Train or Pay a case comment for Eynon v Simplicity Air Ltd., 2021 ONCA 409

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In *Eynon v Simplicity Air Ltd.*, 2021 ONCA 409 [Eynon], the Ontario Court of Appeal reminded employers that they were required to train supervisors extensively, as they are direct workplace representatives. If supervisors behave reprehensively after a workplace injury, the employer will be liable for the punitive damages that flow from their misconduct.

In *Eynon*, work colleagues challenged an employee to climb a 14-foot high chain hoist. Unfortunately, the individual suffered injuries requiring emergency surgery while attempting this act. The Workplace Safety and Insurance Board denied the employee's benefit claim because the injury did not take place in the course of his employment. In a subsequent tort case, the employer was found to be negligent. The jury reduced the employee's general and pecuniary damages by 75% due to his contributory negligence but awarded $150,000 in punitive damages. The Board did not provide a basis for this award, aside from acknowledging that there was a lack of safety training and that the workplace culture did not place adequate importance on safety.

While the employee stated, among other things, that he did not receive any safety training and that he drove a forklift without proper certification, the punitive damages arose from the supervisors' behaviour *after* the injury. The employee testified that he requested an ambulance, but his supervisor laughed at him and failed to even look at his injury. Instead of going to the hospital, he drove him to another location to speak with the service manager and his direct supervisor. There, the employee demanded to be driven to the hospital. Only then did his supervisors offer to take him home. Most problematically, two of his supervisors told him to say that the injury happened at home.

The employer challenged the punitive damages on the following grounds:

1. the judge erred by instructing the jury to consider punitive damages, especially without providing a range of acceptable awards;
2. the employer should not be liable for punitive damages for the conduct of its employees
3. the award should be reduced, as it is unreasonable, unjust, and did not take contributory negligence into account.

Unequivocally, the Court condemned the supervisors' instructions to lie about where the injury occurred. They noted that this contravened ss. 22.1 and 155.1 of the *Workplace Safety and Insurance Act* (WSIA) and that the employer could have been prosecuted under s. 158. Alone, this contravention was sufficient to warrant punitive damages, so the judge did not err by raising them with the jury. His instructions were detailed and accurate, and it would have been inappropriate to provide a quantum of damages given that counsel did not raise an appropriate range.

The Court distinguished *Eynon* from *Boucher v Wal-Mart Canada Corp*, 2014 ONCA 419, due to the differences between "reprehensible conduct specifically referable to the employer" and the supervisor's conduct. In the *Wal-Mart Canada Corp* case, the judge instructed the jury to ground punitive damages in vicarious liability. Additionally, no one tied the supervisor's independent actionable wrongdoing to Wal-Mart's failure to enforce workplace policies. In *Eynon*, the supervisor was acting in the course of his employment, whereby he was explicitly in charge of representing the employer. The Court referred to the jury's determination that the appellant had "a culture within the company whereby employees failed to place adequate importance on best safety practices". For this reason, the Court did not accept the appellant's argument that punitive damages were unwarranted because one of its supervisory personnel was responsible for the misconduct. The Court ultimately found that the appellant was responsible for the supervisor's behaviour.

The Court did not believe that it should not reduce damages, given that the supervisors' illegal and reprehensible actions sufficiently justified deterrence. While the employer could have been penalized under the *WSIA*, it was not. For the appellant, a penalty under the *WSIA* would have reduced the need for punitive damages.

The employee's negligence before the accident was not relevant to the punitive damages award since the Court awarded punitive damages to punish the employer and not to compensate the employee. The Court found that there was no basis to reduce the punitive damages award based on contributory negligence.

The Court dismissed the appeal.

By

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