AN INTERESTING QUESTION
REGARDING PUNITIVE DAMAGES

by William E. McNally and Barbara E. Cotton[1]

Here is an interesting question - in considering whether punitive damages should be awarded, and the amount thereof, can the court look at the conduct of the defendant relative to individuals other than the plaintiff?

It would seem that the clear answer to this question is yes.

The Supreme Court of Canada has recently reviewed the principles governing punitive damages in *Whiten* v. *Pilot Insurance Co.*[2] In this case the home of the appellant and her husband burnt down just after midnight in January of 1994. The family was forced to flee the house wearing only their nightclothes in -18° Celsius temperature. The fire totally destroyed the home and its contents, including three cats. The appellant was able to rent a small winterized cottage nearby for $650 per month, but the respondent insurer made only a single $5,000 payment for living expenses and covered the rent for a couple of months. The insurer then cut off the rent without telling the family. Thereafter the insurer adopted a confrontational attitude toward the appellant insured and persisted in a theory that the appellant had burnt down the house through arson, even though this theory of arson was not supported by the local fire chief, the insurer's own expert investigator and another expert.

A jury awarded compensatory damages and $1,000,000 in punitive damages. This punitive damage award was cut back to $100,000 by the Ontario Court of Appeal. The Supreme Court of Canada restored the $1,000,000 punitive damage award and in the process reviewed the principles governing punitive damages.

Most significantly for the purposes of the question before us, the Supreme Court of Canada per Binney J., for the majority, confirmed that there were three objectives to a punitive damage award: retribution, deterrence and denunciation. It is within the concept of satisfying the objective of deterrence that the conduct of the defendant towards others in addition to the plaintiff can be taken into account.

Binney J. summarized the principles regarding punitive damages as follows:[3]

> "To this end, not only should the pleadings of punitive damages be more rigorous in the future than in the past . . ., but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the profit, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just dessert (retribution), **to deter the defendant and others from similar misconduct in the future (deterrence)**, and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient." (Emphasis added.)

Binney J. then commented that deterrence was an important justification for punitive damages and that this objective would have played a greater factor in the case if there was evidence that the respondent insurer's conduct was typical towards other policy holders. There was no such evidence on the facts, however.

A recent case has imposed significant punitive damages on an insurer when the court found that the egregious conduct of the insurer was typical of its corporate practice to policyholders, however. In *Clarfield* v. *Crown Life Insurance Co.*[4], a decision of Juriansz J. of the Superior Court of Justice, the insured Mr. Clarfield was a senior broker and head of a branch office of Marchment McKay in 1992 and earned over $200,000. At this time he purchased an Income Replacement Plus disability insurance policy from the defendant Crown Life Insurance Co. A significant provision of this policy was that the insurer was obliged to pay residual disability benefits, which were defined as follows: ". . . as a result of Injury or Sickness you have a Loss of Monthly Income of at least 20% of your Prior Average Monthly Income, and you are under the care and attendance of a legally qualified physician appropriate to the Disability."

In 1993 Mr. Clarfield's income was $122,000. In September 1996 he founded his own business and did not draw a salary, intending to live on his savings and his wife's employment income while the new business was being established. He then became ill in September 1997 and completed a claim for disability insurance benefits. What is significant is that the plaintiff had no employment income prior to the time that he claimed for the disability benefits. His illness was diagnosed by a physician to have likely begun in February 1997 such that he was completely incapacitated by July 1997.

In July 1998, the defendant's claims adjuster sent a letter stating that the insurer had decided that there was no longer evidence of the total disability of Mr. Clarfield, but that since the plaintiff was still in treatment and seeking assistance with a vocational-rehabilitation program the insurance company was willing to assist him by going outside the terms of the policy and providing him with benefits on a "extra-contractual" basis. This letter enclosed a cheque in the amount of

$4,800 and requested that Mr. Clarfield sign the bottom of the letter indicating his agreement with its terms. The letter made no mention of residual disability benefits, and it later became apparent at trial that the attitude of the insurance company was that Mr. Clarfield was not entitled to residual disability benefits because he was earning no income prior to making his claim for disability benefits.

Mr. Clarfield did not sign the letter regarding the "extra-contractual" benefits and did not cash the cheque, although he needed the money. He brought an action on the insurance policy and claimed aggravated and punitive damages.

In the result Mr. Clarfield was successful and was awarded aggravated and punitive damages in addition to damages on the basis of his entitlement under the policy. Juriansz J. relied upon the Ontario Court of Appeal decision in *Whiten* v. *Pilot Insurance Co.*[5] as authority that the important goal of deterrence should be taken into account in assessing liability for punitive damages. Juriansz J. noted Finlayson J.A.'s adoption of the criteria set out in *Pacific Life Insurance Co.* v. *Haslip*[6] which should be considered in assessing whether punitive damages should be awarded, and in particular the criteria of "the degree of reprehensibility and similar conduct in other cases". Juriansz J. then reviewed the evidence and found that it was a policy of Crown Life to deny residual disability benefits in all cases where an insured was not earning income prior to the claim for disability insurance, stating: "Furthermore, there was evidence that can only lead to the conclusion that the insurer's deleterious conduct is not confined to this case." And further: ". . . I have found that the defendant's conduct was not an isolated incidence. Here there was a corporate practice to avoid payment of all claims made by insureds who had no earned income at the time they became disabled." And further: ". . . in these circumstances, I propose to assess the quantum of punitive damages based solely on the fact that the insurer's deleterious conduct in this case was as a result of its staff's established practices, and that a disincentive to the continuation of those practices is necessary . . ."

A judge of the Ontario Superior Court of Justice has noted that Juriansz J.'s punitive damage award was based largely on the fact that the defendant insurer had a corporate practice of dis-entitling claimants under its disability policy when claimants had no income at the time of the disability.[7]

Indeed, the Alberta Court of Queen's Bench has taken into account the defendant's conduct towards persons other than the plaintiff in *Muir* v. *Alberta*.[8] In this case Muir was a child whose mother did not want her. She was at the lower end of the range of normal intelligence. Starting in 1953, Muir's mother sought to have her admitted to the Provincial Training School for Mental Defectives. In 1955 the ten-year old Muir was admitted, even though appropriate steps were not taken to determine whether she was "mentally defective". In 1959, Muir was irreversibly sterilized without appropriate procedures first being complied with. She left the school in 1965 at the age of 21 and was then twice married. The sterilization and ten years of confinement had catastrophic effects on her life and she sued the Province of Alberta in tort for wrongful sterilization and wrongful confinement. The Province admitted liability. Viet J. stated that, but for the acts of the Province in admitting liability, it would have assessed $250,000 in punitive damages. In coming to this conclusion Viet J. clearly took into consideration the Province's conduct towards others than the plaintiff Muir. Thus, Viet J. stated:[9]

> "- the trial had established that the government's approach to the sterilization of Ms. Muir was not an isolated situation. The government routinely operated outside of the law that permitted sterilization, that the agency routinely ignored its own administrative procedures and safeguards, routinely performed operations such as appendectomies that were not medically necessary. But despite the fact that the Eugenics Board claimed to have an IQ cut-off point of 70, persons above that level were approved for sterilization; some of those persons had conditions such as spinal meningitis, hearing defects, or had been accused of criminal offences; . . ."

An interesting case is that of *Coughlin* v. *Kuntz*,[10] a decision of the British Columbia Court of Appeal per Hinkson J.A. In this case the plaintiff was injured when he jumped from a runaway logging truck after the vehicle's transmission and brakes failed. He experienced pain in his

left shoulder after the accident and continued to suffer discomfort in the injured shoulder for some time. He received physiotherapy and consulted various doctors. The Worker's Compensation Board then authorized the defendant Dr. Kuntz to perform surgery on the left shoulder. It refused to authorize a cervical discectomy, however.

The defendant Dr. Kuntz had developed a personal theory with respect to the narrowing of disc spaces which he described as "Kuntz's Syndrome". In the course of developing this theory he carried out a large number of cervical discectomies on his patients. This fact came to the attention of the College of Physicians and Surgeons and in January, 1982, the College requested him to stop these procedures pending an investigation. While other orthopedic surgeons used a bone graft to separate the cervical spaces, Dr. Kuntz used a spacer for his patients.

The plaintiffs underwent a cervical discectomy performed by Dr. Kuntz, and at this time a spacer was inserted. Within a few weeks of the operation the spacer slipped forward and rested against the patient's esophagus, causing an impediment each time the plaintiff swallowed. The plaintiff went to another surgeon to correct the difficulties, was ultimately healed, and sued Dr. Kuntz.

Dr. Kuntz was held liable for medical malpractice and what is of interest is that punitive damages were awarded as against the defendant doctor in the amount of $25,000 by the trial judge. This award was upheld by the British Columbia Court of Appeal, with Hinkson J.A. stating:[11]

> "In determining whether or not an award of exemplary damages is appropriate, it is necessary to keep in mind that the practice of medicine has gradually evolved and that many advances are attributable to practitioners who have developed new techniques and adapted available knowledge to improving procedures in treatment of patients. The criticism made of the defendant in this case is that rather than following the type of research which is considered necessary and desirable in developing a new remedy, **the defendant has resorted to increasing his knowledge and demonstrating the**

> **soundness of his theory by experimenting on his own patients**. It is for that reason that his theory has attracted criticism from his peers." (Emphasis added.)

On the other hand, in *A & E Television Network* v. *Alliance Communications Corp.*,[12] a decision of Campbell J. of the Federal Court, Trial Division, two paragraphs of a Statement of Claim were challenged on the basis that the punitive damages claimed were unrelated to the conduct for which the damages were claimed. This case was a trademark infringement action and the plaintiff sought to allege in the impugned paragraph that the defendant Alliance had a history of attempting to misappropriate the plaintiff's trademark for its own use. The paragraph then went on to give particulars of this history of misappropriation. Giles A.S.P. had struck out this paragraph in the first instance, but Campbell J., on appeal, granted the appeal in part to amend the paragraph to allow a claim simply for: ". . . punitive damages for Alliance's flagrant infringement of AETN's intellectual property rights".

This case stands alone, however, and would not seem to undermine the general principle that conduct of the defendant towards others as well as the plaintiff can be considered in assessing a claim for punitive damages.

CONCLUSION:

The Supreme Court of Canada in *Whiten* v. *Pilot Insurance Co.* has recently affirmed that deterrence is one of the three objectives of an award for punitive damages, and has implicitly further affirmed that the conduct of the defendant towards others than the plaintiff can be considered in assessing a claim for punitive damages. The conduct of the defendant towards others was the focus of the majority judgment of the Ontario Court of Appeal in this decision (overturned in the result).

What was the general course of conduct of the defendant? Was the egregious conduct demonstrated towards the plaintiff a pattern of conduct of the defendant, or perhaps a corporate

practice? Should punitive damages be awarded in order to deter the defendant in this course of conduct? It would seem that these are valid questions in assessing whether punitive damages should be awarded and the amount thereof.

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2. [2002] S.C.J. No. 19

3. At pp. 23, 24 (Q.L.)

4. (2000), 50 O.R. (3d) 696

5. (1999), 42 O.R. (3d) 641

6. 499 U.S. 1 (1990)

7. *Anderson* v. *Zurich Insurance Co.,* [2001] O.J. No. 5580

8. (1996), 179 A.R. 321

9. At p. 356

10. (1989), 2 C.C.L.T. (2d) 42

11. At pp. 55, 56

12. (1998), 82 C.P.R. (3d) 382