

***SIGNIFICANT DAMAGE AWARDS INCLUDING PUNITIVE AND ECONOMIC  
LOSS AWARDS ACROSS CANADA AND THE MEANING OF “SERIOUS  
IMPAIRMENT” IN THRESHOLD CASES***

**Eleni Maroudas  
&  
Sivan Tumarkin**

*McCague Peacock Borlack McInnis & Lloyd LLP*

## **A) RECENT DAMAGE AWARDS OF NOTE FROM ACROSS CANADA**

### **The Tiger and the Fly**

Two particularly recent damage awards of significance in Ontario are *Cowles v. Balac*<sup>1</sup>, known as the African Lion Safari case, and *Mustapha v. Culligan of Canada Ltd.*<sup>2</sup>, the fly in the bottle case. *Cowles* was decided on the issue of strict liability where as *Mustapha* dealt with the “thin skull” doctrine.

### ***Cowles v. Balac***

In *Cowles*, a group of Siberian tigers attacked and injured a couple that were driving their car through the African Lion Safari park. The plaintiffs were awarded over \$2.5 million in damages at trial after the Court found that the vehicle’s windows were lowered accidentally. The tiger tried to pull both plaintiffs out and the couple suffered severe physical and psychological injuries as a result of the attack.

In finding the park strictly liable for the injuries sustained by Mr. Balac and Ms. Cowles, MacFarland J. applied the doctrine of *Scienter*, which basically holds that the keeper of a dangerous animal will be held strictly liable for any damages the animal causes, irrespective of a finding of negligence. The Court further found that even if the park was not strictly liable for the incident, it would have still been found liable in negligence and in breach of the *Occupier’s Liability Act*<sup>3</sup>.

The Court rejected the defences raised by the park, namely voluntary assumption of risk, contributory negligence, and intervening act. The Court also refused to deduct

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<sup>1</sup> [2005] O.J. No. 229 (Ont. S.C.J.) [hereinafter *Cowles*].

<sup>2</sup> [2005] O.J. No. 1469 (Ont. S.C.J.) [hereinafter *Mustapha*].

<sup>3</sup> R.S.O. 1990, c. O.2.

from the damage award any collateral benefits received by the plaintiffs on the basis that such a deduction would result in the park inappropriately benefiting from premiums paid by the plaintiffs.

Finally, the Court was of the view that section 267.1 of the *Insurance Act* did not apply because the injuries suffered by the plaintiffs when they were attacked could not be said to arise from the use and operation of an automobile. This case is currently under appeal.

### ***Mustapha v. Culligan***

In *Mustapha*, the plaintiffs were awarded over \$300,000 in damages at trial after they discovered a dead fly in a bottle of drinking water supplied to them by the defendant, Culligan. The plaintiffs sued for negligence and breach of contract, alleging that as a result of discovering the dead fly in the bottle, which had an internal seal that had not yet been broken, they suffered nervous shock, emotional distress, anxiety, depression and physical and psychological injuries. As a result of the incident, Lynn Mustapha gave birth prematurely and Marin Mustapha developed a phobia of bathing.

In finding the defendant, Culligan, liable, the Court refused to make any deduction for the possibility of injury from some other cause. Brockenshire J. surmised that the outcome of the case depended on a finding being made on the credibility of Martin Mustapha. In this regard, the Court found that the plaintiffs were credible and refused to accept the defence psychiatrist's diagnosis that Ms. Mustapha was a malingerer. The plaintiffs' expert evidence was accepted and the Court held that there was a presumption of negligence on Culligan because there was an injurious substance in

the bottle. The Court concluded that Culligan was unable to disprove the presumption and consequently found that Culligan had breached its duty of care to the plaintiffs.

In reaching its conclusion, the Court applied *Athey v. Leonati* and found that Mr. Mustapha was a “thin skull” victim and that the fly in the bottle materially contributed to his injuries. General damages were assessed at \$80,000 and special damages for the cost of treatment were assessed at \$24,174. In addition, past economic loss and future economic loss were assessed at \$237,600. This case is also under appeal.

Under the tort principle of remoteness, a defendant will be held liable to pay for the results of a physical injury which triggers mental suffering or a nervous disorder, even if the results are more serious than one might expect. Of interest, however, in this case is the failure it seems of the trial judge to consider and apply the principle that,

[t]he law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals... [B]efore a defendant will be held in breach of a duty to a bystander he must have exposed them to a situation in which it is reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury.<sup>4</sup>

### **Damages for Wrongful Birth**

Two particularly recent damage awards of significance from British Columbia are *Bevilacqua v. Altenkirk*<sup>5</sup> and *Roe v. Dabbs*<sup>6</sup>. Both cases dealt with a newly formulated approach to assessing damages for wrongful birth.

### ***Bevilacqua v. Altenkirk***

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<sup>4</sup> *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 at 58.

<sup>5</sup> [2004] B.C.J. No. 1473 (B.C. S.C.) [hereinafter *Bevilacqua*].

<sup>6</sup> [2005] B.C.J. No. 1485 (B.C. S.C.) [hereinafter *Roe*].

In *Bevilacqua*, the plaintiff mother was awarded \$30,000 and the plaintiff father \$20,000 in non-pecuniary damages for the wrongful birth of their healthy child. The claim arose out of the defendant doctor's failure to properly read a laboratory report of the plaintiff father's sperm count following a vasectomy. The plaintiffs subsequently stopped using birth control and the plaintiff mother conceived a healthy child. The most contentious issue before the court was the quantification of damages in a wrongful birth of a healthy child. The defendant argued contributory negligence on the basis that the plaintiff father failed to return to his urologist for a post-operative examination. However, the Court rejected this argument and the defendant was found 100 percent liable.

***Roe v. Dabbs***

In *Roe*, the plaintiff sued for a failed therapeutic abortion that resulted in the birth of her child. In particular, the plaintiff alleged that the physician was negligent in the performance of the abortion and in providing proper instructions for follow-up after the procedure was completed. The defendant physician argued that he met the standard of care in both instances, but that in the alternative, the plaintiff was contributorily negligent. The Court concluded that the defendant breached the duty of care he owed the plaintiff in performing the procedure and awarded the plaintiff \$55,000 for non-pecuniary damages and \$5,000 for income loss.

The significance of these two British Columbia decisions is that they have unanimously rejected the previously accepted approaches to an assessment of damages

for wrongful birth cases. The four traditional approaches to assessing damages for wrongful birth are:

- 1) Total recovery: Recovery for full cost of raising a child;
- 2) Offset/benefits: Recovery for cost of raising a child, with deduction for benefits that the parents are found to receive as a result of the child's birth;
- 3) No recovery: No recovery based on the rationale that birth is a blessing for the parents and should not properly result in the assessment of damages; and
- 4) Limited damages: Recovery for the pregnancy, the childbirth, and the costs of initially accommodating the newborn child, but no recovery for the costs of raising the child.

After analyzing and rejecting these four approaches, the Courts in *Bevilacqua* and *Roe* adopted a method similar in some respects to the English approach of awarding a “conventional” award for wrongful birth. This “conventional” award is meant to signify some measure of recognition of the wrong done, which is to be in addition to an award for pain and suffering attributable to the pregnancy and trauma of childbirth.<sup>7</sup> The Courts in *Bevilacqua* and *Roe* awarded the plaintiffs non-pecuniary, rather than pecuniary damages. In arriving at this new method and in trying to adequately assess an appropriate quantum of damages, the Court in *Bevilacqua* stated:

While there is no completely adequate method of assessing damages for wrongful birth, it is my view that the appropriate method of assessment is one that treats the damages as essentially non-pecuniary in nature. While the redistribution of economic resources within the family may

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<sup>7</sup> This approach is outlined in a 2003 House of Lords decision: *Rees v. County Durham & Darlington Memorial Hospital N.H.S. Trust*, [2003] UK HL 52 (JL).

be a factor in assessing those damages, that redistribution should not itself be treated as if it were simply a pecuniary loss. The lifestyle re-adjustments necessary to effect the redistribution of resources are simply an aspects of non-pecuniary damages.

I do not believe that such an approach need amount to placing a value on the life of the child. The law does not assume that the child is less worthy by awarding the child's parents a level of compensation for his or her birth and upbringing. It merely recognizes that, valued as the child may be, the child's parents face burdens (including the burden of stretching economic resources) in bearing and raising him or her.

It might be argued that any figure chosen as "adequate to compensate the plaintiffs" will be arbitrary. To some degree, that is true. It is equally true, however, whenever the court assesses non-pecuniary damages. Once it is accepted that damages for wrongful birth are not properly characterized as "pecuniary", it follows that the assessment will not have a purely mathematical basis. The court must instead draw on the general considerations that inform all awards of general damages.<sup>8</sup>

It would be interesting to see how Canadian courts take to this new approach and whether it would be adopted and/or preferred over the previous four approaches to wrongful birth damages. It would also be interesting to see how Courts *quantify* non-pecuniary damages in wrongful birth cases and whether they would do so on the basis of the child's characteristics (i.e. sex, disability, race, etc.). This, in turn, could raise constitutional and public policy issues that may further complicate the Courts' ability to adequately rationalize an award of non-pecuniary damages in wrongful birth cases.

### **Liability of Public Bodies**

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<sup>8</sup> *Supra* note 3 at 182-184.

*Finney v. Barreau du Quebec*<sup>9</sup> is a very recent and significant case that originated in Quebec and made its way all the way up to the Supreme Court of Canada. It dealt with the issue of attaching liability to public regulatory bodies.

Prior to *Finney*, Canadian cases such as *Cooper v. Hobart*<sup>10</sup>, *Edwards v. LSUC*<sup>11</sup>, *Rogers v. Fraught*<sup>12</sup>, *V.M. v. Stewart*<sup>13</sup> and *Carlstrom v. Professional Engineers of Ontario*<sup>14</sup> made it clear that any action against regulatory bodies for negligence would be very difficult to sustain. In particular, the Supreme Court of Canada in both *Hobart* and *Edwards* held that a duty of care would rarely be found to be owing to individuals by such bodies and that even if the first branch of the *Anns* test could be satisfied, it would probably be negated by residual policy considerations under the second branch of *Anns*.

In addition, regulatory bodies protected by statutory immunity provisions, such as Section 38 of the *RHPA*<sup>15</sup>, or Section 9 of the *Law Society Act*<sup>16</sup> have an extra layer of protection that can only be overcome if it could be proven that the regulatory body in question did not exercise its powers in “good faith”.

### ***Finney v. Barreau du Quebec***

In *Finney*, the respondent sued the appellant, Barreau du Quebec, for damages for breach of its obligation to protect the public in its handling of complaints made against her former solicitor. The governing legislation was the *Professional Code*, which governed the Barreau and activities of professional orders in Quebec.

Although *Finney*’s action was dismissed at trial, the Quebec Court of Appeal allowed the appeal and awarded her \$25,000 in moral damages. The Supreme Court of Canada upheld the Court of Appeal’s decision and found the Barreau liable in negligence.

In its argument before the Supreme Court, the Barreau relied on Section 193 of the *Professional Code* – an immunity provision which,

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<sup>9</sup> [2004] S.C.J. No. 31 (S.C.C.) [hereinafter *Finney*].

<sup>10</sup> [2001] 3 S.C.R. 537 (S.C.C.) [hereinafter *Cooper*].

<sup>11</sup> [2001] 3 S.C.R. 562 (S.C.C.) [hereinafter *Edwards*].

<sup>12</sup> [2001] O.J. No. 850 (Ont. S.C.J.) [hereinafter *Rogers*].

<sup>13</sup> [2004] B.C.J. No. 1852 (B.C. C.A.) [hereinafter *V.M.*].

<sup>14</sup> [2004] O.J. No.680 (Ont. S.C.J.) [hereinafter *Carlstrom*].

<sup>15</sup> *Regulated Health Professions Act*, S.O. 1991, C.18.

<sup>16</sup> *Law Society Act*, R.S.O. 1990, c. L.8.

prohibits prosecutions of professional orders and their officers and staff for acts engaged ‘in good faith in the performance of their duties’ or functions.<sup>17</sup>

However, in dismissing the Barreau’s appeal, the Supreme Court held that,

it would be contrary to the fundamental objective of protecting the public if this immunity provision was interpreted as requiring evidence of malice or intent to harm in order to rebut the presumption of good faith. Therefore, **the concept of bad faith had to be given a broader meaning to include serious carelessness and recklessness.**<sup>18</sup>

The Supreme Court, therefore, effectively broadened the term “bad faith”, or what constitutes lack of “good faith”, to include “serious carelessness or recklessness.”<sup>19</sup> This expansion may make it easier to pierce the shielding provisions that protect many regulatory bodies and allow for new actions in negligence to overcome the very high bar that has been historically set by these provisions.

However, the Supreme Court went further in its decision. In addition to the expansion of what constitutes “bad faith”, the Court also considered whether a duty of care *could* in fact be imposed on public bodies. In this regard, the Court held that,

the decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.<sup>20</sup>

Thus, the Court appears to have effectively opened the door to actions of negligence against public regulatory bodies in circumstances where seriously careless and/or reckless conduct towards a specific individual, or group of individuals could be established. The question now becomes how far will the courts go in such negligence actions to allow success against such bodies and whether the legislature will attempt to contain any such claims.

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<sup>17</sup> *Ibid.* at 30.

<sup>18</sup> *Ibid.* at 40 (emphasis added).

<sup>19</sup> *Ibid.* at 39.

<sup>20</sup> *Ibid.* at 46.

### **Novel Head of Damage**

In *Walker v. Ritchie*<sup>21</sup>, the plaintiff was a 17-year-old girl who was injured in a motor vehicle accident. The trial judge found the driver of a tractor-trailer and his employer liable for the accident. He awarded the plaintiff, among the various heads of damage, \$125,000 for her “loss of future interdependent relationship”. The trial judge explained this award in his decision as follows:

This is a heading of future pecuniary loss, based on the proven and well known fact that two people can live together less expensively than they can live apart. This is a relatively new head of damages, but at the same time has been discussed frequently enough to acquire the acronym L.O.I.R.<sup>22</sup>

The Ontario Court of Appeal commented that this award represented compensation for future financial loss as a result of losing the ability to “share a household with a partner”<sup>23</sup>, thus losing the “opportunity to share household expenses”<sup>24</sup>. The Court acknowledged that this is not a new head of damage and that it has been accepted in the past. While the appellants argued that such an award should be assessed globally and incorporated under the heading of “loss of future earning capacity”, the Court of Appeal disagreed. It upheld the trial judge’s decision to award damages under this specific head of damage, while taking into account various contingencies in order to avoid double recovery. The Court surmised that the plaintiff’s loss of a future interdependent

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<sup>21</sup> [2005] O.J. No. 1600 (Ont. C.A.) [hereinafter *Walker*].

<sup>22</sup> *Walker v. Ritchie*, [2003] O.J. No.18 at 188.

<sup>23</sup> *Supra* note 19 at 54.

<sup>24</sup> *Ibid.*

relationship should be “measured by the loss of the contribution that she would have received but for the accident”<sup>25</sup>.

## **B) LATEST CASES DEALING WITH ECONOMIC LOSS**

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## **C) PUNITIVE DAMAGES IN A *POST-WHITEN V. PILOT CANADA*: STEPS YOU CAN TAKE TO LIMIT YOUR EXPOSURE**

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Punitive damages have been said to be “straddling the divide between civil law and criminal law”<sup>26</sup> in that they punish a defendant for egregious conduct through financial penalties. Their purpose is to censure deplorable and highly offensive behaviour, while providing express denunciation of such conduct. Punitive damages are an exception to the general common law rule that damages are designed to compensate an injured party, not punish the wrongdoer<sup>27</sup>, and unlike aggravated damages, which focus on the plaintiff’s loss, punitive damages focus specifically on the defendant’s conduct.

### ***Whiten v. Pilot Insurance (2002, S.C.C.)***

In 2002, the Supreme Court of Canada affirmed this principle in *Whiten v. Pilot Insurance Co.*<sup>28</sup> and upheld a jury award of punitive damages in the amount of \$1 million against an insurance company for breaching its good faith obligation to its insured.

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<sup>25</sup> *Ibid.*

<sup>26</sup> B. Chapman, “Punitive Damages as Aggravated Damages: The Case of Contract” (1990) 16 Can. Bus. L.J. 36.

<sup>27</sup> *Vorvis v. Insurance Corporation of British Columbia*, [1989] 58 D.L.R. (4th) 193.

<sup>28</sup> [2002] 1 S.C.R. 595 (S.C.C.) [hereinafter *Whiten*].

Although a decision familiar to most by now, the facts in *Whiten* involve a family whose home burned down in the middle of a January night in 1994 by a fire that was investigated and concluded to be accidental. Pilot Insurance, the defendant, made a single payment in the amount of \$5,000 for living expenses and paid the rent for the small cottage that the family subsequently rented for several months following the accident. Struggling financially, the Whitens commenced an action against their insurer, claiming approximately \$345,000.

The jury awarded the family \$1 million in punitive damages. The decision was appealed and the Ontario Court of Appeal reduced the award to \$100,000. The Supreme Court of Canada subsequently restored the jury's award and in what became a landmark decision, the Court provided the following framework in determining when punitive damages are appropriate<sup>29</sup>:

- Punitive damages are very much the exception rather than the rule;
- They should be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
- Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant for the misconduct in question;

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<sup>29</sup> *Supra* note 8 at 94.

- Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation;
- Their purpose is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
- Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and they are given in an amount that is no greater than necessary to rationally accomplish their purpose;
- While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages; and,
- Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

### ***Post-Whiten***

Some have predicted that as a result of the *Whiten* decision there would be an increase in claims for punitive damages<sup>30</sup>, particularly in first-party insurance contract

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<sup>30</sup> Insurance Bureau of Canada, "Whiten v. Pilot Award for Punitive Damages", (February 27, 2002) Bulletin No. Ontario 469.

disputes, as well as in relation to intentional torts such as libel and assault, negligence, and even claims in nuisance.<sup>31</sup> Others, however, predicted that as Canadian jurisprudence on punitive damages develops, stricter guidelines and limitations might be imposed in order to maintain some degree of control over the astronomical amounts awarded in such cases. A review of post-*Whiten* cases indicate that punitive damage awards may indeed be on the rise in both quantum and prevalence, as juries appear more inclined to punish egregious and highly offensive conduct by insurers towards their insureds.

***Khazzaka v. Commercial Union (2002, Ont. C.A.)***

In *Khazzaka (c.o.b. E.S.M. Auto Body) v. Commercial Union Assurance Co. of Canada*<sup>32</sup>, a jury awarded the plaintiff \$200,000 in punitive damages against the defendant insurer for its conduct in handling a \$157,000 claim that arose out of a fire that damaged his auto repair shop. Although the trial judge did not feel that the facts of the case were comparable to those in *Whiten*, the Court, nonetheless, ruled that the conclusions arrived at by the jury were “within the scope of what a reasonable jury could conclude.”<sup>33</sup>

The Ontario Court of Appeal concluded that the insurer “persisted over a three-year period in resisting what it should have known was a valid claim.”<sup>34</sup> Following a review of the evidence and facts of the case, the Court dismissed the insurer’s appeal and held that the defendant learned “nothing from the example of *Whiten*”<sup>35</sup>.

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<sup>31</sup> R. Oatley, “Punitive Damages in Canada: *Whiten v. Pilot Insurance*, “The insurer from hell” (2002) 21 Advocates’ Soc. J. No.3, 14-16.

<sup>32</sup> [2002] O.J. No. 3110 (Ont. C.A.) [hereinafter *Khazzaka*].

<sup>33</sup> *Khazzaka (c.o.b. E.S.M. Auto Body) v. Commercial Union Assurance Co. of Canada*, [1999] O.J. No. 3583 at paras. 13 and 14.

<sup>34</sup> *Ibid.* at para. 20.

<sup>35</sup> *Ibid.*

*Ferme v. Grenville (2002, Ont. C.A.)*

In *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.*<sup>36</sup>, the plaintiff carried on a family dairy business, which burned as a result of a fire that broke out in the barn. By the end of the trial, the defendant insurer had paid out \$1.17 million, but the plaintiffs then added an additional claim for punitive damages in the amount of \$700,000. The jury found in favour of the plaintiff on the issue of punitive damages, but the award was subsequently appealed and was set aside on grounds that no reasonable jury, properly instructed, could have concluded that this award was rationally required in order to punish the defendant.

Speaking for the majority of the Ontario Court of Appeal, Madam Justice Charron held that a properly instructed jury could have concluded that the defendant had breached its good faith duty and thought the jury in this case was properly instructed on the exceptional nature of the remedy. In particular, the Court held that,

The implied obligation to act in good faith has been extended beyond mutual disclosure requirements in relation to the nature of the risk being undertaken. In particular, the courts have recognized that the insured, having suffered a loss, will frequently be in a vulnerable position and largely dependent upon the insurer to provide relief against the financial pressure occasioned by the loss underlying the claim. **Hence the obligation to act in utmost good faith required an insurer to act promptly and fairly at every step of the claims process.**<sup>37</sup>

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<sup>36</sup> [2002] O.J. No. 3588 (Ont. C.A.) [hereinafter *Ferme*]. Appeal to the Supreme Court was dismissed without reasons.[2002] C.S.C.R. no. 488.

<sup>37</sup> *Ibid.* at 482 (emphasis added).

However, the Court also stated that no reasonable jury, properly instructed, could conclude that the conduct in question was so outrageous or extreme as to warrant punishment. In allowing the appeal and setting aside the punitive damages award, Madam Justice Charron stated that,

This was a hard-fought commercial dispute between two sophisticated parties. Although it was open to the jury to disapprove of the position taken by the defendant in the overall negotiation of the contentious parts of the claim, and even to find that in some respects it had breached its duty of good faith in failing to pay what was clearly owed under the policy, the evidence could not reasonably support the finding that an award of punitive damages, let alone in the amount of \$750,000, was rationally required to punish the misconduct.<sup>38</sup>

Dissenting in part, Weiler J.A. stated that the jury in *Whiten* was also not instructed on the nature of the independent wrong, yet both the appellate and the Supreme Court in that case found the jury instructions sufficiently adequate regarding this point.<sup>39</sup> He further stated that although punitive damages were appropriate in this case, he would have set the award at \$200,000.<sup>40</sup> The Supreme Court dismissed the appeal without reasons.

### ***Mazza v. Hamilton Township Mutual***

In *Mazza v. Hamilton Township Mutual Insurance Co.*<sup>41</sup>, a jury in St. Catharines set the *Whiten* award in its shadows by awarding \$2.5 million in punitive damages against an insurer for its malicious and high-handed conduct towards its insured. The case involved a mushroom farmer whose farm operation had been destroyed by fire. The

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<sup>38</sup> *Ibid.* at 483.

<sup>39</sup> *Ibid.* at 115.

<sup>40</sup> *Ibid.* at 156.

<sup>41</sup> [2004] O.J. No. 3335 (Ont. S.C.J.) [hereinafter *Mazza*].

insurer, while claiming arson as the cause of the fire, refused to pay the insured even after the investigation failed to substantiate arson. The insurer proceeded to raise alternate defences, all of which failed. This case is currently under appeal.

***Tips on How to Limit Your Exposure to Punitive Damages***

In order to limit your exposure to punitive damage, you must, as an insurer, keep in mind your duty of good faith to your insured. In particular, you should correspond with your insured in a timely manner and document each step that you take in handling the claim. If you experience delay, make sure to correspond with your insured on a regular basis and advise him/her of the reasons and estimated length of the delay. Ensure that your investigation of the loss is fair and adequate and be as objective as you can with respect to the evidence of the loss. If you rely on surveillance or investigation reports, make sure to review the unedited surveillance to ensure that nothing was missed in the reports. If you decide to deny the claim, make sure you outline the reasons for the denial clearly and in writing, setting out in full any statutory or policy authority for the denial. Lastly, remember to be professional and fair in your dealings with your insured.

Another fallout of the *Whiten* decision is the extent to which plaintiffs ought to be able to go into the general business affairs of insurers in order to gather evidence for any punitive damages claim. The post-*Whiten* jurisprudence contains two opposing streams of cases on this issue. For a general discussion, see Rudy Buller, *Insurers' Discovery Obligations in the Context of Bad Faith Claims* (2003), 27 *Advocates' Quarterly* 49-70.

**D) AUTO INSURANCE THRESHOLD ISSUES: IS THE IMPAIRMENT**

## **SERIOUS ONLY IF IT AFFECTS THE INSURED'S EMPLOYMENT**

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In *Meyer v. Bright* (1993)<sup>42</sup>, the Ontario Court of Appeal set forth a three-pronged test for determining whether a person has suffered a “permanent serious impairment”:

1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
2. If the answer to question number 1 is yes, is the bodily function, which is permanently impaired, an important one?
3. If the answer to question number 2 is yes, is the impairment of the important bodily function serious?

This test, although formulated under the regime of the OMPP, continue to apply to cases under Bill 59, which is a no-fault regime that applies to motor vehicle accidents occurring after November 1, 1996.

In Court of Appeal in *Meyer* provided an analysis with respect to what constitutes a “serious impairment” under the *Insurance Act*<sup>43</sup>. The Court stated that,

Generally speaking, a serious impairment is one which causes **substantial interference** with the ability of the injured person to perform his or her usual daily activities **or** to continue his or her regular employment.<sup>44</sup>

The Court distinguished between an impairment that interferes with an injured person's performance of daily activities and an impairment that interferes with an injured person's

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<sup>42</sup> (1993), 15 O.R. (3d) 129 (Ont. C.A.) [hereinafter *Meyer*].

<sup>43</sup> R.S.O. 1990, C. I.8 [hereinafter *Act*].

<sup>44</sup> *Ibid* at 158 (emphasis added).

regular employment. Subsequent case law, such as *Bridgewater v. James*<sup>45</sup>, *East v. Waheed*<sup>46</sup> and *Pinchera v. Langille*<sup>47</sup> has confirmed *Meyer's* threshold analysis and applied its criteria consistently.

The issue of whether an impairment is serious must be examined in two contexts: where an insured was *not* employed prior to the accident, and where an insured *was* employed prior to the accident.

### ***Not Employed Prior to the Accident***

In cases where an injured person was not employed prior to his/her accident, the Court would obviously not look at his/her employment records to determine whether s/he has suffered a “serious impairment”. The Ontario Court of Appeal in *Meyer* has specifically distinguished between interference to one’s regular employment and one’s ability to perform his or her usual daily activities. This distinction presumably safeguards unequal treatment between individuals who are employed and those who are not.

For instance, in *Snider v. Salerno*<sup>48</sup>, the Court was faced with a 70-year old plaintiff who sustained a serious whiplash injury in a motor vehicle accident. She was retired and a highly skilled Bridge player. In finding that she suffered a “serious impairment”, Killeen J. stated:

Clearly, her injuries and their after-effects are permanent for the rest of her life, in my view, on the evidence of the doctors whose evidence I accept for the purposes of this issue. Clearly, the injuries relate to important physical and psychological functions. If they do not, nothing does. She

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<sup>45</sup> [2004] O.J. No. 5282 (Ont. S.C.J.) [hereinafter *Bridgewater*].

<sup>46</sup> [2004] O.J. No. 924 (Ont. S.C.J.) [hereinafter *East*].

<sup>47</sup> [2005] O.J. No. 521 (Ont. S.C.J.) [hereinafter *Pinchera*].

<sup>48</sup> (2001), 58 O.R. (3d) 209 (Ont. S.C.J.) [hereinafter *Snider*].

will be left with chronic pain in her neck, back, and head, through the headaches, for the rest of her life; and the pain is of such an order and magnitude that it can be said to be disabling in a significant way; and from my perspective, a serious way that is, that it is a serious impairment of those functions.<sup>49</sup>

The Court in this case examined the effect that the plaintiff's injuries had on her daily activities and determined that she had met the threshold test set out in *Meyer*. It was irrelevant that she was unemployed at the time of the accident.

Strictly speaking, then, the question of whether an impairment is serious only if affects an injured person's employment must be answered in the negative. Any contrary assertion would be highly prejudicial to retirees, infants, disabled individuals, etc.

However, in circumstances where an individual had been working prior to his/her accident, the Court would analyze the *degree of interference* to that individual's regular employment resulting from the injuries sustained as a result of the accident.

### ***Employed Prior to the Accident***

In *Meyer*, the Court of Appeal stated that,

Where... permanent impairment of an important bodily function frustrates the chosen career path of an injured person we think the impairment is properly described as being a serious one for that person.<sup>50</sup>

This wording implies a continuum, or range of impairment that may exist with respect to employment in the context of a threshold injury. Where a person has not returned to work due to his/her injuries, the test for "serious impairment" can more easily be met.

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<sup>49</sup> *Ibid.* at 3.

<sup>50</sup> *Supra* note 20 at 158.

However, where an individual has returned to work by the time of trial, the analysis becomes highly factual and case-specific.

For instance, in *Bridgewater*, the Ontario Superior Court was faced with a motion by the defendant for a determination of whether the plaintiff had met the threshold requirements under Section 267.5(5). Siegel J. applied the test enunciated in *Meyer* and in examining the issue of the plaintiff's employment, stated:

By "continuity of employment", I believe the Court of Appeal [in *Meyer*] meant the ability to continue in the same position or, at least, employment of the same nature. I do not believe that the Court of Appeal meant the mere ability to work every shift in a month. In other words, **the test can only be met if it can be demonstrated that the extent and regularity of the employee's lost time resulted, or will result, in a termination of employment or other involuntary retirement of the employee.**

In this action, the plaintiff's evidence falls well short of satisfying this test. For this purpose, the following observations are relevant. First, the impact on the plaintiff's employment that has been demonstrated, as discussed above, falls well below the standard of affecting the continuity of employment for the following three reasons. The **impairment has not adversely affected her annual income**, which is currently higher than it was before the 1998 accident. The plaintiff acknowledged that she is, in fact, **working more hours on a full-time basis more consistently** than she had before the 1998 accident. In addition, the plaintiff could make up the average amount of lost time reflected in these records by working an additional shift in the course of the month. Lastly the evidence of **both the plaintiff and her employer satisfies me that her impairment does not, in any way, jeopardize the plaintiff's current employment.**

Second, however, even if the plaintiff had been able to establish a loss of employment time representing, on average, between two and three days per month, the plaintiff would not have satisfied the test in *Meyer v. Bright*. **Again, the test would only be met if the extent of**

**the regularity of the employee's lost time resulted, or will result, in a termination of employment or other involuntary retirement of the employee.**<sup>51</sup>

While this Court's interpretation of the test in *Meyer* vis-à-vis employment is fairly stringent, other cases, such as *Perger (Litigation guardian of) v. Olsen*<sup>52</sup>, do not appear to require such drastic effects on a person's employment in order to satisfy the threshold criteria as set out in *Meyer*.

In *Perger*, the plaintiff brought a motion for a declaration that injuries constituted a "permanent serious impairment". He taught cooperative education at the high school level and coached sports teams. In reviewing the effect of the injuries on the plaintiff's employment, the Court stated:

School records show that he was off sick 17.5 days during the 1998-99 school year; 11.5 days during 1999-2000; 17 days in 2000-2001 (taking only 3 days off after the accident); and 26 days during 2001-2002, with a concentration of days being taken after he complained to his family doctor of difficulty sleeping in April, 2002. He took all but a few weeks off during the 2002-2003 school year, **returning to work full time in June of 2003.**<sup>53</sup>

The Court further commented that the plaintiff did not lose income as a result of his absences at school, "as he was able to draw on his sick days through work"<sup>54</sup>. However, despite having found that the plaintiff returned to work following the accident, and despite having found that he suffered no income loss, the Court still held that his

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<sup>51</sup> *Supra* note 22 at 55-58 (emphasis added).

<sup>52</sup> [2004] O.J. No. 4604 (Ont. S.C.J.) [hereinafter *Perger*].

<sup>53</sup> *Ibid.* at 8 (emphasis added).

<sup>54</sup> *Ibid.* at 16.

impairment substantially interfered with his usual daily activities and altered his entire attitude to life, work, family and friends.

Thus, it seems that Courts apply a contextual approach to the determination of threshold injuries. In particular, Courts may not accept a change of attitude to one's regular employment as sufficient to prove "serious impairment", but a change of attitude to one's regular employment, coupled with substantial interference to one's usual daily activities stands a better change of satisfying the test.

In another recent case, *Brunetta v. Brampton (City)*<sup>55</sup>, the plaintiff was injured in a motor vehicle accident. The defendant argued that although the plaintiff could not work as a master electrician after the accident, his business had nevertheless grown and his income increased since the accident. The defendant, therefore, argued that the plaintiff's injuries did not cause "substantial interference" with his ability to continue his regular employment and that he did not suffer a "serious impairment". The Court disagreed and stated:

In this case I accept that Brunetta must continue to deal with ongoing pain and discomfort in his left foot after a day's work. He is unable to stand or crouch repeatedly or for lengthy periods of time because of the pain and discomfort it causes in his foot. These are usual and necessary activities for an electrician. They were also the regular pre-accident activities of the plaintiff. The pain and discomfort have significantly affected the way he works. He is unable to do some of the heavy work himself and he has had to hire help to assist him. As a result, I find that his ability to work as a master electrician is compromised and he is unable to work full time at the work of master electrician. I accept that he would only be able to do that type of work part time because his ability to walk, crouch and to stand, particularly on ladders has been limited by his pain and discomfort. I agree that he has managed to adapt

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<sup>55</sup> [2004] O.J. No. 2239 (Ont. S.C.J.).

his employment to more of a business owner rather than a master electrician. However, in my view the injury has substantially interfered with his ability to continue with his regular pre-accident activities, both in his leisure golfing and in his work related duties. I therefore find that the permanent impairment of the important function is also serious.<sup>56</sup>

The Court thus treated the plaintiff's increase in income and business success as irrelevant for the purpose of determining whether he suffered a "serious impairment". The key consideration is whether the plaintiff's regular employment has been substantially affected by the injury sustained as a result of the accident.

These cases, therefore, suggest that mere interference with a person's regular employment is not, in itself, sufficient to satisfy the "serious impairment" criteria, as set out in *Meyer*. Instead, there must be substantial interference with the person's regular employment and such a finding depends on the facts of each case and the context in which those injuries have been sustained.

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<sup>56</sup> *Ibid.* at 28.