

Pine Tree Justice: Punitive Damage Reform in Canada

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I. INTRODUCTION

Since the decision of the Supreme Court of Canada in *Whiten v Pilot Insurance Co*, the dire predictions of some academic and industry commentators have largely failed to come true.¹ Fears abounded that *Whiten*'s \$1,000,000 award of punitive damages² would open the floodgates, with Canadian courts becoming swamped in the perceived morass of American tort law.³ In Manitoba, punitive damage awards since *Whiten* have become neither larger nor more frequent.⁴ The anxiety of the commentators, although not fully realised, reflects the precarious position of the law governing punitive damages in Canada. Many of their fears were reflected in the decision of Binnie J (and LeBel J in dissent) in *Whiten*

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¹ *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 [*Whiten* SCC].

² Following the practice of the Supreme Court of Canada, I have used the term "punitive damages" in this paper instead of "exemplary damages." The terms are synonymous.

³ See e.g. Rudy V Buller, "*Whiten v Pilot*: Controlling Jury Awards of Punitive Damages" (2003) 36 UBC L Rev 357; Roger G Oatley, "Punitive damages in Canada: *Whiten v Pilot Insurance*, "The Insurer from Hell"" (Winter 2002) 21 Advocates' Soc J No 3 14; Canadian Underwriter, "Court upholds \$1 million punitive award against Pilot" (1 March 2002), online: Canadian Underwriter <<http://www.canadianunderwriter.ca/news/court-upholds-1-million-punitive-award-against-pilot/1000113589/>>; Eleni Maroudas & Sivan Tumarkin, "Significant Damage Awards Including Punitive and Economic Loss Awards Across Canada and the Meaning of "Serious Impairment" in Threshold Cases", online: Samfiru Tumarkin LLP <http://www.stlawyers.ca/damages_paper.pdf>.

⁴ See Appendix I for recent punitive damage awards in Manitoba.

itself. Perennial concerns about punitive damage awards are unresolved. Chance, not systemic safeguards, has prevented a flood of cases that would undermine the legitimacy of the system of punitive damages.

This paper will argue that punitive damages serve a valuable function in Canadian law and ought to be preserved as an exceptional remedy in appropriate cases. The jurisprudential basis for awarding punitive damages is solid, but measures need to be taken to preserve that philosophical basis. A number of problems, some old and some new, are unresolved by the decision in *Whiten*. Moreover, public confidence in this scheme is at risk of eroding. The omnipresent influence of American politics and popular culture informs public perception in Canada. Problematically, the law governing punitive damages has few safeguards to prevent the type of case that will provoke public outrage. American states have tried various proactive and reactionary approaches to the punitive damages “problem”. Provincial legislatures should act, informed by the varied American experience, to address the weaknesses in the system.

II. HISTORY OF PUNITIVE DAMAGES

The history of punitive damages, in one form or another, is thousands of years old.⁵ The ancient precursors to modern punitive damages had a similar function but operated much differently. For example, the *Code of Hammurabi* and Roman law formally required, without discretion, that damages be multiplied by prescribed factors in certain types of cases as a form of approbation of particularly undesirable conduct.⁶ In the common law world, punitive damages as we know them have existed in England since *Wilkes v Wood* and *Huckle v Money* in 1763.⁷ The first reported American case arose in 1784.⁸ In Canada, punitive damages were first considered by the Supreme Court in 1886 in *Collette v Lasnier*, where

⁵ See Michael Rustad & Thomas Koenig, “The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers” (1993) 42:4 Am U L Rev 1269 at 1285-86; see also *Whiten* SCC, *supra* note 1 at para 41, Binnie J.

⁶ Rustad and Koenig, *supra* note 5 at 1284-86.

⁷ *Wilkes v Wood*, (1763), Lofft 1, 98 ER 489 CP (Eng); *Huckle v Money*, (1763), 2 Wils KB 206, 95 ER 768.

⁸ *Genay v Morris*, (1784) 1 SCL (1 Bay) 6 (SC Sup Ct).

“exemplary damages” were pleaded but not awarded.⁹ Only in *Wilkes v Wood* did Pratt LCJCP recognise a jury’s discretionary power to award damages “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.”¹⁰ Since *Wilkes v Wood*, punitive damage awards have been a consistent feature of common law legal systems. As described below, these awards present unique practical and jurisprudential problems. They have persisted in an environment of constant attack and questioning for 350 years. Many times, judges, academics and law-makers have had to defend the existence of punitive damages.¹¹ The modern foundation for punitive damages lies in the House of Lords decision in *Rookes v Barnard*.¹² Ironically, this decision (and the significant House of Lords case of *Cassell & Co Ltd v Broome*¹³) is itself antagonistic to the idea of punitive damages.

In Canada, the law of punitive damages has been allowed to grow without legislative intervention. For example, in 1991, the Ontario Law Reform Commission’s *Report on Exemplary Damages* advocated for a number of changes in the law, but stopped short of recommending legislative action.¹⁴ No province in Canada has legislated in the area of punitive damages. By contrast, the majority of American states have passed laws constraining the use of punitive damages in various ways.¹⁵

III. WHAT ARE PUNITIVE DAMAGES?

Punitive damages in Canada, the United States and England and Wales are distinct from compensatory damages, which include aggravated

⁹ *Collette v Lasnier* (1886), 13 SCR 563 (available on WL Can).

¹⁰ *Wilkes v Wood*, *supra* note 7.

¹¹ See Rustad & Koenig *supra* note 5 at 1298 for a discussion of “The Nineteenth-Century War on Punitive Damages”; see also Anthony J Sebok, “What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today” (2003) 78 Chi Kent L Rev 163 at 182 for a discussion of the nineteenth-century debate between Simon Greenleaf and Theodore Sedgwick.

¹² *Rookes v Barnard*, [1964] 1 AC 1129, [1964] 1 All ER 367 [Rookes].

¹³ *Cassell & Co Ltd v Broome*, [1972] 1 AC 1027, [1972] 1 All ER 801 [Broome].

¹⁴ Ontario Law Reform Commission, *Report on Exemplary Damages* (Toronto: Queen’s Printer for Ontario, 1991) [Report on Exemplary Damages].

¹⁵ See Appendix II for details of specific American laws.

damages. The difference between aggravated and punitive damages has been “a source of confusion”¹⁶ in the law, according to Lord Devlin in *Rookes*. In *Broome*, Lord Hailsham LC went further: “My own view is that no English case, and perhaps even in no statute, where the word ‘exemplary’ or ‘punitive’ or ‘aggravated’ occurs before 1964 [the year *Rookes* was decided] can one be absolutely sure that there is no element of confusion between the two elements in damages.”¹⁷ Prior to *Rookes*, English law made no intelligible distinction between punitive and aggravated damages.¹⁸ Despite this attempt at clarifying the terminology, only eight years after *Rookes*, Lord Hailsham LC devoted three pages of *Broome* to an explanation of these terms.¹⁹ Indeed, the Supreme Court of Canada has itself many times felt it necessary to attempt to explain the intractable distinction between aggravated and punitive damages.²⁰

In *The Law of Damages*, Professor Waddams clearly distinguishes punitive damages from compensatory damages:

An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose not of compensating the plaintiff but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated, and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. “Exemplary” was preferred by the House of Lords in *Cassell & Co. Ltd. v. Broome*, but “punitive” has also been used in many Canadian courts including the Supreme Court of Canada in *H.L. Weiss Forwarding Ltd. v. Omnis*. The expression “aggravated damages,” though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation but takes full

¹⁶ *Supra* note 12 at 39.

¹⁷ *Supra* note 13 at 17.

¹⁸ Julius Stone, “Double Count and Double Talk: The End of Exemplary Damages?” (1972) 46 *Australian L J* 311 at 314-18.

¹⁹ *Supra* note 13 at 17-19.

²⁰ See e.g. *Whiten SCC*, *supra* note 1 at paras 156-58, LeBel J; *Vorvis v Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, 58 DLR (4th) 193, McIntyre J [Vorvis]; *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30, [2006] 2 SCR 3 at paras 50-55, McLachlin CJC and Abella J; *McKinley v BC Tel*, 2001 SCC 38, [2001] 2 SCR 161 at para 85, Iacobucci J; *Norberg v Wynrib*, [1992] 2 SCR 226, [1992] 6 WWR 673, LaForest J; *Hill v Church of Scientology*, [1995] 2 SCR 1130, 126 DLR (4th) 129, Cory J [Hill].

account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.²¹ [citations omitted]

However, exactly what constitutes aggravated damages is not clear. Professor Cooper-Stephenson draws a line between aggravated damages and other non-pecuniary damages, separating damages for pain and suffering from aggravated damages:

Aggravated damages are simply a variety (or possibly sub-head) of non-pecuniary damages. They too compensate for intangible loss, but in particular for hurt feelings caused by the nature of the defendant's conduct. Thus Lord Diplock has spoken of them as "additional compensation" for "injured feelings," where the plaintiff's "sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it." The range of injured feelings will of course vary with the circumstances, but it often embraces such emotion as humiliation, indignity, degradation, shame, indignation, and fear of repetition. Operating in effect as a balm or solatium for mental distress, aggravated damages closely resemble other non-pecuniary damages, especially those for pain and suffering. The distinction between them lies mainly in causal sequence. Whereas damages for pain and suffering cover distress caused by the physical injuries themselves, aggravated damages cover distress caused by the character or form of the defendant's misbehaviour.²²

The confusion in terms stems from a fundamental confusion in purpose. It is difficult to draw a meaningful line between compensatory damages for pain and suffering and aggravated damages for mental distress caused by the defendant's exceptionally bad conduct. Moreover, both aggravated damages and punitive damages require proof of exceptionally bad conduct by the defendant, over and above an ordinary finding of liability. According to the Ontario Law Reform Commission, the overlap in both purpose and process is problematic: "... as long as the courts are required to employ the same standard of conduct to trigger both a compensatory award and an exemplary award, confusion will remain with respect to both aggravated and exemplary damages."²³ The confusion between the different types of damages led the Commission to call for aggravated damages to be abolished.²⁴ It advocated for exceptional misconduct to be compensated through punitive damages and for run-of-

²¹ SM Waddams, *The Law of Damages*, 3d ed (Toronto: Canada Law Book, 1997) at 483.

²² K Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed (Toronto: Carswell, 1996) at 527.

²³ *Report on Exemplary Damages*, *supra* note 14 at 29.

²⁴ *Ibid* at 30.

the-mill mental distress to be included in a general calculation of compensatory damages.

A. The State of the Law in Canada

First in *Hill*,²⁵ then in *Vorvis*²⁶ and *Whiten*, the Supreme Court of Canada drew the boundaries of the law surrounding awards of punitive damages in Canada. *Whiten* is the leading case. The facts of the case are summarised concisely by Binnie J:

The appellant, Daphne Whiten, bought her home in Haliburton County, Ontario, in 1985. Just after midnight on January 18, 1994, when she and her husband Keith were getting ready to go to bed, they discovered a fire in the addition to their house. They and their daughter, who had also been upstairs, fled the house wearing only their night clothes. It was minus 18 degrees Celsius. Mr. Whiten gave his slippers to his daughter to go for help and suffered serious frostbite to his feet for which he was hospitalized. He was thereafter confined to a wheelchair for a period of time. The fire totally destroyed the Whitens' home and its contents, including their few valuable antiques and many items of sentimental value and their three cats.

The appellant was able to rent a small winterized cottage nearby for \$650 per month. Pilot made a single \$5000 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 hostile and confrontational policy which the jury must have concluded was calculated to force the appellant (whose family was in very poor financial shape) to settle her claim at substantially less than its fair value. The allegation that the family had torched its own home was contradicted by the local fire chief, the respondent's own expert investigator, and its initial expert, all of whom said there was no evidence whatsoever of arson. The respondent's position, based on wishful thinking, was wholly discredited at trial. Pilot's appellate counsel conceded here and in the Ontario Court of Appeal that there was no air of reality to the allegation of arson.²⁷

On these facts, a jury awarded Daphne Whiten \$287,300 in compensatory damages and \$1,000,000 in punitive damages. The trial judge also awarded prejudgment interest on the compensatory damages and ordered Pilot to pay Daphne Whiten's legal costs, which were substantial: \$320,000.

All of the Ontario Court of Appeal justices concurred that punitive damages were warranted in this case, but the majority ruled that

²⁵ *Supra* note 20.

²⁶ *Supra* note 20.

²⁷ *Supra* note 1 at paras 2-3.

\$1,000,000 was too high and reduced the punitive damages to \$100,000. Laskin JA, dissenting on this point only, would have upheld the jury award. At the Supreme Court, Binnie J (for McLachlin CJ and L'Heureux-Dubé, Gonthier, Major, and Arbour JJ) restored the jury award. LeBel J, dissenting, upheld the judgment of the majority of the Ontario Court of Appeal.

The majority judgment in *Whiten* did not substantially change the law governing punitive damages, but Binnie J used this case as an opportunity to clarify and consolidate rules from previous cases. Guided by an overarching desire to “keep this remedy within reasonable limits,”²⁸ Binnie J laid out ten principles that should govern these cases. Those principles are summarised as follows:

1. The English categorical approach to punitive damages is rejected.
2. The objectives of punitive damages are punishment, deterrence and denunciation.
3. Because the primary vehicle for punishment is the criminal law, punitive damages are exceptional.
4. “[T]ime-honoured pejoratives” are not helpful; a principled approach is desirable.
5. A court should make the lowest award that will rationally achieve one of the objectives of the law.
6. Using punitive damages to force a defendant to disgorge ill-gotten profits is legitimate.
7. Fixed caps or ratios do not sufficiently account for the many variables that will arise.
8. Punitive damages should be awarded if, but only if, other damages are not sufficient to achieve the objectives of the law.
9. Juries should be instructed on the function of punitive damages and given guidance on how to assess an appropriate award.
10. Punitive damages are not at large; appellate courts may intervene if the award “exceeds the outer boundaries of a rational and measured response.”²⁹

Despite this attempt to clarify the law governing punitive damages, Canadian courts have struggled to interpret these subjective guidelines. Since *Whiten*, appellate courts have frequently split on the issue of when

²⁸ *Ibid* at para 45.

²⁹ *Ibid* at paras 66-76.

punitive damages should be awarded and, if so, how large the awards should be.³⁰ *Whiten* has not provided Canadian courts with a reliable method of determining when punitive damages are appropriate and how large awards should be: the numerous split opinions at the appellate level reflect the uncertainty in the law. Much is left to opinion: the nature of the defendant's conduct, the rationality of the award *vis-à-vis* the objectives of punitive damages and the quantum of awards, whether from judges or juries.

Although Binnie J wished to jettison "time-honoured pejoratives" in favour of a principled approach, the reality is that the varied and colourful pejoratives judges have used to describe conduct deserving of punitive damages reflect the inherent subjectivity of the exercise. In *Hill* (approved of by Binnie J in *Whiten*), Cory J allowed punitive damages "in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. ... It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant."³¹ The degree of outrage particular facts generate in a particular trier of fact is not amenable to objective measurement. In the words of Blair JA, dissenting in *McIntyre*, "'Outrage' is not a sound yardstick for measuring legal policy."³² At the trial level in *Whiten* itself, the jury pleaded with the trial judge for some guidelines to determine the size of a punitive damage award. After consulting with both counsel, Justice Matlow candidly acknowledged, "I don't know that I can really be of all that much help to you," and urged them to figure out for themselves "what that magic figure should be."³³ Once the jury conjures up that magic figure, it is "almost invulnerable to interference by an appellate court."³⁴

³⁰ See e.g. *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112, 510 AR 1; *Hockley v Riley*, 2007 ONCA 804, 88 OR (3d) 1; *McIntyre v Grigg* (2006), 83 OR (3d) 161, 274 DLR (4th) 28 (Ont CA) [*McIntyre* cited to OR]; *Keays v Honda Canada Inc.*, (2006) 82 OR (3d) 161, 274 DLR (4th) 107 (Ont CA); *Asselstine v Manufacturers Life Insurance Co.*, 2005 BCCA 292, 254 DLR (4th) 464; *Fidler v Sun Life Assurance Co of Canada*, 2004 BCCA 273, 239 DLR (4th) 547; *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416; 239 DLR (4th) 577 (Ont CA); *Ferme G rald Laplante & Fils Lt e v Grenville Patron Mutual Fire Insurance Co* (2002), 61 OR (3d) 481, 217 DLR (4th) 34 (Ont CA); *Brisson v Brisson*, 2002 BCCA 279, 213 DLR (4th) 428.

³¹ *Hill*, *supra* note 20 at para 196.

³² *McIntyre*, *supra* note 20 at para 144.

³³ *Whiten v Pilot Insurance Company* (1999), 42 OR (3d) 641 at 656; 170 DLR (4th) 280

The difficulty appellate courts have had in applying *Whiten* is a direct result of the subjective discretion it leaves to them: Binnie J allowed “that an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case.”³⁵ As this guidance is not a clear standard of review, it is unsurprising that different judges have interpreted it in different ways. In jury trials, there are no reasons for awards and appellate courts are therefore left the unenviable task of divining whether the particular award is a “rational and measured” response. As Canadian law does not permit a jury to provide a rationalisation for its decisions, nor to be informed of a reasonable range of awards, it is unsurprising that appellate courts differ on whether the “magic” number was pulled from the air by the jury on a rational and measured basis or for some other, unsupportable reason.

Whiten itself perfectly illustrates the subjectivity problem. At the Ontario Court of Appeal, Laskin JA upheld \$1,000,000 in punitive damages despite the award being more than sixty times higher than the previous upper limit in this type of case.³⁶ He justified the award in part because of the high award in *Hill*. *Hill*, of course, first laid out the standard of appellate review affirmed in *Whiten*.³⁷ Finlayson JA (for the majority), also purporting to apply the standard in *Hill*, reduced the \$1,000,000 award to \$100,000, and explained his decision plainly: “I do not propose to justify my intervention on any basis other than that I think the award is simply too high.”³⁸ Again, at the Supreme Court, Binnie J and LeBel J both adhere to the test devised by Cory J in *Hill* but arrive at different conclusions about whether the punitive damages were rational and measured. The subjective element in these cases is evident even in Binnie J’s comments on *Whiten* in 2011 to a reporter from *The Globe and Mail*: “It seemed to me that on a human scale, a massive injustice had been

(CA), quoting Matlow J [*Whiten* CA].

³⁴ *Riches v News Group Newspapers Ltd*, [1986] QB 256 at 280G, [1985] 2 All ER 845 (Stephenson LJ) [*Riches*].

³⁵ *Whiten* SCC, *supra* note 1 at para 76.

³⁶ *Whiten* CA, *supra* note 33 at 656-657.

³⁷ *Hill* at para 197.

³⁸ *Whiten* CA, *supra* note 33 at 661.

corrected and a very powerful message sent to the insurance industry ... Occasionally, you feel that you have really made a difference.”³⁹

One unequivocal result of *Vorvis* and *Whiten* is the availability of punitive damages as a remedy in any type of case. Canada was never restricted by the English categorical approach set out in *Rookes*, but *Vorvis* and *Whiten* have clearly said that punitive damages are available in cases of negligence and, controversially, in contract.

There is much to commend the system of punitive damages in Canada, as described in *Whiten*. Undeniably, the \$1,000,000 award of punitive damages awarded to Daphne Whiten had a strong deterrent, punitive and denunciatory effect on Pilot Insurance specifically and the insurance industry in general. After being wretchedly mistreated by her insurer in a time of great need and vulnerability, the award of punitive damages was surely sweet vindication for her and her family. Furthermore, punitive damages offered recourse in *Whiten* that would not be available elsewhere. What Pilot Insurance did was likely not criminal. Simple compensatory damages would have no deterrent effect on Pilot: they would simply delay a payment that ought to have been made in the first place. The system of punitive damages is a valuable tool for expressing the censure of Canadian society for egregiously bad conduct.

When combined with contingency fee arrangements with lawyers, punitive damages can enhance access to justice. The potential for a substantial windfall—especially post-*Whiten*—entices lawyers to take on cases. This possibility of over-compensation enhances the ability of plaintiffs to find legal representation and to have their cases adjudicated.

IV. PROBLEMS WITH PUNITIVE DAMAGES

A. Windfalls

The foremost problem with punitive damage awards in every jurisdiction is discomfort with the “windfall” problem. First and most importantly, tort law is meant to be compensatory and damages are designed to restore a plaintiff to his or her original position.⁴⁰ By their very

³⁹ Kirk Makin, “An insider’s glimpse at a court in transition; Retiring Justice Ian Binnie reflects on his most memorable cases, and rebukes those who say the court has lost its way,” *The Globe and Mail* (24 September 2011) A8.

⁴⁰ Allen M Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, ON:

nature, punitive damages are not compensatory. They are punishment, added on top of whatever is necessary to compensate. There is a deep discomfort about plaintiffs receiving money they do not deserve, among the public and the courts alike. Punitive damage awards, especially in the United States, can be very large. When an Alabama jury awards a man \$4,000,000 in punitive damages because his BMW is scratched, the public blood boils.⁴¹ The case of Stella Liebeck, awarded \$2,700,000 by a jury for spilling hot coffee in her lap, has become emblematic of public outrage over punitive damage awards that seem very far removed from any compensatory function.⁴² The details of these cases that would mitigate public outrage are not so sensationalist and therefore rarely publicised.⁴³

Public outrage is also fuelled by widespread reporting of frivolous claims that are ultimately dismissed. The notorious case of *Pearson v Chung* attracted much media attention for its comical facts: an administrative judge sued a dry cleaner for more than \$67,000,000 for losing his pants.⁴⁴ This case attracted enormous media attention likely in part because of its comical aspects. However, one tort reform lobby group issued a press release holding up the case as an example of the need for reform, perhaps thereby unintentionally lending some legitimacy to the case and entrenching the public perception that such lawsuits are pervasive.⁴⁵ Public perception is always difficult to assess, but in one American study from 1992, the authors found that 83% of jurors held a negative opinion of plaintiffs in civil suits and felt that there were too many frivolous lawsuits.⁴⁶ Since then, the media have given much press to the cases noted above and others, “tort reform” held a prominent place in the 2000 and

LexisNexis, 2011) at 4-5; *Whiten SCC*, *supra* note 1 at paras 146-147 (LeBel J).

⁴¹ *BMW of North America, Inc v Gore*, 517 US 559 (1996) (available on WL) [BMW v Gore]. The award was greatly reduced on appeal, as discussed later in this article.

⁴² *Liebeck v McDonald's Restaurants, PTS, Inc*, 1995 WL 360309 (N Mex Dist Ct 1994) [McDonald's].

⁴³ See *Hot Coffee*, 2011, DVD: (The Group Entertainment, 2011).

⁴⁴ *Pearson v Chung*, 961 A 2d 1067 (available on WL)(DC App Ct 2008).

⁴⁵ American Tort Reform Association, “ATRA Cheers Defense Verdict in Infamous ‘Pantsuit’” (25 June 2007) online: American Tort Reform Association <<http://www.atra.org/newsroom/releases.php?id=8132>>.

⁴⁶ Valerie P Hans & William S Lofquist, “Jurors Judgment of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate” (1992) 26:1 Law and Soc’y Rev 85.

2004 American presidential election campaigns, and lobby groups such as the US Chamber of Commerce and the American Tort Reform Association have escalated their lobbying in favour of restricting plaintiff's rights. Given those developments in the last twenty years, it seems unlikely that public attitudes have shifted towards favouring plaintiffs. Although not on precisely the same point, a 2005 Angus Reid poll found that 61% of Americans supported "[t]ort reform to limit lawsuits against doctors and manufacturers."⁴⁷

In Canada, we do not see the size or frequency of punitive damage awards that Americans do.⁴⁸ However, it is undeniable that Canadian public opinion on a great number of issues is informed by the American experience and the omnipresent American media and entertainment behemoth. The public scorn for punitive damage awards is understandable, given the media climate, but judges too are uncomfortable with plaintiff windfalls. In *Rookes*, Lord Devlin called them an "anomaly";⁴⁹ Lord Hailsham LC in *Broome* called them "unmerited",⁵⁰ Both Binnie J and LeBel J refer to the *in terrorem* arguments about the American experience with plaintiff windfalls and attempt to distinguish the Canadian situation.⁵¹ Binnie J, among others, has tried to reconcile these windfalls with policy principles by arguing that punitive damages are a reward for performing the valuable public service of exposing execrable conduct: "In the present case, for example, no one other than the appellant could rationally be expected to invest legal costs of \$320,000 in lengthy proceedings to establish that on this particular file the insurer had behaved abominably. Over-compensation of a plaintiff is given in exchange for this socially useful service."⁵² The notion of plaintiffs as "private Attorneys General",⁵³ rewarded by a windfall payment, is discussed further below.

⁴⁷ Angus Reid Public Opinion, "Differing U.S. Views on Liability Limits" (8 May 2005) online: Angus Reid <http://www.angus-reid.com/polls/20151/differing_us_views_on_liability_limits/>.

⁴⁸ Steven R Schoenfeld, Michael A Penny & John A Terry, "Understanding Litigation in Canada" (2001) NYLJ 16 April 2001.

⁴⁹ *Supra* note 12 at 34.

⁵⁰ *Supra* note 13 at 51.

⁵¹ *Whiten* SCC, *supra* note 1 at paras 39 and 148.

⁵² *Ibid* at para 37.

⁵³ *Associated Industries of New York State Inc v Ickes, Secretary of the Interior, et al*, 134 F 2d

B. Confusion between civil and criminal law

By definition, punitive damages incorporate punishment and censure as goals among their other objects.⁵⁴ In *Whiten*, LeBel J is resigned to the entrenchment of punitive damages as a remedy in the system of Canadian law, but nonetheless comments on how *Whiten* particularly and punitive damages generally tend to distort the function of tort law:

The award of punitive damages in discussion here leads us far away from this principle. It tends to turn tort law upside down. It transmogrifies what should have remained an incident of a contracts case into the central issue of the dispute. The main purpose of the action becomes the search for punishment, not compensation. Perhaps, at some time in the future, this will be viewed as part of a broad intellectual and social movement of privatization of criminal justice, consonant with the general evolution of society. For the time being, without using *in terrorem* arguments, such an award has a potential to alter significantly what would appear to have been the proper function of tort law.⁵⁵

This criticism of punitive damages has a long pedigree. Undeniably, punitive damages blur the line between criminal and civil law. As LeBel J identifies, it is a step towards the privatisation of criminal justice. The blurring of these lines was described with colourful indignation by Foster J in *Fay v Parker*:

What is a civil remedy but reparation for a wrong inflicted, to the injury of the party seeking redress,—compensation for damage sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.⁵⁶

Two representative cases will demonstrate the practical implications of the confusion and overlap between punitive damages in a civil trial and a criminal prosecution on the same facts.

694 (2d Cir 1943) at para 5.

⁵⁴ David G Owen, "A Punitive Damages Overview: Functions, Problems and Reform" (1994) 39 Vill L Rev 363 at 373-382. Owen identifies five functions of punitive damages: 1. Education 2. Retribution 3. Deterrence 4. Compensation 5. Law Enforcement.

⁵⁵ *Supra* note 1 at para 148.

⁵⁶ *Fay v Parker*, 53 New Hampshire Reports 342 (1872) at 382.

1. *AJ v WD*⁵⁷

In *WD*, the plaintiff, *AJ*, alleged gruesome sexual and physical abuse by the defendant, *WD*, her stepfather, beginning when she was eleven or twelve years old. She filed her statement of claim in March of 1992—one year prior to the laying of criminal charges—and sought general and punitive damages. *WD* was criminally charged with rape, unlawful intercourse and gross indecency in March of 1993. The charges of rape and unlawful intercourse were dismissed. *WD* was convicted of one count of gross indecency in October of 1995 and sentenced to six months' imprisonment. The civil case was not decided until April of 1999.

WD was convicted in the criminal trial only of gross indecency for an act of fellatio, but in the civil case *AJ* was able to prove substantially more: a pattern of physical and sexual assaults over several years, including many incidents of forced sexual intercourse.⁵⁸ The trial judge awarded *AJ* over \$100,000 in compensatory damages, but refused to consider punitive damages for these brief reasons: "While I recognize that there is authority for the awarding of punitive damages notwithstanding a criminal conviction and sentence, I am of the view that the authorities suggest that the awarding of exemplary and punitive damages in addition to a criminal sentence is the exception."⁵⁹

2. *McIntyre v Grigg*⁶⁰

In this case, *Grigg* hit *McIntyre* with his car while driving impaired in September of 1996. He caused her serious and permanent physical and psychological damage. *Grigg* was criminally charged with driving with a blood alcohol content over .80, impaired driving causing bodily harm and operating a motor vehicle in a manner dangerous to the public causing bodily harm. At the criminal trial, the breathalyser evidence was excluded under section 24(2) of the *Charter* as the police had not properly informed *Grigg* of his right to counsel. *Grigg* was convicted of the provincial *Highway Traffic Act* offence of careless driving and fined \$500.

In the civil trial, a jury awarded *McIntyre* \$250,000 in general damages, \$100,000 in aggravated damages and \$100,000 in punitive

⁵⁷ *AJ v WD*, 1999 CanLII 14143 (Man QB) [*WD*].

⁵⁸ *Ibid* at paras 101-104.

⁵⁹ *Ibid* at para 196.

⁶⁰ *Supra* note 30.

damages. It was proven at the civil trial that Grigg was driving while impaired by alcohol. At the Ontario Court of Appeal, McMurtry CJO and Weiler JA agreed that there was a need for an award of punitive damages, but reduced the award to \$20,000. Blair JA would not have awarded punitive damages at all. Blair JA felt that an award of punitive damages would undermine the criminal proceeding and valuable legal principles:

“Outrage” is not a sound yardstick for measuring legal policy (although it may form a basis for applying it). In this case, for example, the jury’s level of outrage led them to make a punitive damage award of \$100,000. It is hard to conceive of an impaired driving offence where a fine of that dimension, or even a fine of \$20,000 (the amount of punitive damages upheld by the majority here), would be imposed. Would it follow that judges or juries in civil cases such as this are entitled to superimpose their version of a “fine” on the defendant even though the defendant was required to pay a fine perfectly in keeping with the principles of sentencing in criminal law, and to do so just because the fine imposed does not accord with their “level of outrage”? Or, because they felt that the misconduct in question before them was broader than the misconduct proved in the criminal proceeding?

A judge or jury in the civil proceeding cannot know the answer to this latter question – or, indeed, to the question of whether the fine imposed in the criminal proceeding was appropriate for that proceeding – without knowing all of the evidence and all of the factors underlying the disposition of the criminal proceeding. They cannot know these dynamics of the parallel criminal case without having tried it. There is a well-founded policy against the duplication of legal proceedings. I do not see how the preservation of public order and the tempering of harm done to the public good – the objectives of punitive damages – are advanced by allowing judges or juries in civil cases to override what they may perceive to be imperfections in the criminal proceedings, except in the truly rarest of cases.⁶¹

The majority dealt with the issue of the criminal trial differently, and specifically feels that its award of \$20,000 in punitive damages is a more appropriate punishment than the criminal court’s \$500 fine:

In our view, a court in a civil proceeding should generally demonstrate deference to the decision of the other court. Otherwise, the review of the appropriateness of a penalty administered in a criminal court, for example, could be viewed as a collateral attack on that decision. In our opinion, the “disproportionality” test enunciated by Binnie J. in *Whiten* in relation to the wrongful conduct and the penalty imposed is one that should be approached with considerable caution.

We believe that the facts in the present case present one of those rare instances where the disproportionality test applies. It was rational for the jury to

⁶¹ *Ibid* at paras 144-145.

conclude that punitive damages would denounce Andrew Grigg's conduct and signal the need for general deterrence of impaired driving. Given Andrew Grigg's fine of \$500, punitive damages would not amount to double punishment, and indeed would be more appropriate punishment.⁶²

3. *Whiten*

In *Whiten*, Binnie J did address the obvious conflicts that will arise between criminal law and punitive damages, although no such issue arose on the facts of that case itself:

Third, there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts, but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance. The Ontario Law Reform Commission, *supra*, recommended that the "court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant."⁶³ [citations omitted]

Compensatory damages also punish. In many cases they will be all the "punishment" required. To the extent a defendant has suffered other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question, the need for additional punishment in the case before the court is lessened and may be eliminated. In Canada, unlike some other common law jurisdictions, such "other" punishment is relevant but it is not necessarily a bar to the award of punitive damages. The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment. The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.⁶⁴

⁶² *Ibid* at 80-81.

⁶³ *Supra* note 1 at para 69.

⁶⁴ *Ibid* at para 123.

4. Analysis

The first problem arising from Binnie J's analysis in *Whiten* is pointed out by Blair JA in *McIntyre*: "Outrage is not a sound yardstick for measuring legal policy."⁶⁵ Despite its inherent subjectivity, Binnie J legitimised outrage as the sole basis for a jury to impose punitive damages. In the criminal system, the outrage, *per se*, of the sentencing judge is not really a factor to be considered in determining an appropriate sentence under section 718 of the *Criminal Code*.⁶⁶ Punishment is not an objective of sentencing in the scheme of the *Criminal Code*: rather, punishment is the end result of the sentencing process, which has different objectives. The sentencing objectives of the *Criminal Code* are: denunciation, deterrence, protection of society, rehabilitation and the promotion of a sense of responsibility in offenders. Again, the objectives of punitive damages are: punishment, deterrence and denunciation.⁶⁷ When assessing punitive damages, punishment is a valid objective in itself; a desire to punish is not a legitimate starting point for a sentencing judge. The jury considering punitive damages and the judge considering a criminal sentence are not engaged in identical processes: even if working from the same proven facts, they are required to consider different factors in arriving at their conclusions.

The second problem is that neither Binnie J nor the judges in *WD* or *McIntyre* address a fundamental problem with accounting for criminal sanctions in civil cases: it is the sequence of cases that determines the penalty the offender/defendant will suffer. The plodding pace of civil justice in Canada means that it is far more likely for criminal proceedings to be concluded prior to a decision in a parallel civil case. Even when the civil statement of claim is filed before criminal charges, as was the case in *WD*, the criminal process will probably conclude first, given the *Charter* right to be tried within a reasonable time.⁶⁸

The principle articulated by all of these judges is that one should not be made to pay twice for the same conduct. However, if we imagine a case

⁶⁵ *Supra* note 30 at para 144.

⁶⁶ *Criminal Code*, RSC 1985, c C-46 s 718 [*Criminal Code*]. "Outrage" could be a factor subsumed in the objective of denunciation, or in the aggravating factors at s 718.2.

⁶⁷ *Whiten* SCC, *supra* note 1 at para 68.

⁶⁸ *Canadian Charter of Rights and Freedoms*, s 11(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

where the civil trial concludes first and punitive damages are awarded for egregious conduct, we can be certain that if there is a subsequent criminal conviction for the same acts that a sentencing judge will not account for those punitive damages in determining a fit criminal penalty. Binnie J has not addressed this inconsistency. If the principle against double punishment is to be accepted, it ought to be applied universally. There is no principled basis for awarding punitive damages to the plaintiff in this hypothetical scenario but denying them to AJ in *WD*.

The *Criminal Code* itself addresses at least one scenario where an offender/defendant may be required to pay twice. See section 741.2 of the *Criminal Code*: “A civil remedy for an act or omission is not affected by reason only that an order for restitution under section 738 or 739 has been made in respect of that act or omission.”⁶⁹ Here, the *Criminal Code* specifically permits double recovery by a plaintiff. A restitution order made under section 738 could require an offender to pay the victim what are, essentially, compensatory damages. Section 741.2 does not prohibit a parallel civil remedy concerning the same matter. Certainly, Canadian law does not prohibit double recovery or double punishment as an absolute rule. Manitoba has another scheme whereby a civil punishment can be imposed despite the existence of a parallel criminal penalty: *The Criminal Property Forfeiture Act*.⁷⁰ This Act permits the province to seize proceeds of crime and specifically disregards the significance of criminal proceedings.⁷¹ Under this scheme, an offender can be convicted criminally for some activity and then have the province seize property used in the commission of the offence. The CPFA is as much double punishment as punitive damages are. Both schemes have purposes that are aligned with but not identical to the goals of the criminal justice system. Punishment in one arena does not necessarily satisfy the needs of the other.

The third issue raised by Binnie J’s formulation of the law is that the worst cases are the ones least likely to attract punitive damages. Although it is an oversimplification, compare *Whiten* to *WD*: Daphne Whiten received \$1,000,000 for being mistreated by an insurance company while AJ received nothing for years of physical and sexual assault by her stepfather. Apart from the question of the financial capacity of the

⁶⁹ *Criminal Code*, RSC 1985, c C-46, s 741.2.

⁷⁰ *The Criminal Property Forfeiture Act*, SM 2004, c 1, CCSM c C306 [CPFA].

⁷¹ *Ibid*, s 9(1), although this section was recently repealed on June 14, 2012.

respective defendants, the biggest factor at play was the criminal conviction of WD. This conviction was enough for Monnin J to dispose briefly of the entire question of punitive damages.

Almost by definition, the worst conduct is most likely to attract criminal penalties. Canadian society has expressed its collective repugnance at the worst of human conduct in the criminal law. A plaintiff who is the victim of egregiously bad conduct is more likely to be the victim of something criminal and therefore least likely to be awarded punitive damages. The near-prohibition on punitive damages following a criminal conviction is a strong factor undermining the legitimacy of this entire scheme. Was the damage to Casey Hill's reputation really worth \$800,000 while AJ's years of suffering, abuse and psychological trauma were worth nothing?⁷² Was the Church of Scientology's behaviour \$800,000 worse than that of WD? Obviously, other factors were involved in the punitive damage awards in these cases, but for AJ in WD, the criminal conviction was a complete bar to recovery of punitive damages.

The fourth problem is that Binnie J pays only lip service to the substantial differences between criminal and civil proceedings, even when arising out of ostensibly the same underlying facts. There will be very few cases where exactly the same facts are proven in criminal and civil cases arising out of the same proceedings. There are a myriad of differences between a criminal and a civil case and many are of fundamental importance. The largest is the standard of proof: on the same evidence, a civil trier of fact can conclude that something did happen, while a criminal trier of fact may not. Obviously, the evidence that a criminal trier of fact even gets to hear is substantially restricted by tighter criminal rules of evidence. Most importantly, the accused in a criminal case cannot be compelled to testify. The different rules of evidence mean that the civil trier of fact may get to hear substantial evidence that a criminal trier of fact will not. *McIntyre* demonstrates clearly how the exclusion of relevant evidence because of a *Charter* breach can fundamentally change the findings of fact and the outcomes in civil and criminal cases.

Given that the same things are highly unlikely to be proven in parallel civil and criminal cases, it seems quite rash to dismiss a claim for punitive damages (as Monnin J did in WD) on the basis of a criminal conviction

⁷² *Hill*, *supra* note 20, where the Supreme Court of Canada upheld \$800,000 in punitive damages because of the Church of Scientology's slander of Casey Hill.

that could be based on different evidence, proven to a different standard, decided in an entirely different framework and that attracted a sentence based on objectives exclusive to Part XXIII of the *Criminal Code*.

Canadian law generally prohibits the re-litigation of the same action or issue. The law has many protections to prevent this from happening: “principles of the plea of *autrefois acquit*, *res judicata*, the rule in *Kienapple v The Queen*, the maxim *nemo debet bis vexari pro una et eadem causa* and section 11(h) of the *Canadian Charter of Rights and Freedoms*.”⁷³ Notably, none of these principles are argued in cases of dual civil/criminal processes. If double punishment for the same acts were truly the courts’ concern, *res judicata* would prevent civil litigation on the same facts as a previous criminal prosecution. Acquittals would be as persuasive as convictions when assessing punitive damages. The differences in process, procedure and rules reflect another fundamental difference between parallel civil and criminal cases: committing a crime (i.e. a wrong against the Crown) is not equivalent to committing a wrong against another person.

C. Judges and Juries

When a judge sentences an offender for a crime, one of the guiding considerations is that similar sentences should be given to similar offenders for similar crimes.⁷⁴ No such principle governs awards of punitive damages. Instead, juries and trial judges are given little guidance. The principle of rational relation to the purposes of punitive damages from *Whiten* stands in the stead of the principle of similarity that governs criminal sentencing. Binnie J advises that “proportionality”⁷⁵ is the rule, but he does not mean proportionality between an award aimed at the conduct of the specific defendant and its general blameworthiness when compared to other cases. Here, proportionality means an award that is rationally related to the conduct in issue. Essentially, the assessment of the quantum of damages is done in a vacuum.

As noted above, the jury in *Whiten* sought advice from the trial judge on the appropriate range of punitive damages for them to consider. The

⁷³ *R v Van Rassel*, [1990] 1 SCR 225, 53 CCC (3d) 353.

⁷⁴ *Criminal Code*, *supra* note 66, s 718.2(b).

⁷⁵ *Supra* note 1 at para 74.

trial judge, with the concurrence of both plaintiff's and defendant's counsel, left it to the jury to find the "magic" figure. The jury, who apparently felt that Pilot Insurance Co. had behaved abominably, awarded \$1,000,000. Every judge involved in this case agreed that the figure was high; disagreement was only whether \$1,000,000 was too high. At the Supreme Court, Pilot's counsel argued that the trial judge should have given greater direction to the jury on how to assess the appropriate size of a punitive damage award.⁷⁶ Binnie J agreed that the jury instruction was threadbare, but declined to change the Supreme Court's view on whether a range of numbers should be given to a jury:

If counsel can agree on a "bracket" or "range" of an appropriate award, the trial judge should convey these figures to the jury, but at the present time specific figures should not be mentioned in the absence of such agreement. (This prohibition may have to be reexamined in future, based on further experience.) Counsel should also consider the desirability of asking the trial judge to advise the jury of awards of punitive damages made in comparable circumstances that have been sustained on appeal.⁷⁷

While the possibility of counsel agreeing on a range may have been the case in the past, now that high six- and seven-figure punitive damage awards have been upheld in Canada, that prospect seems unlikely. *Whiten* has let the cat out of the bag, as Rudy Buller ably describes:

Prior to *Whiten*, an insurer may reluctantly have agreed to this approach. It would provide some certainty and, if awards were to increase, they would at least do so incrementally, as opposed to the jump from \$50,000 to \$1 million. On the other hand, providing such a "bracket" or "range" is tantamount to admitting liability for punitive damages and most insurers would not want to make such an admission.

Post-*Whiten*, the chances of counsel agreeing on such figures are non-existent. The insurer will want the range to start at "zero" and the plaintiff will want the upper end of the range to be at least \$1 million. Juries will continue to be left on their own and it is possible the next award will be a quantum leap higher than *Whiten*.⁷⁸

In *Hill*, Cory J stated that providing numerical guidelines to juries was "clearly ... a matter for legislation."⁷⁹

⁷⁶ *Ibid* at para 93.

⁷⁷ *Ibid* at para 97.

⁷⁸ Buller, *supra* note 3 at paras 15-16.

⁷⁹ *Supra* note 20 at para 163.

Neither Binnie J nor Cory J provides much defence for the *status quo* in this area. Neither examines the obvious comparator to the process of assessing punitive damages: criminal sentencing. There is a close connection between the objectives and function of punitive damages and criminal sentences. The assessment of punitive damages, based on the judge's or jury's level of outrage at the defendant's conduct, is much closer to the process of criminal sentencing (subject to the comments above) than it is to the assessment of other types of damages in a civil case. Punitive damages, like criminal sentences, come into play only after liability is established. While punitive damages are the exception and criminal sentences are required, they are both an assessment of the degree of reprehensibility of the conduct in issue. Applying their particular frameworks, the judge or jury must craft an appropriate penalty.

In the criminal justice system, judges in countless cases apply section 718.2(b) of the *Criminal Code* by searching reported cases for comparators. It is "one of the most difficult tasks a trial judge can face."⁸⁰ Innumerable articles, textbooks and cases are devoted to criminal sentencing and the appropriate philosophical and practical processes that should be followed in determining a just sentence for a particular offender. Although most often concerned with offences where imprisonment is available as a potential punishment, the same processes and rules apply when a judge is sentencing an offender to a fine or some other non-custodial sentence. Generally, Canadian society has chosen a careful and deliberate process when meting out punishment for the behaviour it censures. It is not conceivable that we would leave the assessment of a criminal sentence to the black box of a jury and accept the "magic" number it produces.

There are many obvious differences between the assessment of punitive damages and criminal sentencing. Most significantly, punitive damages cannot include imprisonment and the state, with its limitless power and resources, is not an antagonist in the proceedings. However, the state is still involved: its power is used to enforce the judgments of the court. The denunciatory and deterrent objectives of punitive damages serve a state purpose, not an individual one. There are only two mechanisms by which the state will exact punishment from its citizens: offences (both criminal and regulatory) proscribed by law and tried in a

⁸⁰ *R v Hogg*, 2004 MBQB 16 at para 21, 181 Man R (2d) 63.

court and punitive damages. Rich systemic safeguards rule the former; only a very slim appellate review power constrains the latter. The strong correlation between punitive damages and criminal sentences has not gone unnoticed. Lord Justice Stephenson was troubled by this unusual role for a jury in *Riches v News Group Newspapers Ltd*:

According to the law as it stands, the plaintiff who seeks exemplary damages asks a jury in a civil case, under the direction of the judge, to do what a jury in criminal case cannot do, namely, to assume the function which a judge has to perform in a criminal case (however much he might like to transfer it to the jury), and to punish the defendant (or defendants) by awarding a financial penalty, commonly and inevitably regarded as a fine.⁸¹

One of the tenets of the Canadian justice system is its adversarial nature. Judges and juries are not to make decisions in a vacuum: it is the vigorous and complete argument from both parties in a case that provides the full story needed to make a proper decision. The primary importance of the adversarial system in achieving justice has been emphasised by the Supreme Court on many occasions. In *Lavallee, Rackel & Heintz v Canada* (AG), LeBel J described the key role of “vigorous confrontation”:

Moreover, whether it is the pride or the bane of our civil and criminal procedure, Canadian courts rely on an adversarial system. An impartial and independent judge oversees the trial. He or she must make sure that it remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice. Nevertheless, the operation of the system is predicated upon the presence of opposing counsel. They are expected to advance often sharply conflicting views. They are also responsible for introducing evidence and presenting argument to the court, in a spirit of sometimes vigorous confrontation.⁸²

In *Borowski v Canada* (AG), Sopinka J ably described the basic importance of adversarial conflict:

... a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.⁸³

⁸¹ *Supra* note 34 at para 15.

⁸² *Lavallee, Rackel & Heintz v Canada* (Attorney General); *White, Ottenheimer & Baker v Canada* (Attorney General); *R v Fink*, 2002 SCC 61 at para 68, [2002] 3 SCR 209.

⁸³ *Borowski v Canada* (Attorney General), [1989] 1 SCR 342, 57 DLR (4th) 231.

At all stages in a criminal or civil case, whether before a judge or a jury, the justice system depends on complete argument to reach an appropriate result. In a criminal case, opposing counsel make arguments and recommendations to the sentencing judge; he or she depends on counsel's representations in order to arrive at a fit sentence. In civil and criminal trials, counsel make arguments to juries, advocating for the jury to believe them over their opponents. Only when determining the size of punitive damages do we leave the trier of fact alone, to make its decision in the absence of argument and precedent. In *Whiten*, Binnie J was uncomfortable with the trial judge's "skeletal"⁸⁴ instruction to the jury. However, his recommendations for change are not substantially different. Juries are to be given only minimal information when deciding on the size of punitive damage awards: "They should be told in some detail about the function of punitive damages and the factors that govern both the award and the assessment of a proper amount."⁸⁵ Binnie J refuses to permit juries to hear about previous awards in similar cases unless counsel can agree on an appropriate range. Juries are left to administer punishment based on opinion, without argument and without reference to precedent. Their decisions are to be based solely on their level of outrage and indignation at the particular facts of the case: is this not the "palm tree justice"⁸⁶ Lord Reid warned of in *Broome*?

LeBel J took the concern about palm tree justice and Canadianised it. He was concerned about what was developing "under the pine trees of this country",⁸⁷ as his conclusion in *Whiten* shows:

The problems that occurred in the present case demonstrate that some sort of instruction on the range of punitive damages awards, even without counsel's agreement, would have been useful. Without removing the jury's discretion, it would at least communicate to them some idea of past figures and of guidelines that may be found in appellate or Supreme Court of Canada judgments. They should also be instructed clearly that an award of general damages may also amount to all the punishment that is necessary in a given case. Failing this, and

⁸⁴ *Supra* note 1 at para 26.

⁸⁵ *Ibid* at para 75.

⁸⁶ *Supra* note 13 at 30. See also the comments of Binnie J in *Pacific National Investments Ltd v Victoria (City)*, 2004 SCC 75 at para 13: "This is not to say that it is a form of 'palm tree' justice" that varies with the temperament of the sitting judges." There are many parallels between the unjust enrichment remedy and punitive damages.

⁸⁷ *Whiten* SCC, *supra* note 1 at para 158.

in the absence of a proper application of the rationality and proportionality criteria, problematic awards are bound to happen.⁸⁸

American courts have few options because of the constitutional right to a trial by jury in civil cases.⁸⁹ In Canada, however, the use of juries in civil trials is constrained in a number of ways. Notably, Canadian courts can require that complex cases be heard by judges. Generally, Canada has chosen a middle path between widespread jury use in the United States and heavily constrained civil jury trials in the United Kingdom.⁹⁰ There is no legal obstacle to requiring that a judge, and not a jury, determine the size of a punitive damage award. If the current system is likely to produce the “problematic awards” that LeBel J warns of, legislative action may be a prudent course.

D. Multiple Plaintiffs

Another problem with the law governing punitive damages in Canada is related to the windfall problem discussed above. How is a court meant to deal with a case with multiple plaintiffs? Many of the issues with this scenario arose in *AB v South West Water Services Ltd.*⁹¹ In that case, 180 plaintiffs sought damages from a water company for contaminating their drinking water with aluminum sulphate. Stuart-Smith LJ struck out the plaintiff’s claim for exemplary (punitive) damages partly because the defendants had already been convicted criminally and fined in relation to the conduct in issue. He was greatly troubled by the unique problems posed by the number of plaintiffs and the practical difficulties in assessing damages and apportioning them appropriately:

There is, however, one aspect of the case which in my view makes it peculiarly unsuitable for an award of exemplary damages, even if the first two hoops are negotiated, and that is the number of plaintiffs. Unless all their claims are quantified by the court at the same time, how is the court to fix and apportion the punitive element of the damages? Should the court fix a global sum of £x and divide it by 180, equally among the plaintiffs? Or should it be divided according

⁸⁸ *Ibid* at para 168.

⁸⁹ US Const amend VII.

⁹⁰ See the comments of McLachlin CJC in “Joint Meeting of The American College of Construction Lawyers and The Canadian College of Construction Lawyers” (2005) 39 CLR (3d) 4 at 17-20.

⁹¹ *AB v South West Water Services Ltd*, [1993] QB 507, [1993] Env L R 266 [SW Water cited to QB].

to the gravity of the personal injury suffered? Some plaintiffs may have been affected by the alleged oppressive, arbitrary, arrogant and high-handed behaviour, others not. If the assessment is made separately at different times for different plaintiffs, how is the court to know that the overall punishment is appropriate? The point was touched on in *Riches v News Group Newspapers*, in the judgment of Stephenson L.J. That was a libel case with 10 plaintiffs where a very large sum had been awarded as exemplary damages; the judge had not directed the jury how they were to deal with the problem of a number of plaintiffs. Stephenson L.J. commented that the problem “furnishes yet another complication engendered by the survival of the right to exemplary damages and another argument in favour of abolishing the right.”⁹²

In Canada, one exceptionally complicated case dealt with the precise problems formulated by Stuart-Smith LJ above. In *Mainland Sawmills Ltd v USW Union Local 1-3567*, thirty-three plaintiffs were awarded punitive damages in an action against thirty-one defendants.⁹³ The case was tried before a judge. Members of one union local had illegally occupied a sawmill, the workplace of another union local. Through violence and intimidation, they closed down the sawmill. Damages were awarded for trespass, assault and battery. The trial judge, Fisher J, calculated what she thought was an appropriate global figure for punitive damages: \$323,000. She then categorised the plaintiffs and defendants into one of several groups. The plaintiffs received either \$15,000, \$7,000 or \$3,000 in punitive damages, based on the degree of harm they had suffered. The defendants were placed into categories, which were collectively assigned 40%, 30%, 20% or 10% of the total liability.

Fisher J’s decision may well have been the most appropriate and just response to the facts of the case, but it strays away from the objectives of punitive damages laid out in *Whiten*. It also demonstrates well the practical difficulty and complexity that ensues from this type of case. The apportionment of punitive damages based on the harm suffered seems just, but is it really a matter of compensation, either through pecuniary or non-pecuniary compensatory damages? Collectively, the defendants were required to pay \$323,000 in punitive damages. How are the objectives of denunciation, deterrence and punishment furthered through the apportionment of damages to the plaintiffs according to the harm they

⁹² *Ibid* at 527.

⁹³ *Mainland Sawmills Ltd v USW Union Local 1-3567*, 2007 BCSC 1433, 52 CCLT (3d) 161 [*Mainland Sawmills*].

suffered? In this case, it seems that the distribution of punitive damages was an afterthought: now that we have determined that punitive damages should be awarded, what are we going to do with the money? Moreover, the apportionment of damages to thirty-three different plaintiffs required Fisher J to examine all of their individual circumstances. This huge task would be even more cumbersome if there had been 180 plaintiffs, as in *SW Water*.⁹⁴ What happens in a class action with thousands of plaintiffs?

Whiten also does not address the further problems raised by similar cases being raised in series. If a defendant is liable for conduct meriting punitive damages, should those damages only go to the first plaintiff to bring his or her case forward? Should the defendant be liable for punitive damages in subsequent cases on the same issues? It is difficult to justify awarding punitive damages more than once for the same conduct, if we bear in mind the objectives of deterrence, denunciation and punishment. However, granting punitive damages only to the plaintiff with the fortune of being the first to bring his or her case to a conclusion returns us to the windfall problem examined above. Hypothetically, the first plaintiff may have the easiest case to prove, or be the least complicated, and therefore may conclude before others. Perhaps the second plaintiff was the victim of worse conduct, requiring lengthier pre-trial processes and more issues to resolve at trial. What is the philosophical justification for granting the windfall to the quickest out of the gate? What happens if a greater degree of misconduct is proven at the second trial than the first? Do we award punitive damages twice? Do we award punitive damages only for that portion of the misconduct not covered by the award granted to the first plaintiff? How is a judge to instruct a jury in this situation if he or she is unable to refer to previous cases?

The case of *HO v MacDougall* dealt with some of these issues in as just a fashion as possible under the present legal framework.⁹⁵ The defendant MacDougall was employed for many years as a provincial Corrections Officer. He sexually abused many young inmates over more than twenty years. A number of civil suits were launched against MacDougall. The court severed the issue of punitive damages from a number of cases and consolidated them in *MacDougall*. Joyce J determined a fit global sum to meet the objectives of punitive damages and awarded \$10,000 to thirty

⁹⁴ *Supra* note 91 at 268.

⁹⁵ *HO v MacDougall*, 2006 BCSC 180, 38 CCLT (3d) 253.

different plaintiffs. Unlike Fisher J in *Mainland Sawmills*, Joyce J concluded that “it would not be appropriate to award punitive damages to the various plaintiffs in differing amounts depending upon my view of the severity of the sexual assault in each particular case.”⁹⁶ He did not wish to engage in the complicated exercise of determining the relative severity of specific sexual acts inflicted on the various plaintiffs. In addition, he found that this exercise would not advance the objectives of punitive damages: “the fact that the particular acts of misconduct may have had greater or lesser impact on the lives of the plaintiffs is something to be considered in determining the compensation to which each plaintiff is entitled. But I am not concerned with compensation. I am concerned with punishment.”⁹⁷

Thirty victims were compensated through the award in *MacDougall*, but more victims existed. MacDougall was also convicted criminally for his actions and sentenced to a four-year term of imprisonment. Joyce J did not account for this criminal penalty when assessing punitive damages as none of the plaintiffs in his matters were victims in the incidents prosecuted criminally. What happens to those who were the victims in the criminal case, or others who may come forward in the future? In *MacDougall*, Joyce J determined what he thought was an appropriate global punishment in the form of punitive damages. If MacDougall has already been punished appropriately, it would be unfair for any subsequent plaintiffs to be awarded punitive damages, even though the abuse they suffered may have been as bad or worse than those who were apportioned \$10,000. Again, the windfall problem arises: there is no reasoned basis for awarding punitive damages to the first claimants other than simply because they were first. One case could be put forward later than another for a multitude of reasons not related to the merits of the claim.

One further problem identified by David Owen is that in cases of mass torts, early awards of punitive damages may deprive subsequent claimants of compensatory damages.⁹⁸ Owen uses litigation against asbestos companies as an example, where large, early punitive damage awards have depleted the assets of a number of companies. When subsequent plaintiffs come forward, the company is bankrupt and they are

⁹⁶ *Ibid* at para 21.

⁹⁷ *Ibid*.

⁹⁸ Owen, *supra* note 54 at 393-94.

denied even compensation while the early plaintiffs benefit from large punitive awards.

V. POTENTIAL SOLUTIONS

Different jurisdictions have tried different solutions to the many problems posed by punitive damages. This section will review a number of solutions, tested and untested, and provide recommendations on what action should be taken to improve the law in relation to punitive damage awards.

A. Class actions

Many cases attracting punitive damage claims are class actions. Because there is such a high threshold of misbehaviour for the imposition of punitive damages, it is often the case that defendants liable for punitive damages have engaged in a pattern of misconduct, directed at more than one plaintiff. There are many reported cases of class actions where punitive damages are also pleaded.⁹⁹ Class actions are the vehicle most suited to adjudicating mass tort claims. Since the decision of the Supreme Court in *Rumley v British Columbia*, it is beyond doubt that punitive damages can be certified as a common issue in class actions.¹⁰⁰

The nature of class actions is such that an unsuccessful defendant can expect to pay a substantial award of damages. Punitive damages can be added on top of compensatory damages. However, the objectives of punitive damages can often be satisfied in a class action simply through a general award of damages. Consider the case of *BMW v Gore*: Mr. Gore suffered damage of approximately \$4,000 to his BMW when the company re-touched the factory paint after damage in shipping.¹⁰¹ During the trial, it was established that BMW had secretly re-touched the paint of

⁹⁹ See e.g. *Walls et al v Bayer Inc*, 2005 MBQB 3, [2006] 4 WWR 720 (consumers of a cholesterol-lowering drug); *Brimner v Via Rail Canada Inc*, 50 OR (3d) 114, 1 CPC (5th) 185 (passengers in a train derailment); *Wuttunee v Merck Frosst Canada Ltd*, 2008 SKQB 229, 312 Sask R 265 (consumers of Vioxx); *Chalmers v AMO Canada Company*, 2010 BCCA 560, 504 WAC 186 (purchasers of a dangerous contact lens solution); *Griffiths v British Columbia*, 2003 BCCA 367, 19 CR (6th) 367 (victims of sexual assault in a foster home).

¹⁰⁰ *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184 at para 34.

¹⁰¹ *BMW v Gore*, *supra* note 41.

approximately 1,000 other cars in the same fashion. If BMW were required to compensate only Mr. Gore for their misbehaviour, a \$4,000 penalty would not sufficiently punish them or deter them from such conduct in the future. Extrapolating from Mr. Gore's \$4,000 loss, the award of \$4,000,000 is simple: it accounts for the 1,000 other cars that BMW had secretly refinished.

A \$4,000,000 award to Mr. Gore is an unearned windfall. It certainly punished BMW and deterred them from future misconduct. However, if the \$4,000,000 had been divided 1,000 times to deserving plaintiffs, the case would not likely have generated a public sensation and outraged newspaper headlines.¹⁰² Compensation does not generate outrage; public outrage stems from the idea that BMW should pay one person \$4,000,000 because of minor damage to his car. Ironically, because of the enormity of the award of punitive damages, the Supreme Court of Alabama reduced the punitive damages to \$2,000,000. The United States Supreme Court later overturned even that smaller award and sent the case back to the Alabama Supreme Court, which in turn ruled that \$50,000 was a constitutionally-permissible award.¹⁰³ In the majority opinion, the United States Supreme Court imposed limits on punitive damage awards under the due process clause of the Fifth Amendment.¹⁰⁴ In the end, an award of punitive damages that appeared scandalous not only allowed BMW to escape substantial punishment for its misdeeds, but imposed a new constitutional limit on punitive damages in the United States. The public policy objectives underlying punitive damages were harmed through excess. The use of a class action would not have attracted public scorn and, ultimately, would have accomplished the goal in a more defensible fashion. The same logic would have applied to *McDonald's*, the most notorious case of all: 700 other people had suffered serious burns because of McDonald's coffee.¹⁰⁵ One can only speculate on how far public respect

¹⁰² See e.g. Richard J Mahoney, "Act Now to Curb Multiple Damage Suits", Letter to the Editor, *The New York Times* (18 October 1995); "BMW case drives litigation reforms" *The Washington Post* (30 May 1995); James Kilpatrick, "Punitive damages take BMW for a ride: The system is loony" *Spartanburg Herald-Journal* (29 September 1995).

¹⁰³ *BMW of North America, Inc v Gore*, 701 2d 507 (1997 Ala Sup Ct)(available on WL).

¹⁰⁴ *BMW v Gore*, *supra* note 41 at 1595.

¹⁰⁵ *Supra* note [42](#).

for punitive damages was diminished by that case. A class action avoids the despised windfall problem.

B. Raised standard of proof

The majority of American states that have legislated punitive damage reforms have raised the standard of proof for punitive damage liability to “clear and convincing evidence” from the old balance of probabilities standard. This standard is not unknown to Canadian law.¹⁰⁶ However, how such a standard of proof could practically be applied is questionable. For example, the Minnesota statute raising the standard of proof for punitive damages says:

Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.¹⁰⁷

What happens if a plaintiff is able to prove the required facts, but only to the satisfaction of the balance of probability standard? The plaintiff would be left with a scenario where the court, when determining liability, finds that the defendant did X. However, when the court is assessing damages, it does not find that the defendant did X. The anomaly in these findings would damage public confidence in the justice system. Moreover, there does not appear to be a legitimate basis to raising the standard of proof beyond simply limiting the availability of punitive damages. The civil justice system functions well using the balance of probabilities standard. There is nothing unique about punitive damages requiring a higher standard. If the legislature’s goal is to reduce punitive damage awards, other means can be chosen that avoid the distressing anomaly described above.

C. Standard of appellate review

Post-*Whiten*, appellate courts may interfere with an award of punitive damages if it “exceeds the outer boundaries of a rational and measured response to the facts of the case.”¹⁰⁸ When combined with the inscrutability of jury awards, this standard does not leave much room for

¹⁰⁶ See e.g. *Penner v Niagara (Police Services Board)*, 2010 ONCA 616, 102 OR (3d) 700.

¹⁰⁷ Minn Stat §549.20(1)(a) (2011).

¹⁰⁸ *Whiten* SCC, *supra* note 1 at para 76.

appeal courts to intervene. Several American jurisdictions have removed barriers to appellate intervention, specifically legislating that appeal courts owe no deference to trial-level decisions on punitive damages and allowing them to examine the issue anew.¹⁰⁹ As jury decisions are made in a black box, these laws appear to be designed to give appeal courts some foothold in cases where the jury award is suspect on its face.

In Canada, such a change would be a strong departure from the traditional role of appellate courts. In *Housen v Nikolaisen*, Iacobucci and Major JJ delineated the general role of appellate courts in the Canadian legal system:

...the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.¹¹⁰

We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.¹¹¹

Expanding the ability of appellate courts to over-rule trial-level decisions on punitive damages would provide a safeguard against improper awards, but it would come at the cost of substantially redefining their role. The present standard of review is substantial and meaningful, but only when the appellate judges have intelligible reasons, which must come from a judge. It is difficult to understand how appellate judges are meant to evaluate whether a jury award is rational and measured without knowing the reasoning processes that led to the award. In all facets of the Canadian legal system, juries are entitled to give whatever weight to the evidence they feel is appropriate. If appellate courts have no reasons to justify an award of punitive damages, any time they overturn an award, it must necessarily be because they disagree with the jury on the weight that should be given to particular pieces of the evidence. In *Whiten* (CA), Finlayson JA overturned the jury award for the following reasons:

¹⁰⁹ See Appendix II.

¹¹⁰ *Housen v Nikolaisen*, 2002 SCC 33 at para 9, [2002] 2 SCR 235.

¹¹¹ *Ibid* at para 23.

I do not propose to justify my intervention on any basis other than that I think the award is simply too high. The conduct of the appellant justifying the making of an award of punitive award is clearly reprehensible and I will not attempt to excuse it. However, awards for punitive damages against insurers based on bad faith handling of insurance claims are traditionally in the range of \$7,500 to \$15,000, well below the level of this award. I can think of no justification for such a radical departure from precedent as is represented by the award of this jury.¹¹²

Finlayson JA's rationale is a blatant re-weighing of the evidence in a fashion proscribed by Iacobucci and Major JJ in *Housen v Nikolaisen*. In addition, it is a curious step to criticise the jury's award for being wildly outside the accepted range of punitive damages when they have been specifically prohibited from knowing that information. If punitive damage awards are to be constrained based on acceptable ranges, it seems prudent to provide that range to the jury at the first opportunity. Finlayson JA appears to have shown no deference to the trial-level decision and has simply calculated the punitive damages anew according to his assessment of the evidence: a process very similar to the American laws described above.

Changing the role of appellate courts in the American fashion would be impractical and costly and undermine the legitimacy of the trial process. If punitive damages are to be assessed anew on appeal, the trial-level decision on that point is not going to be of much significance. The present standard of review functions well when appellate courts have the benefit of reasons, which can only be provided by a judge.

D. Judges to decide the size of punitive damage awards

Some measure of intelligibility is needed to provide appeal courts with a foothold when reviewing trial-level decisions on punitive damages. No American jurisdiction has enacted a law requiring the assessment of punitive damages to be done by a judge instead of a jury, likely because of the Seventh Amendment constitutional implications. Instead, expanded appellate powers of review, as described above, seem to be a back-door method to have judges examine punitive damage awards. In Canada, we are not constrained by the American constitutional limitations; it is open

¹¹² *Supra* note 33 at para 51.

to the provincial legislatures to require that judges determine the size of punitive damage awards.

A jury in a criminal trial determines guilt; the judge sentences the convicted. A jury in a civil trial could determine liability, including liability for punitive damages, and a judge could consider the appropriate award. Since *Hill*, we have definitively entered an era of punitive damage awards into the hundreds of thousands and beyond. Such awards are made not just against large corporations, as in *Hill* and *Whiten*, but even against individuals, as in *MacDougall*. Much is at stake for both the plaintiff and the defendant, yet the size of punitive damage awards is left to the jury with minimal instruction, never mind full argument from counsel. A judge can consider precedent and tailor an award that is appropriate to the circumstances of the case. Awards from judges are open to appellate review and public scrutiny.

Removing the assessment of punitive damages from the purview of the jury does not upset its traditional, time-honoured role as the arbiter of fact. If the jury determines that punitive damages are appropriate, a hearing could be held, akin to a sentencing hearing in the criminal justice system. The additional burden on the court system would be minimal: there is near-universal agreement that punitive damages are an exceptional remedy to be applied rarely.

E. Ranges of awards to be provided to juries

If juries continue to determine the size of punitive damage awards, they could be instructed on the range of awards that have been made in similar cases in the past. In *Whiten*, Binnie J acknowledged that the rule prohibiting juries from knowing commonly-accepted ranges of awards “may have to be reexamined in future.”¹¹³ As discussed above, it is difficult to understand the rationale behind this prohibition. In the criminal justice system, like crimes should attract like penalties. There seems little reason not to extend this principle of fairness to the assessment of punitive damages in the civil system. A properly-instructed jury could be informed of the range of awards made in the past, with the *caveat* that it is not bound to stay within that range. The size of punitive damage awards

¹¹³ *Supra* note 1 at para 97.

would thereby be capable of evolution. Such changes would more likely be incremental, instead of the giant leaps seen in *Hill* and *Whiten*.

F. Caps on punitive damages

Numerous American states have limited the size of punitive damage awards, most commonly by capping the award at twice or three times the amount of compensatory damages.¹¹⁴ Generally, few Canadian cases would stray outside these boundaries. The punitive damages in *Whiten* itself were approximately three times the compensatory amount. However, rigid rules can produce injustices. Just as minimum sentences in the criminal context can, at times, be inappropriate, limits on punitive damages may at times obstruct their three objectives. Returning again to *BMW v Gore*, it would be difficult to see the punitive or deterrent effect on BMW if they were required to pay Mr. Gore only three times his damages: \$12,000.

G. Punitive damages could be allocated to public funds

One method of eliminating the windfall problem is to divert awards of punitive damages to public funds. These awards, by definition, are undeserved windfalls for the plaintiffs. Many of the problems that arise with multiple plaintiffs are eliminated if we abandon the notion that the first plaintiff out of the gate is the one to collect the prize. Second, there is a public perception that there is an abundance of frivolous lawsuits by plaintiffs seeking such a windfall. Although the reality may not correspond with this perception, it is more than a theoretical risk: the pants lawsuit of *Pearson v Chung* is but one dramatic example. Moreover, there is value in preserving public confidence in the system of civil justice. If punitive damage awards were diverted to public funds, it would immunize plaintiffs from suspicion of their motives and perhaps enhance the apparent legitimacy of their claims.

The jury in *Riches* returned to ask if they could allocate punitive damages to a police charity instead of to the individual plaintiffs.¹¹⁵ In principle, there is no reason why punitive damages, which are already so very much like a criminal fine, could not be diverted to some public good. In most cases, it would not be difficult to conceive of a charity rationally

¹¹⁴ See Appendix II.

¹¹⁵ *Supra* note 34 at para 41.

related to the offensive conduct that brought about the award in the first place. By definition, the plaintiff does not need the punitive damages; he or she is meant to have been compensated through general damages. Apportioning punitive damages to an appropriate charity surely serves the public good and furthers the objectives of punitive damages. It may also provide further vindication to a wronged plaintiff if the tortfeasor is required to contribute to a cause that aims to prevent similar wrongs in the future.

VI. WHAT SHOULD BE DONE?

Three basic actions by provincial legislatures will resolve many of the problems associated with punitive damage awards described in this paper.

First, criminal convictions should not be accounted for when assessing punitive damages. There is a risk that a defendant will essentially be punished twice for the same conduct, but that risk is small. It is rare that a criminal conviction will be based on the same facts that will be proven in a civil trial. In most cases, the civil liability will encompass a broader range of conduct than the criminal liability. The objectives of the criminal law are similar but not the same as the objectives of punitive damages. It is not safe to assume that a criminal conviction will necessarily achieve the goals of punitive damages. Also, there is no viable method of accounting for the vagaries of process that determine which of two parallel cases is decided first.

Second, judges and not juries should determine the appropriate size of punitive damage awards. Jury awards are inscrutable and therefore exceedingly difficult for appellate courts to review properly. The increased magnitude of punitive damage awards in recent years means that this portion of a trial can have very severe consequences for a defendant. After a jury or judge has determined that punitive damages are warranted, the judge should hold a hearing on the quantum of the award. He or she will make a decision the way that it ought to be made: with the benefit of argument from counsel and in view of precedent. This approach will not result in rigid ranges to be applied in specific cases: judges should be guided by, not bound by, awards that have come before.

Third, punitive damage awards should not go solely to the plaintiffs. The redirection of these awards to another beneficiary eliminates improper motives, suspicion of impropriety and the multiple plaintiff

problem. It enhances public confidence in the civil justice system and serves the public good by exacting payment from wrongdoers and redirecting the money towards some social good. Some portion of the punitive damages should still go to the plaintiff for two reasons. First, it is a reward for the public service of exposing bad conduct, as described by Binnie J in *Whiten*.¹¹⁶ Second, in order to arrive at the appropriate size of award, the judge needs the benefit of the adversarial process, which is itself dependent on two interested parties. Punitive damage awards should, where appropriate, be directed mostly to a relevant charity. If no such charity can be found, the bulk of the award should be paid to the province to a fund for general public use. *The Criminal Property Forfeiture Act* established just such a scheme in Manitoba: seized assets are sold and the proceeds go into a general fund designed to compensate victims, remedy unlawful activity and promote safer communities.¹¹⁷

Punitive damages serve a unique function in the system of civil law. Their persistence through centuries of opposition tells us something of their value. In *Whiten*, the Supreme Court attempted to modernize the law but has failed to go far enough to ensure that public confidence in the system of civil justice stays strong and to ensure that the law is applied fairly and consistently with the principles of fundamental justice upon which it is built. The provincial legislatures should act to solidify the law to ensure that this valuable tool does not disappear for want of legitimacy.

¹¹⁶ *Whiten* SCC, *supra* note 1 at paras 39-40.

¹¹⁷ *Supra* note 69, s 19(4).

VII. APPENDIX I – REPORTED MANITOBA CASES WITH PUNITIVE DAMAGE AWARDS

Year	Case Name	PD Award	Other Damages	Cause of Action	Judge or Jury
2011	<i>Lounsbury v Dakota Tipi First Nation</i> 2011 MBQB 96	\$10,000	\$143,965	Wrongful dismissal	Judge
2010	<i>CNR v Huntingdon REIT</i> 2010 MBQB 195	\$2,500	\$2,118,626	Breach of contract, trespass	Judge
2009	<i>Johnson v BFI</i> 2009 MBQB 215	\$5,000	\$6,762	Breach of contract	Judge
2007	<i>Jensen v Stemmer</i> 2007 MBCA 42	\$25,000	\$8,800	False imprisonment	Jury
2006	<i>Halligan v Liberty Tax</i> 2006 MBQB 75	\$200,000	\$84,538	Breach of contract	Judge
2003	<i>Auch v Wolfe</i> 2003 MBQB 91	\$50,000	\$176,763	Fraudulent Misrep	Judge
2002	<i>Brown & Root v Aerotech</i> 2002 MBQB 229	\$50,000	\$1,681,476	Breach of contract	Judge
2001	<i>Mellco Developments v Portage La Prairie</i> 2001 MBQB 236	\$10,000	\$35,000	Breach of contract	Judge
2001	<i>Uni-Jet Industrial Pipe v Canada (AG)</i> 2001 MBCA 40	\$20,000	\$45,000	Misfeasance in public office	Judge (CA)
1999	<i>Lawfer v Bucklaschuk</i> 181 DLR 4th 83	\$500,000	\$2,160,000	Defamation	Jury
1994	<i>Mining & Allied Supplies v 2390869 Manitoba Ltd</i> 96 Man R 2d 91	\$50,000	\$382,760	Conversion	Judge

VIII. APPENDIX II – PUNITIVE DAMAGE RESTRICTIONS IN AMERICAN STATES

A. States that Cap Punitive Damage Awards

- Alabama: General cap of \$250,000.
- Alaska: General cap of the greater of \$500,000 or three times compensatory damages
- Arkansas: General cap of the greater of \$250,000 or three times compensatory damages, not to exceed \$1,000,000.
- Colorado: general cap equal to amount of compensatory damages
- Connecticut: Punitive damages in cases of product liability are limited to twice compensatory damages
- Florida: General cap of the greater of \$500,000 or three times compensatory damages
- Georgia: General cap of \$250,000
- Idaho: general cap of the great of \$250,000 or three times compensatory damages
- Illinois: general cap of three times compensatory damages
- Indiana: general cap of the greater of \$50,000 or three times compensatory damages
- Kansas: General cap of the lesser of the defendant's annual income or \$5,000,000
- Mississippi: General Cap of 2% of the defendant's net worth
- Montana: General cap of the lesser of \$10,000,000 or 3% of the Defendant's net worth
- North Carolina: General cap of the greater of \$250,000 or twice compensatory damages
- Nevada: general cap of the greater of \$300,000 or three times compensatory damages
- New Jersey: General cap of the greater of \$350,000 or five times compensatory damages
- Ohio: general cap of the lesser of \$350,000 or twice compensatory damages

- Oklahoma: three caps based on the degree of misconduct: the great of compensatory damages or 1000,000, the greater of five times compensatory damages, or \$500,000, or unlimited
- Oregon: General cap of three times compensatory damages
- Tennessee: General cap of the greater of \$500,000 or twice compensatory damages
- Texas: General cap of the greater of \$250,000 or twice compensatory damages

B. States Requiring Allocation of Awards

- Alaska: 50% of punitive damage awards shall go to the state
- Georgia: 75% of punitive damage awards shall go to the state
- Indiana: 75% of punitive damage awards shall go to the state
- Iowa: if the conduct of the defendant was not directed specifically at the claimant, 75% of punitive damage awards are paid into a state fund “for purposes of indigent civil litigation programs or insurance assistance programs.”
- Missouri: 50% of punitive damage awards shall go to the state “tort victims’ compensation fund”.

C. States Permitting or Requiring Bifurcation of Trials

- Alaska: If liability for punitive damages is established, the same fact finder shall determine the amount in a separate proceeding
- Arkansas: Upon request, the finder of fact first determines if compensatory damages are warranted. In a separate proceeding, it determines if punitive damages are warranted and in what amount.
- Colorado: A claim for punitive damages is permitted only after discovery has established “*prima facie* proof of a triable issue:” on the underlying claim.
- Delaware: Punitive damages in medical negligence can only be awarded in a separate proceeding after determining liability for compensatory damages
- Georgia: Quantum of punitive damages must be determined in a separate proceeding from liability for punitive damages.
- Idaho: in order to put forth a claim for punitive damages, the plaintiff must establish a “reasonable likelihood of proving

facts at trial sufficient to support an award of punitive damages” at a separate hearing

- Illinois: in order to put forth a claim for punitive damages, the plaintiff must establish a “reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages” at a separate hearing. Upon request of the defendant, issues relating to punitive damages must be dealt with at a separate hearing subsequent to the determination of liability and the award of compensatory damages.
- Kansas: the size of punitive damage awards is determined at a separate hearing.
- Minnesota: the size of punitive damage awards is determined at a separate hearing.
- Mississippi: Liability for punitive damages established at a separate proceeding.
- North Carolina: upon motion of the defendant, liability for punitive damages shall be determined at a separate proceeding.
- Nevada: size of punitive damage awards shall be determined in a separate proceeding.
- New Jersey: upon the defendant’s request, liability for and quantum of punitive damages are determined at a separate proceeding.
- Ohio: upon the defendant’s request, liability for and quantum of punitive damages are determined at a separate proceeding.
- Oregon: the trial judge must review all punitive damage awards independently for rationality.
- Tennessee: Liability for and quantum of punitive damages are automatically bifurcated from the main proceeding.

D. States requiring the “clear and convincing” standard of proof

- Alabama
- Alaska
- Arkansas
- Florida
- Georgia
- Idaho

- Illinois
- Indiana
- Iowa
- Kansas
- Minnesota
- Mississippi
- Montana
- North Carolina
- North Dakota
- New Jersey
- Ohio
- Oklahoma
- Oregon
- Tennessee
- Texas

E. States that have banned punitive damages

- Illinois (for legal and medical malpractice only)
- Louisiana
- New Hampshire
- Washington