H

2010 CarswellOnt 3551, 2010 ONCA 384, [2010] W.D.F.L. 2724, 82 C.C.E.L. (3d) 14, 74 C.C.L.T. (3d) 163, 2010 C.L.L.C. 210-037, 263 O.A.C. 347

Piresferreira v. Ayotte

Marta Piresferreira and Judy Scott (Plaintiffs / Respondents) and Richard Ayotte and Bell Mobility Inc. (Defendants / Appellants)

Ontario Court of Appeal

E.A. Cronk, S.E. Lang, R.G. Juriansz JJ.A.

Heard: December 2, 2009
Judgment: May 28, 2010
Docket: CA C49859

© Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Proceedings: reversing in part *Piresferreira v. Ayotte* (2009), 74 C.C.E.L. (3d) 303, 2009 CarswellOnt 3347 (Ont. S.C.J.); and reversing in part *Piresferreira v. Ayotte* (2008), 2009 C.L.L.C. 210-023, 2008 CarswellOnt 7733, 72 C.C.E.L. (3d) 23 (Ont. S.C.J.)

Counsel: Ronald Caza, Denis Boivin for Appellants

John Yach for Respondents

Subject: Torts; Labour and Employment; Public; Civil Practice and Procedure; Family

Torts --- Negligence — Miscellaneous

Negligent infliction of mental suffering — During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee brought action against A and employer for damages on various grounds including negligent infliction of emotional distress — Action was allowed — Employer and A appealed trial judge's findings of liability for negligent infliction of mental suffering — Appeal allowed — A and employer were not liable for negligent infliction of mental suffering as tort was not available in employment context — Accepting that employer's code of business conduct was part of employment contract, breach of contractual duty could not be basis for recognition of common law tort — Trial judge erred in basing standard of care on contractual obligation — Under Anns test, employer and employee were in relationship of proximity that would not have arisen but for contract and could support creation of common law duty of care, it was reasonably foreseeable that employee would experience mental suffering from abusive manner in which A supervised — Policy consideration foreclosed recognition of duty of care —

General duty to take care to shield employee from acts in workplace that might cause mental suffering was more expansive than duty to act in good faith during termination.

Torts --- Intentional infliction of mental suffering — Elements of tort

During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee brought action against A for damages on various grounds including intentional infliction of emotional distress — Action was allowed — Trial judge found that A's threat of placing employee on probation immediately after he assaulted her and then delivering PIP to her first time she returned to office, without assuming responsibility for his abusive behaviour, was flagrant and outrageous — Trial judge found that A's conduct was "calculated to produce harm" even though he did not actually intend for her to suffer injury she did — A and employer appealed trial judge's finding of liability for intentional infliction of mental suffering — Appeal allowed — Trial judge placed too much weight on A's failure to apologize in concluding that his conduct was flagrant and outrageous — Also, trial judge recognized test for second prong of intentional infliction of mental distress test, but then applied different test of reckless disregard — Permitting liability on reduced standard of reckless disregard would have unduly interfered with settled principles of employment law.

Torts --- Intentional infliction of mental suffering — Miscellaneous

During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee brought action against A for damages on various grounds including intentional infliction of emotional distress — Action was allowed — Trial judge found that A's threat of placing employee on probation immediately after he assaulted her and then delivering PIP to her first time she returned to office, without assuming responsibility for his abusive behaviour, was flagrant and outrageous — Trial judge found that A's conduct was "calculated to produce harm" even though he did not actually intend for her to suffer injury she did — A and employer appealed trial judge's finding of liability for intentional infliction of mental suffering — Appeal allowed — Trial judge placed too much weight on A's failure to apologize in concluding that his conduct was flagrant and outrageous — Also, trial judge recognized test for second prong of intentional infliction of mental distress test, but then applied different test of reckless disregard — Permitting liability on reduced standard of reckless disregard would unduly have interfered with settled principles of employment law.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages for mental distress arising from dismissal (Wallace damages)

During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee went on sick leave and never returned to work — Employer asked employee to return to work on several occasions, employer informed her that A had been relocated and she could return but employee refused because A still worked out of Ottawa office in same capacity — Em-

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

ployee subsequently resigned — Employee brought action against employer for damages for wrongful dismissal — Action was allowed — Employer appealed trial judge's finding of bad faith — Appeal dismissed — There was clear evidentiary foundation for finding of employer's bad faith in constructive dismissal of employee — Employee was assaulted by her supervisor, and A deliberately timed delivery of PIP to ward off possibility of complaint by her — Employer did not provide employee with copy of disciplinary warning issued to A or advise her specifically of its contents, and did not take adequate action to ensure that she could feel safe returning to work.

Torts --- Trespass — Trespass to person — Assault and battery — Miscellaneous

Assault and battery — During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee brought action against employer and A for damages on various grounds including assault and battery — Action was allowed — A and employer appealed quantum of damages awarded for battery — Appeal allowed in part — Trial judge included damages due to factors other than assault and battery — Analysis was hampered by fact that trial judge did not separately assess damages for battery, she assessed and awarded damages arising from employee's tort claims — Most of acts included in assessment were those of employer not A, relationship between acts was not causal — A's battery did not cause next event in chain — Damages awards for battery absent actual injury that were considered by trial judge ranged from $400 to $11,000 — Employee awarded $15,000 in damages from battery.

Torts --- Miscellaneous

Assault and battery — During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee brought action against employer and A for damages on various grounds including assault and battery — Action was allowed — A and employer appealed quantum of damages awarded for battery — Appeal allowed in part — Trial judge included damages due to factors other than assault and battery — Analysis was hampered by fact that trial judge did not separately assess damages for battery, she assessed and awarded damages arising from employee's tort claims — Most of acts included in assessment were those of employer not A, relationship between acts was not causal — A's battery did not cause next event in chain — Damages awards for battery absent actual injury that were considered by trial judge ranged from $400 to $11,000 — Employee awarded $15,000 in damages from battery.

Labour and employment law --- Employment law — Relationship to third parties — Liability of employer for acts of employee — Torts — Assaults

Assault and battery — During argument, employee was shoved by her manager, A — Immediately following alleged assault, A issued performance improvement plan ("PIP") for employee — Employee reported assault to human resources representative at company — A received minor disciplinary reproach — A and employer moved to impose PIP including onerous schedule of meetings with A — Employee brought action against employer and A for damages on various grounds including assault and battery — Action was allowed — A and employer appealed quantum of damages awarded for battery — Appeal allowed in part — Trial judge included damages due to factors other than assault and battery — Analysis was hampered by fact that trial judge did not

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

separately assess damages for battery, she assessed and awarded damages arising from employee's tort claims — Most of acts included in assessment were those of employer not A, relationship between acts was not causal — A's battery did not cause next event in chain — Damages awards for battery absent actual injury that were considered by trial judge ranged from $400 to $11,000 — Employee awarded $15,000 in damages from battery.

Cases considered by *R.G. Juriansz J.A.*:

Anns v. Merton London Borough Council (1977), (sub nom. *Anns v. London Borough of Merton*) [1977] 2 All E.R. 492, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — followed

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 203 N.R. 36, [1996] 3 S.C.R. 458, 31 C.C.L.T. (2d) 113, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — referred to

BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1993), 1993 CarswellBC 1254, [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10 (S.C.C.) — considered

Bielitzki v. Obadisk (1922), 15 Sask. L.R. 153, 1922 CarswellSask 87, 23 A.L.R. 351, [1922] 2 W.W.R. 238, 65 D.L.R. 627 (Sask. C.A.) — considered

Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 (S.C.C.) — considered

Childs v. Desormeaux (2006), 30 M.V.R. (5th) 1, 80 O.R. (3d) 558 (note), 210 O.A.C. 315, 2006 CarswellOnt 2710, 2006 CarswellOnt 2711, 2006 SCC 18, 347 N.R. 328, 266 D.L.R. (4th) 257, 39 C.C.L.T. (3d) 163, [2006] 1 S.C.R. 643, [2006] R.R.A. 245 (S.C.C.) — referred to

Correia v. Canac Kitchens (2008), 2008 ONCA 506, 2008 CarswellOnt 3712, 67 C.C.E.L. (3d) 1, 240 O.A.C. 153, 294 D.L.R. (4th) 525, 91 O.R. (3d) 353, 58 C.C.L.T. (3d) 29, 2009 C.L.L.C. 210-001 (Ont. C.A.) — considered

Janvier v. Sweeney (1919), [1919] 2 K.B. 316 (Eng. C.A.) — considered

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, (sub nom. *Honda Canada Inc. v. Keays)* 2008 C.L.L.C. 230-025, 376 N.R. 196, 294 D.L.R. (4th) 577, (sub nom. *Honda Canada Inc. v. Keays)* [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), (sub nom. *Honda Canada Inc. v. Keays)* 63 C.H.R.R. D/247, 66 C.C.E.L. (3d) 159, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 239 O.A.C. 299 (S.C.C.) — followed

Kedia International Inc. v. Royal Bank (2008), 2008 CarswellBC 206, 2008 BCSC 122 (B.C. S.C.) — considered

Nielsen v. Kamloops (City) (1984), [1984] 5 W.W.R. 1, 1984 CarswellBC 476, 66 B.C.L.R. 273, [1984] 2

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 1984 CarswellBC 821 (S.C.C.) — considered

Prinzo v. Baycrest Centre for Geriatric Care (2002), 2002 CarswellOnt 2263, 161 O.A.C. 302, 60 O.R. (3d) 474, 2002 C.L.L.C. 210-027, 17 C.C.E.L. (3d) 207, 215 D.L.R. (4th) 31 (Ont. C.A.) — considered

Rahemtulla v. Vanfed Credit Union (1984), [1984] 3 W.W.R. 296, 51 B.C.L.R. 200, 29 C.C.L.T. 78, 1984 CarswellBC 36, 4 C.C.E.L. 170 (B.C. S.C.) — considered

Wallace v. United Grain Growers Ltd. (1997), 123 Man. R. (2d) 1, 159 W.A.C. 1, 152 D.L.R. (4th) 1, 1997 CarswellMan 455, 1997 CarswellMan 456, 219 N.R. 161, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1997] L.V.I. 2889-1, 97 C.L.L.C. 210-029 (S.C.C.) — considered

Wilkinson v. Downton (1897), [1897] 2 Q.B. 57, 66 L.J.Q.B. 498, 76 L.T. 493, 45 W.R. 525, 13 T.L.R. 388, 41 Sol. Jo. 493 (Eng. Q.B.) — followed

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

s. 61(2)(e) — referred to

APPEAL from judgment reported at *Piresferreira v. Ayotte* (2009), 74 C.C.E.L. (3d) 303, 2009 CarswellOnt 3347 (Ont. S.C.J.) and *Piresferreira v. Ayotte* (2008), 2009 C.L.L.C. 210-023, 2008 CarswellOnt 7733, 72 C.C.E.L. (3d) 23 (Ont. S.C.J.), finding liability for intentional and negligent infliction of mental suffering.

***R.G. Juriansz J.A.*:**

A. Introduction

1 Richard Ayotte and Bell Mobility Inc. appeal from the judgment and costs order of Aitken J. dated June 9, 2009. The trial judge found Ayotte personally liable for the torts of battery and intentional and negligent infliction of mental suffering. She also found Bell Mobility vicariously liable for the torts committed by Ayotte, and directly liable for negligence and constructive dismissal. She awarded the respondent, Marta Piresferreira, damages totalling $500,955. She also awarded $15,000 to Piresferreira's partner under the *Family Law Act*, R.S.O. 1990, c. F.3, as damages for the loss of guidance, care and companionship. She held Ayotte and Bell Mobility jointly and severally liable for all these amounts. She also awarded Piresferreira costs of the action and trial in the amount of $225,000.

2 The appellants appeal the quantum of damages the trial judge awarded for battery, her findings of liability for intentional and negligent infliction of mental suffering, her finding that Piresferreira had not failed to mitigate her damages, the damages awarded to Piresferreira's partner and the costs award. I would allow the appeal in part.

3 I would find that the trial judge erred by finding the tort of negligence was available against an employer and supervisor for conduct in the course of the respondent's employment, by finding that the tort of intentional

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

infliction of mental suffering had been made out and in assessing the damages for battery. I would attribute the general damages the trial judge awarded for these torts to damages for mental suffering under the framework of *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362 (S.C.C.). I would award the respondent an additional $15,000 damages for the tort of battery. I would reject the appellants' contention that Piresferreira failed to mitigate her damages and would maintain the 12 months' wages the trial judge awarded in lieu of reasonable notice, but I would set aside the additional lost wages she awarded as tort damages. I would set aside the damages the trial judge awarded to Piresferreira's partner for the loss of guidance, care and companionship.

B. Factual Background

4 At the time of the incident, Piresferreira had been an employee of Bell Mobility for some 10 years. She worked in Bell Mobility's Ottawa office from January 1997 to May 2005 as one of six account managers under the supervision of Ayotte, who was the sales manager. Except for the year 2000, Piresferreira received excellent performance reviews every year until 2004. Her mid-term and year-end 2004 performance reviews prepared by Ayotte indicated she needed to improve her performance.

5 Ayotte was a critical, demanding, loud and aggressive manager. Other employees corroborated Piresferreira's testimony that he would yell and swear at employees, had a temper, and would bang his fist on the table to make a point. He had high expectations for the account managers on his team. Other employees described Piresferreira as nervous and sensitive, not taking responsibility for problems but instead blaming others, and not dealing well with criticism — regardless of how it was delivered. The two personalities could hardly be less complementary.

6 Commencing in 2004, Ayotte became more verbally abusive of everyone on the team, but particularly of Piresferreira. As noted, Ayotte strongly criticized Piresferreira in her 2004 year-end performance appraisal. In his closing comments in the appraisal, he said:

> Marta had a very disappointing year. She has had a lot of trouble accepting these results and at times has been quite controversial when help was offered or suggestions were made. She often gets emotional when things are not going right and as a result may make some of her peers uncomfortable. She needs to get a grip on her situation and work on it in a calm manner.
>
> In her attempt to inform people in problem situations, she is forgetting that she needs to take ownership of these problems and follow them through rather than pass them on.
>
> In 2005, she must become strategic in the direction that she wants to approach her accounts. I will work with her in achieving this objective. Marta has been a top performer in the past and I am quite confident she can do it again; however hard work will be required to do so.

7 Antoine Shiu, the general manager to whom Ayotte reported, testified that he and Ayotte had discussed Piresferreira's 2004 year-end performance appraisal and that he had instructed Ayotte to monitor her performance during the first quarter of 2005 and to consider issuing a Performance Improvement Plan (PIP) to ensure she developed some concrete strategies to meet targets in the future. Shiu also testified that he spoke with Ayotte in April 2005 about Piresferreira's continued poor performance and a decision was made "to move forward with a PIP". He advised Ayotte to consult Bell Mobility's Human Resources Department (HR) before moving forward. Ayotte testified he consulted with HR about how he should proceed with a PIP for Piresferreira. He received a sample PIP from HR by email on May 4, 2005.

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

1) The Battery of May 12, 2005

8 On Thursday, May 12, 2005, Ayotte learned that Piresferreira had failed to arrange a meeting with a client. He arranged the meeting himself on short notice by phoning the client. He yelled and swore at Piresferreira while criticizing her for failing to do her job. She attempted to justify her efforts to schedule the meeting, asking that he read an email on her Blackberry. He indicated he did not wish to hear her explanation. Piresferreira followed him, proffering her Blackberry and persisting in saying she wanted him to read the email. He told her to get away from him and when she held up the Blackberry in front of him, he pushed her on her left shoulder, repeating that she should get away from him. The trial judge found that "[t]he push carried enough force that Piresferreira was pushed approximately a foot. Piresferreira took a step backward and balanced herself against a filing cabinet."

9 After he pushed Piresferreria, Ayotte went to his office and sat at his desk. Piresferreira followed Ayotte to his office and told him he should not have pushed her. Ayotte told her "to get the hell out of his office" and that he was in the process of preparing a PIP regarding her performance. Piresferreira went back to her desk and began to cry. After speaking to colleagues, she collected her things and went home.

2) Aftermath of the Battery

10 After the incident, Ayotte prepared a PIP for Piresferreira and sent it to HR that afternoon. In his covering email to HR, he expressed concern that she would go on sick leave as soon as the PIP was presented. He asked for HR's quick approval of the PIP so he could present it to Piresferriera the next afternoon "to give the employee the weekend to reflect on it." He did not mention the confrontation with Piresferreira earlier that day or that she was upset because he had pushed her.

11 The next day, Piresferreira sent an email to Ayotte stating that "it is certainly not acceptable that you shoved me in the corridor yesterday afternoon" and offering "to sit down together outside the office and come to an agreement to work as a team".

12 After some scheduled vacation days, Piresferreira returned to the office on May 19, 2005. Ayotte presented her with the PIP he had prepared on May 12. It required her to report to him daily on her activities and attend bi-weekly individual meetings with him. It advised her that an overall review of her progress would occur on August 12, 2005, and if her performance did not improve to a fully acceptable level, further disciplinary action up to and including dismissal would result. Piresferreira refused to sign the PIP and went home.

13 On May 20, 2005, Piresferreira lodged a formal complaint with HR against Ayotte. Shiu spoke to Ayotte, who gave his version of the incident. He admitted pushing her but claimed he was provoked by her persistence in trying to get him to read an email on the Blackberry that she was brandishing in his face. Shiu did not contact Piresferreira to obtain her version of the incident.

14 On May 24, 2005, HR sent two communications to Piresferreira. The first, an email sent mid-day, stated in part:

> As discussed on Friday, May 20th, I will provide you with a response to your complaint by the end of today. As well, I have scheduled a meeting between you, Rick Ayotte and Antoine Shiu for tomorrow morning May 25th at 9h30 to review the performance improvement plan.

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

15 Piresferreira sent an email to HR stating that she would be on sick leave as of May 25 and would be unable to attend any meeting. She provided a sick leave certificate from her family doctor indicating she was not at work due to "stress leave due to anxiety — dealing with work harassment."

16 Though the above letter referred to the purpose of the meeting only as a review of the PIP, later in the day, HR sent Piresferreira a letter that claimed that she had declined to attend a meeting to allow Ayotte to apologize. That letter read:

> Re: Complaint against Richard Ayotte
>
> Marta,
>
> This is to confirm the reception of your complaint against Richard Ayotte on May 20th, 2005 concerning an altercation that would have involved yelling and pushing.
>
> After reviewing the information you provided to me, I discussed the allegations that you put forward with Richard Ayotte. Mr. Ayotte confirmed that he acted inappropriately towards you and regretted having pushed you and yelled after you.
>
> Considering that these were unacceptable behaviours, especially for a manager, the following actions have been taken:
>
> - Schedule a meeting to allow Richard Ayotte to offer formal apologies to you, which you have declined to attend.
> - Written disciplinary warning will be given to Richard Ayotte for unacceptable behaviour in the workplace.
> - Richard Ayotte will be asked to attend two courses on "Effective communication at work" and "Resolving conflict: The art of handling interpersonal tension".
>
> We trust that the actions taken and outlined above and the sincere regrets of Richard Ayotte regarding his behaviours are the right responses to the gravity of the complaint.
>
> We, therefore, consider this case closed.

17 On May 25, 2005, Shiu delivered the following letter to Ayotte:

> Re: Disciplinary Warning - Unacceptable behaviours
>
> Richard,
>
> We have received an official complaint on May 20th, 2005 regarding an altercation that would have occurred between Marta Piresferreira and yourself on May 12th, 2005. This altercation involved you yelling and pushing Ms. Piresferreira. The complaint has been reviewed with you and you have acknowledged that these actions did occur.
>
> The above behaviours are totally unacceptable and will not be tolerated in the workplace. Furthermore, as a manager of employees, you are expected to demonstrate the leadership attributes relative to your position

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

while preserving the respect and dignity of your employees.

Please note that as an employer, Bell Mobility has the obligation to insure the physical and psychological integrity of its employees. As a result, and considering that these were unacceptable behaviours, especially for a people manager, the following actions will be taken:

• You are asked to offer apologies to Marta Piresferreira

• This written disciplinary warning will be in your file

• You will attend a Monitored Response Procedure through Bell Mobility's retained Human Resource Consulting firm Warren Shepell.

Once again, Bell Mobility will not tolerate these behaviours in the workplace. If another incident of unacceptable behaviour does occur, you will be subject to further disciplinary action, up to and including termination.

We trust that you will make every effort to prevent this situation to occur again.

Sincerely, Antoine Shiu

18 Ayotte attended one session with a counsellor through Bell Mobility's Employee Assistance Program. He had already completed the two courses mentioned in the May 24 letter some time earlier and did not repeat them.

19 Piresferreira never returned to work. She commenced litigation against Ayotte and Bell Mobility on August 11, 2005.

20 On September 27, 2005, Bell Mobility's lawyers proposed that if Piresferreira returned to work, a representative from HR would meet with her and Ayotte in an effort to work through their differences. As an alternative, Bell Mobility offered to implement a system where Piresferreira reported directly to Shiu and not to Ayotte. Piresferreira declined this offer.

21 On March 9, 2006, Bell Mobility's lawyers advised Piresferreira that Ayotte had been "relocated within the Bell Family" and, thus, she could return to the office without having to work with him. Piresferreira refused because former colleagues informed her that Ayotte still worked out of the Ottawa office in the same capacity. This was confirmed at trial.

22 On September 11, 2006, Bell Mobility advised Piresferreira that Ayotte was retiring at the end of the month and again proposed that she return to work. Piresferreira declined again.

23 On September 21, 2006, Bell Mobility responded that it considered Piresferreira to have resigned effective September 19, 2006. The matter proceeded to trial.

3) Piresferreira's Condition

24 Piresferreira began to see a psychologist, Dr. Heney, in November 2005. Dr. Heney, who was still treating her at the time of the trial, diagnosed her with posttraumatic stress disorder and testified that she was totally disabled from work as a result. In Dr. Heney's opinion, Piresferreira's symptoms related to the assault and what

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

she perceived as a betrayal and injustice on the part of Bell Mobility.

25 Piresferreira also saw a psychiatrist, Dr. Basson, who treated her from July 2006 to September 2007. Dr. Basson diagnosed her as suffering from major depressive disorder with symptoms of anxiety. In her opinion, Piresferreira's depression and anxiety were triggered by Ayotte's physical assault, followed by his failure to apologize and then Bell Mobility's failure to apologize and take concrete steps to remove Ayotte from a position of authority and supervision over Piresferreira.

C. The Decision at Trial

26 The trial judge rejected Ayotte's evidence that he pushed Piresferreira in a defensive reaction and that he was provoked by her persistently brandishing the Blackberry in his face. Ayotte had committed a battery and was liable for all the damage that resulted even though "the injuries arising out of his assault and battery...exceeded all reasonable expectations and intended or foreseeable consequences". Bell Mobility was vicariously liable for the damage.

27 The trial judge found that Ayotte had also commited the tort of intentional infliction of mental suffering. The trial judge set out the elements of this tort as stated in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.):

(1) flagrant or outrageous conduct;

(2) calculated to produce harm; and

(3) resulting in a visible and provable illness.

28 She found that Ayotte's threat of placing Piresferreira on probation or on a PIP immediately after he had assaulted her and then delivering a PIP to her the first time she returned to the office — without first having assumed responsibility for his abusive behaviour — was flagrant and outrageous conduct.

29 The trial judge predicated her conclusion that the second element was established, not on intention or knowledge that harm was substantially certain to follow, but on a finding that "Ayotte showed reckless disregard for Piresferreira's emotional well-being". In her view, Ayotte's conduct was "calculated to produce harm" even though he did not actually intend that Piresferriera suffer the injury that she did.

30 The trial judge found that the third element was satisfied because Ayotte's conduct caused or materially contributed to Piresferreira developing posttraumatic stress disorder and a major depressive disorder with anxiety.

31 The trial judge held Bell Mobility vicariously liable for both the above torts.

32 Next, the trial judge found Ayotte and Bell Mobility both liable for the tort she described as "Negligent Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability". She found that Bell Mobility as Piresferreira's employer and Ayotte as her immediate supervisor owed Piresferreira a duty of care to ensure that Piresferreira was working in a safe and harassment-free environment without verbal abuse, intimidation or physical assault, all in accordance with Bell Mobility's Code of Business Conduct.

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

33 She found that Ayotte breached this duty of care by yelling and swearing at Piresferreira particularly during 2004 and 2005, and including on May 12, 2005 when he berated her in front of other employees, physically assaulted her and added insult to injury by, without apologizing, issuing a PIP. She found that his conduct did not conform "with Bell Mobility's expectations as set out in its Code of Business Conduct" and added that "[i]t was reasonably foreseeable to Ayotte that every aspect of this behaviour was likely to cause Piresferreira anxiety, stress and emotional upset."

34 In addition to its vicarious liability for Ayotte's breach of his duty of care, the trial judge found that Bell Mobility, itself, breached its duty of care. The basis of that finding was that after Ayotte admitted he had yelled at and pushed Piresferreira, neither HR nor Shiu contacted Piresferreira to express Bell Mobility's concern as to how she had been treated, to apologize on Bell Mobility's behalf, and to see how she was doing. Instead, Bell Mobility's communications conveyed to Piresferreira that its priority was the PIP — not Ayotte's behaviour. The disciplinary measures that Bell Mobility told Piresferreira it would impose on Ayotte were inappropriately mild and ignored Ayotte's failure to apologize to Piresferreira, his use of a PIP to intimidate her, his failure to report the assault and the immediate imposition of a PIP. Moreover, no one from Bell Mobility contacted Piresferreira to get her input on what steps could be taken to ensure that she would feel physically and emotionally safe at her workplace in the future.

35 The trial judge found that Piresferreira suffered damage from the appellants' breach of their duty of care, and her damages were not too remote to be recoverable. Moreover, in light of Ayotte's personal knowledge of Piresferreira, it was foreseeable to him that his conduct would cause her serious psychological injury.

36 Therefore, the trial judge found the tort was made out.

37 In regard to remedy, the trial judge found that the damages for battery and intentional infliction of mental suffering were not limited by what harm was foreseeable. She assessed Piresferreira's damages for the three torts of battery and intentional and negligent infliction of mental suffering all together. She assessed Piresferreira's general damages at $50,000 and calculated her loss of income to retirement at age 65 at $500,924. She made no reduction for the long-term disability benefits Piresferreira received but reduced the assessed damages by 10% for the contingencies of life. The contingencies she discussed were that Piresferreira may not have worked until retirement and may have suffered anxiety given the death of close friends, other medical problems and the fact that her partner had been seriously injured that year.

38 The trial judge also awarded Piresferreira special damages of $5,122, and awarded her partner $15,000 for the loss of guidance, care and companionship.

39 The trial judge then turned to Piresferreira's claim for wrongful dismissal. She found that Piresferreira had been constructively dismissed on May 24, 2005 since by that date her continued employment at Bell Mobility had become impossible. She assessed Piresferreira's wage loss at $87,855 based on a twelve month notice period and her damages for mental distress from the manner of dismissal at $45,000, but did not award these amounts as Piresferreira was already compensated for them through the tort damages.

40 The trial judge ordered Bell Mobility to pay Piresferreira costs in the amount of $225,000, inclusive of disbursements and GST, and made Ayotte jointly and severally liable for the sum of $200,000.

D. Issues

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

41 The appellants raise the following issues:

1. Did the trial judge err in finding that the tort of negligent infliction of mental suffering was available in the context of the employment relationship?

2. Did the trial judge err in finding Ayotte committed the tort of intentional infliction of mental suffering?

3. Did the trial judge err in her award of damages for assault and battery?

4. Did the trial judge err in finding that Piresferreira did not fail to mitigate her damages for constructive dismissal?

5. Can the trial judge's award of damages under the *Family Law Act* stand?

E. Analysis

42 Once the trial judge found that Ayotte and Bell Mobility were jointly and severally liable for the torts of battery, intentional infliction of mental suffering, and negligent infliction of mental suffering, she assessed "Piresferreira's damages arising from her tort claims" globally. Since I conclude that the tort of negligent infliction of mental suffering is not available in this case and the tort of intentional infliction of mental suffering was not made out on the evidence, the damages awarded must rest on the tort of battery alone. For that reason, I leave consideration of the battery issue until after dealing with the other two torts.

43 I begin by explaining why the tort of negligence is not available and then why the tort of intentional infliction of emotional suffering was not made out. Then, after dealing with the trial judge's damages award for battery, I turn to Piresferreira's entitlement to damages for mental distress at employment law, the issue of mitigation, and the costs award at trial.

1) Negligent Infliction of Mental Suffering

44 The appellants' main submission is that the trial judge erred by recognizing the existence of this tort in employment relationships. At trial, the appellants did not advance this argument. I would entertain the argument nevertheless. An appellate court has the inherent authority to permit an argument to be made that was not raised in the proceedings below and should do so when the issue is one of pure law, no further evidence is necessary and there is no prejudice in the form of detrimental reliance: see *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.). Here, the argument raises a pure question of law of broad importance in employment law. Had the appellants contested the existence of the tort at trial, it would have had no effect on the presentation of Piresferreira's evidence and its only impact would have been on the legal arguments advanced in closing. The respondent did not object to the issue being raised before this court and responded to it in her factum.

45 The trial judge termed the tort she recognized "Negligent Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability". She found that the duty of care for the tort rested squarely on the contractual relationship between the parties. Under the heading, "Did Ayotte/Bell Mobility owe Piresferreira a duty of care?", she said that Bell Mobility "as Piresferreira's employer" and Ayotte "as her immediate supervisor" owed her "the duty to ensure that [she] was working in a safe and harassment-free environment...all *in accordance with Bell Mobility's Code of Business Conduct*" (emphasis added).

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

46 Counsel for Piresferreira defended this finding by stressing that the Code of Business Conduct formed part of the employment contract. Employees had to sign it every year as part of their annual performance appraisal. The Code of Business Conduct, he argued, made it clear that the employer had the duty to ensure that employees did not suffer mental suffering. Counsel pointed out that the Code of Business Conduct guaranteed employees the "right to work in an environment free from violence and threats" and prohibited "all acts of physical, verbal or written aggression or violence". He submitted that the duty of care recognized by the trial judge flowed from the Code of Business Conduct, and that the conduct of the employer constituted "a fundamental breach of the terms and conditions of employment".

47 Accepting that Bell Mobility's Code of Business Conduct was part of the employment contract, a breach of a contractual duty cannot be the basis for the recognition of a common law tort. For concurrent tort liability to be available there must be a common law duty of care that would exist even in the absence of the specific contractual term which created the corresponding contractual obligation. In *Central &; Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), Le Dain J. differentiated between a duty that is created by the contract and an independent common law duty. He wrote at p. 205:

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract.

48 The meaning of this passage was clarified by the majority of the Supreme Court of Canada in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), at p. 36:

> In our view, Le Dain J.'s use of the words "created" and "depends" indicates the meaning of this passage is simply that for concurrent tort liability to be available there must be a duty of care in tort that would exist even in the absence of the specific contractual term which created the corresponding contractual obligation.

49 Here, the trial judge rested her finding that Piresferreira had established the tort of negligent infliction of mental suffering on Bell Mobility's failure to treat her "in accordance with Bell Mobility's Code of Business Conduct." After itemizing Ayotte's acts on which her finding was based, she wrote, "None conformed with Bell Mobility's expectations as set out in its Code of Business Conduct." The trial judge erred in basing the standard of care on a contractual obligation.

50 Could the trial judge have rested her conclusion on a tort duty of care? Since no Canadian appellate court has recognized a free standing cause of action in tort against an employer for negligent infliction of mental suffering by an employee, it is necessary to apply the *Anns* test. The two-part test from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K. H.L.) for determining whether a duty of care arises as adopted and recast by the Supreme Court of Canada in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), at pp. 10-11, involves asking first whether the relationship between the plaintiff and the defendant is sufficiently close or "proximate" to render damages reasonably foreseeable and justify the imposition of a duty of care, and second, whether there are countervailing policy considerations why a duty of care should be limited or not recognized: see *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.), at para. 11.

51 The relationship of employer and employee puts the parties in a relationship of proximity. As Le Dain J. explained in *Rafuse*, a relationship of proximity that would not have arisen but for a contract can support the creation of a common law duty of care. The question is whether there is a relationship of sufficient proximity, not

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

how that relationship arose.

52 The trial judge found the damage was foreseeable. She noted as follows:

> In my view, it is reasonably foreseeable that a person of ordinary fortitude would suffer serious psychological injury if that person was regularly yelled and sworn at by her manager/supervisor/boss, was told by the manager/supervisor/boss that she did not know what she was doing, was not given the opportunity to explain her actions or defend herself, was pushed by the manager/supervisor/boss who at the time was clearly angry and out of control, and was immediately told that she would be put on probation or issued a PIP.

53 The appellants submit that this foreseeability finding is incompatible with the Supreme Court's judgment in *Honda*. In *Honda*, the Supreme Court reiterated the general rule that damages in a wrongful dismissal action are confined to the loss suffered from the employer's failure to give proper notice and that no damages are available for the mental suffering the employee may have suffered unless the parties contemplated at the time of the employment contract that a breach of the contract might cause the plaintiff mental distress. The proposition that mental suffering is generally not within the contemplation of the parties to an employment contract does not mean, as the Supreme Court makes clear, that it is not contemplated by the parties to a particular employment contract. As well, the principle enunciated in *Honda* is directed to mental suffering as a consequence of the manner of termination, as opposed to mental suffering that results from mistreatment during the employment relationship.

54 I see no reason to resist the finding of the trial judge that it was reasonably foreseeable that Piresferreira would experience mental suffering from the abusive manner in which Ayotte supervised her during her employment.

55 Given that the parties had a relationship of proximity and that the damages suffered were reasonably foreseeable, it must be determined whether policy considerations foreclose the recognition of a duty of care. In my view, they do.

56 First, the Supreme Court has already strongly intimated that the recognition of such a tort in the employment context is better left to the legislature. In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), Iacobucci J. writing for the majority rejected the notion that a tort existed for breach of a good faith and fair dealing obligation by employers in dismissing employees. He wrote at para. 77, "To create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures." The further evolution of the law in *Honda* is completely consistent with this view.

57 The duty rejected in *Wallace* is not exactly the same duty postulated in this case. This, however, provides more, not less, reason to reject a duty in this case. The duty of care put forward in this case is broader than the duty that was rejected in *Wallace*. A general duty to take care to shield an employee during the entire course of his or her employment from acts in the workplace that might cause mental suffering strikes me as far more expansive than a duty to act fairly and in good faith during just the termination process. The duty rejected in *Wallace* would have applied only at the time of termination and to the manner of termination. The duty put forward in this case would apply in the course of employment as well as to its termination. The general duty postulated would require employers to take care to shield employees from the acts of other employees that might cause mental suffering.

58 In this sense, the asserted duty of care would have a far greater impact on settled jurisprudence than

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

would the duty of good faith and fair dealing that Iacobucci J. described in *Wallace* at para. 76 as "overly intrusive and inconsistent with established principles of employment law".

59 The findings of the trial judge in this case provide an apt example. The trial judge assessed Piresferreira's damages for wrongful dismissal as comprised of her salary and benefits for 12 months from May 24, 2005 and an additional $45,000 for mental distress under the framework established by *Honda*. By contrast, the tort damages awarded by the trial judge included lost income between May 24, 2005 and July 2009, less a 10% discount for contingencies. In *BG Checo*, the Supreme Court noted at p. 38 that "it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course."

60 No particular circumstances or policy that would support different scales of damages for mental suffering in tort and contract in the employment context were brought to the court's attention. Rather, there are good reasons for avoiding such a scenario.

61 In a case in which the employer's allegedly tortious behaviour includes the termination of the employee, compensation for mental distress is available under the framework the Supreme Court has set out in *Honda*. In a case in which the employer does not terminate the employee, the employee who is caused mental distress by the employer's abusive conduct can claim constructive dismissal and still have recourse to damages under the *Honda* framework. Recognizing the tort in the employment relationship would overtake and supplant that framework and all of the employment law jurisprudence from which it evolved. In other words, in the dismissal context, the law already provides a remedy in respect of the loss complained of here. The recognition of the tort is not necessary.

62 That leaves the category of cases in which the employee suffers mental distress from employer conduct that would not provide the grounds for a claim of constructive dismissal. Perhaps it can be said, as the respondents submit, that it is not foreseeable that an employee would suffer mental distress from criticism of poor work performance that is constructive. However, much disagreement can be anticipated as to whether criticism is "constructive", whether work performance is "poor", and whether the tone of the former was appropriate to the latter. The existence of the tort would require the resolution of such disputes. The court is often called upon to review the work performance of employees and the content and manner of their supervision in dismissal cases. It is unnecessary and undesirable to expand the court's involvement in such questions. It is unnecessary because if the employees are sufficiently aggrieved, they can claim constructive dismissal. It is undesirable because it would be a considerable intrusion by the courts into the workplace, it has a real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply indeterminately.

63 I would set aside the trial judge's finding that the appellants were liable to the respondents for committing the tort of negligent infliction of mental suffering as the tort is not available in the employment context. Employees, of course, can sue their employers or supervisors for the intentional infliction of mental suffering. I now turn to the trial judge's finding that the appellants were liable for that tort.

2) Intentional Infliction of Mental Suffering

64 The appellants submit that the trial judge erred in finding that there was "flagrant and outrageous conduct" and in finding that "reckless disregard" met the requirement that their conduct was "calculated to produce harm". Before proceeding to appraise the trial judge's analysis, it is important to note that she found that Ayotte committed this tort but was not persuaded that Bell Mobility had in its own right. She stated that she did not

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

"consider Bell Mobility's conduct flagrant or outrageous, nor...that it was calculated to produce harm." However, in her view, Bell Mobility was vicariously liable for the tort committed by Ayotte. Therefore, only Ayotte's conduct is pertinent to the analysis.

i) Flagrant and Outrageous Conduct

65 The appellants argue that, viewed in context, Ayotte's act of placing Piresferreira on a PIP after the assault does not satisfy the tort's requirement for "flagrant and outrageous" conduct. They submit that the trial judge's failure to take into account significant evidence in her analysis led her to rationalize Piresferreira's poor performance in 2005 and understate Ayotte's prior intention to place her on a PIP.

66 The trial judge emphasized that Ayotte, "aside from the chronic annual observations", had not kept a written record of Piresferreira's shortcomings in the spring of 2005. She noted that there was no documentary evidence to corroborate the evidence of Ayotte and Shiu that, "early in 2005, Ayotte told Shiu about significant deficiencies on Piresferreira's part and Shiu instructed Ayotte to issue a PIP." She also noted that neither Ayotte's email to HR indicating his intention to place an employee on a PIP nor the May 4 response from HR providing Ayotte with a sample PIP mentioned Piresferreira by name.

67 The appellants submit that, as the trial judge did not make any adverse finding about Shiu's credibility, she had no basis to disregard his testimony that in April 2005 Ayotte did report to him that Piresferreira continued to perform poorly after her 2004 performance review and that he advised Ayotte to issue the PIP after consulting with HR. The appellants say there was no evidence that the sample PIP provided by HR related to an employee other than Piresferreira. The sample PIP should have been seen as corroboration of Shiu's and Ayotte's testimony.

68 The appellants submit that the evidence establishes that Shiu and Ayotte had discussed the PIP process on two occasions in the months before the incident on May 12, that Shiu had specifically authorized the issuance of a PIP, and that Ayotte was already preparing to present the PIP to Piresferreira when she failed to arrange the meeting with the client on May 12. In this context, they submit, though there is no excuse for Ayotte losing his temper and pushing Piresferreira, his immediate angry announcement that he was placing her on a PIP and his subsequent issuance of a PIP cannot reasonably be described as "flagrant or outrageous" for the purpose of this tort.

69 While the trial judge did not indicate any basis for expressing scepticism about this evidence, what she found significant was the timing and context of the presentation of the PIP, not the presentation itself. What she found flagrant and outrageous was Ayotte's threat to issue a PIP immediately after the assault, then delivering the PIP immediately on Piresferreira's return to work "without first having assumed responsibility for his abusive behaviour". This finding largely undermines the appellants' complaints about the trial judge's treatment of the evidence. It seems to me that the trial judge implicitly accepted that a PIP was eventually going to be issued to Piresferreira.

70 Nevertheless, the behaviour the trial judge described is far removed from the sort of glaring and notorious false communication that has been the basis of the classic application of the tort.[FN1] Rather, the behaviour spans seven days and largely rests on an omission rather than an act. The clear implication is that the presentation of the PIP would not have been "flagrant and outrageous" had Ayotte apologized before presenting it to Piresferreira. Though I recognize that the ambit of what the case law considers "flagrant and outrageous" is expanding as this tort evolves, I harbour considerable unease with the weight the trial judge placed on Ayotte's

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

failure to apologize in concluding that his conduct was "flagrant and outrageous" in this case.

71 However, it is not necessary to resolve my unease, as I have no hesitation in finding that the trial judge erred in law by concluding that the second element of this tort — the requirement that the conduct be calculated to produce harm — was established.

ii) Reckless Disregard

72 In *Prinzo*, at para. 61, Weiler J.A. writing for the court stated the test for the second element of this tort as follows:

> [F]or the conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow.

73 The trial judge recognized this test, but then applied a different one. Her reasons make plain that she did not find that Ayotte either desired to produce the consequences that followed or that he knew they were substantially certain to follow. Instead she found "that Ayotte showed reckless disregard for Piresferreira's emotional well-being". In making this finding she relied on *Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200 (B.C. S.C.).[FN2]

74 Though this court in *Prinzo* considered *Rahemtulla* in the course of its review of the caselaw and commentary, it did not include "reckless disregard" in its statement of what was required to establish the second element. This court referred to *Rahemtulla* again in *Correia v. Canac Kitchens* (2008), 91 O.R. (3d) 353 (Ont. C.A.). After quoting the comments in *Rahemtulla* about "reckless disregard", Rosenberg and Feldman JJ.A., writing for the court, noted at para. 85 that this court in *Prinzo* had "used similar language noting that this element is made out 'if the consequences are known to be substantially certain to follow'". It seems then that *Correia* viewed the "reckless disregard" standard applied in *Rahemtulla* as merely the articulation of the standard stated in *Prinzo* in different language. *Correia* did not relax the standard stated in *Prinzo*, but reaffirmed it.

75 "Recklessness" is a flexible term capable of different meanings in different contexts. As I read it, *Correia* indicates that in the context of the employment relationship, recklessness should be understood as proceeding in the face of subjective awareness that harm of the kind that resulted was substantially certain to follow. An objective approach to recklessness that considers whether a reasonable person would know that the harm was foreseeable or likely to result seems more consonant with negligence than with an intentional tort. Intentional torts provide remedies for advertent behaviour, rather than inadvertent behaviour. The law treats intentional torts more severely, for example by not limiting the scope of damages in the same way as in a negligence case. The test stated in *Prinzo* and reaffirmed in *Correia* maintains the distinction between intentional torts and negligence. As noted Weiler J.A. said in *Prinzo* that the "consequences *must be known by the actor* to be substantially certain to follow" (emphasis added).

76 I have already rejected the recognition of the tort of negligent infliction of mental suffering in an employment relationship. Accepting an objective sense of "recklessness" dependent on whether the harm ultimately suffered was foreseeable or likely to result should be rejected for the same reasons. Essentially, permitting liability on such a reduced standard would unduly interfere with the settled principles of employment law.

77 In this case, the trial judge did not explain what meaning she attached to "recklessness" in finding that Ayotte acted in "reckless disregard for Piresferreira's emotional well-being". It is apparent, however, that she did

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

not consider "reckless disregard" as merely expressing the standard in *Prinzo* and *Correia* in different language. Rather, she had a lower standard in mind. She explained that she was satisfied that Ayotte's conduct was calculated to produce harm "even though he did not actually intend for her to suffer the injury she did." Elsewhere in her reasons, she said it was "reasonably foreseeable" to Ayotte that his behaviour "was likely to cause Piresferreira anxiety, stress and emotional upset". She erred by finding that the second element of this tort was established by something less than the standard stated in *Prinzo* and *Correia*.

78 The trial judge's conclusion that the second element of the tort was made out must be set aside for an additional reason. In establishing the tort it must be shown that the defendant desired to produce the *kind* of harm that was suffered or knew that it was substantially certain to follow. In the seminal case of *Wilkinson v. Downton* , the court further noted at p. 59 that the defendant's conduct must be "plainly calculated to produce some effect *of the kind* which was produced" (emphasis added). It is clear, as the trial judge observed, that where the tort is established, the plaintiff is entitled to recover the full extent of the damages suffered even if they could not have been anticipated. As indicated in *Wilkinson v. Downton*, "it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs." The *extent* of the harm need not be anticipated, but the *kind* of harm must have been intended or known to be substantially certain to follow.

79 Here, the trial judge found that Ayotte showed reckless disregard "for Piresferreira's emotional well-being". She did not consider and the evidence does not support the inference that Ayotte intended or knew it was substantially certain to follow that Piresferreira would suffer posttraumatic stress disorder as diagnosed by Dr. Heney or a major depressive disorder as diagnosed by Dr. Basson, with the result that she would never be able to work in any employment again and that her personal life would be changed so dramatically. At most, the trial judge found, at para. 190, that serious psychological injury was foreseeable to Ayotte. Foreseeability, which indicates only that a result may follow, is much less than knowledge that a result is substantially certain to follow. I agree with the remarks of M.E. Boyd J. in *Kedia International Inc. v. Royal Bank*, 2008 BCSC 122 (B.C. S.C.), at para. 196, as follows:

> I agree with the defence submission that it makes no sense to deem intention on the basis of simple foreseeability, while at the same time denying the defendant the benefits of the limitations of liability applicable in a negligence action. Put another way, the standard of constructive intention must be very high.

80 As the trial judge erred in finding that the second element of the tort was satisfied, I would set aside her ruling that the tort of intentional infliction of mental suffering was established.

3) Damages for Assault and Battery

81 The appellants concede that Ayotte committed an inexcusable battery on Piresferreira. They do, however, contest the trial judge's assessment of damages for the battery. They submit that she included damages due to factors other than the assault and battery. I agree.

82 The analysis is hampered by the fact that the trial judge did not separately assess the damages for battery. As noted earlier, she assessed and awarded "damages arising from [Piresferreira's] tort claims". However, in her earlier discussion of each tort the trial judge set out her approach to the damages that arose from each. In considering what damages flowed from the battery, the trial judge reasoned that the battery "started a chain of events" that "collectively resulted in the deterioration of Piresferreira's emotional health and resulted in her disability". She held as follows:

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

> Included in that chain of events was Ayotte's failure to apologize for the assault, Bell Mobility's failure to apologize for the assault, Ayotte's immediate and inappropriate imposition of a PIP and Bell Mobility's collaboration in this regard, Bell Mobility's failure to adequately investigate the incidents of May 12, 2005, Bell Mobility's failure to adequately address the risk to Piresferreira of her continuing under Ayotte's supervision, Bell Mobility's failure to adequately discipline Ayotte for the assault, Bell Mobility's on-going expectation for Piresferreira to return to the same work environment without meaningful steps being taken to ensure a "safe" environment for her, and Bell Mobility's meritless allegation that Piresferreira orchestrated the constructive dismissal scenario because she could not accept that her performance at work was below standard.

83 It is difficult to discern what, other than chronology, links these acts into one chain. Most of the acts included are those of Bell Mobility and not those of Ayotte. The relationship between the acts is not causal. Ayotte's battery did not cause the next event in the chain as does the first vehicle in a highway pileup where each vehicle is struck and forced forward to collide with the next. After the assault, Bell Mobility might have acted differently than the way the trial judge found, in part, "collectively" resulted in the damages. Bell Mobility might have taken all of the steps that the trial judge considered necessary. It might have apologized for the assault, it might have disavowed the imposition of the PIP, it might have adequately investigated the incident of May 12, 2005, it might have adequately addressed the risk to Piresferreira of her continuing under Ayotte's supervision, it might have adequately disciplined Ayotte, it might have ensured a "safe" environment for Piresferreira, and it might have refrained from making a meritless allegation that Piresferreira orchestrated the constructive dismissal scenario because she could not accept that her performance was below standard. If Bell Mobility had done these things differently, the damages that resulted from the battery would have also been different. In other words, the acts and omissions of Bell Mobility relied on by the trial judge were neither the necessary nor the inevitable result of the battery.

84 In her negligence analysis, the trial judge dealt with Bell Mobility's failures as independent ones for which Bell Mobility itself was responsible. As well, the trial judge's damages analysis included acts that flowed from acts done before the assault. It is clear from a reading of her reasons as a whole that the trial judge considered that Piresferreira's psychological disabilities and her inability to work in any employment were largely caused by matters other than the battery itself.

85 While it may be, as the trial judge observed, that damages for battery are not limited to what the defendant intended or foresaw, it is still necessary that the damage be caused by the battery. The trial judge's conclusion that all the damages were caused by the battery because the damages collectively resulted from the battery and other acts is both unreasonable and inconsistent with her other findings.

86 On the findings of the trial judge, Piresferreira suffered no physical injury, psychological harm or other ill effect from the push itself. In fact, after the battery, Piresferreira was still willing to "come to an agreement to work as a team" with Ayotte. The trial judge described in detail the course of Piresferreira's deterioration with her perception of the unfairness of subsequent events and the failure of Bell Mobility to provide her with a safe working environment. The subsequent events did not inevitably follow from the battery.

87 The damages awards for battery absent actual injury that were considered by the trial judge ranged from $400 to $11,000. Taking into consideration the context in which it occurred, I would assess Piresferreira's damages from the battery generously at $15,000.

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

4) Damages for Wrongful Dismissal

88 The trial judge found that Piresferreira was constructively dismissed on May 24, 2005 and assessed damages based on a 12-month period of notice. Bell Mobility does not appeal those findings but argues that the trial judge erred by refusing to address Piresferreira's failure to mitigate her damages and by finding that an award of $45,000 for the manner of dismissal was appropriate.

89 I would not give effect to the argument regarding Piresferreira's failure to mitigate her lost wages because the trial judge, as she was entitled to do, accepted the evidence that Piresferreira was incapable of working in any other employment.

90 Bell Mobility contested the trial judge's finding of bad faith, arguing that her criticism of its handling of Piresferreira's complaint was too exacting. Piresferreira filed her complaint against Ayotte on Friday, May 20, 2005. Bell Mobility points out that it reacted quickly, providing Ayotte with a disciplinary letter on May 25, 2005 after a long weekend. The letter confirmed that Ayotte had yelled and pushed Piresferreira, stated uncategorically that such behaviours were totally unacceptable and would not be tolerated, asked Ayotte to apologize to Piresferreira, placed a disciplinary warning in his file, and warned him that a repetition could result in his dismissal. Bell Mobility, as the letter shows, did not accept Ayotte's rationalization that Piresferreira had provoked him into yelling at her and pushing her. The letter was unequivocal in condemning his conduct. Bell Mobility argues that it acted on Piresferreira's account of the event in her complaint, and as it was an open and shut case, did not need to interview her again to "learn her version". Piresferreira's position that she would not return to work unless Ayotte was fired was unreasonable. This was the first complaint about Ayotte's conduct Bell Mobility had received in his eight years of employment. The battery could not preclude Bell Mobility from exercising proper supervision over Piresferreira. Here Bell Mobility had an ample basis to believe Piresferreira was performing poorly. The trial judge should have confined herself to assessing the employer's reasonable and good faith view of Piresferreira's performance instead of measuring Piresferreira's performance herself, which she did by rationalizing Piresferreira's poor performance in 2004 and the spring of 2005, including her failure to persuade the client to attend the meeting on May 12.

91 Regardless of the merit of these arguments, there was a clear evidentiary foundation for the trial judge's finding of Bell Mobility's bad faith in the constructive dismissal of Piresferreira. Piresferreira was assaulted by her supervisor. The trial judge found that Ayotte deliberately timed his delivery of the PIP to Piresferreira on May 19 to ward off the possibility of a complaint by her, that HR emailed Piresferreira on May 24 advising that a meeting had been scheduled "to review the Performance Improvement Plan" and, when she declined to attend, wrote her claiming that she had declined to attend a meeting that had been scheduled to allow Ayotte to apologize to her. Bell Mobility did not provide Piresferreira with a copy of the disciplinary warning issued to Ayotte or advise her specifically of its contents, and did not take adequate action to ensure that she could feel safe in returning to work.

92 The trial judge's assessment of Piresferreira's damages of $45,000 for mental suffering from the manner of her dismissal has a solid foundation. After assessing these damages, the trial judge did not award them as they would duplicate the tort damages she awarded. I would give effect to her assessment and award these damages.

5) Damages for Loss of Guidance, Care and Companionship

93 Given my conclusions above, the trial judge's damages for loss of guidance, care and companionship awarded to Piresferreira's long-term partner must be set aside. The right of dependents to sue in tort for loss of

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works

guidance, care and companionship under s. 61(2)(e) of the *Family Law Act* is purely derivative and dependent on Piresferreira's entitlement to damages after being injured by the fault or neglect of another. For the reasons I have set out, Piresferreira has no entitlement to damages for negligent or intentional infliction of mental suffering and, on the trial judge's findings, she suffered no actual damage from the battery itself.

F. Conclusion

94 I would allow the appeal in part. In my view, the tort of negligent infliction of mental suffering is not available against an employer and supervisor for conduct in the course of employment. Further, I conclude that the trial judge erred in finding that the tort of intentional infliction of mental suffering was made out on this record and in her assessment of damages for the assault and battery. However, I would reject the appellants' submission that the respondent failed to mitigate her damages.

95 I would award the respondent $15,000 in damages for the battery, for which Bell Mobility and Ayotte are jointly and severally liable. In addition, I would uphold the trial judge's award of damages for constructive dismissal and hold that Bell Mobility is liable for an additional $45,000 for mental suffering due to the manner of Piresferreira's dismissal. The trial judge's other damages awards, including under the *Family Law Act*, are set aside.

96 The appellants have been largely successful on appeal. I would fix the cost of the appeal in their favour in the amount of $20,000, inclusive of GST and disbursements. Absent agreement, parties may make written submissions on the costs of the trial within 30 days of the release of these reasons.

***E.A. Cronk J.A.*:**

I agree.

***S.E. Lang J.A.*:**

I agree.

Order accordingly.

FN1 For example, in *Wilkinson v. Downton*, [1897] 2 Q.B. 57 (Eng. Q.B.), the defendant falsely told the plaintiff that her husband had been seriously injured in an accident; in *Janvier v. Sweeney*, [1919] 2 K.B. 316 (Eng. C.A.) the defendant, pretending to be from Scotland Yard, falsely told the plaintiff that she was wanted by the police because she corresponded with a German spy; and in *Bielitzki v. Obadisk* (1922), 65 D.L.R. 627 (Sask. C.A.), the defendant was responsible for the plaintiff being told falsely that her son had committed suicide by hanging himself from a tree.

FN2 The trial judge noted that counsel for Ayotte acknowledged that reckless disregard could meet the intention required for the second element. Bell Mobility, which was separately represented at trial, submitted that evidence of intention to produce the consequences or knowledge of reasonably certain consequences was required.

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. Govt. Works