# PUNITIVE AND AGGRAVATED DAMAGES FROM A DEFENCE PERSPECTIVE

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Post-*Whiten*, Ontario courts have been busier than usual dealing with claims for punitive and aggravated damages and we expect this will continue. Starting with the Ontario Court of Appeal decisions of *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.*[1] and *Plester v. Wawanesa Mutual Insurance Co.*[2] and moving on to more recent decisions in which claims for aggravated or punitive damages were made, a review of the caselaw reveals that the courts remain fairly conservative in their approach to such claims, and that the upper end of punitive damages established in *Whiten v. Pilot Insurance Co.*[3] remains in place. We will review the critical element of these decisions along with what counsel should be aware of when defending claims for aggravated and punitive damages.

## Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.

In April of 2006, the Ontario Court of Appeal released *Pereira*. At trial, the plaintiffs were successful in suing the defendant insurer for failing to indemnify them for their losses in connection with a fire that destroyed their industrial building. The insurer alleged arson and denied coverage. In addition to nearly $500,000 in compensatory damages, the jury awarded a total of $2,500,000 in punitive damages. The insurer appealed and a new trial was ordered as a result of improper instructions to the jury on a number of issues concerning liability.

Regarding the award of punitive damages, the court held that there were indeed facts on which a properly instructed jury could have concluded that an award of punitive damages was warranted: there was evidence that the insurer prejudged the merits of the claim and conducted a somewhat biased investigation. It was also true that some of the defences the insurer pursued appeared to have been baseless. Thus, the court held, the question of punitive damages was likely to be a live issue at the new trial.

The court went on to find that the quantum of punitive damages was "grossly excessive" and irrational. The court pointed out that the total award of $2,500,000 in punitive damages exceeded the award of $1,000,000 in *Whiten* by a factor of 2.5, and in that case, Justice Binnie held that $1,000,000 was at the "upper end" of the permissible range. Moreover, the court held, the insurer's conduct was not nearly as egregious as it was in *Whiten*. To avoid a similar mistake at the new trial of this action, the court suggested that counsel and the trial judge offer the new jury a range within which an appropriate award of punitive damages should fall, if they believed

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[1] [2006] O.J. No. 1508 (C.A.) (QL) [*Pereira*].

[2] [2006] O.J. No. 2139 (C.A.) (QL) [*Plester*].

[3] [2002] 1 S.C.R. 595 at para. 4 [*Whiten*].

one was warranted at all. Although the court felt it inappropriate to offer its own opinion as to where such a range should be, it held that the facts of this case did not come close to justifying the upper limit of $1,000,000 established in *Whiten*.

**Plester v. Wawanesa Mutual Insurance Co.**

A short time after *Pereira*, the Ontario Court of Appeal released *Plester*. This was another fire loss case in which the defendant insurer denied coverage to its insureds on the basis of arson. At trial, the jury awarded total damages of $1,132,573.80, which included aggravated damages of $175,000 and punitive damages of $450,000. The court of appeal dismissed the insurer's appeal on the finding of liability, noting that there was an abundance of evidence to support the jury's conclusion on liability. The appeal against the punitive damages award was also dismissed. While the award of punitive damages was "fairly high" and more than what the court of appeal would have awarded, it was not so exorbitant or grossly out of proportion to the insurer's misconduct as to shock the court's conscience and sense of justice.

On the issue of aggravated damages, the court held that the jury's award of $175,000 was grossly excessive and reduced it to $50,000. The case for aggravated damages, the court held, was very thin as the only evidence which could have supported such an award was the insured's presumable shame and humiliation as a result of the allegation of arson made by the insurer.

**Fidler v. Sun Life Assurance Co. of Canada**

A number of cases on punitive and aggravated damages have been released since *Pereira* and *Plester*. Perhaps the most notable on the subject of aggravated damages is *Fidler v. Sun Life Assurance Co. of Canada*[4]. Fidler was a bank employee covered under a group benefits plan through Sun Life. She became ill with an infection in 1990. After the infection healed, she was diagnosed with chronic fatigue syndrome and fibromyalgia. She received long-term disability benefits for two years under her group plan as her condition prevented her from performing the essential duties of her own job. After two years, the payments continued as her condition prevented her from engaging in any occupation for which she was or may have become reasonably qualified by education, training or experience. Sun Life continued paying Fidler's benefits for five years.

In the summer of 1996, Sun Life conducted video surveillance of Fidler, which, it determined, showed Fidler engaging in various activities that conflicted with answers Fidler gave earlier that year on a "Lifestyle Questionnaire". Sun Life then sent Fidler a letter indicating that as a result of a "non medical investigation" revealing that her activities were incompatible with her alleged disability, her benefits would be terminated. Sun Life had no medical evidence indicating that Fidler was capable of working. Fidler promptly wrote to Sun Life and asked for a copy of the

[4] [2006] S.C.J. No. 30 [*Fidler*].

video surveillance. Sun Life replied that it was unprepared to disclose its investigative report. An independent medical examination was conducted and the doctor reported that Fidler was "increasingly able to consider returning to work on a graduated basis", but that "[p]rior to this being successful, she should embark upon a graduated training program to improve her level of physical fitness". Two months later, Sun Life's internal medical consultant concluded that there was "no medical and non-medical evidence to support" that Fidler could not "perform at a light physical, clerical or sedentary job on a regular basis". Sun Life then confirmed its termination of benefits in a letter to Fidler.

On the eve of trial, Sun Life agreed to reinstate Fidler's benefits; thus, the trial proceeded only on the plaintiff's entitlement to aggravated and punitive damages. She was awarded $20,000 in aggravated damages but was denied punitive damages. The British Columbia Court of Appeal upheld the award of aggravated damages and awarded Fidler an additional $100,000 in punitive damages.

The Supreme Court of Canada affirmed the award of aggravated damages and provided valuable comments on the nature of aggravated damages. As this was a breach of contract case, the court recognized that an award of damages should put the plaintiff in the same position as if the contract had been performed, as far as money can do so. However, concomitant with this principle is the rule of remoteness from *Hadley v. Baxendale* that damages must be "such as may fairly and reasonably be considered either arising naturally…from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties". Damages for mental distress are generally not allowed in breach of contract cases as a result of the remoteness rule. The exception to this, however, occurs in cases involving contracts promising peace of mind. Unlike in other contracts, it is within the reasonable contemplation of the parties that a breach of a contract, which has as its object the peace of mind of a contracting party, will cause that party mental distress. In such cases, therefore, it is in keeping with the general compensatory rule of damages and with the principle of remoteness to award the wronged party damages for their mental distress. The award of damages must give the wronged party the peace of mind that they would have had if the contract had been performed.

Accordingly, damages for mental distress in a breach of contract case are not true aggravated damages. They simply form part of the usual compensatory award when i) it was an object of the contract to secure a psychological benefit, ii) it was within the reasonable contemplation of the parties that a breach of the contract would cause mental distress, and iii) the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.

True aggravated damages, on the other hand, usually arise in tort and rest on a separate cause of action, like defamation, oppression or fraud. They aim to compensate the plaintiff by taking full account of the intangible injuries, such as distress and humiliation, which may have been caused by the defendant's insulting behaviour. However, the court noted that in a breach of contract case involving a contract for peace of mind, no independent actionable wrong is required to

compensate a plaintiff for mental distress. Rather, the usual rule of recovery for breach of contract as established in *Hadley* is all that is required.

The court held that the mental distress suffered by Fidler was of a degree sufficient to warrant compensation. The evidence, which included extensive medical evidence documenting Fidler's stress and anxiety, amply supported that Fidler genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage. Thus, merely paying the arrears and interest did not adequately compensate Fidler. The award of $20,000 was to compensate her for the psychological consequences of Sun Life's breach.

In its decision to reverse the appeal court's punitive damages award, the court held that the issue was whether Sun Life breached not only its contractual obligation to pay Fidler benefits, but also its contractual obligation to deal with the respondent's claim in good faith. As in *Whiten*, an independent actionable wrong—like a breach of the duty of good faith that an insurer owes to its insured—is required to award punitive damages in a breach of contract case. The court relied on O'Connor J.A.'s description of the duty of good faith in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters*:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly…both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. <u>The duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith</u>.

Whether or not the duty of good faith was met requires a careful consideration of the evidence. The trial judge's assessment of the credibility of Sun Life's representative was significant in determining whether Sun Life acted with an improper purpose in denying Fidler's claim. Although Sun Life's medical consultant was wrong, the ambiguity of the independent medical examiner's report coupled with Fidler's behaviour depicted in the surveillance tapes casted doubt on the suggestion that Sun Life acted with an improper purpose in denying Fidler's claim. The court also specifically rejected the appellate court's view that Sun Life's concession that Fidler was entitled to benefits was the civil equivalent of a guilty plea. An insurer, the court held, will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded or judicially determined to be legitimate.

While Sun Life's conduct was "troubling", the court held, it was not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. As such, there was no basis to interfere with the trial judge's decision to deny punitive damages.

While in *Fidler*, the lack of a breach of the duty of good faith precluded an award of punitive damages against the defendant insurer, it is important to note that the presence of a breach of the duty of good faith does not imply that punitive damages are warranted. The breach must be sufficiently malicious or high-handed to reach the exceptional level required for such an award.

The distinction made by the Supreme Court of Canada in *Fidler* between, on the one hand, mere compensatory damages for mental distress in a breach of a contract for peace of mind situation, and on the other, true aggravated damages, is important. While in both scenarios, the award seeks to compensate the plaintiff for mental distress, the *Fidler*-type case is nothing more than a normal application of the law of damages in breach of contract cases, as established long ago in *Hadley*. No independent actionable wrong is required when the breached contract promised peace of mind to the plaintiff.

It is noteworthy that insurance contracts and vacation packages are not the only contexts in which a person bargains for peace of mind. In a recent libel case[5], the parties entered into minutes of settlement in which the parties agreed to keep in confidence all the terms of the settlement other than the publication of a public apology to the plaintiff by the defendant in a local Greek newspaper. The defendant not only published the apology, but also published a portion of the order dismissing the action on consent. However, the preamble to the order, which indicated that the parties had settled the action, was omitted. This, the plaintiff submitted, would have left readers of the newspaper with the impression that the plaintiff's libel suit had been unsuccessful, which caused the plaintiff embarrassment in his community. The plaintiff sued the defendant for breach of contract and claimed damages for mental distress. The court, relying on *Fidler*, found that a "promise in relation to state of mind" was part of the bargain within the reasonable contemplation of both parties with they signed the minutes of settlement, as the parties had bargained to bring peace to highly charged, emotional and personal litigation. Thus, damages for mental distress in the event of a breach of the contract (i.e., a publication of the terms of settlement) were in the reasonable contemplation of the parties at the time the minutes were made.

It is the nature of aggravated damages that they cannot be awarded to a corporation, since a corporation (even a closely held one) does not have feelings and cannot suffer intangible injuries such as embarrassment, hurt feelings or humiliation.[6] However, in keeping with the principles

[5] *Gianopoulos v. Kranias*, [2007] O.J. No. 1094 (S.C.J.) [*Gianopoulos*].

[6] *Thomas Management Ltd. v. Alberta (Minister of Environmental Protection*), [2006] A.J. No. 1332 at para. 16 (C.A.).

established in *Fidler*, if a corporation suffers a loss of reputation due to a breach of contract and the *Hadley* test is satisfied, then the corporation can be awarded damages to redeem its business reputation. Similarly, as aggravated damages are to compensate a plaintiff in respect of grief, sorrow and mental anguish, they are not available to *Family Law Act* claimants as the wording of s. 61 does not allow for recovery in respect of grief, sorrow and mental anguish. The same is true for punitive damages, as "damages for loss of care, guidance and companionship focus on the relationship between the victim and his or her relatives, not on the conduct of the tortfeasor".[7]

As discussed above, insurers are allowed to be wrong and they are allowed to do their due diligence. In another recent long-term disability benefits case, the court refused to award aggravated and punitive damages because, it held, the insurer took "a principled approach to what can only be characterized as a difficult case". While the court did not agree with the insurer's interpretation of a key document upon which the insurer relied in denying the plaintiff long-term disability benefits, the insurer's position was not unreasonable. Its position throughout the litigation was tenable and the issues were real. There was "nothing frivolous in defending this defendable matter".[8] The court also held that there was nothing wrong with the defendant insurer pursuing "technical defences":

> "It seems to me not unusual that a Defendant would raise all possible defences of substance in a Statement of Defence but would determine, in its litigation strategy, to limit its focus at trial to the very core issues of the dispute."

**Keays v. Honda Canada Inc.**

Another recent and important punitive damages decision is *Keays v. Honda Canada Inc.*[9] At trial, Keays was awarded $500,000 in punitive damages against his employer, Honda, for wrongful dismissal. The trial judge awarded compensatory damages in lieu of 24 months' notice, and also awarded the plaintiff $610,000 in substantial indemnity costs, which was inclusive of a 25% premium on account of the significant financial risk taken by the plaintiff and his counsel in proceeding to trial.

Keays had been employed at Honda for fourteen years. He began experiencing health problems a short time after beginning work, and was absent from time to time as a result. He went on disability leave in 1996 and was diagnosed with chronic fatigue syndrome in 1997. In 1998, Keays returned to work against his doctor's advice as Honda's long-term disability carrier had determined that he was able to work and had cut off his benefits. Keays continued to be

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[7] *Latimer v. Canadian National Railway Co.*, [2007] O.J. No. 762 at paras. 8-10 (S.C.J.).

[8] *Rowe v. Unum Life Insurance Co. of America*, [2006] O.J. No. 1897 at para. 421 (S.C.J.).

[9] *Keays v. Honda Canada Inc.*, [2006] O.J. No. 3891 (C.A.), leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 470 [*Keays*].

intermittently absent from work, so Honda began "coaching" him by way of written reports and requiring him to provide a doctor's note for each absence from work. Honda did not do this with employees who had "mainstream" illnesses. Honda eventually demanded that the plaintiff meet with its company doctor, who threatened to move the plaintiff to the physically demanding production line. Honda then asked Keays to meet with an occupational medicine specialist, but refused to reveal the purpose, methodology and parameters of the assessment. Keays refused to undergo the assessment and was terminated for insubordination.

The trial judge based his award of punitive damages on his finding that Honda's course of conduct "belittled" Keays's disability and contained a "litany" of acts of discrimination and harassment. These acts of discrimination and harassment were contrary to the Ontario *Human Rights Code*, the court held, and were independent actionable wrongs upon which an award of punitive damages could be justified.

On appeal, the court held that the trial judge's punitive damages award of $500,000 failed to accord with the fundamental principle of proportionality. There was no evidence to support the finding of a protracted corporate conspiracy.

The court of appeal agreed that Honda's conduct was sufficiently outrageous to warrant an award of punitive damages, but held that the quantum needed to be reconsidered. This was not a case like *Whiten*, the court held, where the defendant engaged in continuous misconduct including attempts by its counsel to influence the opinions of experts. Rather, Honda took the advice from its experts—the advice just happened to be wrong and based on insufficient information. This led to a decision to question Keays's disability and, ultimately, to fire him. However, the court noted, Honda had accommodated Keays for almost a year before this occurred. In *Whiten*, there was a two year period of escalating misconduct, whereas the misconduct in this case occurred over a much shorter timeframe. Further, the principle that "it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities" was not adopted by Justice Binnie in *Whiten* as the trial judge suggested it was. As there was no pattern of abuse in this case, it was not rational to conclude that a lesser award of punitive damages could not have achieved the goal of deterrence.

Moreover, the totality of all other penalties imposed on the defendant, including compensatory damages, must be considered in determining an appropriate quantum of punitive damages. There was nothing in this case, the court held, to suggest that Honda viewed the possibility of wrongful dismissal damages as nothing more than a licence fee. In all the circumstances, $100,000 in punitive damages was sufficient to effect the goal of deterrence. Honda was recently granted leave to appeal this case to the Supreme Court of Canada.

**McIntyre v. Grigg**

Perhaps the most interesting recent case dealing with both punitive and aggravated damages is *McIntyre v. Grigg*[10], an unintentional tort case involving drunk driving. The plaintiff, McIntyre, was severely injured when the defendant, Grigg, hit her with his car as she was walking home from a pub. Grigg, who was a player for the Hamilton Tiger-Cats, had been drinking at the same pub as the plaintiff just prior to the accident. After the accident, Grigg was arrested and administered a breathalyzer, which revealed a blood alcohol level well in excess of the legal limit. Unfortunately, the police neglected to advise Grigg of his right to counsel before the breathalyzer. As a result, the Crown had no choice but to drop the charges of drunk driving and driving in a manner dangerous to the public causing bodily harm. Instead, Grigg plead guilty to careless driving and received a $500 fine with no licence suspension.

McIntyre sued Grigg for negligence, claiming both aggravated and punitive damages. She also sued the pub for over-serving Grigg. In addition to an award of $250,000 in general damages (of which 70% was payable by Grigg and of which 30% was payable by the pub), the jury awarded $100,000 in aggravated damages and $100,000 in punitive damages, the entirety of which awards were payable by Grigg.

McIntyre suffered both physical and psychological injuries as a result of the accident. The primary physical injury was a serious fracture of her right femur. Before the accident, McIntyre was a very athletic person and participated in a variety of sports. The effect of her injuries was therefore devastating and caused her to experience depression and attempt suicide on two occasions.

The trial judge found that the award of aggravated damages could be anchored on the notion that the plaintiff's psychological harm was increased because Grigg was impaired at the time of the accident. The Ontario Court of Appeal disagreed. Aggravated damages are awarded because of the nature of the defendant's conduct. They are designed to compensate the plaintiff specifically for the additional harm that the defendant's reprehensible or outrageous conduct caused the plaintiff. They are awarded when the reprehensible or outrageous nature of the defendant's conduct causes a loss of dignity, humiliation, additional psychological injury, or harm to the plaintiff's feelings. The court of appeal found that the expert medical evidence was insufficient to establish that McIntyre's psychological harm was increased because Grigg was impaired at the time of the accident.

In addition, while a court may separately identify aggravated damages from general damages, they are not separate in principle, but are to be assessed as part of the general damages. Accordingly, they are subject to the upper limit for personal injury set by the trilogy. Given that the upper limit at the time of the trial was $299,000, the jury award of $250,000 for general non-

[10] (2006), 83 O.R. (3d) 161 [*McIntyre*].

pecuniary damages was generous and should not have been increased even if there was an evidentiary basis for aggravated damages.

On the question of punitive damages, this was a novel case. The parties were unable to produce any Canadian case law in which the issue of punitive damages in the context of an impaired driving case was considered. The court noted that punitive damages in a negligence action are rare, and should only be awarded if the misconduct in question was deliberate and "extreme in nature and such that by any reasonable standard it is deserving of full condemnation and punishment". However, the court of appeal disagreed with the submission that misconduct must be specifically directed at the plaintiff to attract punitive damages. If this were true, then punitive damages could well be barred in product liability cases despite how reckless or indifferent defendants in such cases might have been. The scope of punitive damages should not be so narrowed. Rather, it is sufficient if there was an intention to do the act or combination of acts that eventually caused the injury.

The court of appeal rejected the submission that this was "no more than a motor vehicle accident resulting from excessive alcohol consumption" and that Grigg's conduct was not high-handed, malicious, oppressive, harsh or vindictive. Punitive damages are available when conduct is reprehensible and offends the ordinary standards of decent conduct in the community. The evidence before the jury was sufficient to meet these requirements. It was sufficient for the jury to find that Grigg's conduct was deliberate and intentional and that he showed a conscious and reckless disregard for the lives and safety of others. Moreover, it was sufficient to meet the requirement that his behaviour was reprehensible and offended the ordinary standards of decent conduct in the community. The court stated that the social evil of drinking and driving has a far greater impact on Canadian society than any other crime. The need for general deterrence in impaired driving offences and the significant losses caused by impaired driving has been repeatedly emphasized by the courts. Grigg's decision to drink excessively and drive, combined with the evidence that he was speeding and driving erratically, were key contributors to the cause of the accident and were all factors that demonstrated that on that night, Grigg showed a conscious and reckless disregard for the lives and safety of others.

Another factor in considering whether punitive damages were appropriate was whether punishment had already been imposed in a separate proceeding for the same conduct. As established in *Whiten*, the fact that other punishment has been administered is relevant, but not necessarily a bar to an award of punitive damages. Punitive damages may still be rational when the prescribed fine is disproportionately small in comparison to the level of outrage the jury wishes to express. However, the court noted that such an analysis must be approached with considerable caution. A court in a civil proceeding should generally demonstrate deference to the decision of a criminal court in which a penalty was already administered. The general principle is that where a wrongdoer has already been punished for an offence, punitive damages directed at the same conduct in a civil trial will not serve a rational purpose. An exception may,

however, be available when the original punishment did not serve the objectives of retribution, deterrence and denunciation.

The court held that while Grigg was convicted of careless driving in relation to the accident, the evidence in the civil trial established that his conduct would normally have warranted a more serious punishment. This was one of those rare instances where the disproportionality test applied: given Grigg's fine of $500, punitive damages would not amount to double punishment and, indeed, would be more appropriate punishment.

After determining that the jury's choice to award punitive damages was rational, the court of appeal considered whether the quantum was proportionate. This required an analysis of various factors articulated by Justice Binnie in *Whiten*. The quantum of punitive damages must be proportionate, i) to the blameworthiness of the defendant's conduct, ii) to the degree of vulnerability of the plaintiff, iii) to the harm or potential harm directed specifically at the plaintiff, iv) to the need for deterrence, and v) after taking into account any penalties assessed in respect of the conduct in other forums which have been inflicted on the defendant for the same conduct. The court held that the lower level of blameworthiness given the isolated nature of Grigg's misconduct, the lack of a previous relationship of trust between Grigg and McIntyre and the fact that the misconduct was not specifically directed at McIntyre all indicated that an amount of punitive damages much less than what the jury awarded would be rational. The court therefore reduced the quantum from $100,000 to $20,000.

**Some Final Thoughts**

It appears that the appellate courts continue to treat claims for aggravated and punitive damages with caution. For punitive damages claims, the principles of rationality and proportionality elucidated in *Whiten* continue to be the guiding ones as does the "upper limit" of $1,000,000 established in that case. Moreover, the conduct of the insurer in *Whiten* continues to epitomize the type of behaviour that punitive damage awards ought to target.

Despite Justice Binnie's warning in *Whiten* that anthropomorphisms should not be attributed to corporations, it appears that the financial status of corporate defendants is a relevant factor in determining the lowest possible award necessary to effect the goals of deterrence, condemnation and denunciation. The concept of punitive damages requires that the award must "sting".

It is likely that punitive damages in unintentional tort cases will remain the exception rather than the rule. Punitive damages will only be awarded when there is intentional behaviour; recklessness is not enough. While the defendant in *McIntyre* had no intention of injuring the plaintiff, his decision to get behind the wheel, combined with the common knowledge that drinking and driving often causes harm, was, in itself, a sufficiently callous and high-handed act to justify punitive damages. Moreover, had the defendant "got what he deserved" in the criminal forum, one would imagine that the question of punitive damages could have been answered quite differently. If a person has already received substantial punishment in other proceedings, such as

criminal or quasi-criminal proceedings, an award of punitive damages in the civil context will generally not pass the rationality test. *McIntyre* may well lead to an increase in the frequency of punitive damages awards, but perhaps only in the limited context of negligence cases involving alcohol.

In the context of insurance cases, some of the cases discussed above should provide some encouragement to insurers. Insurers are allowed to make mistakes. Even a breach of the duty of good faith will sometimes not warrant an award of punitive damages. While in many cases, a plaintiff has little to lose and much to gain from claiming punitive damages in their prayer for relief, the facts of most cases will fall short of justifying the type of scornful language employed in cases like *Keays* and *Whiten*.

Aggravated damages, like punitive damages, are also not awarded as a matter of course. However, it would appear that *Fidler* will make it easier for plaintiffs to receive damages for mental distress in breach of contract cases. Where it can be established that it was an object of the contract to secure a psychological benefit and that it was within the reasonable contemplation of the parties that a breach of the contract would cause mental distress to the plaintiff, damages for mental distress will be available when the mental distress suffered is sufficiently severe. True aggravated damages, on the other hand, rest on a separate cause of action, like defamation, oppression or fraud. *McIntyre* affirms the compensatory nature of aggravated damages: while they may be set out as a separate head of damages, they form part of the overall compensatory award and, thus, are subject to the Trilogy limit. In addition, there must be a causal link between the oppressive act and the psychological harm suffered. The oppressiveness of the defendant's act must be the reason for the plaintiff's psychological harm. In *McIntyre*, the oppressiveness of the defendant's act was his drunkenness, which was not, in itself, the cause of the plaintiff's mental distress.

In conclusion, we expect to see more and more punitive and aggravated damages claims in the future. The defence of these claims requires vigorous witness and documentation investigations at the early stage of the claim in order to properly assess and reduce risk.