while this is a positive move, the majority's means of achieving this end is flawed.

## II. THE PERSONAL DIMENSION<sup>3</sup>

IN 1972, PUBLIC PRESS, a wholly owned subsidiary of United Grain Growers Limited [hereinafter U.G.G.], was at a cross-roads. At the time, Public Press mostly did in-house magazine publications for U.G.G., which were sent out to various agricultural groups. Only a small amount of commercial out-side publishing was done. U.G.G. had a choice to make: either close down its printing arm and farm out its publishing needs or expand. The decision was made to expand.

A new "web" press was purchased. It cost in the neighbourhood of one to two million dollars. To justify the expense Public Press had to increase its commercial sales from \$200 000 to \$3 million. Don Logan, Public Press's then marketing manager, needed new customers. He needed a salesman who knew the "web" press. He needed Jack Wallace. In his words, "We wanted somebody like Jack Wallace so bad we could taste it."

In 1972 Jack Wallace was working for another printer, Lawson Graphics. He had been with them for 25 years and he was their top salesman. But there were problems. Wallace felt that Lawson had not fully compensated him for a commission on a new account he had obtained for them. Also, a short time before, a fellow worker had been fired for what seemed to Wallace to be a minor infraction of company rules. Wallace heard that Public Press was looking for a "web" press salesman. He contacted Don Logan.

Wallace was concerned about jeopardising his present position. He did not want Lawson Graphics to know that he was looking elsewhere. Accordingly, Logan and Wallace met at the duck pond in City Park. During the course of the meeting it became apparent to Logan that Wallace was very concerned about "tenure." Wallace was 44 years of age, had been with Lawson for 25 years, and he did not want to give up this security. Logan described Wallace as "pre-occupied" with tenure. Wallace raised the firing of his co-worker. Logan testified:

A. Well, the reason for his raising it, and the reason I'm raising it, is that he wanted the assurance from me that people didn't get treated that way at Public Press. That's the thing in a nutshell. He wanted to be sure that he wasn't going to get fired for no cause, in other words.

Q. And, and so what did you tell him after he had raised this concern?

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<sup>3</sup> The facts as outlined are taken from the reported decisions as well as from the actual trial transcript. Specific citations are omitted.

- A. I told him that's not the kind of outfit Public Press is. That just never happens at Public Press; never has and I don't think it ever will. United Grain Growers same thing.

Logan then gave Wallace the following assurances:

- A. Well, I said to him, "Jack, I can't give you detailed terms right now but I can tell you that you'll be fairly treated at Public Press. You'll make the money you deserve; you won't get any shortfalls like you've experienced where you are. And that as long as he performed—and I think I used the term kept his hand out of the till; didn't have any offences; there's no reason he couldn't retire from Public Press."

Following the meeting in the park Logan went back to his office and talked to the general manager of Public Press. Logan related "in detail" his discussion with Wallace "including Jack's apprehensiveness about tenure." The general manager of Public Press had no problem with tenure, so long as Wallace performed. So it was that Jack Wallace was lured to work for Public Press.

Logan confirmed Wallace's hiring in writing. The letter to Wallace was short. It included confirmation of a draw against commission and car allowance. What was left to be decided was the commission that Wallace was to earn on his sales. Logan wrote, "I greatly appreciate the confidence you have that we will treat you fairly on this point, and you may be sure that events will justify this." No express mention was made of "tenure," but Logan, in testifying, stood by his oral assurances.

Jack Wallace was not your typical hiring. U.G.G. usually paid its employees on straight salary. Wallace was to be paid by commission. In fact, Logan recalled talking about Wallace to the then President of U.G.G., Mr. Runciman. Logan told him that Wallace, working on a commission, had the potential to earn more money than he, the president of the company. To wit Mr. Runciman replied, "More power to him."

Unfortunately for Jack Wallace the assurances that Don Logan gave to him were not expressly spelled out in the contract of employment. Times changed. The leadership changed. Gone was Don Logan, a man of integrity—a man of his word, who left Public Press in 1975 to establish his own business. Gone too was Mr. Runciman.

Wallace performed splendidly. He filled the web press with business. In his 14 years with Public Press he was always their top salesman. In 1985, he received a letter from the general manager of U.G.G. congratulating him on establishing a new plateau for sales—over \$2.3 million.

A year later on 22 August 1986 Jack Wallace was fired. He was 19 days shy of his 59<sup>th</sup> birthday. We don't know why he was fired. We do know that U.G.G. had no just cause. They admitted that. Leonard Domerecki, manager of marketing for Public Press at the time, was given the task of firing Wallace. Domerecki disagreed with the firing. In his words, "We don't have any reason to." He was told, "You have to do it." He did. Wallace was allowed to retrieve

certain personal possessions and then escorted out of the building. Wallace was not told why he was being fired.

Subsequently, a letter was sent to Wallace. The letter was drafted by Domerecki and the general manager for Public Press, James Kirch. The last paragraph of that letter read, "The main reason for your being terminated is due to the inability to perform satisfactorily the duties of your position." Domerecki admitted that this statement was not true. This untruth was repeated in the defendant's statement of defence. The defendant only withdrew its allegation of cause on the eve of trial, 12 December 1988—over two years after Jack Wallace was fired.

Jack Wallace was devastated by the firing. His wife told the court of the shock both she and he felt by the firing. He went through denial. She testified,

I mean, he went through some of the normal processes of getting up, shaving, getting dressed in a business suit, and, you know, going—actually hoping that he would get a phone call so he could go down.

Denial turned to anger when the letter arrived from U.G.G.; the letter that claimed he was fired for cause. It arrived on his birthday in September, but he did not open it until the next day. His wife described his reaction as follows,

He couldn't understand that and he was becoming angry at, at that time. It was no longer denial it was anger because nowhere had he been told that he had not performed in his position.

He changed. He became bitter, and was irritable with her. He did not want anyone around, because he did not want anyone to know. He never told two of his children. He only told his eldest son, who was in the printing business and would hear of the firing. He became obsessed with the case. He became suicidal. He was diagnosed as being depressed. His psychiatrist testified that the depression was caused by the firing:

The dismissal shattered his sense of self-esteem, his sense of being, his sense of purpose in life. And it's been a matter of trying to address that, rebuild that, without having a job there to replace that.

Mrs. Wallace, in a telling statement, summed up what had happened to her husband. She told the court,

Because he got all of his, his being from his job. That was his pride and that's what he excelled at and that's what he did. So when they took that away from him they took away everything because his life revolved around that.

She was not cross-examined.

### III. THE LAWYER DIMENSION

WALLACE FILED A STATEMENT OF CLAIM in October of 1986. The case then meandered through the civil justice system for eleven years before finally being resolved. The case was marred by interruption and delay. Motion followed interlocutory motion. Pleadings were amended and then re-amended. The trial began in December 1988 with a false start in that only one witness was called before the trial was adjourned. It did not resume until 30 April 1992. The plaintiff then put in its case and the trial was adjourned again on 8 May 1992 to await the defendant's answer. It is at this point that the case was hijacked by the issue of Wallace's bankruptcy.

On 26 September 1985 Wallace filed for personal bankruptcy. The problem was that at the time of filing his action Wallace remained an undischarged bankrupt. His bankruptcy was not discharged until December 1988. Wallace's supervisor at U.G.G. knew about his bankruptcy. The payroll department knew. It was disclosed in Wallace's 1986 income tax form that was made available to the defendant on discovery. Yet it was only after the plaintiff had closed its case that counsel for the defendant "twigged" on to the bankruptcy. The defendant then brought a motion to amend its statement of defence to assert that Wallace, by virtue of his bankrupt status, lacked the capacity to commence or continue the proceedings and that his claim for breach of contract be struck. In October 1992 the trial judge granted leave to amend the statement of defence and went on to strike out the plaintiff's claim for breach of contract. The plaintiff's appeal of this ruling was stayed pending completion of the trial. The trial finally was completed in May 1993. Ultimately, the Manitoba Court of Appeal ruled that Wallace still had capacity to bring his action. The Supreme court of Canada came to a similar finding, although through different reasoning.

It is fair to say that the bankruptcy issue tainted Wallace's wrongful dismissal claim. First, here was a person who was released from paying over \$254 000 in secured and unsecured debts. Second, it was used to attack Wallace's credibility in that he had not informed his trustee in bankruptcy of the legal action. Third, the information uncovered in the bankruptcy proceedings brought into question whether Wallace was so depressed as to be unable to work in 1987-1988.

What is so troubling about this case is that the defendant from the outset knew that there was no just cause to fire Wallace. Remember Leonard Domerecki's words, "We don't have any reason to." The decision to fire was that of the general manager, Jim Kirch, who ordered Domerecki to "do it." And the decision was made to play hardball. Wallace was told that he was fired for cause, when as we know, no cause existed. Now it may have been the case that Kirch simply decided to get rid of Jack Wallace—an "out with the old and in with the new" approach. After all Kirch had just taken over as general manager of Public Press in February of 1986. Perhaps he wanted his own people in place.

Perhaps he simply wanted to exercise control. We don't know; we can only speculate.

What we do know is that the statement of defence, which was filed in December of 1986, repeated the claim that Public Press had "reasonable and just cause" for termination. The specific grounds pleaded were,

[I]nsubordination, failure to safeguard confidential information, exceeding his authority, hindering customer relations, incompetence to perform duties, conduct injurious to the defendant and conflict of interest.

Where was the proof of these allegations? "The lawyer's first duty when beginning or defending a suit is to inform himself fully of all the relevant facts."<sup>4</sup> The evidence concerning Wallace's work performance was available. A reasonable investigation should have been undertaken. Orkin, in his book on legal ethics, speaks of the duty of counsel "to make himself master of his client's case and in order to do so he should not be content merely with what his client tells him; he should make all necessary searches and investigations and confer personally with the witnesses."<sup>5</sup> If this were done it is hard to see how on the facts or on the law a claim of just cause could possibly be sustained. Certainly following the taking of the examinations for discovery at the end of April 1987 it should have been abundantly clear to defendant counsel that no just cause existed. Yet the allegation of cause was not formally abandoned until the start of the trial. Moreover, defendant counsel persisted up to the end of the trial, which was May of 1993, with innuendo that "reasons did exist for Public Press to be dissatisfied with Mr. Wallace's performance as an employee."<sup>6</sup> No evidence was produced.

As mentioned earlier, this was a case that should have settled—for the benefit of both sides. The time to settle was in 1987 and 1988. Yet, it is not until December of 1991, five years after Wallace was wrongfully fired, that the defendant made a formal offer to settle in the amount of \$150 000 all inclusive of costs. By this time, both sides were committed to litigation and Wallace's wrongful dismissal claim had been further aggravated by the false claims of "just cause." The legal battle was now fully engaged.

Let us turn back to the fall of 1986. What is the role of defendant's counsel at this time?<sup>7</sup> Kirch may have wanted to play hardball, but should counsel? Our

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<sup>4</sup> M. Orkin, *Legal Ethics*, (Toronto: Cartwright, 1957) at 78.

<sup>5</sup> *Ibid.* at 80.

<sup>6</sup> Taken from the trial judgment of Lockwood J., *Wallace v. United Grain Growers Ltd.*, [1993] 7 W.W.R. 525 at 547 (Man. Q.B.) [hereinafter Wallace Trial Judgment].

<sup>7</sup> Note that counsel who represented the defendant on appeal to the Court of Appeal and before the Supreme Court of Canada was not counsel at this time and was not trial counsel.

*Code of Professional Conduct* is suitably vague.<sup>8</sup> Counsel are to “discourage” the client from proceeding with useless or frivolous proceedings, but what is one to do when the client insists on carrying on with such a case? Dubin J.A., in *Foulis v. Robinson*, commented,<sup>9</sup>

Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action.

The situation in *Wallace*, however, was not a simple matter of putting the plaintiff to his proof, the defendant was raising an affirmative defence. The obligation rested with the defendant to prove just cause for dismissal. In this way the defendant is like the plaintiff who asserts a claim. Professor Wolfram, in his leading text on legal ethics, put it very well when he wrote,<sup>10</sup>

It has been argued that a higher standard of candor applies to “affirmative” statements, such as in complaints, and a lesser standard to statements of denial, such as in answers that have the legal effect of calling upon the other party to offer proof of assertions known to be true. Yet it seems equally as objectionable to subject an opponent who is a claimant to the needless expense of proving matters that cannot be controverted as it is to subject a defending opponent to the needless expense of meeting claims that are incontrovertibly unfounded or false.

Now it is tempting to claim just cause. It provides a tactical advantage for the client in that it strengthens the client’s bargaining position. Playing hardball may scare off would-be plaintiffs or cause them to settle for less. But that does not make it right to plead the allegation where the facts and law are not there to sustain it.

In the United States the Federal Rules of Civil Procedure under Rule 11 mandate sanctions against counsel who sign and file pleadings found to be groundless. Rule 11 was spawned out of concern that it was too easy to make groundless allegations, which once made result in delay, obstruction, and needless expense. The applicable portion of Rule 11 reads as follows,<sup>11</sup>

(b) *Representations to Court*

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

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<sup>8</sup> *Canadian Bar Association, Code of Professional Conduct* (Ottawa: Canadian Bar Assoc., 1987), see Chapter III, commentary 6 and Chapter IX, commentary 7.

<sup>9</sup> *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 at 776 (C.A.); cited with approval in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 at 22 (C.A.).

<sup>10</sup> C. Wolfram, *Modern Legal Ethics* (St. Paul, Minn.: West, 1986) at 599.

<sup>11</sup> Rule 11 was amended in 1993. For a discussion of that amendment see: “Federal Rules of Civil Procedure” 146 Fed. R.D. 401 at 583–592.

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) *Sanctions*

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Rule 11 has an objective and subjective component. The lawyer must not only be acting in good faith, but must also have reasonable grounds to support that faith. As one court put it, "an empty head but a pure heart is no defense."<sup>12</sup>

Rule 11 has much to commend it. First, it is a clear statement of counsel's responsibility in ensuring the integrity of court documents that they prepare, file, and sign. This is a legitimate gate-keeping function for counsel to assume. You will hear the contrary. Many counsel say, "It is not for me to judge my client's case." Such a position is to be rejected, as it amounts to no more than a plea for ignorance. Competent counsel investigate the facts of the case and the applicable law. They are then in a position to assess their client's case. A judgment is made and should be made. In the criminal realm, crown counsel engage in this type of assessment on a daily basis in the screening of charges.<sup>13</sup>

Second, Rule 11 provides a convenient way for counsel to say no to a client. Citing Rule 11, counsel can say to a client, "I have reviewed the facts and law. Your claim is not supported by either. If I prepare and sign a statement of claim (defence) making allegations that are unfounded I will be liable for sanctions. Therefore, I cannot do what you ask." This sends a strong message to the client that his proposed position is wrong.

Third, Rule 11 provides a practical sanction. It is one thing to speak about a lawyer's ethical and professional obligations. Vagueness generates inaction. Rule

<sup>12</sup> *Thornton v. Wahl* (1986), 787 F. 2d 1151 at 1154 (7<sup>th</sup> Cir.), as quoted in R. Marcus, M. Redish & E. Sherman, *Civil Procedure: A Modern Approach*, 2<sup>nd</sup> ed. (St. Paul, Minn.: West, 1995) at 140.

<sup>13</sup> See Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993) at 50-142 (Chair: Hon. G. A. Martin).



11 with its sanctions provides a ready means for counsel to police themselves or for the courts to do so.

It is naive to think that the tactical abuse in the United States that gave rise to Rule 11 does not occur in Canada. The fundamental principle underlying the rule is sound; counsel must take responsibility for the representations that they include in their pleadings. Counsel acting with due diligence and in good faith need not fear such a rule. Therefore, our courts should look seriously at the inclusion of a Rule 11 equivalent into our rules of court.

A second troubling aspect of the *Wallace* case is the delay between the date the trial started, 12 December 1988, and the date it reconvened, 30 April 1992, a hiatus of three years and four months. Motions, adjournments, and objections were the order of the day. The case was adjourned *sine die* after the opening day. The adjournment was granted to allow defendant counsel time to assess their position and decide whether further examination for discovery of the plaintiff was needed in light of the plaintiff's amendment to the statement of claim. At the opening of the trial, the plaintiff amended the statement of claim to include damages for mental distress arising from breach of contract. The claim had been originally pleaded only in tort. Frankly, I do not see how this amendment would require any further examination of the plaintiff, the change being more of legal housekeeping rather than raising new factual matters. Months passed whilst the defendant contemplated further examination of the plaintiff. Then the defendant moved to have the plaintiff examined by a psychiatrist. More months passed. Months turned to years. Throughout this time trial conferences were held, but were of a *pro forma* nature. The judge never exercised control over the case and it was allowed to wallow in the civil process. The delay is unacceptable. It underscores the need for strong and effective case management. Studies have shown that the most effective way to reduce costs and delay is the setting of a firm, fixed trial date.<sup>14</sup> Unfortunately, this was not done in *Wallace*.

In some respects *Wallace* shows our civil justice system at its worst, however, it also shows it at our best. Plaintiff counsel are to be commended for their tenacity and endurance. They took on Jack Wallace's cause. A legal battle turned into an eleven year war. They represented the "little guy" who was wronged and their work represents the finest traditions of the bar.

#### IV. THE LEGAL DIMENSION

BEFORE TURNING TO THE LEGAL ISSUES raised in *Wallace* it is helpful to outline certain fundamental principles that guided the existing law of wrongful dismissal. First, employers have a right to dismiss any employee hired on an inde-

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<sup>14</sup> J. Kakalik, *et al.*, *Just, Speedy, and Inexpensive: An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, (Santa Monica, Cal.: Rand Institute for Civil Justice, 1996) at xxxiii.

terminate contract of employment. Similarly, employees have the right to terminate any employment. "Wrongful dismissals" usually arise when employers do not give their dismissed employees reasonable notice or payment in lieu of notice. Therefore, the "wrong" is not the "dismissal;" rather it is the failure to provide notice. In this way, the courts confine damages to the reasonable period of notice. Other heads of damage, such as for mental distress, which flow from the dismissal and not the lack of notice, are denied. The policy behind the approach is the concern of the courts that dismissal will always occasion a measure of mental distress and personal anguish and that employers ought not to be found liable for exercising their right to dismiss any employee. McIntyre J., in *Vorvis v. I.C.B.C.*,<sup>15</sup> referred to the House of Lords' decision in *Addis v. Gramophone Co.*<sup>16</sup> and summarised the law as follows,<sup>17</sup>

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 *Wallace*, the plaintiff sought to make the "wrong" the "dismissal" and sought to make the "manner of dismissal" another actionable wrong; these changes in the law were of prime interest to the justices in the Supreme Court of Canada. Further, *Wallace* also raised a number of other issues concerning wrongful dismissal. The Court was called upon to decide the following questions:

- (i) did Wallace have a fixed term contract to age of retirement (65);
- (ii) is Wallace to be compensated for damages for mental distress;
- (iii) are punitive damages available absent an independent cause of action;
- (iv) should the courts imply a principle of good faith and fair dealing into every contract of employment;
- (v) if Wallace had an indeterminate contract of employment, what was he entitled to by way of reasonable notice?

### A. Fixed Term Contract

At trial it was argued strenuously that Wallace had a fixed term contract with Public Press and that he had tenure to retirement subject to cause for dismissal

<sup>15</sup> *Vorvis v. I.C.B.C.* (1989), 58 D.L.R. (4<sup>th</sup>) 193 (S.C.C.) [hereinafter *Vorvis*].

<sup>16</sup> [1909] A.C. 488 (H.L.) [hereinafter *Addis v. Gramophone Co.*].

<sup>17</sup> *Vorvis*, *supra* note 15 at 203.

or redundancy. The trial judge said no, as did the Manitoba Court of Appeal. Scott C.J.M. commented,<sup>18</sup>

General expressions of inducement such as found by the trial judge are rarely intended or accepted as creating binding legal obligations. I am in entire agreement with Lockwood J.'s view that "such a contract would be so special in nature that it would have to be worded in very explicit terms" and, I would add, most certainly in writing.

True, in the usual employee-employer context a "no-cut" contract would be rare—the offer of "permanent" employment being an aspiration rather than a term of the contract of employment. There is no question that employers are loathe to provide a guarantee of tenure and, generally speaking, they do not. The workplace reality is that of power imbalance between employee and employer. The employer is the bearer of power and the employee is not.<sup>19</sup> What follows from this is that employers will not agree to a "no-cut" contract unless they have to.

Yet, was the hiring of Jack Wallace not unique? Was he not a "star," who could well dictate a contract of tenure? We have the uncontradicted evidence of Logan and Wallace that such tenure was in fact agreed to. The authorities relied upon by the Court of Appeal in dismissing a fixed term contract are not convincing. None of these authorities comes close to the specific facts in Wallace. There is a marked difference between a mere advertisement of "permanent" employment and the more detailed discussion between Wallace and Logan which formed the basis for Wallace coming to work for Public Press. I suggest that the evidence of a fixed term contract was there.

The finding of a fixed term contract was one that the trial judge had to make. He did not. Given this finding of fact it is not surprising, and we cannot be too critical of the appellate courts, who gave this ground of appeal short shrift and moved on to other questions of law.

## B. Damages for Mental Distress

The trial judge awarded Wallace \$15 000 for "aggravated damages resulting from mental distress."<sup>20</sup> As can be seen from this statement, what the trial judge did was combine aggravated damages with damages for mental distress. Yet it should be kept in mind that these heads of damage are distinct. Aggravated damages are compensatory, but take into account the additional intangible injury to the plaintiff caused by the defendant's outrageous and malicious con-

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<sup>18</sup> *Wallace v. United Grain Growers Ltd.*, [1995] 9 W.W.R. 153 at 173 (Man. C.A.) [hereinafter *Wallace Appeal Judgment*].

<sup>19</sup> *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4<sup>th</sup>) 416 (S.C.C.), per Dickson C.J.C.

<sup>20</sup> *Wallace Trial Judgment*, *supra* note 6 at 540.

duct.<sup>21</sup> Damages for mental distress, on the other hand, require tangible proof of the mental distress, but do not depend upon oppressive behaviour by the defendant. The two overlap where, as in *Wallace*, it is alleged that the same misconduct caused the mental distress and justified the claim for aggravated damages. According to the trial judge, liability was found both in contract and tort on the basis of the "reasonable foreseeability" test. He wrote,<sup>22</sup>

I find that ... it must have been in the contemplation of the defendant that if the plaintiff, having been given such a guarantee, was unjustifiably dismissed without warning, he would probably suffer mental distress. I find it to have been an implied term of the contract of employment.

I find that it was reasonably foreseeable that mental distress would result from the manner in which the dismissal was handled and also by the decision to play hardball with the plaintiff ... There was, consequently, a negligent breach of the duty of care warranting compensation by way of aggravated damages.

The Court of Appeal overturned this award. The Court rejected the "reasonable foreseeability" approach. Rather, they required a separate actionable wrong. The Court went on to reject the trial judge's finding of "negligent breach of a duty of care" in the manner of dismissal. Scott C.J.M. concluded,<sup>23</sup>

No authority was cited nor is any available that in the circumstances of this case there is a duty upon an employer to take care to discharge an employee in such a way so as to reduce or even eliminate any risk of mental suffering or other adverse consequences to the employee.

The majority judgment in the Supreme Court of Canada accepted the Court of Appeal's approach. Justice Iacobucci wrote,<sup>24</sup>

Relying upon the principles enunciated in *Vorvis*, the Court of Appeal held that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination "must be founded on a separately actionable course of conduct." Although there has been criticism of *Vorvis* ... this is an accurate statement of the law.

The Court of Appeal concluded that there was insufficient evidence to support a finding that U.G.G. had committed a separate actionable wrong either in tort or in contract. Justice Iacobucci agreed.

Thus, we can now say that recovery for mental distress, as a separate head of damages, needs to be based on a separate actionable wrong apart from the breach of contract. This clarified the ambiguity flowing from the Supreme Court's earlier decision in *Vorvis v. I.C.B.C.* Some courts had used the ambiguity in *Vorvis* to award aggravated damages when they were felt to be just, not-

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<sup>21</sup> *Vorvis*, *supra* note 15 at 202.

<sup>22</sup> *Wallace* Trial Judgment, *supra* note 6 at 540 and 547.

<sup>23</sup> *Wallace* Appeal Judgment, *supra* note 18 at 182.

<sup>24</sup> *Wallace* Supreme Court Judgment, *supra* note 2 at 26-27.

withstanding that no separate actionable wrong could be shown. This door to recovery is now closed.

However, Justice Iacobucci then went on to open a new door to recovery. Where the manner of dismissal has caused mental distress which falls short of an independent actionable wrong the trial judge has a discretion to extend the period of reasonable notice. As will be discussed, this creates an unprincipled means of recovery.

### C. Punitive Damages

Punitive damages are not awarded to compensate the plaintiff. Rather they are intended to punish wrongdoers and act as a deterrent to the defendant and to others. Before punitive damages are awarded the defendant's misconduct must be so malicious, oppressive, and high-handed that it offends the court's sense of decency. In *Vorvis*, McIntyre J. required that the punitive damages be based upon a separate actionable wrong. Wilson J., in dissent, saw no need to tie the misconduct to a separate wrong.

In *Wallace* the trial judge refused to award punitive damages. He did not find that the defendant, "in playing so-called hardball," had acted in a sufficiently reprehensible manner to warrant punitive damages being awarded. He also noted that there was no separate actionable wrong to support such an award. The Court of Appeal affirmed the trial judge's finding. Justice Iacobucci agreed with the findings of the courts below. Therefore, it seems that the majority accepts the need for a separate actionable wrong.

Why this is so is not difficult to fathom; the majority's decision carefully limits the liability of employers in wrongful dismissal actions. Wrongful dismissals are especially emotive. And jurors, in those jurisdictions where a civil jury is available, are likely to sympathise with the wrongfully dismissed employee, especially if treated in a high-handed fashion by the employer. Punitive damages could be high and unpredictable. For example, in *Wallace* the plaintiff sought \$150 000 in punitive damages. By tying punitive damages to a separate actionable wrong the Court limits the availability of these awards. The majority's decision is one of policy rather than principle.

In principle, what Justice Wilson said in *Vorvis* remains as true then as it does now.<sup>25</sup>

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 and malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not ... .

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<sup>25</sup> *Vorvis*, *supra* note 15 at 224.

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 Supreme Court, however, has spoken. One response is legislation. In New Brunswick the law was recently reformed to allow for punitive and aggravated damages to be awarded without the need for an independent actionable wrong.<sup>26</sup>

#### D. A Principle of Good Faith and Fair Dealing

Given that there was no fixed term contract, it was open to U.G.G. to dismiss Wallace. What the plaintiff strongly pressed for on appeal was that a term should be implied into each and every contract of employment that an employee would only be fired for just cause or legitimate business reasons. This change in the law has long been advocated by Stacy Ball, who presented the argument before the Supreme Court.<sup>27</sup>

The Supreme Court of Canada, both in its majority and minority judgments, was not prepared to accept this principle of law, which would make the dismissal the wrong. The recognition of a new cause of action for "bad faith discharge" was too big a change in the law—the plaintiff was asking for too much. In the end this proposed change in the law found no support in the Supreme Court.

In the alternative, the plaintiff argued for a duty of good faith and fair dealing in the manner of dismissal. It is here where the dissent rests. Justice McLachlin would find an implied contractual term to act in good faith in dismissing an employee. Justice Iacobucci would not. He concluded, "[t]o create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures."<sup>28</sup>

On the other hand, Justice McLachlin saw an implied condition of good faith as sound incremental change in the law. Her decision is consistent with principle. What is recognised as wrong is the *manner* in which an employee is discharged. It will provide compensation for those injured by callous and mali-

<sup>26</sup> *Law Reform Act*, R.S.N.B. 1998, c. L-1.2, s. 3(1). The New Brunswick legislation reads as follows:

s. 3(1) Where in any proceedings a claim is made for aggravated, exemplary or punitive damages, it is not necessary that the matter in respect of which those damages are claimed be an actionable wrong independent of the alleged wrong for which the proceedings are brought.

<sup>27</sup> See, for example, S. Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 1997), para. 20:110; S. Ball, "Bad Faith Discharge" (1994) 39 McGill L.J. 568.

<sup>28</sup> *Wallace* Supreme Court Judgment, *supra* note at 28.

cious treatment. Moreover, it will provide an independent base to found aggravated or punitive damages to deter such misconduct. Accordingly, Justice McLachlin upheld the trial judge's award of \$15 000, which would now be payable through breach of the implied term of good faith in the firing of Wallace.

Although Justice Iacobucci was not prepared to find a separate actionable wrong arising from breach of an employer's duty to treat employees in fair manner upon dismissal, he was prepared to indirectly provide compensation under the rubric of reasonable notice.

### E. Reasonable Notice

Iacobucci J., writing for the majority, would impose an obligation of good faith and fair dealing upon employers in the dismissal of employees. Should employers act in bad faith in the firing of employees then "such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by *an addition to the notice period.*" [Emphasis added.] It is worth outlining what Justice Iacobucci had to say about these additional damages:<sup>29</sup>

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest, and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

I note that, depending upon the circumstances of the individual case, not all acts of bad faith or unfair dealing will be equally injurious and thus, the amount by which the notice period is extended will vary. Furthermore, I do not intend to advocate anything akin to an automatic claim for damages under this heading in every case of dismissal.

However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment.

I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and

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<sup>29</sup> Wallace Supreme Court Judgment, *supra* note 2 at 29–38.

despair. In my view, the reasonable person would expect such treatment. So should the law.

In the end Iacobucci J. restored the order of 24 months notice awarded by the trial judge, which had been reduced to 15 months by the Manitoba Court of Appeal.

The difficulty with Justice Iacobucci's approach is that the damages do not fit the wrong. Damages are paid as a substitute for reasonable notice, which represents the time that may reasonably be required to find replacement employment. The wrong is the manner of dismissal, which may have absolutely no impact on what the reasonable period of notice ought to be. The two are only connected if the manner of dismissal makes it more difficult for the employee to obtain other employment.

Justice Iacobucci's "adding on to the notice period" represents an unsatisfactory compromise. On the one hand, he saw the wrong in allowing employers to fire employees in a callous manner. On the other hand he, like so many justices before him going back to the Lords in *Addis v. Gramophone Co.*, was concerned about the scope of the damage awards. The practical, albeit unprincipled, solution was to tie the wrong to the notice period regime, which throughout the years has limited wrongful dismissal awards.

Lack of principle leads to unprincipled results. Consider the problem outlined below and ask yourself why employee X should receive \$15 000, whilst employee Y receives \$6 000 given that they suffered the same wrong. Extending the notice period has nothing to do with the wrong or redressing the injury caused.

ILLUSTRATION 1  
Problem of Notice Period Compensation

Employee X earns \$5 000 per month	Employee Y earns \$2 000 per month
He is fired in a bad faith manner. His notice period is increased by 3 months. The damage award is: $3 \times \$5\,000 = \$15\,000.$	He is fired in the same bad faith manner as employee X. His notice period is also increased by 3 months. The damage award is: $3 \times \$2\,000 = \$6\,000.$

Next consider how mitigation impacts on such an award. An employee is obligated to mitigate his damages by finding other employment otherwise the law would be encouraging waste. Any earnings so obtained are offset against the employer's obligation to pay damages in lieu of reasonable notice. Assume an employee obtains alternative employment six months after being fired. A court finds that his reasonable term of notice is 6 months, plus 3 months are added for



the manner in which he was fired. Does his alternative employment go to mitigate the extended period of notice added because of the bad faith firing? Why should it?<sup>30</sup>

Justice McLachlin in her dissent predicted "uncertainty and unpredictability" would follow the majority's approach. She is correct. We see this in *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.*<sup>31</sup> where the Manitoba Court of Appeal was called upon to apply and interpret *Wallace*.

Whiting sued the defendant for wrongful dismissal. She claimed damages for mental distress. The trial judge found that she was wrongfully dismissed and that she was entitled to six months pay in lieu of notice. In addition she was awarded \$15 000 for non-pecuniary damages for mental distress and \$38 000 for loss of income arising from her inability to work because of the mental distress. The Court of Appeal applied *Wallace* and overturned the damage awards for mental distress. However, because the dismissal was "callous, improper and totally without sensitivity" the Court went on to extend the notice period from six to twelve months.

*Whiting* presents an interesting test case for the *Wallace* approach. The evidence was clear that the manner of dismissal caused the plaintiff's mental distress. In turn, the mental distress resulted in Whiting being unable to work for a period of between 14–20 months. At the same time the mental distress, in law, did not arise from a separate actionable wrong and compensation would have to flow through *Wallace*.

What we see is that the Court of Appeal used the reasonable notice regime to severely limit the damages. The result is that the plaintiff was not fully compensated for the mental distress caused by the defendant's bad faith dismissal.

In a way, unorganised workers are worse off than before. At least before *Wallace* judges could use the ambiguity in the law regarding damages for mental distress or aggravated damages to redress wrongs where appropriate. The decision of the trial judge in *Whiting* provides a case on point. The trial judge awarded Whiting 24 months lost employment income plus \$15 000 non-pecuniary damages arising from the mental distress. Applying *Wallace*, the total award was cut by the Court of Appeal to 12 months. Workers may have gained in law a new duty of care owed to them, but lost in the remedy.

What troubled the Court of Appeal was the following hypothetical:

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<sup>30</sup> In *Frank v. Federated Co-operatives* (1998), 33 C.C.E.L. (2d) 243, the trial judge awarded an additional five months because of the manner in which the plaintiff was fired. Earnings made were then offset against this additional notice period.

<sup>31</sup> *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.*, (23 April 1998), (Man. C.A.) [Unreported].; aff'd (1997), 116 Man. R. (2d) 89 (Q.B.) [hereinafter *Whiting*].

A young man or woman, after three years in the job, is subjected to a bad-faith dismissal which can be proven to have caused a five-year mental breakdown. Is that person then entitled to five years' payment in lieu of notice?

The Court of Appeal in no uncertain terms answered no. Kroft J.A. said it would be ridiculous to make such an award<sup>32</sup>:

Before leaving this matter, I wish to make it clear that I am not suggesting, nor is the judgment in *Wallace*, that every month during which a plaintiff is disabled by stress which interferes with re-employment automatically entitles him or her to an extra month of payment in lieu of the salary which should have been received. Any such concept could lead to ridiculous results. [Justice Kroft then went on to cite the hypothetical above.]

Twaddle J.A., in a concurring opinion, wrote,<sup>33</sup>

The Supreme Court did not rule [in *Wallace*] that a distinct period of notice on account of the bad-faith discharge should be added to what a court otherwise finds to be the reasonable notice period. Rather, it ruled that the bad-faith discharge factor is but an additional factor to be taken into account when deciding ... what notice period is reasonable.

And he went on to conclude,<sup>34</sup>

What the majority of the Supreme Court did not do was to increase the notice period above that fixed by the trial judge in lieu of the additional damages which he awarded for mental stress and which were deleted from the trial judgment. This suggests to me that, although the consequences of a bad-faith discharge are to be taken into account in assessing the length of reasonable notice, the notice period once properly assessed is not to be lengthened with specific reference to mental stress or other consequences.

What Justices Kroft and Twaddle do is essentially remove mental distress from the damage equation. They concentrate upon the bad faith misconduct and not its consequences. Now their interpretation of *Wallace* may be correct and it may not. Justice Twaddle spoke of not adding on to the notice period; yet this is precisely what Justice Iacobucci spoke about doing. Justice Twaddle concluded that additional damages for mental distress were not recoverable; yet Justice Iacobucci referred to "injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem" which were all worthy of compensation. If we focus upon the misconduct of the employer in dismissing an employee and ignore the consequences then "callous, insensitive, improper" handling of a termination will lead to the same damages whether the employee was affected by the misconduct or not. The resilient employee and the devastated employee receive the same. The employer is punished for its improper manner of dismissal, but redress for serious mental distress is not compensated for unless a separate actionable wrong is found. Does this make sense? No.

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<sup>32</sup> *Ibid.* at para. 44.

<sup>33</sup> *Ibid.* at para. 52.

<sup>34</sup> *Ibid.* at para. 54.

Wrongs should give rise to a remedy. The problem with *Wallace* is that the remedy is divorced from the wrong. And we see how the Court of Appeal in *Whiting* used the reasonable notice remedy to relieve the employer from paying the full cost of the wrong it caused.

Let us return to the hypothetical that so troubled the Court of Appeal in *Whiting*. If a person is rendered, because of the manner of dismissal, incapable of working for five years why should that employer not pay for that proven damage? The employer has caused the harm after breaching its duty to treat the employee fairly and in good faith upon dismissal. Moreover, why should the state, through its social programs, be burdened with the human costs caused by this wrongdoing?

## V. CONCLUSION

THE DISSENT OF JUSTICE MCLACHLIN is to be preferred in terms of law, policy and principle. The creation of a new independent cause of action that demands good faith in dismissing employees is the principled and right way to go. A clear duty of care is created and the remedies flow from that breach of duty. There is consistency between the wrong and the remedy. Employees, such as *Whiting*, could well be compensated fully for their injuries flowing from the manner in which they are dismissed. This is just. Good employers treat their employees fairly and they dismiss their employees in a sensitive manner. Bad employers do not and they should be made to pay.

