MEMORANDUM

To: Prof. Gillian Demeyre

From: Eric Grigg

File: George Stapleton

Date: January 21st, 2010

Re: Reasonable Notice & Punitive Damages

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1. Facts

George Stapleton [GS] is a reserved, 26 or 27-year-old man who identifies as a homosexual. He has worked as a full-time sales associate at Happy Go Lucky Toys [HGLT] in London, ON for just short of 5 years and at no time was he required to sign a contract. HGLT is owned and operated by Fred and Betsy Johnson who pride themselves on the family-run nature of their business and they strive to make their staff feel like part of the family. GS kept his private life to himself at work, which led to innocent teasing from Fred Johnson [FJ]. On a Friday night in November, however, GS, after some prompting, shared his sexual orientation with FJ. FJ reacted with a violent outburst in which he publicly fired GS and barred him from entering his store on the erroneous basis that GS was a paedophile. GS left the pub immediately.

The following business day GS received a letter of termination, effective immediately, his outstanding pay, and his termination entitlements under the Ontario *Employment Standards Act* [ESA].[1] Nearly two months after his dismissal, GS has approached us seeking advice on how to proceed with a wrongful dismissal action. It is not expected that HGLT will allege just cause for his termination. Similarly, GS is an employee both under statute and at common law.

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[1] *Employment Standards Act*, S.O. 2000, c. 41 [*ESA*].

2. Issues

You have asked me to consider the potential damages available to GS on the basis of the above facts. I have identified the following issues:

a. Reasonable Notice Quantum

Given the fact that GS' employer, FJ, is not alleging just cause for GS' termination it is not necessary at this point to discuss whether any exists. Instead, the focus will be on the quantum of damages likely to be awarded, if any, for the unjustified termination. This will necessitate a review of the leading cases on the topic as well as canvassing wrongful dismissal cases that are based on analogous facts. On this basis I will provide a range of damages GS might expect to secure.

b. Current Availability of Punitive Damages

The current state of the law on punitive damages in a breach of contract action requires that they be grounded in an "independent actionable wrong" [IAW].[2] It will be necessary to establish whether the manner of GS' dismissal gives rise to such a wrong. This will require an examination of each of the three types of IAWs to determine whether the facts disclose such a wrong as the law currently stands. The current law, however, is not favourable to GS' case.

c. Potential for an Increased Scope for the Award of Punitive Damages

The law as it relates to punitive damages is currently unsettled. This is especially true as it relates to discriminatory behaviour. Regardless of whether an argument can be made for punitive damages within the current framework, there are several avenues of attack that remain unexplored. Primarily, this will involve an attempt to revive the approach taken in *McKinley v.*

[2] *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at ¶ 25 [*Vorvis*].

BC Tel [*McKinley*].[3] If successful, this argument would allow a plaintiff to ground a claim for punitive damages in a breach of a provincial human rights statute. Alternatively, an argument could be made that employment contracts contain, at common law, an implied term of non-discrimination. If true, then the breach of this implied term could provide the basis of a punitive damages claim insofar as it represents a breach of a distinct contractual term.

3. Reasonable Notice

a. Relevant Case Law

The primary question in an action for wrongful dismissal is what would have constituted a reasonable notice period. Given that the employer is contractually obliged, at common law, to provide either a reasonable notice period or pay in lieu of notice, the failure to do so constitutes a breach of contract. The court, then, is looking to provide compensatory damages to the former employee so as to place him in the same position as he would have been had the employer discharged her implied duty. In carrying out this task the courts have looked to several factors that were first outlined by McRuer C.J.O. in *Bardal v. Globe & Mail Ltd.*[4] [*Bardal*] and confirmed by Iacobucci J. in *Machtinger v. HOJ Industries*[5] [*Machtinger*]. These factors include

> "the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant"[6]

These factors contain no guidance, however, as to how to weigh them in any given case. To this end Laskin J.A., in *Minott v. O'Shanter Development Company Ltd.*,[7] warns that placing too much weight on any one factor, such as length of service in that case, undermines the

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[3] *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 [*McKinley*].
[4] *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) at [*Bardal*].
[5] *Machtinger* v. *HOJ Industries Ltd.* (1991), 91 D.L.R. (4th) 491 [*Machtinger*].
[6] *Bardal*, *supra* note 4 at ¶ 21.
[7] *Minott v. O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (C.A.).

intended flexibility of the *Bardal* factors. For similar reasons, Laskin J.A. also denounces the previous approach of simply granting 1 month of notice for every 1 year of service. It becomes necessary, then, to identify prior cases with similar facts in an effort to discern what an appropriate reasonable notice period would have been in the instant case. Such information is provided in Fig. 1 below. Some of the notice periods have been annotated to indicate that other factors were taken into account beyond what is provided in the headings of Fig. 1 and that those factors arguably changed what otherwise would have been a straight application of the facts provided. For example, in *Coultis v. ATS Omex* Searle Deputy J. awarded the respondent a notice period 1-2 months longer than he might otherwise have due to Coultis' back problems.[8] Similarly, in *Tong v. Home Depot of Canada Inc.* the 3-month period, which seems rather low for his age, was the period of reasonable notice negotiated between counsel, not awarded by Echlin J.[9]

Fig. 1

Case Name	Nature of Employment	Age (at dismissal)	Length of Service	Reasonable Notice
Coultis v. ATS Omex[10]	Machine Operator	26	5 yrs, 9 mths	5 months (* high)
Katz v. Canada Mortgage & Lending Corp.[11]	Sales Associate	27	6 mths	4 months (* high)
S & B Wholesale Footwear Ltd. v. McLean[12]	Sales Clerk	27	- 3 yrs	2 months
Isopo v. Kobe Fabrics Ltd.[13]	Salesperson	35	4 yrs, 3 mths	5 months
Cappelli v.	Salesperson	36	4 + yrs	5 months

[8] *Coultis*, *infra* note 10 at ¶ 11.
[9] *Tong*, *infra* note 16 at ¶ 21.
[10] *Coultis v. ATS Omex*, [2005] O.J. No. 1802 (Sup. Ct. (Sm. Cl. Div.)) [*Coultis*].
[11] *Katz v. Canada Mortgage & Lending Corp.*, [2009] O.J. No. 902 (Sup. Ct.).
[12] *S & B Wholesale Footwear Ltd. v. McLean***,** [1983] M.J. No. 393 (Co. Ct.).
[13] *Isopo v. Kobe Fabrics Ltd.*, [1994] O.J. No. 1509 (Prov. Ct. (Gen. Div.)).

Promospec Specialty Advertising Ltd.[14]				
McHugh v. Fitness Canada Health Spa Ltd.[15]	Sales Manager & Sales Representative	46	4 + yrs	6 months
Tong v. Home Depot of Canada Inc.[16]	Sales Associate	54	4 yrs, 6 mths	3 months (* low)
Boyd v. Wright Environmental Management Inc.[17]	Salesperson	55	9 yrs	10 months

b. Application

Given what GS has told us about his situation the following observations can be made. First, his age will likely weigh against him, if it factors in at all, insofar as judges seem to be more likely to hold a younger person readily employable. This, then, will likely be HGLT's strongest argument against a significant reasonable notice quantum. Second, the nature of GS' position as a sales associate again appears to have a neutral, if not detrimental, impact on his case. Searle Deputy J. cites Coultis' significant transferable skills as a reason he might have awarded a lesser notice period.[18] Whether other job opportunities are available to GS in a similar setting as he enjoyed at HGLT will have to be established with reference to the facts of the job market GS now finds himself in. Whether the judge will be assumed to take judicial notice of those facts or they are to be led at trial will have to be considered. Third, and perhaps most importantly, the judge will have to take in account GS' not inconsiderable tenure at HGLT. Though reasonable notice does not and should not necessarily track years of experience one-for-one, it does appear to provide a rough starting point. How much they factor in, however, is up to

[14] *Cappelli v. Promospec Specialty Advertising Ltd.*, [1997] O.J. No. 3441 (Prov. Ct. (Gen. Div.)).
[15] *McHugh v. Fitness Canada Health Spa Ltd.*, [1996] O.J. No. 1698 (Prov. Ct. (Gen. Div.)).
[16] *Tong v. Home Depot of Canada Inc*., [2004] O.J. No. 3458 (Sup. Ct.) [*Tong*].
[17] *Boyd v. Wright Environmental Management Inc.*, [2008] O.J. No. 4649 (C.A.), aff'g [2007] O.J. No. 1236 (Sup. Ct.).
[18] *Coultis*, *supra* note 10 at ¶ 11.

the judge. Fourth, and finally, there are the other factors for which we do not have sufficient information, such as GS' education, any prior experience as a sales associate, and how long he will remain unemployed prior to trial. These factors might add to, but likely will not detract from the quantum awarded. For example, unless GS has a technical post-secondary qualification, his education is not likely to lower the reasonable notice threshold, but if he has less than a high school diploma, it might increase The same could be said for his prior experience, which is probably not significant given the age at which he was hired, and for his period of unemployment prior to trial, which can only be a matter of speculation at this time.

c. Remedy

Before assessing what range of damages GS might expect it is necessary to comment on the issue of mitigation. As in any breach of contract case, the plaintiff in a wrongful dismissal action is under a common law duty to mitigate the losses he has suffered due to his wrongful dismissal, that is, the breach of contract.[19] In this context, the duty is to make all reasonable efforts to secure alternative employment. Failing to due so would be held against the applicant when the judge determines the wrongful dismissal quantum. Provided GS continues to make reasonable and honest efforts at procuring comparable employment or even accepts a lower paying or different position this should not become an issue. Additionally, the burden is on the respondent, HGLT, to prove that the applicant has failed to mitigate his losses.[20]

Given the case law and GS' facts a notice period of between 3 and 6 months, with up to an additional 2 months appears reasonable. The first range takes into account what we know of GS' circumstances: his age, the length and nature of his employment, and the availability of alternative work. The second range accounts for those factors about which there is insufficient

[19] *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324.
[20] *Ibid*. at 331.

information or which cannot be assessed until trial, such as his length of time spent unemployed. It must also be noted, however, that the amount of reasonable notice awarded at trial, if any, will be inclusive of the 4 weeks pay GS has already received from HGLT in discharge of their obligations under the ESA.[21] The total amount GS might expect to secure from his wrongful dismissal action, then, is actually between 2 and 5 months extra pay and perhaps another 2 if the judge holds other factors to be present.

4. Punitive Damages

Three issues bear on the question of punitive damages in GS' case. First, to establish the strength of GS' claim an analysis of the current state of the law will be required. Second, starting at the bottom, with a discussion of the nature of private law and punitive damages, the potential for an increased scope in the circumstances that give rise to an award of punitive damages will become apparent. Third, and finally, a review of the factors that will affect the quantum of a potential award of punitive damages will conclude with a range of punitive damages that GS might expect to receive. With regard to the quantum, the relevant factors will be the same regardless of which IAW, if any at all, it springs from. This is because an award of punitive damages reflects the defendant's misconduct, not the plaintiff's loss. In this respect, at least, how the defendant's misconduct is characterized within the current IAW framework does not change its other qualities.

a. Current State of the Law

In *Honda Canada Inc. v. Keays* [*Keays*] [22] Bastarache J. affirmed Binnie J.'s approach to punitive damages in *Whiten v. Pilot Insurance Co.* [*Whiten*].[23] *Whiten* in turn built upon the

[21] *ESA*, supra note 1, ss. 54, 57, 58, 61.
[22] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 [*Keays*].
[23] *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 [*Whiten*].

holding in *Voris* insofar as it maintains, though expands, McIntyre J.'s requirement of an IAW as the basis of a punitive damages claim. Post-*Whiten* there are three such IAWs recognized in Canadian law. It should also be noted that given GS' lack of emotional or mental distress following his termination, it is unnecessary to discuss aggravated damages formerly known as *Wallace* damages. If they were present, they would complicate the analysis of punitive damages insofar as they are often both linked to the same objectionable action by the defendant and can lead to an apprehension of double-compensation, something Bastarache J. is adamant to avoid.[24]

i. Tort

The most obvious and least theoretically problematic IAW on which to base a punitive damage claim is a tort. If you were physically accosted at the time of the breach of contract, then the respondent's actions clearly demand more of a response than if he had breached the contract with civility and decorum. With this in mind, however, there are few, if any, torts that could be made out on the facts of GS' case. Two of the most obvious are also the least useful. A tort of discrimination would be fairly easy to make out on these facts, if it existed in Canada.[25] Similarly, a tort of privacy could give rise to an IAW insofar as FJ, through his outburst, shared GS' private information with an entire pub. As with the tort of discrimination, however, no tort of privacy has been recognized in Canada, though it is well established in New Zealand that "disclosure of private facts where there is a reasonable expectation of privacy and disclosure of the information would be highly offensive to a reasonable person" can found tortious liability.[26]

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[24] *Keays*, *supra* note 22 at ¶ 60. See also *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] 60 O.R. (3d) 474, C.A.).
[25] Philip H. Osborne, *The Law of Torts*, 3d ed. (Toronto: Irwin Law 2007) at 258-9.
[26] *Ibid*. at 252-6. See *Hosking v. Runting*, 2005, 1 NZLR 11 (CA).

The tort of intentional infliction of nervous shock, though well established, does not fit our facts insofar as there is no evidence of FJ's comments disturbing our stoic client.[27]

The best fit for GS' circumstances is found in the tort of defamation[28] generally and slander[29] specifically. To make out an action for defamation it must be proven that there was a defamatory statement that referred to the plaintiff by any mode of communication that might cause 'right-thinking members' of society to develop a negative opinion of the reputation of the plaintiff. It must be noted that while it is no defence to claim that those who encountered the defamatory statement did not actually change their opinions of the plaintiff, it is a defence to claim that the statement was made in either anger or haste. Similarly, though deliberate or negligent disclosure is tortious, accidental disclosure is not, but in any event the standard of liability is strict. Defamatory statements include "disparaging remarks about a persons character" or allegations that "cause a person to be shunned, ridiculed, hated, pitied, or held in contempt, such as allegations of racism, venereal disease, poverty, and immortality."[30]

Given that defamation is a tort about the plaintiff's reputation and not his mental or emotional distress, the fact that GS does not seem perturbed by FJ's statement is immaterial. Instead, the question turns on whether FJ's statements were of the requisite character and whether there are any defences open to him. The former question can be answered in the affirmative insofar as the allegation of paedophilia alone carries a serious social stigma. The answer to the latter question is less clear. FJ's disclosure was not accidental, but it was certainly made in anger. Exactly what kind of circumstances are captured by the defence of hasty and

[27] *Ibid*. at 250-1.
[28] *Ibid*. at 386-92.
[29] *Ibid*. at 393.
[30] *Ibid*. at 388.

angry statements would require further research, but it appears safe to conclude that a tortious IAW is not GS' strongest argument for punitive damages.

ii. Breach of a Distinct Contractual Term

Binnie J.'s holding in *Whiten* affirms the need for an IAW, but extends the scope of the concept to include breaches of distinct contractual terms. The result is that the plaintiff need not allege a tort or breach of statute in order to ground a claim for punitive damages. Instead, the plaintiff needs to demonstrate that the defendant breached both the term complained off in the action for compensatory damages as well as another distinct contractual term. In *Whiten* Binnie J. held that the insurance contract at issue contained an implied term of good faith and that its breach, and not a tort or breach of statute, served as the legal foundation for the jury's punitive damages award.[31]

What is not clear from *Whiten* is whether such an implied term is only to be found in insurance contracts or if it is to be found in contracts more generally. This type of IAW is of particular interest in GS' case due to the fact that his is an employment contract at common law. As such, the analysis is not guided strictly by the contract as it was reduced to writing, but is rather more subject to judicial interpretation. In this respect, it should be noted that the nature of the insurance contract is what is said to give rise to the implied contractual duty of good faith. Binnie J. finds that between the position of vulnerability that insureds find themselves in and the 'peace of mind' nature of insurance contracts that such a contract duty is always implicit.[32] If the implied duty is a product of the power imbalance between the contracting parties, then it would not be much of a leap to apply the same principle to the realm of employment contracts. Indeed,

[31] *Whiten*, *supra* note 23 at ¶ 79.
[32] *Ibid*. at ¶ 129.

the one-sided nature of such contracts was a topic of concern for Iacobucci J. in *Machtinger*.[33] This is especially true for those who engage in paid work without a written contract. As to the 'peace of mind' nature of insurance contracts, it might be argued that long-term employment is sought for a similar reason. Perhaps such an implied duty does not exist in short-term contract employment, but in long-term employment the presumption is that the employment will continue subject only to the employee's good behaviour and the employer's financial success. It must be cautioned, however, that this particular application was not well developed in the majority decision in *Keays*,[34] though LeBel J., dissenting, suggests that the Supreme Court of Canada [SCC] has accepted the proposition that a contract for employment is a good faith one.[35]

If such an implied term of good faith is held to be part of, at least common law, employment contracts, then it would have to be argued that such a duty included, among other things, a duty of non-discrimination. *Whiten* suggests that good faith includes, at minimum, a prohibition against hard bargaining. It is far less clear whether it includes a requirement to base employment related decisions only upon relevant and rationally connected grounds. Perhaps the reasoning behind *Empress Towers v. Bank of Nova Scotia*[36] on the one hand and *Mannpar Enterprises Ltd v Canada*[37] on the other could guide this approach. Read together, these cases suggest that a contractual duty of good faith will be enforced where there is an objective benchmark against which to measure the parties' efforts. In this sense, at least, it might be possible to establish a breach of a distinct contractual term, insofar as FJ's termination of GS's

[33] *Machtinger*, *supra* note 5 at 22-4.
[34] *Keays*, *supra* note 22 at ¶ 75-8.
[35] *Ibid*. at ¶ 81.
[36] *Empress Towers v. Bank of Nova Scotia* (1991), 73 D.L.R. (4th) 400 (B.C. C.A.).
[37] *Mannpar Enterprises Ltd v. Canada* (1999), 173 D.L.R. (4th) 243 (B.C. C.A.).

employment was not based in anyway on performance-related issues and, therefore, has no rational basis in their contract. This argument will be a tenuous at best.

iii. Breach of Statute

The ability to found a punitive damages claim upon a breach of statute remains possible in Canada, though it is not as open as perhaps it once was. By affirming the holding in *Seneca College v. Bhadauria* [*Bhadauria*][38] *Keays* closed off the possibility of using a breach of a human rights code as the basis of a claim for punitive damages.[39] The argument in *Keays* is that human rights codes, specifically the Ontario statute, provide a comprehensive scheme for dealing with discriminatory actions. Bastarache J. relied on *Bhadauria* for the proposition that such a scheme precludes the finding of either an independent tort of discrimination or the ability to found a civil action on such a breach.[40] The message, then, is clear: discrimination is to be dealt with through the established administrative framework, not, at least initially, through the common law courts. It must noted, however, that Bastarache J. also felt that it was not even necessary to consider discrimination in Keays' case insofar as the actions of Honda did not disclose an actionable breach under s. 5 of the Ontario *Human Rights Code* [*Code*].[41] In this sense at least, *Keays* should not be taken as an exhaustive and definitive treatment of the place of discrimination and breaches of human rights legislation within the larger topic of punitive damages. As Bastarache J. notes, the Ontario Court of Appeal found *McKinley* to be a persuasive holding to the contrary.[42]

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[38] *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 [*Bhadauria*].
[39] *Keays*, *supra* note 22 at ¶ 63-7.
[40] *Ibid*. at ¶ 64.
[41] *Human Rights Code*, R.S.O. 1990, c. H-19 [*Code*].
[42] *Keays*, *supra* note 22 at ¶ 64.

b. The Scope of Punitive Damages

i. In Theory

The private law, we are told, is a mechanism for resolving disputes between two private individuals. What is at issue is not of national concern or significance and in no way imputes social disapprobation. Indeed, this is the conceptual basis of compensatory damages. The question is not 'how bad was the defendant,' but 'how much did the plaintiff lose?' As Prof. Weinrib suggests, the private law is about corrective justice.[43] The argument is that both parties are the bearers of certain rights that other individuals are under a duty to respect. When an individual fails in her duty and injures another's right[44] she has not only injured that person or their property, but also created an imbalanced in their social relationship. In effect, the tortfeasor, for example, now enjoys more rights than the plaintiff. In an attempt to re-establish a relationship of equality between these individuals the defendant, if found responsible, must compensate the plaintiff in such a way as to repair, not necessarily his loss, but their relationship by re-balancing their rights.

This theory receives its purest application in contract where the parties are under no duty or obligation other than those they freely agreed to in the contract. This, it is suggested, is in contrast to tort where a particularly callous or malicious defendant might expect to pay more than is strictly necessary to compensate.[45] Furthermore, most duties in tort are duties that we are all under, more or less, all the time. The implicit assumption, then, is that it is somehow less 'private' than contract law. Whether this is a misunderstanding of tort or contract law, is beyond the scope of this memo. This confusion regarding the theoretical foundation and purpose of

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[43] Ernest J. Weinrib *The Idea of Private Law* (1995) See specifically, "The Passing of Palsgraf?" (2001), 54 Vanderbilt Law Review 803, at 805.

[44] Not their person or things in which they hold property, it must be noted, but their right. In this sense, at least, it is meant to be an objective assessment.

[45] *Vorvis*, *supra* note 2 at ¶ 26.

private law generally and contract law specifically gives rise to many of the difficulties in justifying punitive damages in a 'pure' breach of contract case.

ii. Nature of Punitive Damages

Punitive damages are said to be reserved for conduct that is "harsh, vindictive, reprehensible and malicious" and "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment"[46] or simply behaviour that "offends the court's sense of decency."[47] In fact, we are told that the purpose of punitive damages is "retribution, deterrence and denunciation"[48] and that they should "sting."[49] This in turn is based on the proposition that punishment is not the sole preserve of criminal law.[50] Finally, punitive damages are concerned with the defendant's conduct and not the plaintiff's loss.[51]

Punitive damages, then, appear an odd fit as a remedy for a private action. Indeed, Prof. Swan makes a forceful argument against punitive damages as they exist post-*Whiten*.[52] While many of his criticisms are levelled at the particulars of that holding, he does suggest several problems with an award of punitive damages in general. Why, for example, does the private law seek to punish. Even if it is accepted as a legitimate purpose of private law, how it is unclear that a single plaintiff should recover for industry-wide malfeasance. The concern is that either other would-be plaintiffs are barred from bring an action for their own loss on the basis of *res judicata* or else the defendant is now subject to multiple orders for punitive damages for the same alleged

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[46] *Keays*, *supra* note 22 at ¶ 68 citing *Vorvis*, *supra* note 2 at ¶ 1108.
[47] *Whiten*, *supra* note 23 at ¶ 36 citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.
[48] *Ibid*. at ¶ 43 citing *Wilkes v. Wood* (1763), Lofft. 1, 98 E.R. 489.
[49] *Ibid*. at ¶ 32 citing (1999), 42 O.R. (3d) 641 (C.A.), Laskin J.A., dissenting (in part).
[50] *Ibid*. at ¶ 37.
[51] *Ibid. at* ¶ 73.
[52] John Swan, "Punitive Damages for Breach of Contract: A Remedy in Search of a Justification" (2004) 29 Queen's L.J. 596 [Swan, "Punitive Damages"].

wrongs. Furthermore, if the SCC is prepared to accept the concept of efficient breach,[53] then it is unclear as to how it should reconcile this concept with an award of punitive damages for a 'bad faith' breach. Sawn also takes issue with the authority that Bastarache J. relied on for the purpose justifying the use of punitive damages at common law.[54] Not only is the case very old, but it is both a tort case and politically charged and, as such, serves as poor foundation in a 21st Century contract case. Finally, Swan suggests that mechanisms already exist for compensating 'public interest' plaintiffs. If, in the judge's opinion, a plaintiff has performed a public service by brining a pervasive offender to the attention of the courts, then she is quite capable of awarding full costs in an effort to indemnify such plaintiffs. Punitive damages, in Canada at least, do not fill this role.

Not all academic treatment of punitive damages in breach of contract is negative, however. Prof. McCamus suggests there is no theoretical reason to require a 'double-breach' for punitive damages in contract when a single breach is sufficient in tort.[55] If both are private law subjects and if both are engaged in corrective justice, then it does not appear necessary to make the distinction. Wilson J. dissenting in *Vorvis* goes further.[56] She questions why duties owed to society at large do not have a requirement of an additional wrong, an insult to injury, while duties owed to a very specific class of people, other parties to the contract, do. The suggestion is that it should be implied in contractual relations that you owe a certain level of care and respect to those you are in a specific and deliberate relationship with; perhaps more so than you do to complete strangers when you are driving your car. It is also worth noting that in tort the courts have not had trouble discriminating between hard bargaining and abuse of rights in the nuisance

[53] *Ibid*. at 639-41.
[54] *Ibid*. at 608-15.
[55] John D. McCamus, "Prometheus Bound or Lose Cannon? Punitive Damages for Pure Breach of Contract Canada" (2004) 41 San Diego L. Rev. 1491 at 1504 [McCamus, "Prometheus"].
[56] *Vorvis*, *supra* note 2 at ¶ 57, Wilson J., dissenting.

context.[57] In this sense, then, punitive damages recognize that we expect a certain level of civility and care to be taken when one private individual interacts with another. Fail to do so and you will be called to account for more than just the loss you caused.

A theoretical reconciliation between punitive damages and the private law might help shed some light upon the availability of punitive damages in GS' case. Much is made of the fact that the purpose the private law is to correct imbalances in rights and duties that develop between private individuals. It is far from clear, however, that that is the only thing going on. As Swan is so eager to suggest, the 21st Century is quite a different place than even the mid-20th Century was.[58] In fact, there is less and less truly 'private' space left in modern Canadian society. It might be the case that contracts between individuals of equal power and standing will remain a 'private' affair, but it is not clear that contracts in explicitly regulated areas such as insurance and employment are of the same character. In this sense at least punitive damages fulfil the role of re-balancing, not just the plaintiff's rights, but the rights of similar people. Why the plaintiff, and not the class, receives the windfall remains theoretically problematic. The fact remains, however, that the SCC has established that punitive damages have a role to play in actions for breach of contract, provided the requisite IAW is made out. With this in mind, we can turn to two IAWs that may allow punitive damages a greater scope than they currently enjoy in matters of discrimination and wrongful termination.

iii. Breach of a Distinct Contractual Term

The easiest and most obvious way to establish an IAW in a breach of contract action is to establish a breach of an independent and discrete contractual term. In *Whiten* the SCC went so far as to imply a term of good faith. An analogous approach would be to adopt the Women's

[57] *The Mayor, etc. of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) as compared with *Hollywood Silver Fox Farm Ltd. v. Emmett*, [1936] 2 K.B. 408 (C.A.).
[58] Swan, "Punitive Damages" *supra* note 52 at 613.

Legal Education and Action Fund's (LEAF) proposal that a term of non-discrimination be implied in employment contracts.[59] This would achieve the desired result of providing a basis for punitive damages in the case of dismissal on the basis of discrimination in a much cleaner manner than if non-discrimination is forced into the implied duty of good faith. The argument is slightly different, however, in that LEAF asserts that the real problem is a jurisdictional one. The victim of the discriminatory dismissal is forced to choose whether to launch one action or two. By forcing victims of discrimination to file two claims to be fully remedied the administration of justice is frustrated. Indeed, LEAF's complaint could have just as easily applied to the legal landscape prior to the *Judicature Acts*.[60]

An implied term of non-discrimination would avoid the concerns in *Bhadauria* insofar as there would remain no independent cause of action based on discrimination. Rather, the plaintiff would have to establish a breach of an employment contract in order to seek a remedy. A victim of pre-employment or any other kind of discrimination would still be required to seek redress at the relevant human rights tribunal. The attractiveness of this solution is that it allows the courts to signal society's disapproval of the grounds for dismissal without forcing the plaintiff to jump through hoops. Critics, however, will note that the SCC was apparently not persuaded by LEAF's arguments during the *Keays* hearing. This cannot be denied, but that might have more to do with the facts of the case than the merits of the argument. Bastarache J. holds that Keays' case does not disclose a breach of s. 5 of the *Code* and, as such, does not have a *bona fide* case of discrimination on which to base his decision.[61] Had Keays been more clearly a victim of

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[59] Chris Donovan, "*Honda v. Keays*: LEAF argues that courts need more complete jurisdiction" *The Court* (28 February 2008) online: thecourt.ca <http://www.thecourt.ca/2008/02/28/honda-v-keays-leaf-argues-that-courts-need-more-complete-jurisdiction/>.

[60] *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict, c. 66 and *Supreme Court of Judicature Act, 1875* (U.K.), 38 & 9 Vict, c. 77.

[61] *Keays*, *supra* note 22 at ¶ 67.

discrimination, Bastarache J. might have been forced to address LEAF's submission more thoroughly.

iv. Breach of Statute

The more interesting approach to finding an IAW in GS' case is to broach the subject of a breach of the *Code* as the basis for an award of punitive damages. Though Bastarache J. holds that *Bhadauria* conclusively rules out a breach of a human rights code as an IAW it is possible that he might have overreached. First, while human rights legislation does provide a fairly comprehensive system of compensation it does not share the same purpose as punitive damages. The *Code*, at least, is purely remedial.[62] It attempts to provide a victim of discrimination with a certain measure of redress for the pain and humiliation they suffered. It does not attempt retribution, deterrence, or denunciation. It also focuses on the plaintiff's loss and not, as punitive damages would, on the defendant's conduct. It is also worth noting that in *Whiten* criminal proceedings are not taken to be an absolute bar to a claim for punitive damages.[63] Rather, we are merely warned that other forms of prior or pending punishment are to be taken into account when assessing the quantum. In fact, in *Whiten* Binnie J. suggests that sometimes prior punishments will not be enough to truly display society's disapproval of the defendant. If a criminal conviction does not preclude an award of punitive damages, then it is unclear why a remedial administrative ruling should carry significantly more weight.

A more radical suggestion is provided by McCamus to the effect that the judicial insistence on an IAW really stems from a misunderstanding of McIntyre J. in *Vorvis*.[64] Instead of establishing what has now been accepted as the necessity of an IAW to found a claim for

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[62] *Code*, *supra* note 41 ss. 45.2, 45.3.
[63] *Whiten*, *supra* note 23 at ¶ 69.
[64] McCamus, "Prometheus" *supra* note 55 at 1498.

punitive damages, McCamus suggests that McIntyre J. was simply noting that often the "harsh, vindictive, reprehensible and malicious" conduct of the employer is in the manner of supervision that precedes the wrongful dismissal and not in the manner of the dismissal itself. Indeed, McCamus suggests that

> "it may be difficult to imagine circumstances where the manner of giving unreasonable notice is so offensive as to warrant an award of punitive damages, nothing in the reasoning of Justice McIntyre in *Vorvis* precludes this possibility."[65]

If such circumstances exist, as they might for GS, and if the other requirements for punitive damages are made out, then it is not clear that *Vorvis* precludes an award of punitive damages in the absence of an IAW. In this sense, then, the court would be able to take notice of the discriminatory nature of the dismissal and, on that basis alone, display their disapproval with an award of punitive damages. To be sure, the court might well make reference to s. 5 of the *Code* to provide an objective benchmark for what constitutes discrimination, but in doing so it would not be recognizing it as an IAW *per se*.

A third, and far less radical, alternative would be to argue that *Bhadauria* and *McKinley* must be read together in such a way as to give effect to both. *Bhadauria* is taken to stand for the position that there is no independent tort of discrimination at common law in Canada and that a breach of a human rights statute cannot serve as the basis of an action for a common law remedy.[66] This is not what is at issue in a claim for punitive damages, however. In fact, in *McKinley* Iacobucci J. cites *Collinson v. William E. Coutts Co.*[67] for the proposition that, independent the facts of the case, a breach of a human rights statute can serve as the basis of an

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[65] *Ibid*.
[66] *Bhadauria*, *supra* note 38 at 188.
[67] *Collinson v. William E. Coutts Co*., [1995] B.C.J. No. 2766 (S.C.) (QL).

action for punitive damages.[68] The holding in *Vorvis*, and those that affirm it, lends further credence to this suggestion. Much has been made of the fact that McIntyre J. wrote 'independent actionable wrong' and not an 'independent tort.'[69] Similarly, by holding that breaches of distinct contractual terms, such as a duty of good faith, can constitute such an IAW *Whiten* implies that the test of what is an 'actionable wrong' is not whether the wrong could serve as the basis of a cause of action in a common law court. If it were, then the breach of an distinct contractual provision would only speak to further compensatory, and not punitive, damages. Finally, Lamer C.J.C.'s own language is also illustrative on the relationship between *Bhadauria* and *McKinley*:

> It is quite a different thing … to confer an economic benefit upon certain persons, *with whom the alleged obligor has no connection*, and solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach.[70]

This implies that where there is a connection between the parties, such as a pre-existing contractual relationship, a breach of a human rights code could, on the basis of *McKinley*, constitute an IAW within the meaning of the term in *Vorvis*. On this analysis, Bastarache J.'s application of *Bhadauria* is both over inclusive and not supported by its language. Furthermore, his failure to comprehensively deal with *McKinley* leaves the relationship between the two an open question; a question that might be exploited to GS' advantage.

c. Remedy

Attempting to assess the quantum of damages that GS might expect if able to establish grounds for a punitive damages claim is difficult at best. The Ontario Court of Appeal has signalled its distaste for punitive damage awards.[71] This in turn is highly significant due to the

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[68] *McKinley*, *supra* note 3 at ¶ 89.
[69] *Whiten*, *supra* note 23 ¶ 79-83.
[70] *Bhadauria*, *supra* note 38 at189, emphasis added.
[71] McCamus, "Prometheus" *supra* note 55 at 1509-10.

large and discretionary review powers granted to appellate courts in *Whiten*.[72] In total Bastarache J. establishes 11 guidelines to be followed when awarding punitive damages.[73] While they will all come to bear on any judge's decision to grant punitive damages, there are several of particular interest given the facts of GS' case. It is clear, I think, that FJ's conduct meets the requirement of rule 2 insofar as his actions were both arbitrary and highly reprehensible and represent a marked departure from ordinary standards of decent behaviour. Similarly, rule 5 suggests that punitive damages are appropriate where the defendant's misconduct might go un- or under-punished and rule 7 notes that punitive damages have a place in deterring future conduct by the defendant and those like him as well as marking society's disapproval for such actions. This might be a double-edged sword, however, as it is unclear that, without a basis in retribution, a jury will find it necessary to deter FJ insofar as his ability to perpetrate similar acts in the future is necessarily limited by the size of his business. Punitive damages in this case, then, must be argued on a truly 'exemplary' basis insofar as the deterrence is aimed no so much at FJ as it is at the London, or Ontario, business community as a whole. Similarly, rule 5 is significant insofar as any compensation that GS might receive from an human rights commission might lack the 'sting' needed to send a message on behalf of all homosexual employees.

The *Whiten* guidelines do not only favour GS, however, as rule 3 demonstrates. An award of punitive damages must be proportionate to the harm caused, the misconduct committed, the vulnerability of the plaintiff, and the profit, if any, the defendant made from his actions. It must be noted that firing an employee of a toy store in November cannot be a profitable choice. Similarly, assuming that GS' action for wrongful dismissal is successful and given that GS is claiming no damages on the basis of mental distress or similar aggravating factors, it is unclear

[72] *Whiten*, *supra* note 23 at ¶100-6.
[73] *Ibid*. *supra* at 599-60.

how much 'harm' GS suffered. That said, GS' vulnerability as an employee and the 'misconduct' quality of FJ's actions do suggest that rule 3 will not act as a total bar to GS' claim. Rule 8 requires that punitive damages only be awarded where the compensatory damages do not carry a sufficiently 'punitive' character. This will depend on what quantum GS receives for his wrongful dismissal action and on what factors are considered therein. It should be noted, however, that, as above, compensatory damages in a contract action are not likely to stray far from what the plaintiff would have had but for the defendant's breach. If the court accepts this characterization, then it is likely that the quantum for the wrongful dismissal action will not be held to be punitive at all.

On balance, then, there exists a possibility of punitive damages being awarded. The award, however, will likely be exemplary in more than one sense. If a judge is meant to take the defendant's means into account, then it will likely not require much at all to make FJ's choice sting. Indeed, if the court decides to express society's abhorrence of discrimination on the basis of sexual orientation, then GS is likely to receive only a token amount in punitive damages. While this does not pose a conceptual problem for the private law, it might make the effort less appealing to GS. Given the extraordinary nature of punitive damages it would be unlikely that GS would be awarded more than $7000 for FJ's conduct. In all likelihood, it will be closer to $2000.

5. Conclusion

a. Reasonable Notice Quantum

On balance, GS should expect to receive between 3 and 6 months in his wrongful dismissal action on the basis of an analysis of the *Bardal* factors and a survey of analogous cases. If the judge identifies other *Bardal* factors to be present in his case, GS might expect an

additional month or two, but this would be unexpected as the facts are stated in this memo. Given that GS has already received his termination pay under the ESA, any court ordered award would be made less the amount he has already received.

b. Current Availability of Punitive Damages

The current state of law of punitive damages does not favour GS' case. If the holding in *Keays* is taken as the appropriate application of *Bhadauria*, then GS is bared from relying on a breach of an human rights statute as the basis of his claim for punitive damages. Similarly, an attempt to make out a tort as the basis of his claim is weak at best. If other torts, such as privacy or discrimination, were available to him, his case would be clearer. Even the use of defamation is problematic due to the nature of FJ's outburst. GS might have a basis for his claim if he were able to establish (1) that the duty of good faith in *Whiten* is also to be implied in, at least, common law employment contracts of an indefinite duration and (2) that a judge could be persuaded that such a duty contains an obligation of non-discrimination in carrying out that contract. This, however, is far from certain.

c. Potential for an Increased Scope for an Award of Punitive Damages

Though obviously untested, GS' best chance for punitive damages will be to argue that the current state of the law as it relates to punitive damages is wrong. He can either argue that *Vorvis* has been misapplied insofar as it has been held to require an IAW or he can assert that *Bhadauria* was misapplied in *Keays*. Of the two, the latter is the stronger argument as it would represent the smallest change to the law. If a breach of a human rights statute is taken to fall within the meaning of an IAW, as in *McKinley*, then it is fairly apparent that GS can establish such a breach. The only question, then, will be of the quantum and that remains hard to judge, but will likely be between $2000 and $7000.