C.A. No. 125259

NOVA SCOTIA COURT OF APPEAL

Hallett, Freeman and Roscoe JJ.A.

Cite as: Healthvision Corporation v. Killorn, 1997 NSCA 161

BETWEEN:

HEALTHVISION CORPORATION, a body corporate formerly known as HCS HEALTHCARE SYSTEMS INC., a body corporate Appellant - and - J. COLLEEN KILLORN Respondent	)	William L. Ryan, Q.C. and Nancy Rubin for the Appellant Raymond S. Riddell for the Respondent Appeal Heard: September 10, 1996 Judgment Delivered: January 10th, 1997

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Roscoe, J.A. concurring; and, Freeman, J.A. dissenting.

FREEMAN, J.A.: (Dissenting)

The appellant Healthvision Corporation, which sells computer systems including hardware and software to hospitals and other health care facilities, has appealed a jury award of $60,000 damages for mental distress in a wrongful dismissal action brought by the respondent.

The Facts

The respondent Colleen Killorn, then Colleen Clark, was hired November 9, 1989, as account manager with a sales territory consisting of the four Atlantic provinces. At that time the appellant had no history of sales in the Atlantic Provinces and it was expected to take her three or four years to develop the territory. Her responsibilities, as the only account manager, in the territory included not only making sales contacts but co-ordinating the activities of the specialists within the company who had to design and build the system required by the customer.

Her conditions of employment were set out in a sales compensation plan which was automatically renewable each March 31st if not renegotiated at the instance of either party as of that date. The plan called for a base salary of $40,000 plus commissions of five per cent of software license revenue and of the gross margin on new hardware accounts and two per cent on existing hardware accounts. The sales compensation plan had not been changed prior to March 31, 1993.

In 1988 the province of Prince Edward Island had opened negotiations with a number of suppliers, including the appellant, for a computer system to serve all Island hospitals. That proposal was known both to the company and to Ms. Killorn through her previous employment. It was not specifically referred to in her employment contract. Both Ms. Killorn and the company learned in February, 1993, that the P.E.I. negotiating committee had chosen the Healthvision proposal. This

was confirmed in March, 1993. Ms. Killorn anticipated a commission of $90,000 because the pending sale was within her sales territory.

Ms. Killorn played a role in securing the contract and had contacts with the P.E.I. negotiating committee but the sale was co-ordinated through the Vancouver office and David Wilson, vice-president of marketing and sales, was involved in the negotiations. In mid-1992, without notifying Ms. Killorn, the appellant had assigned responsibility for the P.E.I. contract to Mr. Wilson.

As of March 16, 1993, shortly after learning that its P.E.I. proposal had succeeded, the appellant sent Ms. Killorn "a new offer of employment", essential parts of which were non-negotiable. It provided for a four percent commission on software licenses and the net margin on hardware sales, plus a scheme of cash bonuses for exceeding revenue targets which were not stated. It was signed by Bob Brand, vice president of finance and administration and Mr. Wilson, her immediate superior.

Ms. Killorn did not sign the offer. She telephoned Mr. Wilson for clarification as to commissions and cash bonuses and was told that Prince Edward Island was his target, not hers, and that the commissions were to be split with others. Ms. Killorn sent Mr. Wilson a memo asking for clarification and received no response. She met with Mr. Wilson in Toronto and was told she would not be receiving the full commission for Prince Edward Island, but he would not elaborate. She repeated her memo asking for clarification and received a fax message advising her that her target for the year, to qualify her for a cash bonus, was $4,700,000 in product sales, excluding Prince Edward Island. Ms. Killorn wrote to Mr. Wilson May 13, 1993, expressing concerns that her target was unrealistically high and received no response.

The company was aware of Ms. Killorn's expectations from the P.E.I. contract, but at no point did anyone discuss them forthrightly with her or explain the company's position. Ms. Killorn attempted to discuss the matter with Mr. Wilson at a sales conference in British Columbia in June, 1993, but found him "agitated" toward her and unwilling to deal with her concerns. She said she was upset with Mr. Wilson's unwillingness to communicate with her and feeling crushed.

Ms. Killorn testified she had no previous emotional difficulties but had become increasingly upset when no one in the company would communicate with her about the altered sales compensation plan. Dr. Colin Davey, her physician, noted "depression symptoms" in Ms. Killorn on an office visit May 14, 1993, and prescribed Zoloft, an anti-depressant with numerous side-effects. Two weeks later, on May 28th, she was again diagnosed with depression and told to stay on the Zoloft for another month. On June 7th Dr. Davey spoke by telephone with Ms. Killorn in her hotel room in Vancouver and followed this with a faxed letter advising that she required time off for medical reasons.

She personally advised the company at the Vancouver office on June 7, 1993, that she needed time off. Without informing her, the company sent letters to all of her prospective customers advising that she was going to be away for an extended period of time. Dr. Davey saw Ms. Killorn on July 6, 1993, and advised her she could return to work. When she called the company on that date to say that she was coming back she was told her return would have to be "co-ordinated" through Mr. Wilson and the Toronto office because of the letters. She returned to work on July 9, 1993.

She testified that she hoped to remain with Healthvision indefinitely, but her dealings with Mr. Wilson made her feel insecure about her future with that

company. She wrote two prospective employers, enclosing resumes, on July 6 and July 10, 1993.

She was advised that she would be visited in her Halifax office by Ms. Lucy McKiernan, the company's director of administration, for a physical audit. The real purpose of Ms. McKiernan's visit was to deliver a written notice of termination, which she did on July 12, 1993. The letter of dismissal offered $14,000 severance pay, the equivalent of four months' notice based on the salary element of her compensation package. Her office was stripped of everything but the desk and telephone and all files, including her notes, were removed to the Toronto office. She rejected the compensation offer and brought action for wrongful dismissal.

About the same time a letter was sent from the P.E.I. Joint Management Team confirming its intention to finalize negotiations with Healthvision for a contract to be worth approximately $2,770,282 and the hospital in Yarmouth, N.S. confirmed its intention to purchase $365,000 of Healthvision's product.

Neither of these sales became final contracts within ninety days of Ms. Killorn's dismissal and she was not entitled to commissions on them. There was evidence that Mr. Wilson would receive a "benefit" from the Prince Edward Island transaction.

Ms. Killorn had been given no indication that the company had any concerns with her performance, and she had no prior warning that she might be dismissed. She was given no reason for her dismissal and her employment record falsely stated that she was terminated because of a shortage of work.

"To say I was crushed would be a complete understatement . . ." Ms. Killorn testified. "I just could not believe that this could happen."

She again sought medical advice and was on medication for depression

at the time of the trial. She had not found alternate employment.

Her husband testified that he first noticed a change in her emotional and mental state in March of 1993 when she received the non-negotiable offer of a changed compensation package and could not get a response from the company to her concerns. She went into a depression, sliding to emotional depths he had not seen in her before. She did not eat. She had fits of crying and bouts of rage. She ceased communicating. Her relationship with her husband and children suffered. She was still showing ill effects at the time of trial.

The Jury's Conclusion

The jury found that Ms. Killorn was entitled to six months' notice. It also found that she suffered mental distress as a result of conduct arising out of the dismissal, "other than the dismissal itself," which would warrant additional damages of $60,000 for mental distress. The jury described this conduct as follows:

> The conduct of Health Vision Corp. was high handed and callous. Mrs. Killorn was misled into believing her office was being audited when in fact she was also being terminated, this resulted in further financial turmoil, added mental distress to her and her family.

There can be little doubt the jury had the lost commissions in mind, although the language used is not specific on the point. The jury had heard effective addresses by both counsel in which the effect of termination on the commissions was a central issue. While the appellant did not allege incompetence nor suggest that Ms. Killorn was dismissed for cause, its counsel, Mr. Ryan, down played the value of her efforts and emphasized that she had not met her sales objectives. Mr. Riddell on her behalf emphasized that Ms. Killorn had been unfairly treated during the chain of events that began with the revival of interest in the Prince Edward Island transaction in February, 1993, and ended with her termination. The genesis

of the language used by the jury can be found in his remarks:

> In a nutshell, the biggest nutshell, is Colleen got ripped off and she was treated really shabbily by this company. I think she was treated in a high-handed and callous manner. That's my theory. And she got ripped off.

Mr. Riddell emphasized that Ms. Killorn was not given a written response to her inquiries as to the effect of the purported change in the compensation scheme.

> She asked for a response in writing and Bob Brand said he gave answers to Mr. Wilson. They were never communicated to Colleen. Mr. Brand would have had the decency and courtesy and professional responsibility to have written a response. Mr. Wilson didn't. And right after sick leave, she was fired with no warning, no reprimand, no expression of displeasure, no assistance, no explanation, leaving her to explain to potential employers she was fired without explanation. I mean that has a defamatory effect. What are they going to think? They're going to think the worst. And you'll be asked to put down conduct of Healthvision and that's the kind of conduct we're looking at, okay.

Grounds of Appeal

The appellant alleges two errors by the trial judge: he should not have permitted the issue of mental distress to go to the jury, and he mischarged the jury on the question of foreseeability. It argues that the answers of the jury "were generally unreasonable, unjust, perverse and contrary to law and evidence," could not have been given by reasonable persons; were not supported by sufficient material evidence to support its answers. It argued that the jury erred in law in finding that the conduct of the appellant caused mental distress to the respondent, and that the jury's assessment of damages for mental distress was inordinately and disproportionately high.

Damages for Mental Distress

Prior to the decision of the Supreme Court of Canada in **Vorvis v. Insurance Corporation of British Columbia**, [1989] 94 N.R. 321 the judicial rule of thumb was that damages in wrongful dismissal cases were limited to the length of the appropriate notice period, and were not available for mental distress. **Addis v. Gramophone Co. Ltd.**, [1909] A.C. 488 (H.L.) stood as authority that:

> Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment.

It was recognized, however, that the indemnity the dismissed employee was entitled to in lieu of notice could reflect lost commissions.

By the 1980s the authority of the **Addis** rule had begun to erode. In **Pilon v. Peugeot Canada Ltd.** (1980), 29 O.R. 2d. 711 Galligan J. of the Ontario High Court of Justice considered the case of an automotive service manager wrongfully dismissed after 17 years loyal service, despite assurances of life-long security given in lieu of higher salary. In addition to damages for 12 months' notice, Galligan J. awarded $7,500 for the mental distress, anxiety, vexation and frustration caused by the defendant's breach of contract.

> It seems to me, and I say this with the greatest of deference, that the issue before the Court in **Peso Silver Mines Ltd. (N.P.L.) v. Cropper,** [1966] S.C.R. 673, 58 D.L.R. (2d) 1, 56 W.W.R. 641, was the entitlement to compensation for damages to reputation, not whether mental distress could be an element of damages in a breach of contract case. I think, with respect, therefore, that the words "wounded feelings" at p. 684 S.C.R., p. 10 D.L.R. of that judgment are obiter dictum. In **Delmotte v. John Labatt Ltd. et al.** (1978), 22 O.R. (2d) 90 at p. 92, 92 D.L.R. (3d) 259 at p. 261, R.E. Holland, J ., thought that the law relating to

> damages was changing. Professor Rose in his commentary in 55 Can. Bar Rev. 333 (1977) at p. 342, implied that the famous **Jarvis v. Swans Tours**, [1973] Q.B. 233, may be only the preliminary skirmish in a general assault upon **Addis v. Gramaphone**. . . .
>
> In my opinion, it cannot fail to have been in the contemplation of the defendant that if it suddenly, without warning, unlawfully discharged a man whom it had led to believe was secure in his job for his working life, there would be the gravest likelihood that such a man would suffer vexation, frustration, distress and anxiety.

The current jurisprudence as to claims for mental distress in wrongful dismissal cases has developed as courts have sought to interpret or reconcile the two distinct approaches expressed by McIntyre and Wilson JJ. in **Vorvis v. Insurance Corporation of British Columbia**, supra, a case well known for McIntyre J.'s definitions of aggravated and punitive damages at pp. 333-334:

> . . . Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. . . . In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.

Vorvis had been engaged by I.C.B.C. in 1973 as a junior solicitor and was dismissed in 1981 some two years before his pension vested. He found work at a similar salary, but not as a lawyer, in seven months. The corporation was unable to prove allegations of incompetence. At trial Vorvis was awarded seven months'

notice but his claims for punitive damages and aggravated damages for mental distress were dismissed on the authority of **Addis v. Gramaphone Co., Ltd**. as restated in **Peso Silver Mines Ltd. (N.P.L.) v. Cropper**, [1966] S.C.R. 673 and **Harvey Foods Ltd. v. Reed** (1971), 3. N.B.R. (2d) 444 (N.B.C.A.). This was substantially affirmed on appeal.

On further appeal to the Supreme Court of Canada, McIntyre J., writing for a three-judge majority including Beetz and Lamer, JJ., first set out the basic law in wrongful dismissal cases as follows:

> The law has long been settled that in assessing damages for wrongful dismissal the principal consideration is the notice given for the dismissal. A contract of employment does not in law have an indefinite existence. It may be terminated by either employer or employee and no wrong in law is done by the termination itself. An employee who is dismissed is entitled to the notice agreed upon in the employment contract or, where no notice period is specified in the contract, to reasonable notice. He is entitled in the alternative in the absence of due notice to payment of remuneration for the notice period.

After a review of authorities McIntyre J. concluded at pp. 338-339:

> From the foregoing authorities, I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the **Addis** and **Peso Silver Mines** cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law regime) has always been one where either party could terminate the contract of employment by due notice, and therefore, the only damage which could arise would result from, a failure to give such notice.
>
> I would not wish to be taken as saying that

> aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here. . . .
>
> Furthermore, while the conduct complained of, that of Reid (Vorvis' supervisor) was offensive and unjustified, any injury it may have caused the appellant cannot be said to have arisen out of the dismissal itself. The conduct complained of preceded the wrongful dismissal and, therefore, cannot be said to have aggravated the damage incurred as a result of the dismissal. Accordingly, I would refuse any claim for aggravated damages in respect of the wrongful dismissal.

In her dissent, concurred in by L'Heureux Dubé J., Wilson J. stated at p. 356:

> I must respectfully disagree with my colleague's view that conduct advanced in support of a claim for damages for mental suffering must constitute a separate "actionable wrong" from the breach itself. I disagree also that because the conduct complained of preceded the wrongful dismissal it cannot aggravate the damages resulting from that dismissal. Rather than relying on a characterization of the conduct as an independent wrong, I think the proper approach is to apply the basic principles of contract law relating to remoteness of damage. These were articulated by Baron Alderson of the Court of Exchequer Chamber in **Hadley v. Baxendale** (1854), 9 Ex. 341; 156 E.R. 145, at pp. 354-355 and at p. 151, as follows:
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> Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract,

> as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

At p. 360 she stated:

> It is my view that the established principles of contract law set out in **Hadley v. Baxendale** provide the proper test for the recovery of damages for mental suffering. The principles are well-settled and their broad application would appear preferable to decision-making based on a priori and inflexible categories of damages. The issue in assessing damages is not whether the plaintiff got what he bargained for, i.e. pleasure or peace of mind (although this is obviously relevant to whether or not there has been a breach) but whether he should be compensated for damage the defendant should reasonably have anticipated that he would suffer as a consequence of the breach. . . .

With respect to the claim by **Vorvis** she concluded at p. 364:

> ...I am persuaded, therefore, that mental suffering would not have been in the reasonable contemplation of the parties at the time the employment contract was entered into as flowing

> from the appellant's unjust dismissal. I would therefore, like my colleague, deny recovery under this head.

Justice Wilson's dissent reflects the view which had prevailed until **Vorvis**, that damages in wrongful dismissal cases arise only from a breach of the contract of employment, although the majority view that tortious conduct could result in aggravated damages was not unknown.

Ribeiro v. Canadian Imperial Bank of Commerce (1989), 24 C.C.E.L. 225 (Ont. H.C.J.); (1992), 44 C.C.E.L. 165 (C.A.) appears to represent the state of the law prior to **Vorvis**. The bank terminated an employee and made false allegations of dishonesty against him as a result of which a prosecution was begun and abandoned by the Crown. He was awarded the three months' notice his contract required and in addition the trial court awarded him $10,000 for mental distress and punitive damages of $10,000. These amounts were increased on appeal to $20,000 and $50,000 respectively. The appeal court left open the question whether damages for loss of reputation could also have been awarded, being of the opinion that "any damages which might have been awarded for loss of reputation would have been subsumed in the award for mental distress."

In his comprehensive judgment at trial Carruthers J. stated:

> Accordingly, I must find that the plaintiff is not entitled to an award of damages not based upon the provisions of his employment agreement. If those provisions did not apply, I would conclude that the plaintiff was entitled to 8 months' notice of termination. . . .
>
> In the present case, the defendant bank has made much of the fact that the plaintiff's employment with it expressly contemplated that he be honest and act with integrity throughout. The defendant bank wrongfully, and I can also say wantonly and recklessly accused the plaintiff of being otherwise and purported to terminate his

> employment for cause on this basis. I have concluded that this conduct on the part of the defendant bank constituted a breach of its employment agreement with the plaintiff. Having regard to the nature of the agreement, and specifically the requirements for honesty and integrity on the part of the plaintiff, I find that it is reasonable to draw the inference that it was in the contemplation of the parties that if the plaintiff was terminated in this manner he would suffer mental distress. I have already concluded that it did in fact do so. Thus the requirements for the application of the second rule in **Hadley v. Baxendale** have been met, and the plaintiff is entitled therefore to recover damages for his "mental and emotional suffering".

Carruthers J. cited at some length the judgment of Weatherston J.A. in **Brown v. Waterloo Regional Bd. of Police Commrs.** (1983), 43 O.R. (2d) 113, 2 C.C.E.L. 7 including the following passage which identifies one of the problems in a strictly contractual analysis:

> I must confess that I have some difficulty in considering mental suffering as a head of damages for breach of contract. If, in this case, Storwal had dismissed the plaintiff with the proper amount of notice, it would not have been liable in damages for mental suffering even if it could foresee that the manner of dismissal would cause such suffering. That is because there would have been no breach of contract and thus no cause of action. ...It seems to follow that, if an employer miscalculates the amount of reasonable notice required, he opens the door to a claim for damages for mental suffering which would not otherwise have been available to the discharged employee. In such a case, the damages must flow from the inadequate notice and not from the act of dismissal. . . .
>
> ...In my opinion, the correct rule is stated in Corbin, supra, Vol. 5, p. 429, citing the **Restatement of the Law of Contracts**, para. 341, as follows:
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> > There is sufficient authority to justify the statement that damages will be awarded for mental suffering caused by the wanton or

> reckless breach of a contract to render a performance of such a character that the promisor had reason to know when the contract was made that a breach would cause such suffering, for reasons other than pecuniary loss.

Carruthers J. quoted Saunders J. in **Bohemier v. Storwal Int' Inc.** (1982), 40 O.R. (2d) 264 (H.C.):

> Saunders J. says "There are said to be two grounds for awarding damages for mental distress which, to an extent, overlap." He identifies the second basis as being that which can be done by way of aggravated damages. In saying this he followed Linden J. in **Brown v. Waterloo**, supra, who at pp. 288-89 [O.R.] of that decision, says:
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> > The aim of aggravated damages is to "soothe a plaintiff whose feelings have been wounded by the quality of the defendant's misbehaviour". They are a "balm for mental distress" which is brought about by the wrongful "character of the defendant's wrongdoing." There must be evidence of damage of this type to the plaintiff. . . .
> >
> > Canadian law seems to have recognized the need for something like aggravated damages in contract law by awarding damages, not only for financial losses, but also for any mental suffering incurred by the plaintiff in appropriate cases. The purpose behind allowing such damages is to compensate for hurt feelings, anxiety and stress caused by certain types of contractual breach, where they are in the contemplation of the parties. Where the conduct of a defendant which violates a contract is particularly callous, the likelihood of mental suffering would be more foreseeable to him.

> Linden J. concluded that if the mental suffering of the plaintiff had not been compensable under **Hadley v. Baxendale**, supra, he would have been inclined to base such an award on aggravated damages. However, he found it unnecessary to do so in view of the recent developments in Canadian law of contract damages for mental suffering.
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> . . . Weatherston J.A. at p. 122 [O.R.] of his decision, says:
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> > Linden J. would have awarded aggravated damages if he had not allowed the claim for mental distress. But what I have said in respect of the award for mental distress is equally applicable to that claim. Whatever name is given to the claim for damages, it arises out of a separate decision of the board that was not actionable, and that decision cannot be made compensable by merely tacking it on to a compensable claim.

If nothing else, this case illustrates how unwieldy the **Hadley v. Baxendale** analysis had become when mental distress was claimed in wrongful dismissal cases. The reluctance of Ontario courts to instruct juries on the issue was understandable.

The majority decision in **Vorvis** did nothing to invalidate this approach, but it provided a simpler alternative by introducing tort law principles. The concept of an "independent actionable wrong" is broad enough to embrace a breach of the general duty of care.

In **Donaghue v. Stevenson**, [1932] A.C. 562, Lord Atkins stated:

> The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question: Who is my neighbour? receives a restricted reply.

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In **Anns v. Merton London Borough Council**, [1977] 2 All E.R. 492 at 498, a two stage approach was adopted:

> . . . the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...

The Supreme Court of Canada accepted the **Anns** approach. In **Canadian National Railway Co. v. Norsk Pacific Steamship Co**. (1992), 91 D.L.R. (4th) 289 (S.C.C.) Justice McLaughlin explained that the approach required two questions to be asked : "(1) is there a duty relationship sufficient to support recovery? and, (2) is the extension desirable from a practical point of view, i.e., does it serve useful purposes or, on the other hand, open the flood gates to

unlimited liability."

In **Fletcher v. Manitoba Public Insurance Co.**, [1990] 3 S.C.R. 191, Madame Justice Wilson quoted with approval from the judgment of this Court in **Nova Mink Ltd. v. Trans-Canada Airlines**, [1951] 2 D.L.R. 241 where MacDonald, J., stated in part at 254 and 256 as follows:

> The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result."
>
> . . . Many attempts have been made to generalize the circumstances which create a legal duty of care. . .What is common. . .is the idea of a relationship between parties attended by a foreseeable risk of harm.

In **Canadian Tort Law**, 10th ed. (Toronto: Butterworths 1994) A.M.Linden and L.N.Klar cite C.A. Wright in his "Introduction to Cases on the Law of Torts" as follows:

> Arising out of the various and ever increasing clashes of activities of persons living in a common society . . . there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another.

A degree of mental distress is always likely to accompany the termination of employment. That is foreseeable at the time of formation of the contract of employment, and it is remedied by the requirement that notice be given. In the language of **Anns**, that is one of the

> . . . considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

It is only when the employer's conduct aggravates the mental distress beyond the degree contemplated by the parties on the formation of the contract, that is, beyond the degree which can be remedied by agreement or reasonable notice, that a right to further damages arises.

Following the McIntyre analysis in **Vorvis**, it appears that damages can arise for mental distress on termination when an employer in the breach of the duty of care or in the course of other tortious conduct does something more harmful to the employee than either would have reasonably contemplated, and provided for by way of a contractual remedy, when they entered into the employment contract. The test in my view is whether a reasonable person would perceive that the employer has terminated the employment contract in a manner that caused the dismissed employee more harm than reasonably necessary. If the employer's acts are independently actionable as torts the situation becomes very clear, but with respect, McIntyre J. did not make this a requirement. He said:

> I would not like to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, **particularly** where the acts complained of were also independently actionable. (Emphasis added.)

A wrong would not be independently actionable if the damages were not foreseeable, but in the case of tortious conduct, such as breach of the duty of care, it needs only to be foreseeable when it occurs, and not necessarily as early as the time of the formation of the contract of employment.

In **Hall v. Herbert** (1993), 101 D.L.R. (4th) 129 at p. 156 Cory J. reviewed

general tort principles as they have evolved in the jurisprudence of the Supreme Court of Canada and stated the Court's two-stage test for considering foreseeability, proximity and duty of care:

> It is:
>
> (i) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of a party, carelessness on its part might cause damage to another person; if so
>
> (ii) are there any considerations which should negate or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise.

In the application of that rule to wrongful dismissal cases in which an independently actionable act has occurred, the damages caused by one person in the employment relationship to another would be limited to those in excess of the damages in the contemplation of the parties at the formation of the contract and taken into account by its terms.

Cases since **Vorvis** in which damages have been awarded for mental distress, in addition to damages for inadequate notice alone, appear to follow this general approach.

In **Dixon v. B.C.Transit** (1995), 13 C.C.E.L. (2d) 272 (B.C.S.C.) a senior executive, enticed to B.C.Transit from a secure job at a senior level, was dismissed after seven and a half months amid allegations that the dismissal was for cause, so the employer could evade paying a year's salary of $150,000 required by the contract for dismissal without cause. The court, following McIntyre J. in **Vorvis**, found the tort of deceit with respect to the false allegations. Dixon had been persuaded to give up a secure senior management position, and it was foreseeable that early termination, even with notice, would cause him severe mental distress. He was awarded aggravated damages of $50,000 for malicious conduct which

caused humiliation and frustration, and punitive damages of $75,000.

In **Russell v. Nova Scotia Power Incorporated** (1996), 150 N.S.R. (2d) 271 (S.C.) a systems officer with a good work record was dismissed without notice on false allegations of incompetence and insubordination. His dismissal was announced by an E-mail message to supervisors and their staffs over the company's computer network. The trial judge awarded twelve months' salary in lieu of notice and $40,000 for mental distress, dismissing a claim for defamation which he held to be included in the mental distress award.

In **Backman v. Hyundai** (1990), 100 N.S.R. (2d) 24 (S.C.) Davison J. considered both approaches in **Vorvis** in dismissing claims for mental distress and punitive damages.

> Regardless of which test I use, I conclude the plaintiff is not entitled to aggravated damages. None of the actions of the defendant would give rise to an independent action and any loss is properly compensated by the damages awarded for failure to give notice. Furthermore, there was no circumstances in this case which would have rendered mental suffering foreseeable at the time the employment contract was made. Although the plaintiff and his former wife would have the court isolate the cause of mental suffering to the dismissal, I am not at all convinced that a major factor in the stress suffered by Backman did not result directly from the criminal charges and the financial circumstances in which he found himself as a result of not being in a position to find other employment as quickly as if the cloud of suspicion was not hovering over his head.

The Jury Question

In Nova Scotia the general rule under s. 34 of the **Judicature Act** R.S.N.S. 1989, c. 240 is that in cases involving issues either of law or equity parties are entitled to demand a jury trial by notice, which a judge may overturn on

application.

In Ontario the general rule under s. 59 of the **Judicature Act** R.S.O. 1980, c. 223 is that all issues of fact shall be tried and all damagers assessed by the judge without the intervention of a jury. Except in matters of equity jury notice may be given by a party, but the judge has discretion to dispense with the jury of his or her own motion. In both jurisdictions a judge also has discretion independent of the jury notice to direct that issues of fact be tried or damages assessed by a jury.

The appellant has cited a line cases from Ontario which hold that the question of mental distress in wrongful dismissal cases is too difficult to leave with a jury. These cases begin with **Fulton v. Town of For Erie** (1982), 40 O.R. (2d) 235 (Ont. H.C.J.) and include **MacDougall v,. Midland Doherty Limited** (1984), 7 C.C.E.L. 28 (Ont. H.C.J.); **Stadler v. National Bank of Canada** (1984), 23 A.C.W.S. (2d) 483 (Ont. H.C.J.); **Saraga v. Wellington County Board of Education** (1985), 11 C.C.E.L. (2d) 317 (Ont.Ct. Gen. Div.).

The appellant submits:

> It is submitted that, having regard to the complexity of the issue and the inconsistent approach of the Courts even subsequent to **Vorvis**, the **Fulton** Line of Cases holding that trial by jury is inappropriate with regard to mental distress is still valid.

Given the two approaches in **Vorvis**, the law as to damages for mental distress in wrongful dismissal cases is not free of difficulty, but in my view it is not so complex that it cannot be explained to and understood by a jury. It was not an improper exercise of the trial judge's discretion to leave the matter with the jury and I would dismiss this ground of appeal.

The Jury Charge--Foreseeability

The second ground of appeal is whether the trial judge erred in mischarging the Jury on the question of foreseeability. The appellant does not take issue with any other aspect of the contents of the jury charge.

In the course of his charge to the jury the trial judge said:

> I can tell you, as a matter of law, that because of the nature of the employment in this case, it was foreseeable and must have been in the contemplation or mind of the parties in this case that mental distress could result from a dismissal without notice.

It is not only a matter of law but a matter of common sense that in this case or any other mental distress could result from dismissal, with or without notice; it could hardly be otherwise as long as human beings have feelings. The jury's concern was not whether mental distress occurred, but how much there was of it. Was it present in the normal degree that parties contemplate when they enter an employment contract, or were there elements that increased it beyond what could be compensated for by ordinary notice. To read the impugned sentence in context it is necessary to repeat verbatim several of the paragraphs that precede and follow it.

The judge deliberately broke his charge into two portions, general principles on one afternoon and more specific concerns on the following morning. In the second portion of his charge he discussed the difference between dismissal for cause and dismissal upon notice, explaining that Healthvision was not relying on any cause to justify the termination of Colleen Killorn without notice. He dealt with mitigation, then moved on:

I will now turn to question number two. Question number two is,

> Has the plaintiff, Colleen Killorn, established that she suffered mental distress as a result of conduct arising out of the dismissal by

the defendant, HealthVision, other than the dismissal itself, which would warrant or require the awarding of additional damages to the plaintiff for mental distress?

Here you're required to give an answer which would be "yes" or "no" and if it is yes the you're asked to briefly write a paragraph briefly describing conduct on which you base your decision.

Now I will explain to you the law on mental distress. In certain cases a Court can order or award what are commonly known as aggravated damages. These are damages in addition to the pay or income that would be payable to the plaintiff, Colleen Killorn, during any reasonable period of notice which you decide in question number one. This is in addition to that.

In this case the plaintiff, Colleen Killorn, is asking you to award her a sum of money to compensate her for the mental distress and the effect on her and her family life which she claims she suffered as a result of the conduct of the defendant, HealthVision Corporation, in the manner in which she was dismissed.,

I should point out that aggravated damages for mental distress are not routinely awarded in cases of unlawful termination of employment. This is because there is usually some element of mental distress when a person loses their job. However, if the conduct of the employer, in this case, HealthVision, this is important, other than the mere fact of the dismissal itself, that is, if the dismissal is carried out in an unjustified, callous, sudden and inconsiderate manner, such conduct may give rise to damages for mental distress.

The conduct complained of must be surrounding the manner of the dismissal not merely the fact that a dismissal without notice occurred. *I can tell you, as a matter of law, that because of the nature of the employment in this case, it was foreseeable and must have been in the contemplation or mind of the parties in this case that mental distress could result from a dismissal without notice.*

In this case, you should consider the manner in which the dismissal was carried out and not the actions of Mr. Wilson, which occurred at the seminars prior to the dismissal. Colleen Killorn relies on the fact she was allegedly dismissed because HealthVision was not satisfied with a number of aspects of her performance, but she was never told so by way of verbal or written notice. If that was HealthVision's intention, they would normally have been required to advise her of this fact so that she could have a reasonable opportunity to address any problems or concerns, as I mentioned previously.

Colleen Killorn also relies on the fact that the company handbook set out a procedure for termination and that it was not followed. She also relies on the fact that all of her records, including her file notes, were all taken from her and not provided to her for review. She was not given a notice--sorry, she was not given a reason for her dismissal. She relies on this fact as well.

It is Colleen Killorn's contention that this amounts to callous, offensive, sudden, humiliating and inconsiderate conduct which caused her mental distress in addition to the dismissal itself.

Colleen Killorn and others have testified how this affected her. The burden or onus of proving on the preponderance of the evidence that this alleged conduct of Healthvision was unjustified and that this conduct caused her mental distress is or rests upon Colleen Killorn.

In addition to her own testimony she relies on the testimony of Dr. Davey, her husband and friend, who you heard testify, as to her demeanour and her behaviour around this time. She relies on this evidence to establish and prove mental distress.

Colleen Killorn, therefore, has to prove three things with regard to question number two. The first that she did, in fact, suffer mental distress; second, that the mental distress which she alleges she suffered was caused by HealthVision's conduct in the manner in which

> she was dismissed; and third, that the conduct complained of warrants or justifies the awarding of damages for mental distress.

The trial judge was obviously at pains to create a clear distinction in the minds of the jury between the mental distress that arises from dismissal without notice and the mental distress which was caused by the employer's conduct in the manner in which she was dismissed. That is essentially the **Vorvis** distinction between the mental distress contemplated by the parties at the formation of the contract of employment, which is compensated for by adequate notice, and the additional mental distress that occurs when the employer's conduct is independently actionable or so unnecessarily harsh and callous that mental distress unforeseeable and unprovided for at the formation of the contract becomes a factor with foreseeable results.

In its proper context the trial judge's reference to the foreseeability of mental distress as a matter of law was related to mental distress resulting from a dismissal without notice, and not the additional mental distress which the jury had to find to justify an award for mental distress as aggravated damages.

In my view the impugned sentence does not amount to a misdirection which caused the jury to proceed upon an improper principle. I would dismiss the second ground of appeal.

The Jury's Assessment of the Evidence

The appellant submits that the jury erred in assessing the evidence, and raises the following questions:

> Whether the answers of the jury were generally unreasonable, unjust, perverse and contrary to law and evidence.
>
> Whether the answers of the jury were not such as could

have been given by reasonable persons in the circumstances.

> Whether the jury made a palpable and overriding error in assessing the evidence of the conduct of the Defendant as there was insufficient material evidence to support the answers of the jury;
>
> Whether the jury erred in law in finding that the "conduct" of the Defendant caused or contributed to the mental distress complained of by the Plaintiff.

While the jury's focus was properly on the termination itself, its effects can only be understood in the context of the events that began in February, 1993, when it became clear that Healthvision was to be the successful contender for the P.E.I. contract. Ms. Killorn anticipated, not unreasonably, that she was entitled to the $90,000 commission. She understandably saw the proposed new compensation scheme, which she received in March, as a move to thwart her expectations. When the employment contract was entered into it was within the contemplation of both parties that any changes in terms would be negotiable. The sales compensation plan provides:

> On the anniversary date of April 1 each year, terms of the plan may be renegotiated by either HCS or the account manager.

When Ms. Killorn was presented with a revised plan without opportunity for negotiation, it was foreseeable by the employer that she would suffer mental distress. It was foreseeable as well that her distress and frustration would be exacerbated when she was denied even an explanation, and the company effectively ceased to communicate with her. It was during this period that her doctor diagnosed depression and placed her on medication. The pattern continued at the sales conference in British Columbia when Mr. Wilson was agitated with her and refused to discuss her concerns, leaving her so upset she sought stress leave. As well, the letter to her customers without her knowledge would be foreseeably

upsetting. The company continued its lack of openness and honesty with Ms. Killorn by pretending that Lucy McKiernan was visiting her for an audit instead of to dismiss her. In my view the letter of dismissal cannot be isolated from the notice of a revised sales compensation plan nor the intervening events; they are all part of the same pattern or transaction which culminated in dismissal with inadequate notice. It was foreseeable that Ms. Killorn might be diagnosed as clinically depressed in May because of the way the company began treating her in March. Against that background the company must have been aware that to fire Ms. Killorn soon after she returned from stress leave would cause her extraordinary mental distress.

The jury was properly instructed. There was evidence before it. In my view the answers of the Jury were not unreasonable, unjust, perverse, or contrary to law and evidence. They could have been given by reasonable persons in the circumstances. In my view the jury made no palpable and overriding error, there was evidence to support its answers, and there was no "error in law" on the part of the jury in finding the conduct of the appellant caused or contributed to the mental distress complained of by the respondent.

The conduct of the company, in fact, was so insensitive that it seemed deliberately calculated to increase Ms. Killorn's mental distress. The jury was not asked to identify a tort committed by the appellant, but in my view when a party's negligent or deliberate acts cause harm to another that is both foreseeable and avoidable, any requirement for an independent actionable wrong referred to in McIntyre J.'s analysis in **Vorvis** is satisfied. The appellant's conduct toward the respondent in this case caused a degree of mental distress on termination well beyond what would have been anticipated by the parties when they entered into the contract, that is, well beyond what adequate notice could be expected to remedy.

It was the conduct of the employer, the protracted and painful termination process that was not predictable, not the mental stress. In my view the jury was entitled to find, and did that the long freezing-out process which ended with the letter of dismissal was so negligently hurtful to Ms. Killorn as to be an independently actionable wrong. Applying the approach of the **Vorvis** minority, it was foreseeable that if Ms. Killorn was dismissed in such a manner, she would suffer mentally and emotionally.

In **Vorvis** the plaintiff was not entitled to damages for mental distress because there was nothing in the dismissal itself which was more painful or distressing than the parties would have contemplated at the formation of the contract, and no independently actionable wrong. The conduct of the supervisor of which Vorvis complained preceded the dismissal and was distinct from it, not enmeshed with it. The nexus was not established. What distinguishes the present appeal from the facts in **Vorvis**, and many of the other wrongful dismissal cases in which claims for mental suffering were not established, is that Ms. Killorn's dismissal was a process extended over several months and not a single, clear-cut and decisive act. There was evidence from which the jury could have concluded that the nexus linking the events was the company's concern with ensuring that Ms. Killorn did not receive a $90,000 commission from the P.E.I. contract.

The process that ended in her dismissal became visible to her in March, 1993, when she was advised that her sales compensation plan had been unilaterally altered by the company. Up to the time she received the notice of the intended change in her contract it was not unreasonable for her to have anticipated receiving the commission. She had been told nothing to the contrary. The company's deceitful conduct toward her had, however, actually begun much earlier when,

without her knowledge, the Prince Edward Island contract was taken from her and added to Mr. Wilson's responsibilities. It was the altered sales compensation plan that first put Ms. Killorn on notice that her status was changing, or had changed. That was the objective act which began the termination process, and its unsevered nexus with the actual notice of dismissal was clear from the evidence. It threw her legal relationship with her employer into doubt. She had no way of knowing how the company viewed her refusal to accept it, nor whether the company's refusal to negotiate or to inform her affected its validity. Was she governed by the old contract, the new contract, or none at all? The company still continued to recognize her as an employee, but refused to communicate with her about her status. She was ostracized by her superiors.

The actual notice of dismissal on Ms. Killorn's return from stress leave in July was almost an anti-climax: Ms. Killorn had been broken by the process leading up to it. After more than three months in a limbo of uncertainty she was in a state of clinical depression, medicated and under a doctor's care. This was foreseeable. It was equally foreseeable that if the termination process had not been protracted from March until July, Ms. McKiernan could have delivered a notice of dismissal to a healthy individual without entitlement to damages for mental suffering.

It is to be noted that the medical evidence relates to the period of the extended termination process, not to the period following the actual dismissal when Ms. Killorn's symptoms might be said to be a more foreseeable result of a dismissal within contemplated norms. It is her own evidence and that of her husband that shows her depression was continuing at her trial.

The jury was entitled to characterize the company's conduct toward Ms. Killorn in the circumstances of her drawn-out dismissal as high-handed and callous;

that was a rational conclusion from the evidence. I would dismiss the grounds of appeal based on allegations the jury erred in finding that Ms. Killorn was entitled to damages for mental distress. Once such a finding is made the issue becomes one of quantification of damages.

Damages

The appellant asks

> Whether the jury's assessment of damages for mental distress was inordinately and disproportionately high.

The appellant reviewed thirteen Nova Scotia wrongful dismissal cases since 1980 and found that eight of them awarded nothing for mental distress because the standard for proving entitlement to damages for mental distress had not been met. Of the five cases in which damages were awarded, only two were for more than a token amount of less than $1,000. In **McOnie v. River Pub Limited and Rohfie** (1987), 79 N.S.R. (2d) 379(S.C.) the plaintiff was awarded $6,500 for mental distress. He had left a seven-year job and had been working for the defendants less than a year. He testified he was humiliated and devastated, had trouble adjusting, gained weight and became reclusive and depressed.

In **Russell**, discussed above, the award was $40,000.

In the present case the award is proportionate to the loss of the P.E.I. commission, which was anticipated but not yet earned or payable at the time of termination. The award was not to compensate for lost commissions but for mental distress. Lost commissions are an aid in quantifying mental distress in cases such as the present one, but a one-to-one correlation cannot be expected.

The applicable principle consistently followed by this court was restated by McIntyre J. writing for the Supreme Court of Canada in **Woelk v. Halvorson**,

[1980] 2 S.C.R. 430 at pp. 435-6:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene. The well-known passage from the judgment of Viscount Simon in **Nance v. British Columbia Electric Railway,** [1951] A.C.601 at p. 613 approved and applied in this court in **Andrews v. Grand & Toy Alberta Ltd**. [1978] 2 S.C.R. 229, provides ample authority for this proposition.

He said:

> . . . Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. . . .

I would dismiss the appeal from the jury's assessment of damages, and dismiss the appeal on all grounds with costs to the respondent which I would fix at $4,000, or 40 per cent of the costs at trial, rounded, plus disbursements. The respondent brought a cross-appeal which was abandoned prior to the hearing. I would allow costs on the cross appeal of $1,000 to the appellant to be deducted from the costs payable to the respondent, leaving a net amount of $3,000 plus

disbursements.

Freeman, J.A.

HALLETT, J.A.:

I have read Justice Freeman's decision and, with respect, I cannot agree that the appeal should be dismissed. On the facts of this case the question of aggravated damages for mental distress ought not to have been left to the jury or, alternatively, if properly left to the jury, ought not to have been left in the manner it was. Secondly, the award of $60,000 for mental distress is inordinantly high and should be set aside.

Facts

In 1988 the appellant began sales efforts to sell the Prince Edward Island Health Services Commission (the Commission), an integrated health information system. The sale had a potential value of $3M.

The respondent, Ms. Killorn, was hired on November 9th, 1989. The letter from the president of the appellant company stated in part:

> "This letter confirms our offer of employment to you as an Account Manager based in Halifax. The compensation for this position will be based on the attached compensation plan: pay periods are the fifteenth and the last day of each month.....
>
> We understand you will be available to commence work with the Company on November 9, 1989. We look forward to your acceptance of this offer."

The compensation plan, referred to in the letter, which she accepted, provided for the following:

> "1. **Compensation** - Compensation shall be comprised of a base salary of $40,000. per annum plus commission. The commission will be calculated as follows:
>
> - 5% of application software license revenue
> - 5% of gross hardware margin (new accounts)
> - 2% of gross hardware margin (existing accounts)
>
> 2. **Payment**: The base salary will be paid semi-monthly.

> Commission will be deemed earned when the customer has paid HCS.
>
> 3. **Sales Territory**: HCS reserves the right to alter the sales territory of the account manager. Initially, it will consist of the four Atlantic provinces.
>
> 4. **Term of Plan**: This plan is deemed to take effect on November 9, 1989 and continue until March 31, 1990. Thereafter it will automatically renew on an annual basis. On the anniversary date of April 1 each year, terms of the plan may be renegotiated by either HCS or the account manager.
>
> 5. **Termination of Employment**: Should the account manager leave the employment of HCS for whatever reason, the commissions payable will be limited to those earned within 90 days after the termination.
>
> HCS and the Account Manager hereby agree to the terms and conditions of this compensation plan:
>
> HCS Health Care Systems, Inc. Account Manager"
> {emphasis added}

In summary, her annual salary was $40,000; she would be entitled to a commission of 5% of application software license revenue and 5% of the gross hardware margin on new accounts.

The potential sale to the Commission involved both the hardware and software components; her commission, if earned, would have been in the $90,000 range.

The evidence showed that Ms. Killorn had minimal involvement in developing the sale to the Commission. Mr. Brand testified that no sales representative has an exclusive territory. This is consistent with the terms of employment as set out in the 1989 contract.

The development of an information system for a customer involves a great deal of technical expertise which function is beyond the capability of sales representatives. This work is done at the head office of the appellant. However, the

potential sale was in Ms. Killorn's territory. Although the contract is not clear, one could infer that she would be entitled to commissions on all sales in her territory pursuant to the terms of the 1989 contract. However, the commissions would not be earned until the customer paid.

On March 16th, 1993, the appellant forwarded a revised compensation plan for her signature. She did not sign it prior to her dismissal. Under that proposed contract she would be entitled to commissions on sales in her territory to assigned customers.

It is not at all clear that the 1989 contract would have applied at the date of her dismissal on July 12th, 1993, as its terms may have been terminated on the anniversary date of April 1st. However, the trial seemed to proceed on the basis that the original employment contract was still in force but again that is not at all clear as the question, although touched on by the Court and counsel during the trial, was not resolved before the jurors were asked to answer the questions put to the them.

In discussions between counsel and the trial judge, subsequent to the jury's verdict, it becomes clear that the trial judge must have taken the view, and his instructions to the jury would be consistent with this conclusion, that the contract between Ms. Killorn and the appellant at the time of her dismissal was one of indefinite duration and that the terms of that contract would be as contained in the 1989 contract. The jury was never told by the trial judge what contract was in effect. Whether or not the trial judge was correct in his assessment as to the contractual situation between the parties is not an issue raised on the appeal. What is relevant is the fact that the trial judge gave no instruction to the jury as to what the contractual terms were that bound the parties at the time of dismissal so as to

enable the jury to properly assess the conduct of the appellant which is relevant to the issue of aggravated damages for mental distress.

History of Relevant Events

Mr. Brand, the appellant's vice-president of finance and administration, testified that Ms. Killorn fell short of her sales goals in both 1990 and 1991. Ms. Killorn acknowledged under cross-examination that she did not reach her planned sales goals in 1990, 1991 or 1992.

Michelle LaVigne, a friend of Ms. Killorn, testified that, as early as 1992, Ms. Killorn began showing signs of stress.

Apparently Ms. Killorn found dealing with Mr. David Wilson, the appellant's vice-president of marketing and sales for Canada, stressful.

On February 17th, 1993, Ms. Killorn consulted her doctor. Ms. LaVigne testified that Ms. Killorn was having a problem with her weight. Dr. Davey's notes indicate that she had a thyroid problem. There is nothing in his notes with respect to that visit that would indicate she consulted him with respect to stress.

On February 26th, 1993, the Committee that had been appointed by the Commission to evaluate the proposals that had been received from different suppliers of information systems recommended to the Commission that negotiations proceed with the appellant and that if terms could not be reached the Committee recommended that the Commission negotiate with the second best supplier, Hewlett Packard.

On March 16th, 1993, Mr. Brand and Mr. Wilson wrote Ms. Killorn forwarding the new compensation package. The letter and the package are reproduced as follows:

"Dear Colleen:

The Corporation has revised its Sales Compensation Plan for Sales Representatives and we are very pleased to make you a new offer of employment based on a revised and improved commission and bonus structure. This offer is effective April 1, 1993 and supersedes all previous agreements in place both written and oral. Details of the offer are outlined on the attached Sales Compensation Agreement.

Your benefits package and vacation entitlement remain unchanged.

Any profit share distribution will be reduced by the value of any and all commissions and bonuses paid to you.

If you have signed the Corporation's revised Confidentiality and Non-competition Agreement, the terms apply equally to this new agreement. If you have not signed the previously-mentioned agreement, then your signature is required on this document as well as part of your acceptance of these new terms of employment.

Please review the attached document(s) and, if you are in agreement, sign and return to Lucie McKiernan.

Yours truly,

Bob Brand
Vice President
Finance and Administration

David Wilson
Vice President
Marketing and Sales"

The sales compensation agreement attached to the letter was in the following form:

"Health VISION CORPORATION

SALES REPRESENTATIVE
SALES COMPENSATION AGREEMENT

SALES
REPRESENTATIVE: COLLEEN KILLORN

BASE SALARY: $40,000.00 per annum, paid semi-monthly.

COMMISSION: 4% on licences from assigned customers will be given on Corporation software licenses, net margin on third party software and net margin on hardware sales. Commission will be accrued when revenue is recognized under the Corporation's revenue recognition policy; however, commission will only become payable, on a pro-rata basis, as and when the Corporation receives payment from the client.

Refundable draws against commission will be given at the sole discretion of Finance based on accrued commissions and on demonstrated client prospects.

CASH BONUS: On or about the first of each year, annual and quarterly revenue targets will be established for each Sales Representative. On a year to date basis as at March 31, June 30, September 30, and December 31, if the Sales Representative has reached or exceeded the target for that date, then a cash bonus of $2,000.00 will be paid. If, at December 31, the Sales Representative has reached or exceeded the annual target, a further cash bonus of $10,000.00 will be paid. If, at December 31, the Sales Representative has reached or exceeded the annual target by 125% a further cash bonus of $10,000.00 will be paid. If, at December 31, the Sales Representative has reached or exceeded the annual target by 150% a further cash bonus of $15,000.00 will be paid.

Bonus is paid in addition to the base salary and commission.

SALES TERRITORY: The Corporation reserves the right to alter the sales territory of the Sales Representative from time to time.

TERMS OF AGREEMENT: This Agreement is deemed to take effect on April 1, 1993 and continue for one year. Thereafter, it will automatically renew on an annual basis. On the anniversary date of each year, terms of the plan my be renegotiated by either the Corporation or the Sales Representative.

TERMINATION OF

EMPLOYMENT: Should the Sales Representative leave the employment of the Corporation for whatever reason, the commissions payable will be limited to those orders received prior to termination and deemed earned within 30 days after the date of termination." {Emphasis added}

There is no evidence as to what is meant by the term "assigned" customers; this is different from the original agreement. There is no evidence as to what the appellant meant by the concept that commissions will be payable on a pro rata basis. I would infer it meant that commissions would be shared with others under the new arrangement but there is no criteria as to how the commissions would be shared. Mr. Brand testified that on balance the new compensation agreement was an improvement over the original agreement because, although commissions were reduced from 5% to 4%, nevertheless, the sales representatives would be getting 4% on sales to all customers new or existing. Under the 1989 contract form they were only entitled to 2% on sales to existing customers. Furthermore, there was no provision for bonus incentives under the 1989 contract.

Mr. Brand testified that the compensation package sent to Ms. Killorn was the same as that sent to the other five Canadian sales representatives.

Ms. Killorn did not sign this agreement; the others did. In the months that followed she sought clarification from Mr. Wilson respecting the terms of the new compensation plan. She testified that the day she received the new compensation package she telephoned Mr. Wilson. She testified that Mr. Wilson told her that the P.E.I. contract was his target for bonus purposes and that she did not have the experience to close the P.E.I. deal. He also told her that the commission on the P.E.I. contract was to be split. She testified that she felt crushed, betrayed and ripped off.

Ms. Killorn testified that in March, 1993, after her conversation with Mr. Wilson, she sought medical advice. However, it would appear from Dr. Davey's notes that she first contacted him with respect to depression on May 14th. Ms. Killorn may have been mistaken in the date.

> Ms. Killorn wrote Mr. Wilson on April 2nd, 1993, as follows:
> "As per my request to you earlier this week, there are a few points in the new sales compensation agreement that I would like clarified.
>
> 1. What is my defined territory in this new agreement?
>
> 2. What are my annual and quarterly targets for bonus purposes?
>
> 3. Are the targets established on written or paid business for bonus purposes?
>
> 4. When does the new compensation plan kick in, example: If an order was received prior to April 2, 1993 - and only 1/2 of the contract has been paid by the customer, in which the sales person received 5% commission in their original employment agreement, which commission structure will apply for the second 1/2 of the payment from the customer?
>
> 5. What compensation will I be given in the event that my territory is altered, (reduced)?
>
> 6. What percentage of the P.E.I. contract will be used toward my projected targets?
>
> 7. What percentage of commission will be paid to me on the P.E.I. contract? What percentage will be paid to others on this contract?
>
> It is my understanding that the contract is forthcoming, that the announcement has been made publicly that we are the successful vendor and that they (P.E.I.) are now putting together a management team to negotiate the contract with us. Will I be taking part in the contract negotiations?
>
> I ask that a written response be sent to me."

There was an indication Ms. Killorn had consulted a lawyer in this period. There was no response from Mr. Wilson.

Subsequent to writing this memo she met with Mr. Wilson at a company

meeting in Toronto and Mr. Wilson told her that the P.E.I. commission would be split.

On May 2nd, 1993, she faxed to Mr. Wilson the same request as forwarded on April 2nd, 1993.

The only response from Mr. Wilson was the following memo to Ms. Killorn dated May 11th, 1993:

> "The following are your sales goals for FY '93. You should note that revenue recognition is as follows:
>
> New HCS Software Module Sales - 80% of selling price counts toward your goal,
>
> Software Installs - 20% of selling price once the site goes "live",
>
> Hardware - 100% counted on the ship date.
>
> Yours goals are:
>
> HCS Software: 1,000K
>
> HCS Hardware: 700K
>
> * Plus P.E.I.deal."

It would appear from a review of this memo that Mr. Wilson only addressed questions 2 and 6, set out in her written memo to him. In particular, there was no response from Mr. Wilson with respect to the questions raised in Item 7 (her inquiry with respect to the commission on the P.E.I. contract). What share would be hers is unknown but one might infer that it was still assigned to her as it was part of her target. However, Mr. Brand's evidence would indicate that the P.E.I. contract had been assigned to Mr. Wilson in 1992. Ms. Killorn testified that this fact had not been communicated to her.

On May 14, 1993, Ms. Killorn consulted her family doctor, Dr. Davey. He

diagnosed depression. He prescribed an anti-depressant drug, Zoloft; his notes show that he was to recheck her in two weeks. Ms. Killorn testified that her income was critical to her family's well-being as her husband's new business was not doing well. Ms. Killorn had a 15 year old daughter.

On May 28th, 1993, Dr. Davey again saw Ms. Killorn. His notes indicate that she was still suffering from depression; he continued the Zoloft and he noted that he would recheck in a further two weeks.

On June 7th, 1993, Ms. Killorn attended a sales retreat in Victoria, British Columbia. Ms. Killorn testified that she again sought clarification from Mr. Wilson on the commission structure. She testified he became agitated with her and would not address her concerns. She also testified that he interrupted and criticized a presentation of hers to the sales group and that she found this humiliating and very stressful. She left the meeting. Mr. Brand was at that meeting; he testified that the sales representatives' presentations are constantly interrupted by management as they must know, for planning purposes, how close sales are to closing.

Mr. Wilson was present during the trial but did not testify.

On June 7th Dr. Davey received a long distance call from either Ms. Killorn or her husband or both and on the same date he wrote a "To Whom it May Concern" letter to the appellant as follows:

> "RE: Colleen Killorn
>
> Mrs. Killorn is under my care and will require time off work due to medical reasons.
>
> I expect a period of between four and eight weeks off work and then she should return to her normal duties.
>
> If you require further information please do not hesitate to contact me."

On June 7th Ms. Killorn told the appellants, by way of a voice message left for Mr. Wilson, that they were not to contact her and that she was off for a minimum of six weeks. She immediately left Vancouver and returned home.

Mr. Brand testified that Ms. Killorn left the company in an impossible situation. The appellant's technical staff had slated a demonstration in Nova Scotia; they had no information as to who to contact as Ms. Killorn did not leave any information. Ms. Killorn simply told the appellant's management that they were not to contact her.

The appellant wrote to customers in Ms. Killorn's territory that she was off on sick leave and that Mr. Dewar would look after the accounts.

Mr. Brand testified that in mid-June 1993 the appellant decided to terminate Ms. Killorn after concluding that she was not able to handle the job considering, in particular, her poor sales results. This was a change of opinion as to her ability from that which existed on March 16th, 1993, when Mr. Brand forwarded the new compensation package and stated how pleased he was to do so.

The appellant did not wish to terminate her while she was on sick leave or to advise her of termination other than in a personal meeting. The decision was made that once Ms. Killorn returned from sick leave a representative of the appellant from the Vancouver office would travel to Halifax and advise her of the dismissal and at the same time do a physical audit of the Halifax office.

On July 6th, 1993, Ms. Killorn again saw Dr. Davey (she had not kept an appointment for June 16th). Dr. Davey's file notes state that she was still depressed but feeling better because she had been off work for three weeks. The Zoloft was still causing headaches. The plan was to discontinue the Zoloft and she intended

to return to work.

On July 9th, 1993, Ms. Killorn returned to work and so advised the appellant.

On July 12th Ms. McKiernan, the Director of Administration of the appellant's Vancouver office, arrived in Halifax. Ms. Killorn had been told that the purpose of the visit was to do the physical audit. When she met with Ms. Killorn, Ms. McKiernan delivered a letter from the president terminating her employment. An offer of severance pay in the amount of $14,000 was made. This offer was rejected. The termination letter stated that all outstanding commissions had been paid and a final cheque and details were enclosed.

On July 13th, 1993, Mr. Wayne Hooper, the Chairperson of the Committee, appointed by the Commission, to look into the merits of the Commission acquiring an information system wrote Mr. Wilson as follows:

> "This is to confirm our intent to finalize ongoing negotiations with the objective of purchasing the hardware and software as proposed for Phase I in the HealthVISION Corporation's RFP response dated January 9, 1992 at a total cost of approximately $2,777,281.00*. This purchase is subject to the approval of the final contract by the PEI Government.
>
> Yours truly,
>
> Wayne Hooper
> CHAIRPERSON
> IHIS Joint Management Team
>
> WH/jf
>
> * This price includes all hardware and software as outlined in the latest revision of the proposal. These amounts may change after we have finalized the hardware configurations."

In late November 1993, after extensive negotiations, the Commission

signed the contract to purchase the system from the appellant.

Justice Freeman has reviewed the evidence of Ms. Killorn, her husband and her friend, Michelle LaVigne, with respect to the mental distress of Ms. Killorn in the spring of 1993 and subsequent to her dismissal. In summary her husband testified that after she was dismissed she became even more depressed. Ms. Killorn testified that she was still on medication when the action was tried; there was no medical evidence to confirm this.

Mr. Wayne Hooper testified that there was not a lot of contact with Ms. Killorn as the Committee was basically dealing with Dave Wilson from Vancouver. He testified that the Committee had hired consultants and had asked that the potential suppliers were to deal with the Committee's consultant because of the complexity of the deal. The Committee's consultants dealt with the appellant's head office. Mr. Hooper testified that he could not recall being at any meetings or having dealings with Ms. Killorn after June of 1992. Mr. Hooper testified that in December of 1992 the Committee had decided that another supplier was their preferred supplier but that in January of 1993 they changed their mind and the Committee advised the appellant that they were the preferred supplier. He testified that hundreds and hundreds of hours were spent negotiating the terms of the contract following their decision that the appellant would be the preferred supplier and these negotiations were primarily with Dave Wilson. He testified that as of July 12th, 1993, (the date Ms. Killorn was terminated) there was no commitment to sign a contract with the appellant.

Disposition re: First Ground of Appeal

In my opinion, the issue of aggravated damages for mental distress ought not to have been left to the jury. In **Vorvis v. Insurance Corp. of British**

Columbia, [1989] 1 S.C.R. 1085 McIntyre J., writing for the majority, reviewed the long established law as enunciated in **Addis v. Gramophone Co.**, [1909] A.C. 488 and **Peso Silver Mines Ltd. (N.P.L.) v. Cropper**, [1966] S.C.R. 673, aff'g (1965), 56 D,L.R. (2d) 117. Those cases held that damages in wrongful dismissal cases are limited to the earnings lost during the period of notice to which the employee is entitled and cannot include damages for the manner of dismissal. McIntyre, J. then noted that the case law subsequent to the Supreme Court of Canada decision in **Peso Silver Mines**, had been inconsistent. After considering a number of those cases, he concluded at p. 1103:

> "(21) From the foregoing authorities, I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the *Addis* and *Peso Silver Mines* cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage could arise would result from a failure to give such notice.
>
> (22) I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here. As noted by Hinkson J.A. in the Court of Appeal, at p. 46:
>
> > It was not suggested by the plaintiff that Reid's actions in the months prior to his termination constituted a breach of contract. Upon the basis of the reasoning in the *Brown* case, Reid's conduct was not a separate head of damages in the claim for breach of contract.
>
> His reference to the *Brown* case was to the words of Weatherston J.A. in *Brown v. Waterloo*

> *Regional Board of Commissioners of Police*, *supra*, p. 736, speaking for the Court, he said:
>
> > If a course of conduct by one party causes loss or injury to another, but is not actionable, that course of conduct may not be a separate head of damages in a claim in respect of an actionable wrong. Damages, to be recoverable, must flow from an actionable wrong. It is not sufficient that a course of conduct, not in itself actionable, be somehow related to an actionable course of conduct.
>
> (23) Furthermore, while the conduct complained of, that of Reid, was offensive and unjustified, any injury it may have caused the appellant cannot be said to have arisen out of the dismissal itself. The conduct complained of preceded the wrongful dismissal and therefore cannot be said to have aggravated the damage incurred as a result of the dismissal. Accordingly, I would refuse any claim for aggravated damages in respect of the wrongful dismissal."

The essence of his judgment is that, as a general rule of longstanding, the only damages that can be awarded in a wrongful dismissal suit are those relating to a failure to give notice. McIntyre J., by his comments in paragraph 22, did leave the door open a crack whereby the scope of a claim for damages in a wrongful dismissal suit might include a claim for damages for mental distress but the only basis for such an extension that was identified by McIntyre J. was if there existed an independent actionable act to found such a claim and that such an act is separate and apart from the acts giving rise to the claim for breach of the contract of employment.

The inconsiderate conduct of Mr. Wilson towards Ms. Killorn, and the conduct of the appellant in terminating her without warning or reasons, does not give rise to an independent actionable wrong such as found in certain cases where the employer's conduct was defamatory of the employee. The alleged suddenness and

callousness of the termination was the evidence relied upon at trial as founding the claim for damages for mental distress. The evidence was not significantly different from that in the **Vorvis** case. In **Vorvis**, both the majority and the minority judgments concluded the evidence did not warrant an award of damages for mental distress.

The trial judge ought to have instructed himself in accordance with the general rule adopted by the majority of the Supreme Court of Canada in **Vorvis** that damages in cases of wrongful dismissal are limited to damages arising from failure to give the required notice unless there is, in addition, a separate actionable wrong upon which a claim for damages for mental distress can be founded. Damages for mental distress can only be awarded if there is a separate actionable wrong out of which the mental distress claim flows; no such wrong was identified at trial. Therefore, the trial judge ought not to have left the issue of aggravated damages for mental distress to the jury as the manner in which the dismissal was carried out (absent conduct that would give rise to an independent actionable wrong) cannot give rise to a claim for mental distress damages which would be in addition to an award for damages based on the requirement to give reasonable notice of termination.

Since preparing these reasons, the decision of the Manitoba Court of Appeal in **Wallace v. United Grain Growers Ltd.**, [1995] 9 W.W.R. 153 has come to my attention. The following comments by Scott, C.J.M. at p. 181 are consistent with my view of the law respecting damages for mental distress in a wrongful dismissal suit:

> "Thus any award of damages over the above compensation for breach of contract in failing to give reasonable notice must be founded on a separately actionable course of conduct.

This conclusion explains the absence in the reasons of McIntyre J. to any reference to the concepts of foreseeability, the rule in *Hadley v. Baxendale* or whether mental suffering would have been in the reasonable contemplation of the parties at the time the employment contract was entered into. This is all negated by the requirement that there be an independent wrong. In fact, this was the point of departure for Wilson J. in her minority judgment in *Vorvis* in which she would have awarded damages for mental distress [p. 1119] "when it can be said to have been in the reasonable contemplation of the parties when the contract was made that its breach would cause such distress." Decisions such as *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711 (H.C.), *Speck v. Greater Niagara General Hospital*, supra, *Backman v. Hyundai Auto Canada Inc.* (1990), 100 N.S.R. (2d) 24 (T.D.), and *Swain v. Northern Fortress Ltd.* (1993), 131 N.B.R. (2d) 342 (Q.B.), and *Ribeiro v. Canadian Imperial Bank of Commerce* (1989), 67 O.R. (2d) 385, varied (1992), 13 O.R. (3d) 278 (C.A.) (leave to appeal to S.C.C. denied 157 N.R. 400), which utilized the "foreseeability approach" to award damages for mental distress consequent upon a wrongful dismissal are, in my opinion, no longer persuasive.

A few trial decisions have taken the position that it is still permissible to award damages for mental distress where the acts complained of were not independently actionable: *Taylor v. Gill* (1991), 113 A.R. 38 [[1991] 3 W.W.R. 727] (Q.B.), and *Gourlay v. Osmond* (1991), 104 N.S.R. (2d) 155 (T.D.). There is, however, substantial support at the appellate level for the conclusion that I have reached that any award of damages for mental distress, or aggravated damages in such circumstances must be independently actionable. See, Levitt, *The Law of Dismissal in Canada*, 2nd ed. (Aurora: Canada Law Book, 1994); *Dooley v. C.N. Weber Ltd.* (released April 7, 1995, Ont. C.A. [reported 80 O.A.C. 234]); *Trask v. Terra Nova Motors Ltd.* (released March 22, 1995, Nfld. C.A. [reported 9 C.C.E.L. (2d) 157]), together with a host of trial decisions. In *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (C.A.), Weiler J.A., writing for the court, held (at p. 88):

> Here, no medical evidence was presented

> at trial to support a claim for mental distress. The trial judge did not make a specific finding that, in the words of McIntyre J., the conduct of the Bank was "also independently actionable". Accordingly, I do not think there is any basis for an award of aggravated damages, or for an award of damages for mental distress.
>
> Here the trial judge applied the reasonably foreseeable test. He clearly erred in doing so. His conclusion that there was a "negligent breach of the duty of care warranting compensation by way of aggravated damages" cannot stand since there was no finding, and no evidence to support one, that the actions of UGG were such as to constitute an independent cause of action. No authority was cited nor is any available that in the circumstances of this case there is a duty upon an employer to take care to discharge an employee in such a way so as to reduce or even eliminate any risk of mental suffering or other adverse consequences to the employee."

There would be less confusion in the law if Courts applied, rather than ignored, the majority decision in **Vorvis**.

But even conceding that the trial judge might properly have left the issue of aggravated damages for mental distress to the jury, his instructions were wrong. I will develop these thoughts in the next segment of the decision by assessing what, in my view, the jury did in this case and why I disagree with Justice Freeman's conclusions as to what the jury was really doing in making the award of $60,000 for mental distress.

Counsel's Submission and Trial Judge's Instruction to the Jury

In order to understand the jury's answers to the questions put to the jury it is helpful, and quite possibly necessary, to consider the summations of counsel to the jury as well as the trial judge's instructions.

Mr. Ryan, on behalf of the appellant, submitted that Ms. Killorn was not credible and pointed out a number of aspects of her testimony that should raise a doubt as to the validity of her claim for mental distress. He submitted that there was no hidden agenda to get rid of Ms. Killorn so as to avoid payment to her of a commission on the P.E.I. contract. Mr. Ryan submitted to the jury that four months' salary in lieu of notice was more than reasonable given the terms of her contract and the length of her service. He submitted that the dismissal was carried out in a reasonable manner as evidenced by Miss McKiernan coming to Halifax to personally advise Ms. Killorn of the dismissal.

Mr. Riddell submitted to the jury that they should find that 24 months' notice would have been reasonable considering the length of time it takes to close a sale of this type of product and to enable Ms. Killorn to collect a commission on sales in that period:

> "The law in this province that you hear about says that we're [Ms. Killorn] entitled to a period of reasonable notice. You can fire someone without reasonable cause. You've got to provide reasonable notice. They [the appellant] were wrong. You get to right this wrong and you get to correct this injustice. You do.
>
> What's reasonable? The big question. In my submission, it's long enough so that the payment of commissions are made to Colleen. It's long enough that she could collect commissions on sales made for those that might have been made during the appropriate notice period. And I think that should be the normal sales cycle, two years. The range I'm suggesting when you put in your answer there is a minimal of 18 months, a maximum of 32 months, but fairness dictates 24 months, okay. Fairness dictates 24 months."

He submitted to the jury that Ms. Killorn should also be compensated by an award of aggravated damages for the callous manner in which Ms. Killorn was terminated and that Ms. Killorn had been "ripped off" by the appellant. He submitted

that the jury should award punitive damages to send out a message to employers not to dismiss employees in such a callous manner.

The following questions were put to the jury:

> 1. What period of time by way of reasonable notice is the plaintiff, Colleen Killorn, entitled to, under the circumstances, as a result of being dismissed from her employment on July 12, 1993 without cause?
>
> 2(a) Has the plaintiff, Colleen Killorn, established that she suffered mental distress as a result of conduct arising out of the dismissal by the defendant, Health Vision, other than the dismissal itself, which would warrant or require the awarding of additional damages to the plaintiff for the mental distress?
>
> If the answer is yes, briefly describe the conduct.
>
> (b) If the answer to question #2(a) is yes; then what amount should be awarded to compensate Colleen Killorn for the mental distress she suffered?
>
> 3(a) Was there any conduct by the defendant, Health Vision, for which it ought to be additionally punished by an award of punitive damages?
>
> If the answer is yes, briefly describe the conduct.
>
> (b) If the answer to question #3(a) is yes; then what amount should be awarded Colleen Killorn for punitive damages?"

In the trial judge's instruction to the jury, after dealing with question one, the period of notice of termination that would be reasonable in the circumstances, the trial judge instructed the jury on Questions 2 and 3. After stating the questions to the jury he continued:

> "Now I will explain to you the law on mental distress. In certain cases a Court can order or award what are commonly known as aggravated damages. These are damages in addition to the pay or income that would be payable to the plaintiff, Colleen Killorn, during any reasonable period of notice which you decide in question number one. This is in addition to that.

In this case the plaintiff, Colleen Killorn, is asking you to award her a sum of money to compensate her for the mental distress and the effect on her and her family life which she claims she suffered as a result of the conduct of the defendant, HealthVision Corporation, in the manner in which she was dismissed.

I should point out that aggravated damages for mental distress are not routinely awarded in cases of unlawful termination of employment. This is because there is usually some element of mental distress when a person loses their job. However, if the conduct of the employer, in this case, HealthVision, this is important, other than the mere fact of the dismissal itself, that is, if the dismissal is carried out in an unjustified, callous, sudden and inconsiderate manner, such conduct may give rise to damages for mental distress.

The conduct complained of must be surrounding the manner of the dismissal not merely the fact that a dismissal without notice occurred. I can tell you, as a matter of law, that because of the nature of the employment in this case, it was foreseeable and must have been in the contemplation or mind of the parties in this case that mental distress could result from a dismissal without notice.

In this case, you should consider the manner in which the dismissal was carried out and not the actions of Mr. Wilson, which occurred at the seminars prior to the dismissal. Colleen Killorn relies on the fact she was allegedly dismissed because HealthVision was not satisfied with a number of aspects of her performance, but she was never told so by way of verbal or written notice. If that was HealthVision's intention, they would normally have been required to advise her of this fact so that she could have a reasonable opportunity to address any problem or concerns, as I mentioned previously.

Colleen Killorn also relies on the fact that the company handbook set out a procedure for termination and that it was not followed. She also relies on the fact that all of her records, including her file notes, were all taken from her and not provided to her for review. She was not given a notice -- sorry, she was not given a reason for her dismissal. She relies on this fact as well.

It is Colleen Killorn's contention that this amounts to callous, offensive, sudden, humiliating and inconsiderate conduct which caused her mental distress in addition to the dismissal itself.

Colleen Killorn and others have testified how this affected

her. The burden or onus of proving on the preponderance of the evidence that this alleged conduct of HealthVision was unjustified and that this conduct caused her mental distress is or rests upon Colleen Killorn.

In addition to her own testimony she relies on the testimony of Dr. Davey, her husband and her friend, who you heard testify, as to her demeanour and her behaviour around this time. She relies on this evidence to establish and prove mental distress.

Colleen Killorn, therefore, has to prove three things with regard to question number two. The first that she did, in fact, suffer mental distress; second, that the mental distress which she alleges she suffered was caused by HealthVision's conduct in the manner in which she was dismissed; and third, that the conduct complained of warrants or justifies the awarding of damages for mental distress.

On the other hand, HealthVision takes the position that it was not callous or inconsiderate when it dismissed her without cause or notice on July 12th, 1993. It states that it was considerate in having a member of the Vancouver office attend personally at the offices in Dartmouth to hand Colleen Killorn the dismissal letter personally rather than advising her by telephone that a decision had been made to dismiss her.

HealthVision also relies on the fact it offered Ms. Killorn a $14,000 cash settlement as compensation for the dismissal without notice. HealthVision also contends that Colleen Killorn has not, in fact, proven that she suffered the mental distress she claims as a result of HealthVision's conduct surrounding the dismissal. HealthVision claims Ms. Killorn was suffering from stress before the dismissal which could, therefore, not have been caused by the manner of the dismissal and HealthVision also claims that this level of stress or depression did not change significantly after the [dismissal?].

In the final analysis, it is for you to decide whether Colleen Killorn has proven on a balance of probabilities that she suffered mental distress caused by the conduct of HealthVision surrounding her dismissal and it is also for you, the jury, to decide whether the alleged conduct warrants or requires the awarding of damages for mental distress in order to compensate her.

Now you have heard the evidence here of Colleen Killorn surrounding her dismissal. She was told there was going to be an audit and it ended up her termination. You had heard the evidence of how she says the dismissal, in the way it was

done, affected her family. You heard medical evidence. You have also heard the evidence of HealthVision Corporation as to how they feel that their actions were reasonable in delivering the letter personally, offering her a cash settlement of $14,000 and that in view of all the surrounding circumstances they claim their actions were reasonable and that if any mental distress was being suffered around this time by Ms. Killorn, that it was not suffered by their inappropriate actions but by other forms of stress related to things which did not have anything to do with the dismissal itself.

Now this is the exercise you will have to go through to decide question number two. The first answer will be either "yes" or "no" and if it is "yes" I will ask you to briefly comment.

You will note in all of these explanations I do not go through all of the testimony and all of the evidence but I want to remind you, and I'll remind you at the end, all of the evidence is for you to consider.

I'm now going to go to question number three. Question number -- sorry, before I go to question number three, question number two there is a (b) part and I neglected to mention that. Which really says, If the answer to question number 2(a) is "yes", after you have filled in the little paragraph to describe the conduct then you are asked to answer what amount should be awarded to compensate Ms. Killorn for the mental distress and there would be a dollar -- an amount in dollars.

Question 3(a) is, Was there any conduct by the defendant, HealthVision, for which it ought to be additionally punished by an award of punitive damages. And I will now explain to you the law on punitive damages.

In this case Colleen Killorn has also advanced a claim for punitive damages. These are damages in addition to damages for mental distress. Damages for mental distress are meant to compensate the plaintiff -- compensate just another word for make up to the plaintiff, for the mental suffering and the effects on her and her family life.

Punitive damages, on the other hand, are quite different and they are exactly what the name or the term implies. They are meant to punish a defendant, in this case, HealthVision, for what Colleen Killorn claims is reprehensible, vindictive, malicious and harsh conduct and conduct which is either at or close to, which the plaintiff argues is at or close to heinous in nature.

The conduct complained of in punitive damages claims

must be such as to offend the standards of decent conduct in the community. I can tell you -- this is important, I can tell you that awards of punitive damages by our courts are rare. In order for such an award to be made, the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and disapproval and requires or warrants punishment.

The mere fact that we may disapprove of a particular conduct is not sufficient. It must also meet these criterion of extreme that I have just mentioned previously.

You must bear in mind that punitive damages are a form of punishment, the same way a fine is punishment. Punitive damages are not for the purpose of compensating the plaintiff for losses but they are, rather, meant to send a message to other employers that the Court finds the conduct unacceptable and that it will not be tolerated.

The purpose of punitive damages is strictly to punish the wrong-doer and to discourage other employers from following similar unacceptable courses of action. As I said, and I repeat, the conduct must be extreme before punitive damages can be awarded.

Such damages cannot be awarded merely because we disapprove of the conduct, no matter how strongly we disapprove. For these reasons, awards of punitive damages are rare in dismissal without cause cases.

The plaintiff, Colleen Killorn, relies on the manner of the dismissal as part of her claim for punitive damages. She also relies very heavily on the contention that she was dismissed summarily on July 12th, 1993, so that, and for the main purpose that HealthVision would not have to pay her commission on large deals such as P.E.I. and Yarmouth, which were approaching or heading towards fruition or nearing fruition.

On the other hand, HealthVision relies on their conduct that they have already mentioned in defence of their claim for mental distress, basically the notice delivered personally, the offer of compensation and further contends that there is no evidence whatsoever that HealthVision terminated Ms. Colleen Killorn for the purpose, or primarily for the purpose of depriving her of commissions on deals such as P.E.I. and Yarmouth which were nearing fruition.

HealthVision contends the main reason they dismissed Colleen Killorn was because they were dissatisfied with her

performance and that they saw the Nova Scotia office location as unnecessary or superfluous and that this matter had been discussed previously.

They also point to the fact that, according to their evidence, Mr. Wilson opposed the decision to close the office in Nova Scotia earlier in 1992. However, in the final analysis it is for you, the jury, to decide whether the evidence raises an inference or a conclusion that HealthVision terminated Ms. Killorn in order to avoid paying her future commissions.

Here Ms. Killorn relies in part on conversations she said she had with Mr. David Wilson, her immediate boss, where she testified he said P.E.I. would not be part of her targets and that she had not done much work on that deal. She also relies on the fact that she was interrupted when she tried to explain the P.E.I. deals at seminars as an indication that HealthVision and, in particular, Mr. David Wilson had a plan, as she put it, a hidden agenda, to cut her out of the P.E.I. deals by either pushing her to resign and, failing that, by changing her territory or dismissing her entirely.

HealthVision, on the other hand, says these allegations are merely conjecture, guesses and speculation and are not supported by the weight or preponderance of the evidence. But, again, in the final analysis it is for you, the jury, to decide whatever kind of extreme conduct that I have just explained to you and which is required in order to grant an award of punitive damages to Colleen Killorn. It is for you to decide whether that has been proven by her on the preponderance of the evidence.

If you find there is misconduct then you may award a sum which will punish HealthVision and/or discourage others from similar conduct.

While such an award should be large enough to be meaningful it should not be more than necessary if you find such an award is appropriate in the circumstances.

This is the exercise you will have to go through in deciding question number three." (emphasis added)

It is clear from a review of discussions between counsel and the Court, prior to counsels' summations to the jury and the judge's instructions, just why the jury was asked to state their reasons if they were to make an award for mental distress. The trial judge was of the opinion that it was important that the Court and

counsel know "which conduct the jury focused on" in making the award. The trial judge stated:

> "Otherwise we may never know. And I think that since there is a danger that they would consider which the case law doesn't allow them to consider, I thought it would be appropriate to have them just briefly describe the conduct in case somebody wants to challenge their verdict at any stage. Otherwise we wouldn't know what they focussed on."

The trial judge shortly thereafter said "You don't necessarily have to ask what the conduct consisted of in jury questions, but I think that in this case it was dangerous not to do so." Counsel for Ms. Killorn agreed.

It is also clear from a review of the discussions between the trial judge and counsel prior to instructing the jury that the trial judge intended to tie the theory of Ms. Killorn's counsel that she was fired to avoid payment of commissions to the punitive damage question.

The trial judge stated to counsel:

> "See, it seems to me that the punitive damage award hinges on the crucial finding of fact, which is whether HealthVision dismissed Colleen Killorn on July 12th, 1993, primarily and principally with the unacceptable purpose of depriving her of commissions for which she had worked long and hard on projects."

The trial judge, after advising counsel, over Mr. Ryan's objection, that he would leave both the issue of mental distress damages and punitive damages to the jury and that he would ask the jury why such awards were made if the jury found Ms. Killorn entitled to such damages, stated to counsel:

> "So I -- in this case then, I do not -- since we have the two questions asking them to briefly describe the conduct. I think it provides the necessary safeguard to ensure the jury properly applies the law and also allows them to make a crucial determination of fact as to the reasons for the termination. And I believe that finding of fact should be left to the jury. So

> having said that, I will allow the jury to decide the issues of mental distress and punitive damages."

Counsel for the appellant then restated for the record that it was his position that leaving the issue of mental distress damages and punitive damages to the jury was inappropriate.

The trial judge's instructions to the jury shows that he related the theory, that Ms. Killorn was fired by the appellant to avoid payment of a commission on the P.E.I. deal, to the punitive damage question. I have underlined those passages of the instruction to the jury to this effect.

Considering counsels' summations to the jury and the judge's instructions, I would infer from the jury's answers to Questions 1 and 2, coupled with the jury's decision not to award punitive damages, that the jury rejected that theory. Had the jurors wished to allow Ms. Killorn to collect a commission on the P.E.I. contract, they would have decided a period greater than six months would have been reasonable notice. Had the jurors accepted Ms. Killorn's theory that she was fired so the appellant could avoid payment of the commission on the P.E.I. contract, the jurors would have made an award for punitive damages. Therefore, I cannot accept Justice Freeman's conclusion the jury was really compensating Ms. Killorn for the lost commissions when the jury awarded her the $60,000 for mental distress.

The award of $60,000 was for the manner in which she was dismissed which the jury described as callous and high-handed. The jury also found fault in the appellant not telling Ms. Killorn over the telephone that it was sending Ms. McKiernan to Halifax to terminate her employment. The jury's answer as to why an award for mental distress was made does not otherwise describe what the callous or high-handed conduct was. Counsel for Ms. Killorn and the trial judge in his

instructions to the jury had stressed to the jury the suddenness and callousness of the dismissal without warning, and without reasons, were factors to consider on the issue of mental distress arising out of the termination.

In my opinion, the termination without warning or without notice are factors relevant to the issue of reasonable notice and are compensated for by an award to an employee for the breach of the obligation of the employer to give an employee warnings if performance is unsatisfactory and in failing to give the employee reasonable notice of termination.

Considering the majority decision in **Vorvis**, these are not factors relevant to a claim for damages for mental distress. Counsel for Ms. Killorn submitted to the jury, and the trial judge instructed the jury, that the failure of the appellant to give Ms. Killorn reasons for her dismissal was a factor to consider on the question of aggravated damages for mental distress. With respect, there is no obligation at law on an employer to give reasons for a dismissal (**Pulsifer v. GTE Sylvania Canada Ltd.** (1983), 56 N.S.R. (2d) 424 (N.S.C.A.)).

The jury was given the 1989 employment contract and the March 12th, 1993 contract proposal forwarded to Ms. Killorn but was given no instructions as to which contract was in force, if either. Under the circumstances, a number of questions come to mind. What contract did the jury consider the parties were bound by? What interpretation did the jury put on the provisions respecting the right of either party to renegotiate prior to the anniversary date of April 1st? Did the jury consider the 1989 contract continued after April 1st, 1993? Did the jury consider the terms of the contracts with respect to entitlement to commissions as provided for in both the 1989 contract and the March 1993 proposal, that is, commissions will be paid when accounts are paid by the customer?

The jury was given the contracts without the aid of any instruction from the trial judge as to their legal effect or the legal effect of the appellant forwarding to Ms. Killorn the March 1993 proposed contract.

The jury was simply told that there was a requirement for reasonable notice and that they were to determine what would have been reasonable notice in all the circumstances.

They were not advised whether they were to take into consideration on the mental distress issue the terms of either contract nor were they advised as to what was the effect of the provisions in the employee's handbook respecting termination of employment relationships by the appellant. In short, the trial judge did not instruct the jury as to what were the terms of Ms. Killorn's employment at the date of termination. There was no instruction to the jury with respect to the provision of either contract respecting the payment of commissions following termination of employment. I would infer from discussions between the Court and counsel that the trial judge concluded that these were legal questions which were not appropriate for a jury. However, it would seem to me that the trial judge ought to have decided these fundamental legal issues before instructing the jury on the questions that were left to them. Otherwise, the jury was acting in a vacuum and unable to properly answer any of the questions before them as they had no assistance from the trial judge as to the status of Ms. Killorn's employment contract on the date of dismissal. The parties were entitled to have the trial judge determine these issues as to what the contractual arrangement was as of July 12th, 1993 so that the jury could give due consideration to the terms of the employment arrangement at that time in deciding as to what was reasonable notice under the circumstances and in deciding the question of aggravated damages for mental distress arising out of the

termination.

If the contractual terms of employment at the time of termination were clear, it may have been appropriate, with a proper instruction on the law, to leave the issue of aggravated damages for mental distress to the jury. But in this case the terms of employment at the time of dismissal were not clear. Under the circumstances it demanded a careful instruction on that issue as well as an instruction on the law respecting claims for mental distress in wrongful dismissal cases. There are those who suggest the law in Canada is in a state of confusion following the decision of the Supreme Court of Canada in **Vorvis**. To some extent it is, but in my opinion, the courts must try to simplify the law. This can be done by applying the majority decision of **Vorvis** that damages are not to be awarded for mental distress unless there is an independent cause of action apart from the breach of contract caused by the dismissal without reasonable notice.

On the facts of this case, the trial judge did not correctly instruct the jury respecting the issue of damages for mental distress. Apart from the failure to decide and advise the jury what were the terms of Ms. Killorn's employment on July 12th, 1993, the trial judge erred when he instructed the jury that damages for mental distress could be awarded to compensate Ms. Killorn for the manner in which she was dismissed if it was foreseeable that she would suffer such mental distress on termination. This instruction was contrary to the majority decision in **Vorvis**.

Justice Freeman has stated that the concept of an independent actionable wrong, as described in **Vorvis**, is broad enough to embrace a breach of the general duty of care. He then discussed decisions in **Donahue v. Stevenson**, **Anns v. Merton London Borough Council** and **Canadian National Railway Co. v. Norsk Pacific Steamship Co.** Justice Freeman concluded, following the McIntyre

analysis, that it would appear to him that damages can arise from mental distress on termination when an employer in breach of the duty of care or in the course of other conduct does something more harmful to the employee than either would have reasonably contemplated and provided for by way of a contractual remedy when they entered into the employment contract. The inference to be drawn from Justice Freeman's comments is that the jury could have found that the appellant had a duty of care based on the foreseeability of harm if the appellant terminated Ms. Killorn on coming off sick leave.

While Justice Freeman acknowledged that given the two approaches in **Vorvis**, the law of damages with respect to mental distress and wrongful dismissal cases is not free from difficulty, he was of the view that it was not so complex that it cannot be explained to and understood by a jury and that it was not an improper exercise of the trial judge's discretion to have left the matter with the jury. For the reasons previously set out, I do not agree with him. On the facts of this case the issue of aggravated damages for mental distress should not have been left with the jury. But even if I were to agree that it was properly left to the jury and agree that the appellant, in these circumstances, may have had a duty of care to Ms. Killorn, which it may have breached, the learned trial judge did not instruct the jury on the law of negligence. This would have been essential in order for the jury to determine this issue.

In summary, the trial judge's instruction to the jury on the law respecting an award of aggravated damages for mental distress was totally inadequate no matter how one looks at it. While the issue should not have been left to the jury due to the complexity of the facts, having been left, it was not left in a manner that adequately instructed the jury on the issue. The erroneous instruction opened the

door to the extraordinary award made in this case.

The Award of $60,000 Damages for Mental Distress

At trial, the appellant admitted that Ms. Killorn had been dismissed without cause. She had not been given an advance notice but was offered the equivalent of four months' salary in lieu of notice. The appellant has not challenged the jury's finding that six months' notice was reasonable in the circumstances. The cross-appeal by Ms. Killorn on the ground that the jury erred in fixing six months as reasonable notice of termination was abandoned. The judgment for Ms. Killorn was entered for the total sum of $101,122.51 inclusive of pre-judgment interest and costs. Although I have concluded that the trial judge, on the facts of this case, ought not to have left the issue of damages for mental distress to the jury, I will deal with the appellant's argument that $60,000 was an excessive award. I do so because this award, in my opinion, sets a dangerous precedent.

The decided cases indicate that $60,000 for mental distress in this case is inordinantly high when one considers the reasons given by the jury for making the award. I repeat what the jury stated as the reason for making the award:

> "The conduct of Health Vision Corp. was high handed and callous. Mrs. Killorn was misled into believing her office was being audited when in fact she was also being terminated, this resulted in further financial turmoil, added mental distress to her and her family."

Counsel for the appellant has pointed out in his Factum that an examination of 13 Nova Scotia cases that considered damages for mental distress in wrongful dismissal cases indicate that damages for mental distress are the exception. Secondly, that when such damages are awarded, typically they are in the range of $500 to $850.

In the following trial decisions, although damages for mental distress were claimed, nothing was awarded for mental distress:**Sweet v. The Canadian Indemnity Co.** (1980), 43 N.S.R. (2d) 55; **Wilcox v. Phillips Electronics Ltd.** (1984), 64 N.S.R. (2d) 352; **Lynch v. J.D. Mack Ltd.** (1984), 65 N.S.R. (3d) 417; **Bell v. Isaak Walton Killam Hospital for Children** (1986), 74 N.S.R. (2d) 309; **Backman v. Hyundai Auto Canada Inc.** (1990), 100 N.S.R. (2d) 24; **Cardenas v. Clock Tower Hotel Ltd. Partnership** (1993), 120 N.S.R. (2d) 49; **Monk v. Coca-Cola Bottling Ltd.** (1996), 150 N.S.R. (2d) 192 and **Damery v. Matchless Inc.**, [1996] N.S.J. No. 229 (S.C.).

In the following cases Nova Scotia trial courts fixed damages in nominal amounts (less than $1,000) for mental distress arising out of a wrongful dismissal: **McNair et al v. J.D. Bremner & Son Ltd.** (1983), 58 N.S.R. (2d) 222; **Morin v. Atlantic Cooperative Publishers** (1988), 88 N.S.R. (2d) 117 and **Legorburu v. Det Norske Veritas** (1990), 97 N.S.R. (2d) 250.

In **McOnie v. River Pub Ltd. and Rofhie** (1987), 79 N.S.R. (2d) 379 (S.C.) the Court awarded $6,500 for mental distress arising out of wrongful dismissal and in **Russell v. Nova Scotia Power Inc.** (1996), 150 N.S.R. (2d) 271 an award of $40,000 was made.

In **McOnie** (supra) in a routine meeting, the plaintiff met the defendant and his solicitor for breakfast. Without any notice he was handed a letter terminating his services. The Court found that the dismissal was without cause. The plaintiff had resigned from his seven year job to work with the defendant and had been working less than a year when his employment was terminated. The plaintiff testified that he was humiliated and devastated and had difficulty adjusting. He gained weight, and became reclusive and depressed. A psychiatric expert

diagnosed a depressive illness. The trial judge found that the manner of the dismissal warranted an award for mental distress.

McOnie was decided before the decision of the Supreme Court of Canada in **Vorvis**.

In **Russell** (supra) the plaintiff was dismissed for unfounded allegations of incompetence and insubordination after 17 years with Nova Scotia Power. The employer sent an e-mail message to other employees to the effect that the plaintiff was dismissed for incompetence. The effect of this conduct was found to have aggravated the plaintiff's longstanding and well controlled generalized anxiety disorder and almost immobilized him for several months after termination. The Court noted the rarity of such awards but found on the evidence the employer's actions were oppressive. This award was post **Vorvis**. The award was made for stress over and above that caused by the dismissal itself.

There are decisions from other provinces in which substantial awards have been made for mental distress and they are relied upon by counsel for Ms. Killorn. In **Pilato v. Hamilton Place Convention Centre Inc.** (1984), 3 C.C.E.L. 241, 45 O.R. (2d) 652 (H.C.J.) an award of $25,000 was made. The 36 year old employee had been employed by the defendant for about two years when serious allegations were made against him. The plaintiff was not given the opportunity to respond to them and his dismissal was published in the press while he was on vacation. The court considered psychiatric evidence and make the award for aggravated damages in addition to an award of $25,000.00 punitive damages.

In **Young v. Huntsville District Memorial Hospital** (1984), 5 C.C.E.L. 113 (Ont. H.C.J.) an award of $20,000 was made to a 55 year old employee who had been employed for 18 years as a business manager with the defendant. He

suffered a heart attack and required two months to recover. When he returned to work, he was depressed. He was then subjected to increased demands by a superior and eventually was presented with a negative performance review one month after his return. He was demoted; the Court found that he had been constructively dismissed. The Court emphasized the size of the community, the recklessness of the dismissal, the fact that the employers knew of his delicate condition. The Court held that "any reasonable view of the contractual situation entered into by the parties in 1964 would have included the realization that such distress could have followed a wrongful termination of the contract by the parties to it".

In **Smith v. Reichhold Ltd.** (1988), T.L.W. 743-001 (B.C.S.C.), an award of $30,000 was made for mental distress for a plaintiff who had been a plant manager with 20 years of service to the defendant. Certain allegations of misconduct and criminal acts were made against the plaintiff resulting in his dismissal. The employer did not investigate the allegations or allow a fair hearing before the dismissal and treated the plaintiff as a security risk. The court found that the plaintiff had been insulted, humiliated and suffered mental distress.

In **Pilato**, **Young**, and **Smith** the decisions were pre **Vorvis** and were significantly different on their facts from Ms. Killorn's situation. In **Pilato** there were serious allegations made against the plaintiff. He was not given an opportunity to respond. His dismissal was published in the press while he was on vacation. Nothing of this sort took place with respect to the dismissal of Ms. Killorn.

In **Young** the employee was 55 years of age, had been employed for 18 years, and had suffered a heart attack. Clearly the dismissal on his return to work was very reckless and warranted a substantial award.

In **Smith** the plaintiff had been an employee with 20 years of service. Allegations of misconduct and criminal acts were made against him resulting in his dismissal. The employer did not investigate the allegations. Obviously a factual situation far different than that of Ms. Killorn's.

The following are post **Vorvis** decisions in which awards for mental distress damages were made. Counsel for Ms. Killorn also relies on these decisions.

In **Ribeiro v. Canadian Imperial Bank of Commerce** (1992), 44 C.C.E.L. 165 (Ont. C.A.) an award of $20,000 for mental distress was made to a 30 year old employee who had been employed as a consumer loans officer for six years. The bank had made allegations that the employee had acted improperly and terminated the employee with minimal investigation. Criminal charges were also brought forth. The Court concluded that he was wrongfully dismissed and the allegations were unfounded. The Court also found that the actions of the bank were wanton and reckless and that these actions caused severe depression. The Court of Appeal also awarded the plaintiff $50,000 punitive damages to punish the bank for its reprehensible and vindictive conduct. Neither the trial judge nor the Court of Appeal made any reference to the Supreme Court of Canada decision in **Vorvis**. Leave to appeal to the Supreme Court of Canada was refused.

In **Hughes v. Gemini Food Corp** (1992), 45 C.C.E.L. 113 (One. Gen. Div.) an award of $75,000 was made to the plaintiff who was a chief executive officer of the defendant and had been in that position for a short time. Allegations of misconduct came forth with respect to a business dealing and eventually the plaintiff was terminated in a very public manner. He suffered mental distress. The court awarded $75,000 as aggravated damages, citing **Ribeiro** in its reasons for

judgment; there was no reference to the Supreme Court of Canada position in **Vorvis**.

In **Dixon v. B.C. Transit** (1995), 13 C.C.E.L. (2d) 272 (B.C.S.C.) an award of $50,000 for mental distress was made to the plaintiff who was president and chief executive officer of the defendant company. He had joined the defendant after leaving a secure job. He was terminated seven months later. The defendant made allegations of poor performance when there was no cause and the defendant simply wished to avoid paying a severance. The employee suffered aggravation, frustration and public humiliation. In allowing the claim for aggravated damages, the Court noted that the actions of the defendant in dismissing him, knowing there was no cause, but stating that there was, could be considered an independent tort of deceit. The Court also awarded $75,000.00 in punitive damages because the actions of the defendant in advising the media that the plaintiff had been fired for cause, when no cause existed, and in refusing to pay him one year's salary as provided for in the contract were defamatory and malicious. The Court followed the decision in **Vorvis**.

In **Ribeiro** allegations of improper activity and even criminal charges were brought forth. The situation in **Ribeiro** was far different from the conduct of the appellant in the appeal we have under consideration.

In **Hughes** (supra) allegations of misconduct were made; the plaintiff was terminated in a very public manner. No such allegations were made against Ms. Killorn.

In **Dixon** (supra) the plaintiff had left a secure position and was terminated within a very short period of time (7 months). Allegations of poor performance were made when there was no cause to make such allegations. The dismissal was made

in a very public manner. The court found that the defendant simply wished to avoid paying a severance. The court also found the employer committed the torts of deceit and defamation. The employee suffered aggravation, frustration and public humiliation. These facts puts this situation in a considerably different category than that of Ms. Killorn.

In **Russell** the plaintiff was subject to unfair demands and unfounded criticisms by a supervisor; his dismissal for his incompetence was announced to other employees by e-mail. He suffered mental distress and the award of $40,000 was made. This award was high but was not appealed. There were no such publicized allegations made by the appellant against Ms. Killorn.

Analysis of the Facts Relevant to the Jury Award of $60,000 Damages for Mental Distress

In addition to the significant facts referred to in Justice Freeman's opinion relating to the conduct of the appellant leading up to July 12th, 1993, it is well to also keep in mind other facts relevant to her termination and the mental distress claim arising therefrom.

Ms. Killorn was unemployed prior to being engaged by the appellant in 1989. She was not induced away from a secure job. She did not have a long term employment or any form of job guarantee with the appellant. She was suffering from stress as early as 1992. This stress was unrelated to the termination of her employment. She had not met her sales goals in 1990, 1991 or 1992. Her husband's business was not successful; she was the primary income earner. She was having a problem with her weight and had consulted Dr. Davey with respect to that matter in February of 1993.

The cause of her stress cannot be attributed solely to the events involving the appellant starting in March of 1993.

As early as 1992 Mr. Brand wanted to close the Atlantic Canada office as it could not be justified on financial considerations. At that time he acquiesced in Mr. Wilson's desire to keep it open. Mr. Wilson obviously changed his mind in 1993.

It was by no means clear that in February/March 1993 that the appellant would be able to successfully negotiate a contract with the P.E.I. Commission as is evidenced from the extensive negotiations which took place following the Committee's decision that the appellant would be its preferred supplier.

The revised compensation package forwarded to Ms. Killorn on March 16th, 1993, was the identical package forwarded to the other five Canadian sales representatives. It was not a package hatched to upset Ms. Killorn.

With respect to the interruption of her presentation at the sales conference in Victoria on June 7th, 1993, Mr. Brand testified that he was there and the interruptions were the standard procedure when sales representatives are making presentations so that management could make informed decisions on what sales could be expected from the sales representatives in the upcoming year.

On June 7th Ms. Killorn left the meeting and told Mr. Wilson not to contact her. Under the circumstances, what course was open to the appellant other than to assign another sales representative in Toronto to service the accounts until she came off sick leave and so inform her customers?

Ms. Killorn decided to return to work on July 9th. The appellant was not told the nature of Ms. Killorn's problem as the note from the doctor merely stated that Ms. Killorn was under his care but should be able to return to normal duties within four to eight weeks. Was it not reasonable for the appellant to assume that

when Ms. Killorn decided to return to work that she had recovered and would be able to deal with the appellant's decision to terminate her?

Was it unreasonable of the appellant not to advise her by phone in advance of Ms. McKiernan coming to Halifax that the appellant intended to terminate her? To have done so would have completely negated their desire not to crassly terminate her employment by a phone call rather than have Ms. McKiernan travel from Vancouver to Halifax to tell her personally.

Ms. Killorn was initially engaged pursuant to a contract that was for one year and renewal from year to year unless renegotiated. She had been employed for less than five years. Under the circumstances, was four months' salary so unreasonable that the termination would cause such extraordinary stress to Ms. Killorn that a $60,000 award was warranted?

Was clearing out her office in Halifax so unreasonable, having terminated her? To have done so was not an unusual or unreasonable procedure in business.

Had the appellant wished to terminate Ms. Killorn to save the commission it could have done so at any time in March 1993 by simply notifying her that her contract was not being renewed. There was no need to go through the convoluted process that was described by Ms. Killorn as a hidden agenda. The appellant was hardly any closer to obtaining a contract with the Commission in July of 1993 than it was in March of 1993. The negotiations were extensive and did not conclude with a contract until November, 1993.

The reasonable inference from the facts is that the appellant did not decide to terminate Ms. Killorn until after the June 7th, 1993, incident in Victoria, British Columbia. I would repeat the point made earlier that the jury apparently rejected the theory advanced on behalf of Ms. Killorn that the appellant wished to

cheat her out of her commission as the jury did not award her the 24 months' notice urged upon the jury by Ms. Killorn's counsel so as to pick up commissions that would eventually be paid on the P.E.I. contract. Nor did the jury make an award for punitive damages which the trial judge had clearly linked to the theory that the appellant was attempting to cheat her out of the commission. As previously stated, I disagree with Justice Freeman's analysis that the jury could have concluded that the events leading up to her dismissal on July 12th, 1993, were for the purpose of ensuring she did not get the $90,000 commission. What the jury did and did not do simply does not support such a finding. The jury made no specific findings of callous behaviour by the appellant towards Ms. Killorn other than the appellant indicated to Ms. Killorn that Ms. McKiernan was coming down to do an audit when she was also coming to terminate Ms. Killorn's employment. Unlike other cases in which substantial awards were made for mental distress, Ms. Killorn's dismissal was not done in a public manner; there were no allegations of misconduct made against her, no defamation, nor any deceit. In short, there was no separately actionable wrong identified by the jury upon which it could have made such an award. Furthermore, the facts surrounding the dismissal of Ms. Killorn simply do not equate with the facts of those cases in which substantial awards were made for mental distress arising out of the manner in which the termination was carried out.

I would note that in **Vorvis** both the majority reasons of McIntyre J. and the minority reasons of Wilson J. decided that **Vorvis** was not a case in which there should be any award for aggravated damages arising out of mental distress despite the fact that Mr. Vorvis was distressed as a result of the dismissal.

The standard measure of damages for dismissal of an employee without cause and without notice is based on what would have been a reasonable notice of

termination considering all the circumstances. Claims for mental distress arising in wrongful dismissal cases have come to the fore only in recent years. Since the Supreme Court of Canada decision in **Vorvis**, those decisions that do not turn on a finding of a separate actionable wrong, apart from the dismissal, are no longer of persuasive authority.

In my opinion, aggravated damages for mental distress can be awarded on the limited basis established by the majority decision of McIntyre J. in **Vorvis** (see paras. 21-23 inclusive of that decision as previously set out).

While Justice McIntyre left the door open for a claim for damages on some basis other than a separate actionable wrong, until such time as the Supreme Court of Canada identifies such other basis for a claim, courts should only award damages for mental distress if the employer has committed an actionable wrong separate and apart from the breach of contract that gave rise to the wrongful dismissal claim. To proceed otherwise creates too much confusion in the law. The majority of the Supreme Court of Canada did not accept the reasoning of Justice Wilson with respect to the legal principles to be employed in considering an award for mental distress in these cases.

It is of interest to note that in **Vorvis** Justice Wilson respectfully rejected what she described as the narrow approach in English Courts in both **Bliss v. South East Thames Regional Health Authority**, [1987] I.C.R. 700 and **Hayes v. James and Charles Dodd (a firm)**, [1990] 2 A.E.R. 815 (C.A.), in which cases the Courts concluded, as a matter of policy, that there should not be damage awards for reasonably foreseeable mental distress in breach of contract of employment cases. Justice Wilson stated in paragraph 45:

> "The Court of Appeal in **Hayes and anor v. Dodds** seems to have been unduly concerned at the prospect of large "U.S.-

> style" awards for mental suffering, ignoring the fact that the award has to be quantified on a sensible and realistic basis. Indeed, awards under this head have tended to be rather modest in Britain and in Canada. For example, in **Cox v. Philips Industries Ltd.**, the damages for mental suffering awarded against the corporate employer were assessed at £500. In the Canadian cases of **Antonaros v. SNC Inc.** and **Pilon v. Peugeot Canada Ltd.**, the damages (also against corporate employers) were assessed at $3,500 and $7,500 respectively. I mention this not to endorse the propriety of the awards in these cases but to point out that the fear of unrealistic or unfair awards for mental distress in breach of contract cases is not really warranted by anything that has happened to date."

The award made to Ms. Killorn of $60,000 for mental distress for the manner in which she was dismissed as found by the jury by the answer to Question 2 illustrates that the fear of unrealistic jury awards for mental distress in wrongful dismissal cases is now real.

In **Wallace v. United Grain Growers** (supra), Scott, C.J.M. stated at p. 178 that the rationale for the English policy is not hard to ascertain :

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

Summary on the Issue as to the Quantum of the Mental Distress Award

The appellant had decided to terminate Ms. Killorn's employment in mid June, 1993. Ms. Killorn was on sick leave. The appellant waited until she returned to work and then sent Ms. McKiernan from Vancouver to Halifax to advise her of the termination rather than do it over the telephone. The jury awarded $60,000 because

the appellant was callous and high-handed and had deceived Ms. Killorn in not advising her that one of the objects of Ms. McKiernan's visit to Halifax was to terminate Ms. Killorn's employment. The question must be asked: Does the appellant's conduct in the months preceding the dismissal and the appellant's decision not to tell Ms. Killorn that Ms. McKiernan was coming to Halifax to terminate her warrant an award of $60,000 for mental distress? The answer must be no. Based on the reasons given by the jury for making the award of $60,000, the award is so inordinantly high that it is a wholly erroneous estimate of the damage. To allow such an award to stand has the effect of turning the law respecting an assessment of damages in a wrongful dismissal case on its head as the award for mental distress is three times the award made by the jury based on the requirement that an employer give reasonable notice of termination.

If an award of damages for mental distress was lawful, the facts do not disclose conduct by the appellant that would justify a jury award in excess of $15,000, as gauged by awards made in other cases.

Conclusion

The suddenness and callousness of a dismissal does not constitute conduct that gives rise to an actionable wrong separate and apart from the cause of action for the dismissal without cause and without notice. Damages for wrongful dismissal are to compensate the employee for the failure of the employer to give reasonable notice. The damages are compensatory and are measured by calculating the loss of income of the employee for the period that would have been encompassed by a reasonable notice of termination.

In the absence of facts disclosing a separate actionable wrong, as, for

example, where defamation is proven, there cannot be an award of damages for mental distress arising from the wrongful dismissal. As in **Vorvis**, the facts do not warrant an award of damages to Ms. Killorn for mental distress.

I would allow the appeal and set aside those parts of the trial judge's order that relate to the award of damages for mental distress and pre-judgment interest on that award.

Apparently there was an offer to settle. Therefore, I would reserve the matter of costs, both at trial and on appeal, so this Court can receive submissions by counsel for the parties that would arise as a result of such an offer having been made.

Hallett J.A.

Concurred in:

Roscoe J.A.

C.A. No. 125259

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HEALTHVISION CORPORATION, a body corporate, formerly known as HCS HEALTHCARE SYSTEMS INC., a body corporate Appellant (Respondent on Cross-Appeal) - and - J. COLLEEN KILLORN Respondent (Appellant on Cross-Appeal)`	)	REASONS FOR JUDGMENT BY: HALLETT, J.A. ROSCOE J.A. (Concurring) Freeman, J.A. (Dissenting)