PUNITIVE DAMAGES AND THE REQUIREMENT FOR AN INDEPENDENT ACTIONABLE WRONG: WHITEN V. PILOT INSURANCE CO.

1. Introduction

In *Whiten v. Pilot Insurance Co.*,[1] the Supreme Court of Canada considered whether a jury award of $1 million in punitive damages against an insurance company for breach of a contract was reviewable. Also considered was whether breach of an insurer's duty to act in good faith amounted to the independent actionable wrong which is requisite to found punitive damages for breach of contract under the principle ostensibly established by the Supreme Court in *Vorvis v. Insurance Corporation of British Columbia.*[2]

The Supreme Court's decision in *Whiten* is significant in at least two respects. First, by reversing the Court of Appeal[3] and affirming that the jury's punitive damages award of $1 million was within rational limits, it clearly has extended the outer limits of such damages in breach of contract actions. Second, it marks the first time — beyond the brief comments it offered in *Royal Bank of Canada v. Got & Associates Electric Ltd.*[4] — that Canada's highest court has had to determine the applicability of the principles surrounding punitive damages enunciated in *Vorvis* to a case not involving employment law.

As articulated by the Supreme Court in the leading decision of

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1. (2002), 209 D.L.R. (4th) 257, [2002] I.L.R. ¶1-4048, [2002] S.C.J. No. 19 (QL) (S.C.C.).
2. [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193, [1989] 4 W.W.R. 218.
3. *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, 117 O.A.C. 201 (C.A.). There have been several published comments on *Whiten* at the Court of Appeal level, including Joseph Y. Obagi and Elizabeth A. Quigley, "Making a Claim for Punitive Damages against First Party Insurers" (2001), 24 Adv. Q. 4; Paul M. Iacono, "Punitive Damages and the Pendulum Swing" (2000), 19 Leg. Alert 9; Gary Will, "Punitive Damages for Bad Faith" (1997), 15 Can. J. Ins. L. 19; Jim Middlemiss, "Dropping the Hammer: [Punitive Damages Litigation]" (2001), 10 National No. 1, 32.
4. [1993] 3 S.C.R. 408, 178 D.L.R. (4th) 385, [2000] 1 W.W.R. 1.

Hill v. Church of Scientology,[5] punitive damages may be awarded against a defendant whose "misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency".[6] Such damages are awarded only when a combined award of general and aggravated damages would not be enough to punish and deter.[7] But in breach of contract situations, high-handed and oppressive conduct is not sufficient. To secure punitive damages, the plaintiff must also establish that an independent actionable wrong, beyond the matter sued upon, has also occurred.

This case comment is divided into several parts. Part 2 provides an account of the facts in *Whiten* as well as an analysis of the law of punitive damages contained in the judgment. Part 3 challenges the soundness of requiring an independent actionable wrong before punitive damages can be granted. Part 4 describes the proportionality test advanced by the Supreme Court in setting quantum for punitive damages and goes on to ask whether the $1 million award in this case is appropriate. Part 5 suggests several practice points to which *Whiten* gives rise. Part 6 offers a very brief conclusion.

2. Whiten: The Facts and the Law

In 1985, the appellant, Daphne Whiten, bought a home in Haliburton County, Ontario, and took out a fire insurance policy with the respondent, Pilot Insurance Co., in respect of the home. On January 18, 1994, soon after midnight, the appellant and her husband discovered a fire in the addition to the home. They and their daughter fled the home wearing only their nightrobes in minus 18 degree Celsius temperatures. That night Mr. Whiten suffered serious frostbite to his feet for which he was hospitalized and temporarily confined to a wheelchair. The fire completely destroyed the Whitens' home in addition to some valuable antiques, items of sentimental value, and their three cats.[8]

The appellant rented a small winterized cottage for $650 per month. The respondent made a single payment of $5,000 to the appellant for living expenses and covered the rent of the cottage for a couple of months. The respondent then cut off payment of the rent

5. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, 84 O.A.C. 1.
6. *Ibid.*, at p. 1208.
7. *Ibid.*
8. *Whiten, supra*, footnote 1, at para. 2.

without notifying the Whitens. It subsequently refused to settle the claim and accused the Whitens of deliberately setting fire to their home. Pilot maintained this position even though an independent insurance adjuster as well as a firefighter and other experts initially retained by the respondent to investigate the incident concluded that the fire was accidental. To add insult to injury, the respondent pursued a hostile and confrontational policy apparently designed to force the appellant (whose family was in dire financial straits) to settle her claim at substantially less than its fair value. It even rejected an offer by the Whitens to take a polygraph test administered by an expert selected by the respondent in an attempt to satisfy the respondent that they did not set the fire. The respondent's arson theory was completely discredited at trial.[9]

In response, the jury awarded $318 252.32 in compensatory damages and $1 million in punitive damages against Pilot.[10] A majority of the Ontario Court of Appeal (Laskin J.A. dissenting in part) allowed the appeal in part. While agreeing that Whiten was entitled to an award of punitive damages, the court held that the $1 million awarded by the jury was "simply too high"[11] and reduced the award to $100,000. The Supreme Court restored the jury's award.

In the Supreme Court of Canada, Justice Binnie (McLachlin C.J.C. and L'Heureux-Dubé, Gonthier, Major, and Arbour JJ. concurring) confirmed that punitive damages are reserved for exceptional cases where there has been "'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'".[12] The majority also acknowledged great concern and controversy surrounding the appropriate quantum for punitive damages, particularly as these awards have grown both in number and amount since the 1970s.[13] Indeed, Binnie J. opened his judgment with the following sentence: "This case raises once again the spectre of uncontrolled and uncontrollable awards of punitive damages in civil actions."[14] For these reasons, the court considered it opportune to "clarify further the rules governing whether an award of

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9. *Ibid.*, at para. 3.
10. See *Whiten v. Pilot Insurance Co.* (1996), 132 D.L.R. (4th) 568, 27 O.R. (3d) 479, 47 C.P.C. (3d) 229 (Ont. Ct. (Gen. Div.)).
11. See *Whiten v. Pilot Insurance Co.* (C.A.) at p. 661, *per* Finlayson J.A., *supra*, footnote 3.
12. *Whiten* (S.C.C.), *supra*, footnote 1, at para. 36.
13. *Ibid.*, at para. 44.
14. *Ibid.*, at para. 1.

punitive damages ought to be made and, if so, the assessment of a quantum that is fair to all parties".[15]

After a comprehensive review of how punitive damages are regarded in a number of foreign common law jurisdictions, Justice Binnie extracted the following principles, which he concluded are consistent with Canadian jurisprudence:

1. The attempt to limit punitive damages to "categories" does not work and "was rightly rejected in Canada in *Vorvis*".[16]
2. The general objectives of punitive damages are "punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation".[17]
3. The main venue for punishment is criminal law so that "punitive damages should be resorted to only in exceptional cases and with restraint".[18]
4. Merely reciting the "time-honoured pejoratives ('high-handed', 'oppressive', 'vindictive', etc.)" does not provide adequate guidance to judges and juries setting quantum.[19]
5. Punitive damages must be awarded rationally. The award must further at least one objective of the law of punitive damages and at the lowest amount that would serve that purpose ("because any higher award would be irrational").[20]
6. Wrongdoers should be disgorged of profits via punitive damages where compensatory damages would not provide adequate deterrence for "outrageous disregard of the legal or equitable rights of others".[21]
7. Courts should not engage in a mechanical or formulaic approach — such as a fixed cap — to punitive damages as this does not provide sufficient flexibility. As Justice Binnie admonished: the "proper focus is not on the plaintiff's loss but on the defendant's misconduct".[22]

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15. *Ibid.*, at para. 45.
16. *Ibid.*, at para. 67.
17. *Ibid.*, at para. 68.
18. *Ibid.*, at para. 69.
19. *Ibid.*, at para. 70.
20. *Ibid.*, at para. 71.
21. *Ibid.*, at para. 72.
22. *Ibid.*, at para. 73.

8. Quantum must be directly tied to proportionality. According to the court, the[23]

> overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation.) Thus there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes, supra*, and affirmed here in *Hill, supra.*

9. Juries should receive considerable guidance from the trial judge, including being told "in some detail" about the function of punitive damages and the factors to assess.[24]
10. Punitive damages are not at large and for this reason, appellate courts are entitled to intervene "if the award exceeds the outer

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23. *Ibid.*, at para. 74. The idea here is that punitive damages should be awarded "if but only if" the compensatory award is inadequate.
24. *Ibid.*, at para. 75. The court also provided ingredients to the trial judge's charge to the jury which is also very helpful in assessing when and why, from a general perspective, punitive damages should be awarded. According to the court, at para. 94:

> . . . 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 behaviour. (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 defendant, (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 desert (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.

> boundaries of a rational and measured response to the facts of the case".[25]

With those principles in place, the court went on to assess whether the plaintiff could establish the separate actionable wrong required by *Vorvis*. More specifically, the court asked: "is a breach of an insurer's duty to act in good faith an actionable wrong independent of the loss claim under the fire insurance policy"?[26] After determining that the rule in *Vorvis* does not require the plaintiff to establish a tort and that any actionable wrong will do — including breach of contract or breach of fiduciary obligation[27] — the court went on to assess whether the plaintiff had succeeded in so doing. The central question was whether breach of the implied covenant to act in good faith was an actionable wrong separate and distinct from its obligation to compensate Whiten for the insured loss.

Counsel for the insurer argued, *inter alia*, that there was no independent actionable wrong on the facts. What Pilot did was breach its contract of insurance by failing to act in good faith and this amounts to one actionable wrong, not two.[28] This argument was, however, rejected by all three levels. In the words of the Supreme Court "a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss".[29] Yet the Supreme Court of Canada did not explain *why* this is so.

That said, it is easy to understand the court's motivation to find a separate actionable wrong. The conduct of the insurer was deserving of sanction and was oppressive in the extreme. Indeed, it defies explanation as to why the company took such an extreme and hostile position against the plaintiff. It is entirely proper for the court to sanction such conduct. But this begs the question: *why* must the plaintiff establish an independent actionable wrong? If the breach of contract is egregious, oppressive, high-handed and so on, why is this not enough? The answer to this question is outlined in the next section.

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25. *Whiten v. Pilot Insurance Co.* (S.C.C.), *supra*, footnote 1, at para. 76.
26. *Ibid.*, at para. 78.
27. *Ibid.*, at para. 79.
28. *Ibid.*, at para. 31.
29. *Whiten v. Pilot Insurance Co.* (S.C.C.), *supra*, footnote 1, at para. 79.

3. The Vorvis Requirement of an Independent Actionable Wrong

The Supreme Court's decision in *Vorvis v. Insurance Corporation of British Columbia*[30] has traditionally been interpreted as requiring that, before punitive damages will be awarded in a breach of contract action, the plaintiff must establish an independently actionable wrong, separate and distinct from the wrong forming the substratum of the action. This is certainly the interpretation taken by the court in *Whiten* and in its 1997 decision of *Wallace v. United Grain Growers Ltd.*[31]

In *Vorvis*, the court considered, *inter alia*, whether the conduct of the Insurance Corporation of British Columbia (ICBC) in wrongfully dismissing the plaintiff (Mr. Vorvis) from its employment without cause warranted the imposition of punitive damages. Vorvis was employed by ICBC as a solicitor in its legal department. At some point during the course of employment, his immediate supervisor, Mr. Reid, who was ICBC's General Counsel, became increasingly dissatisfied with Vorvis' pace of work. Consequently, he established "productivity meetings" each Monday morning through which he reviewed Vorvis' work during the previous week. Reid consistently criticized Vorvis for the number of hours he spent on each project. As the pressure increased, Vorvis became tense, agitated and distressed. He resorted to medical attention and a tranquillizer. Without any precipitating event, ICBC dismissed Vorvis from its employment. The trial judge held that Vorvis was an honest, loyal, trustworthy and diligent employee and was dismissed without cause. However, he declined to award punitive damages on the ground that such damages could not be awarded in a wrongful dismissal case. On appeal, the British Columbia Court of Appeal also disallowed the claim for punitive damages.[32] On further appeal to the Supreme Court of Canada, that court held that while it is very unusual, punitive damages may be awarded in an action alleging breach of contract,[33] but that none would be awarded in this case.

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30. *Supra*, footnote 2.
31. (1997), 152 D.L.R. (4th) 1, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86. In this case, Justice Iacobucci, writing for the majority, refused to award punitive damages to Mr. Wallace, seeing no reason to interfere with findings by the lower courts that no actionable wrong had occurred, at p. 28.
32. (1984), 53 B.C.L.R. 63, 9 D.L.R. (4th) 40, 4 C.C.E.L. 237 (C.A.).
33. *Supra*, footnote 2, at p. 1107.

For the majority (Beetz, McIntrye and Lamer JJ.), Justice McIntyre noted that in assessing damages for wrongful dismissal "the principal consideration is the notice given for the dismissal"[34] and that punitive damages can be awarded in the proper case.[35] As the court went on to ask:[36]

> When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves; however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. *The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff.*

Justice McIntyre continued:[37]

> Turning to the case at bar, it is clear from the judgments below that the appellant's superior, Reid, treated him in a most offensive manner. As has been noted, the trial judge would have awarded punitive damages had he been of the view that it was open to him to do so. The question before us now is whether the trial judge was right in concluding that it was not open to him to award the punitive damages. In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award.

Note that in these passages the court did not actually require a *separate* actionable wrong in order to entitle the plaintiff to punitive damages. It merely required that an *actionable wrong has occurred which caused the damages claimed* (here, mental distress). In an action where the only breach is the bare fact of dismissal without notice, a *separate* actionable wrong would be functionally necessary to found punitive damages. This is because merely dismissing someone without notice would not ordinarily amount to harsh, vindictive, reprehensible and malicious conduct and to the extent that someone suffered mental distress upon dismissal, it would not be *caused* by the breach (*i.e.* of bare dismissal without notice or pay in lieu) but more likely by the *fact* of dismissal (*i.e.* the employee is distressed to have lost his or her job and would have been just as upset with or without notice). It is therefore important to distinguish

34. *Ibid.*, at p. 1096.
35. *Ibid.*, at p. 1104.
36. *Ibid.*, at pp. 1105-1106 (emphasis added).
37. *Ibid.*, at p. 1107.

what the plaintiff in *Vorvis* practically requires to succeed in its claim for punitive damages from the case's general statement of the law. That is, in a wrongful dismissal case, egregious conduct is highly unlikely to be found in the *fact* of dismissal since indeterminate contracts of employment can be ended by either party on notice. There must generally be something more — beyond bare dismissal without notice — to which punitive damages can be attached.

In this way, what was practically required in *Vorvis*, namely a separate actionable wrong, has mistakenly been interpreted as the *ratio* of the case, namely that before punitive damages will sound in breach of contract actions, there must be a separate actionable wrong. And, no doubt, *Vorvis* lacks a certain incisiveness[38] which contributes to the confusion. However, if *Vorvis* is understood as making the much more limited claim that the plaintiff in a bare wrongful dismissal action will functionally need an independent actionable wrong to which to attach punitive damages, then this area of law will be better able to develop unburdened by formulaic incantations. And since it stands to reason that a breach of contract *could* encompass conduct deserving of sanction all on its own, there is no need to require a separate actionable wrong in order to found punitive damages. What matters is whether the breach or the manner of its commission was egregious. This accords with Justice Wilson's dissenting observation in *Vorvis* that the purpose of an award of punitive damages "is to reflect the court's awareness and condemnation of flagrant wrongdoing and indifference to the legal rights of other people".[39] Hence, it simply is not germane whether the defendant commits two oppressive and high-handed breaches, or only one.

In sum, Canadian law is mistaken to insist that a separate actionable wrong is a generic requirement for punitive damages in *all* breach of contract situations and is out of step with the common law jurisdictions surveyed in *Whiten* to do so.[40] Such a requirement —

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38. Indeed, the dissent interprets the majority as insisting that the misconduct itself must constitute an actionable wrong: *ibid.*, at p. 1130. Note that under *Wallace*, *supra*, footnote 31, Mr. Vorvis most certainly would have seen an extension in the notice period for the employer's bad faith in the *manner* of dismissal.

39. *Ibid.*, at p. 1131.

40. *Whiten* (S.C.C.), *supra*, footnote 1, at paras. 47-65. Note that Ireland, for example, does not appear to require an independent actionable wrong. As the Supreme Court summarizes the matter: "In Ireland, punitive damages are said to arise from

because it is divorced from any over-arching rationale — is to make the law needlessly mechanical, a matter we are warned against in *Whiten* itself.

4. Setting the Quantum

The Supreme Court offered some specific thoughts on how quantum should be assessed in cases involving punitive damages, and identified proportionality as the key value informing that process. In a lengthy discussion, Justice Binnie provided a list of factors to be used in determining whether the award displays the requisite proportionality. They are contained in the following section, which relies liberally on the exact words used by the court.[41]

(1) Proportionality: Setting the Quantum

1. The proper award must be proportionate to the blameworthiness of the defendant's conduct. In assessing blameworthiness, it must be determined, *inter alia*:

    - whether the defendant's conduct was planned and deliberate
    - the defendant's intent and motive
    - whether the defendant persisted in the outrageous conduct over an extended period
    - whether the defendant conceded or attempted to cover up its misconduct
    - whether the defendant was aware that what he or she was doing was wrong
    - whether the defendant profited from its misconduct
    - the interest violated by the misconduct was known to be deeply personal to the plaintiff (*e.g.* professional reputation as in *Hill*).

2. The proper award must be proportionate to the level of the plaintiff's vulnerability, including financial or other vulnerability.

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the nature of the wrong that has been committed or the manner of its commission and are intended to punish the defendant for outrageous conduct, deter the defendant and others from such conduct in the future, and "to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case" (at para 58).

41. *Ibid.*, at paras. 111 to 123.

3. The proper award must be proportionate to the harm or potential harm directed specifically at the plaintiff.
4. The proper award must be proportionate to the need for deterrence.
5. The proper award must be proportionate, even after taking into account the other penalties — both civil and criminal — which have been or are likely to be inflicted on the defendant for the same misconduct.
6. The proper award must be proportionate to the advantage wrongfully gained by the defendant from the misconduct.

Albeit with some hesitation, Justice Binnie refused to characterize the $1 million quantum as irrational, though he did identify it as at the outer reaches of a rational claim.[42] In defence of his deference, Justice Binnie remarked, *inter alia*, that "one of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities".[43] It was at this moment that he arguably broke the 1978 compact created by the court in the trilogy of *Andrews v. Grand & Toy Alberta Ltd.*,[44] *Thornton v. School District No. 57*[45] and *Arnold v. Teno*.[46] This was the very point made by Justice LeBel in dissent when he advocated the importance of placing controls on punitive awards.[47]

This trilogy is well known for establishing the upper limits of non-pecuniary damages in cases involving personal injury. The number — $100,000 in 1978 dollars or approximately $280,000 in 2002 — is indisputably low given that it is the maximum permissible even for plaintiffs who have suffered quadriplegia as a result of the defendant's negligence. However, then Chief Justice Dickson articulated the following policy:[48]

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical

42. *Ibid.*, at para. 4.
43. *Ibid.*, at para 136.
44. [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577.
45. [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607.
46. [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 3 C.C.L.T. 272.
47. *Whiten* (S.C.C.), *supra*, footnote 1, at paras. 163-65.
48. *Andrews*, *supra*, footnote 44, at p. 262.

> arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

As well, Dickson J. emphasized the difficulty of assessing non-pecuniary loss when he wrote:[49]

> But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

Given the generic resonance of Justice Dickson's reasoning and the desirability of integrity between areas of law, there is good reason for the court to impose limits or caps in the area of punitive damages as well. The same policy considerations identified by Justice Dickson are in play when assessing punitive damages — namely, that the emphasis of Canadian law is on compensation and this on the generous side where appropriate; that intangibles are difficult to measure; and that general damages can never be adequately addressed monetarily in any event. If all this is so, how can a $1 million dollar award for punitive damages involving an insurer's bad faith be "rational" if $280,000 is the upper limit for pain and suffering associated with quadriplegia?

5. The Practice Repercussions of Whiten

The quantum the Supreme Court affirmed in *Whiten* is record-breaking. As was pointed out to the court in argument, the highest previous award against an insurer in a bad faith action was $50,000,[50] with the average award being in the range of $7,500 to $15,000.[51] From the perspective of good practice and in light of the

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49. *Ibid.*, at p. 261; quoted by LeBel J. in *Whiten* (S.C.C.), *supra*, footnote 1, at para. 164.
50. *Ibid.*, at para. 136. As partial justification for the jump here, the Supreme Court observed that prior to *Hill*, the highest award for punitives in a libel case was $50,000 in *Westbank Band of Indians v. Tomat*, [1989] B.C.J. No. 1638 (QL) (S.C.), cited by the court in *Whiten*, *ibid.*, at para. 136.
51. *Per* Finlayson J.A., *supra*, footnote 11, at p. 661.

increasing stakes, how counsel proceeds is critical since advancing a defence devoid of merit can directly lead to a punitive award in favour of the plaintiff.

There is no doubt that aspects of the strategy followed by counsel for the defendant were problematic, leading the trial judge to comment that his "enthusiasm for his client's case appears to have caused him to exceed the permissible limits which ought to confine a lawyer in the preparation of witnesses".[52] Pilot conceded this on appeal but also, importantly, added that "Pilot, not its counsel, made the decision to deny the claim and Pilot was fully aware . . . of counsel's 'enthusiasm'. Pilot recognizes that it bears the responsibility for what occurred."[53] Without suggesting or implying any additional concerns about how Pilot was defended, what follows are several generalized practice points for the defence bar which can be gleaned from the Supreme Court's commentary. None of this is offered as being novel but rather as a timely reminder.

1. Counsel should avoid identifying too closely with the client or risk losing sight of the plain facts of the case.
2. Counsel must take a cold and assessing look at the overall defence strategy and be assured that it has at least a reasonable chance of success. The risk is that the court will see the insurer's lawyer as part of a war of attrition being waged against the insured, particularly if the insured is financially vulnerable.
3. Counsel should challenge strenuously any employee of the insurer who presses an untenable or unprovable theory of the case, with *Whiten* being required reading for that individual.
4. Given the damage a renegade employee of the insurer can cause in the days well prior to trial, it may be desirable — though not always possible — for counsel to become involved in the matter at a much earlier point to ensure that the file is being conducted fairly.
5. Experts must be given full information concerning the claim and investigations of the claim to date, for good or ill.
6. Any attempts to get an expert to change his or her opinion to conform with counsel's theory of loss is fraught with danger. If there is no factual foundation to sustain counsel's request for a change,

52. Quoted by the Supreme Court in *Whiten*, *supra*, footnote 1, at para. 22.
53. *Ibid.*

he or she is almost certainly engaging in an indefensible practice.[54]

Whiten also contains some practice points for the plaintiffs' bar. It essentially warns that in seeking punitive damages, plaintiff's counsel must expressly plead the material facts necessary to found the award. It is not enough simply to seek punitive and exemplary damages in the prayer for relief. Case law to the contrary is overruled for neglecting "the basic proposition in our justice system that before someone is punished they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it".[55] Nor will pleadings containing "time-honoured adjectives describing conduct has 'harsh, vindictive, reprehensible and malicious' be sufficient given that these words lack specific content".[56] Rather, the facts giving rise to punitive damages should be pleaded "with some particularity"[57] and even rigour.[58]

6. Conclusion

The punitive damages award affirmed in *Whiten* is remarkable, far outstripping any non-pecuniary damages award to date. In the end, it would appear that the majority in *Whiten* was most persuaded by the analysis of the matter offered at the appellate level by Laskin J.A., a passage of whose judgment was quoted by Binnie J.:[59]

> "Pilot acted maliciously and vindictively by maintaining a serious accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental. It abused the obvious power imbalance in its relationship with its insured by refusing to pay a claim that it knew or surely should have known was valid, and even by cutting off rental payments on the Whitens' rented cottage. It took advantage of its dominant financial position to try to force the Whitens to compromise or even abandon their claim. Indeed, throughout nearly two years that the claim was outstanding, Pilot entirely disregarded the Whitens' rights."

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54. For additional commentary on how to avoid punitive damages, see Monique Conrod, "Lesson in Avoiding Punitive Damages", vol. 18, No. 43, *The Lawyers Weekly* (March 26, 1999), at pp. 7-8.
55. *Whiten, supra*, footnote 1, at para. 86.
56. *Ibid.*, at para. 87.
57. *Ibid.*
58. *Ibid.*, at para 94.
59. *Ibid.*, at para. 137.

This is all true. Pilot's conduct was deserving of serious sanction, but should the quantum of punitive damages awarded have exceeded the ceiling set in *Andrews*? Juries may have a lot to teach us, as Justice Binnie rightly observed, but for the court to relinquish its leadership role in maintaining limits on non-pecuniary damages is to break with *Andrews* in a fundamental way. Of course, the plaintiffs' bar will be pleased with such a rupture while defendants' counsel will be left shaking their heads. In the meantime, there is little doubt that *Whiten* will fuel increased litigation in the years to come and, until the dust settles, will distract civil law from its primary purpose, which is to compensate.

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