

Elmardy v. Toronto Police Services Board et al.*
[Indexed as: Elmardy v. Toronto Police Services Board]

Ontario Reports

Ontario Superior Court of Justice,

Divisional Court,

Sachs, Nordheimer and Spies JJ.

April 4, 2017

136 O.R. (3d) 471 | 2017 ONSC 2074

Charter of Rights and Freedoms — Equality before the law — Two police officers stopping appellant on street and questioning him — Trial judge finding that there was no reasonable basis to suspect appellant of involvement in criminal activity — Trial judge erring in declining to find that appellant was victim of racial profiling on basis that there was no evidence that decision to stop him was based on his race — Circumstantial evidence giving rise to reasonable inference that officers suspected appellant of criminal activity solely because he was black — Officers violating appellant's rights under s. 15 of Charter — Canadian Charter of Rights and Freedoms, s. 15.

Case Summary

Charter of Rights and Freedoms — Remedies — Damages — Two police officers stopping appellant on street and questioning him — One officer punching appellant in face twice after appellant refused to take his hands out of his pockets — Appellant handcuffed and left lying on ice-covered deck for 20 to 25 minutes — Appellant's pockets and wallet searched — Trial judge finding that appellant's rights under ss. 8, 9 and 10 of Charter were violated and awarding him damages of \$2,000 for s. 9 violation and \$1,000 each for s. 8 violation and s. 10 violation — Trial judge awarding punitive damages of \$18,000 — Trial judge erring in deciding to deal with objectives of deterrence and vindication through award of punitive damages — Trial judge also erring in failing to find that officers violated appellant's rights under s. 15 of Charter by engaging in racial profiling — Damages for Charter violations increased to \$50,000 — Award of punitive damages increased to \$25,000 — Canadian Charter of Rights and Freedoms, ss. 8, 9, 10, 15.

The appellant, a black man, was stopped on the street by two police officers on a cold night. One officer, the defendant P, testified that he had a hunch that the appellant might be violating bail terms. The other officer testified that she was concerned that the appellant might be carrying a weapon because his hands were [page472] in his pocket. When the appellant refused to remove his hands from his pocket, P punched him in the face twice. The appellant was handcuffed and left lying on an ice-covered deck for 20 to 25 minutes, and his pockets and wallet were searched. The appellant sought damages for battery and for violations of his rights

under the *Canadian Charter of Rights and Freedoms*. The trial judge found that there was no reasonable basis for the officers to suspect the appellant of criminal behaviour. He found that the appellant's rights under ss. 8, 9 and 10 of the *Charter* were violated. He declined to find that the officers discriminated against the appellant on the basis of his race by engaging in racial profiling. He awarded damages of \$5,000 for battery, \$2,000 for the s. 9 violation, and \$1,000 each for the s. 8 and the s. 10 violations. He also awarded punitive damages in the amount of \$18,000 (arrived at by doubling the aggregate award for the other heads of damages) and granted declaratory relief. The appellant appealed from the trial judge's failure to find racial profiling and from the damages award.

Held, the appeal should be allowed.

The trial judge erred in declining to find that the appellant was the victim of racial profiling because there was no evidence that the decision to stop him was based on his race. Racial profiling can rarely be proven by direct evidence. While there may have been no direct evidence of racial profiling, there was circumstantial evidence from which one could draw a reasonable inference that it was more probable than not that the officers' conduct towards the appellant was motivated by the fact that he was black. The appellant's rights under s. 15 of the *Charter* were violated.

The award of general damages in the amount of \$5,000 for battery did not fall outside of the appropriate range.

The trial judge erred in deciding to deal with the objectives of deterrence and vindication through punitive damages. He failed to recognize sufficiently that *Charter* damages are awarded against the state, not the individual tortfeasor for whose actions the state may be vicariously liable. He also failed to recognize the important public objectives of *Charter* damages, which are different from the objectives of punitive damages that may be awarded against a private individual. Deterrence and vindication in the public law context are different from deterrence and vindication in the private law context. It is the state, not the individual, that must be deterred, and it is society's, not the claimant's, rights that must be vindicated. While that would be a sufficient basis to set aside the award of *Charter* damages, the trial judge's failure to recognize that the appellant's rights under s. 15 of the *Charter* were violated provided an additional reason for doing so. The award of *Charter* damages should be increased to \$50,000, awarded against the Police Services Board only. The punitive damages award should be increased to \$25,000 as against both the board and P. This amount reflected the seriousness of P's misconduct but was not so large as to remove any realistic possibility that P would be unable to pay it.

Ernst v. Quinonez, [2003] O.J. No. 3781, [2003] O.T.C. 847, 125 A.C.W.S. (3d) 923 (S.C.J.); *Evans v. Sproule*, [2008] O.J. No. 4518, 176 A.C.W.S. (3d) 895 (S.C.J.); *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, [2010] S.C.J. No. 27, 2010 SCC 27, 213 C.R.R. (2d) 166, 321 D.L.R. (4th) 1, 290 B.C.A.C. 222, 2010EXP-2331, 76 C.R. (6th) 207, 7 B.C.L.R. (5th) 203, J.E. 2010-1305, EYB 2010-177090, [2010] 9 W.W.R. 195, 75 C.C.L.T. (3d) 1, 404 N.R. 1, **consd**

Other cases referred to

Dunlea v. Attorney General, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Leclair v. Ottawa (City) Police Services Board*, [2012] O.J. No. 1233, 2012 ONSC 1729 (S.C.J.); [page473] *Pirani v. Esmail*, [2014] O.J. No. 877, 2014 ONCA 145, 94 E.T.R. (3d) 1, 320 O.A.C. 356; *R. v. Brown* (2003), 64 O.R. (3d) 161, [2003] O.J. No. 1251, 170 O.A.C. 131, 173 C.C.C. (3d) 23, 9 C.R. (6th) 240, 105 C.R.R. (2d) 132, 36 M.V.R. (4th) 1, 57 W.C.B. (2d) 108 (C.A.); *R. v. Richards*, [1999] O.J. No. 1420, 120 O.A.C. 344, 26 C.R. (5th) 286, 42 M.V.R. (3d) 70, 42 W.C.B. (2d) 251 (C.A.); *Sherman v. Renwick*, [2001] O.J. No. 632, [2001] O.T.C. 135, 103 A.C.W.S. (3d) 853 (S.C.J.); *Wisdon v. Durham (Regional Municipality) Police*, [2011] O.J. No. 6289, 2011 ONSC 3419 (S.C.J.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 8, 9, 10, (a), (b), 12, 15

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1)

Police Services Act, R.S.O. 1990, c. P.15, s. 50(1)

APPEAL from the decision of Myers J. (2015), 126 O.R. (3d) 130, [2015] O.J. No. 2314 (S.C.J.) that the police officers did not engage in racial profiling and from a damages award.

Andrew J. MacDonald, for appellant.

David A. Gourlay, for respondents.

The judgment of the court was delivered by
SACHS J.: —

Overview

[1] On a winter's evening in Toronto, the appellant, a black man, was walking on a downtown street when he was stopped by two Toronto Police Service officers. An interaction ensued during which the respondent Constable Pak punched the appellant in the face twice, emptied the appellant's pockets without his consent, and left the appellant lying on his handcuffed hands in the cold for 20 to 25 minutes.

[2] In a decision dated May 7, 2015 [*Elmardy v. Toronto Police Services Board* (2015), 126 O.R. (3d) 130, [2015] O.J. No. 2314], Myers J. found that the officers had no reasonable suspicion of criminal conduct when they initiated contact with the appellant, but declined to find that the conduct of the officers was racially motivated. He did find that Constable Pak had committed a battery on the appellant; that the appellant's detention was unlawful and a breach of his rights under s. 9 of the *Canadian Charter of Rights and Freedoms*; that the search of the appellant's pockets was a breach of his rights under s. 8 of the *Charter*, and that the appellant's

rights under s. 10(a) and (b) of the *Charter* were violated when he was not told why he was detained or given his rights to counsel upon being detained.

[3] The trial judge awarded the appellant \$5,000 in damages in relation to the battery, \$2,000 in relation to the s. 9 *Charter* breach, [page474] \$1,000 for the s. 8 breach, and \$1,000 for the s. 10 breaches. He also awarded punitive damages in the amount of \$18,000, twice the amount of the aggregate award under the other heads of damages, and granted declaratory relief. Finally, he awarded the appellant his costs fixed on a substantial indemnity basis.

[4] This is an appeal of the trial judge's failure to make a finding that the appellant was a victim of racial profiling, his failure to find that the appellant's rights under ss. 7, 12 and 15 of the *Charter* were breached, and of his damages award. On this appeal, the appellant submits that the trial judge committed a palpable and overriding error when he found that there was no evidence that the conduct of the officers was racially motivated. This in turn led the trial judge to err in his damages assessments as he failed to give effect to the need to deter and punish police officers who engage in violent, abusive and unconstitutional conduct based on racial profiling.

[5] For the reasons that follow, I would allow the appeal and increase the award of damages for the constitutional violations to \$50,000. (According to the Supreme Court of Canada, these damages can only be awarded against the respondent Toronto Police Services Board.) I would also award punitive damages against both respondents in the amount of \$25,000. I would not increase the damages in relation to the battery.

The Racial Profiling Issue

Factual background

[6] On January 15, 2011, Constable Pak was driving a police cruiser, accompanied by Constable Poole, when the officers saw the appellant walking in the opposite direction and on the opposite side of the street. Constable Pak immediately observed that the appellant was a black male.

[7] Constable Pak testified that immediately after seeing the appellant (who was walking alone), he had a hunch that he may be violating bail terms. As the officer described it, a person on bail would usually have to be accompanied by their surety and would not be walking alone. Constable Pak noted that the appellant looked at him as his police cruiser drove by.

[8] Constable Poole also saw the appellant look at the police cruiser as it passed. She had an immediate concern that the appellant might be carrying a weapon as he had his hands in his pockets.

[9] The officers did a U-turn and pulled up alongside the appellant. They asked him questions. According to the trial [page475] judge, the appellant was hostile to the police. The appellant had his hands in his pockets as it was cold outside, and he was not wearing gloves.

[10] The officers got out of their car and asked the appellant to take his hands out of his pockets. When he declined to do so, they subdued him and, in the course of doing so, Constable Pak punched the appellant twice in the face. The appellant was knocked to the ground, handcuffed to his back and he was left lying on wooden decking covered with ice, with

his hands exposed and against the ice, for 20 to 25 minutes. All of his pockets were searched and emptied of belongings, and Constable Pak searched the contents of his wallet. During the interaction, the police asked the appellant where he was from.

[11] The police gave the appellant no reason for his detention and he was not advised of his right to counsel. During the incident, the police filled out a card, known as a 208 card or field information report, for the appellant. Part of the information to be included on the card was the appellant's skin colour, which was filled in as "black", and his birth place, which was filled in as "Sudan". The police did not explain to the appellant that he was being "carded".

The trial judge's finding with respect to racial profiling

[12] The trial judge's finding with respect to racial profiling appears at para. 4 of his decision and reads as follows:

I also do not make any finding that Mr. Elmardy was discriminated against on the basis of his race or that he was the victim of "racial profiling" as alleged. The police were entitled to try to chat with Mr. Elmardy. While it is tempting to try to ascribe motives, there was no evidence that the decision to stop him was based on his race. Mr. Elmardy did not prove on a balance of probabilities that the actions of Constable Pak were racially motivated. Nor was there a basis in the evidence to draw that inference.

Analysis

[13] The trial judge found that there was no basis in the evidence to draw the inference that the officers' conduct towards the appellant was motivated by race. While there may have been no direct evidence of racial profiling, there was circumstantial evidence from which one could draw the inference that it was more probable than not that the officers' conduct towards the appellant was motivated by the fact that he was black. The failure of the trial judge to consider this indirect evidence constitutes a palpable and overriding error.

[14] In *R. v. Brown* (2003), 64 O.R. (3d) 161, [2003] O.J. No. 1251, 173 C.C.C. (3d) 23 (C.A.), at para. 7 (quoting from [page476] a definition adopted in an earlier case, *R. v. Richards*, [1999] O.J. No. 1420, 26 C.R. (5th) 286, 120 O.A.C. 344 (C.A.), at p. 295 C.R.), the Ontario Court of Appeal describes racial profiling as follows:

Racial profiling is criminal profiling based on race. Racial or colour profiling refers to the phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

[15] The court in *Brown* also notes, at paras. 8-9, that the attitudes underlying racial profiling can be consciously or unconsciously held and that social science research establishes that racialized characteristics of black people provoke police suspicion in Toronto.

[16] The court goes on to find that racial profiling can rarely be proven by direct evidence, as "[t]his would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion. . . . Accordingly, if racial profiling is to be

proven it must be done by inference drawn from the circumstantial evidence" (*Brown*, at para. 44).

[17] Further, "where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused for attention, the record is then capable of supporting a finding that the stop was based on racial profiling" (*Brown*, at para. 45).

[18] In this case, the trial judge found that there was no reasonable basis for the police to suspect the appellant of criminal behaviour. As put by him, at para. 72 of his decision, "[t]here was no reason for Constable Pak to have a hunch about bail or sentencing conditions and none for Constable Poole to have a concern about weapons".

[19] The only reasonable inference to be drawn from the fact that both officers, without any reasonable basis, suspected the appellant of criminal behaviour is that their views of the appellant were coloured by the fact that he was black and by their unconscious or conscious beliefs that black men have a propensity for criminal behaviour. This is the essence of racial profiling.

[20] In this case, the officers' unreasonable beliefs about the appellant caused them to assault the appellant, unreasonably search him and forcibly restrain him. In other words, instead of presuming his innocence, they assumed and acted as if he were guilty and dangerous. He must be violating his bail and he must be carrying a gun. These assumptions, for which there is no explanation other than the colour of the appellant's skin, caused [page477] them to blatantly and aggressively violate the appellant's constitutional rights.

[21] The trial judge found that the officers' real motivation for stopping the appellant was so that they could "card" him by filling in information on a 208 card. This begs the question of why the officers would single the appellant out for "carding".

[22] However, the trial judge also found that the officers lied about why they stopped the appellant and "backfilled" a purpose after the fact. Lying about the real reason for a stop is another basis for drawing the inference that what motivated the stop was the appellant's race and colour. As noted in *Brown*, at para. 45, the inference that a police officer is lying about why she or he singled out an individual for attention is a circumstance that is "capable of supporting a finding that the stop was based on racial profiling". Such a finding becomes even more compelling when, as here, the "lies" that the police chose to tell about why they stopped the individual are based on racial stereotypes, such as the belief that black men are more likely to be on bail and more likely to be carrying weapons.

[23] Contrary to the finding of the trial judge that there is no evidence from which one can draw the inference that the conduct of the police officers was racially motivated, there is no other reasonable inference that is available from all of the evidence. The explanation the officers gave for their behaviour was both rejected by the trial judge and infected with racial stereotypes. Given this, there can be no issue that the appellant's right to equal protection and equal benefit of the law without discrimination based on race under s. 15 of the *Charter* was also violated.

Damages

Damages for the battery

[24] With respect to general damages for the battery committed upon the appellant, the trial judge found as follows [at paras. 42, 43 and 110]:

It is clear that Mr. Elmardy's physical injuries were very minor. He was unemployed at the time so he did not miss any work. He has no out-of-pocket expenditures. His bruises all healed within several days to a week. His knees healed although he now complains of knee pain he concedes that he cannot ascribe cause for that pain to the incident in question. Mr. Elmardy raises emotional concerns regarding his feelings of dignity and his current nervousness or suspicion in dealing with the police in light of the events to which he attests. But there is no medical report supporting significant psychological injury and no specific damages are sought on that basis. [page478]

Mr. Elmardy seeks \$75,000 in general damages in relation to the battery committed upon him by Constable Pak. The battery consisted of two punches in the face and some further minor contact that caused little or no injury. Mr. Elmardy's cheek was swollen for a few days. His lip cut healed quickly. His knees were better within a week. General damages are to compensate a plaintiff for the injuries suffered. This includes emotional losses such as the plaintiff's claim to have been humiliated and to now distrust police. Considering tort cases dealing with similar injuries, in my view, an award of \$5,000 for general damages for pain and suffering is appropriate although it may well be at the high end of the range for such injuries.

[25] The appellant cited two cases to support his submission that the trial judge's general damages award did not fall within the range for similar types of injuries: *Ernst v. Quinonez*, [2003] O.J. No. 3781, [2003] O.T.C. 847 (S.C.J.) and *Evans v. Sproule*, [2008] O.J. No. 4518, 2008 CarswellOnt 8753 (S.C.J.). In the former, the court awarded general damages of \$25,000 for police battery and in the latter the award was \$100,000. However, in both cases the injuries and consequences were far more serious than the trial judge found existed in this case.

[26] In contrast, the respondent cited a number of other cases in which courts (in most cases, provisionally) made damage awards for similar types of alleged battery by the police in amounts not exceeding \$5,000 (see *Wilsdon v. Durham (Regional Municipality) Police*, [2011] O.J. No. 6289, 2011 ONSC 3419 (S.C.J.), *Leclair v. Ottawa (City) Police Services Board*, [2012] O.J. No. 1233, 2012 ONSC 1729 (S.C.J.) and *Sherman v. Renwick*, [2001] O.J. No. 632, [2001] O.T.C. 135 (S.C.J.)).

[27] Given the findings of the trial judge about the nature and extent of the appellant's injuries and the case law, it cannot be said that the trial judge's award of general damages for battery falls outside of the appropriate range for such damages.

Charter damages

[28] In fixing compensation for the *Charter* breaches, the trial judge focused on the general damages that the appellant suffered by virtue of those breaches and found that "vindication and

deterrence are best dealt with by declaratory relief and punitive damages". Thus, he awarded \$2,000 for the s. 9 breach, which resulted from a detention lasting approximately 30 minutes; \$1,000 for the s. 8 breach, which resulted from an illegal search where the applicant did not suffer any destruction of his property; and \$1,000 for the s. 10 breaches.

[29] *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, [2010] S.C.J. No. 27, 2010 SCC 27 is the leading case concerning the awarding [page479] of damages for *Charter* breaches. That case makes several points of interest about *Charter* damages:

(a) Damages for breach of a person's *Charter* rights are to be distinguished from private law damages. They are to be distinguished from a tort claim for which a state actor may be vicariously liable. Rather, they are to be regarded as a "a public law action directly against the state for which the state is primarily liable". . . . The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages -- including constitutional damages -- lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action" (at para. 22, in part quoting *Dunlea v. Attorney General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81).

(b) There are three purposes that *Charter* damages may serve: compensation, vindication and deterrence.

(c) In the public law context, when it comes to compensation, the courts have recognized that personal losses that may be compensated include "harm to the claimant's intangible interests" which includes "distress, humiliation, embarrassment, and anxiety". This harm will often merge with psychological harm, but "a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury" (at para. 27).

(d) "Vindication focuses on the harm the infringement causes society . . . [V]iolations of constitutionally protected rights harm not only their particular victims, but society as a whole . . . While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society" (at para. 28).

(e) "Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution . . . [D]eterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future" (at para. 29). [page480]

(f) Damages for *Charter* breaches where the conduct is serious "promote good governance. Compliance with *Charter* standards is a foundational principle of good governance" (at para. 38).

(g) The quantum of *Charter* damages should not be unduly high (partly in recognition of the fact that it is society as a whole that is asked to pay), but the award "must

represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches" (at para. 54).

[30] The trial judge's reasons do not contain a discussion of these principles. Most importantly, in deciding to deal with the objectives of deterrence and vindication through punitive damages, the trial judge failed to sufficiently recognize that *Charter* damages are awarded against the state, not the individual tortfeasor for whose actions the state may or may not be vicariously liable. He also failed to recognize the important public objectives of *Charter* damages, which are different from the objectives of punitive damages that may be awarded against a private individual. As *Ward* makes clear, deterrence and vindication in the public law context are different from deterrence and vindication in the private law context. It is the state, not the individual, that must be deterred; and it is society's, not the claimant's, rights that must be vindicated.

[31] While this reason would be a sufficient basis to set aside the trial judge's award of *Charter* damages, the fact that the trial judge failed to recognize that the appellant's right to be free from discrimination under s. 15 of the *Charter* was also violated provides an additional basis for doing so.

[32] Under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, a court to which an appeal is taken may, unless otherwise provided, "make any order or decision that ought to or could have been made by the court or tribunal appealed from" and/or "make any other order or decision that is considered just". Case law has recognized that where an appeal court sets aside an award of damages, it is in the interests of justice for the court to reassess the amount of damages based on the record before it; the court should do so rather than sending the issue back to the trial judge (see *Pirani v. Esmail*, [2014] O.J. No. 877, 2014 ONCA 145, 320 O.A.C. 356, at para. 89). In this case, it is in the interests of justice that this court set the quantum of damages based on the findings of the trial judge and the finding of this court that the appellant was the victim of racial profiling. [page481]

[33] In *Ward*, an award of \$5,000 in *Charter* damages was upheld by the Supreme Court of Canada. In that case, the claimant had been lawfully arrested, but he was then the subject of an unlawful strip search. However, the court noted that the search was relatively brief and not extremely disrespectful in the sense that while the claimant was stripped to his underwear, he was never touched and did not suffer any resulting physical or psychological injury. The court also found that the conduct of the officers responsible for the search was not intentional in the sense of being malicious, high-handed or oppressive. Thus, the court decided that the objectives of deterrence and vindication did not require an award of substantial damages against the state.

[34] This case is very different from the situation in *Ward*. The driving force behind the *Charter* breaches -- racial profiling -- is a phenomenon that has been recognized as a problem in our police services for some time. The Court of Appeal's decision in *Brown* was released in 2003 and the conduct giving rise to this proceeding occurred in 2011, eight years later. Racial profiling has a serious impact on the credibility and effectiveness of our police services. It has led to distrust and injustice. It must stop.

[35] Unlike in *Ward*, the conduct of Constable Pak was both high-handed and oppressive. The appellant was not only touched; he was punched in the face twice. The interaction lasted half an hour, much of which time the appellant spent on the ground, handcuffed, with his bare hands exposed to ice. The appellant was an innocent man who had fled his country looking for a society in which his rights would be respected. Instead of finding the respect to which he is entitled, he was subjected to humiliating, violent and oppressive behaviour from one of this city's police officers, all because of the colour of his skin. Further, when questioned about their behaviour the police officers were found to have lied to the court, conduct that can seriously undermine the administration of justice.

[36] For these reasons, there is a need for an award of damages that is significant enough to vindicate society's interest in having a police service comprised of officers who do not brutalize its citizens because of the colour of their skin and that sends the message to that service that this conduct must stop. The courts and others have already made statements about the serious, wrongful nature of this type of conduct. Yet, it continues to occur. Declaratory relief is just another such statement. More is required.

[37] For these reasons, I would award the appellant \$50,000 by way of compensation for the *Charter* breaches. In accordance with *Ward*, this amount is awarded against the Toronto Police [page482] Services Board only. It is an amount that is not so large as to make it inappropriate for the government to pay, but large enough to send a message about the seriousness of the conduct at issue.

Punitive damages

[38] The trial judge awarded the appellant \$18,000 by way of punitive damages. He arrived at this number by doubling the aggregate award he had given for the other heads of damages, thereby tripling the appellant's recovery. In view of the fact that I have varied the award for *Charter* damages, fixing punitive damages based on the multiple used by the trial judge would not be appropriate.

[39] In this case, punitive damages are necessary as against Constable Pak to punish and deter him for his misconduct. The amount awarded should reflect the seriousness of that misconduct, but not be so large as to remove any realistic possibility that a police officer such as Constable Pak would be able to pay those damages. In my view, an award of \$25,000 will accomplish these objectives. I appreciate that by reason of s. 50(1) of the *Police Services Act*, R.S.O. 1990, c. P.15, the Toronto Police Services Board is also liable to pay this damage award. However, that fact is not determinative of the exercise I must perform in assessing damages, which is to determine the amount that the person who is directly responsible for those damages should pay.

Conclusion

[40] For these reasons, I would allow the appeal, set aside the trial judge's award for *Charter* and punitive damages and award \$50,000 by way of *Charter* damages as against the Toronto Police Services Board and \$25,000 by way of punitive damages as against both respondents. These damages are in addition to the amount of \$5,000 that the trial judge awarded for the battery. I would not vary the costs order below (nor was there any request that we do so).

[41] The appellant is entitled to his partial indemnity costs for this appeal, which I fix in the amount of \$14,684.35 for fees (a similar amount to that claimed by the respondents in their costs outline) and \$3,139.87 for disbursements, plus applicable HST, for a total of \$20,141.37.

Appeal allowed.

[page 483]

* Vous trouverez la traduction française à la p. 483, *post.*