

File No. 29954

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

JOSEPH DOUGLAS BELLEROSE

APPLICANT
(APPELLANT)

AND:

BRADLEY GERALD BOB

RESPONDENT
(RESPONDENT)

RESPONSE ON THE APPLICATION FOR LEAVE TO APPEAL

**FILED BY THE RESPONDENT BRADLEY GERALD BOB
PURSUANT TO SUPREME COURT ACT, R.S.C. 1985, C.S-26, SECTION 40**

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MEMORANDUM OF ARGUMENT**PART I - STATEMENT OF FACTS****A. INTRODUCTION**

1. This is a case about a deliberate "car jacking". The Respondent ("Mr. Bob") was the victim of an intentional criminal act.

2. On April 18, 1999 the Applicant unlawfully entered Mr. Bob's van while Mr. Bob was standing in front of it. The Applicant proceeded to steal the van by driving it forward directly over Mr. Bob who became caught up in the left front wheel well. Mr. Bob sustained serious life threatening injuries as a result of being pushed about one city block before the van was stopped.

Reasons for Judgment of Huddart J.A., para. 4, Leave Book p. 25.

3. The Applicant pleaded guilty to the charge of criminal negligence causing bodily harm and was sentenced to sixteen and one-half months in prison.

Reasons for Judgment of Huddart J.A., para. 4, Leave Book p. 25

4. At trial, a jury awarded Mr. Bob, *inter alia*, \$75,000.00 in aggravated damages and \$500,000.00 for pain, injury, suffering and loss of enjoyment of life.

Questions for the Jury, Leave Book p. 9.

5. While the facts of this case are shocking, this case is not of national importance.

6. Mr. Bob's award for aggravated damages is founded upon well settled legal principles pronounced by this Court which are consistently applied across Canada.

B. THE ACTION

(i) Pleadings

7. In his Statement of Claim, Mr. Bob, plead that the Applicant's conduct was an intentional act. Alternatively, it was alleged that the Applicant acted recklessly or negligently.

Statement of Claim, paras. 4, 5, Leave Book, pp. 75, 76.

8. Mr. Bob also plead, *inter alia*, entitlement to an award of aggravated damages.

Statement of Claim, Leave Book, p. 79.

(ii) Trial

9. Prior to delivering his charge to the jury, Lamperson J. advised both counsel of the wording he intended to use in instructing the jury on the issue of aggravated damages. The Applicant's counsel, Mr. Home, advised Lamperson J. that the proposed charge was "*fine with me*".

Pre-Charge Discussion-Trial Transcript pp. 514-515, Response on the Application for Leave to Appeal pp. 5, 6.

10. At trial, Lamperson J. instructed the jury that they could consider awarding Mr. Bob aggravated damages on the following principle:

... as extra compensation to Mr. Bob for injury to his feelings, dignity, pride or self respect resulting from the reckless disregard in which the Applicant inflicted Mr. Bob's injury. Aggravated damages are a type of non-pecuniary award. This type of damage award, and I want to emphasize this, is not meant to set an example or punish the Applicant, but instead is meant to enhance the non-pecuniary damage award and to help assuage the resentment, anger, humiliation or loss of pride that Mr. Bob feels or experiences as a result the manner in which the Applicant ruined his life. This type of award is, as the Applicant's counsel said, generally found in sexual assault cases and wrongful dismissal cases, but is not confined to that. It is a head of damage that you must consider and whether it is applicable depends on your view of the facts.

Reasons for Judgment of Huddart J.A. para. 26, Leave Book p. 38.

11. At trial, the Applicant consented to Mr. Justice Lamperson's charge to the jury on the issue of aggravated damages.

Reasons for Judgment of Huddart J.A. paras. 25, 27, Leave Book pp. 37,38.

12. It was open to the jury to find that the Applicant intended to injure Mr. Bob as he committed the intentional tort of hijacking Mr. Bob's van.

Reasons for Judgment of Lamperson J., para. 9, Leave Book p. 15.

Reasons for Judgment of Huddart J.A., para. 32, Leave Book pp. 40, 41.

13. The Jury awarded Mr. Bob, *inter alia*, \$75,000.00 in aggravated damages and \$500,000.00 for pain, injury, suffering and loss of enjoyment of life.

Questions for the Jury, Leave Book p. 9.

14. Mr. Bob's pain and injury award was reduced to \$281,000.00 by agreement of counsel to conform with the "*trilogy cap*" set by this Court.

Reasons for Judgment of Huddart J.A., para. 12, Leave Book pp. 29, 30.

(iii) Appeal (Majority Reasons of Huddart J.A.; Mackenzie J.A. concurring)

15. The Applicant did not appeal Mr. Justice Lamperson's charge to the jury. More specifically, the Applicant did not allege as a ground of appeal that Mr. Justice Lamperson had erred in law by charging the jury on the issue of aggravated damages.

Reasons for Judgment of Huddart J.A. paras. 25, 27, 29, Leave Book pp. 37, 38, 39.

Applicant's Notice of Appeal and Amended Notice of Appeal, Response on the Application for Leave to Appeal, pp. 1-4.

16. In light of the Applicant's position both at trial and on appeal, the Court of Appeal was limited to considering whether the quantum of Mr. Bob's aggravated damages was "plainly

unreasonably and unjust such that no jury reviewing the evidence as a whole and acting judicially could have reached it.”

Reasons for Judgment of Huddart J.A. para. 27, Leave Book p. 38.

17. Although the Applicant only appealed the quantum of Mr. Bob's aggravated damages award, the Court of Appeal did consider, in *obiter*, the trial Judge's charge to the Jury to ensure that Mr. Bob's award for aggravated damages was founded upon well settled legal principles pronounced by this Court. In that regard, the Court of Appeal relied on *Rookes v. Barnard* as well as this Court's decision in *Hill v. Church of Scientology* as binding legal authorities on this issue.

Reasons for Judgment of Huddart J.A., para. 30, 31, Leave Book p. 40

Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.)

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130

18. In its consideration of this issue, the Court of Appeal found that the trial judge was clear in his instructions to the jury on the manner in which they were to consider Mr. Bob's claims for pain and suffering as well as his claim for aggravated damages. The Court of Appeal also held that it must be assumed that the jury followed the trial judge's charge in awarding compensation for both pain and suffering as well as aggravated damages and that there could be no duplication of damages.

Reasons for Judgment of Huddart J.A. para. 28, Leave Book p. 39.

19. The Court of Appeal concluded that they could see no logical reason why the jury, as right-thinking people, could not be equally offended by the Applicant's conduct in this case as they would be in a sexual assault or wrongful dismissal case.

Reasons for Judgment of Huddart J.A., para. 32, Leave Book p. 40, 41.

20. The Court of Appeal also held that the trial judge's decision, as supported by both counsel, to separate the quantum of the pain and suffering award from the aggravated damages award, may have been for the purposes of clarity in the chance of appellate review.

Reasons for Judgment of Huddart J.A. para. 23, 34, Leave Book pp.30, 41, 42.

21. As the combined amount of Mr. Bob's adjusted pain and suffering award (\$200,000.00) plus his aggravated damages award (\$75,000.00) were below the "*trilogy cap*", the Court of Appeal concluded that it was unnecessary to consider whether the "*trilogy cap*" applied to an award of non-pecuniary damages, including aggravated damages.

Reasons for Judgment of Huddart J.A. paras. 3, 35, Leave Book pp. 25, 42.

(iv) Appeal (Dissenting Reasons of Newbury J.A.)

22. Newbury J.A. agreed with the majority judgment that Mr. Bob's claim for pain, injury, suffering and loss of enjoyment of life merited an award of \$200,000.00.

Reasons for Judgment of Newbury J.A. (dissent), para. 37, Leave Book p. 43.

23. In dissent, Newbury J.A. held that the quantum of Mr. Bob's award for aggravated damages was excessive and should be reduced to \$10,000.00.

Reasons for Judgment of Newbury J.A. (dissent), para. 38, 42, Leave Book pp. 43, 47.

24. Newbury J.A. also held that it was open to the jury to conclude that the Applicant was aware that he was dragging Mr. Bob and that Mr. Bob has feelings of resentment or anger as a result of the Applicant's conduct.

Reasons for Judgment of Newbury J.A. (dissent), paras. 38, 39, Leave Book pp. 43, 44.

25. Although Newbury J.A. voiced concerns of the causal link between the Applicant's conduct and Mr. Bob's injured feelings in this case, she held, by inference, that in cases where *it is proven* that a Plaintiff suffers true "humiliation" or other similar feelings, a significant award of aggravated damages is appropriate.

Reasons for Judgment of Newbury J.A. (dissent), para. 39, 42,
Leave Book pp. 44, 46, 47.

PART II – QUESTIONS IN ISSUE

26. Mr. Bob submits that the proposed appeal does not raise any issues of public interest or national importance. Further, the disposition of this case by the British Columbia Court of Appeal was made in accord with well settled legal principles pronounced by this Court.

27. Mr. Bob respectfully disagrees with the legal issues posed by the Applicant. The Applicant is seeking leave to appeal, as a question of law, Mr. Bob's entitlement to an award of aggravated damages.

28. The Applicant is foreclosed from doing so as the Applicant consented to Mr. Justice Lamperson's charge on that issue, and did not allege as a ground of appeal from trial, that Mr. Justice Lamperson erred in law in leaving that issue with the jury.

Arland v. Taylor, [1955] O.R. 131 (C.A.)

G.K. v. D.K. (1999), 122 O.A.C. 36.

29. In *Wilson et al. v. United Counties Bank Limited et al.*, [1920] A.C. 102 (H.L.) at 106, Lord Birkenhead gave the following direction in circumstances of this nature:

I think it necessary to point out that, unless circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them. The object of indicating in detail the grounds of appeal, both at the Court of Appeal and to your Lordship's House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth.

30. Accordingly, Mr. Bob respectfully submits that the Applicant, by its conduct at trial and at the Court of Appeal, is limited to seeking leave to appeal to this Court on the following two issues only:

Issue A – Is the jury’s quantum of Mr. Bob’s award for aggravated damages so plainly unreasonable and unjust to satisfy this Court that no jury reviewing the evidence as a whole and acting judicially could have reached it?

Issue B – Does the “cap” on non-pecuniary damages as set by this Court in the “trilogy” apply to awards for pain and suffering as well as aggravated damages in cases of intentional torts involving a motor vehicle?

31. If the Applicant is seeking leave to appeal Mr. Bob’s entitlement to an award for aggravated damages, Mr. Bob submits that this Court should not entertain such motion. However, if this Court does accede to the Applicant’s request, then the issue is more properly stated as follows:

Issue C – Are aggravated damages available in cases of intentional torts involving a motor vehicle?

PART III – ARGUMENT

A. Is the jury's quantum of Mr. Bob's award for aggravated damages so plainly unreasonable and unjust to satisfy this Court that no jury reviewing the evidence as a whole and acting judicially could have reached it?

32. The standard of review by Appellate courts of a jury's verdict has been defined by this Court as follows:

[T]he verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

McCannell v. McLean, [1937] S.C.R. 341 at p. 343;

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33

33. The Applicant has not alleged that the Court of Appeal erred in applying the appropriate standard of review on this issue.

34. The majority decision of the Court of Appeal is that Mr. Bob's award of aggravated damages was not excessive and was justified.

Reasons for Judgment of Huddart J.A. at para. 35, Leave Book p. 42.

35. With all due respect to the Applicant, it cannot be said that the quantum of Mr. Bob's aggravated damages award is of national importance or otherwise merits review by this Court.

B. Does the "cap" on non-pecuniary damages as set by this Court in the "trilogy" apply to awards for pain and suffering as well as aggravated damages in cases of intentional torts involving a motor vehicle?

36. This issue no longer represents a live controversy between the parties in this action.

37. The total quantum of Mr. Bob's claim for non-pecuniary damages (pain and suffering *plus* aggravated damages) as varied by the Court of Appeal, is \$275,000.00. As this amount is less than the present value of the cap on non-pecuniary damages (\$281,000.00¹) as set by this Court in the "*trilogy*", this issue is moot to these proceedings and only of academic interest.

38. Accordingly, Mr. Bob submits that the *doctrine of mootness* applies to this issue and as such does not merit review by this court.

Borowski v. Canada (Attorney-General), [1989] 1 S.C.R. 342.

39. Further, it cannot be said that review of the proposed issue is warranted by this Court on any of the discretionary grounds as described by this Court in *Borowski, supra*.

40. Mr. Bob should not be burdened with either the financial or human cost associated with such an academic exercise.

C. Are aggravated damages available in cases of intentional torts involving a motor vehicle?

(i) Nature of this Case

41. Mr. Bob was the victim of an intentional tort perpetrated by the Applicant with a motor vehicle. It was a physical assault, no different than if the Applicant had used a knife or his fists. A vehicle was simply the Applicant's choice of weapon.

42. This is not a typical car accident case involving simple negligence causing personal injury. The facts of this case are unique.

¹ It was agreed by counsel that the present value of the "*trilogy cap*" at the date of trial was \$281,000.00. Reasons for Judgment of Huddart J.A., para. 12, Leave Book p. 29.

43. It has long been recognized that a jury may take into consideration the motives and conduct of the Defendant in considering an award of aggravated damages to a victim of a tort where “*there may be malevolence or spite or the manner of committing the wrong may be such as to injure the Plaintiff’s proper feelings of dignity and pride.*”

Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.) at 407.

(ii) Legal Authorities of this Court

44. An award of aggravated damages and the principles of law which govern its application as stated by the House of Lords in *Rookes v. Barnard*, supra, has been endorsed and approved by this Court on several recent occasions:

(a) *Vorvis v. ICBC*, [1989] 1 S.C.R. 1085

Although a wrongful dismissal case, this Court made the following general statement concerning the role and principles upon which aggravated damages are to be awarded at page 1099:

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

(b) *Norberg v. Wynrib*, [1992] 2 S.C.R. 226

In this case, this Court made the following statement regarding the role of aggravated damages at pages 263 and 264:

Aggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances. These damages are not awarded in addition to general damages. Rather, general damages are assessed “taking into account any aggravating features of the case and to that extent increasing the amount awarded”

Although aggravated damages will frequently cover conduct which could also be the subject of punitive damages, as I noted, the two types of damages are distinguishable; punitive damages are designed to punish whereas aggravated damages are designed to compensate.

In this case, this Court awarded the Plaintiff, *inter alia*, \$20,000.00 in aggravated damages for coerced sexual exploitation although the assaults were not physically violent.

(c) *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130

In this defamation case, this Court made the following statement on the governing principles applicable to an award of aggravated damages at paragraphs 188 and 189:

Aggravated damages may be awarded in circumstances where the Defendant's conduct has been particularly high-handed or oppressive, thereby increasing the Plaintiff's humiliation and anxiety arising from the libellous statement. . . .

These damages take into account the additional harm caused to the Plaintiff's feelings by the Defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the Defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the Defendant.

45. Although the subject matter of these cases all differ, the legal principles that were applied in each case by this Court in determining the availability of an aggravated damages award are the same.

46. In his Argument, the Applicant acknowledges that this Court has considered the issue of aggravated damages on 6 occasions in the past 15 years but attempts to distinguish these cases on the basis that the issue of aggravated damages in those cases arose in "entirely different" contexts from the present case.

Applicant's Memorandum of Argument, paras. 50-52, Leave Book pp. 65, 66.

47. This is simply not true. The "context" of this Court's consideration of an aggravated damages award in *Norberg* was in relation to the sexual exploitation of the Plaintiff. The Defendant's conduct was described by this Court as a "battery".

Norberg, supra, at 263.

48. With all due respect to the Applicant, the facts in *Norberg, supra*, and the present case are indistinguishable. They are both cases of intentional torts to the person.

49. The Applicant is advocating the creation of artificial "legal categories" or "contexts" out of which the conduct arises and injured feelings occur to govern the availability of an aggravated damages award instead of allowing the legal principles to dictate its application.

50. As was recognized by this Court in *Vorvis, supra*, in determining the availability of a punitive damages award, the focus must remain on the applicable legal principles and not on the legal category of the wrong out of which the action arises.

Paragon Properties Ltd. v. Magna Investments Ltd. (1972), 24 D.L.R. (3d) 156 (Alta.C.A.) considered in *Vorvis, supra*.

51. The Applicant's submission seeks to draw arbitrary distinctions where none exist. Such an approach is inconsistent with the underlying principle upon which aggravated damages are based and represents an artificial limitation. Such an approach promotes rigidity and inconsistency.

(iii) Canadian Legal Text

52. In his text on Personal Injury Damages in Canada, Professor Cooper-Stephenson describes aggravated damages as follows:

Aggravated damages are simply a variety (or possibly sub-head) of non-pecuniary damages. They too compensate for intangible loss, but in particular for hurt feelings caused by the nature of the defendant's conduct. Thus Lord Diplock has spoken of them as "additional compensation" for "injured feelings", where the plaintiff's "sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it". . . . Whereas damages for pain and suffering cover distress caused by the physical injuries themselves, aggravated damages cover distress caused by the character or form of the defendant's behaviour.

Aggravated damages are typically awarded in cases of intentional wrongdoing, that sort of conduct being most likely to occasion bruised feelings. Not surprisingly, the common instance in the domain of personal injury are actions for assault and battery including, increasingly, claims for sexual assault. However, aggravated damages can also be awarded in actions framed in negligence, especially where the wrongdoing is tantamount to recklessness.

Cooper-Stephenson, K. and I. Saunders. *Personal Injury Damages in Canada*. 2d ed. Toronto: Carswell, 1996 pp. 527, 528

53. Professor Cooper-Stephenson makes the following additional comment on the issue of aggravated damages which has particular application to the present case:

The strict causal requirements that have been developed in contract law may not be as significant in tort law, at least not in personal injury cases. This is because Defendants take their Plaintiffs as they find them, and if they are found wounded by pre-tort events, which condition exacerbates the post-injury non-pecuniary harm, the Defendant is liable to the extent that the post-injury harm exceeds what might have been expected absent the actual physical injuries.

Cooper-Stephenson, *supra*, pp. 96, 97.

(iv) **Canadian Court of Appeal Authorities**

54. The principles pronounced by this Court in *Vorvis, Norberg and Hill, supra*, on aggravated damages have been consistently applied by Courts of Appeal across Canada in various examples of intentional torts causing personal injury:

British Columbia

(a) *Rioux v. Smith* (1983), 48 B.C.L.R. 126 (C.A.) at p. 130.

In this case the Plaintiff suffered injuries as a result of the Defendant's negligent driving. The Defendant was convicted on a charge that his blood alcohol was over .08. The trial judge denied the Plaintiff's motion to amend his claim to plead entitlement to aggravated damages. The Court of Appeal dismissed his appeal as there was no claim or evidence that the Plaintiff suffered humiliation or a loss of dignity as a result of the Defendant's conduct.

- (b) *S.Y. v. F.G.C.* (1996), 26 B.C.L.R. (3d) 155 (C.A.) at p. 178.

In this sexual assault case, the Court of Appeal awarded \$250,000.00 in non-pecuniary damage, inclusive of aggravated damages.

- (c) *Vukelic v. Canada* (1997), 29 B.C.L.R. (3d) 288 (C.A.) at para. 29.

In this case the Plaintiff was physically assaulted by the RCMP. The Plaintiff was awarded \$90,000.00 for non-pecuniary losses at trial. The Court of Appeal increased the award to \$120,000.00 (inclusive of aggravated damages), in light of aggravating factors.

Saskatchewan

- (d) *H.L. (Canada) (Attorney General)* 2002, 227 Sask. R. 165, 2002 SKCA 131 at paras. 202, 220.

In this case of sexual battery the Court of Appeal upheld a trial judge's award of \$20,000.00 in aggravated damages.

Ontario

- (e) *G.K. v. D.K.* (1999), 122 O.A.C. 36 at paras. 1, 21.

In this physical assault case the Court of Appeal upheld a jury verdict of \$30,000.00 for aggravated damages.

- (f) *Fleury v. Fleury* (2001), 144 O.A.C. 372 at para. 13.

In this case of sexual battery the Court of Appeal sustained an award of \$20,000.00 in aggravated damages.

Nova Scotia

- (g) *G.B.R. v. Hollett* (1996), 139 D.L.R. (4th) 260 (N.S.C.A.) at p. 307.

In this case of sexual and physical abuse the Court of Appeal upheld an aggravated damages award of \$25,000.00 against the respondent, Hollett.

Federal

(h) *Peeters v. Canada*, [1994] 1. F.C. 562 (C.A.) at p. 568.

In this case the Plaintiff was severely beaten and assaulted by three corrections officers. Although no claim was advanced for aggravated damages, the Court applied the principles stated by this Court in *Norberg, supra*, in recognizing that the award is available in personal injury cases.

55. In the present case, the trial judge, jury and Court of Appeal all correctly applied the principles pronounced by this Court in determining Mr. Bob's entitlement to an award of aggravated damages in the amount of \$75,000.00

56. There is nothing novel or of national importance about the application of these principles to the facts of this case. The governing legal principles applicable to an award of aggravated damages for personal injuries arising out of intentional torts in Canada have been clearly stated by this Court and are being consistently applied by courts across Canada.

(v) **Dissenting Reasons of Newbury J.A.**

57. The Applicant relies on the dissenting view of Newbury J.A. in this case in support of its assertion that clarification from this Court is required with respect to the principles governing the availability and assessment of aggravated damages for personal injury.

58. With all due respect, Madam Justice Newbury's dissent does not support that submission.

59. Madam Justice Newbury did not take issue with the governing principles to be applied in determining the appropriateness of an award for aggravated damages in this case. Newbury J.A. only took issue with the quantum of the award.

Reasons for Judgment of Newbury J.A., para. 38, Leave Book p. 43.

60. Firstly, Newbury J.A. recognized *Hill, supra*, as a binding authority of this Court in determining entitlement to an award of aggravated damages.

Reasons for Judgment of Newbury J.A., para. 38, Leave Book p. 43.

61. Secondly, she acknowledged that the jury did find that the Applicant had knowledge that he was dragging Mr. Bob and that it was open to the jury to find Mr. Bob had hurt feelings as a result of the Appellant's conduct.

Reasons for Judgment of Newbury J.A., para. 38, 39, Leave Book pp. 43, 44.

62. Finally, Newbury J.A. affirms by inference, that where a Plaintiff suffers "true humiliation" or other similar feelings an award of aggravated damages is appropriate.

Reasons for Judgment of Newbury J.A., para. 42, Leave Book pp. 46, 47.

63. This is further confirmed by Newbury J.A. in that she would have awarded Mr. Bob aggravated damages of \$10,000.00.

Reasons for Judgment, Newbury J.A., para. 42, Leave Book pp. 46, 47.

64. The Applicant appears to be relying on Newbury J.A.'s observation that she would not be as convinced as the jury was of the causal connection between the Applicant's conduct and Mr. Bob's injured feelings. This Court has recently confirmed however that an appellate court can not set aside a trial decision on damages absent a "palpable and overriding error".

Reasons for Judgment of Newbury J.A., para. 39, Leave Book p. 44

Applicant's Memorandum, para. 19, Leave Book p. 54

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33 at para. 21.

65. Whereas here, a trier of fact, properly charged, has awarded aggravated damages and there is no palpable or overriding error. Leave should not be granted.

(vi) Lack of Divergent Case Authorities

66. It is also noteworthy that the Applicant has not referenced a single Canadian case authority in support of its submission that a lack of clarity exists in Canada on this issue.

67. In light of the uniform jurisprudence applicable to an award of aggravated damages in Canada as pronounced by this Court, and the consistency with which these principles are applied by courts across Canada, Mr. Bob submits that there is no need to respond to the Applicant's submission that there exists tension throughout the Commonwealth on this issue or that it has troubled other jurists and law reform bodies in those nations.

PART IV – SUBMISSIONS CONCERNING COSTS

68. Mr. Bob seeks an order for costs of responding to the Applicant's Leave to Appeal.

PART V – ORDER SOUGHT

69. Mr. Bob seeks an order that the Applicant's application for Leave to Appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS _____ DAY OF OCTOBER, 2003.

MERVIN L. SADDEN (Fulton & Company)
Counsel for the Respondent,
Bradley Gerald Bob

PART VI - TABLE OF AUTHORITIES

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PART VII - STATUTE/REGULATION/RULE

None.