DAMAGES FOR IMPROVIDENT EMPLOYER BEHAVIOUR:TWO JUDICIAL APPROACHES

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The work undertaken in the following focuses on modern English and Canadian judicial approaches to the compensatory model imposed in common law employment disputes by the 1909 decision of the House of Lords in Addis v. Gramophone Co. Ltd., [1909] A.C. 488 (H.L.). The dissertation is concerned, primarily, with the legal impact of the Addis case, as well as both the legal and public policy considerations which favour a departure from the same.

Both the House of Lords and the Supreme Court of Canada have, in the past six years, addressed the restrictions imposed by the Addis case on contemporary employment law damages. Although each of these courts recognized a need to depart from Addis, distinct approaches to the issue have resulted. The House of Lords has chosen a course by which the limit of damages prescribed by Addis (being compensation in the amount of "reasonable notice" of dismissal) may be overcome by a related claim for breach of the dismissing employer's duty of "trust and confidence". In Canada, however, the Supreme Court has devised a principle which affords judicial discretion to award additional "notice" compensation to an employee who has been dismissed in "bad faith". The Supreme Court of Canada approach has been questioned, on the basis that it defies established contract law principles and, further, is not wholly responsive to the practical realities of modern employment as a "relational contract".

After a comprehensive review of these two judicial responses to Addis, it is submitted that neither approach is adequate or, for that matter, as legally complete as contemporary concepts of employment allow or demand. If the common law is to have relevance in employment law, it must evolve at a pace and direction consistent with the evolution of employment itself. At this juncture, the common law has been nudged (by both the House of Lords and the Supreme Court of Canada) in an appropriate general direction, but further reforms, which would equate typical employment relationships with insurance agreements and other "peace of mind" contracts, are desirable.

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Cette dissertation porte sur les approches judiciaires canadiennes et anglaises modernes quant au modèle compensatoire imposé en common law dans les différends en matière d'emploi par la décision de 1909 de la Chambre des Lords : Addis c. Gramophone Co. Ltd., [1909] A.C. 488 (H.L.). Elle s'intéresse principalement à l'impact juridique de la cause Addis, ainsi qu'aux considérations juridiques et gouvernementales qui justifient de s'en écarter.

Au cours des six dernières années, tant la Chambre des Lords que la Cour suprême du Canada ont abordé la question des limites imposées à ce jour par la cause Addis sur les dommages-intérêts en droit de l'emploi. Quoique chacun de ces tribunaux ait reconnu la nécessité de s'écarter de la décision Addis, leurs approches sont différentes. La Chambre des Lords a choisi de contourner la limite imposée par Addis (une compensation équivalente à un « préavis raisonnable » de congédiement) en permettant les réclamations connexes pour violation du devoir de « confiance » de l'employeur. Au Canada cependant, la Cour suprême a adopté un principe permettant au tribunal d'accorder, à sa discrétion, une compensation additionnelle à celle équivalant au « préavis » à un employé congédié de « mauvaise foi ». Cette approche a été remise en question parce qu'elle défie les principes établis du droit contractuel et qu'elle s'adapte mal aux réalités modernes de l'emploi considéré comme « contrat relationnel ».

Après un examen exhaustif de ces deux réponses judiciaires à la cause Addis, la dissertation soutient que ni l'une ni l'autre n'est adéquate ou juridiquement complète par rapport à ce qu'exigent ou permettent les concepts contemporains en matière d'emploi. Pour que la common law soit utile au droit de l'emploi, elle doit évoluer au même rythme et dans la même direction que le secteur de l'emploi lui-même. La Chambre des Lords et la Cour suprême ont poussé la common law de quelques centimètres dans la bonne direction, mais des réformes additionnelles se moulant aux liens usuels d'emploi avec contrats d'assurance et autres contrats assurant une certaine « tranquillité d'esprit » sont souhaitables.

I. Introduction

Employment has achieved an elevated position in the Western world. In a society which encourages materialism, and which fuels its insatiable product consumption with credit, steady income from employment can be essential to the physical and emotional well-being of an individual (and his or her family). For that reason, the termination of an employment relationship normally poses emotional, as well as obvious financial, consequences to the ex-employee.

For centuries, the common law of England and Canada has imposed a number of safeguards on employment terminations to help minimize the impact of dismissals "without just cause". Although employers have (subject to applicable legislation) the discretion to terminate a worker's employment without any legal justification, the employer is obligated by the common law in those circumstances to provide "reasonable notice" of dismissal to the employee in question. The "reasonableness" of notice to be afforded to any particular employee depends upon the individual circumstances of that person and, short of an agreement (or eventual settlement) made between the employer and the employee, can only be determined by a court. The objective behind an award of "reasonable notice" is the alleviation of economic hardship, which generally follows the employer's breach of the employment contract.

The common law governing reasonable notice of wrongful dismissal is quite settled. What is not certain, however, is the consequence of improvident employer behaviour toward an employee, either during employment, at the time of dismissal or thereafter. Should an employee be compensated for emotional suffering and economic hardships which extend beyond those which are the normally contemplated results of wrongful dismissal, particularly if precipitated by egregious employer behaviour of a morally (if not legally) offensive nature?

For almost a century, the common law response to the question of wrongful dismissal damages in excess of "reasonable notice" was restrictive in the extreme. The House of Lords decision in *Addis v. Gramophone Co. Ltd.*[1] was touted as a shield which supposedly protected employers from most employee claims exceeding the amount of "reasonable notice". Simply stated, the "*Addis* Principle" was viewed as a preclusion of punitive or aggravated damages awards, except when the employer had committed a "*separately actionable wrong*".

After the early twentieth century decision in *Addis*, legislation has evolved in both Canada and England which ameliorates, in part, the inequities inherent in the employment relationship: the significance of these inequities, which have operated for centuries to the benefit of employers and to the detriment of employees, is well illustrated in *Addis*' case itself.

In Canada, each of the ten provincial Legislatures, as well as the federal Parliament, have enacted *minimum* employment standards laws affording basic protections to employees and, thus, enhancing common law entitlements. England has also legislated protective measures for all employees, with the most notable enactment currently being the *Employment Rights Act 1996* (the "*ERA*"). Perhaps unfortunately, it has been this law, made for the benefit of employees, which has partially obstructed the revolutionary common law employment development which is the subject of this discussion. Since the common law has remained influential in some England employment conflicts despite the *ERA*, its developing position regarding the availability and extent of damages in employment law disputes in that country remains relevant.

Perhaps as a consequence of the current economic climate, and the significant dependence that many individuals place upon employment income as the foundation of their individual, credit-based financial "houses of cards", courts in England and Canada have, within the past six years, revolutionized the law of wrongful dismissal damages. In each of these countries, a distinct approach has been adopted to overcome the hurdle posed by *Addis*. Observation of the state of the law in these jurisdictions to

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[1] *Addis v. Gramophone Co. Ltd*., [1909] A.C. 488 (H.L.).

date, beginning with a review of the trail of reasoning followed in each, assists in determining their respective merits and, ultimately, the most effective future judicial response to improvident employer behaviour.

II. Employment Law And The Addis Principle

The highest courts in England and Canada have both noted the elevated importance of employment relationships in modern society. The significance imported to employment in the twenty-first century by the House of Lords and the Supreme Court of Canada is adequately illustrated by the following statements:

> Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. *An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable.*[2]

> Work is one of the most fundamental aspects of a person's life, providing the individual with the 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.*[3]

One might argue, with persuasion, that any "close personal relationship" which is "fundamental to an individual's sense of identity and well-being" has achieved a standing not far removed from the relationships most revered in the entire society, including marriage. In fact, it would be plausible to suggest that employment, with its determining influence on the very identity of individuals, equals or exceeds even fiduciary relationships in the context of relational legal importance. How did the contract for services come to occupy such an exalted position in Western society?

Employment has not always been so "fundamental". Prior to the Industrial Revolution, and even during the many subsequent years of industrial evolution, individual dependence on employment as a means of existence was relatively conservative. R. E. Pahl has provided the following comments on the development of employment dependency:

> Employment is simply one form of work. In the past, work was synonymous with toil: an agricultural worker might do some digging or plowing as part of the collective household labour needed for that household to achieve a modest

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[2] *Malik v. Bank of Credit and Commerce International S.A.*, [1997] 3 AllE.R. 1 at 8 per Lord Nichols of Birkenhead [emphasis added].

[3] *Reference Re: Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368 per Dickson C.J. [emphasis added].

> livelihood; other digging or plowing could be done as waged labour... Whilst there has, indeed, been a market for labour for at least 800 years in England so that most households probably had some source of income, however erratic and irregular that might be, income generation was not an essential basis for livelihood. Malcomson remarks that, even as late as the eighteenth century, 'in most households, an adequate subsistence depended on a complex of various forms of task work and wage labour: regular, full- time employment at a single job was not the norm'. Indeed, from as early as the seventeenth century, there was substantial resistance to the spread of wage labour. To give all of one's labour power in return for a wage was seen as a grievous loss of independence, security and liberty.[4]

The hyper-evolution of industrialism to its late twentieth and twenty-first century stature has forced most Westerners to concede the threads of "independence, security and liberty" which their ancestors struggled to retain. As the desire for business efficiency (and, ultimately, profitability) grew, the requirement to devote oneself to employment became unavoidable for most, particularly if the employment itself was a necessity for household income. At the same time, the insidious replacement of spiritualism by materialism in Western society greatly fostered widespread subjugation to employment:

> Thus, as one would expect, in an increasingly secular society notions of self-determination and realization rather than spiritual salvation come to assume more prominence in the personal meaning of employment. When no longer done for some spiritual reward and in the service of some higher calling, what one does, not just how one does it, becomes important. Stripped of an ethereal, extra-terrestrial aspect, the purposes of work and employment are more likely to be made to serve the earthly imperatives of social justice, than the moral teachings of divine revelation. Denied a spiritual justification for their circumstances, employees could be expected to seek more immediate rewards from their work.[5]

In our industrialized and secularized part of the world, employment often *defines* people. The notion is that individuals no longer do what they *must* but, rather, they do what they *like* and what their talents allow. The result is that one's "job" conveys a sort of implied psycho-social profile to the rest of the community. The type of work a person does becomes a *part* of that individual; a complex and unspoken definition.

Added to the impact of the "dwindled spirituality/increased materialism" phenomenon in Western society on employment dependency is the clever institution of credit. As a means of feeding the now voracious

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[4] R.E. Pahl, ed., *On Work: Historical, Comparative and Theoretical Approaches* (Oxford: Basil Blackwell, 1988) at 11-12.

[5] David M. Beatty, "Labour Is Not A Commodity" in Barry J. Reiter and John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 313 at 318-20, 321.

Western appetite for material consumption, and increasing today's profits with tomorrow's earnings, our economy has devised a massive system of credit by which employees are enabled to make expenditures well in excess of their current means. Additionally, the ultimately powerful economic machinery of Western industry has amassed extensive expertise in both the art and science of intensely persuasive, if not hypnotic, consumer advertising. Modern technology, in turn, provides the ever-expanding and often invasive "canvass" from which advertisers shape and manipulate our thoughts and actions in respect of financial consumption. Today, one must consider the famous words of the Cambridge-educated and Canadian-born philosopher Marshall McLuhan - "The medium is the message" - in the context of our curious reality: slick television advertisements entice us to purchase bigger and better TVs, internet banner ads promote newer, faster computers, and the list goes on.

Without any question, Westerners are well-trained and devout consumers, "educated" with clever marketing and fuelled by credit. As a result, mass dependency upon employment for the income needed to feed our collective consumerism has come full circle. Ironically, therefore, the effect of an individually oppressive work regime (such as feudalism) from which employment was thought to free our society, has arguably reinvented itself in our current economic system. Modern employees may be no less enslaved to the complex structure of industrialized earnings and credit- based consumerism than were serfs to feudal lords in previous land-based production systems. As Michael Moore, the American political commentator, points out, almost half - forty percent (40%) - of his country's wealth is owned by a mere one percent (1%) of its population.[6]

Contemplation of modern employee circumstances leads to the inescapable conclusion that the House of Lords and the Supreme Court of Canada are right: employment is absolutely critical to the financial, social and emotional well-being of Western employees. This context, of employment as a fundamentally important relationship in society, has shaped the manner in which British and Canadian courts have sought to resolve common law claims for wrongful dismissal damages. As a sub-text in the larger topic of wrongful dismissal, courts have been forced to address the evolving "nature" of employment in relation to pre-existing judicial perceptions. One of the most time-consuming and difficult employment-related jurisprudential concepts has revolved around the decision of the House of Lords in *Addis v. Gramophone Co. Ltd.*[7]

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[6] Michael Moore, *Downsize This!* (New York: Harper, Perennial, 1997) at 1-2.

[7] *Supra* note 1.

A. Employment as a Contract

Every employment relationship is based on a contract, whether written or verbal. The common law demands that each such agreement address particular issues, for which conditions are "implied" unless specifically considered by the parties. The implied terms of a common law employment contract have been, and continue to be, tremendously significant employment law concepts.

The most prominent of all implied terms is this: the employer must not terminate the contract unless it has "just cause" to do so or, alternatively, provides the employee with "reasonable notice" of dismissal. Unfortunately, employers and prospective employees rarely discuss the termination of their relationships at the outset. In the same way that many marriages are not commenced with a discussion of arrangements in the event of divorce, employment agreements are quite often silent on the subject of dismissal. For that reason, the implied "reasonable notice" term is frequently at the centre of employment-related litigation.

Answering the question of how much notice of dismissal is "reasonable" is not without its own complexity. Courts determine the issue on the individual circumstances of each dismissed employee, making "reasonable notice" a subjective entitlement. Indeed, the statement of McRuer J., that "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases,"[8] has often been quoted.

The implied "reasonable notice" term affords considerable flexibility in the awarding of damages for wrongful dismissal. In fact, that condition itself has played a central role in at least one modern judicial response to improvident employer behaviour. However, the "reasonable notice" term is only one of the employment contract terms implied at common law, and the law itself is not static. A more recent implied term, which imposes a duty of "mutual trust and confidence" on the parties to some employment relationships, has also received judicial attention in response to unduly harsh employer actions.

The existence and evolution of implied terms in the contractually-based employment relationship have been in response to developing notions of employment in society. Lord Hoffman enunciated this concept in *Johnson v. Unisys Ltd.*:

> At common law the contract of employment was regarded by the courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was

[8] *Bardal v.The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) at 145.

> free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self- esteem. *The law has changed to recognise this social reality*.[9]

While it may seem that the imposition of implied contractual terms allows for rectification of *any* employment injustice, it is important to recognize fundamental limitations in that regard, including:

a) the state of the existing common law;

b) the requirement that implied terms must not contradict express contract conditions; and

c) the need for maintaining consistency with legislative policies.

Each of these matters has, on various occasions since the commencement of the twentieth century, influenced the manner in which wrongful dismissal damages entitlements have been determined.

B. The Decision in Addis v. Gramophone Co. Ltd.

A persuasive argument can be made to the effect that no judicial decision of the twentieth century has exceeded *Addis*' case in its influence over the common law of wrongful dismissal damages. For decades after being reported in 1909, the House of Lords' decision was accepted as a complete restriction on awards of damages in respect of the *manner* in which an employee was dismissed. Both the English and Canadian courts followed Addis' case with great vigour for the majority of the last century, even while Western society elevated the importance it assigned to employment relationships. Only in the past six years have English and Canadian courts begun the difficult task of confronting the rigidity of the *Addis* Principle, and considering ways to circumvent it.

C. The Addis Principle

The subject matter of the *Addis v. Gramophone Co. Ltd.* case did not lend itself well to a thorough and exhaustive contemplation of wrongful dismissal damages, since it was founded on the breach of *express* contractual terms, rather than the implied terms which are so frequently at the heart of wrongful dismissal lawsuits. Essentially, Addis had been employed by the Defendant as a manager, and was to receive both salary

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[9] *Johnson v. Unisys Ltd.*, [2001] 2 W.L.R. 1076 at para. 35 (H.L.) [emphasis added].

and commission as remuneration. An express provision of the employment agreement stated that Addis could be dismissed with six months' notice. When Gramophone Co. Ltd. fired Addis, it immediately appointed his replacement as manager. Although he was paid his salary for the duration of the contractual six month notice period, Addis was not provided an opportunity to earn the commissions that made up a component of his total remuneration. After he commenced the lawsuit in respect of his dismissal, a jury awarded Addis damages which included an award for his injured feelings arising from the manner in which he was dismissed.

The House of Lords overruled the award of damages in respect of Addis' hurt feelings, with Lord Loreburn L.C. making an unequivocal statement as to the unavailability of such damages in wrongful dismissal matters:

> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.[10]

In more recent times, Addis' case has attracted significant legal analysis, likely due to the obstacle which it presents in respect of wrongful dismissal damages awards. One difficulty which has been encountered in arriving at a full understanding of the *Addis* decision is the multiple premises of the case, including the existence of: a preclusion against awards of exemplary damages in cases of employment contract breach; a preclusion against awarding damages in respect of injury to feelings caused by the manner of a wrongful dismissal; and a preclusion against awarding damages in respect of injury to reputation or "for the loss [the employee] may sustain from the fact that the dismissal of itself makes it more difficult for him [or her] to obtain fresh employment".[11]

The decision seems to be clear in the extreme with respect to two of the three above-noted issues. The House of Lords reiterated that exemplary damages *could not be* awarded in a breach of contract case and, further, the majority of the Law Lords favoured a restriction on non-pecuniary damages in respect of hurt feelings or loss of reputation arising from the manner in which an employee was wrongfully dismissed. As has been noted by Lord Steyn in the *Johnson* case, however, an argument exists to the effect that none of the remaining Law Lords specifically endorsed the speech of Lord Loreburn as it pertained to a restriction on an award of pecuniary damages in respect of the manner in which a wrongful dismissal was conducted. Lord Steyn has, in *Johnson v. Unisys Ltd.*, suggested that only Lord James of Hereford can be reasonably taken to have endorsed

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[10] *Addis v. Gramophone Co.*, *supra* note 1 at 491.

[11] *Ibid*. at 488.

Lord Loreburn's exclusion of pecuniary damages arising from the manner of dismissal.

Despite the legal machinations which have, of late, raised important questions regarding the true nature and extent of the *Addis* Principle, it cannot be reasonably doubted that, in 1909, the *intended* effect of the decision was to limit wrongful dismissal damages to an amount equalling "reasonable notice", and to exclude damages in excess of reasonable notice. Nevertheless, it is understandable that Lord Steyn raised the question, in the *Johnson* case, as to whether or not the long-accepted meaning of the *Addis* Principle (set out in the head note of the case) is even accurate. Lord Steyn noted that "The speeches in *Addis*' case are not easy to understand."[12] His Lordship concluded, however, that only Lord Loreburn and, perhaps, Lord James of Hereford, specifically subscribed to the notion that *all* damages (including pecuniary or special damages) arising from the manner in which a wrongful dismissal has been conducted would be unrecoverable; the remaining Law Lords appeared to occupy themselves solely with the question of non-pecuniary (or general) damages.

One must question why a full century nearly passed before a critical analysis of Addis' case raised the queries put forth by Lord Steyn in *Johnson v. Unisys Ltd.* During the twentieth century, *Addis* was enthusiastically followed in both Canada and England.

D. The Impact of Addis in Canada

Two decisions frequently cited in Canada to support the application of the *Addis* Principle are *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*[13] and *Vorvis v. Insurance Corporation of British Columbia*.[14] Both decisions evidence long-standing support for the notion that damages arising from the "manner" of a dismissal could not typically be awarded.

The first case, *Peso Silver Mines Ltd.*, was primarily a question of the fiduciary obligations of a director to his company concerning liability to account for mining claims offered to and rejected by the company, and later purchased by the director. The question of wrongful dismissal damages arose only in the context of a counter-claim by the director. On that subject, Cartwright J., speaking for the majority of the Supreme Court of Canada, made the following succinct statement:

> I agree with Bull J.A., that the claim being founded on breach of contract for damages cannot be increased by reason of the circumstances of dismissal whether in

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[12] *Johnson v. Unisys Ltd.*, *supra* note 9 at para. 15.

[13] [1966] S.C.R. 673.

[14] [1989] 1 S.C.R. 1085.

> respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.[15]

Although neither the Supreme Court of Canada nor the British Columbia Court of Appeal specifically referenced the *Addis* decision in concluding, emphatically, that damages in respect of the manner of dismissal could not be awarded, their conclusion was expressed as though it were "foregone" and, essentially, beyond dispute.

More than twenty years after its decision in *Peso Silver Mines Ltd.*, the Supreme Court of Canada demonstrated a tepid quasi-prescription to the *Addis* Principle in the *Vorvis* case. Although its decision in *Vorvis* does not unequivocally follow *Addis*, the Supreme Court of Canada generally supported its concepts and the decision is interpreted as a severe restriction on both punitive and aggravated damages awards.

The Plaintiff in *Vorvis* was a 54 year-old solicitor who was dismissed from his employment with the Insurance Corporation of British Columbia after approximately seven years. The Plaintiff claimed damages in respect of the Defendant's failure to provide reasonable notice of dismissal but, also, general damages for mental distress, as well as both aggravated and punitive damages.

Speaking for the majority, MacIntyre J. noted the accepted interpretation of *Addis*' case in Canada:

> The majority of the House of Lords determined that the jury could not award more than salary lost during the notice period. 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.[16]

The majority of the Supreme Court of Canada acknowledged its prior decision in *Peso Silver Mines Ltd.* as "a clear application of the *Addis* Principle" but, in contemplation of that concept, the Court also reviewed a line of cases beginning with *Jarvis v. Swans Tours Ltd.*,[17] which were authorities for the proposition that *Addis*' case *did not* prohibit claims for general damages in respect of mental distress arising in an action for breach of contract. The eventual outcome of the Court's jurisprudential review was stated by MacIntyre J. as follows:

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[15] *Peso Silver Mines Ltd. v. Cropper*., *supra* note 13 at 684.

[16] *Vorvis v. Insurance Corp. of British Columbia, supra* note 14 at para. 18.

[17] [1973] 1 Q.B. 233.

> From the foregoing authorities, I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the *Addis* and *Peso Silver Mines Ltd.* cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result in the failure to give such notice.
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> I would not wish to be taken as saying that aggravated damages could never be awarded in the case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here.[18]

Essentially, then, the Supreme Court of Canada did not provide explicit direction regarding the application of the *Addis* Principle in Canada, but the majority of the Court expressed continued favour with *Addis'* case as a governing principle, subject only to certain undefined (and apparently rare) circumstances in which punitive and aggravated damages *could* be awarded, including the occurrence of "independently actionable wrongs".

Hindsight allows for the knowledge that the dissenting decision in *Vorvis*, delivered by Wilson J., provided a more progressive approach to damages awards in respect of improvident employer action. Essentially, Wilson J. commented on the *Addis* Principle as follows:

> The trial judge in this case applied the absolute rule set out in *Addis* v. *Gramophone Co.*, [1909] A.C. 488 (H.L.) and *Peso Silver Mines Ltd. (N.P.L.)* v. *Cropper*, [1966] S.C.R. 673, to the effect that damages for mental suffering are not available in breach of contract cases because contractual damages must be compensatory, tangible and estimable. They are confined to putting the plaintiff in the financial position he would have been in had he been given reasonable notice. *With respect, I think this is no longer the law.*[19]

Supported by L'Heureux-Dubé J., the dissenting decision continues with a recognition that, generally, breach of contract cases *can* result in damages for mental suffering:

> The absolute rule has been whittled away by the numerous English and Canadian authorities referred to by my colleague in which damages have been awarded for mental suffering in a variety of different contractual situations. It is my view, however, that what binds all of these cases together, their common denominator so to speak, is the notion that the parties should reasonably have foreseen mental suffering as a

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[18] *Vorvis v. Insurance Corp. of British Columbia, supra* note 14 at paras. 21-22.
[19] *Ibid*. at para. 39 [emphasis added].

> consequence of a breach of the contract at the time the contract was entered into. That this is the true test appears clearly, I believe, from Lord Denning's judgment in *Jarvis* v. *Swans Tours Ltd.*, [1973] Q.B. 233 (C.A.), and from the Ontario Court of Appeal's judgment in *Brown* v. *Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113.[20]

The *Vorvis* dissent perceptibly raised what ought to have been an obvious question at virtually any time in the latter half of the twentieth century and, particularly, in 1989: How could a contract of employment possibly be viewed as less important than a contract for travel services? For that matter, how could the parties to a travel contract be viewed as having an expectation of resulting mental distress should the vacation be unsuccessful, without also expecting that mental distress could arise from a dismissal from employment without reasonable notice? Wilson J. seemed to deflate the unstated rationale of the *Addis* Principle with reference to Professor G.H.L. Fridman's text on contract law, in which he noted:

> [The] most important type of contract in which damages for mental distress have been awarded is the employment contract. (p. 677). He suggests that this is because of the nature of the relationship it creates which is one of trust and confidence (p. 681). I would add that it may also be because of the vulnerability of the employee to the superior authority of the employer.[21]

Essentially, then, Wilson J. concluded that damages for mental distress arising from the breach of an employment contract were available and, further, were not dependent upon the occurrence of a "separate actionable wrong" from the contractual breach. Instead, the preferred approach was extracted from the speech of Baron Alderson in *Hadley v. Baxendale*:

> Now we think the proper rule in such a case as the present is this: ... Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arriving naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[22]

As for the imposed preclusion of punitive damages (again a product of the *Addis* Principle), Wilson J. was likewise unimpressed. She found that the Canadian Courts, along with their counterparts in Australia and New

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[20] *Ibid*.

[21] *Ibid*. at para. 42, quoting G.H.L. Fridman, *The Law of Contracts in Canada*, 2nd ed. (Toronto: Carswell, 1986).

[22] *Ibid.* at para. 44, quoting *Hadley v. Baxendale* (1854), 9 Ex. 341 at 354-55 (C.Ex.).

Zealand had not adopted "...The restrictive approach to punitive damages in tort prescribed by the House of Lords in *Rookes v. Barnard*".[23] She cited the decision of the Ontario Court of Appeal in *Brown v. Waterloo Regional Board of Commissioners of Police* as authority for the proposition that punitive damages in breach of contract cases should be made available:

> In recent years, the principles of damages in tort and contract are becoming more consistent. That is good and should be encouraged. *By allowing punitive damages for contract breach, that laudable trend will be advanced. Moreover, hopefully those who plan to breach contracts in a callous fashion will think twice.*
>
> Consequently, I conclude that it is not beyond the power of this Court to award punitive damages in those rare situations where a contract has been breached in a high-handed, shocking and arrogant fashion so as to demand condemnation by the court as a deterrent.[24]

Recognizing the significance of employment contracts in Western society, the illogic of *not* awarding punitive damages seems to have been the point advanced by Wilson J. in the *Vorvis* dissent.

E. Conclusion with Respect to the Survival of the Addis Principle in Canada Before 1997

The decision of the Supreme Court of Canada in *Vorvis* demonstrated the enduring impact of the *Addis* Principle in Canada up until the late 1990s. Although a minority of the Court rather brilliantly identified firm rationales for departure from the *Addis* Principle, the majority held fast to its *effect*, if not the Principle's complete preclusion against damages in respect of mental distress and punitive damages in employment law cases.

F. The Addis Principle in England Before 1997

As referenced by Madam Justice Wilson in the *Vorvis* case, the *Addis* Principle became particularly difficult to maintain after the English decisions in *Jarvis v. Swans Tours Ltd.*[25] and *Jackson v. Horizon Holidays Ltd.*[26] In each of those cases, the Plaintiffs had contracted for vacation services, but the contracts were breached by the Defendant tour companies. In each case, damages for mental distress were awarded. The

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[23] *Ibid*. at para. 56, citing [1964] A.C. 1129 (H.L.).

[24] *Ibid*. at para. 57, quoting *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277 (H.C.J.) at 293 [emphasis added], var'd (1983), 43 O.R. (2d) 113 (C.A.).

[25] *Supra* note 17.

[26] [1975] 3 All E.R. 92 (C.A.).

English courts took notice of the *Jarvis* decision in respect of wrongful dismissal cases and, in *Cox v. Phillips Industries Ltd.*, Lawson J. awarded mental distress damages in respect of a dismissal that exposed the Plaintiff to "the degree of vexation, frustration and distress which he in fact underwent."[27]

Despite the questionable legal foundation of the *Addis* Principle and the relative groundswell of jurisprudential and academic support for the attribution of aggravated and punitive damages in breach of contract cases, advancement of the English common law in that regard suffered a setback from the progress represented by *Cox* and others when the English Court of Appeal decided *Bliss v. Southeast Thames Regional Health Authority*. In that case, Dillon L.J. chose not to follow the *Cox* prescription to the broadened remedial approach of *Jarvis* but, instead, emphatically reverted to the *Addis* Principle:

> The general rule laid down by the House of Lords in *Addis* v. *Gramophone Co. Ltd.*, [1909] A.C. 488 is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. Modern thinking tends to be that the amount of damages recoverable for a wrong should be the same whether the cause of action is laid in contract or in tort. *But in Addis, Lord Loreburn regarded the rule that damages for injured feelings cannot be recovered in contract for wrongful dismissal as too inveterate to be altered, and Lord James of Hereford supported his concurrence in the speech of Lord Loreburn by reference to his own experience at the Bar*.[28]

The curiosity which arises in respect of the *Bliss* decision is not unlike that derived from the majority decision in the Canadian *Vorvis* case: although Lord Dillon seems to initially support the preclusion of aggravated and punitive damages in respect of all contract matters, he later concludes that *particular* contract circumstances (such as those of the *Jarvis* case) *will* support the more exceptional awards:

> There are exceptions now recognised where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress. See *Jarvis* v. *Swans Tours* [1973] Q.B. 233 and *Heywood* v. *Wellers* [1976] Q.B. 446. Those decisions, as decisions, do not however cover this present case. ... *For my part, I do not think that that general approach is open to this court unless and until the House of Lords has reconsidered its decision in Addis*.[29]

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[27] [1976] 3 All E.R. 161 (Q.B.) at 166.

[28] *Bliss v. Southeast Thames Regional Health Authority*, [1987] I.C.R. 700 (C.A. (Civ.Div.)) at 717-18 [emphasis added].

[29] *Ibid.* at 718 [emphasis added].

The *Bliss* decision, with its slavish observance of *Addis*, is another illumination of the modern absurdity posed by the *Addis* Principle: the employment contract is not of the same importance as a vacation agreement. While the contract at the centre of *Jarvis* was intended to "... provide peace of mind or freedom from distress", agreements between employers and employees for a *livelihood* were not found to be of that magnitude. The economic and social context from which the *Addis* Principle had sprung was notably incompatible with modern employment realities, particularly when the century-old concept is forced to "fit" in a completely different legal climate.

Rigid adherence to *Addis* was demonstrated by the Court of Appeal, once again, in *O'Laoire v. Jackel International Ltd.*[30] Although the facts of this case are complicated by considerations arising from duplicate claims for unfair dismissal *and* wrongful dismissal, the Court subscribed to the traditional rule that no damages for loss of reputation or injured feelings could be awarded to the dismissed employee.

G. The Legal Landscape Pre-1997

As can be easily seen from a brief review of pre-1997 jurisprudence, the common law of wrongful dismissal applied in both England and Canada has been dominated by the House of Lords' decision in *Addis v. Gramophone Co. Ltd.*[31] Consequently, the significance of employment as a relationship was minimized and, effectively, ignored for the better part of the twentieth century. In spite of the heightened "relational" nature of employment in the context of our industrialized and consumer-based society, employers continued to reap the benefit of the extraordinarily conservative *Addis* Principle for almost ninety years. Even today, the *Addis* Principle still exerts influence on the manner and extent to which wrongful dismissal awards are made by British and Canadian courts.

Although even a cursory consideration of the significance of employment in Western society leads to the conclusion that the relationship between employer and employee is of utmost importance, the rule in *Addis* (or at least the manner in which the case has been interpreted) stagnated development in the common law of wrongful dismissal during an era when, by comparison, the law pertaining to other "types" of contracts was advancing significantly. Without any apparent rationale, the highest courts in England and Canada maintained dutiful compliance with the *Addis* Principle until the end of the twentieth century. When compliance was challenged by the advancement of breach of contract damages law (see, for example, *Jarvis v. Swans Tours*

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[30] [1997] I.R.L.R. 70 (C.A.).

[31] *Supra* note 1.

Ltd.[32]), the courts simply erected imaginary and unsupportable boundaries between employment contracts and other contracts intended "... to provide peace of mind or freedom from distress." By the end of the twentieth century, it was painfully apparent that the long-held interpretation of the *Addis* case lacked relevance in modern Western society. Since justice demanded a departure from the long-standing comfort of the *Addis* Principle, it was necessary for British and Canadian courts to "chart new courses" in the common law of wrongful dismissal damages.

III. The Evolution of the Canadian Approach to Addis

As occurred in other countries, employment in Canada evolved throughout the twentieth century. By the 1980s, no one could reasonably deny that most workers had developed an unhealthy dependence on their jobs as financial and emotional cornerstones supporting life itself. Recognition of that new reality was made by Canadian courts even while the *Addis* Principle stood fast as the "law of the land" in respect of wrongful dismissal damages. The inescapable acknowledgment of heightened employee dependence on their relationships with their employers has eventually made the absolute preclusion of exemplary (both punitive and aggravated) damages in wrongful dismissal actions untenable. The legal path which the Canadian courts chose for their departure from *Addis* is different from the approach chosen in Great Britain, and is legally unique. Arriving at the end of the Canadian trail leading away from the *Addis* Principle, one is left to ask: "Where are we?"

Even before the House of Lords made the statement, in *Addis*, which has been interpreted as a sweeping prohibition of damages in excess of "reasonable notice" in wrongful dismissal actions, the Supreme Court of Canada had taken steps in the same direction. In *Guildford v. Anglo-French Steamship Co.*,[33] the Supreme Court of Canada refused to award "vindictive damages" in a wrongful dismissal case, and limited the claim to compensatory damages only. The decision of the House of Lords in *Addis* reinforced the notion that breach of an employment contract, no matter how egregious, could not - in itself - attract an award of damages beyond the reasonable notice contemplated (either expressly or impliedly) in the contract itself. As noted in Chapter One, the Supreme Court followed *Addis* with the often-quoted decisions in *Peso Mines* and *Vorvis*, affirming, basically, the unavailability of exemplary damages in wrongful dismissal cases throughout the 1900s. Finally, by 1997, it had become excruciatingly obvious that a fresh approach to the issue of compensation for wrongful dismissal was needed. The case of *Wallace v. United Grain*

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[32] *Supra* note 17.

[33] (1884), 9 S.C.R. 303.

Growers Ltd.[34] was the vehicle chosen for a ground-breaking trip into uncharted legal territory.

A. The Wallace Case

Jack Wallace was 45 years old in 1972 when he entered into negotiations with United Grain Growers Ltd. concerning the prospect of employment. Having worked for UGG's competitor over the previous 25 years, Wallace was recognized as having the degree of experience that UGG required; at the same time, Wallace wanted assurances of job security, and he received the same from UGG. UGG told Wallace that, if his job performance was satisfactory, he would likely be able to continue working for the Company until his retirement. Since each party's needs could be met by the other, a relationship was commenced and, for 14 years, was quite successful. In each of the years that he was employed by UGG, Wallace was recognized as its top salesperson. However, in 1986, UGG terminated Wallace's employment without any explanation. When Wallace commenced a lawsuit for wrongful dismissal, UGG countered with a Statement of Defence alleging just cause for his firing.

The combined impact of his dismissal and UGG's allegations of just cause was of such significance that Mr. Wallace actually suffered mental distress, for which he required psychiatric treatment.

While the *Wallace* case has importance in determining the rights of bankrupt litigants (since Jack Wallace was a bankrupt at the time of his lawsuit), it is more important to note that its contribution for the purposes of this analysis lies in the handling of wrongful dismissal damages. In fact, the novel judicial approach that led the Supreme Court of Canada to its conclusion in the case represented the introduction of a new era for wrongful dismissal damages in Canada. While the Court could have abandoned the *Addis* Principle in whole, it chose, instead, a course which awkwardly purports to preserve *Addis* while, at the same time, providing some recognition for the new reality of employment relationships which had evolved in the nine decades falling between *Addis* and *Wallace*. The *Wallace* Factor (as it has been titled by Canadian lawyers and judges) is likely the most important Canadian employment law principle now in operation.

B. The Trial Decision

At trial, the Manitoba Court of Queen's Bench determined the appropriate period of reasonable notice which United Grain Growers Ltd.

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[34] [1997] 3 S.C.R. 701, var'g (1995), 102 Man. R. (2d) 161 (C.A.), rev'g (1995), 102 Man. R. (2d) 161 (Q.B.).

owed to Wallace by considering a number of common factors, including his age, the nature of his employment, the history of his employment relationship, his qualifications, his length of service and the availability of similar employment. The Court also acknowledged the difficulty that Wallace had encountered in obtaining re-employment, and concluded that it was caused by aspersions cast over Wallace by the manner in which he had been dismissed. After reviewing all of these factors, the Court picked a period of 24 months' notice (approximately 1.7 months' salary per year of service) as reasonable in the circumstances.

In addition to its award of reasonable notice, the trial court gave Wallace aggravated damages in the amount of $15,000.00, as well. The Court cited foundations for its aggravated damages award in both contract and tort, as follows:

> a) regarding the Plaintiff's claim in contract for aggravated damages, it was noted that Wallace had been ensured employment security by the Defendant at the time of his hiring. Although the contract itself did not contain a fixed term, it was concluded that *the Defendant could have foreseen the prospect of Wallace's incurrence of mental distress* in the event that its assurance of job security to Wallace was unilaterally breached. The job security contemplated by the parties at the commencement of the employment contract was the basis for an implied term, the trial judge found, which implied term had been breached by the Defendant. The breach of the implied term (that Wallace would not be dismissed in a manner that would likely cause him mental distress) represented a "separate actionable wrong" under the *Vorvis* rationale, and attracted compensation;
>
> b) furthermore, and independent of the contractual basis found for awarding aggravated damages, the trial court concluded that the Defendant's behaviour toward Wallace, both in the harsh conduct of his dismissal and its decision to play "hard ball" with Wallace in the ensuing litigation, combined to create a "negligent breach of the duty of care" which it owed to not inflict mental distress or harassment on the Plaintiff.

Although the trial judge awarded aggravated damages to Wallace, the *Vorvis* decision required "harsh, vindictive, reprehensible and malicious" behaviour on the part of the Defendant in order to justify punitive damages. At trial, it was concluded that the circumstances of Wallace's case did not warrant *punitive* damages. Nevertheless, the Court's award of aggravated damages (in addition to a relatively generous reasonable notice award equaling 1.71 months' salary per year of service) made Wallace a liberal departure from the conservatism which had been the hallmark of Canadian employment law for more than a century. As such, the decision was ripe for appeal.

C. Wallace at the Manitoba Court of Appeal

Aside from the status of a bankrupt employee who initiates and maintains a wrongful dismissal action, the decision of the Manitoba Court of Queen's Bench in Wallace's case presented two more issues of substantial importance in Canadian employment law. Firstly, the trial judge had awarded Wallace a reasonable notice period equaling 24 months' salary (or 1.71 months for each year of service). Since very few Canadian wrongful dismissal cases had ever exceeded one month per year of service in respect of reasonable notice, Wallace's award invited further legal analysis. Secondly, the trial court's award of aggravated damages to Wallace was a violation of the unspoken rule that no such damages could be awarded in a Canadian wrongful dismissal case, except in respect of some "independently actionable wrong". This rule (essentially, the *Addis* Principle) was unspoken in the sense that even the Supreme Court of Canada had acknowledged, in *Vorvis*, that circumstances *could* arise in a wrongful dismissal case to warrant an award of aggravated damages, even in the absence of an independently actionable wrong. Acknowledgment of potential exceptions to the general rule, however, have been neither plentiful nor meaningful.

Regarding the first issue, the Court of Appeal acknowledged that Wallace's entitlement to damages in respect of reasonable notice should be "at the high end of the scale"; however, the Court of Appeal did not support the amount of notice given. The Court referenced *Bardal v. The Globe and Mail Ltd.*,[35] both for the factors to be considered in making a reasonable notice award but, also, in respect of the award itself. The Court noted that, in *Bardal*, the employee had been dismissed in circumstances similar to those of Wallace, including a representation of employment security to the date of retirement. Although he had been employed for sixteen years, Bardal was awarded 12 months' salary (3.23 weeks' salary per year of service).

The Court of Appeal noted that, while reasonable notice awards had increased considerably in the 25 years following *Bardal*, the rationale at the heart of the increase was highly questionable. A previous decision of the Manitoba Court of Appeal regarding the same point was cited for its conclusion:

> ... I mean to demonstrate my concern about the excessive length of the notice period for which employers, acting wrongfully but not in bad faith, have been found liable in recent years. This trend cannot be explained by inflation and only to a limited degree by other economic factors. It is obvious why money judgments in personal injury cases grow as the value of the dollars shrinks, but I do not understand why, when the

[35] *Supra* note 8.

> principles to be applied in determining reasonable notice remain constant, the amount of time determined should be significantly larger now than it was in the past. This concern was addressed in *Foster* v. *Kockums Cancar Division Hawker and Siddeley Canada Inc.*, [1993] 8 W.W.R. 477 (B.C.C.A.). There Southin, J.A. stated (at page 486):
>
> > What, if anything, happened from 1960 to 1987 to leave the oft quoted passage from *Bardal* v. *Globe and Mail Ltd.* intact as a guide, but the conclusion of McRuer, C.J.H.C. in tatters?
> >
> > Of course, one could say that British Columbia is not Ontario and 1987 was not 1960. But one has to ask, What are the differences to justify these long periods of reasonable notice? I see none.[36]

The question posed by the Manitoba Court of Appeal, both in *Wiebe v. Central Transport Refrigeration (Man.) Ltd.*,[37] and in *Wallace* is a good one: Why was Jack Wallace awarded a reasonable notice period equalling 7.37 weeks per year of service and, in *Bardal*, the Plaintiff was awarded 3.23 weeks per year of service (less than half of the *Wallace* award)? The answer to the question likely lies in the financial realities of modern living. Since the *Bardal* decision of 1960, life in Canada (and, in fact, the entire Western world) had become even more secular, more materialistic, less financially restrained and more employment-dependant. Employment had become a fundamental thread in the fabric of each individual. In the *Wallace* case, the Court of Appeal agreed that Wallace should have been compensated "at the high end of the scale", but it disagreed with the actual amount of damages awarded by the trial court. As a result, the Court of Appeal reduced Wallace's reasonable notice damages from 24 months to 15 months. The Court suggested that "an element of aggravated damages must have crept into the determination by the trial judge that Wallace was entitled to 24 months' notice of termination of his employment".[38] However, since the trial judge had independently awarded aggravated damages to Wallace, it must be asked if the trial court's award of reasonable notice was not simply based upon the difficulties incurred by Wallace in attempting to obtain re-employment.

The award of aggravated damages in favour of Wallace was clearly a matter of significant interest and concern to the Court of Appeal. Predictably, the Court immediately referenced *Addis v. Gramophone Co. Ltd.*,[39] *Peso Silver Mines Ltd. v. Cropper,*[40] and *Vorvis v. Insurance*

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[36] *Wallace v. United Grain Growers Ltd., supra* note 34 (C.A.), citing *Wiebe v. Central Transport Refrigeration (Man.) Ltd.* (1994), 95 Man. R. (2d) 65 (C.A.) at 79 per Kroft JJ. A.

[37] *Ibid.*

[38] *Wallace v. United Grain Growers Ltd., supra* note 34 (C.A.).

[39] *Supra* note 1.

[40] *Supra* note 13.

Corporation of British Columbia[41] for the misquoted proposition that only reasonable notice should be awarded in respect of an employment contract breach. Although the Court of Appeal acknowledged the "holiday cases" as departures from the *Addis* Principle, it also referenced then recent decisions of the English Court of Appeal (namely, *Bliss v. Southeast Thames Regional Health Authority*[42] and *Hayes v. James & Charles Dodd*[43]), both of which made the point that general damages for mental distress, injured feelings or annoyance caused by breach of an employment contract should not be awarded. The *Hayes* decision went even further, stating that awards of damages in respect of mental distress (even when it was reasonably foreseeable) were rejected "as a matter of policy". The Court of Appeal was quick to espouse the policy:

> Given that an innocent party may well suffer an adverse emotional reaction (or worse) consequent upon a wrongful dismissal, if a right to damages for mental distress was based on foreseeability of damages arising out of the circumstances surrounding the dismissal, this would be inconsistent with the fundamental tenet of employment law referred to earlier in *Vorvis* namely, that either party is entitled to terminate the employment arrangement (leaving aside contractual provisions to the contrary, such as a collective agreement) subject to reasonable notice or damages in lieu thereof.[44]

In light of *Addis*, *Peso Silver Mines* and *Vorvis*, the Court of Appeal flatly rejected Wallace's argument to the effect that a separate independent cause of action in tort, called "bad faith discharge", existed. Further, the Court of Appeal equally dismissed the notion that fair treatment was an implied term of the employment contract. In the end, therefore, the Court overturned the trial judge's award of aggravated damages to Wallace, and awarded nothing under that head of damages.

Basically, then, the Court of Appeal applied a relatively conservative notion of reasonable notice, in addition to its restrictive approach to the *Addis* Principle, to significantly limit the compensation owed by United Grain Growers Ltd. to Wallace. The Court demonstrated, however, some of the discomfort which must surely be a common component of every effort to preserve the *Addis* Principle in the context of modern employment.

D. The Supreme Court of Canada Decision

As previously noted, the decision of the Supreme Court of Canada in *Wallace* is likely the most significant Canadian employment law decision

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[41] *Supra* note 14.

[42] *Supra* note 28.

[43] [1990] 2 All E.R. 815 (C.A.).

[44] *Wallace v. United Grain Growers Ltd.*, *supra* note 34 (C.A.) at paras. 86, 88.

of the twentieth century. Given its stature in common law jurisprudence, the lack of clarity found in the majority judgment is problematic; in fact, the dissenting decision provided by McLaughlin J. can be easily preferred over the majority ruling on a strictly legal interpretation. That having been said, the majority ruling seems to address, in an indirect and incomplete fashion, the legal abnormality derived from continued devotion to the *Addis* Principle. The difficulty with the majority's approach might be that it falls short of actually "fixing" the legal and social problems inherent in preservation of *Addis*, but tinkers enough with both *Addis* and ages old reasonable notice principles to leave, as a result, a peculiar, "home-made" principle which may, ironically, be less legally supportable than *Addis* itself.

1. The Majority Decision

The majority decision in *Wallace* may be a classic example of infamous Canadian compromise. At the heart of the case was the issue of whether or not a dismissed employee was entitled to exemplary damages in respect of "bad faith" conduct on the part of the Defendant employer. The difficulty posed was, of course, rooted in the inherent incongruity of the *Addis* Principle with modern contract damages principles. The *Wallace* case offered an opportunity for the Supreme Court of Canada to answer this nagging question: "Should the *Addis* Principle survive in the Canadian common law of employment?" The answer from the majority appears to be a qualified, hesitant "yes".

The majority decision was issued by Iacobucci J.[45] A number of fundamental observations were made in the decision which are not easily reconciled with the rationale of the decision itself. Before reviewing the conclusion of the majority, consider the following accepted premises:

a) a contract of employment represents a special relationship with "unique characteristics" (para. 90);

b) "The contract of employment has many characteristics that set it apart from the ordinary commercial contract" (para. 91);

c) employment contracts rarely result from an exercise in free and equal bargaining power "in the way that the paradigm commercial exchange between two traders does." The existing power imbalance, which almost always favours the employer, continues beyond the time of hiring and throughout the relationship (paras. 90 and 91, quoting *Studies in Contract Law*, *supra* note 5 at 363);

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[45] *Wallace v. United Grain Growers Ltd.*, *supra* note 34 (S.C.C.).

d) the unequal balance of power in employment had led the majority of the Court in *Slaight Communications Inc. v. Davidson*[46] to describe employees as "a vulnerable group in society" (para. 93);

e) "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" (para. 93, quoting *Reference Re: Public Service Employee Relations Act, supra* note 3 at 368); and

f) "... for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status *is bound to have far-reaching repercussions*" (para. 94) [emphasis added].

The fact that these observations accurately reflect the reality of late twentieth and twenty-first century employment in Canada is indisputable; the reconciliation of these observations with the majority's apparent subscription to the *Addis* Principle is, at best, very difficult and, at worst, impossible.

2. The Majority Position on Aggravated Damages for Mental Distress

Ultimately, the majority found that exemplary damages could not be awarded, based on the *Vorvis* case. The majority 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' . . .". Since no "separate actionable wrong" had been established in Wallace's case, the majority concluded that it could not award aggravated damages for mental distress. The majority distinguished *Jarvis v. Swans Tours Ltd.*[47] by concluding that "an employment contract is not one in which peace of mind is the very matter contracted for ...".[48]

Can it *really* be said that "peace of mind" is not central to a contract of employment? Or, for that matter, can it be reasonably stated (particularly in the face of the acknowledgment of the majority cited above) that "peace of mind" is a substantially lesser component of employment contracts than vacation contracts? Furthermore, is "peace of mind" a different (and more valuable) commodity than is "an essential component of [an individual's] sense of identity, self-worth and emotional well-being"? Therein lies an

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[46] [1999] 1 S.C.R. 1038.

[47] *Supra* note 17.

[48] *Wallace v. United Grain Growers, supra* note 34 (S.C.C.) at para. 73, citing *Vorvis, supra* note 14 at paras. 90-94.

apparent difficulty with adherence to the *Addis* Principle in the modern employment law context: it is extraordinarily difficult to logically maintain, as the majority seems compelled to have done in support of its decision, that an employment contract can be, on one hand, *essential to an individual's sense of self-worth, identity and emotional well-being* but, on the opposite hand, *not* a contract to which peace of mind is central. A substantial argument can be advanced to the effect that any attempt to maintain a distinction between a vacation contract and a modern day employment contract on the basis of "peace of mind" is irrational. Nevertheless, that distinction was critical to the majority's adherence to the general preclusion of aggravated damages awards in wrongful dismissal cases.

3. Punitive Damages

The analysis by Iacobucci J. in respect of Wallace's claim for punitive damages is not lengthy. While the hypothetical availability of punitive damages in an employment contract case was acknowledged, two references were made to the specific facts of the *Wallace* case. Firstly, the majority noted the absence of a "separately actionable wrong" (but, at the same time, failed to establish such a wrong as a pre-condition of a punitive damages award). Secondly, the absence of "*sufficiently* harsh, vindictive, reprehensible and malicious conduct" on the part of the Defendant was cited. This latter point evolves into a curiosity as the majority decision continues.

4. The Wallace Factor

The majority decision in *Wallace* represents a subscription to traditional *Addis* Principle reasoning in respect of aggravated damages and punitive damages. Nevertheless, the majority of the Court seems to have acknowledged the awkwardness of imposing the *Addis* Principle on contemporary employment. While prepared to reject the application of exemplary damages in favour of Wallace, the Court was also willing to fashion an unusual new compromise approach to reasonable notice damages. The resulting "*Wallace* Factor" is a new legal principle which departs from *Addis* but which does not arrive at *Jarvis*. In essence, the *Wallace* Factor occupies a rarely inhabited legal middle ground by awarding "extra damages" (but not aggravated or punitive damages) to Plaintiffs who have been subjected to "bad faith" dismissals, irrespective of the impact of such employer behaviour on each individual employee. The extra damages contemplated in the *Wallace* Factor are meant to be a component of the "reasonable notice" award itself while, at the same time, representing a supplement to the reasonable notice that would have

otherwise been awarded had the employer not participated in bad faith conduct. Iacobucci J. expressed the *Wallace* Factor as follows:

> 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 results from dismissal. In *Machtinger*, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, *employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period*.[49]

As is evident from the tone of Iacobucci J.'s statement, the Supreme Court of Canada issued the *Wallace* decision from a more liberal, "rights-based" perspective on the employment relationship than that on which the *Vorvis, Peso Mines* and *Addis* cases were based. In so far as the *Wallace* case acknowledges the need to break free from the restrictions of the *Addis* Principle in terms of judicial responses to improvident employer conduct, it represents progress in the law of wrongful dismissal damages. Even the Court's definition of (or lack thereof) an employer's "good faith" obligations is demonstrative of a relatively expansive approach quite unlike the rigidity which was born from *Addis*:

> 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.[50]

Keeping in mind that the majority of the Court expressly rejected Wallace's argument that a tort of "bad faith discharge" should be recognized, it is interesting to observe that the same majority acknowledged an "obligation of good faith and fair dealing" owed by employers to dismissed employees. Presumably, the "good faith" requirement (if not tort-based) was found to be an implied contractual term; however, rejection of that notion seems to have been equally clear:

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[49] *Wallace v. United Grain Growers Ltd., supra* note 34 (S.C.C.) at para. 95 [emphasis added].

[50] *Ibid.* at para. 98.

> The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for "bad faith discharge". Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare.[51]

If the "good faith" requirement (the breach of which leads to application of the *Wallace* Factor) is neither contractual nor tort based, how does a dismissed employee become entitled to additional damages by virtue of its breach? No answer to that question seems readily apparent. Perhaps more perplexing is the manner in which damages are to be quantified under the *Wallace* Factor; this aspect was left unspecified by Iacobucci, J. Remembering also that the majority dismissed out of hand Wallace's claims for aggravated damages and punitive damages, it is interesting to note its recognition of "intangible injuries" which may be assumed to exist upon proof of bad faith conduct on the part of an employer:

> ... [A]lthough the loss of a job is very often the cause of injured feelings and emotional upset, the law *does not* recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealings 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 ... Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period ... However, *in my view, the intangible injuries are sufficient to merit compensation in and of themselves*.[52]

On the foundation of this curious reasoning, the Supreme Court of Canada chose to maintain the *Addis* Principle by refusing to award aggravated damages or punitive damages against United Grain Growers Ltd. In recognition of the modern reality of employment relationships, however, the Court chose a new and unique path on which to distance itself from the practical impact of *Addis*. By following this new path, called the *Wallace* Factor, the majority of the Supreme Court of Canada found its way to restoring the trial court's award to Wallace of 24 months' salary in lieu of notice. As was noted by Iacobucci J., the majority's conclusion was, in part, a compensatory award for Wallace's "intangible injuries" suffered as a result of the employer's breach of a "good faith" obligation which, apparently, is neither contractual nor tort-based.

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[51] *Ibid.* at para. 88.

[52] *Ibid.* at paras. 103-104 [emphasis added].

5. The Dissent

The dissenting decision in *Wallace* was issued by McLachlin J., and was concurred in by La Forest J. and L'Heureux-Dubé J. The dissent provides a dramatic contrast in reasoning with the decision of the majority.

Firstly, McLachlin J. did not accept the majority's decision that the manner in which an employee has been dismissed may be considered *generally* in defining the amount of reasonable notice to which that employee is entitled. The minority approach may be summarized as follows:

> First, I am of the view that an award of damages for wrongful dismissal should be confined to factors relevant to the prospect of finding replacement employment. It follows that the notice period upon which such damages are based should only be increased for manner of dismissal if this impacts on the employee's prospects of re-employment.
>
> An alternative view [to that of the majority] is that the manner of dismissal should only be considered in defining the notice period where the manner of dismissal impacts on the difficulty of finding replacement employment, and that absent this connection, damages for the manner of termination must be based on some other cause of action.[53]

McLachlin J. made the point that the "alternative" approach to that taken by the majority is more consistent with the fundamental principle that "damages must be grounded in a cause of action". The observation of the minority with respect to the *Wallace* Factor, then, is that an award of additional or increased damages to a dismissed employee for "intangible injuries" incurred as a result of behaviour which is neither tortious or a contractual breach is an award without legal basis. Further, the recognition of "intangible injuries", which may flow as a matter of course from a "bad faith" dismissal, without any link between those injuries and the employee's ability to obtain re-employment, is inconsistent with the entire premise of common law reasonable notice.

As noted above, the concept of *Wallace Factor* damages was not the only conceptual difficulty expressed by McLachlin J.:

> The law has now developed to the point that to these traditional actions may now be added another: *breach of an implied contractual term to act in good faith in dismissing an employee.* I agree with Iacobucci J. that an employer must act in good faith and in fair dealing when dismissing employees, and more particularly that "employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or in bad faith by being, for example, untruthful,

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[53] *Ibid.* at paras. 112 and 118.

misleading or unduly insensitive" (para. 98)…

I differ from my colleague, however, in that *I see no reason why the expectation of good faith in dismissing employees that he accepts should not be viewed as an implied term of the contract of employment*. To assert the duty of good faith in dismissing employees as a proposition of law, as does my colleague, is tantamount to saying that it is an obligation implied by law into the contractual relationship between employer and employee. In other words, it is an implied term of the contract.[54]

In the end, McLachlin J. agreed that Wallace should be awarded 24 months' notice *in respect of his prospects for re-employment*, and not on the basis of the majority's reasoning. Furthermore, McLachlin J. would have upheld the Trial Judge's award of aggravated damages, based on the employer's breach of an *implied contractual term* of "good faith and fair dealing". Finally, she would not have disturbed the trial court's decision with respect to punitive damages.

A number of scholars have preferred the reasoning of McLachlin J. to that of the majority. The fact that the majority refused to acknowledge an implied *contractual* duty of good faith owed by employers to employees has been questioned, for example, in light of the clear recognition of employment as having much more than a "transactional" dimension, but having "relational and psychological" elements, as well.[55]

The dissent of McLachlin J. raises interesting questions regarding the *Wallace* Factor. In fact, the dissenting decision in *Wallace* bears striking similarities to the recent approach taken by the House of Lords (namely, *Johnson v. Unisys Ltd.*[56]) in addressing the *Addis* Principle.

E. The Wallace Factor Summarized

The primary points to be taken away from the *Wallace* case are these:

a) while the majority of the Supreme Court of Canada did not subscribe to the notion of an employer's "bad faith conduct" or "unfair dealing" in the dismissal of an employee being characterized as a breach of an implied contractual term or, alternatively, tortious conduct, it did accept that such employer behaviour is reprehensible and should warrant increased compensation for the employee in the form of a reasonable notice award;

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[54] *Ibid.* at paras. 135-36 [emphasis added].

[55] Ian McKenna, "The Aftermath of United Grain Growers: Time To Revive the Employer's Contractual Duty to Provide a Safe Workplace?" (2000) 27 Man. L.J. 415 at para. 36.

[56] *Supra* note 9.

b) the extent and nature of an employer's obligation of "good faith and fair dealing" was not specified in *Wallace*; irrespective of any narrow interpretations of the *Wallace* Factor periodically advanced by employers, however, it seems clear that a broad application requiring "candid, reasonable, honest and forthright" behaviour from employers is the standard. While the full extent of the expansive obligation imposed by the majority on employers has not been exhausted, applications of the *Wallace* Factor in Canadian cases since 1997 confirm the broad range of employer behaviours which can attract *Wallace* Factor damages, including:

1) unreasonable failure to provide a letter of reference: see *Hampton v. Thirty- Five Charlotte Ltd.*;[57]

2) failure to be honest and forthright in respect of the future of a worker's employment: see *Budd v. Bath Creations Inc.*;[58]

3) insensitive conduct in the course of dismissal, including changing the lock on the company's premises and escorting the employee from those premises: see *Mrozowich v. Grandview Hospital District No. 3B*;[59]

4) failure to provide statutory employment benefits: see *Stolle v. Daishinpan (Canada) Inc.*;[60] and *Mitu v. New Century Food and Paper Ltd.*;[61]

5) maintaining an unreasonable position in defence of a wrongful dismissal claim: see *Wallace v. United Grain Growers Ltd.*;[62] and *Hampton v. Thirty- Five Charlotte Ltd.*;[63]

6) failure to reasonably communicate a notice of dismissal: see *Danaher v. Moon Palace (2000) Ltd.*;[64]

7) unreasonably precluding the attendance of a former employee on company premises: see *Elliott v. Kiwanis Club of Western Kings Inc.*;[65]

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[57] [1999] N.B.J. No. 423 (Q.B.)(Q.L.).
[58] [1998] O.J. No. 5468 (Ont. Gen. Div.)(Q.L.).
[59] (1998), 36 C.C.E.L. (2d) 144 (Man. Q.B.).
[60] (1998), 37 C.C.E.L. (2d) 18 (B.C.S.C.).
[61] [2001] B.C.J. No. 1184 (B.C.P.C.)(Q.L.).
[62] *Supra* note 34.
[63] *Supra* note 57.
[64] (2002), 248 N.B.R. (2d) 331 (Q.B.).
[65] [2000] N.B.J. No. 537 (S.C.)(Q.L.).

8) failure to properly and reasonably investigate allegations of just cause made with respect to the dismissed employee: see *Day v. Wal-Mart Canada Inc.*;[66]

c) the increased damages award contemplated under the *Wallace* Factor is not technically dependent upon proof of any concrete injury having been suffered by the Plaintiff. Instead, the majority decision in *Wallace* makes room for an award of increased damages (via extension of the reasonable notice period) as a means of holding employers "... to an obligation of good faith and fair dealing in the manner of dismissal ..." (at para. 95).

The contrasting positions of the majority and the minority of the Supreme Court of Canada in the *Wallace* case graphically illustrate the significant difficulty still posed by the *Addis* Principle almost a century after its inception. Iacobucci J., speaking for the majority, made a valiant effort to preserve the Addis rationale while, at the same time, attempting to acknowledge the "new reality" of employment relationships, including the inherent vulnerability of employees in those relationships. The resulting *Wallace* Factor helps to discourage egregious employer behaviours on dismissal and, hypothetically, to foster sensitivity towards dismissed employees. Unfortunately, the attempt in *Wallace* to retain the *Addis* Principle and, at the same time, to dull its pro-employer effect, has led the state of Canadian wrongful dismissal law (perhaps appropriately) into a legal hinterland which is, at once, exhilarating and perplexing in its remoteness from established common law concepts.

IV. Dismissal Damages - Present & Future

Where does the law of Canadian and English wrongful dismissal damages now stand? In what direction is dismissal compensation headed? These are questions of rudimentary importance but, unfortunately, without clear answers. If it had no other value in the modern employment context, *Addis*' case did supply a measure of certainty; however, the *Addis* Principle no longer wears comfortably on Canadian and English employment contracts.

As inflexible as it is, the rule in *Addis* has been outgrown by the much-expanded concept of employment as a relational contract - a concept which, like a goldfish transferred from a small bowl to a large tank, has grown exponentially in this industrialized, de-spiritualized and hyper-materialized twentieth century liberal environment. In a society which recognizes employment as being fundamentally important to an individual's financial and emotional well-being (not to mention his or her

[66] (2000), 188 N.S.R. (2d) 69 (C.A.).

sense of identity), a restrictive and conservative approach to dismissal damages simply will not fit.

The House of Lords has, in *Malik* and *Johnson*, expressly noted the inappropriateness of *Addis* and has moved away from its effect. In order to facilitate compensation awards in excess of mere "reasonable notice", however, it has resorted to the new implied contractual term of "mutual trust and confidence". An employer's breach of this duty gives rise to additional damages on the strength of a "separate and actionable wrong" which exceeds a breach of the more familiar requirement to provide "reasonable notice" of dismissal. Employers in England, therefore, should be made keenly aware of the mutual trust and confidence term and the potential increase in employment damages which it facilitates. Any intent to avoid the mutual trust and confidence term should be addressed in express contract language.

On the other hand, Canadian courts have demonstrated a stubborn reluctance to recognize mutual trust and confidence as an implied term of modern employment contracts. Instead, the need for common law reform in response to the contemporary realities of employment relationships has been acknowledged in the creation of the *Wallace* Factor - an uncomfortable "middle ground" between subscription to *Addis* and departure from it. The direction of law of wrongful dismissal damages in Canada is, therefore, even less certain.

A. Is Mutual Trust and Confidence Necessary?

The implied term of mutual trust and confidence has been identified by the House of Lords as a means of overcoming the restrictions of the *Addis* Principle. Can it be identified as a *necessity*, however? Lord Hoffman suggested as much in *Johnson*:

> ... *[T]he only loss* caused by a wrongful dismissal flows from a failure to give proper notice or make payment in lieu. *Therefore, if wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation. On the other hand, if such damage is loss flowing from a breach of another implied term of the contract, Addis' case does not stand in the way*.[67]

If Lord Steyn's speech in *Johnson* had been favoured by the remaining Law Lords, then his willingness to depart from the *Addis* Principle would surely have made possible the award of additional damages to a dismissed employee, even in the *absence* of a mutual trust and confidence breach. It should be noted that one reason for departure from the *Addis* case was, in Lord Steyn's opinion, the evolution of employment from its status as a

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[67] *Johnson v. Unisys Ltd., supra* note 9 at para. 44 [emphasis added].

"commercial contract" and its entry into the realm of "relational contract". Lord Hoffman and Lord Millett have observed, for example "... [T]he nature of the contract of employment has been transformed"[68] and that the previous common law view of employment as a commercial contract made between free and equal parties was "unsatisfactory".[69] Lord Millett acknowledged that, "In reality there was no comparison between the consequences for an employer if the employee terminated his employment and the consequences for an employee if he was dismissed."[70] How employment was masqueraded as a pure commercial contract for almost the entire twentieth century is, then, a curiosity. It should not be forgotten that, while courts were constantly repeating *Addis* in the employment context, they were also observing very "non-commercial" characteristics in typical employer-employee relationships - including employer assertions that their workers were contractually bound to keep business information confidential, not to compete and, generally, to act in good faith.

Having now concluded that employment relationships are no longer pure commercial contracts but, instead, agreements which are "defining features of people's lives"[71] that give employees "... an identity and a sense of self-esteem",[72] it seems only logical that these same contracts should no longer be governed by *Addis* but must, instead, fall under the exception of *Jarvis* and *Jackson*. Consider, in this regard, the words of Lord Millett:

> Contracts which are not purely commercial but which have as their object the provision of enjoyment, comfort, *peace of mind or other non-pecuniary personal* or family benefits (as in *Jarvis* v. *Swans Tours Ltd.*, [1973] QB 233 and similar cases) are usually treated as exceptions to the general rule, *though in truth they would seem to fall outside its rationale*.[73]

Is it even *possible* that the sense of identity and emotional well-being which flow from employment contracts *do not* constitute "peace of mind" or "other non-pecuniary personal benefits"? Of course not. As a result, it should be clear that employment contracts are no longer influenced by *Addis*, irrespective of whether or not an implied term of mutual trust and confidence exists. Read again the first line of Lord Millett's above-noted quote, which identifies the types of contracts that are typically *not* subject to the *Addis* Principle: "Contracts which are not purely commercial ...". At paragraph 77, Lord Millett removes any doubt which may have otherwise

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[68] *Ibid.* at para. 35.
[69] *Ibid.* at para. 72.
[70] *Ibid.*
[71] *Ibid*. at para. 77.
[72] *Ibid.* at para. 35.
[73] *Ibid.* at para. 70 [emphasis added].

lingered with respect to the categorization of employment agreements as "purely commercial" or not, when he unequivocally acknowledges that "[c]ontracts of employment are no longer regarded as purely commercial contracts ...".[74]

Given judicial recognition of the modern employment contract as much more than a commercial, profit-based relationship but, instead, one which is regularly borne from bargaining inequality and which is commonly known to fundamentally impact upon an employee's overall *well-being*, it should be clear that continued application of the *Addis* Principle restrictions in employment litigation is *wrong*. The implied mutual trust and confidence term, therefore, should not be a requirement for overcoming *Addis* in wrongful dismissal damages awards; rather, the endorsement of the mutual trust and confidence term by the House of Lords only increases the opportunity for employees to be awarded damages in excess of reasonable notice. But for the existence of the *Employment Rights Act, 1996* in England, the combined effect of the *Malik* and *Johnson* decisions would seem to be an unfettered judicial discretion in respect of wrongful dismissal damages awards, particularly in circumstances where the employer's breach of mutual trust and confidence occurred prior to the final act of dismissal (i.e., in the circumstances of constructive dismissal or in the steps leading up to the final dismissal, such as the investigation [or non-investigation] of alleged just cause for the employee's dismissal).

The relative clarity in the House of Lords' position regarding *Addis* is not enjoyed in Canada. In *Wallace v. United Grain Growers Ltd.*, the Supreme Court has struggled with the restrictions of the *Addis* Principle, but has remained bound by its effect. Despite its numerous acknowledgements of the employment agreement as something more than a purely commercial contract, the majority of the Court did not, unfortunately, view that modern reality as an escape from *Addis*. Furthermore, the majority could not bring itself to find the existence of an implied contractual term of mutual trust and confidence in the employment relationship, or even an implied term requiring the employer to act in "good faith" in the course of a dismissal. The reluctance of the majority in these two regards is, at best, troubling and, at worst, irreconcilable with acknowledged realities of employment. For example, and as observed by Lord Steyn in *Johnson*, it is rather difficult to fathom how an employer cannot owe a reciprocal duty of trust and confidence to an employee from which the employer demands such an obligation. Surely a discrepancy such as this can only be the product of the unequal bargaining power which both the House of Lords and the Supreme Court of Canada have acknowledged as inherent in employment relationships.

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[74] *Ibid.* at para. 77.

The current Canadian response to *Addis* is difficult to define in legal terms. The *Wallace* Factor is not the product of an outright rejection of the *Addis* Principle or, for that matter, an effort to overcome that rule. Instead, the *Wallace* Factor is a relatively nebulous notion to the effect that, although an employer has no contractual duty to act in "good faith" during the course of a dismissal, its failure to do so *may* be the basis for an award of additional reasonable notice, *whether or not the employer's bad faith conduct has affected (or may affect) the employee's ability to obtain re-employment.* As noted previously, the dissenting decision of McLaughlin J. in *Wallace* illuminates these difficulties in the majority position.

The *Wallace* Factor is clearly a product of the growth of employment relationships beyond the intended application of the *Addis* Principle. Just as a boy outgrows clothing, so too has employment outgrown *Addis.* In Canada, however, there has been reluctance to admit that the *Addis* "coat" no longer fits the grown-up employment relationship; the *Wallace* Factor seems to be an unnecessarily desperate attempt to retain the traditional principle when, in fact, it need not be retained.

B. Where Should Employment Law "Go" From Here?

The Supreme Court of Canada and the House of Lords have each moved toward acknowledging, in different manners, that employment contracts have outgrown the *Addis* Principle. In Great Britain, it appears that the acceptance of the implied term of mutual trust and confidence would (in the absence of statutory intervention) allow judges to award damages in excess of reasonable notice to wrongfully dismissed employees. The more difficult Supreme Court of Canada decision is one which allows judges a discretion to award reasonable notice damages in excess of *typical* reasonable notice damages on the basis of employer "bad faith" conduct which, though the employer has no contractual obligation to avoid it, is objectionable nonetheless. Both courts have, essentially, recognized the need to make additional damages available to employees in circumstances where their employers have behaved badly toward them, an acknowledgement which has the practical effect of imposing upon employers new respect for the profound impact of employment in the lives of employees. Courts in both England and Canada should, however, further adopt a more decisive and consistent position with respect to the *Addis* Principle and, ultimately, the modern contract of employment.

C. A New Approach

First, the automatic application of the *Addis* Principle in the context of modern employment relationships should be clearly rejected. Given its premise, that commercial contracts should not typically give rise to

damages in excess of non-pecuniary damages, courts should reserve their application of *Addis* for "purely commercial contracts" which are the product of free and equal bargaining. The condition of late twentieth, early twenty-first century employment as a relationship from which employees derive far more intangible benefits than compensation or "profit" (as has been noted by Lord Millett and others) should, in itself, justify a departure from *Addis*. The additional fact that, in most employment relationships, a gross inequality of bargaining power has been acknowledged is a further basis of support for the contention that the application of *Addis* was not intended for the type of relationship that employment *has become*. The judicial machinations reflected in *Wallace* (and, to some extent, *Johnson*) would be rendered unnecessary if, finally, courts laid *Addis* to rest in respect of normal employment relationships.

Irrespective of whatever position courts in England and Canada adopt regarding the continued application of *Addis*, judicial recognition of the implied term of mutual trust and confidence is a logical and overdue "next step" in the evolution of the employment relationship. As suggested by Lord Steyn in *Johnson*, the notion of a unilateral implied obligation of trust and confidence, benefiting only the employer, is virtually impossible to rationalize, and should be universally replaced with a mutual obligation.

While Canadian courts should follow the House of Lords' imposition of an implied term of mutual trust and confidence in employment contracts, the courts of England should follow the Canadian lead toward the extension of the mutual trust and confidence obligation to include the time of dismissal and thereafter. As was noted by Iacobucci J. in *Wallace*, the point at which an employee faces dismissal is a time of great vulnerability, and a contractual term which assists in minimizing the effect of that vulnerability has strong social appeal. Having regard to such an implied term, both the Supreme Court of Canada and the House of Lords would be wise to follow McLaughlin J.'s recommendation in *Wallace*, to the effect that a "good faith" behaviour obligation be imposed upon employers in respect of the entire dismissal process, rather than the much less certain concept advanced by Iacobucci J. in the majority decision.

Anything short of an expansive implied term of mutual trust and confidence in employment contracts, governing behaviour of both employers and employees during and after the employment, will perpetuate an inequity which has operated in favour of employers for centuries.

D. The Case for Exemplary Damages

A strong case also exists for affording courts broad jurisdiction to award exemplary damages (punitive and/or aggravated damages) in

wrongful dismissal matters. In fact, an argument favouring the application of exemplary damages in appropriate employment law cases, where the employer has egregiously violated the contractual rights of its employee (and has likely done so with a sense of security grounded in the inherent power imbalance which typically operates in favour of employers), is particularly compelling in an era in which it has been recognized that many employees risk being manipulated, to their detriment, by employers. If the modern employment relationship is one of "mutual trust and confidence", should a wilful or reckless breach of the contract on which that relationship is founded go unpunished?

The very restrictive approach to exemplary damages prescribed in *Addis* has been entrenched in our jurisprudence. The House of Lords lent support to the general limitation on exemplary damages awards in *Rookes v. Barnard*.[75] While that case has been frequently criticized, it does serve as a classic example of the judicial mind set which has subscribed to the *Addis* Principle. In the *Rookes* case, Lord Devlin supposed that only two types of cases should warrant consideration of exemplary damages. One category of cases was described by Lord Devlin as "oppressive, arbitrary or unconstitutional action by the servants of the government".[76] The second category defined by his Lordship was, however, not nearly so narrow:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ... Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money-making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.[77]

Obviously, the immediate difficulty posed by such a notion lies in the *Addis* Principle. Historically, exemplary damages have not been awarded for breach of contract and, particularly, for breach of employment contracts. As has been noted by Waddams in *The Law of Damages*, the traditional limitation on exemplary damages in contract cases has, however, been eroded:

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[75] *Supra* note 23.
[76] *Ibid*. at 1226.
[77] *Ibid*. at 1226-27.

> It is increasingly held that concurrent liability in contract and tort exist in many cases formerly treated as purely contractual. This development will, it seems, have the effect of enlarging the scope of exemplary damages ... It has been held in recent years that damages for breach of contract can include intangible matters such as mental distress caused by the breach and loss of mental satisfaction that would have accompanied performance. The analogy with aggravated damages and tort cases is obvious. Although in the leading case, *Jarvis* v. *Swans Tours Ltd.*, the court disavowed the intention of awarding exemplary damages, it is not easy, in seeking to compensate such intangible losses, entirely to exclude punitive considerations.[78]

Even the Supreme Court of Canada, with its demonstrated affinity for the *Addis* Principle, has accepted the *prospect* of an exemplary (punitive) damages award in a breach of contract case:

> ... [W]hile it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract... Where the defendant has breached the contract, the remedies open to the plaintiff must arise from that contractual relationship, that "private law", which the parties agreed to accept. The injured plaintiff then is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss. This distinction will not completely eliminate the award of punitive damages but it will make it very rare in contract cases.[79]

The rejection of *Rookes v. Barnard* in other Commonwealth countries, including Australia, New Zealand and Canada, should be noted.[80] Under that restrictive approach, however, an award of exemplary damages against an employer which chooses to dismiss a worker without "just cause" and without providing reasonable notice could easily fall within Lord Devlin's second category of cases warranting exemplary damages. Any legal practitioner, senior manager or human resources professional with experience in advising an employer on the legal ramifications of dismissal is likely aware of the fact that many employers "seek to gain at the expense of the [employee] some object ... which either [the employer] could not obtain at all or not obtain except at a price greater than [it] wants to put down". Essentially, many employers desire to "buy out" the "reasonable notice" entitlement of a dismissed employee at a "price" which equals less than the reasonable notice itself. In that regard, the offending employer makes a clear and conscious attempt to breach its obligation to provide reasonable notice, and does so with the desire to reduce the expense of its contractual obligations. Remembering the frequent statements made by both Canadian and English courts regarding the usual inequality of

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[78] S.M. Waddams, *The Law of Damages, 2nd ed.* (Toronto: Canada Law Book, 1991) at 11.260.

[79] *Vorvis v. Insurance Corporation of British Columbia*, *supra* note 14 at 1107.

[80] Waddams, *supra* note 78 at 11.190.

bargaining power which operates against employees in most employment relationships, and recognizing the ability of employers to prey on that inequality, including the acute financial distress which often accompanies an employee's job termination in this era of heavy credit consumerism, it would seem very prudent and equitable for our courts to discourage abuses by employers of their relational power over employees. When the employment contract has been enhanced by an implied (or express) term of "mutual trust and confidence", even more reason arises to award exemplary damages against employers which unfairly exercise economic and emotional power to the detriment of dismissed employees.

E. The Employment Anomaly

A recent decision of the Supreme Court of Canada makes the usual preclusion of exemplary damages in wrongful dismissal cases particularly difficult to rationalize. In *Whiten v. Pilot Insurance Co.*[81] the Court considered an award of punitive damages to an insured whose family home had been destroyed by fire. When the Appellant/Plaintiff made a claim under her fire insurance policy to obtain her contractual benefit entitlement, the Respondent insurer denied the claim and, by devising a "trumped up" arson allegation, forced the Appellant into an eight week trial. At the conclusion of the trial, an Ontario jury awarded contract damages to the Appellant but, in addition, it awarded punitive damages in the amount of one million dollars. As might be appreciated, the punitive damages component of the jury's award was unusual in Canadian jurisprudence, and was appealed to the Ontario Court of Appeal. The Court of Appeal reduced the punitive damages award to $100,000.00. After conducting a lengthy analysis of punitive damages approaches in the western world, the Supreme Court of Canada ultimately restored the one million dollar penalty against Pilot Insurance Co. While the amount of the award was, in the Canadian context, quite noteworthy, it is the Supreme Court's *rationale* for the award which bears significance to this present analysis.

Two obvious characteristics of the insured - insurer relationship seem to have formed the basis for the punitive damages award in *Whiten*:

a) an insurer is "under a duty of good faith and fair dealing" owed to its insured; and

b) in relation to their insureds, insurers are "in a superior bargaining position and one which places the insureds in positions of dependency and vulnerability".[82]

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[81] *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, rev'g (1999), 42 O.R. (3d) 641 (C.A.).

[82] *Ibid.* at paras. 79, 83, quoting in part *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.) at para. 85 per Murray J.

The manner in which the Supreme Court of Canada addressed the first of these two insurance contract realities may help to explain the Court's extraordinary caution, in *Wallace*, regarding the implication of "good faith" obligations on employers. The majority decision in *Wallace* left the notion of good faith as an employer's "quasi-obligation"; not an implied contractual requirement but, nonetheless, an obligation which, if ignored, can invite additional wrongful dismissal damages. Conversely, the House of Lords easily arrived at its conclusion that good faith is a contractual duty owed by employers to their employees. Why has the Supreme Court of Canada been so reluctant to acknowledge a similar obligation on Canadian employers? Perhaps the answer is found in the *Whiten* decision:

> However, in my view, *a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss*. It constitutes an "actionable wrong" within the *Vorvis* rule, which does not require an independent tort.[83]

As previously discussed at length, *Vorvis* effectively endorsed the *Addis* Principle by determining that aggravated damages and punitive damages would not be awarded in Canadian wrongful dismissal cases except in the event of an "actionable wrong" which was separate from an employer's breach of the contractual duty to provide reasonable notice. If a separate "actionable wrong" was committed by an employer, then, the non-contractual damages precluded by *Addis* could be awarded. Under the *Whiten* rationale, the breach of a contractual "good faith" obligation constitutes the requisite "actionable wrong" and, thus, would permit aggravated damages and punitive damages awards in the event of employer "bad faith". If the Supreme Court of Canada had adopted a characterization of the employment relationship consistent with that enunciated in *Malik* and *Johnson*, then aggravated damages and punitive damages could be awarded against employers by following the *Whiten* decision.

The second basic truth of insurance contracts referenced by the Supreme Court of Canada in *Whiten* is the inequality of bargaining power which is inherent in any negotiation between a large insurance company and a potential insured for an insurance contract. The Court quoted the Alberta Court of Queen's Bench decision in *Andrusiw v. Aetna Life Insurance Company of Canada*,[84] in which an award of $20,000.00 in punitive damages was made against an *insured*, due to that individual's untruthful conduct in the course of a disability insurance claim:

> A great deal has been in the case law, to which this court was referred, of the fact that insurers *vis-a-vis* their insureds are in a superior bargaining position and one which

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[83] *Ibid.* at para. 79 [emphasis added].

[84] *Supra* note 82.

> places the insured in positions of dependency and vulnerability. Equally, insurers must not be looked upon as fair game. It is a two-way street founded upon the principle of utmost good faith arising from the very nature of the contract. Thus, it is appropriate that punitive damages be awarded and I do so in the sum of $20,000.00.[85]

The notion of a contractual insurance relationship as one requiring "mutual good faith" is, of course, not distinguishable from the common expectation of employment relationships. In fact, the House of Lords had endorsed the existence of the implied "mutual trust and confidence" term in employment contracts, noting that it would be somewhat implausible to maintain a contractual obligation of good faith on the part of employees without recognizing a reciprocal responsibility on the part of employers. Nevertheless, the Supreme Court of Canada has attempted to maintain that unilateral approach to good faith in the employment context.

The *Whiten* case provides additional insight into the Supreme Court's consideration of exemplary damages in contract cases through its analysis in relation to a proportional award of punitive damages regarding the "degree of vulnerability" of the Plaintiff:

> The financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.[86]

The Supreme Court quoted Laskin J.A., who made the following comment in the Ontario Court of Appeal decision in *Whiten*:

> Vindicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. *A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disasters strike*.[87]

However, Mr. Justice Binnie, writing for the majority in *Whiten*, distinguished common commercial contracts from the "peace of mind" contracts (including the vacation contract at the heart of *Jarvis v. Swans Tours Ltd.*[88]) which were referenced in *Wallace*:

> I add two cautionary notes on the issue of vulnerability. First, this factor militates against the award of punitive damages in most commercial situations, particularly where the

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[85] *Whiten v. Pilot Insurance Co., supra* note 81 at para. 83, quoting *ibid*. at para. 85.

[85] *Ibid.* at para. 114.

[87] *Ibid.*, quoting *Whiten v. Pilot Insurance Co, supra* note 81 (C.A.) per Laskin J.A. [emphasis added].

[88] *Supra* note 17.

> cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.[89]

Is the "peace of mind" bargained for by employees under most employment contracts really that much different than the "peace of mind" which those same employees might bargain for under a contract of insurance or, for that matter, a vacation contract? Based upon the conclusions of both the House of Lords and the Supreme Court of Canada, to the effect that employment contracts are "*fundamental" to the worker's sense of identity and emotional well-being*, the answer should be a resounding "*no*". Naturally, the circumstances of each employment relationship would have to be considered in the context of the unequal bargaining power issue, as some employees will definitely bargain from a position of equality, or even strength, against the prospective employer. However, the similarities between many insurance and vacation contract negotiations, on one hand, and employment contract negotiations, on the other, cannot be overlooked. For example:

a) many insurance contracts and vacation contracts[90] and employment contracts are negotiated between large corporations on one hand and relatively unsophisticated individuals on the other;

b) many Traditional Peace of Mind Contracts and employment contracts are made by individuals who *need* to make a contract on an expedient basis;

c) a great number of insurance / tour companies and employers have standard form contracts to which amendments are often not made, and which contracts are offered to individuals on a "take it or leave it" basis;

d) many insurance / tour companies and employers have available to them significant information resources, including legal counsel, while the individuals with whom those companies are bargaining typically do not;

e) often, the insurance / tour companies and employers have more resources available with which to litigate contract disputes with individuals and, in fact, the corporations sometimes benefit financially from delays in payment of contract obligations, which

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[89] *Whiten v. Pilot Insurance Co., supra* note 81 at para. 115.

[90] ["Traditional Peace of Mind Contracts"].

delays are caused by protracted litigation; and

f) quite often, Traditional Peace of Mind Contract and employment contract disputes arise as a result of the conduct of the corporate party, and not the individual; for example, a Traditional Peace of Mind Contract dispute often arises from the corporation's decision not to provide benefits, and employment contract disputes frequently arise as a result of the corporation's decision not to pay reasonable notice of dismissal. At the time these decisions are typically made, the *individual* has likely already complied with his or her obligations under the contract (either by paying insurance premiums, paying vacation costs or by providing employment services). Consequently, the individual's bargaining power is further diminished by having little or no value to "withhold" from the corporation.

If it is accepted that employment contracts are typically fundamental to an individual's sense of identity and emotional well-being and, in the context of modern credit-based consumerism, are critical to the financial well-being (or "peace of mind") of employees, then the argument which favours the inclusion of employment contracts in the category of "peace of mind" contracts is quite persuasive. The argument gains strength from the reality that, in most employer-employee relationships, a significant power imbalance operates for the benefit of the employer. Consequently, the same policy considerations which were applied in the *Whiten* case to insurance contract considerations should logically apply to many employment contracts, and the awarding of exemplary damages against employers in appropriate cases should be considered, for reasons similar to the following:

> Deterrence is required. The obligation of good faith dealing means that the appellant's peace of mind should have been Pilot's objective, and *her vulnerability ought not to have been aggravated as a negotiating tactic*. It is this relationship of reliance and vulnerability that was outrageously exploited by Pilot in this case. The jury, it appears, decided a powerful message of retribution, deterrence and denunciation had to be sent to the respondent and they sent it.[91]

The current reality is that employment contracts in both Canada and England share striking similarities to insurance contracts. In most cases, it should be equally objectionable for an employer to unjustly violate an employee's "sense of identity and emotional well-being" as it is for an insurer to disrespect an insured's "peace of mind". The vulnerability of the weaker parties to these important contracts should not be aggravated with

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[91] *Whiten v. Pilot Insurance Co., supra* note 81 at para. 129 [emphasis added].

the permission (or condonation) of our courts.

F. Square Pegs, Round Holes

The law of wrongful dismissal damages in both Canada and England has been left in a state of disarray. What compensation *can* a dismissed employee successfully claim, one asks? The answer is very much "it depends". Prior to 1997, both Canadian and British courts fully subscribed to the *Addis* Principle and, thus, damages were restricted to amounts equalling "reasonable notice" unless the employer in question had, in addition to wrongful dismissal, committed a "separate actionable wrong". In 1997, the Supreme Court of Canada and the House of Lords each took steps to address the waning relevance of *Addis* in the modern employment context, but arrived at different results. In *Malik*, the House of Lords confirmed that an implied term of "mutual trust and confidence" existed in most employment contracts, the breach of which (if it occurred *during* the employment relationship) would give rise to compensation for financial losses, such as "loss of reputation" or "stigma damages". On the other hand, the Supreme Court of Canada maintained the view that any wrongful dismissal damages in excess of "reasonable notice" would be reserved for truly exceptional circumstances, and would not arise from a breach of the employment contracts but, instead, only in the event of a separate actionable wrong. Nevertheless, and although the majority of the Supreme Court expressly avoided the application of any contractual obligation of "good faith" on the part of employers, it did prescribe an arbitrary increase in reasonable notice damages when an employer acted in "bad faith" toward an employee *at the time of dismissal*.

The sense of confusion surrounding wrongful dismissal damages seems to have only deepened as courts respond to the *Malik*, *Johnson* and *Wallace* decisions. Two examples of the complexities which now influence this field of law are briefly summarized below:

a) *Gogay v. Hertfordshire County Council.*[92]

In this case, the Claimant, Julie Gogay, was employed as a residential care worker by the Hertfordshire County Council. As a result of information received from a disabled resident under her care, Gogay was suspended while her employer conducted an investigation into possible "gross misconduct" on her part. The Council's response to the allegation was described by the Court as "an immediate knee jerk reaction", rather than the response prescribed in the Council's own guidelines: "A cool, clear and structured response". The Court

[92] [2000] E.W.J. No. 4190 (C.A.)(Q.L.).

concluded that the employer's 'knee jerk' reaction constituted a breach of its implied obligation of "mutual trust and confidence" owed to Gogay. Further, the Court concluded that Gogay suffered a psychiatric illness as a consequence of the employer's breach.

The Court of Appeal distinguished the case from *Johnson*, which the employer understandably relied upon in its argument against Gogay's claim. In making the distinction, the Court stated:

> The complaint here relates to a suspension, which manifestly contemplates the continuation of the employment relationship. The clear import of *Malik* is that the ambit of *Addis* should be confined. There are in this case two differences from *Addis*: first this was not a dismissal, and secondly, this was psychiatric illness rather than hurt feelings. In my judgment, therefore, the judge was right to award damages for both the financial loss and the non-pecuniary damage resulting from the claimant's illness.
>
> I recognise that this produces the strange result that, according to *Johnson*, the defendant authority would have done better had they dismissed rather than suspended the claimant. That simply reinforces my view that the sooner these matters are comprehensively resolved by higher authority or by Parliament, the better.[93]

While the eventual outcome of the *Gogay* case did result in an award of compensation respecting the psychological impact of her employer's contractual breach, some concern should arise from what may become relatively arbitrary distinctions made between an employee's "hurt feelings" and "psychiatric illness". For example, it could be possible that the distinction will often rest upon the pursuit and availability of treatment for the employee, since "hurt feelings" might often be simply symptoms of an untreated psychiatric/psychological condition. Additionally, and as identified by the Court of Appeal in *Gogay*, the current status of the law in England does not extend the mutual trust and confidence obligation to an employee's dismissal and, therefore, considerable illogic arises from the ability of an employer to act in bad faith toward an employee at the time of his or her greatest vulnerability (dismissal).

b) *Marlowe v. Ashland Canada Inc.*[94]

Donald Marlowe was employed by the Defendant for slightly more than four years. His employment was terminated on the basis of alleged "just cause", which arose from what the British Columbia Supreme Court found to be a "harsh, vindictive and malicious" 1998

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[93] *Ibid.* at paras. 68-69.

[94] [2001] B.C.J. No. 1338 (S.C.)(Q.L.).

performance review. The Court concluded that the unacceptable review was manufactured for the purpose of depriving the Plaintiff of a sales bonus to which he would have otherwise been entitled.

Keeping in mind the application of the *Wallace* case, the British Columbia Supreme Court properly determined that exemplary damages could only be awarded in extraordinary circumstances, but that *Wallace* Factor damages could be provided to Marlowe if the Court concluded that the Defendant had acted in "bad faith" toward its employee in the course of his dismissal. Ironically, the Court concluded that Marlowe's *dismissal* had not been conducted in "bad faith" and, therefore, no *Wallace* Factor damages were awarded to him. Instead, the Court found that the Defendant's reprehensible conduct related to its issuance of the 1998 performance review, which was prepared "in bad faith". The Court referred to the Supreme Court of Canada's recognition that punitive damages could be awarded in breach of contract cases, though it would be "very rare" to do so. The Court made the following statement regarding exemplary damages:

> Employers are bound to deal with matters of employment fairly and in good faith. A substantial company such as Ashland with a Human Resources Department and substantial profits, estimated by Mr. Coxhead to exceed $38 million annually, should be expected to refrain from the kind of employment practices it pursued in relation to Mr. Marlowe. Simply stated, the manner in which Mr. Marlowe was reviewed for the 1998 year was reprehensible and a substantial departure from the conduct and practices reasonably to be expected of an employer such as the Defendant.
>
> *Ashland must be reminded by means of a financial penalty of its obligation to deal with employees in good faith regardless of the level of the employee's position in the company.* I assess punitive damages in the amount of $20,000.[95]

A shortcoming of the *Wallace* Factor is made readily apparent in *Marlowe*; under the *Wallace* Factor, an employer's bad faith conduct must occur *in the course of dismissal* in order to warrant increased damages.

The *Gogay* and *Marlowe* cases each illustrate judicial willingness to venture beyond the protective confines of the *Addis* Principle. In fact, both cases seem to acknowledge the *need*, from a policy context, for doing so in modern employment cases. How the *Addis* Principle is to be properly escaped, however, remains a source of obvious confusion.

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[95] *Ibid.* at paras. 158-59 [emphasis added].

G. The Case for Clarity

Clarity could be brought to the common law of wrongful dismissful damages with only a minimal number of alterations to our current employment law context.

First, it should be admitted that the modern employment contract *may* be (if it is not *likely* to be) a "peace of mind" contract from the employee's perspective. In that sense, many employment contracts will be legally akin to the holiday contract and insurance contract. If it were acknowledged that the "emotional well-being" which employees derive from their relationships with employers was comparable to the "peace of mind" which Plaintiffs in cases such as *Jarvis*, *Jackson* and *Whiten* derived from their agreements, then the awarding of damages in excess of reasonable notice should be a more available option.

The second required amendment would include an implied term of mutual trust and confidence in all employment contracts *except*:

a) those which expressly exclude it; and

b) those in which the evidence demonstrates a clear lack of any such expectation on the part of both parties.

As has been noted previously, the breach of a mutual trust and confidence term allows for damages awards which exceed reasonable notice. In that regard, the mere implication of the mutual trust and confidence term minimizes the impact of *Addis*. Neither the House of Lords nor the Supreme Court of Canada should find the concept of the mutual trust and confidence term offensive, since each has been influenced, in varying degrees, by the notion. The artificial restrictions imposed on the term by the House of Lords and the Supreme Court of Canada should, however, be struck down. In both jurisdictions, the term should be identified as a clear contractual obligation, and it should apply equally to all aspects of the employment relationship, including hiring, firing and the duration of the employment itself.

By identifying most employment contracts as "peace of mind" agreements, and by including a mutual trust and confidence and term in those agreements, any reluctance to award mental distress damages and exemplary damages in appropriate wrongful dismissal matters should be eliminated.

Will employers be unduly oppressed by these developments in the common law? Not likely. Instead, employers would be expected to act fairly, honestly and forthrightly in their relationships with employees, both during employment and during the time of dismissal. Since this has been an expectation both maintained and understood by employers (in respect

of the behaviour of their employees) for centuries, it is inconceivable that the expansion of those expectations into the realm of a mutual obligation would be anything more than fair and equitable. Furthermore, it is foreseeable that the recognition of employment as generally a "peace of mind" relationship, which demands trust and confidence from both parties, should ultimately result in more structured and stable workforces by forcing employers to carefully and soberly monitor their hiring, discipline and dismissal processes.

Clearly, employees would benefit from these contemplated advancements in the common law. Workers would have a higher prospect (or, at least, an *opportunity*) to obtain wrongful dismissal compensation which is more commensurate with the extent of their personal "investments" in each relationship, and the devastation resulting from dismissal. Just as importantly, however, the amendment of the common law would properly reflect the modern reality of employment and the "relational contract" which most often serves as a cornerstone of an individual's "sense of identity and emotional well-being". Western society has not only played a part in the evolution of employment from commercial to relational contract, it has motivated and shaped the transformation. If the law, as the "rule book" of our society, fails to accurately reflect the current reality, then its relevance must be questioned. The continuing influence of the *Addis* Principle in both Canada and Britain is a graphic confirmation of the fact that the common law of wrongful dismissal remains rooted in a bygone era.