

Spring Has Sprung - Maybe?!


*Rough winds do shake the darling buds
of May.*

William Shakespeare

After that brutally cold April, let's hope the old bard has got it right! In this Spring edition of the *Legal Observer* we focus on the topics of law making and punitive damages.

In the summer 2000 edition of the newsletter, we reviewed the topic of damages generally, including the various heads of damage. In *The so-called evolution of punitive damages* we discuss in a more precise way the area of punitive damages and specifically the "changes" that are occurring in this country with respect to punitive damages. In addition, have compiled a list of tips for avoiding this dreaded award.

The law affects us all on a daily basis, yet many are unaware of just how law is created. In "There ought to be a law!!" we provide you with a brief overview of the source of Canadian law as well as how it is created.

And finally, we continue our series of profiles by casting the spotlight on Aaron Moscoe. 

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The so-called "evolution" of punitive damages

Nothing strikes fear into the heart of a defendant like the concept of punitive damages. Exemplary or punitive damages are intended to punish the defendant and will be awarded where the defendant has behaved with arrogance, high handedness, and with a callous disregard for the plaintiff and his or her rights.

You will no doubt be familiar with the American punitive damage awards which often make headlines. Juries in the U.S. have on more than one occasion, awarded outrageous amounts for punitive damages.

For example, an Alabama jury awarded \$4,000,000 in punitive damages against a BMW dealership for failure to disclose a minor paint job to fix a cosmetic blemish on a new vehicle. And a New Mexico jury awarded 81 year old Stella Liebeck \$160,000 in compensatory damages and \$2,700,000 in punitive damages for burns resulting from a spilled cup of McDonald's coffee, notwithstanding that she tried to open the cup while balancing it on her lap. Although these awards were greatly reduced on appeal, American juries continue to be quite liberal with punitive damages.

Punitive damages have been around for years. Almost 240 years ago, a judge in England made the following comments with respect to this monetary award:

A jury have it in their power to give damages for more than the injury received. Damages are designed not only

as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

In Canada, punitive damages are considered as a way to punish a defendant's reprehensible conduct, as opposed to providing compensation to the plaintiff. As a result, it has traditionally been difficult to successfully make out a claim for punitive damages. And even in those cases where the plaintiff has been successful, the awards are fairly modest, particularly when compared to similar awards in the U.S.

However, last year's Supreme Court of Canada decision in *Whiten v. Pilot Insurance Co.* has perhaps opened the door just a bit farther.

Whiten, the insured, lost her home and contents in an accidental fire. She made a claim under her fire insurance household policy, which was held with Pilot Insurance. The insurer provided a single \$5,000 payment for living expenses. It also covered the rental of a small cottage for several months, before stopping those payments.

Despite much evidence to the contrary, including from the local fire chief, Pilot's own expert investigator as well as Pilot's initial expert, Pilot alleged that Whiten had burned her own home. In addition,



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it dealt with her in a confrontational and hostile manner throughout.

Whiten was ultimately forced to sue Pilot. The jury awarded Whiten \$345,000 for her insured losses, but she had spent more than \$320,000 in legal costs. The jury also found that Pilot had denied the claim in bad faith and awarded punitive damages of \$1,000,000. Pilot appealed to the Ontario Court of Appeal. The court allowed the appeal in part, reducing the punitive award to \$100,000. Whiten appealed this reduction to the Supreme Court of Canada, who reinstated the original million dollar award.

Justice Binnie, writing for the majority in the Supreme Court of Canada, indicated that the punitive damage award, although high, was rational in the specific circumstances of the evidence in this case. Pilot's denial of the claim had been designed to force the financially vulnerable Whiten to make an unfair settlement for an amount below that which she was entitled to. A review of the evidence clearly indicated that Pilot's denial of the claim had been planned and deliberate.


In the decision, Justice Binnie set out the two requirements for a claim for punitive damages to be considered in a contract case. The first is that there must be an actionable wrong in addition to the breach of the policy for punitive damages to be awarded. Secondly punitive damages had to be properly pleaded in the statement of claim by providing concrete details in support.

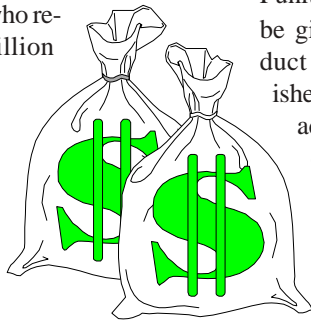
In addition, the Supreme Court listed a number of considerations that should be taken into account for dealing with claims for punitive damages.

- Punitive damages are very much the exception rather than the rule in law-

suits and juries should be advised of this.

- Punitive damages should only be imposed where there has been high handed, malicious, arbitrary or highly reprehensible misconduct.
- Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of misconduct, the relative vulnerability of the plaintiff, any advantage or profit gained by the defendant and having regard to any other fines or penalties suffered by the defendant.
- Punitive damages should generally be given only where the misconduct would otherwise be unpunished, or if other penalties were inadequate to achieve retribution, deterrence, and denunciation.
 - Punitive damages should not serve to compensate the plaintiff but should only be awarded when compensatory damages are insufficient to achieve retribution, deterrence and denunciation.
- The amount of the punitive damages should be no greater than rationally necessary to accomplish the purpose of denunciation and the jury should be advised that moderate awards are generally sufficient. In other words, punitive damages should not be a "windfall" for the plaintiff.

Since this decision was released just over a year ago, it has been considered by the lower courts more than 75 times. This is an extraordinary number and is an indication of the impact of this decision. However, while *Whiten* provides perhaps the best example of why punitive damages should be available, at the end of the day, *Whiten* has not significantly changed the law of punitive damages in Canada, only heightened its visibility. 




What's Fair, What's Not: How to avoid punitive damages

As previously noted, nothing strikes fear into the heart of a defendant like the potential liability for punitive damages. So how then can a defendant avoid punitive damages? And how can a plaintiff appreciate whether punitive damages should be claimed?

When punitive damages have been awarded by the court, the decision has included the following words which describe the defendant's conduct: "reprehensible", "oppressive", "harsh", "malicious", "offends the court's sense of decency", "capricious", or "highhanded".

What constitutes this type of behaviour will vary from case to case. For example:

- It is not unfair for an insurer (defendant) to consult the fire department in a case of a fire or the police in the case of a property loss, nor to refuse to accept their opinions without independent investigation.
- It is unfair to persist in an opinion that the insured's claim has no merit without a credible basis for that opinion. (i.e.; *Whiten v. Pilot*)
- It is unfair to concoct evidence, to raise obstacles and to act without concern for the plaintiff's rights and well being.
- It is fair to compensate a plaintiff.
- It is unfair to provide a windfall to a plaintiff through punitive damages.

The bottom line is that the facts must be reviewed very carefully and the parties as well as their respective counsel, must be consistent and honourable in their dealings. 

“There ought to be a law!!!”

law (lô), *n.* **1.** *the principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decision.* **The Random House Dictionary of the English Language, Second Edition**

Whether it is driving down the road, buying groceries or firing an employee, there is very little we do on a day-to-day basis that is not affected by the law. This set of rules, referred to as the law, regulates the affairs of individuals, businesses and governments. It establishes, for each of these groups, standards of acceptable conduct.

In Canada, there are two main sources for the rules which govern our actions and behaviours - statutory law and common law. Statutory law is a system based on the legislation enacted by the federal and provincial governments, whereas the common law is a system of law based primarily on judicial decisions.

Two other important sources of law, which we will not discuss in this article, are the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1867*. These two documents can be thought of as “super statutes”. Like all statutes they were passed by Parliament, however, unlike other statutes they cannot be changed at all without the use of a complicated amending formula.

Statutory Law

One of the main responsibilities of government is to make laws. In Canada, by virtue of the *Constitution Act, 1867*, both the federal Parliament and provincial Legislatures have been given the power to enact legislation within the areas reserved to each.

There are essentially five steps involved in making a law.

The **First Reading** is the formal introduction of a bill to Parliament or the Legislature. At this stage, a bill is generally passed with no debate. Although a number of bills will be introduced during a Parliamentary session, depending on the public’s reaction, many will either be replaced or withdrawn at this stage.

During the **Second Reading** a bill will be reintroduced and will be the subject of a full debate. At this stage, the bill will be approved in principle. In appropriate cases it may be referred to a committee for a detailed study or have formal public consultation.

Amendments arising out of committee will be debated during the **Third Reading**. It is at this stage that a bill will receive its final vote, and if a majority vote for its adoption as presented, it will be passed.

The final stage is for the bill to receive **Royal Assent** and to be **Proclaimed**. Royal Assent is the formality of the signing of the bill into law by the Governor General or Lieutenant Governor, as the case may be. The statute will come into force on the day it is proclaimed to take effect. Often this is the day it is given Royal Assent, however a law may contain a provision that delays the coming into force until some future date. Delaying the coming into force provides those most affected by the new law, time to study it and to adjust to new requirements. It also allows the government time to make last minute amendments.

Ontario’s new law dealing with limitation periods provides a good example of this five-step process at work. On April 25, 2001, the Government of Ontario introduced Bill 10, the *Limitations Act 2001*. Bill 10 replaced Bill 163, which had been introduced in December 2000 but which did not complete

the legislative process, i.e. it died at first reading. Bill 10 was subsequently replaced by Bill 213, the *Justice Statute Law Amendment Act, 2002*, which among other things creates a new limitations act. The *Justice Statute Law Amendment Act, 2002* received Royal Assent in December 2002 however, the Limitations Act, 2002 will not be proclaimed in force until January 2004.

The Common Law

While statutes are the major source of law in Canada, the common law is also an important source. Common law is essentially a group of legal rules and exceptions that have been developed by the courts over hundreds of years. As judicial decisions are rendered a body of case law is created for different areas which then act as a guide in future cases. As new fact situations arise, existing principles will be broadened or contracted and exceptions will be developed by the judges and courts of appeal who are referred to these precedents and who then render their decisions.

In order to better illustrate how common law develops we will consider a topic already touched upon in this newsletter - punitive damages.

Punitive damages in a civil action are not mandated by a particular piece of legislation. Rather it is a concept that was recognized in English courts at least 240 years ago. Despite the legitimacy of punitive damages, a review of the case law indicates that Canadian courts have generally been stingy about making such awards. However, more recently they have begun to provide new rules and guidelines for awarding such damages, thus contributing to the expansion of the common law in this area.

A 1995 defamation case involving the Church of Scientology had a significant

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Aaron Moscoe

This issue we profile the “newest” member of Williams McEnery, Aaron Moscoe.

While Aaron may be the newest member of the firm, since he only arrived in January 2001, he is certainly not our newest lawyer, having more experience than all but our two founding partners, Eric Williams and Paul McEnery. Aaron graduated from Queen’s University law school in 1981 and has been practising law since 1983. He began to build his experience in Toronto in an established personal injury litigation firm before moving to Ottawa in 1985.

Prior to joining us, Aaron had practiced with other firms in Ottawa doing both plaintiff and defence work. He now focuses almost exclusively on personal injury litigation – which leads to some lively discussions with some of our insurance defence litigators. Aaron’s ability to settle cases and obtain a good result for his clients is a tribute to his negotiation and lawyering skills. Thankfully we now have him with us and not against us!


In his spare time Aaron spends time with his wife, Margie, and their two children, Adam, 11 and Elana, 9. Together they are all involved in a variety of sports, music, travel and simply enjoying each others company. 

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impact on the common law relating to punitive damages in that it allowed for an award of \$500,000. Up to this point the most significant punitive damage awards had been in the neighbourhood of \$50,000. Last year another important case involving punitive damages was decided by the Supreme Court of Canada – *Whiten v. Pilot Insurance*. In that case a punitive damage award of \$1,000,000 was upheld. In addition, to raising the monetary bar, the court created a set of guidelines for juries to determine whether punitive damages are warranted in a particular case as well as how high they should be.

Although Supreme Court of Canada decisions are always significant, when cases such as *Whiten* receive the media and judicial attention that they do, the essence of the decision suddenly becomes a standard claim in similar actions. For instance, since *Whiten* was released

by the Supreme Court on February 22, 2002, it has been judicially considered in 78 cases. This can be added to the 78 times it was considered following the initial jury decision, and the subsequent Court of Appeal decision. This is an example of how lawyers will take a judicial decision and attempt to apply the principles to their fact situation. It is also an example of courts having to either follow, consider, acknowledge or distinguish a prior court’s ruling.

As you can see, making laws is not easy. The German Chancellor Otto von Bismarck once said, “*Laws are like sausages. It’s better not to see them being made.*” There are many who would criticize laws, our elected representatives who make statutes, and of course the lawyers and judges who argue the law. But without laws where would we be.....well you certainly wouldn’t have the need for *Williams McEnery’s Legal Observer*. 



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