

**120 O.R. (3d) 481** | [2014 ONCA 419](#)

**LASKIN J.A.** (TULLOCH J.A. concurring): —

*A. Overview*

[1] The respondent, Meredith Boucher, began working for the appellant Wal-Mart in 1999. She was a good employee. In November 2008, she was promoted to the position of assistant manager at the Wal-Mart store in Windsor. Her immediate supervisor was the store manager, the appellant Jason Pinnock. [page484]

[2] At first, Boucher and Pinnock worked well together. Their relationship turned sour, however, after an incident in May 2009, in which Boucher refused to falsify a temperature log. Pinnock then became abusive towards her. He belittled, humiliated and demeaned her, continuously, often in front of co-workers. Boucher complained about Pinnock's misconduct to Wal-Mart's senior management. They undertook to investigate her complaints. But in mid-November 2009, they told her that her complaints were "unsubstantiated" and that she would be held accountable for making them. A few days later, after Pinnock again humiliated Boucher in front of other employees, she quit. A few weeks later, she sued Wal-Mart and Pinnock for "constructive" dismissal and for damages.

[3] The action was tried before a judge and a jury. The jury found that Boucher had been constructively dismissed and awarded her damages equivalent to 20 weeks' salary, as specified in her employment contract. The jury also awarded her damages of \$1,200,000 against Wal-Mart, made up of \$200,000 in aggravated damages for the manner in which she was dismissed, and \$1 million in punitive damages. And the jury awarded Boucher damages of \$250,000 against Pinnock, made up of \$100,000 for intentional infliction of mental suffering, and \$150,000 in punitive damages (awards for which Wal-Mart is vicariously liable as Pinnock's employer).

[4] On appeal, Pinnock and Wal-Mart challenge both their liability for and the amount of damages for intentional infliction of mental suffering, aggravated damages and punitive damages.

[5] Pinnock makes these submissions:

- (1) the award of damages for intentional infliction of mental suffering should be set aside because the trial judge incorrectly instructed the jury on the elements of the tort. Alternatively, the award is unreasonable, or at least excessive;
- (2) the award of punitive damages should be set aside because it was not rationally required to punish Pinnock for his conduct.

[6] Wal-Mart makes the following submissions:

- (1) the award of aggravated damages should be set aside because of an error in the trial judge's charge. Alternatively, the award is excessive and should be reduced;
- (2) the award of punitive damages should be set aside or reduced because [page485]

-- the trial judge erred in her charge;

- Wal-Mart's conduct was not so reprehensible to warrant punitive damages;
- alternatively, an award of punitive damages was not rationally required to punish Wal-Mart;
- the trial judge erred by failing to give the jury guidance on a reasonable range for an award of punitive damages;
- the trial judge erred by permitting Boucher to amend her statement of claim to conform to the jury's verdict.

[7] Finally, Boucher has cross-appealed against Wal-Mart. She submits that the trial judge erred in law by instructing the jury that she could not recover future income loss beyond the period specified in her employment contract. She asks for \$726,601 to compensate her for her loss of income until retirement.

## B. Background

### (a) *Meredith Boucher and her employment with Wal-Mart*

[8] Meredith Boucher is 43 years old, is married and has one child. She entered the labour force after finishing high school.

[9] In 1999, Boucher began working for Wal-Mart at its store in Chatham. She received regular promotions. In January 2000, she was promoted to customer service manager. In January 2001, she was transferred to the Wal-Mart store in Newmarket, where she continued working as a customer service manager.

[10] In 2005, Boucher was transferred back to the Wal-Mart store in Chatham and promoted to department manager. In September 2007, she was promoted to administrative manager of the Wal-Mart store in Wallaceburg, and in March 2008 she became an assistant manager trainee. In November 2008, Boucher accepted a transfer to Wal-Mart's Windsor store as an assistant manager.

[11] Boucher testified that she valued her work at Wal-Mart. She intended to work there until she retired.

### (b) *Wal-Mart and its policies*

[12] Wal-Mart is one of the world's largest retailers with stores throughout North America. This litigation arises out of events that took place at its Windsor store. [page486]

[13] According to the evidence at trial, Wal-Mart holds itself out as a business that regards its employees highly. It has a number of workplace policies intended to reflect its concern for its employees. One policy that figured prominently in this trial was Wal-Mart's open door communication policy: Wal-Mart encourages its employees to report on a confidential basis concerns about how its stores are operated or its employees treated.

[14] Wal-Mart also has a prevention of violence in the workplace policy. It undertakes to take all employee reports of incidents seriously and to protect an employee making a complaint from acts of retaliation. Finally, Wal-Mart has a harassment and discrimination policy. The purpose of this policy is to protect employees from unwelcome conduct that offends a person's feelings. Wal-Mart requires all of its employees to treat each other with dignity and respect.

[15] Boucher's evidence was that Wal-Mart paid lip service to its policies. It did not enforce them. And when Boucher sought the protection of these policies, she was threatened that she would be held accountable if her complaints proved unwarranted.

### (c) *The working relationship between Pinnock and Boucher*

[16] Much of Boucher's evidence about the deterioration of her relationship with Pinnock was contested by the appellants. In this brief summary, I set out the evidence supporting Boucher's claims, as it was obviously accepted by the jury.

(i) *In the beginning*

[17] Initially, Pinnock and Boucher had a good working relationship. Soon after Boucher's transfer to the Windsor store, Pinnock chose her over eight other candidates as his lead assistant manager. He told her that she was the "most promotable" of everyone in the store. He was happy to have her on his team because she was a real "go-getter".

[18] In April 2009, Pinnock gave Boucher her first performance appraisal. He evaluated her favourably, describing her as "[o]verall, a great asset to any team." However, the good working relationship between the two ended after an incident in May 2009.

(ii) *The May 2009 temperature log incident*

[19] For health reasons, Wal-Mart must maintain temperature logs, which record temperatures of food and dairy products stored in its coolers. Boucher was responsible for ensuring that the logs were maintained. [page487]

[20] In May 2009, Boucher went on a month-long course at Wal-Mart's food academy. Another assistant manager assumed her responsibility for the temperature logs. During that month, an employee did not complete a temperature log in one of the departments for which Boucher would have been responsible had she been in the store.

[21] When Boucher returned to the store at the end [of] May, Pinnock told her the incomplete log would negatively affect the store's pending evaluation, and this in turn would negatively affect his own evaluation as store manager. Pinnock told Boucher to make sure that the store received a "green" evaluation, not the "yellow" evaluation it would receive if the log remained incomplete. In other words, Pinnock told Boucher to alter the log. She refused to do so. Because she refused, Pinnock subjected her to a disciplinary "coaching" session.

(iii) *The June 3, 2009 open door meeting*

[22] Boucher felt that Pinnock had unfairly disciplined her for her refusal to alter the temperature log. She also had developed concerns about Pinnock's use of profane and disrespectful language when he spoke to her and other female assistant managers.

[23] To express her concerns, Boucher decided to use Wal-Mart's open door communication policy. She asked for and was granted a meeting with the district people manager. Boucher and one other assistant manager met with him to relate their concerns about Pinnock's conduct. In breach of the policy, however, Pinnock was made aware of the meeting. He berated Boucher and then admonished her; she testified that he "let me know that if I was ever going to have a effing meeting about him again, that I'd better have the effing decency to at least tell him before I do it."

(iv) *Pinnock's conduct: June to October 2009*

[24] Boucher testified that from the day Pinnock found out about her meeting with the district people manager, he subjected her to an unrelenting and increasing torrent of abuse. He regularly used profane language when he spoke to her. He belittled her. He demeaned her in front of other employees. He even called in other employees so he had an audience when he berated her and showed his disdain for her.

[25] Boucher gave many specific examples of Pinnock's abuse. A sampling is as follows: [page488]

- Pinnock pulled employees who reported to Boucher into morning store tours and in front of them told Boucher how stupid she was, and that her career was blowing away;
- when Pinnock criticized Boucher, he pounded his chest and said, "let me know when you can't fucking handle it anymore";
- Pinnock berated Boucher in front of other managers, and even store customers: "he would say this is a fucking shit show, look at this fucking mess"

[26] Other Wal-Mart employees testified about Pinnock's conduct towards Boucher. For example,

- one assistant manager testified that after the May 2009 temperature log incident, Pinnock turned "ferocious" towards Boucher. His treatment of her was "humiliating". She said, "we were constantly called idiots like we were so stupid";
- another assistant manager testified that after the May 2009 incident, Pinnock's treatment of Boucher was "terrible, horrific".

(d) *Boucher's complaints to Wal-Mart and Wal-Mart's investigation*

(i) *The October 26, 2009 meeting with Wal-Mart representatives*

[27] On October 26, 2009, Boucher met with three senior management representatives of Wal-Mart. She had asked for the meeting because nothing had been done to address her complaints about Pinnock's treatment of her.

[28] The management team said that they would investigate Boucher's concerns. They also told her to report any new incidents of misconduct. But they also cautioned Boucher that if her concerns were found to be unwarranted, she would be held accountable for raising them.

(ii) *Boucher's November 2, 2009 complaint*

[29] Pinnock continued to be abusive towards Boucher. As she had been asked to do, she reported the incidents to Wal-Mart's district people manager. She got no response. [page489]

(iii) *The results of Wal-Mart's investigation*

[30] Witnesses for Wal-Mart testified that its management team did investigate Boucher's complaints. They held three meetings at the Windsor store with several employees. They completed their investigation in early November, and met with Boucher on November 14, 2009 to discuss their findings.

[31] Wal-Mart's management team told Boucher that they had investigated her complaints and found them to be "unsubstantiated". They also told her that she would be held accountable for making these unsubstantiated complaints, but they had not yet decided what discipline she would face. They concluded that Boucher was trying to undermine Pinnock's authority. Boucher left the meeting in tears.

[32] Pinnock, on the other hand, was not disciplined for his conduct or even cautioned about it. He was spoken to only about his and his team's use of inappropriate language.

[33] In reaching their findings, Wal-Mart's management team appeared to ignore the numerous incidents in which Pinnock berated Boucher in front of co-workers. And little evidence was led at trial that Wal-Mart's investigators sought information from the other assistant managers who had witnessed Pinnock's abusive conduct.

(e) *The final incident: November 18, 2009*

[34] At the end of Boucher's shift on November 18, Pinnock again berated her because ten extra skids of products delivered to the store overnight had not been unloaded. Pinnock grabbed Boucher by the elbow in front of a group of co-workers. He told her to prove to him that she could count to ten. He prompted her by initiating the count, then told her to count out loud along with him. Boucher was so humiliated she left the store.

[35] Four days later, Boucher sent Wal-Mart an e-mail that she did not intend to return to work until her complaints about Pinnock were resolved to her satisfaction. They never were. And she never returned to work. In early December, she started this lawsuit for constructive dismissal and damages.

(f) *Pinnock's motives: The evidence of Samantha Russell*

[36] Samantha Russell was the store people manager. She had observed how Pinnock treated Boucher. At one point, she cautioned Pinnock about going after Boucher so hard because Boucher was beginning to look ill. Pinnock replied: "Not until she fucking quits." When Pinnock found out that Boucher had quit, he was overjoyed. He had achieved his goal. [page490]

(g) *The effect of Pinnock's and Wal-Mart's conduct*

[37] Boucher testified about the effect of Pinnock's conduct toward her, and of Wal-Mart's failure to do anything about it, or even acknowledge it. She said that she was stressed out. She could not eat or sleep. She had abdominal pain, constipation and bloating. She lost weight and began vomiting blood. Co-workers testified that Boucher went from a fun-loving, lively, positive leader to a defeated and broken person.

[38] Boucher went to see her family doctor, Dr. Avril MacDonald, three times between September and November 2009. In Dr. MacDonald's opinion, Boucher's physical symptoms were stress related. Dr. MacDonald prescribed a sedative and referred Boucher to a psychiatrist. Boucher saw a therapist in December, but by then she was already feeling better. She testified that by late December, she felt she had nearly fully recovered and was actively looking for another job.

[39] Boucher had not found another job by the time of trial in September 2012. Her employment contract with Wal-Mart entitled her to two weeks' pay for every year of employment. As she had worked for Wal-Mart for ten years, she was entitled to 20 weeks' pay. Wal-Mart, in fact, paid her salary for eight months.

C. *Pinnock's Appeal*(1) *The award for intentional infliction of mental suffering*

[40] The jury awarded Boucher \$100,000 for Pinnock's intentional infliction of mental suffering. Pinnock challenges the award on three bases:

- the trial judge incorrectly instructed the jury on the proper elements of the tort;
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- no reasonable jury could have found Pinnock liable;
- alternatively, the amount awarded is excessive.

(a) *The elements of the tort and the trial judge's charge*

[41] The tort of intentional infliction of mental suffering has three elements. The plaintiff must prove

the defendant's conduct was flagrant and outrageous;

the defendant's conduct was calculated to harm the plaintiff;

the defendant's conduct caused the plaintiff to suffer a visible and provable illness.

**[scroll ahead one page for application!!!]**

See *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, [2002] O.J. No. 2712 (C.A.).

[42] The trial judge instructed the jury several times on the three elements of the tort. Pinnock submits that the trial judge misstated the second element. She told the jury:

In determining whether the conduct was calculated to produce harm, you must be satisfied that Mr. Pinnock either intended to produce the consequences or *alternatively, ought to have known that the consequences were substantially certain to occur*. Has it been established that Mr. Pinnock intended to cause mental suffering on the part of Ms. Boucher, or engaged in conduct that was substantially certain to cause such suffering?

(Emphasis added)

[43] The alternative, that Pinnock could be liable if he "ought to have known" the consequences were substantially certain to occur, is wrong, he contends, because it imports an objective test into the tort. I am inclined to agree that the trial judge misstated the second element. The test is purely subjective as Weiler J.A. said in *Prinzo*, at para. 61:

[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.

See, also, *Piresferreira v. Ayotte*, [\[2010\] O.J. No. 2224](#), [2010 ONCA 384](#), [319 D.L.R. \(4th\) 665](#), at para. 75, leave to appeal to S.C.C. refused [\[2010\] S.C.C.A. No. 283](#).

[44] The plaintiff cannot establish intentional infliction of mental suffering by showing only that the defendant ought to have known that harm would occur. The defendant must have intended to produce the kind of harm that occurred or have known that it was almost certain to occur: see *Piresferreira*, at para. 78.

[45] However, I would not give effect to this error on appeal because Pinnock's trial counsel did not object to the charge at trial, and the error did not result in an injustice.<sup>1</sup>

[46] The trial judge gave counsel a draft of her proposed jury instructions and invited their comments and objections. Neither counsel for Pinnock nor for Wal-Mart objected to the proposed charge on intentional infliction of mental suffering. The trial judge prepared revised instructions, which incorporated some suggestions from counsel, and before delivering her charge, gave counsel a final opportunity to comment. Again, counsel for Pinnock and Wal-Mart did not object. [page492]

[47] In their review of jury instructions in civil cases, appellate courts justifiably have been unsympathetic to objections to a charge made for the first time on appeal. That must be especially so when counsel have been given the opportunity to consider and comment on the charge in advance. Even where the alleged error is one of "misdirection", as is the case here, as opposed to an error of "non-direction", an appellate court will not interfere unless the error produces an injustice: see *K. (G.) v. K. (D.)*, [\[1999\] O.J. No. 1953](#), [122 O.A.C. 36](#) (C.A.); and *Marshall v. Watson Wyatt & Co.* [\(2002\), 57 O.R. \(3d\) 813](#), [\[2002\] O.J. No. 84](#) (C.A.).

[48] The error here was inconsequential; it caused no injustice. The evidence of Samantha Russell, which I reviewed earlier and which the jury almost certainly accepted, shows that Pinnock intended by his conduct to cause the very harm that occurred; he wished to cause Boucher so much stress or mental anguish that she would resign. I would therefore not give effect to Pinnock's submission on the charge.

#### (b) *Liability*

[49] Pinnock submits that no jury acting reasonably could have found him liable for this tort. I do not agree with this submission. Appellate review of a civil jury award is limited. The standard is "unreasonableness" and this standard applies to liability as well as to amount. A civil jury verdict should be set aside only where it is so plainly unreasonable and unjust that no jury, reviewing the evidence as a whole and acting judicially, could have arrived at the verdict: see *Housen v. Nikolaisen*, [\[2002\] 2 S.C.R. 235](#), [\[2002\] S.C.J. No. 31](#), at para. 30. In this case, the evidence led at trial reasonably supported each of the three elements of the tort of intentional infliction of mental suffering.

[50] Pinnock's conduct was flagrant and outrageous. He belittled, humiliated and demeaned Boucher continuously and unrelentingly, often in front of co-workers, for nearly six months.

[51] Pinnock intended to produce the harm that eventually occurred. He wanted to get Boucher to resign. To do so, he wanted to cause her so much emotional distress or mental anguish that she would have no alternative but to quit her job. The evidence of Samantha Russell, which was not challenged in cross-examination, and was reviewed by the trial judge for the jury, supports this element of the tort. Ms. Russell testified that Pinnock was "overjoyed" when Boucher resigned because he had achieved his goal.

[52] Because of Pinnock's conduct, Boucher suffered a visible and provable illness. The stress of Pinnock's conduct caused [page493] physical symptoms: Boucher suffered abdominal pain, constipation and weight loss. She vomited blood and could not eat or sleep. Her appearance became grey and haggard. These physical symptoms were similar to those suffered by the plaintiff in *Prinzo*, and were held in that case to meet the third element of the

tort. And, as in *Prinzo*, Boucher's family doctor confirmed her symptoms and attributed them to the stress of Pinnock's conduct. Although Boucher's symptoms did not last long, that is not surprising. They cleared up once the person who caused them -- Pinnock -- was no longer part of her life.

[53] The jury's finding of liability was reasonable. Appellate intervention is not justified.

(c) *Amount*

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(2) *The award of punitive damages*

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[64] The award of tort damages against Pinnock is very high. The magnitude of this compensatory award carried a strong punitive component. The compensatory award alone provided retribution to Boucher, substantially denounced Pinnock for his conduct, and in the Windsor community would likely deter Pinnock and other senior employees from engaging in similar conduct. An additional award of \$150,000 against an individual employee is not rationally required to achieve these purposes or to punish Pinnock. To give modest effect to the jury's view of Pinnock's misconduct, an award of \$10,000 in punitive damages would be appropriate. Accordingly, I would allow Pinnock's appeal on punitive damages and reduce the jury's award from \$150,000 to \$10,000.

#### D. *Wal-Mart's Appeal*

(1) *The award of aggravated damages*

[65] The jury awarded Boucher \$200,000 for aggravated damages. Wal-Mart submits that the award should be set aside or reduced for two reasons: first, the trial judge failed to caution the jury against double recovery, thus compensating Boucher twice for Pinnock's conduct; and second, \$200,000 is excessive. I would not give effect to Wal-Mart's submission.

(a) *The trial judge's charge*

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[68] Wal-Mart contends that the trial judge erred in her charge because she failed to caution the jury against double recovery. Wal-Mart's argument is that Pinnock's intentional infliction of mental suffering grounded both the tort award against him and the aggravated damages award against Wal-Mart. Boucher should not be compensated twice for the same wrong.

[69] I do not accept Wal-Mart's contention. The caution requested on appeal was not requested by Wal-Mart's counsel at trial. Quite the contrary. Wal-Mart's counsel approved of the trial judge's instructions. As I said earlier, the absence of an objection at trial weighs heavily against a party on appeal. That is especially so where the objection relates to an omission from the charge, as is the case here, not a misstatement of the law or evidence. Only if Wal-Mart could show that the absence of the caution it now seeks caused an injustice could it succeed on this branch of its appeal. And in my opinion, the absence of a caution did not cause an injustice. I say that for three reasons.

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(b) *Amount*

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(2) *The punitive damages award*

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(a) *Independent actionable wrong*

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[84] Moreover, the evidence reasonably supports the jury's finding that Wal-Mart's own conduct was reprehensible. That evidence, which I reviewed earlier, includes Wal-Mart's refusal to take Boucher's complaints about Pinnock seriously, its dismissal of those complaints as unsubstantiated despite substantial evidence to the contrary, its unwillingness to discipline Pinnock or intervene to stop his continuing mistreatment of Boucher, its threatened reprisal against her and its contravention of its workplace policies. Although Wal-Mart may not have deliberately sought Boucher's resignation, on the evidence led at trial that the jury undoubtedly accepted, Wal-Mart's actions and its inaction were reprehensible.

[85] Thus, although the trial judge erred in her instructions on the requirement of an independent actionable wrong, in my view the error was harmless. I would not set aside the punitive damages awarded against Wal-Mart because of this error.

(b) *Reprehensible conduct*

[86] Wal-Mart submits that its conduct was not so reprehensible to attract an award of punitive damages. I disagree. From the evidence I have just outlined, the jury could reasonably conclude that Wal-Mart's conduct toward Boucher was sufficiently reprehensible to merit an award of punitive damages.

(c) *Rationally required*

[87] The jury found Wal-Mart liable for aggravated damages of \$200,000. In addition, Wal-Mart is vicariously liable for the \$100,000 tort award against Pinnock. And Wal-Mart is liable for damages for constructive dismissal and for \$140,000 in trial costs. In the light of these compensatory awards, Wal-Mart submits that an additional punitive damages award of \$1 million is not rationally required to punish it or to give effect to denunciation and deterrence. I accept Wal-Mart's submission.

[88] The very high aggravated damages award by itself sends a significant denunciatory and punitive message and likely will have a deterrent effect. \*\*\*

E. *Boucher's Cross-Appeal*

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F. *Conclusion*

[109] Pinnock and Wal-Mart appeal their liability for and the amount of damages for intentional infliction of mental suffering, aggravated damages and punitive damages awarded by the jury. Boucher cross-appeals from the trial judge's ruling precluding her from pursuing a future loss of income claim beyond the amount provided for in her employment contract.

[110] I would uphold the jury's damages award of \$100,000 against Pinnock for intentional infliction of mental suffering. I would also uphold the jury's aggravated damages award of \$200,000 against Wal-Mart. [page505]

[111] I would, however, allow the appeals on punitive damages. I would reduce the punitive damages award against Pinnock from \$150,000 to \$10,000 and the punitive damages award against Wal-Mart from \$1 million to \$100,000. Especially in the light of the significant compensatory awards against each appellant, those amounts are all that is rationally required to punish Pinnock and Wal-Mart and to denounce and deter their conduct.

[112] I would dismiss Boucher's cross-appeal. The trial judge correctly ruled that as Boucher had not suffered a loss of earning capacity, her loss of future income claim was limited to the amount provided for in her employment contract.

[113] The parties may make brief written submissions on the costs of the appeal and cross-appeal within 20 days of the release of the court's reasons.

[114] HOY A.C.J.O. (dissenting): -- [omitted]

*Appeal allowed in part; cross-appeal dismissed.*



