
The majority decision of the Supreme Court of Canada in Keays v. Honda 2008 SCC 39, does a very good job of harmonizing damages for intangible losses in contract law. It rejected, but may have left open the possibility that human rights and charter principles can become a part of tort law - not a great result in terms of the need to avoid a multiplicity of proceedings. The downright ugly part of the majority decision is its complete disregard of the principles of appellate review, and its insensitivity to the dynamics of corporate oppression.

First some background: Mr. Keays was one of the first employees hired at Honda’s plant. He lacked any formal education and spent his entire adult life working for Honda. At some point, he developed chronic fatigue syndrome (“CFS”) and began missing time from work. In October, 1996, Mr. Keays went on disability leave. In 1997, following an assessment by the Director of the Sleep Disorders Clinic at Toronto Hospital, Mr. Keays was diagnosed with CFS according to criteria recognized by the Centre for Disease Control in Atlanta, Georgia. His family doctor also supported the diagnosis and his long-term disability benefit claim. Despite this, in December, 1998, Mr. Keays’ long-term disability insurer terminated his benefits. Thereafter, under protest, Mr. Keays attempted to return to work.

The difficulty was that Mr. Keays continued to miss time off work due to his illness. Honda was concerned about Mr. Keays’ absences from work. It prepared a written report to “coach” him about his absences as the first in a progressive disciplinary process. When his absences continued, Honda advised Mr. Keays of its program to provide accommodation for his disability and Mr. Keays enrolled, providing a note from his family doctor that he would likely continue to miss about 4 days a month due to his illness. At this point, Honda instituted a requirement that Mr. Keays provide a doctor’s note validating each absence before he could return to work. Employees with “mainstream” illnesses were not subjected to this requirement.

In October, 1999, after being absent for 6 days, Mr. Keays was sent to the company doctor, Dr. Affoo, who, according to Mr. Keays, threatened to move him back to the production line, a physically demanding job that he feared would seriously worsen his condition. Mr. Keays tried to address concerns about his employment status with his superiors. He met no success: he was told he would not be moved “at that time” and the “coaching” not would not be removed from his record. This led Mr. Keays to retain counsel who wrote a letter to Honda on March 17th, 2000 outlining his concerns, asking that Mr. Keays not have to submit a doctor’s note after each absence, and offering to work toward a resolution of the parties’ differences.

1 The National ME/FM Action Network, who were intervenors in the Supreme Court appeal, explained that CFS is poorly understood, involves highly variable symptoms and there are no objective tests to diagnose the illness.
Honda did not respond to the letter. Instead, Honda’s administrative coordinator Ms. Selby and Mr. Keays’ manager, Ms. Magill, scheduled a meeting with Mr. Keays for March 21st. At the meeting, they explained to Mr. Keays that they had a practice of dealing with associates directly. They told Mr. Keays that they had been reviewing his absenteeism, that the notes that Mr. Keays had provided from his family doctor were repetitive and lacked detail, that Honda took the position that he no longer had a disability requiring him to be absent, that Dr. Affoo and Dr. Brennan (the company’s occupational doctor) both believed that he should be attending work on a regular basis, and that he was expected to meet with Dr. Brennan who would then communicate directly with his doctor to “effectively manage your condition.” By the end of the meeting, Mr. Keays agreed to Honda’s requirement that he meet Dr. Brennan.

He then discussed what happened with his lawyer and the next day, told Honda that on the advice of his lawyer, he would not meet with Dr. Brennan until he was provided with clarification of the purpose, methodology and parameters of the assessment to be conducted by Dr. Brennan. Honda did not comply with this request, instead insisting that Mr. Keays meet with Dr. Brennan. When he did not do so, they fired Mr. Keays.

Following a 29 day trial, the trial judge found that Honda’s requirement that Mr. Keays see Dr. Brennan was unreasonable in the circumstances and was not made in good faith. He found that Mr. Keays was wrongfully dismissed and awarded him damages equivalent to 15 months’ notice. He also awarded Mr. Keays “Wallace” damages equivalent to an additional 9 months’ notice. He dismissed Mr. Keays’ claim for damages for intentional infliction of mental distress, damages for the tort of discrimination and harassment and lost disability benefits. As a result of Honda’s misconduct in its management of Mr. Keays’ disability, he awarded Mr. Keays $500,000 in punitive damages and a premium of 25% of his costs, which were ultimately fixed at $610,000 inclusive of disbursements and GST.

Honda appealed. The Court of Appeal acknowledged the need to defer to the trial judge with respect to his findings of fact. Goudge, J.A., writing for the court, affirmed that Mr. Keays had established that he had been wrongfully dismissed, affirmed the period of notice at 15 months, and acknowledged that a breach of the Ontario Human Rights Code may serve as a separate actionable wrong so as to give rise to punitive damages in a wrongful dismissal case. He parted ways with the two other members of the bench (Justices Rosenberg and Feldman) in the award for punitive damages: he would have sustained the award at $500,000 whereas the majority reduced the award to $100,000.

Honda launched a further appeal to the Supreme Court of Canada. In a decision released June 27, 2008, a majority of the Court upheld the 15 month notice period and dismissed all of the other claims. LeBel J. wrote a dissent (concourred by Fish J.) supporting the additional damages (equivalent to 9 month’s pay), on the basis that Honda had acted in bad faith in its conduct toward Mr. Keays.
The issues before the Supreme Court were the following: (1) in wrongful dismissal actions, how should damages for employer misconduct be characterized? (2) can discrimination (essentially a breach of human rights legislation) constitute tort or an independent actionable wrong? and (3) did Honda act in bad faith, and if so, was its misconduct serious enough to attract an award of punitive damages?

The most redeeming aspect of the Supreme Court decision was its rationalization of damages in contract. Bastarache, J., who wrote the majority decision, referenced an earlier decision of the Court in *Fidler v. Sun Life Assurance Co. of Canada* [2006] 2 S.C.R. 3, which had determined that “it was no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract, whether or not it is a “peace of mind” contract.” (emphasis added - para. 54.) Bastarache J. pursued this analysis, concluding that all compensatory damages for breach of contract should be assessed under the foreseeability principles articulated in *Hadley v. Baxendale*, including damages that had previously been awarded in accordance with the principles in *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701. Having made this statement of the overarching principle, Bastarache J. hastened to add that “[d]amages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.”

With respect to the decision to integrate *Wallace* damages into general contract law, the Supreme Court was unanimous. The harmony and rationalization of contract law offered by this analysis is a logical and welcome development, even with its wrinkles. What remains somewhat unclear is what is necessary to prove the *Hadley* “contemplation of the parties” and when that contemplation ought to have occurred. The implication appears to be that in terminating their employment, employees have the right to expect employers to conduct themselves in good faith, providing truthful information in a respectful manner, a reasonable and appropriate expectation to integrate into all employment contracts.

Comparing this decision to *Fidler*, it can be said that in a disability insurance claim the fact of breach (nonpayment of benefits) attracts damages for mental distress because insureds purchase a disability insurance policy to secure peace of mind, whereas in employment cases, it is the manner of termination that would attract such damages, because while employees understand their services may be terminated, they expect it to be done with dignity and respect.

The next issue, the role of the courts when faced with a tort claim that a defendant is guilty of human rights discrimination, was left somewhat unresolved. At para. 64, Bastarache J. wrote: “It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the Code cannot constitute an actionable wrong; the legal requirement is not met.” However, he went on to acknowledge at
para. 67 that “there is no need to reconsider the position in Bhadauria in this case….” In contrast, LeBel, J. while acknowledging that it was not necessary to reconsider Bhadauria in the Keays appeal, expressly left open the possibility that human rights violations could be heard in the courts. He noted that it had not been necessary for the Court in Bhadauria to “preclude all common law actions based on all forms of discriminatory conduct” and stated that “the development of tort law ought not to be frozen forever on the basis of this obiter dictum.” He recognized the strong influence that human rights legislation and the Charter have exerted on the development of the common law and the merits of leaving the door open.

The driving rationale behind Bhadauria was the prospect of competing interpretations of human rights legislation between human rights tribunals and the courts. However, where an individual has several claims including a human rights violation, the Ontario Court of Appeal’s approach, which was to interpret Bhadauria as only prohibiting a civil action based directly on a breach of human rights legislation and not precluding damages for a human rights breach as an ancillary claim, would appear to offer the most practical solution, in that it allows an individual to recover all available relief in a single forum.

The most troubling aspect of the majority decision in Keays relates to the majority’s vociferous rejection of the trial judge’s findings of facts concerning Honda’s bad faith actions. A starting point is to review the high degree of deference the Supreme Court exhibited towards the trial judge’s conclusion that Sun Life had not been guilty of bad faith:

¶ 73 The trial judge's conclusion that Sun Life did not act in bad faith was the product of a thorough review of the relevant evidence, and depended heavily on his appreciation of the basis on which Sun Life denied Ms. Fidler's claim. He considered every salient aspect of how Sun Life handled Ms. Fidler's claim, including those features that might be relied upon to suggest that Sun Life approached the claim obstructively or dismissively, but made no such finding.

¶ 74 Nor did the trial judge find an improper purpose on the part of Sun Life. The trial judge's reliance, in particular, on the difficulty Sun Life had in ascertaining whether Ms. Fidler was actually disabled supported his conclusion that Sun Life did not act in bad faith and that, instead, its denial of benefits was the product of a real, albeit incorrect, doubt as to whether Ms. Fidler was incapable of performing any work, as required under the terms of the policy.

¶ 75 Sun Life's conduct was troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. The trial judge's reasons disclose no error of law, and his eventual conclusion that Sun Life did not act in bad faith is inextricable from his findings of fact and his consideration of the evidence. As Ryan J.A. concluded in dissent:

The trial judge saw and heard the witnesses. He examined the written material filed as exhibits. It was for him to assess the evidence and to determine its weight and effect. In my view Ms. Fidler has not been able to demonstrate that the conclusions of the trial judge were unreasonable or palpably wrong. [para. 104]

In contrast, in Keays, Bastarache J. launches a frontal attack on the trial judge’s findings of fact without explicitly addressing the high standard of review for factual errors, and reinterprets
evidence of Honda’s actions to depict them in a benign light that is the exact opposite of the trial judge’s factual findings.

The question of how an employer should treat an employee with a disability is complex. Disability which is tied to an employee’s health and productivity creates a serious conflict of interests: the employer is interested in the employee’s productivity whereas the employee is concerned about the impact of work demands on his or her health. In this conflict, the interests embodied by the employee, individual health and human rights, have no less value than corporate interests. In fact, human rights legislation mandates that, to the extent of undue hardship, an employee’s health takes preeminence.

However, conflicts in employment and insurance settings are invariably played out between unevenly matched parties. Honda had the upper hand, financially and “politically”. It had management, human resources staff, and doctors on its payroll, all working together to advance Honda’s interests. Mr. Keays was ill, uneducated, and facing serious financial uncertainty. Put another way, “Kevin” (as he was addressed in Honda’s March 28th letter) was not a threat to Honda whereas Honda was a huge threat to Mr. Keays. Nor was Honda about to cede any of its power: when Mr. Keays attempted to redress the power imbalance by retaining counsel, Honda refused to cooperate.

What Bastarache J. failed to recognize is that the trial judge was in the best position to understand how the conflict played out in this case. The trial judge recognized the essential nature of this dispute, and the Court of Appeal and LeBel J. affirmed the trial judge’s findings that Honda’s actions were oppressive. References to the power of one party and the vulnerability of the other abound. The trial judge wrote:

“All that he was seeking from Honda was a reasonable accommodation for his disability and, in the result, he was terminated. He had attempted to resolve the impasse by retaining counsel who had expertise in these matters but Honda refused to reciprocate. His lawyer attempted to negotiate a reasonable resolution of the differences between the parties but Honda continued to threaten him with termination form the job he loved unless he agreed unconditionally to meet with Dr. Brennan.” (para. 44)

The Court of Appeal wrote:

“The trial judge pointed to a number of indicia of bad faith in the termination process… that the respondent was being set up for an adverse outcome by being asked to meet with Dr. Brennan… The order that the respondent meet with Dr. Brennan was the appellant’s attempt to subject the respondent to that hardball approach without fully explaining this to him…. These findings of fact are all well supported in the evidence and not open to attack on appeal.” (paras. 39-40)

LeBel J. wrote:

“There is ample evidence to support the trial judge’s conclusion that Honda acted in bad faith. Several aspects of Honda’s conduct are particularly persuasive in this regard. Most notable is the misleading nature
of the March 28 letter, which indicated that, according to Dr. Affoo and Dr. Brennan, Mr. Keays did not have a disability requiring him to be absent from work.” (para. 88)

The only leverage the weaker party has in this setting is the law – and the courts’ willingness to enforce principles of good faith and fair dealing articulated in insurance law, human rights legislation and jurisprudence.

Our laws require good faith conduct from corporations both in disability insurance and employment contexts precisely because conflicts of interest are played out in a relationship that involves such significant power imbalances. These dynamics in disability insurance cases have led US courts to impose – and enforce - high standards of corporate conduct. In *Lain v. UNUM Life Ins. Co. of America*, 279 F.3d 337 (2002), the United States Court of Appeals, Fifth Circuit addressed the correlation between power and abuse of discretion in these words:

“A 'sliding scale’ is applied to the abuse of discretion standard where it is determined that the administrator (of a disability insurance plan) has acted under a conflict of interest. ‘The greater the evidence of conflict on the part of the administrator, the less deferential our abuse of discretion standard will be.’” (para. 343)

An equally strong statement was made in the following passage from the US Court of Appeals, Eleventh Circuit decision in *Levinson v. Reliance Standard Life Insurance Company* 245 F.3d 1321 (2001):

“A wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries.” (p. 1326)

While there is no fiduciary relationship between an employer and employee, the power imbalance which is present in every employment relationship is that much more pervasive when the employee suffers from a disability and faces the loss of his/her employment. At the risk of oversimplifying matters, the dynamics between a large corporation and an employee (particularly a disabled one) can be compared to an elephant and a mouse trying to share a bed: any move by the elephant threatens to destroy the mouse. In this context, it is incumbent upon the courts to scrutinize corporate conduct for actions that are oppressive, arbitrary or capricious and to enforce good faith principles with consequences that will deter such conduct.

The Court’s approach to punitive damages – that it can only be awarded where other awards do not achieve the objectives of denunciation, deterrence and retribution - is well taken. However, the Court’s insistence that punitive damages *always* be restricted to conduct that is “malicious and outrageous” imports an archaic and naïve understanding of how to enforce corporate good faith obligations. Corporations do not need to behave in an outrageous manner in any individual case in order to prevail in achieving corporate objectives that are inimical to the interests of their fiduciaries or their employees, as the case may be. In the disability setting, it has been the writer’s experience that since *Fidler*, the general stance of insurers is to outright refuse to pay the
full value of their disability insurance claim or any damages for mental distress even when they acknowledge having wrongly breached the policy, because they know that most insureds are unable to undertake the financial and emotional challenges involved in litigation. Applying a risk benefit analysis to a disability benefit claim, insurers recognize they can deny disability benefits confident that as long as their employees do not engage in “malicious or outrageous” conduct, there is no downside to terminating benefits and often a significant financial upside.

The test for determining what bad faith actions will attract punitive damages must be tailored to the rationale and objectives underpinning awards of punitive damages. Where there are no other measures to deter and denounce corporate misconduct, it does disservice to the law to articulate legal standards of good faith conduct and not enforce them. Surely concerns about opening the floodgates of punitive damages (which are legitimate) can be addressed and over-censure avoided by allowing defendants to advise the court, following a finding on liability, whether they have been subjected to a punitive damages award for the same or similar actions in any other case.

After Fidler and Keays, the score in favour of giving a strong “benefit of the doubt” to corporate defendants – is 2-0. These decisions signal to insureds and employees that the courts will take no action in the face of very troubling corporate conduct. It appears that in Canada, good faith obligations are given lip service only as corporations are allowed to politely steamroll over individuals with disabilities who interfere with their bottom line.