

ONTARIO MUTUAL INSURANCE ASSOCIATION

OCTOBER 2003

**PUNITIVE DAMAGE CLAIMS
PROPER CLAIMS MANAGEMENT AND DEFENCE STRATEGIES^{1 2}**

**HARRY F. STEINMETZ
LERNERS LLP**

¹ With special thanks to Kirk Stevens & Julian Jubenville for their valuable contributions

² This paper contains excerpts from Punitive Damages in Bad Faith Litigation authored by my colleagues Kirk Stevens and Brian Grant

When will Punitive Damages be Awarded Against a Mutual Insurance Company?

Punitive damages will only be recoverable in cases against insurers where the following three requirements are met. First, the conduct in question must disregard the rights of the insured to such an extent that it deserves public censure. Second, the insured plaintiff seeking punitive damages must establish that the defendant insurer committed an independent actionable wrong apart from a policy breach. Third, the award must serve a rational purpose such as punishing the wrongdoer and deterring others.³

Where punitive damages are awarded, the value of the damages should be assessed to be reasonably proportionate to the harm caused by the conduct, including the degree of the misconduct, the relative vulnerability of the Plaintiff and any advantage or profit gained by the Defendant. The court will also have regard to any other fines or penalties suffered by the Defendant for the misconduct in question. Punitive damages are generally awarded 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.⁴

Two of the leading cases that consider the three requirements and the question of when an award of punitive damages is appropriate against an insurer are Whiten v. Pilot Insurance Company [2002] 1 S.C.R. 595⁵, and Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.)⁶.

³Hill v Church of Scientology, [1995] 2 S.C.R. 1130 @ para, 1208.; Whiten, supra at para 78

⁴Whiten v. Pilot Insurance Company [2002] 1 S.C.R. 595, at para. 94

⁵Whiten v. Pilot Insurance Company [2002] 1 S.C.R. 595

⁶Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.)

In Whiten v. Pilot Insurance Company⁷ the appellant and her husband discovered a fire in the addition to their house just after midnight in January, 1994. They and their daughter

fled the house wearing only their night clothes. It was minus 18 degrees Celsius. The husband gave his slippers to his daughter to go for help and suffered serious frostbite to his feet. 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. The respondent insurer made a single \$5,000 payment for living expenses and covered the rent for a couple of months or so, then cut off the rent without telling the family, and thereafter pursued a confrontational policy. The appellant's family was in very poor financial shape. Ultimately this confrontation led to a protracted trial based on the respondent's allegation that the family had torched its own home, even though the local fire chief, the respondent's own expert investigator, and its initial expert all said there was no evidence whatsoever of arson. The respondent's position was discredited at trial and its appellate counsel conceded that there was no air of reality to the allegation of arson. The jury awarded compensatory damages and \$1 million in punitive damages. A majority of the Court of Appeal allowed the appeal in part and reduced the punitive damages award to \$100,000.

Although the Supreme Court of Canada allowed the Plaintiff's appeal and restored the \$1 million punitive damage award, Whiten has established that it will no longer be possible for a judge to instruct a jury that punitive damages may be awarded if the Plaintiff establishes that the Defendant's conduct is harsh, outrageous, high handed, malicious, arbitrary, or reprehensible" departing to a marked degree from the ordinary standards of human behaviour.

Under the test laid down in Whiten, conduct that meets that test is not enough. There must in addition be an independent actionable wrong and a rational purpose to be served by the award of punitive damages. The rational purpose must be grounded in the objective of punishment, retribution, deterrence, or denunciation. This is in

⁷Whiten v. Pilot Insurance Company [2002] 1 S.C.R. 595

furtherance of a judicial policy that punitive damages should be awarded only in exceptional cases and with restraint.

That being said, Whiten has recognized that the insured having suffered a loss will frequently be in a vulnerable position and largely dependent on the insurer to provide relief against the financial pressure occasioned by the loss underlying the claim. As such, the obligation to act in good faith will require the insurer to act promptly and fairly at every step of the claims process.⁸

In Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.), the Plaintiff carried on a family dairy business which was insured under a fire insurance policy issued by the Defendant, Grenville Patron Mutual Fire Insurance Co.

A fire broke out in the Plaintiff's barn and burned for 10 days totally destroying the barn and its contents, damaging silos, killing a bull and a cow, and forcing the relocation of the Plaintiff's remaining herd of cattle. Certain aspects of the Plaintiff's claim turned out to be contentious and an action was commenced. By the time of the trial, the Defendant insurer had paid over \$1.17 million under the policy. The Plaintiff sought an additional \$700,000 at trial. The jury awarded a further \$488,389 in compensatory damages, and \$750,000 in punitive damages. The Defendant appealed.

The majority of the Court of Appeal affirming Whiten held that in a contract case, the Plaintiff must show more than simply a breach of the Defendant's obligations under the contract in order to succeed in a claim for punitive damages.

The court held that in addition to establishing a breach of the insurance contract, there must be an independent actionable wrong that can form the basis of an independent cause of action at law.⁹

⁸Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.) @ page 503 & 504

⁹Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.) @ para 71

In an insurance contract, the law has long recognized that in addition to the express terms of the contract agreed to by the parties, a mutual obligation between insurer and insured to act in utmost good faith exists.

The Supreme Court in Whiten clarified that a breach of this additional duty can found a claim for punitive damages by either insurer or insured since a breach of the contractual duty of good faith is independent of and in addition to a breach of contractual duty to pay the loss, ie an independent actionable wrong.

In Ferme Gerald Laplante et al., the Plaintiff alleged Grenville breached its duty to act fairly and in good faith in its investigation, assessment and negotiation of the claim. It made 3 specific allegations about Grenville's conduct in support of its submission that Grenville acted in disregard of its duty of fairness and good faith:

1. It alleged Grenville failed to pay promptly amounts that it itself recognized were payable under the policy and that it did so with the intention of forcing Laplante to settle for less than the amount to which it was entitled;
 2. It submitted that Grenville breached its undertakings to the Laplante family and applied stricter conditions than those contained in the policy in order to avoid payment under the policy;
 3. It submitted that Grenville refused to follow the advice of its own experts on the amount owed under the policy.
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After reviewing the evidence, Appeal Justice Charron, writing for the majority concluded that a reasonable jury, properly instructed could have concluded in its assessment of the conduct of the insurer throughout the claims process that Grenville had breached its duty to act fairly and in good faith in failing to pay promptly those amounts it reasonably believed were owing under the policy.¹⁰

The court concluded that as such, Grenville could be made liable to pay any consequential damage resulting from such a breach, however, it did not accept that Grenville's conduct fell within the category of cases that call for punishment in addition to compensation for breach of the duty to act fairly and in good faith for the following reasons:

1. Grenville never denied coverage under the policy and commenced its investigation of the claim and assessment of the loss immediately;
2. The claim was handled from the start by experienced and senior insurance representatives;
3. Grenville paid promptly for those items of loss with respect to which there was no issue, ie within 2 months of the fire a total of \$612,923 had been paid.

The record did not disclose that the Defendant abused its power or position to force the Plaintiff into an unreasonable settlement. Rather, the majorities view was that this was a hard fought commercial dispute between two sophisticated parties.¹¹

The court concluded that no reasonable jury, properly instructed, could find that this conduct in question was so outrageous or extreme as to warrant punishment.

¹⁰Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.) @ paras 82, 86, 87, 100

¹¹Ferme Gerald Laplante and Filslette. v. Grenville Patron Mutual Insurance Co. 61 O.R. (3d) 481 (O.C.A.) para 101

The lessons learned from Whiten and Ferme Laplante tell us that the test for the award of punitive damages and measuring the quantum of damages has been made far more restrictive than has ever been understood before. In this sense, the cases are of benefit to ethical insurers since the rules governing eligibility for a punitive damage award are now detailed and strict.

The majority reasons in Ferme Laplante are an example of this since the court stated that although there was evidence the jury could find that the insurer breached its obligations of good faith by failing to pay what was owed under the policy, and by disapproving of the insurer's negotiation tactics on contentious issues, it did not support a claim for punitive damages, let alone an award of \$750,000.

Proper Claims Management

The insurer, to be successful in rebutting claims must appreciate that its claims files, and in appropriate cases, its underwriting of files will come under scrutiny.

There are many factors a court will consider to determine whether an insured's claim under a policy was properly investigated and managed prior to the issuance of a denial.

Examples are as follows:

1. Was the claim investigated promptly and with an open mind;
2. Did the claims examiner or independent adjuster assigned to the file have the appropriate level of training and experience.
3. Was the denial precipitous or was it based on a reasonable investigation?
4. Was the denial supported by expert evidence or if there exists contrary evidence, by the weight of independent expert evidence?
5. Was the expert evidence relied on truly independent and was contrary expert evidence unreasonably rejected?

6. Was the insured given an opportunity to respond to facts, opinions, or arguments raised against him before the denial was made?
7. Was there a review at an appropriate senior level before the denial was made?
8. Was a legal opinion obtained where the issue is one of an interpretation of law?
9. Was the file properly documented contemporaneously to avoid the suggestion that the reason for the denial was concocted after the fact?
10. Is there any support for the proposition that the insured's vulnerability was the reason for the denial?
11. Are there embarrassing notes in the file at any level that cannot be explained away?
12. Is there any suggestion of tunnel vision by those in charge of managing the file?
13. Will the decision maker or makers be available to testify in court as to when, how, and why the decision to deny and defend was made?
14. If there is a claims adjusting manual, was it followed and will the manual be seen to be appropriate?

These are questions that must be asked and answered favourably in every case where a decision is made to deny a claim.

Each insurer should have a protocol to follow when a claim is denied; a supervisory process in place to ensure that it is followed; and an educational program in place so that claims people at all levels understand the risk, the need to document, and the danger of putting gratuitous comments, based on rumour or innuendo, in the file without at least clearly noting them as such, and as something to be followed up and investigated, but not to rely upon.

Defence Strategies

The Pleadings

The Rules of Civil Procedure in Ontario require that every pleading shall contain a concise statement of the material facts on which the party relies in support of their claim or defence.

The Supreme Court of Canada in Whiten stated that one of the purposes of a Statement of Claim is to alert the Defendant to the case it has to meet, and if at the end of the day the Defendant is surprised by an award against it, there is a multiple of what it thought was the amount in issue, there is an obvious unfairness. As such, the material facts referred to in the Statement of Claim to justify an award of punitive damages should be pleaded with some particularity.¹²

Defence counsel should carefully review all of the allegations in the Statement of Claim to ensure that any claim advanced for punitive damages is sufficiently pleaded with particulars to ensure that the Defendant is not taken by surprise by the Plaintiff's evidence during the discovery phase of the litigation, or at trial.

If sufficient particulars of punitive damages claimed are not provided in the Statement of Claim, a demand for particulars should immediately be made. If the Plaintiff fails to supply particulars within 7 days, the court may order particulars to be delivered within a specified time.¹³

¹²Whiten v. Pilot Insurance Company [2002] 1 S.C.R. 595 at para 876

¹³Rule 25.10 of the *Ontario Rules of Civil Procedure*

When it is plain and obvious and beyond all doubt that the Plaintiff will not succeed in establishing bad faith against its insurer at trial, a motion to strike the punitive damages claim should also be considered.

For example, in Morin v. Maritime Life Assurance Co., [2003] N.B.J. No. 103 (N.B.Q.B.), Rideout J. held that a simple claim for punitive damages in the Statement of Claim is insufficient. Something more must be contained in the pleadings to give enough particularity to permit a Defendant to know the case it must meet. The Plaintiff must, also indicate in her pleadings a particular conduct of the Defendant that is deserving of punishment. ... Boilerplate or bald assertions are insufficient pleadings unless sufficient particularity is also found in the pleadings, which support the boilerplate. If no such support is provided, then this type of pleading should be discouraged.¹⁴

The Jury Notice

Specific consideration should be given to determine whether a jury is appropriate in each case. Once a case reaches a certain level of complexity, a trial by jury may be inappropriate. The Ontario Rules of Civil Procedure permit motions to strike juries where a jury trial is unwarranted due to the complexity of the evidence. Defence counsel should, where arguable, move to take the issue away from the jury on the basis that the three pronged test of reprehensible conduct, independent actionable wrong, and rational purpose laid out in Whiten are not met.

Improper and prejudicial remarks by counsel are at times, made throughout the course of a trial. On occasion, comments from Plaintiff's counsel may be deliberately inflammatory. One tactic to be considered, in addition to seeking a mistrial, should be to move to strike the Jury Notice.

¹⁴Morin v. Maritime Life Assurance Co., [2003] N.B.J. No. 103 (N.B.Q.B.) paras 17 and

If the Jury Notice is not struck, then at the conclusion of the evidence at trial there should be argument on the record as to what the judge's charge to the jury should contain. Consideration should be given to asking the jury to specify the conduct it relies on for a punitive damage award, and to identify the independent actionable wrong that it finds the insurer committed.

Defence counsel at trial should not be reluctant to object to the charge to the jury. This is particularly important since the Court of Appeal will often refuse to give effect to grounds of appeal based on the charge to the jury if there is no objection made by the defence at trial.

As a result of Whiten, trial judges should be encouraged to instruct juries and themselves in punitive damage cases to consider some or all of the following points:

1. Punitive damages are very much the exception rather than the rule;
2. Punitive damages are to be awarded only if there is high-handed, malicious, arbitrary and reprehensible behaviour that departs to a marked degree from ordinary standards of decent behaviour;
3. Punitive damages should be reasonably proportionate to such factors as the harm caused, the degree of misconduct, the relative vulnerability of the Plaintiff and any profit or advantage gained by the Defendant;
4. The jury should have regard to any other fines or penalties imposed on the Defendant for misconduct in question;
5. Punitive damages should only be awarded where the conduct would otherwise go unpunished or punished insufficiently to achieve the goals of retribution, deterrence and denunciation;
6. The purpose of punitive damages is not to compensate the Plaintiff, but are for retribution, deterrence, and denunciation (condemnation);

7. Punitive damages are awarded if and only if compensatory damages, which to some extent are punitive, are insufficient to accomplish the threefold purpose;
8. Punitive damages should be in an amount that is no greater than necessary to rationally accomplish their purpose;
9. The Plaintiff will keep punitive damages as a windfall; and
10. Moderate awards of punitive damages, which generally carry a stigma in the broader community, are generally sufficient.¹⁵

Bifurcation of the Trial

If bad faith is being alleged, it can also adversely affect a substantive defence. By advancing a bad faith claim, Plaintiff's counsel can throw doubt on substantive evidence by accusing decision makers and insurance companies of placing undue weight on it because of improper motives.

For example, instead of focussing on the evidence relating to an arson defence, the jury may be deflected by allegations that the insurer is "throwing everything at the wall" or that the claims handler had "tunnel vision".

Consideration should be given to asking the court to bifurcate the claim for punitive damages from the coverage issue and remaining damage claims being advanced by the Plaintiff.

¹⁵Whiten v. Pilot Insurance Company [2002] 1 S.C.R. 595, para. 94.

If the price of bifurcation is to agree to waive privilege when the bad faith claim is tried in the second stage of the trial, the price may be worth paying in cases where the insurer is certain it has acted in good faith.

Many American jurisdictions have adopted the practice of bifurcating actions against insurers where the Plaintiff alleges a breach of the covenant of good faith. The court first tries the Plaintiff's action for coverage. If that aspect of the action fails, the entire action is dismissed. On the other hand, if the Plaintiff's action for coverage succeeds, the bad faith claim then proceeds to determine whether the denial of coverage was in breach of the covenant of good faith in the insurance policy and, if so, the determination of damages for that breach, including punitive damages. It is important to realize that not only may the trial be bifurcated but discovery as well.

To date in Canada, only the British Columbia Supreme Court and the Alberta Court of Queen's Bench have adopted the expedient of bifurcation in the context of an insurance bad faith claim.¹⁶ In the British Columbia case Wonderful Ventures Ltd. v. Maylam, an insurer refused payment on a fire loss claim on the basis that the insured had conducted a commercial venture in a ski chalet that was represented as a personal dwelling. In its Statement of Claim, the insured alleged that the denial of coverage was made in bad faith because it was contrary to legal advice. The insurer adduced an Affidavit of a senior claims examiner attesting to the fact that the insurer had received legal advice to deny coverage. For Garson J., the presence of this issue was decisive and distinguished the case from a previous British Columbia decision¹⁷ that dismissed a motion to bifurcate the issues of coverage and bad faith. Garson J. stated:

¹⁶ Wonderful Ventures Ltd. v. Maylam [2001] B.J.C. No. 1144 (B.C.S.C.), Lawrence v. Insurance Corp. of British Columbia [2001] B.C.J. No. 2516 (B.C.S.C.), and Sovereign General Insurance Co. v. Tanar Industries Ltd., [2002] A.J. No. 107 (Q.B.)

¹⁷ Randall v. I.C.B.C. (1999) 13 C.C.L.I. (3d) 318 (B.C.S.C.)

“Frederickson v. I.C.B.C. (1990) 44 B.C.L.R. (2d) 303 (S.C.) is illustrative of the type of evidence an insurer must adduce at a trial of a bad faith action. Frederickson had sued the ICBC for a bad faith failure to settle within the policy limits. At the trial, the insurer’s solicitor gave evidence, as did the insurer’s representative, regarding the legal advice given, and ICBC’s reliance on it. Similarly, in this case in order to defend the bad faith claims CNS would likely need to call as witnesses its counsel and its adjusters. To defend the bad faith claim, these witnesses would need to testify as to their reasons for denying the claim...”¹⁸

In these circumstances, Garson J. applied the following passage from an American decision¹⁹ ordering bifurcation:

“...where the liability under the contract is still an issue, certain documents in the Defendant’s claim file at this stage in proceedings would irreparably harm the insurer’s ability to defend itself on the contract. Such irreparable prejudice can be avoided.

Furthermore, there can be no cause of action for an insurer’s bad faith refusal to pay a claim until the insured first establishes that the insurer breached its duty under the contract of insurance.”²⁰

¹⁸Wonderful Ventures, supra note 28 at para 27

¹⁹Bartlett v. John Hancock Mutual Life Insurance Company, 538 A. 2d 997 (R.I., 1998)

²⁰Wonderful Ventures, supra note 28 at para 30

While Wonderful Ventures was subsequently followed by the British Columbia and Alberta courts in Lawrence v. Insurance Corp of British Columbia²¹ and Sovereign General Insurance Co. v. Tanar Industries Ltd.²², the courts elsewhere in the country have, thus far, rejected the severance approach. In Ontario, Killeen J. in Sempecos v. State Farm²³ refused to follow Wonderful Ventures, relying on the traditional judicial reluctance to allow split trials, suggesting that the American position “tends to elevate to principle of privileged communications to the level of an untouchable lodestar ... and tilts the playing field unfairly”²⁴. He called the idea of split trials a “dangerous idea” whose time has not come.²⁵ The Divisional Court²⁶ refused to disturb Killeen J.’s decision, despite the British Columbia jurisprudence which was cited to it finding, rather, that Killeen J. had exercised his discretion appropriately. In its reasons for decision, the Divisional Court concluded that it was being asked to “require severance in every case where there is a legitimate claim for punitive damages” and that it was not appropriate for it to “make such a per se rule”²⁷.

State Farm appealed the Order of the Divisional Court to the Ontario Court of Appeal. Although the appeal was dismissed, comments made by the Court of Appeal appear to not shut the door on conducting bifurcated trials for punitive damage claims in the Province of Ontario in the future. The court held:

“We accept that the law in this area has changed since the appellant’s material was prepared. However, on the record before this court, we agree with the Divisional Court that there is no evidence that the appellant will actually suffer the prejudice alleged from disclosing privileged communications. We would therefore dismiss the appeal but without prejudice to the appellant’s right, if so

²¹Wonderful Ventures Supra note 28

²²Wonderful Ventures Supra note 28

²³ Sempecos v. State Farm [2001] O.J. No. 4887 (S.C.J.)

²⁴ Sempecos v. State Farm, para 36

²⁵ Sempecos v. State Farm

²⁶[2002] O.J. No. 4498 (Div.Ct.)

²⁷ Ibid, at para 30

advised, to bring a further motion on the appropriate evidence. The respondents of course will be able to respond as advised."²⁸

²⁸ Sempecos v. State Farm [2001] O.J. No. 4887 (S.C.J.)

Our interpretation of the Court of Appeal's ruling suggests that the Court of Appeal may have considered bifurcation as appropriate if State Farm had decided or been obliged to waive privilege in respect of its solicitor client communications in order to defend the bad faith claims.

Select Your Defence Counsel Carefully and Consider a Second Opinion

Lawyers can sometimes be too aggressive in an attempt to act in what they perceive to be the best interest of their client. Sometimes insurers, not unlike the rest of us, need a dose of cold hard reality. Even where you have no doubt about your case, consider getting a second opinion about the punitive damages claim before going to trial.

This may be unusual, but the times when no one is second guessing or playing devil's advocate on a file can on occasion be the most dangerous of times. Getting a second objective opinion on a file in a significant bad faith claim well before trial may save the insurer a lot of money in both punitive damages and appeal costs.

The Profit Motive

The law also does not differentiate between mutuals and other insurers. However, when a mutual insurance company is sued for bad faith, defence counsel should consider adducing evidence to show how the mutual's decision making is not directed to profit, but rather, the welfare of all of its shareholders, ie in Grenville, the general manager of the Defendant insurer gave evidence at trial about the decision making process during the adjusting of the Plaintiff's claim by leading evidence concerning its decision to allow the insured to switch its line of business from a dairy operation to broiler chickens. While the jury may not have found this evidence persuasive, the Court of Appeal saw this as an indication that Grenville was not out to force its insured into an improvident settlement.

In short, mutuals sued for bad faith need to adduce relevant evidence to show that they are not motivated by profit. Juries need to be given sufficient information about the decision making process and mutuals to show that the object is not profit, but rather, the interest of its owners, the policy holders.

Production of Internal Claims/Underwriting Files and Claims of Solicitor Client Privilege

The issue of the extent of production and discovery in bad faith cases is very much an open one, and such discovery is commonly requested in bad faith cases.²⁹ Recently, the Ontario Divisional Court had the opportunity to consider the application of privilege in bad faith cases. In Davies v. American Home Assurance Co.³⁰, the court considered an appeal by the Defendant insurer from orders of Kiteley J.³¹ That the Defendant insurer produce to the Plaintiff all legal opinions prepared for the Defendant in relation to the Plaintiff's claim up until the Defendant's filing of its Statement of Defence as well as its complete claims file including all documents relating to the investigation. Kiteley J. imposed a continuing obligation on the Defendant to produce such documents up to the commencement of the trial. In allowing the Defendant's appeal, the court found that Kiteley J. had erred in concluding that the mere assertion of a bad faith claim against an insurer is sufficient to destroy the solicitor-client privilege attaching to legal opinions provided by counsel to the insurer³². The court held further that Kiteley J.'s blanket order requiring production of all the contents of the Defendant's claims file was not justified. Rather, the court set aside the orders of Kiteley J. and ordered that the Defendant produce a further and better Affidavit which sets out, for each document for which privilege is claimed, which privilege is being claimed and the grounds for claiming the privilege. The court held that once such an Affidavit of Documents is produced, privilege can be better ascertained³³.

More recently in SCN-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance (2003) 63 O.R. (3d) 226, a case about determining whether solicitor client privilege is waived when a copy of the solicitor's report to the client are copied to an outside adjuster to assist the adjuster in adjusting the claim for the same client, it was ruled that the insurer did not put its

²⁹ See Sam v. Prudential of America (2000), 50 O.R. (3d) 65 (Sup.Ct.); Correa v. CIBC General Insurance Co. [2001] O.J. No. 3599 (Sup.Ct.); Contos v. Kingsway General Insurance Co. [2001] O.J. No. 1327 (Sup.Ct.).

³⁰ Davies v. American Home Assurance Co. (2002) 60 O.R. (3d) 512 (Div.Ct.)

³¹ See [2001] O.J. No. 677 (S.C.J.) and [2001] O.J. NO. 960 (S.C.J.)

³² Court of Appeal decision at paras 17 and 27

³³ *Ibid*, paras 40 and 46

state of mind in issue by detrimental reliance on reports but that it might be different if the insurer claimed that it acted on the solicitor's opinion to act in good faith.

In many cases, the production of relevant documentation by the insurer will depend on the extent to which there is an air of reality to the punitive damages claim being advanced, ie if there some legitimacy to the inquiry, underwriting files, legal opinions, and claims files may have to be produced. Conversely, if the Plaintiff is simply on a fishing expedition without any evidence to support such a claim, documentary production may be somewhat more restrictive.

Conclusion

Punitive damage awards, often in significant amounts, will become a fixture of jurisprudence in Canada in the wake of Whiten v. Pilot Insurance Co.. Insurers and their defence counsel have a crucial role to play in developing Canadian jurisprudence to ensure that when punitive damages are awarded it should be for good and principled reasons that benefit the insurance industry, the interests of justice and society as a whole.