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Reflecting on *Krmpotic v Thunder Bay Electronics Limited* and the Social Model of Disablement

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Reflecting on *Krmpotic v Thunder Bay Electronics Limited* and the Social Model of Disablement

Ravi Malhotra

THIS CASE COMMENT explores the decision of the Ontario Court of Appeal in *Krmpotic v Thunder Bay Electronics Ltd*. This decision upheld the finding of the Superior Court that the employer ought to pay aggravated damages for the manner of dismissal of an employee and that there is no obligation to provide medical or psychological evidence that the manner of dismissal caused mental distress to the employee. The social model of disablement, the foundational idea of the disability rights movement, is helpful to understanding the Court of Appeal's reasoning.

The social model stands for the proposition that it is structural barriers and discriminatory attitudes that impede the lives of people with disabilities. It is manifested in international conventions protecting the rights of people with disabilities, domestic statutes such as human rights codes and accessibility legislation, and case law. By moving away from stigma and a rigid requirement of medical evidence, I suggest that the Court of Appeal makes a small but important step in fulfilling law's promise of equality for people with disabilities.

CET ARTICLE EXAMINE la décision de la Cour d'appel de l'Ontario dans l'affaire *Krmpotic c Thunder Bay Electronics Ltd*. Cette décision a confirmé la décision de la Cour supérieure selon laquelle l'employeur doit verser des dommages-intérêts majorés pour la manière dont le congédiement d'un employé ou d'une employée a été fait, et qu'il n'y a aucune obligation de fournir des preuves médicales ou psychologiques démontrant que le congédiement a causé de la détresse mentale pour l'employé ou l'employée. Le modèle social de l'incapacité, l'idée fondamentale au cœur du mouvement de défense des droits des personnes handicapées, aide à mieux comprendre le raisonnement de la Cour d'appel.

Le modèle social repose sur la notion selon laquelle ce sont les obstacles et les attitudes discriminatoires qui entravent la vie des personnes ayant une incapacité. Ceci se manifeste dans les conventions internationales pour la protection des droits des personnes ayant une incapacité, dans les lois nationales telles que les droits de la personne et la législation pour les personnes avec des incapacités, et la jurisprudence. En s'éloignant de la stigmatisation et d'une exigence de fournir des preuves médicales, cet article suggère que la Cour d'appel prend un petit pas, mais un pas important pour tenir la promesse d'atteindre l'égalité pour les personnes ayant une incapacité.

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Reflecting on *Krmpotic v Thunder Bay Electronics Limited* and the Social Model of Disablement

Ravi Malhotra[*]

I. INTRODUCTION

In *Krmpotic v Thunder Bay Electronics Limited*,[1] the Court of Appeal for Ontario recently upheld a finding of the Superior Court that the employer ought to pay aggravated damages for the manner of its dismissal of an employee. The Court of Appeal concluded that medical or psychological evidence was not required to demonstrate that the manner of dismissal resulted in mental distress.[2] In so doing, the Court of Appeal raised issues that warrant reflection on broader theories of disablement. The social model of disablement has been a touchstone for Canadian jurisprudence for many years, even in cases where the plaintiff or applicant lost the case on the merits.[3] It stands for the proposition that structural barriers in society disable people with impairments, not their inherent medical conditions.[4]

* Full Professor, Faculty of Law, Common Law Section, University of Ottawa. I thank the organizers and participants of the Future of Equality Workshop and particularly Anthony Sangiuliano for his insightful thoughts. I also thank my colleague Anne Levesque, Professor Vincent Kazmierski, Morgan Rowe, my research assistant Katie Schmidt, and an anonymous peer reviewer for insightful feedback. All remaining errors are my responsibility. Lastly, I thank Michael R Switzer, counsel for Mr. Krmpotic, for kindly making available the unreported Superior Court decision in this case.

1 2024 ONCA 332 [*Krmpotic* ONCA], aff'g 2022 ONSC 3748 [*Krmpotic* ONSC].

2 *Krmpotic* ONCA, *supra* note 1.

3 See e.g. *Granovsky v Canada* (*Minister of Employment and Immigration*), 2000 SCC 28 at para 34 [*Granovsky*], where the Court accepted principles of the social model while denying the appellant's *Charter* challenge on the merits.

4 Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990) [Oliver, *Politics*]; Michael Oliver & Colin Barnes, *The New Politics of Disablement* (New York: Palgrave Macmillan, 2012).

In other words, it proffers a sharp distinction between disability, created by physical or attitudinal barriers, and physiological impairment.[5] While law is not the only tool for social transformation, disabled people[6] have understandably sought to challenge disability discrimination through the inclusion of disability as a prohibited ground in human rights legislation[7] and in the *Charter of Rights and Freedoms*.[8]

At the core of this issue is interpreting disability as stigma and subordination. Sophia Moreau's apt conception of building-block torts implies that courts have historically placed greater burdens on plaintiffs claiming mental distress than on others.[9] I suggest that this disparate treatment is inconsistent with the social model of disablement.[10] This article proceeds as follows. In Part II, I provide an account of *Krmpotic,* highlighting the various judges' reasoning on the evidentiary requirements regarding the manner of dismissal and suggest how courts may use it in the future. In Part III, I provide an account of the social model of disablement and its relevance for legal analysis. In particular, I pay attention to the United Nations *Convention on the Rights of Persons with Disabilities* (*CRPD*)[11] and its implications for law reform.[12] In Part IV, I suggest how the social model might assist in understanding how we should think about questions relating to aggravated damages in the context of mental distress more broadly. In Part V, I offer some brief conclusions.

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5 Oliver, *Politics*, *supra* note 4.

6 While language continues to be contested in the disability rights movement, I use both "people with disabilities" and "disabled people" in this paper. The term "disabled people" demonstrates pride in our identity as disabled people.

7 See e.g. *Human Rights Code*, RSO 1990, c H 19.

8 *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

9 Sophia Moreau, "Beyond Anti-Discrimination Law: Realizing Equality Through Other Laws, Such as Tort Law" (2024) 4 Am JL & Equality 427 at 438–41.

10 *Cf* Samuel R Bagenstos, "Subordination, Stigma, and 'Disability'" (2000) 86:3 Va L Rev 397.

11 *Convention on the Rights of Persons with Disabilities*, 12 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) [*CRPD*].

12 For a discussion of the theoretical underpinnings of the CRPD, see Michael A Stein, "Disability Human Rights" (2007) 95 Cal L Rev 75 at 83–85; Michael A Stein & Penelope JS Stein, "Beyond Disability Civil Rights" (2007) 58 Hastings LJ 1203 at 1213–16; Paul Harpur & Michael A Stein, "The U.N. Convention on the Rights of Persons with Disabilities and the Global South" (2022) 47 Yale J Intl L 75 at 83–86, noting the role of the Global South in promoting the *CRPD*. For an application in the context of psychiatric injury, see John Fanning, "Psychiatric Injury and the United Nations Convention on the Rights of Persons with Disabilities" (2022) 49 JL & Soc'y 193.

II. *KRMPOTIC V THUNDER BAY ELECTRONICS LTD*

Legal cases are narratives. To be successful, a plaintiff's lawyer must take the messy facts of a person's life and distill a story that sets out the legal issues faced by the client in a clear and convincing way.[13] Yet, how we construct narratives is deeply contested. Lawyers often must shape the facts, omitting certain aspects and emphasizing others, to fit particular legal doctrines, stereotypes, and societal expectations.[14] Disability narratives have the potential to illustrate the experiences of disabled people in ways that may raise consciousness of disabled people and challenge mainstream understandings of disabled people as objects of pity and shame.[15] I argue that *Krmpotic* provides a fruitful opportunity to engage productively on issues of disability and how we think about disabled employees and their value to employers.

Drago Krmpotic was hired by Thunder Bay Electronics Limited, a television broadcasting company, as a maintenance employee in 1987. He did a variety of tasks including basic fleet maintenance, building demolition, and waste removal, among other duties.[16] Unfortunately, he experienced no fewer than four workplace accidents during the course of his employment, all involving injuries to his back.[17] In 2016, the employer terminated Mr. Krmpotic after nearly thirty years of service at the age of 59, claiming that economic conditions required layoffs.[18] He was terminated within two hours of returning from surgery with no explanation.[19] He was terminated without cause or notice and stated that he could not find suitable

13 Allan Kanner & Tibor L Nagy, "Legal Strategy, Storytelling, and Complex Litigation" (2006) 30:1 Am J Trial Advoc 1 at 13–15.

14 See e.g. William Eskridge Jr, "Gaylegal Narratives" (1994) 46:3 Stan L Rev 607, discussing legal strategies in the case of a racialized gay American soldier Perry Watson. Critical Race Theory has also made use of narratives (see Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Mich L Rev 2411). On the stigmatization of disability, see Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice-Hall, 1963).

15 David M Engel & Frank W Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2003). Morgan Rowe and I have attempted to replicate such an analysis of disability narratives in the Canadian context (see Ravi Malhotra & Morgan Rowe, *Exploring Disability Identity and Disability Rights through Narratives: Finding a Voice of Their Own* (New York: Routledge, 2013)).

16 *Krmpotic* ONSC, *supra* note 1 at para 10.

17 *Ibid* at para 20.

18 *Ibid* at paras 6, 77.

19 *Ibid* at para 22.

alternative employment.[20] He sued for damages for breach of contract/wrongful dismissal, damages for loss of employment benefits if the notice period exceeded the period for which benefits were provided, damages for mental distress of $100,000, and aggravated/moral damages of $200,000.[21] His wife testified at trial how, although surgery in 2016 led to some improvement in her husband's back pain, she had to provide full-time care for her husband as he nevertheless struggled with "constant back pain, knee pain, limited mobility, anxiety, depression, fear, poor sleep, worry, frustration, short-temperedness and helplessness."[22]

At trial, Justice Fregeau held that the plaintiff was entitled to 24 months' notice of termination. Justice Fregeau also held that the plaintiff had properly mitigated his damages by making reasonable efforts to locate alternate employment.[23] Interestingly, despite the progressive development of the law in his decision, which I discuss below, Justice Fregeau also remarked that "there is no obligation on a new employer to provide workplace accommodations to a newly hired employee with physical disabilities."[24] This statement is astonishing as it misstates the fundamental obligations of all employers to accommodate workers with disabilities under provincial human rights codes. For instance, the Ontario *Human Rights Code* requires employers to accommodate all employees with disabilities up to the point of undue hardship.[25] I return to this point in Part IV of the paper.

With relatively little analysis, Justice Fregeau dismissed the plaintiff's claim for mental distress damages. He held that he could not dismiss the probability that Mr. Krmpotic's mental health issues did not arise from his physical impairments.[26] However, with respect to the manner of dismissal, the Court held that, upon reviewing the testimony, it was clear that the employer failed to be candid, reasonable, and forthright in its explanation for why Mr. Krmpotic was dismissed. Accordingly, the Court awarded the plaintiff $50,000 in aggravated damages for the employer's breach of its

20 *Ibid* at para 29.

21 *Ibid* at para 4. The plaintiff agreed to limit damages to $100,000 in order to make the claim under *Rule 76* of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

22 *Krmpotic* ONSC, *supra* note 1 at para 32. I return to the depiction of helplessness later.

23 *Ibid* at paras 64–67.

24 *Ibid* at para 65.

25 *Human Rights Code*, *supra* note 7, ss 11, 17. Analogous provisions exist in other provinces, territories, and the federal jurisdiction.

26 *Krmpotic* ONSC, *supra* note 1 at paras 68–69.

duty of good faith in the manner of dismissal, notwithstanding the dismissal of the plaintiff's claim for mental distress damages.[27]

On appeal, Justice Gillese for a unanimous Court of Appeal held that the trial judge did not make a palpable and overriding error on the question of mitigation. The Court of Appeal found that there was sufficient evidence for the trial judge to conclude that the plaintiff had adequately mitigated.[28] Interestingly, she indicated that the issue of whether the trial judge erred in stating that a new employer had no legal obligation to accommodate the applicant's disabilities was not squarely before the trial judge and need not be addressed.[29] While this is undoubtedly true, it is disappointing that the Court of Appeal did not make clear the legal obligation of all employers to accommodate disabilities.

On the issue of aggravated damages, the Court of Appeal upheld the trial judge's award. It stated that the employer had breached the duty of good faith in its manner of dismissal.[30] First, the employer claimed that the dismissal was for financial reasons, but never provided any evidence of a financial issue. Second, Mr. Krmpotic was dismissed within two hours of returning after his surgery, and the employer was misleading and evasive.[31] It therefore clearly failed in its duty of good faith. The Court of Appeal accepted that there was a range of mental distress. While it certainly encompassed diagnosable psychiatric injuries, it was not limited to that, and such a finding was not a condition precedent to award damages.[32] The Court of Appeal did not accept the employer's argument that it was bound to deny damages without evidence of mental distress as a result of the Supreme Court of Canada's decision in *Honda v Keays*.[33] In *Honda*, a majority of the Supreme Court, speaking through Justice Bastarache, held that damages resulting from the manner of dismissal were only available if the employer engaged in conduct that was unfair or in bad faith.[34] However, employer counsel maintained that under the rule in *Honda*, the Court could only impose aggravated damages when there is evidence of mental

27 *Ibid* at paras 89–92.
28 *Krmpotic* ONCA, *supra* note 1 at paras 19–28.
29 *Ibid* at para 28.
30 *Ibid* at para 36.
31 *Ibid*.
32 *Ibid* at para 34.
33 2008 SCC 39 [*Honda*].
34 *Ibid* at para 57. On the facts, the majority set aside the award of aggravated or punitive damages.

distress and proof that the manner of dismissal caused mental distress.[35] This builds on other recent cases that have modified the law of aggravated damages. For instance, in *Pohl v Hudson's Bay Company*,[36] a sales manager of 28 years' experience was terminated from his employment at Hudson's Bay Company.[37] The Superior Court held that aggravated or moral damages of $45,000 ought to be awarded because (i) the employer's decision to walk the employee out the front door was unduly insensitive;[38] (ii) the employer's offer of a sales job was misleading and a breach of the duty of good faith and fair dealing;[39] (iii) the employer violated the *Employment Standards Act, 2000*[40] by not paying out the wages it owed Pohl in a lump sum within the required period of time;[41] and (iv) the employer failed to issue the employee's Record of Employment in a timely manner.[42] While a full discussion is beyond the scope of this paper, decisions like *Pohl* reflect courts' willingness to be more flexible in the awarding of aggravated damages.

While no scholarly literature was cited, the Court of Appeal's judgment in *Krmpotic* thoughtfully took a broader approach that does not require a finding of a diagnosable psychiatric injury in order to award damages.[43] I suggest this approach is evocative of the social model of disablement. This contrasts significantly with case law in the realm of torts which has traditionally drawn a sharp distinction between physical and mental disability when establishing rules to demonstrate liability.[44] I discuss this further in Part IV, below.

Will *Krmpotic* dramatically impact future decisions? At this time of writing, it is too early to say. However, a recent decision of the New Brunswick Court of King's Bench is suggestive of a coming progression in the law that is more sensitive to plaintiffs who experience mental health trauma. In *MacDonald v Starbucks Coffee Canada Ltd*,[45] the Court considered the action for wrongful dismissal of a Starbucks manager. Mr. MacDonald had

35 *Krmpotic* ONCA, *supra* note 1 at para 29.
36 2022 ONSC 5230 [*Pohl*].
37 *Ibid* at para 1.
38 *Ibid* at para 99.
39 *Ibid* at para 100.
40 SO 2000, c 41.
41 *Pohl*, *supra* note 36 at paras 101–07.
42 *Ibid* at paras 108–11.
43 *Krmpotic* ONCA, *supra* note 1 at para 34.
44 Fanning, *supra* note 12 at 194–95. I should clarify that Fanning does not address "occupational stress" cases.
45 2025 NBKB 67 [*MacDonald*].

been employed with Starbucks since 2015. When the employer decided to close several of its Toronto locations due to a decline in business during the COVID-19 pandemic, Mr. MacDonald accepted the employer's offer to relocate to Fredericton.[46] While running a training session, Mr. MacDonald commented about a non-binary employee in a manner that was deemed by Starbucks to be inappropriate and resulted in a complaint and eventually his dismissal.[47] He claimed that he was unable to mitigate his damages by seeking work because he suffered from persistent depressive disorder (PDD).[48] Justice Morrison ruled that the case law, including the Ontario Court of Appeal's decision in *Krmpotic*, could be distilled to three major principles:

> First, medical evidence is not required to establish a mental injury. Second, expert medical evidence may be very helpful in establishing the injury, and the plaintiff who proceeds without it runs the risk of having their claim rejected. Third, it is up to the trier of fact to determine if other, non-medical evidence is sufficient to establish the mental injury on the balance of probabilities.[49]

The Court of King's Bench ruled that there was sufficient non-medical evidence to establish that Mr. MacDonald experienced PDD and that this condition prevented him from mitigating his damages.[50] Consequently, while the context is slightly different, I believe this judgment embraces the essential principles of *Krmpotic*. Although Justice Morrison thought "medical evidence may be very helpful",[51] his ruling leaves open the possibility that non-medical evidence is sufficient to establish a basis for damages. This judgment is consequently a promising sign that bodes well for future plaintiffs who need not be burdened with the costly and complex task of trying to establish medical evidence. I turn presently to discussing the social model in Part III.

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46 *Ibid* at para 4.

47 *Ibid* at para 5. Mr. MacDonald acknowledged that he commented on whether the t-shirts he was distributing would fit the body of the non-binary employee, using colloquial language to refer to the employee's breasts.

48 *Ibid* at paras 14–15.

49 *Ibid* at para 34.

50 *Ibid* at para 40.

51 *Ibid* at para 34.

III. THE SOCIAL MODEL OF DISABLEMENT

The social model of disablement is based on the simple yet radical idea that it is structural barriers that impair the lives of people with impairments. In other words, it distinguishes between physiological impairment, such as a broken spine, and disability, such as a workplace that has stairs and is consequently inaccessible to wheelchair users. While the medical or individual model sees disabled individuals as defective and focuses on eliminating or reducing impairment through medical treatment and rehabilitation, the social model is aimed at eliminating physical and attitudinal barriers in areas such as employment, transportation, education, and housing.[52] One of the earliest articulations of the social model was a manifesto published by a British advocacy organization, the Union of the Physically Impaired Against Segregation. It stated that "[d]isability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society."[53] While there are numerous versions of the social model and a full discussion is beyond the scope of this paper,[54] the core essence of the social model is now widely accepted in public policy circles, even if the on-the-ground implementation still leaves most disabled people languishing in poverty and, at best, precarious employment.[55] The social model means centring the lived experiences of disabled people to devise policies that reflect their interests and allow them to live quality lives of dignity, independence, and choice. While the Marxist tradition

52 Mike Oliver, "The Social Model in Action: If I had a Hammer" in Colin Barnes & Geof Mercer, eds, *Implementing the Social Model of Disability: Theory and Research* (Leeds, Yorks: The Disability Press, 2004) 18 at 20–21. See also Jerome E Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).

53 Union of Physically Impaired Against Segregation & The Disability Alliance, *Fundamental Principles of Disability* (London: Union of Physically Impaired Against & The Disability Alliance, 1976) at 3–4. The original articulation of the principles took the form of a debate between two British disability rights organizations, but the Union of Physically Impaired Against Segregation (UPIAS) has generally been regarded as the author.

54 For a good discussion of the debates, see Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (Basingstoke, UK: Palgrave MacMillan, 2007) at ch 3. I emphasize the British social model school rather than the more poststructuralist theories dominant in the United States.

55 The literature on this point is abundant. For recent sociological commentaries, see e.g. Emile Tompa et al, "Precarious Employment and People with Disabilities" in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2006) 90 at 100–109; Emily H Ruppel, "The Making of a Reserve Army of Labor: Paradoxes of American Disability Policy" (2025) 51:3 Critical Sociology 451.

largely influenced the original version of the social model, more recent calls for disability justice have incorporated an understanding of intersectionality to address the various experiences of disabled people facing multiple forms of oppression, such as sexism and homophobia.[56]

Although it is certainly true that law is only one path to pursuing justice,[57] including disability justice, three aspects of legal discourse that must be considered when thinking about the social model are international law, statutes that empower disabled people, and case law decisions that advance the law. The United Nations *CRPD* was the fastest negotiated international human treaty in history.[58] It entered into force in 2008 and sets out important foundational principles that are relevant to addressing disability discrimination.[59] The *CRPD* includes provisions establishing a wide range of rights ranging from the equal recognition of the law for people with disabilities (Article 12),[60] liberty and security of person (Article 14),[61] freedom from torture and cruel or inhuman treatment (Article 15)[62] to socioeconomic rights focused

56 See e.g. Natalie M Chin, "Centering Disability Justice" (2021) 71 Syracuse L Rev 683. On the historical materialist roots of the social model, see Oliver, *Politics*, *supra* note 4.

57 For a thoughtful, if controversial, discussion of the limitations of law as a tool for social transformation, see Orly Lobel, "The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120 Harvard L Rev 937. The story of grassroots political mobilization and civil disobedience of disabled people in the streets is mostly untold. But see Joseph P Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993).

58 *CRPD*, *supra* note 11; United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*, by Andrew Byrnes et al (Geneva: UN, Office of the UN High Commissioner for Human Rights, 2007) at iii.

59 Michael Ashley Stein & Janet E Lord, "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential" (2010) 32 Hum Rts Q 689 at 690. A full treatment of the CRPD is well beyond the scope of this paper.

60 Mary Keys, "Article 12 [Equal Protection before the Law]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 263. For an important recent discussion, see Jonas-Sébastien Beaudry, "Ableism's New Clothes: Achievements and Challenges for Disability Rights in Canada" (2024) 74:1 UTLJ 1 at 9.

61 Francesco Seatzu, "Article 14 [Liberty and Security of Person]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 295.

62 Antonio Marchesi, "Article 15 [Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 307.

on education (Article 24),[63] health (Article 25),[64] and work and employment (Article 27).[65] There are also certain rights *sui generis* to the *CRPD* such as the right to accessibility (Article 9),[66] the right to personal mobility (Article 20),[67] and the right to habilitation and rehabilitation (Article 26).[68] It also establishes a *CRPD* Committee of 18 experts which monitors reports produced by State Parties, evaluates the shadow reports of disability non-governmental organizations, releases general comments and recommendations, and provides a biennial report to the General Assembly.[69]

Why is the *CRPD* relevant to Canadian jurisprudence? There is Supreme Court jurisprudence that makes clear the weight that the Court will accord to international law. For instance, in *Saskatchewan Federation of Labour v Saskatchewan*,[70] a majority of the Court relied on the International Labour Organization's Convention 87 in finding that section 2(d) of the *Charter of Rights and Freedoms* established a constitutional right to strike.[71] More recently, a majority of the Court in *Nevsun Resources Ltd v Araya* held that Eritrean workers who worked at a mine owned by a Canadian company, Nevsun, could sue for, *inter alia*, breaches of customary international law in

63 Valentina Della Fina, "Article 24 [Education]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 439. See also Laverne Jacobs, "Access to Post-Secondary Education in Canada for Students with Disabilities" (2023) 23(1-2) Int'l J Discrimination & L 7.

64 Ilja R Pavone, "Article 25 [Health]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 471.

65 Maria V Liisberg, "Article 27 [Work and Employment]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 497.

66 Francesco Seatzu "Article 9 [Accessibility]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 225.

67 Marco Fasciglione, "Article 20 [Personal Mobility]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 375.

68 Ilja R Pavone, "Article 26 [Habilitation and Rehabilitation]" in Valentina D Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham, CH: Springer Nature, 2017) 488 at 488–96.

69 Stein & Lord, *supra* note 36 at 694-96. Space restrictions prevent me from an in depth treatment of the Optional Protocol which allows individuals to make complaints that State Parties have violated the CRPD. Canada ratified the Optional Protocol in 2018.

70 2015 SCC 4.

71 Justice Abella noted that the reliance of Chief Justice Dickson on international law in *Charter* interpretation has "proven to be a magnetic guide (*ibid* at para 63).

the British Columbia courts.[72] The majority concluded that it was not plain and obvious that Canadian courts could not develop a civil remedy in Canadian law for breaches of customary international law norms entrenched in Canadian law.[73] It should be noted, however, that reliance on international conventions remains controversial. As Bruce Ryder has commented, the opinion of Justices Brown and Rowe in *Quebec (Attorney General) v 9147-0732 Québec inc*[74] articulated a narrower interpretation of the role of international law, limiting it to providing support or confirmation of a judicial decision already reached by purposive interpretation.[75] Nevertheless, if a more expansive interpretation of the role of international law in interpreting UN conventions such as the *CRPD* prevails, a robust reading of several Articles would strengthen the case for a broader interpretation of aggravated damages. A person simply cannot achieve rehabilitation without adequate resources. Accordingly, an appropriate reading of Article 27 on work and employment includes substantive protections against dismissal on the basis of an acquired impairment.[76] Where this is impossible and the employee can no longer continue in the workplace, an expansive reading of Article 27 should allow for a social model interpretation of how we determine aggravated damages where an employee, like Mr. Krmpotic, has been discharged in a manifestly unfair manner. I return to this point in Part IV.

A second manifestation of the social model is the passage of disability rights statutes. These vary significantly in content. They are important because they signal that the legislature is committed to the inclusion and accommodation of disabled people. No matter how imperfect the implementation, it reflects the legislature's willingness to make it clear that there is a broad societal consensus to promote disability equality. In other words, disability equality is to be a social norm.[77] While the *CRPD* clearly inspired the growth of focused attention and energy to disability rights

72 2020 SCC 5.

73 *Ibid* at para 122.

74 2020 SCC 32. The Court found that section 12 of the *Charter* does not apply to a corporation charged under the *Quebec Building Act* (*ibid* at para 60).

75 Bruce Ryder, "Triage and Dissensus at the Supreme Court of Canada: A Review of the Court's 2020 Constitutional Decisions" (2022) 104 SCLR 5 at 18–22.

76 *Cf* Liisberg, *supra* note 65 at 501.

77 For a discussion of signalling and its relationship to the development of social norms, see Eric A Posner, "The Signaling Model of Social Norms: Further Thoughts" (2002) 36 U Rich L Rev 465.

in some countries, the *Americans with Disabilities Act of 1990*[78] (*ADA*) has domestic origins in American disability rights activism and long predates the adoption of the *CRPD*. After much lobbying by disabled Americans, a bipartisan coalition passed the *ADA*, which allows individuals to sue service providers and employers.[79] The *ADA* instantiates the principles of reasonable accommodation up to the point of undue hardship in employment and public amenities such as transportation services.[80] While the *ADA* has been widely regarded as a failure in improving the employment rates of disabled Americans and the rate of success of claims against employers has been low,[81] its mere passage has had a powerful symbolic effect and served as a source of pride for many disabled Americans.[82]

In Canada, human rights codes have prohibited discrimination on the ground of disability for many decades.[83] Although the Canadian human rights system is undoubtedly underfunded and subject to chronic delays—as demonstrated, for example, by the Ontario[84] human rights system—people with disabilities may nevertheless seek recourse through human rights tribunals and, sometimes, have obtained justice.[85] As well, in recent years, most provinces and the federal jurisdiction have adopted accessibility legislation specifying objectives to be achieved in areas such as customer service, access to information, public transportation,

78 42 USC § 12101 (1990) [*ADA*].

79 *Ibid*.

80 For an overview, see Doris Zames Fleischer & Frieda Zames, *The Disability Rights Movement: From Charity to Confrontation* (Philadelphia: Temple University Press, 2001).

81 See Marta Russell, *Beyond Ramps*: *Disability at the End of the Social Contract* (Monroe, Me: Common Courage Press, 1998); Samuel R Bagenstos, "The Americans with Disabilities Act as Welfare Reform" (2003) 44 Wm & Mary L Rev 921 at 923.

82 Engel & Munger, *supra* note 15. Engel and Munger note how the mere passage of the *ADA* transformed the consciousness of some disabled people who had never engaged in litigation under the statute (*ibid*).

83 See e.g. *Human Rights Code*, *supra* note 7, s 5 (prohibiting, *inter alia*, discrimination in employment on the ground of disability). For further discussion, see Beaudry, *supra* note 60 at 14–15. It is also the case that the adoption of a prohibition on disability discrimination in a constitutional document, such as section 15 of the *Charter*, has an impact on how citizens conceive of disability rights; however, a discussion of the *Charter* is beyond the scope of this paper. For my thoughts on the impact of the *Charter* on disability rights, see Ravi Malhotra, "Has the *Charter* Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century" (2012) 58 SCLR (2d) 273.

84 For a discussion of the dysfunctional Ontario human rights system see Noel Semple, "The Inaccessibility of Justice in Ontario's Adjudicative Tribunals: Symptoms and Diagnosis" (2024) 2:1 TMU L Rev 84 at 88–89.

85 *ADGA Group Consultants Inc v Lane*, 2008 CanLII 39605 (ON Div Ct).

employment, and outdoor public services.[86] Such legislation, however, has had extremely weak enforcement mechanisms and, in many cases, the regulations have yet to be drafted, let alone come into force.[87] Notably, Ontario has utterly failed to meet the generous 20-year deadline stipulated in the *Accessibility for Ontarians with Disabilities Act* (*AODA*), which requires accessibility to be implemented by 2025.[88] While grievance arbitrators have certainly had a significant impact on defining a broad interpretation of disability for workers in the unionized sector and robustly exercising their ability to reinstate dismissed workers, this influence is limited by the fact that most Canadians are not unionized.[89]

Finally, strategic litigation has worked in tandem with the promotion of disability rights litigation to obtain favourable outcomes for disabled people. The Supreme Court of Canada embraced the social model in *Quebec* (*Commission des droits de la personne et des droits de la jeunesse*) *v Montréal* (*City*); *Quebec* (*Commission des droits de la personne et des droits de la jeunesse*) *v Boisbriand* (*City*).[90] In *City of Montréal*, the Court explicitly affirmed that, when determining what constitutes a handicap for the purposes of human rights law, one must focus on "human dignity, respect, and the right to equality".[91] This contrasts sharply with an approach centred on biomedical impairment.[92] This case concerned three applicants who had been denied employment due to physiological anomalies that had no impact on

86 See e.g. *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11 [*AODA*]; *Accessible Canada Act*, SC 2019, c 10. The Ontario government provides an overview of the parameters of the AODA (see Ontario, "Accessibility in Ontario: What You Need to Know" (last modified 08 January 2026), online: <ontario.ca/page/accessibility-ontario-what-you-need-to-know>.

87 For an overview of the *Accessible Canada Act*, see Laverne Jacobs et al, *The Annotated Accessible Canada Act* (Windsor, ON: University of Windsor, 2021).

88 AODA Alliance, "2025 Has Arrived! Where is the Barrier-Free Society that the Ontario Legislature Unanimously Promised Ontarians with Disabilities Twenty Years Ago?" (1 January 2025), online: < aodaalliance.org/media/2025-has-arrived-where-is-the-barrier-free-society-that-the-ontario-legislature-unanimously-promised-ontarians-with-disabilities-twenty-years-ago>.

89 Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in The Law Society of Upper Canada, ed, *Special Lectures 2007: Employment Law* (Toronto: Irwin Law Inc, 2007) 189; Anupam Das, Ian Hudson & Mark Hudson, "Unionization Rates, Inequality, and Poverty in Canadian Provinces 2000–2020" (2024) 49:3 Capital & Class 441 at 444 (noting a decline in Canadian union density rates). A full discussion of grievance arbitration and its role in authorizing disability accommodations is beyond the scope of this paper.

90 2000 SCC 27 [*City of Montréal*].

91 *Ibid* at para 77.

92 *Ibid*. While outdated today, "handicap" was the term used at the time of the case.

their functional impairments whatsoever.[93] Perhaps because the facts were so compelling and a rejection of the claims would lead to absurd results, the Court took a strong stand, embracing a multidimensional approach that incorporated the political dimension of handicap to include human rights protections for people with perceived impairments.[94] While future cases did not always live up to this promise, *City of Montréal* provided a solid foundation that revolutionized the law and has the potential to empower disabled people.

The Human Rights Committee of the Council of Canadians with Disabilities (CCD) has devoted many years to identifying appropriate cases to seek intervener status.[95] Its interventions have included key equality rights decisions such as *O'Malley*,[96] *Bhinder*,[97] *Andrews*,[98] *Eldridge*,[99] *Eaton*,[100] *Grismer*,[101] and *Granovsky*.[102] Presciently, the CCD made a policy choice to intervene in equality cases that did not concern disabled applicants or plaintiffs, where there was nonetheless a real potential for jurisprudence to

93 *Ibid* at para 3. For instance, Ms. Mercier sought to work as a gardener-horticulturalist but faced discrimination because of anomalies in her spinal column that had no impact on her ability to complete her work (*ibid*).

94 *Ibid* at para 77.

95 I disclose that I served as a member of the Human Rights Committee of CCD for many years.

96 *Ont Human Rights Comm v Simpsons-Sears*, 1985 CanLII 18 (SCC). The Court found that an employer has a duty to accommodate an employee when a neutral rule has an adverse effect on her ability to work due to a prohibited ground of discrimination (*ibid* at para 18). For a discussion of CCD's strategic litigation work, see also Lana Kerzner & David Baker, "Amending the Canadian Human Rights Act" (Winnipeg: Council of Canadians with Disabilities, 1999).

97 *Bhinder v CN*, 1985 CanLII 19 (SCC). The majority of the Court upheld a hard hat rule as not discriminatory, notwithstanding its impact on Sikh employees (*ibid* at para 45).

98 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143. The Court found that a citizenship requirement for membership in the Law Society violated section 15 equality rights (*ibid* at 158).

99 *Eldridge v British Columbia* (*Attorney General*), 1997 CanLII 327 (SCC). The Court found that a refusal to fund sign language interpretation for hospital patient violated section 15 equality rights (*ibid* at para 95).

100 *Eaton v Brant County Board of Education*, 1997 CanLII 366 (SCC). The Court found that the placement of a child in special education class without parental consent does not violate section 15 equality rights (*ibid* at paras 79–80).

101 *British Columbia* (*Superintendent of Motor Vehicles*) *v British Columbia* (*Council of Human Rights*), 1999 CanLII 646 (SCC) [*Grismer*]. The Court found that failure to allow a person with a medical condition to have a driver's test constituted disability discrimination (*ibid* at para 44).

102 *Granovsky*, *supra* note 3 where the Court concluded that the drop out provision of the Canada Pension Plan did not violate Section 15 equality rights of people with temporary disabilities (*ibid* at para 82).

affect all equality-seeking groups. The CCD risked its very financial existence to be a party in the landmark *Via Rail* case concerning accessibility to the rail network for wheelchair users.[103] To the CCD's credit, many leading judicial decisions on disability rights have embraced the language of the social model, even when the applicant is losing the substantive claim. Hence, the Supreme Court in *Granovsky* explicitly adopted the language of barriers in adjudicating allegations that the drop-out provision to the qualification period for a disability pension under the Canada Pension Plan[104] violated the equality guarantee under section 15 the *Charter*.[105] The Court remarked that:

> It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.[106]

Although the *Charter* challenge failed, the Court demonstrated an understanding of the social model of disablement. Similarly, in *Via Rail*, the majority of the Court articulated an appreciation of structural barriers. Justice Abella commented that:

> To redress discriminatory exclusions, human rights law favours approaches that encourage, rather than fetter, independence and access. This means an approach that, to the extent structurally, economically and otherwise reasonably possible, seeks to minimize or eliminate the disadvantages created by disabilities. It is a concept known as reasonable accommodation.[107]

There is no reason for such forward-thinking interpretations to be confined to high-profile *Charter* or administrative law litigation. Such interpretive

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103 *Council of Canadians with Disabilities v Via Rail Canada Inc*, 2007 SCC 15 [*Via Rail*]. The majority of the Court concluded that the Canadian Transportation Agency had authority to order retrofitting of new trains to improve accessibility (see *ibid* at para 246). For a discussion of this case, see David Baker & Sarah Godwin, "ALL ABOARD!: The Supreme Court of Canada Confirms that Canadians with Disabilities Have Substantive Equality Rights" (2008) 71:1 Sask L Rev 39. Both David Baker and Sarah Godwin served as legal counsel for CCD.

104 RSC 1985, c C-8.

105 *Granovsky*, *supra* note 3 at para 34.

106 *Ibid*.

107 *Via Rail*, *supra* note 103 at para 110.

approaches are badly needed in everyday cases that may not receive any media attention. In Part IV, I explore how the social model of disablement might be used to reinterpret the law of aggravated damages.

IV. THE SOCIAL MODEL AND RETHINKING THE BUILDING BLOCKS OF CLAIMS IN WRONGFUL DISMISSAL CASES

What can the social model contribute to the law of wrongful dismissal and the assessment of aggravated damages? I begin by noting two smaller issues that are nonetheless salient for understanding the implications of the social model. Despite the progressive approach taken by Justice Fregeau in *Krmpotic*, the employer's counsel correctly notes that the decision contains an error of law in suggesting that a new employer has no duty to accommodate employees with pre-existing physical disabilities.[108] While the Court of Appeal understandably declined to deal with the matter, it is trite law that all employers are obligated to accommodate the disabilities of both existing employees and applicants, up to the point of undue hardship.[109] Were this not the case, employees with pre-existing physical disabilities would face bleak job prospects. I imagine the learned trial judge was focused on the very real legal responsibilities of the employer vis-à-vis the manner of dismissal and, so, carelessly exaggerated the state of the law. The fact that other employers have a legal obligation to accommodate in no way changes the reality that a dismissed employee with disabilities approaching the age of sixty faces a very bleak labour market.[110]

I also question the trial judge's characterization of Mr. Krmpotic as helpless.[111] While I acknowledge this was apparently the testimony of both the plaintiff and his wife, it is disconcerting to see disabled people described in this manner when one could easily maintain that the actual issue in this case was the complete refusal of the employer to engage in a meaningful disability accommodation analysis. Too often, disabled people are forced to engage in what Wittgenstein might characterize as

108 *Krmpotic* ONCA, *supra* note 1 at para 28.

109 For an overview, see Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective" in Kevin Whitaker et al, eds, *Labour Arbitration Yearbook 2001–2002* (Toronto: Lancaster House, 2002) 51.

110 Arif Jetha et al, "The Working Disadvantaged: The Role of Age, Job Tenure and Disability in Precarious Work" (2020) 20 BMC Pub Health 1.

111 *Krmpotic* ONSC, *supra* note 1 at paras 30–32.

a "language-game" to obtain social assistance or other benefits.[112] In his empirical study of disabled people in California, Dorfman has shown how disabled Americans must emphasize their helplessness in order to secure benefits under administrative regimes that require a demonstration of an inability to work.[113] Yet such policy frameworks fail to capture the complex dynamic of intermittent disabilities. It may well be that a person is perfectly fit on some days but experiences debilitating pain on others. Too often, legal frameworks fail disabled people because their lived experience does not fit into the neat boxes required by administrative regulations and enforced inflexibly by underfunded agencies.[114] This underscores the point that, while legal doctrines arbitrarily address different aspects of an individual's experience, policy confusion and contradictions may lead to unwarranted results. While there is much to like in *Krmpotic* as I will note presently, it cannot be forgotten that the case need not have arisen in the first place had the employer simply engaged in a robust duty to accommodate analysis and worked diligently to find appropriate work for a faithful and very long-term employee.

On the substantive issue of aggravated damages and the requirement of mental distress, I would argue that it is a real advance to move away from the medical model. Disability rights advocates have long critiqued the role of medical professionals as institutional gatekeepers for funding and services for disabled people.[115] The trial judge did not require a finding of mental distress through psychiatric or medical evidence as a condition for

112 Ludwig Wittgenstein, *Philosophical Investigations*, 3d ed, translated by GEM Anscombe (Oxford: Basil Blackwell Ltd, 1958) at para 21.

113 Doron Dorfman, "Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process" (2017) 42:1 L & Soc Inquiry 195 at 198. Dorfman noted how a disabled woman in California emphasizes she must do extra laundry due to her incontinence to ensure she qualifies for benefits (*ibid* at 219).

114 In the United States, Congress had to amend the *ADA* in 2008 to reverse narrow court rulings that did not necessarily provide protection to people with conditions such as epilepsy and depression that only manifested sporadically (see Emily A Benfer, *The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act*, Issue Brief (Washington, DC: American Constitution Society for Law and Policy, 2009) at 11–12).

115 See e.g. Catherine Frazee, Joan Gilmour & Roxanne Mykitiuk, "Now You See Her, Now You Don't: How Law Shapes Disabled Women's Experience of Exposure, Surveillance and Assessment in the Clinical Encounter" in Dianne Pothier & Richard Devlin, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2006) 223 ("[f]or people with disabilities, medical scrutiny may not even notionally be linked to health care meant to benefit them" at 237).

awarding aggravated damages.[116] The costs of obtaining medical expertise to demonstrate mental distress are especially onerous for those plaintiffs who are disabled prior to their dismissal from employment.[117] Instead, the trial judge's appreciation of the fact that mental distress may occur without requiring such evidence is a welcome departure from the medical model. Historically, as Fanning has documented in the English context, it was challenging for plaintiffs to recover damages when a tort claim solely involved a psychiatric injury. In such a case, the claimant must demonstrate that they have suffered a particular type of mental harm.[118] Yet no such requirement exists in English law for purely physical injuries. While aggravated damages for breach of contract have typically been seen as conceptually distinct from tort law,[119] I would argue that the lessons one can learn from tort law are nevertheless instructive.

In *Hinz v Berry*, Lord Denning MR stipulated that damages for recovery were limited to recognizable psychiatric illnesses (RPI).[120] In *Hinz*, a pregnant mother of four children, Mrs. Hinz, witnessed her husband and children badly injured in a car accident while picking bluebells in Kent. Her husband later died, and her children were badly injured. Mrs. Hinz experienced a psychiatric injury, also described at the time as a nervous shock, after seeing these traumatic events. It resulted in depression. Mrs. Hinz sued for damages.[121] On appeal, the Court of Appeal of England and Wales awarded her damages because her psychiatric condition was not mere grief or sorrow; rather, it reached the point of meriting compensation in damages.[122] Nonetheless, Canadian academic commentators have wisely suggested that the Canadian importation of the *Hinz* rule should be rejected, noting that Lord Denning's language in describing the threshold requirement of mental illness for recovery was vague, confusing, and inconsistent.[123] It also risked

116 *Krmpotic* ONSC, *supra* note 1 at para 89. Justice Fregeau also rejected the employer's argument that the plaintiff's failure to seek punitive or *Human Rights Code* damages should result in lower aggravated damages (*ibid* at para 70).

117 I thank Professor Vincent Kazmieski for drawing my attention to this point.

118 Fanning, *supra* note 12 at 203.

119 *Wallace v United Grain Growers Ltd*, 1997 CanLII 332 at paras 73–74 (SCC), Iacobucci J.

120 [1970] 2 QB 40, [1970] 2 WLR 684 (Eng CA).

121 *Ibid*.

122 *Ibid*.

123 Louise Bélanger-Hardy, "Reconsidering the 'Recognizable Psychiatric Illness' Requirement in Canadian Negligence Law" (2013) 38:2 Queen's LJ 583 at 607–609. The literature is extensive and Bélanger-Hardy serves as an illustration. As I note below, Anne Levesque and I have also discussed the problems with the RPI standard (see Anne Levesque & Ravi Malhotra, "The Dawning of the Social Model: Applying a Disability Lens to Recent Developments in the Law of Negligence" (2019) 13:1 McGill JL & Health 1 at 9, n 26).

reinforcing ableist stereotypes that people with mental health conditions are inherently untrustworthy.[124] People with mental health conditions have long been stigmatized as dishonest and to blame for their medical conditions.[125] Removing unduly stringent requirements for recovery paves the way for greater equality for disabled people.

In *Saadati v Moorhead*,[126] the Supreme Court reconsidered the RPI standard. The case concerned Mr. Saadati, the plaintiff, who was driving a tractor-truck in New Westminster, British Columbia when his vehicle was hit by the defendant, Mr. Moorhead. Between 2003 and 2009, the plaintiff was involved in a series of five motor vehicle accidents. The accident in question in this case was the second in the series. The plaintiff was eventually found to be mentally incompetent, and his action was continued by a litigation guardian.[127] At trial, the judge found in favour of the plaintiff and awarded him $100,000 in non-pecuniary damages. The trial judge concluded that despite the plaintiff's lack of physical injuries, he suffered psychological injuries, personality changes, and cognitive difficulties.[128]

At the British Columbia Court of Appeal, the appellant defendant was successful.[129] The Court of Appeal accepted the defendant's argument that the respondent was required to demonstrate that he had suffered a medically recognized psychiatric illness.[130] Moreover, expert medical evidence was not adduced to prove this to the satisfaction of the Court of Appeal.[131]

On further appeal, Justice Brown, for a unanimous Supreme Court, ruled that the ordinary duty of care analysis was appropriate for mental injury caused by negligence.[132] Justice Brown rejected the notion that the RPI requirement provided objectivity, certainty, and predictability of outcomes, citing that psychiatric standards, such as the DSM, had repeatedly been revised and remained subject to internal disputes amongst its

124 Levesque & Malhotra, *supra* note 123 at 10. See also Judith Mosoff, "Lost in Translation?: The Disability Perspective in *Honda v. Keays* and *Hydro-Québec v. Syndicat*" (2009) 3:1 McGill JL & Health 137 at 142.

125 American Psychiatric Association, "Stigma, Prejudice and Discrimination against People with Mental Illness" (March 2024), online: <psychiatry.org/patients-families/stigma-and-discrimination>.

126 2017 SCC 28 [*Saadati* SCC].

127 *Ibid* at paras 3–4.

128 *Ibid* at paras 5–6.

129 *Saadati v Moorhead*, 2015 BCCA 393 at para 37.

130 *Ibid* at paras 22, 28.

131 *Saadati* SCC, *supra* note 126 at para 7.

132 *Ibid* at para 24.

practitioners.[133] The Court therefore allowed the plaintiff's appeal and restored the judgment. The Court thus moved away from the technical debates around RPI to one that is a step closer to the social model.[134] A rejection of medical diagnosis gives space for decision makers to consider the lived experience of the disabled person holistically.

Although the employment law context may differ in some ways from personal injuries that arise in tort law, I would argue that the same issues of equality and dignity are germane. People who respond to mental distress should not be denied aggravated damages simply because their physiological response does not correspond to abstract criteria set out in psychiatric textbooks like the DSM-V.[135] Individuals react differently to the shock of losing their job, and a failure to meet a prescribed set of indicia should not be grounds for denial of compensation. I would argue that even short-term mental distress may warrant compensation because it is not possible to measure the distress by its brevity. An acute episode of mental distress, even when short, may be sufficiently serious to result in compensation and garner the label of disability.

This extra burden of having to meet a set of arbitrary criteria is inconsistent with the social model of disablement. Such restrictive rules are also constitutive of what Sophia Moreau has aptly called a "building-block rule" of tort.[136] She maintains that these foundational rules of tort law devalue the lives of members of subordinate groups, stereotype them through false narratives about their lives, and make it more difficult for them to obtain the same level (or sometimes any) compensation in litigation.[137] For instance, the reasonable person standard in negligence law has been typically based on the behaviour expectations of men, disadvantaging women whose identical conduct may not be regarded as reasonable.[138] Disabled people have also been excluded from the legal imagination of tort law and

133 *Ibid* at paras 32–33. The DSM refers to the Diagnostic and Statistical Manual of Mental Disorders, a standard if controversial psychiatric textbook (see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, Virginia: American Psychiatric Association Publishing, 2013) [American Psychiatric Association, *DSM*]).

134 For a further elaboration on how the Court might have gone further with respect to the ordinary fortitude test it derived from earlier Supreme Court jurisprudence, see Levesque & Malhotra, *supra* note 123 at 22–25.

135 American Psychiatric Association, *DSM*, *supra* note 133.

136 Moreau, *supra* note 9 at 438.

137 *Ibid*.

138 *Ibid* at 439.

its formulation over time. According to Moreau, framing rules are rules that "determine what counts as a legally cognizable cause of action in a given jurisdiction."[139] Moreau insists that framing rules that require different rules for people to obtain compensation for psychiatric harm contribute to the subordination of people with disabilities.[140] I would concur. Moreau's typology of building-block torts and framing rules helps us appreciate how such arbitrary rules can shape how we think about people with mental health conditions. Arbitrary requirements for medical evidence impose significant hurdles when a person is most vulnerable. In the employment law context, *Krmpotic* is a clear step forward. Removing the requirements for psychiatric evidence for recovery for mental distress damages encourages employers to treat all employees with dignity and respect during the dismissal process.

V. CONCLUSIONS

In this short commentary, I have shown how the Court of Appeal's decision in *Krmpotic* advances the law and encourages employers to treat their employees fairly. Through a discussion of the social model of disablement, I have suggested some ways that we could rethink employment law. In particular, I have argued that we could reconsider aggravated damages in light of the social model. A more detailed study would question why employment law rules are structured in a way that allows employers to so easily dismiss long-term employees, whose only recourse is to then sue for damages. This sets them up for a difficult and uphill battle. A broader rethinking of employment law holds out the promise of social justice and dignity for aging disabled workers that a tinkering of rules can never achieve. The CRPD could empower vulnerable disabled employees, while strategic litigation may serve to achieve particular priorities of the disability community. It also warrants careful consideration on a case-by-case basis. It is incumbent on lawyers and legal scholars who value the dignity of labour to undertake this arduous task. Injured workers across Ontario are counting on us.

139 *Ibid* at 436.
140 *Ibid* at 440.