

The Good, the Bad and the Ugly: The New Order of Damages in Employment Law

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If life was a movie, the decision in *Keays v. Honda*² is like the stranger who comes to a frontier town in the Old West, generating an amalgam of excitement, fear, apprehension and curiosity. “There’s a new kid in town” is the thought that comes to mind. In the realm of employment case law, *Keays v. Honda* stands out as a bold, new example of the shape of things to come, a new order in the manner in which lawyers and their clients will view the law in assessing damages and the risk of litigation. Where the court finds that an employee was dismissed wrongfully, there will invariably be a finding that there “is a breach of contract, and all damages flowing there from are recoverable”.³ In this regard, nothing really changes. But with new and improved categories of damages, the plaintiff now possesses a wider variety of remedies than originally contemplated by the court, an evolution of claims that was once upon a time restricted in their use and application. These innovative and improved damages create a host of new ways lawyers will develop their cases while providing new challenges for both employees and employers in assessing their relationship in the workplace.

A Brief (if not complete) History

In the not too distant past, damages in employment cases were primarily limited to the notice period. *Bardal v. Globe & Mail Ltd.* [1960] O.W.N. 253 (H.C.J.), set the parameters of the notice period by determining the criteria that would be used in assessing damages. As stated by McRuer C.J.H.C:

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² *Keays v. Honda Canada Inc.*, [2006] O.J.No. 3891, (2006) 52 C.C.E.L. (3d) 165

³ *Stevens v. LeBlanc’s Welding & Fabricating Ltd.* (1982), 40 N.B.R. (2d) 389 (Q.B.) quoting F. R. Batt, *The Law of Master and Servant*, 5th ed., by George G. Webber (London: Pitman and Sons, 1967).

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and availability of similar employment, having regard to the experience, training and qualifications of the servant.⁴

Bardal created the opportunity for employees to advance claims more advantageously in a common law setting that was primed for change. It was the first beacon of light in what was a most traditional and conservative area of practice. Through the ensuing years, those parameters were broadened and other indicators were added. But *Bardal* opened the door and is the starting point for consideration of what has become the traditional treatment of the notice period.

Despite *Bardal*, the common law continued to be the domain of the upper-management class. Wrongful dismissal was by design something that happened to executives almost exclusively; lower management employees and those categorically referred to as the “rank and file” were relegated to the minimum standards afforded to them by the *Employment Standards Act* (Ontario) as amended. In many cases, the cost of litigation lessened the likelihood that the average employee would attempt to recover anything greater in the civil courts.

The decision in *Cronk v. Canadian General Insurance Company* (1995) 25 O.R. (3d) 505 expanded the constituency base by not limiting extensive common law damages to only company CEOs or managers. *Cronk* was quickly followed by *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701 which extended notice periods for findings of bad faith in the manner and methods employed in the job termination. These cases in combination with the collected law to that time truly invited a reassessment of the traditional notice period. Lawyers and the Courts began to challenge our conventional thinking about damage awards. With the decision in *McKinley v. BC Tel*,⁵ the law raised

⁴ *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at p. 145.

⁵ [2001] 2 S.C.R. 161 rev'g (1999), 67 B.B.L.R. (3d) 337 (C.A.)

the bar considerably by revisiting cause for dismissal and, thereby, lessening the likelihood that a termination for cause could be defended with relative ease. By broadening the plaintiff base and by essentially making it more difficult to terminate an employee, the law was ripe for expanding the array of damages.

Enter *Keays v. Honda Canada* and the rest, we can say, is history or, at the very least, *stare decisis*. *Keays v. Honda Canada Inc.* (some lawyers refer to it as “that Honda case”) pulls a cornucopia of different tests together while giving us more than just a fleeting glimpse of the potential range of damage claims available to creative legal counsel. *Keays v. Honda* effectively deals with notice, extended notice (*Wallace* damages), punitive damages, discrimination and harassment as an alternative vehicle for consideration along with a liberal view of costs. When viewed individually, these components of the damages argument become a most enticing collection of tools useful in building a strong and resilient case in wrongful dismissal lawsuits.

At this moment, the wrongful dismissal playing field is much wider and longer than when it was first envisioned just a few decades ago. A careful review of the dimensions is warranted with the cautionary note that getting downfield still depends upon a good set of facts and reliable witnesses.

Notice: “*The Good*”

We are light years from a time when lawyers would advise that the ceiling for wrongful dismissal cases was 24 to 26 months. Despite the initial decision (and the litigation bar’s elation) in *Kilpatrick v. Peterborough Civic Hospital*,⁶ an assessment of greater damages (i.e. notice) in wrongful dismissal cases was reserved to very few situations and only for those employees who were Executive or CEO material. Though Cronk broadened the employee/plaintiff base, the notice period in itself was not altered to

⁶ *Kilpatrick v. Peterborough Civic Hospital* [1999] O.J. No.1505

any significant degree. *Cronk* opened the door for litigants but did not invite the Court to lengthen notice periods beyond the max.

However, a more aggressive judiciary has seen to it that the pendulum has swung fundamentally in favour of plaintiffs. In fact it appears to have been stuck in that position for some time now. This has meant that in most instances, an award for plaintiffs will be given at trial subject of course to mitigation and prevailing costs consequences as a result of Rule 49 offers. Barring those contingencies, you can expect that a plaintiff would obtain some form of an award of notice as a result of the *Bardal* and *Cronk* effect. Despite the fact that there is much debate on whether or not the “rule of thumb” is still in effect, you can almost be assured of the fact that the Court will give credence to the “one month for every year of employment” test in many situations though it may not be stated so simply. As there is no formula per se, a review of the cases will be the guide in determining whether a given set of facts measures up to a specific notice period.

Extended Notice—*Wallace* Revisited

An extension of notice that in effect expands the general damages claim in an action for wrongful dismissal can be found in the *Wallace* case. Where there is a finding that there has been egregious bad faith displayed by the employer in the manner and methods used in the termination of the employee, then the Court has, in its discretion, an opportunity to fulfil the employee’s expectations for redress by adding a period of additional notice to the original award. Due to its discretionary nature, this award varies from case to case. Without the benefit of the circumstances of the case, the amount of *Wallace* damages is an unknown variable and, only in rare cases can one predict the outcome. The fact that it is being used in significantly more cases signals the likelihood that the range of *Wallace* damages will continue to lengthen and expand in time as the courts become increasingly more comfortable in awarding this unique brand of damage claim.

In *Keays v. Honda*, the court assessed a further nine months of notice for damages but pronounced that it was the circumstances of the particular case that warranted such a finding. It was the employee's vulnerability and the nature of the disability impacting upon the Plaintiff that triggered the greater award. As the court concluded, "These findings of fact are all well supported in the evidence and not open to attack on appeal. They properly ground the finding of bad faith in the appellant's (employer's) course of conduct that culminated in its dismissal of the respondent (employee). Together with the significant adverse consequences to the respondent, they fully justify an extension of the notice period pursuant to Wallace...."⁷

Though it is used effectively in *Keays v. Honda*, Wallace damages remain a "wild card". Where the circumstances warrant their inclusion, Wallace damages ought to be pleaded. But their effect may be tempered by the nature of the evidence that is available. Is the conduct under scrutiny so egregious that the Wallace extension ought to be considered and to what extent? Are there independent witnesses to the conduct? How "damaged" is the plaintiff by the conduct of the defendant? How unreasonable was the employer in the manner and methods used to terminate the employee? Rather than waiting to address these concerns at trial, a thorough examination of this head of damage ought to be conducted at the examination for discovery along with a careful scrutiny of all relevant documents including memos, letters, notes and records that may shed light on the allegation of bad faith. Such an analysis may lead to early resolution; at the very least, it will lead to strengthening a case that may require litigation as a last resort.

In other words, how "ugly" was the termination or the circumstances surrounding the displacement? A conscientious analysis of the facts in each set of circumstances is necessary in determining whether or not to properly plead this remedy.

Wallace damages also factor in cases involving hiring inducements. In the ongoing expansion of the Bardal list of additional factors to be used in determining notice, the court allowed for consideration to be given to compensate reliance and

⁷ *Keays v. Honda*, supra. p. 10, parag. 40.

expectation interests of employees who were induced to quit secure and well-paying jobs when promised greater salary, career advancement, increased responsibilities and job security. In a highly competitive job economy, there is a greater likelihood than not that inducements factor heavily in a job market that offers more mobility than in the past. In Wallace, Iacobucci J. said the following:

In my opinion, such inducements are properly included among the considerations that tend to lengthen the amount of notice required. I ... recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.⁸

The Court of Appeal in *Egan v. Alcatel Canada Inc.*⁹ readily adopted this rationale by not disturbing the trial judge's award of a nine month notice period based on only twenty months of employment. Mary Egan was found to have left secure employment when encouraged to do so by the promise of increased compensation, job security and enhanced opportunities which taken together amounted to the type of inducement contemplated by Iacobucci J. She was also found to have been enticed through the efforts of former colleagues of her prior employer who had joined the new company before her. With persuasive arguments and enticing offers of consideration and job protection, it was evident that Egan could reasonably expect to walk away from the security of her twenty years with another employer in order to embrace some brave, new employment challenges.

Clearly, not every case of inducement will amount to the windfall awarded to Mary Egan. The Court was careful to assess that the notice period "may well be at the high end of the range" with "deference to be accorded to a trial judge on this issue".¹⁰ Inducement needs to be more than the usual encouragement or enticement that is the very basis of the recruitment game. It has to be measured against the reliance and expectation

⁸ Wallace, supra., Para. 85.

⁹ [2006] O.J. No 34, 2006 Can LII 108 (On C.A.)

¹⁰ Egan v. Alcatel Canada Inc., supra, p. 6.

interests of the particular employee, thereby requiring a measure of subjective analysis by a trial judge. But add to it a dose of objectivity in assessing the reasonableness of a person deciding to walk away from a sure thing and taking a chance on a new opportunity. The onus of responsibility quickly falls on the shoulders of the new employer who, though taking the chance, is the person responsible for making the chance a reality. And the reality is that *Wallace* as adopted by *Egan* poses some greater risks of foreseeable damages for employers who aggressively pursue and attract new hires only to dump them ultimately after a short period of employment. For plaintiff's counsel, the caution in the use of *Egan* is in the judicial discretion that will have to be exercised. In other words, how persuasive is the *Egan* model to a judge or a jury? As with most claims, how good are the facts in relation to the head of damage claimed?

Punitive Damages: Good and Bad

Though adjusted downward in the appeal decision, *Keays v. Honda*, became the benchmark for punitive damages in employment cases, a shift from modest awards to something more substantial. For the benefit of the plaintiffs' bar, the court embraced the decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 592 as a reasonable comparator. Both cases involved contracts and in both cases there was egregious conduct that could not go unpunished. Punitive damages were real and available to punish an employer defendant's misconduct and as a result act as a potential deterrent to employers—a warning of sorts as to how intolerant the courts are with truly bad behaviour in the workplace.

But as in most other instances in determining damages, the proportionality test is a dominant factor. As Binnie J. points out in *Whiten*:

The more reprehensible the conduct, the higher the rational limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the

greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).¹¹

But *Whiten* is the extreme litmus test. The factors in assessing conduct included among other things the duration of the impugned conduct, maliciousness and high-handedness, the need for deterrence, the totality of other penalties assessed and the determination of the advantage wrongfully gained by the aggressor party. In essence, when viewing *Whiten* as a comparator in employment cases, the Court is saying that the factors may be used to assess the acts of the employer in any given case but those acts have to measure up to the kind of conduct in *Whiten* in order for the Court to make a substantial award.

Though significant as is the award in *Keays v. Honda*, the impugned conduct of the employer did not measure up to the *Whiten* model. With *Whiten* as the ceiling (until someone raises the roof beams), *Keays v. Honda* is influential in bolstering judicial discretion in this burgeoning new area of novel damages. It will encourage like-minded thinking in comparable cases though one would suspect that a case like *Keays v. Honda* is indeed rare and likely not to recur. What is more likely to occur is the court's rationalization of choosing Wallace damages or punitive damages but not both. In only the rarest of circumstances will the court choose both heads of damages and with only the most egregious of conduct calling for such retribution.

COSTS: The "Ugly"

In contemporary litigation, the parties are afforded a number of opportunities to settle disputes long before trial. Settlement conferences or pre-trial conferences remain effective tools for conscientious counsel to resolve their cases. In jurisdictions where case management is regulated and practiced, mandatory mediation which occurs relatively early in the litigation process, encourages the parties to "get to yes" quickly and effectively. With the obligation to mitigate one's damages hanging over the plaintiff, the urgency to settle becomes increasingly dependent on the economic realities of the

¹¹ *Whiten*, supra. p.112

marketplace. Though the marketplace has expanded (read: the world is flat and somewhat shrunken), economic highs and lows will greatly affect mitigation attempts and thereby invite parties to consider their remedies with more precision and decidedly more resolve in maximizing the return on settlement.

But what about the cases that do not settle regardless of mitigation attempts? Can parties rely merely on their rudimentary understanding of the law of costs to assess risk in the litigation that is heading toward eventual trial?

As stated in *Keays v. Honda*, the awarding of costs is “a paradigmatic exercise of judicial discretion”¹². This will invariably include a consideration of the scale to be used (partial v. substantial indemnity and, recently full indemnity). It may also include, as it did in *Keays v. Honda*, the award of a premium fixed by the trial judge when considering the risk undertaken by the successful party’s counsel along with the overall result. Though “costs” whether fixed or assessable are not known to or described by legal counsel as “damages”, their actual or potential effect on a litigant is “damaging” and will ultimately factor in the assessment of how much a party has won or lost in the circumstances.

Where conduct is sufficiently egregious, an award of a premium to an already high cost award is within the contemplation of a trial judge even when punitive damages have been awarded. *In Keays v. Honda*, the punitive damages award, though reduced, was accompanied by a costs award at the substantial indemnity rate plus a premium, the latter not as rich as when first awarded by the trial judge. However, the point is made by the Court—in addition to the arsenal of damages at a plaintiff’s disposal, enhanced costs are also available in the discretion of a trial judge. Persuasive argument in advancing the notion of necessary retribution in this context is supported by these newer cases which make costs a clear and present danger when assessing the risks of litigation.

¹² *Keays v. Honda*, supra. P. 16

The real trick is in how one explains this added risk to the client. The language of costs has always been alien to most people---party and party, solicitor and client, assessable, fixed—and difficult to adequately explain without some measure of experience or education in this area. Add to it the complexity of the new language—partial and full indemnity—and the vagueness of premiums, you essentially now have a regime that is harder to rationalize but more capable of engendering fear in the hearts of even the most robust of litigants.

If one can keep up with the “revisions upon revisions” that have occurred in the last few years in relation to costs, it is clear that there is a movement to get back to basics. A reading of s. 131 of the Courts of Justice Act as complemented by Rule 57.01 will yield that costs ought to be fixed in most cases, requiring the parties to file a costs outline (Form 57 B) describing the work done, lawyers involved, partial indemnity rates, actual chargeable hourly rates, along with hours spent. The objective is to be fair and reasonable and not to punish the unsuccessful party. However, the availability of a discretionary premium acts to fill the void between partial indemnity and actual costs and gives a trial judge the added opportunity to provide proper redress when assessing the egregious conduct of a defendant in a particular case. Given the application of the premium in *Keays v. Honda*, it is evident that the resort to an added premium though available will be used sparingly and in the most serious of cases.

It is also beneficial to have a healthy understanding of some of the judicial rationale that goes into determining premium cost awards. As stated, the overriding governing provision relating to the award of a premium is s.131 of the *Courts of Justice Act*, which provides that costs are, “in the discretion of the court” and that “the court may determine by whom and to what extent the costs shall be paid”. The court can also award “full indemnity” costs under subrule 57.01(4).

In *Monks v. ING Insurance Co. of Canada*, the court determined that

“...There is a need to encourage lawyers to take on complex cases for indigenous litigants. Such counsel accepts the risk of delayed payment as

well as non-payment and the law firms have to support disbursements for a long period of time. This case meets the seven relevant principles that justify premium awards; legal complexity, responsibility assumed, monetary value, importance of the matter to the client, degree of skill and competence, results achieved and ability to pay. *Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] O.J. No. 1324 para. 21 (Ont. S.C.)¹³.

A premium can be awarded in addition to substantial indemnity costs. In *Lurtz v. Duchesne*, Rosenberg J.A. said:

“In my view, it is open to a trial judge to award a premium on solicitor and client costs in a proper case because of the risk assumed and the result achieved. This is such a case. It is the kind of case that counsel undertake at some financial risk to provide impecunious plaintiffs access to the courts. This respondent was impecunious. Her counsel received no fees whatsoever through trial. They carried significant disbursements from the outset of the litigation. The case was complex and counsel achieved an outstanding result. This was, therefore a proper case to award some premium. ...”¹⁴

The circumstances in which a premium will be awarded has also been described by the Court of Appeal as follows:

“We hasten to add that awarding a premium ought to occur only rarely and only when both factors - risk and result - cry out for an award in excess of substantial indemnity costs. The risk must be based on evidence that the plaintiff lacked the financial resources to fund lengthy and complex litigation, plaintiff’s counsel financed the litigation, the defendant contested liability and plaintiff’s counsel assumed the risk not only of delayed but possible non-payment of fees. In our view, it is not necessary that the plaintiff be proved to be impecunious but it must be shown that the litigation was beyond the plaintiff’s financial means. While risk must be present, it alone does not justify a premium - counsel for the plaintiff must also achieve an outstanding result.”¹⁵

¹³ *Monks v. ING Inc. Co. of Canada* [2005] O.J. No. 3749 at paras. 74, 75, tab 75

¹⁴ *Lurtz v. Duchesne* [2005] O.J. No. 354 at , para. 35

¹⁵ *Walker v. Ritchie* [2005] O.J. No. 1600 at para. 108

Citing Orkin, “The Law of Costs”, an assessment officer described the “appropriate circumstances” for a premium:

“If by the exercise of ingenuity and imagination a solicitor can achieve an outstanding result for the client he may be entitled to a bonus or premium in excess of the ordinary value of the time expended, but not for acting competently or achieving a result that, while satisfactory, is not spectacular.”¹⁶

Re Christian Brothers of Ireland in Canada involved litigation to determine whether the estate of the Christian Brothers of Ireland in Canada had assets to compensate its creditors, principally victims of childhood abuse at the Mount Cashel Orphanage in Newfoundland. Laskin, J.A., in the Ontario Court of Appeal characterized the litigation as a class action “in substance, if not in form”. The Court of Appeal awarded the law firm a premium on its account to its client. The Court said:

“Awarding a reasonable premium to a law firm that assumes such a risk gives lawyers an economic incentive to take on this kind of litigation and do it well. Thus, awarding a premium enhances access to justice in this case and promotes access to justice for future cases.”¹⁷

As demonstrated by these few examples, the cases available to counsel on the issue of premium costs awards are quite extensive. While the court openly welcomes consideration of a broad range of cost awards, it is open to counsel to be ready to argue these costs measures and tie them into the facts of the case. Therefore, adept counsel will want to think of the kinds of costs award that ought to be sought as part of the overall strategy of the case and well in advance of trial-- not merely as an afterthought when the dust on the evidence has settled.

¹⁶ *International Corona Resources Ltd. v. Lac Minerals Ltd.* [1989] O.J. No. 1324 at p. 2 (Q.L), tab 76

¹⁷ *Christian Brothers of Ireland in Canada (Re)* [2003] O.J. No. 4249 (C.A.) at para. 21 *per* Laskin, J.A. tab 77

HUMAN RIGHTS—Good and Ugly

With the advent of Bill 107, employers may begin to feel slightly outflanked. Where Human Rights claims were foreclosed in civil actions based directly and primarily on breaches of the Code,¹⁸ changes to the Human Rights Code in the new bill may see a rash of new pleading.¹⁹ Though not in force as at this writing, individuals will be afforded the opportunity to file claims directly with the Human Rights Tribunal rather than through the Commission. The Tribunal will deal with complaints through adjudication and mediation in a process and administration yet to be determined.

As sweeping a change as is the new regime for determining complaints under the Code, the most revolutionary change is with reference to a new civil remedy. In s. 46.1, a court can in a civil proceeding find that a party has infringed a right under the Code (Part I-Freedom from Discrimination) and order that party to pay monetary compensation for losses that include compensation for injury to dignity, feelings and self-respect. Furthermore, a court can make a restitution order in addition to a compensation order for loss arising out of the infringement, including restitution for injury to dignity, feeling and self-respect.

When proclaimed, the Act will allow claimants to add previously excluded claims under the Human Rights Code and broaden the damages base to include claims for indignities, loss of self-respect and injury to feelings and emotions. This begs the question: how will the courts be asked to assess these damages? Will hurt feelings, a loss of dignity and a lack of self-respect require expert testimony? Or will these require the evidence of family members, acquaintances and fellow-employees who may have first hand knowledge of the breaches so claimed? Will evidence of character have greater weight in civil trials? Will jury addresses become impassioned orations on the emotional

¹⁸ Seneca College of Applied Arts and Technology v. Bhadauria [1981] 2 S.C.R. 181.

¹⁹ The Human Rights Code Amendment Act, 2006, Chapter 30 (given Royal Assent, December 20, 2006 but not proclaimed as of yet)

impact suffered by a plaintiff at the hands of an unscrupulous employer? The possibilities seem endless.

The enormous potential for advancing claims that were once the exclusive domain of the Ontario Human Rights Commission may prove to be one of the most extraordinary changes to employment litigation, perhaps outweighing the importance of *Wallace, Keays v. Honda* or *McKinley*.

The need for expert evidence may create a growth in the number of Human Rights Code specialists whose interpretive skills will broaden our understanding of the Code in everyday workplace routine. The Code will become a tool in itself, a commonly referred to piece of legislation that will find automatic insertion in any well-crafted pleading citing significant claims. The Code may be cited as often as one claims *Wallace* damages in a pleading.

Compensation and restitution referenced in the legislation does not preclude advancing claims under the other heads so discussed. The compensation referenced herein is beyond the other claims as it directly refers to injury to dignity, feelings and self-respect. In essence, these are claims that are beyond the notice claims and, in some instances, may constitute or be interpreted as real damages in the mind of the plaintiff.

One important question remains to be answered: is restitution a synonym for reinstatement? Will employees seek a restoration of their employment for a job loss they deem to be an infringement of their self-respect or an injury to their dignity? For example, a long-term employee who is terminated because the owner of a company wants to replace that person with one of his children may have suffered a significant loss of dignity in being forced out. Can that employee claim the loss of dignity and, once proven, seek reinstatement on that head alone? The changes to the legislation do not preclude that possibility.

Stay tuned.

FINAL SHOWDOWN

And so we find ourselves in the half-century since *Bardal* with new options and improved remedies at our disposal. But the basic underlying concern has not changed: it all comes down to the facts. With respect to the employer, the broad-based view of damages requires more than a scrutiny of facts in determining the existence of cause; it requires a deft understanding of the background and circumstances relating to the need to terminate and a critical analysis of the relationship between employer and employee so as not to expose the employer to greater awards for damages. Never before in the annals of human resources history has a careful review of the options in deciding a course of action by the employer been more warranted in all contemplated terminations. With the broad opportunities available to plaintiff's counsel including the new remedies found in the Human Rights amendments, the need to be vigilant has never before been so evident.

On the other side of the fence, an employee has to be accurate, forthright and detailed in presenting all of the pertinent facts surrounding the termination. Plaintiff's counsel must be adept in understanding the impact of the facts presented and, perhaps for the first time, be most genuinely sensitive to every particular issue including emotional feelings. In both cases, the marshalling of facts has become the most precious resource a party may have to either advance a claim or to defend it vigorously. Deficiencies in facts and inattention to detail may prove fatal to either party and impair significantly one's strategy when addressing damages and an array of cost awards.

And when a client—whether employee or employer—sits across from counsel and begins to relate the story of why they are there, the astute counsel will know that as a first course of action they will need to here it all: the good, the bad and the ugly.

