Whiten v. Pilot Insurance Co. et al.*

[Indexed as: Whiten v. Pilot Insurance Co.]

42 O.R. (3d) 641
[1999] O.J. No. 237
Docket No. C23973

Court of Appeal for Ontario
Finlayson, Catzman and Laskin JJ.A.
February 5, 1999

*Application for leave to appeal to the Supreme Court of Canada was allowed February 22, 2002 (McLachlin C.J.C., L'Heureux-Dub, Gonthier, Major, Binnie and Arbour JJ. (LeBel J. dissenting on appeal)). S.C.C. File No. 27229. S.C.C. Bulletin, 2002, p. 294.

Damages -- Punitive damages -- Insurer denied claim under fire insurance policy on basis of arson in face of overwhelming evidence that fire accidental -- Insurer's breach of implied term of insurance contract to act in good faith constituting separate actionable wrong -- Conduct of insurer reprehensible -- Award of punitive damages against insurer appropriate -- Damage award of $1 million excessive -- Damages reduced on appeal to $100,000.

The plaintiff's home and its contents were insured under a homeowner's policy issued by the defendant. When the house and its contents were destroyed in a fire, the plaintiff claimed for the fire loss under the insurance policy. The defendant refused to pay, alleging arson, even though it had opinions from its adjuster, its expert engineer, an investigative agency retained by it and the fire chief that the fire was accidental. After receiving a strong recommendation from its adjuster that the claim be paid, the defendant replaced the adjuster. Counsel

for the defendant pressured the defendant's experts to provide opinions supporting an arson defence, deliberately withheld relevant information from the experts and provided them with misleading information to obtain opinions favourable to its arson theory. After the fire, the plaintiff and her husband were unemployed and on welfare. The defendant at first paid the rent on a cottage into which the plaintiff and her husband moved after the fire, but later stopp ed the rent payments without advising the plaintiff that it intended to do so. The plaintiff brought an action on the policy and also claimed punitive damages for bad faith dealing on the part of the defendant. The defendant maintained its defence of arson throughout a four-week trial. The jury found in favour of the plaintiff and awarded punitive damages in the amount of $1 million. The defendant appealed the award of punitive damages, arguing that punitive damages should not have been awarded and alternatively that the jury's assessment was excessive.

Held, the appeal should be allowed.

Entitlement to punitive damages

Per Laskin J.A. (Finlayson and Catzman JJ.A. concurring): For an award of punitive damages to be made, two requirements must be met: first, the defendant must have committed an independent or separate actionable wrong causing damage to the plaintiff; and second, the defendant's conduct must be sufficiently harsh, vindictive, reprehensible and malicious that it offends the court's sense of decency.

A contract between an insurer and its insured is one of utmost good faith. Although the insurer is not a fiduciary, it holds a position of power over an insured; conversely, the insured is in a vulnerable position, entirely dependent on the insurer when a loss occurs. For these reasons, in every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith. That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy. An action for dealing with an insurance claim in bad faith is different from an action on the policy for damages for the

insured loss. Breach of an insurer's obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid.

The evidence overwhelmingly showed that the defendant handled the plaintiff's claim unfairly and in bad faith; that it deliberately ignored any opinion that would oblige it to comply with its contractual obligation to pay the claim; and that it abused its financial position and contrived an arson defence to avoid payment of the claim or, at least, to force a significant compromise. The defendant's conduct was reprehensible. An award of punitive damages was fully justified.

Quantum of punitive damages

Per Finlayson J.A. (Catzman J.A. concurring): The award of $1 million in punitive damages was excessive. 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. There was no justification for such a radical departure from precedent as was represented by the award of the jury in this case. There was nothing in the evidence to suggest that the conduct of the defendant was the product of a corporate strategy to avoid payment of all policy claims or to discourage its insureds from making claims. Rather, it appeared to have been an isolated instance for which the defendant's trial counsel should take full responsibility, both for the manner in which the claim was processed and because of the way that the trial was conducted. This case did not demonstrate that there was such insidious, pernicious and persistent malice as would justify an award of this magnitude. Nor did the defendant profit by its intransigence. An award of $100,000 would be sufficient to act as a deterrent to the defendant.

Per Laskin J.A. (dissenting): The jury's assessment was entitled to deference on appeal. An appellate court should intervene only if the award was unreasonable or served no rational purpose. The award in this case served a rational purpose. It served to punish the defendant for its outrageous conduct in maintaining an unsupportable arson defence and to deter the defendant and other insurers from this kind of

conduct in the future. An important consideration in assessing the reasonableness of the award was the extent of the defendant's reprehensible conduct. The award should be proportional to the gravity of the wrong. Vindicating the goal of deterrence is especially important in first party insurance cases. A significant award was needed to deter the defendant and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes. The financial worth of the defendant was relevant to the reasonableness of the award. To be meaningful, an award of punitive damages cannot be perceived as a mere licence fee or as a cost of doing business. The defendant admitted at trial that it had a net worth of $231 million. For a company with such a substantial net worth, an award of $50,000, or even $100,000, was not likely to act as a deterrent. In recent years, both the courts and the legislatures have increased the amount of fines for companies who have acted irresponsibly or contrary to the public interest. This trend reflects an acknowledgment by judges and legislatures that larger fines are needed to deter and punish companies for socially unacceptable behaviour.

Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 36 B.C.L.R. (2d) 273, 58 D.L.R. (4th) 193, 94 N.R. 321, [1989] 4 W.W.R. 218, 42 B.L.R. 111, 25 C.C.E.L. 81, 90 C.L.L.C. 14,035, apld

Adams v. Confederation Life Insurance Co. (1994), 18 Alta. L.R. (3d) 324, [1994] 6 W.W.R. 662, 25 C.C.L.I. (2d) 180, [1994] I.L.R. 1-3096 (Q.B.); Ferguson v. National Life Assurance Co. of Canada (1996), 36 C.C.L.I. (2d) 95, [1996] I.L.R. 1-3316 (Ont. Gen. Div.), affd (1997), 102 O.A.C. 239; Labelle v. Guardian Insurance Co. of Canada (1989), 38 C.C.L.I. 274, [1989] I.L.R. 1-2465 (Ont. H.C.J.); Pacific Life Insurance Co. v. Haslip, 499 U.S. 1 (1990), consd

Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 34 O.A.C. 241, 59 D.L.R. (4th) 533 (C.A.); Colborne Capital Corp. v. 542775 Alberta Ltd. (1995), 30 Alta. L.R. (3d) 127, [1995] 7 W.W.R. 671, 22 B.L.R. (2d) 226 (Q.B.),

revd [1999] A.J. No. 33 (C.A.); Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865n, 126 D.L.R. (4th) 129, 184 N.R. 1, 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, affg (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 20 C.C.L.T. (2d) 129 (C.A.); Lubrizol Corp. v. Imperial Oil Ltd., [1994] F.C.J. No. 1441 (T.D.), revd [1996] F.C.J. No. 454 (C.A.), distd

Other cases referred to

Atlantic Steel Industries Inc. v. CIGNA Insurance Co. (1997), 33 O.R. (3d) 12 (Gen. Div.); BMW of North America Inc. v. Gore, 116 S.Ct. 1589 (1996 U.S.S.C.); Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 86 A.P.R. 109, 31 D.L.R. (4th) 481, 69 N.R. 321, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161 (sub nom. Central & Eastern Trust Co. v. Rafuse); Crisci v. Security Ins. Co., 66 Cal.2d 425 (1967 S.C.); Dorrough v. Bank of Melbourne Limited (1995), No. Q.G. 196 of 1993 (Fed. Crt. Gen. Div.); Egan v. Mutual of Omaha Insurance Company, 24 Cal.3d (1979); Francis v. Canadian Imperial Bank of Commerce (1994), 21 O.R. (3d) 75, 120 D.L.R. (4th) 393, 7 C.C.E.L. (2d) 1, 95 C.L.L.C. 210-022 (C.A.); Gibson v. Parkes District Hospital (1991), 26 N.S.W.L.R. 9 (App. C.L.); Gruenberg v. Aetna Insurance Company, 9 Cal.3d 566 (1973 S.C.); Janmohamed v. Co-operators General Insurance Co. (1997) , 45 C.C.L.I. (2d) 262 (Alta. Q.B.); Maschke v. Gleeson (1986), 54 O.R. (2d) 753, 16 O.A.C. 227, [1986] I.L.R. 1-2063 (Div. Ct.) (sub nom. Maschke v. Gleeson and State Farm Mutual Automobile Insurance Co.); Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 18 O.R. (3d) 663, 115 D.L.R. (4th) 37, [1994] I.L.R. 1-3067, 56 C.P.R. (3d) 46, 4 E.T.R. (2d) 69 (C.A.) (sub nom. Plaza Fiberglass Manufacturing Ltd. v. New Hampshire Insurance Co.); R. v. B. (S.C.) (1997), 36 O.R. (3d) 516, 119 C.C.C. (3d) 530, 10 C.R. (5th) 302 (C.A.); Ribeiro v. Canadian Imperial Bank of Commerce (1992), 13 O.R. (3d) 278, 44 C.C.E.L. 165 (C.A.), revg (1989), 67 O.R. (2d) 385, 24 C.C.E.L. 225, 89 C.L.L.C. 14,033 (H.C.J.); Silberg v. California Life Insurance Company, 11 Cal.3d 452 (1974 S.C.); Walker v. CFTO (1987), 59 O.R. (2d) 104, 37 D.L.R. (4th) 224, 39 C.C.L.T. 121 (C.A.); Wallace v. United Grain Growers Ltd., [1997] 3 S.C 701, 123 Man. R. (2d) 1, 152 D.L.R. (4th)

1, 219 N.R. 161, 159 W.A.C. 1, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 97 C.L.L.C. 210-029, 3 C.B.R. (4th) 1

Statutes referred to

Occupational Health and Safety Act, R.S.O. 1980, c. 321 (as amended 1990, c. 7, s. 35)

Authorities referred to

Brown, The Law of Defamation in Canada, 2nd ed. (looseleaf), p. 25-124
Fleming, The Law of Torts, 9th ed. (1998), p. 274
Grant and Rothstein, Lawyers' Professional Liability, 2nd ed. (1998), pp. 225-28
Ontario Law Reform Commission, Report on Exemplary Damages (1991), pp. 97-99

APPEAL from an award of punitive damages.

Earl A. Cherniak, Q.C., and Kirk F. Stevens, for appellant.
Gary R. Will and Anil Varma, for respondent.

LASKIN J.A. (dissenting in part): -- Pilot Insurance Company appeals a punitive damages award of $1 million, the largest award in Canada against an insurer for dealing in bad faith with a claim by one of its insureds.

Daphne Whiten owned a home on Old Donald Road in Haliburton County, where she lived with her husband, Keith Whiten. The home and its contents were insured under a homeowner's policy issued by Pilot. In the early morning hours of January 18, 1994, a fire destroyed the Whitens' home and all of their belongings. Daphne Whiten claimed for the fire loss under her insurance policy, but Pilot refused to pay. Pilot alleged arson, even though it had opinions from its adjuster, its expert engineer, an investigative agency retained by it and the fire chief that the fire was accidental. Pilot maintained its

defence of arson throughout a four-week trial before Matlow J. and a jury, although it now concedes that the evidence unequivocally shows the fire was accidental.

The jury assessed damages at $1,287,300 -- $287,300 for the fire loss and $1 million for punitive damages. The trial judge ordered Pilot to pay the costs of the action on a solicitor and his own client scale. Pilot restricts its appeal to whether punitive damages should have been awarded and, if so, the amount of the award. It submits that punitive damages should not have been awarded either because it did not commit "an independent actionable wrong", or because its conduct was not reprehensible enough to justify an award. Alternatively Pilot submits that the jury's assessment was excessive and was influenced by errors in the trial judge's charge. Pilot asks this court to set aside the punitive damages award or reduce it to an amount within the range of $15,000-$25,000.

I would not give effect to Pilot's submissions. In my opinion, Pilot's breach of its obligation of good faith was an independent actionable wrong for which punitive damages could be awarded. Pilot's conduct was so reprehensible that a punitive award was justified; and the amount of the award is supportable in the light of the deference to be accorded to the jury's assessment, the extent of Pilot's reprehensible conduct, the need to deter this kind of conduct and the need to impose a fine that is more than a licence fee. Therefore. I would dismiss the appeal.

OVERVIEW OF THE FACTS

The Whitens bought their home in 1985. It had two storeys, an unfinished concrete basement and a one-storey rear addition. Daphne and Keith Whiten discovered the fire in the rear addition as they were getting ready for bed after midnight on January 18, 1994. They fled their home wearing only their night clothes into a night temperature of -18C. Their three pet dogs escaped but their three cats died in the fire. Keith Whiten suffered a serious case of frost bite for which he was treated at the local hospital. He was confined to a wheelchair for two weeks. The fire totally destroyed the Whitens' house and

contents, including a number of valuable antiques and many items of sentimental value.

The origin of the fire was never determined. But everyone who investigated the fire in the six months after it occurred concluded that it was accidental. The first to investigate were the fire chief and the firefighter called to the scene; both considered the fire accidental. Because they did not suspect arson, they did not ask the Fire Marshal's office to investigate.

Pilot then retained Derek Francis, an experienced independent insurance adjuster, to investigate the loss. Francis inspected the site of the fire, interviewed the Whitens, who told him they had been unemployed and had financial difficulties, and also spoke to the firefighter about the speed of the fire, an important factor in determining whether the fire was deliberately set. The physical evidence and the Whitens' conduct satisfied Francis that the fire was accidental. He reported to Pilot on February 3, 1994: "All of the factors served to confirm that this is an accidental fire and there is no suspicion of arson on behalf of the insureds or any members of their family."

Francis continued to investigate. He verified that although the mortgage on the Whitens' home was in arrears, refinancing had been arranged. He reported to Pilot again on February 25, 1994, recommending that the claim be paid. In his reporting letter he said: ". . . with the physical evidence we have and the fact that the insured was attempting to arrange financing through another source and pay off the existing mortgage, there is little or no base to deny this claim."

Francis also reviewed Daphne Whiten's contents claim, which exceeded the policy limit of $117,000. He concluded: "I have no reason to doubt the legitimacy of the content claim . . . and . . . the contents claim is not unreasonable." He recommended issuing a cheque to Daphne Whiten for the policy limit. Pilot, however, refused to accept Francis' recommendations. Instead, it decided to deny the claim. Pilot also refused to tell Francis why it would not pay the Whitens' claim. In turn,

Francis kept the Whitens in the dark and became evasive in response to their questions.

After the fire, the Whitens moved into a nearby rented cottage. At first Pilot paid the rent. But in March 1994, Pilot instructed Francis to tell the landlord it was stopping rent payments. Francis did so but never told the Whitens. Worse, Pilot took this step knowing that the Whitens were in desperate financial circumstances. Their only assets had been destroyed by fire, neither was working at the time and Keith Whiten had declared bankruptcy the previous November.

Francis was also instructed by Pilot to make further inquiries about the fire. He did so and in a letter to Pilot's counsel on April 28, 1994, he confirmed that he still did not suspect arson. He reported:

> When we attended at the scene without any knowledge of the Whitens, we found Mr. and Mrs. Whiten sorting through the debris in old clothes, trying to salvage anything that might have been left as a result of the fire.
>
> I observed Mrs. Whiten with a small porcelain figurine in her hands, wiping the same off with her fingers in an obvious attempt to salvage this item. Had the Whitens known I was going to attend at the scene, I would have expected this type of display of sentiment, however not knowing that I was going to be at the scene, I felt this genuine concern to try and see what could be salvaged now that the weather has afforded this opportunity out of character for someone who might be involved in a suspicious fire.

After receiving this report Pilot removed Francis from the case and hired another adjuster. No one from Pilot testified at trial about why Francis was told to stop his investigation.

Because of the Whitens' precarious financial situation and because he suspected arson, Pilot's claims manager asked the Insurance Crime Prevention Bureau, a body set up by the insurance industry, to investigate the fire. The Bureau reported on February 25, 1994: "we wouldn't have a leg to stand

on as far as declining the claim." Having asked for the Bureau's opinion, the claims manager then said he gave it no credence and refused to consider it in dealing with the Whitens' claim. No one from Pilot testified why the claims manager took this position.

Shortly after the fire occurred, Pilot retained an engineering expert, Hugh Carter of Retrach Engineering, to investigate the loss. In his report to Pilot on January 28, 1994, Carter concluded that the fire was accidental: "the circumstances of the fire would strongly refute considerations of an incendiary fire." Carter delivered two further reports, giving the same opinion. He then received a letter from Pilot's counsel that led him to believe that his opinion had been misunderstood. He asked for a meeting to explain his opinion but Pilot refused to meet with its own expert.

Hugh Carter did meet with Pilot's counsel Donald Crabbe in early June. He then reclassified the fire as "suspicious, possibly incendiary". Pilot concedes that Crabbe likely influenced Carter to give this opinion.

After the meeting, Crabbe wrote a rather astonishing letter to Pilot. In the letter he suggested that a report supporting a denial of the claim was a move "in the right direction" and that an engineer could "freely speculate" the fire was not accidental. He said that he considered it appropriate to deny the claim six months after the fire occurred because there was little chance the Whitens would refuse an offer from Pilot. He expressed the view that the punitive damages claim based on bad faith was a "cloud with a silver lining" because it would make evidence of two previous fires admissible. One of these fires occurred in a cottage owned by the Whitens' son-in-law, but was rented out at the time to a Mrs. Titro; the other occurred in another house previously occupied by Mrs. Titro. Crabbe thought that the force of this evidence of previous fires would be strengthened because the Whitens would not likely have disclosed anything about them to their counsel. He wrote that faced with this evidence counsel for the Whitens would consider it risky to go to trial and would likely recommend their clients significantly compromise their claim. Pilot now

concedes that evidence about these two previous fires was utterly irrelevant and inadmissible.

Between July 1994 and May 1995, Pilot hired a forensic engineer, a fire investigator and a firefighter. Francis' reports were not disclosed to any of them. Instead Pilot's counsel provided these experts with information about the speed of the fire that was misleading if not inaccurate. Nonetheless, the firefighter, Deputy Chief Thomas, gave an opinion that the fire was accidental. The other two experts, the forensic engineer and the fire investigator, gave opinions that lent some support to an arson defence, but again Pilot concedes that these opinions were influenced by Crabbe. Indeed, in instructing the jury on how to weigh the expert evidence, the trial judge commented unfavourably on Crabbe's role.

> Apart from this, with some reluctance. I feel that I must comment on what I choose to characterize as the unfortunate role that Mr. Crabbe assumed in directing and coordinating the development of the defence expert evidence to support the allegation of arson.
>
> While I would not attribute to Mr. Crabbe any dishonest attempt to deliberately influence the evidence of the experts called by him, I respectfully express the view that his enthusiasm for his client's case appears to have caused him to exceed the permissible limits which ought to confine a lawyer in the preparation of witnesses. It may be that Mr. Crabbe unwittingly assumed too active a role in Pilot's continuing investigation of this fire and, in the process, did more than just prepare himself and his witnesses for trial. Although a lawyer may properly raise issues with witnesses and point out conflicts and weaknesses in the evidence, he must be careful not to exercise undue influence on witnesses so as to cause them, consciously or unconsciously, to modify their evidence to suit the needs of the party who retained them.
>
> In this case, there is evidence by Mr. Crabbe's own letters, that he, at least implicitly, put to some of his expert witnesses what evidence to give and that he purported "to

lead them into battle" to secure victory on behalf of Pilot. In my view, it was improper for him to approach witnesses in this suggestive manner, especially expert witnesses whose livelihoods are earned by providing service exclusively to insurers such as Pilot. If you agree with my view on this factual issue, and it is your right to choose to agree or disagree with me, it is for you to decide the extent to which you should reduce the weight that you would otherwise give to the evidence of some or all of these defence -- to some or all of these defence experts.

Pilot now concedes that the trial judge's comments were justified. Of course, Pilot must accept responsibility for its counsel's conduct. Yet no one from Pilot testified whether it objected to its counsel's tactics or why it persisted in denying the Whitens' claim.

Throughout their long ordeal -- nearly two years from the date of the fire until the trial began -- both Keith and Daphne Whiten co-operated fully with Pilot's investigation. They voluntarily submitted to a lengthy taped interview on the day of the fire. Later, Keith Whiten gave another long statement at Pilot's request. The representatives of Pilot who met with the Whitens said that they co-operated and assisted in the investigation. In the spring of 1995, in an attempt to satisfy Pilot that they did not set the fire, both Keith Whiten and Daphne Whiten offered to take a polygraph test administered by an expert chosen by Pilot. They attached no conditions to their offer. Pilot refused the Whitens' offer but gave no reason for its refusal. Instead, it continued to allege that the Whitens had set the fire deliberately. The Whitens had to live with this allegation. They resided in a small community, which was aware that their home was not being rebuilt because the insurer was alleging arson. Only now does Pilot acknowledge the evidence as a whole unequivocally demonstrates that the fire was accidental.

At the close of the plaintiff Daphne Whiten's case, Pilot moved for a nonsuit to dismiss the bad faith claim for punitive damages. The trial judge dismissed the motion. Pilot called a defence, but it did not call anyone to testify about the

handling of the Whitens' claim. The jury assessed damages as follows:

-- Replacement of structure	$160,000
-- Loss of contents	117,500
-- Increased living expenses	9,800
-- Punitive damages	1,000,000
TOTAL	$1,287,300

The jury's assessment was incorporated in a judgment of Matlow J. dated January 25, 1996, from which Pilot appeals. In granting judgment he commented that "the jury's assessment of punitive damages, although very high and perhaps without precedent, is not perverse but is entirely reasonable in light of all of the evidence." I turn now to the issues on the appeal.

First Issue: Was Daphne Whiten Entitled to an Award of Punitive Damages?

Punitive damages are awarded, not to compensate the plaintiff, but to punish the defendant and to deter the defendant and others from acting in an outrageous or reprehensible manner. Cory J. discussed these general principles in Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at p. 1208, 126 D.L.R. (4th) 129.

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to

achieve the goal of punishment and deterrence.

For an award of punitive damages to be made, two requirements must be met: first, the defendant must have committed an independent or separate actionable wrong causing damage to the plaintiff; and second, the defendant's conduct must be sufficiently "harsh, vindictive, reprehensible and malicious" [See Note 1 at end of document.] or "so malicious, oppressive and high-handed that it offends the court's sense of decency." [See Note 2 at end of document.] Pilot submits that neither requirement has been met in this case.

The first requirement, that of an independent actionable wrong, emerges from the judgment of the Supreme Court of Canada in Vorvis v. Insurance Corp. of British Columbia, a wrongful dismissal case. In Vorvis, McIntyre J. acknowledged that punitive damages may be awarded in breach of contract cases although he cautioned that such awards would be rare. He wrote (at p. 206 D.L.R.):

> When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff.

The requirement of an independent actionable wrong was affirmed in Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1, and has been consistently applied by provincial appellate courts since Vorvis. Pilot submits that it did not commit an independent actionable wrong because it simply breached its contract of insurance with Daphne Whiten. Pilot acknowledges that an implied term of that contract was to deal with Daphne Whiten's claim in good faith. But, Pilot argues, even a breach of its covenant to act in good

faith is no more than a breach of its contractual obligation, not an independent actionable wrong as Vorvis requires. Pilot submits that to sustain an award of punitive damages what would have been required was the commission of a separate tort, such as defamation or deceit, neither of which was pleaded or made out in this case.

I do not agree with this submission. A contract of insurance between an insurer and its insured is one of utmost good faith. [See Note 3 at end of document.] Although the insurer is not a fiduciary, it holds a position of power over an insured; conversely, the insured is in a vulnerable position, entirely dependent on the insurer when a loss occurs. For these reasons, in every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith. [See Note 4 at end of document.] That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy. An action for dealing with an insurance claim in bad faith is different from an action on the policy for damages for the insured loss. In other words, breach of an insurer's obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid.

Vorvis requires an independent actionable wrong, not an independent actionable tort. Indeed, if Pilot's submission were correct, punitive damages could never be awarded against an insurer for bad faith in the handling of an insurance claim. Such a result would be contrary to all Canadian authority and to four cases since Vorvis, each of which has recognized that punitive damages may be awarded against insurers in first party cases, that is in actions brought by insureds against their own insurer. [See Note 5 at end of document.] I find support for my position in the following passage from the Ontario Law Reform Commission's 1991 Report on Exemplary Damages, [See Note 6 at end of document.] which endorses punitive damage awards in first party insurance cases:

> There is at least one type of case of breach of contract where the arguments in favour of punitive damages are compelling. This is the case where the defendant breaches the contract deliberately, and refuses or fails to tender

compensation known to be owing to the plaintiff. This could be a case where, without justification, the defendant fails to perform and does not tender damages for the breach, or a case where the defendant declines to honour a known contractual obligation to pay money. Of course, the court would have to distinguish between a true case of denying contractual obligations known to exist, and a bona fide dispute over the existence or extent of liability.

. . . . .

The case for punitive damages in these circumstances is much the same as it is in the tort for profit situation, and may be justified on both retributive and deterrence grounds. The fact that the defendant refuses to honour a known obligation to pay money suggests that there exists some imbalance of power in the relationship that makes it worthwhile for the defendant to do so.

This approach also seems to address the concerns that support punitive damages in the so-called bad faith insurer cases. One variation occurs where insurance companies fail to honour clear first party obligations. This latter type of case might escape the confines imposed in Vorvis. The statutory obligation to pay first party benefits has been relied upon to distinguish this from the purely contractual claim . . . Insurance contracts are said to be governed by duties of utmost good faith. This supports the substantive case for punitive damages. It also provides an avenue for the development of a duty in tort, if Vorvis makes this necessary. This type of case is one where the argument for a deterrence gross up is also compelling.

This raises the possibility of a more restrictive approach to punitive damages for the failure to honour a known obligation to pay money. Punitive damages might be limited to wrongful dismissal and insurance cases, the types of cases that have given rise to punitive damages in Canada to date. Such cases typically involve the abuse of contractual power, which might not be the case in all other circumstance captured by a more general rule.

If Vorvis makes it necessary, like the Commission, I would be prepared to hold that an insured has a duty in tort of good faith towards its insureds. A duty in tort has been propounded by some Australian and American courts [See Note 7 at end of document.] and was hinted at by Mason J. of the Alberta Court of Queen's Bench in Adams v. Confederation Life Insurance Co., supra. The Australian decisions focus on the insurer's superior bargaining position and on the insured's dependence and vulnerability. The nature of the relationship makes it "just and reasonable" to impose on the insurer a duty of good faith. The American decisions acknowledge that an insurer has an implied contractual covenant to deal with its insureds in good faith, but hold that the insurer also has a duty in tort, distinct from its implied contractual covenant. These American cases are consistent with recent Canadian jurisprudence, which has recognized, in a variety of settings, concurrent liability in contract and tort. For example, in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, a solicitor's negligence case, Le Dain J. held that a common law duty of care may be created by a relationship of sufficient proximity and is not confined to relationships that arise apart from contract (at pp. 204-05):

> Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort.

A strong argument can be made for finding that the relationship between insurer and insured is of sufficient proximity to give rise to a concurrent duty in tort alongside the insurer's implied contractual obligation to act in good faith. However, I do not think that it is necessary to go this far because I am satisfied that an insurer's breach of the implied term of the insurance contract to act in good faith meets the Vorvis requirement of an independent actionable wrong.

Pilot also submits that even if acting in bad faith is an

independent actionable wrong, its conduct was not reprehensible enough or high-handed enough to attract an award of punitive damages. This submission has no merit whatsoever. There was overwhelming evidence in this case from which the jury could reasonably conclude that Pilot's handling of the Whitens' claim was so malicious or vindictive or so reprehensible or high-handed that an award of punitive damages was warranted. In summary, the evidence overwhelmingly shows that Pilot handled the Whitens' claim unfairly and in bad faith; that it deliberately ignored any opinion, even of its own adjuster and its own experts, that would oblige it to comply with its contractual obligation to pay the claim; and, that it abused its financial position and contrived an arson defence to avoid payment of the claim or, at least, to force a significant compromise. This evidence includes:

-- Pilot deliberately ignored the opinion and recommendations of Derek Francis, an experienced adjuster it retained to investigate the fire loss.

-- After receiving Francis' strong recommendation to pay the claim, Pilot replaced him.

-- Pilot never provided Francis' reports to the experts that it later retained.

-- Pilot asked the Insurance Crime Prevention Bureau to investigate, but when the Bureau concluded that Pilot had no defence to the claim, Pilot ignored the Bureau's conclusion.

-- Pilot deliberately ignored the opinion of its engineering expert Hugh Carter, who gave three reports that the fire was accidental; and then Pilot refused to meet with Carter when he expressed concern that his opinion was being misunderstood.

-- Pilot admitted that the jury could reasonably infer that Carter's later opinion reclassifying the fire as "suspicious, possibly incendiary", was influenced by Pilot's counsel.

-- Pilot pressured its experts to provide opinions supporting an arson defence. Indeed, Pilot deliberately withheld relevant information from its experts and, instead, provided them with misleading information to obtain opinions favourable to its arson theory.

-- Pilot even admitted that the jury could reasonably conclude the two later expert opinions supporting an arson defence were influenced by Pilot's counsel.

-- Pilot accepted as justified the trial judge's comment that Pilot's counsel acted improperly in suggesting opinions to experts whose livelihood was earned by providing services exclusively to the insurance industry.

-- Pilot used the bad faith claim against the Whitens to refer to evidence of previous fires -- evidence it now concedes was irrelevant and inadmissible -- in order to convince the Whitens' counsel that a trial was risky.

-- At every stage Pilot considered that it could safely deny the claim because the Whitens would not refuse an offer in the future. No representative of Pilot testified why the claim was denied and therefore the jury could reasonably infer that their testimony would not have shown that Pilot had a valid reason for denying the claim.

-- When the Whitens had lost everything in the fire and when they were unemployed and on welfare, Pilot terminated the rent payments on their rented cottage and did so without telling them.

In the face of this evidence, an award of punitive damages was fully justified. I would not give effect to this ground of appeal.

Second Issue: Is the Award of $1 million Excessive?

Pilot submits that even if an award of punitive damages was justified, an award of $1 million was excessive. This

submission has two branches: first, the jury likely inflated their assessment because of errors made by the trial judge in his charge; and second, apart from these errors in the charge, the award is much too high.

(i) Alleged errors in the charge

Pilot submits that the trial judge made three errors in his charge: he erred by instructing the jury that they could take into account the Whitens' offer to take a polygraph test as evidence of their good faith; he erred by failing to instruct the jury that the letters from Pilot's counsel to Pilot's experts were not relevant to punitive damages; and, he erred by failing to give the jury any guidance on how to assess punitive damages. I am not persuaded that the trial judge made any of the errors alleged by Pilot. I will deal briefly with each one.

The trial judge instructed the jury that they could consider the Whitens' offer to take a polygraph test as evidence of their good faith:

> You have heard evidence relating to the offer made by the plaintiff and Keith Whiten to Pilot in May 19, 1995, just before this trial was scheduled to begin, to submit to polygraph or lie detector testing by an examiner to be selected by Pilot and of Pilot's rejection of that offer. You have also heard evidence that polygraph testing is commonly used by insurers to resolve suspicions in certain cases, even though the results of such testing are not generally admissible in evidence in trials.
>
> In the circumstances of this case, the Whitens' offer may be viewed by you as evidence of good faith on their part in helping to resolve the issue of arson that had been raised by Pilot, even though the results of any testing would almost certainly not be admitted as evidence in any trial.

Pilot submits that as evidence of a polygraph test is inadmissible because it is a form of oath helping, the Whitens' offer to take the test should also be inadmissible and therefore the trial judge should have instructed the jury to

ignore the offer when they assessed damages. Moreover, Pilot submits that the Whitens' good faith cannot assist the jury in determining Pilot's bad faith. I do not agree with these submissions. The evidence of the Whitens' offer to take a polygraph test was not tendered to bolster their credibility, but to show their willingness to co-operate in resolving their claim. Their good faith was relevant in assessing Pilot's conduct and thus in assessing punitive damages because an insurer may be more justified in rejecting a claim made by an insured who is not acting in good faith. The offer to take a polygraph test was but one part of the total evidence showing the Whitens' co-operation with Pilot's investigation. The admissibility of the offer and the trial judge's instructions o n how the jury could use the offer are consistent with this court's judgment in R. v. B. (S.C.) (1997), 36 O.R. (3d) 516 at p. 527, 119 C.C.C. (3d) 530 (C.A.).

The second error in the charge alleged by Pilot concerns its counsel's letters to its expert witnesses. Pilot submits that these letters were relevant only to costs, not to punitive damages. Whether or not Pilot's submission is valid, the trial judge only invited the jury to consider the letters in the context of the weight to be given to the expert evidence; he did not instruct them to consider the letters on the issue of punitive damages.

Finally, Pilot argues that the trial judge did not give the jury adequate guidance on how to assess punitive damages. The trial judge instructed the jury on the purposes of punitive damages and when they can be awarded in accordance with Vorvis and Hill:

> And finally, if you determine that Pilot's defence of arson failed and that Pilot breached the provision of the policy of insurance by denying the plaintiff's claim, you must then go on to determine whether the plaintiff is entitled, as well, to recover punitive damages. Punitive damages can be awarded in certain circumstances to serve as a punishment. In this case, depending on your finding of fact, punitive damages can be awarded to deter Pilot and other insurers from engaging in improper conduct in dealing with the claims of their

insureds.

Punitive damages, unlike the other types of damages claimed in this case, are not intended to compensate the plaintiff for her loss. If they are awarded, they will constitute a windfall for the plaintiff and a penalty for Pilot.

Before you may properly make an award of punitive damages, Pilot's defence of arson must fail and you must be satisfied that the plaintiff has proven that Pilot failed to deal with her claim in good faith and instead dealt with this in a malicious, high-handed, arbitrary or capricious manner, and that Pilot's conduct warrants the imposition of a penalty.

No valid objection can be taken to this instruction. However, after the charge, the jury returned with the following question:

Dear Justice Matlow, we are having difficulty in agreements pertaining to assessing the amount of the claim for punitive damages. Would you be able to provide us some guidelines to help us arrive at a consensus. Thank you, the jury.

After obtaining the views of both counsel, the trial judge simply recharged the jury by telling them that punitive damages were in their discretion.

Members of the jury, I have considered the question that you sent to me and I don't know that I can really be of all that much help to you. All that I can say to you is that punitive damages are in the discretion of the jury. You have to be fair and reasonable to both sides, and apart from that, there's not much more or anything more that I can tell you. It is not surprising that it is difficult to arrive at a consensus. I urge you to keep talking to each other and endeavour to find what that magic figure should be.

Pilot submits that the jury should have been given more guidance, presumably by telling them an appropriate range for a punitive damages award. This submission rings hollow in the face of Crabbe's refusal to permit the trial judge to give the

jury a range. Indeed, Crabbe told the trial judge "in terms of suggesting amounts or anything, I think it ought not to occur." The trial judge might have given the jury more help than he did, but his short recharge did not amount to a reviewable error.

(ii) The amount of the award

An award of $1 million in punitive damages against an insured for the bad faith handling of a claim by its own insured is unprecedented in Canada. Previous awards have been in the range of $7,500 to $15,000. [See Note 8 at end of document.] Moreover, as Mr. Cherniak points out, punitive damage awards in another kind of breach of contract case, wrongful dismissal, have not exceeded $50,000. [See Note 9 at end of document.] Nonetheless, I would not disturb the award of $1 million. I rely on six considerations.

First, the jury's assessment is entitled to deference on appeal. An appellate court should intervene only if the award is unreasonable or serves no rational purpose. It should not intervene simply because it would have awarded a different amount. In Hill this court emphasized that although an appellate court should interfere when a punitive damages award serves no rational purpose, it should be hesitant to interfere with the amount of an award that does serve the dual purposes of punishment and deterrence ((1994), 18 O.R. (3d) 385 at pp. 457-58, 114 D.L.R. (4th) 1 (C.A.)):

> Punitive damages are different from compensatory damages in that they are not intended to compensate the plaintiff for the injury caused by the libel. Rather, they are designed to express the repugnance of the public, which is represented by the jury, towards the outrageous and heinous conduct of the defendant. The award of punitive damages must be sufficient to punish the defendant for its conduct and to deter the defendant, specifically, and others, generally, from similar conduct in the future. Finally, punitive damages should only be awarded if the compensatory damages are considered by the jury to be insufficient to express its repugnance at the conduct of the defendant and to punish and deter.

> An appellate court should be very hesitant to substitute its opinion for that of the jury regarding the adequacy of the compensatory award to effect the purpose of punitive damages. The appellate court's duty to interfere arises when it is convinced that an award of punitive damages, in addition to the compensatory award, serves no rational purpose.

In the Supreme Court's judgment in Hill, Cory J. recognized that an appellate court has a wider scope to review an award of punitive damages than an award of compensatory damages, but still he limited review to whether the punitive damages served a rational purpose. He wrote (at pp. 1208-09):

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

I do not think there is any doubt that the award of punitive damages in this case serves a rational purpose. It serves to punish Pilot for its outrageous conduct in maintaining an unsupportable arson defence and to deter Pilot and other insurers from this kind of conduct in the future. The jury, properly in my opinion, did not think that compensatory damages of under $300,000 were sufficient to express their repugnance at Pilot's conduct. Moreover, in this case, the deference accorded to the jury's assessment was reinforced by the trial judge's opinion that the award of $1 million was "entirely reasonable". Matlow J. observed:

> And finally, for the sake of completeness, I record my view that the jury's assessment of punitive damages, although very high and perhaps without precedent, is not perverse but is entirely reasonable in light of all of the evidence.

There was ample evidence that the defendant continued to deny

> the plaintiff's claim even after Francis, its own adjuster, who had conducted a detailed investigation of the plaintiff's claim, had recommended that it be paid. From that point on, the defendant relied on a few suspicious circumstances that were later clarified adequately by the plaintiff in order to press on with an ill-founded defence based on allegations of arson which, I believe, the jury concluded were contrived and of no real substance.
>
> As a result, the plaintiff, who was already in poor financial condition, was required to endure the indignity of having to make temporary living arrangements without the benefit of insurance coverage for which she had paid premiums to the defendant and, as well, she was required to resort to this litigation, including a trial which went on over the course of about two months, to secure the relief to which she was entitled.
>
> In light of the defendant's admission that its net worth was approximately $231 million, I cannot take issue with the jury's conclusion that a very substantial award for punitive damages was required to punish the defendant and to effectively send the implied reminder to the defendant and to other insurers that they owe their insureds a duty of good faith in responding to claims made under policies of insurance issued by them.

I am not persuaded that he erred in these observations.

> Second, an important consideration in assessing the reasonableness of the award is the extent of Pilot's reprehensible conduct. Some wrongs are more blameworthy and more deserving of punishment than others. The award should be proportional to the gravity of the wrong. [See Note 10 at end of document.] In my view. Pilot's conduct was exceptionally reprehensible. The Whitens lost their home and all of their belongings. They tried to protect themselves against this kind of disaster by obtaining and paying for insurance. When the disaster occurred, the Whitens, like other insureds, depended on their insurer to handle their claim fairly and in good faith. Instead, Pilot acted maliciously and vindictively by maintaining a serious

accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental. It abused the obvious power imbalance in its relationship with its insured by refusing to pay a claim that it knew or surely should have known was valid, and even by cutting off rental payments on the Whitens' rented cottage. It took advantage of its dominant financial position to try to force the Whitens to compromise or even abandon their claim. Indeed, throughout the nearly two years that the claim was outstanding, Pilot entirely disregarded the Whitens' rights.

Third, vindicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes.

Fourth, the financial worth of the defendant is relevant to the reasonableness of the award. To be meaningful, an award of punitive damages cannot be perceived as a mere licence fee or as a cost of doing business. The award must sting. Pilot admitted at trial that it had a net worth of $231 million. For a company with such a substantial net worth, an award of $50,000 or even $100,000, let alone $15,000, is hardly likely to act as a deterrent. The comments of Cory J. in Hill are relevant here (at p. 1209):

Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

Fifth, although the award in this case is obviously very

large, there have been at least two other punitive damage awards of $1 million or more in Canada [See Note 11 at end of document.] and in Hill a jury award of $800,000 was upheld by the Supreme Court of Canada. A comparison of Hill to the present case shows that the jury award here is not excessive. Hill, a former Crown attorney, successfully sued the Church of Scientology for defamation. Hill was the victim of a deliberate attempt to assassinate his character in the media. This character assassination was part of the Church of Scientology's systematic efforts to neutralize those it considered to be "enemies" of the Church. The Church's conduct is distinguishable from the present case where no evidence was led to suggest Pilot systematically denies the claims of its insureds to force settlements.

However, other comparative factors support the award for Daphne Whiten. Before Hill, punitive damage awards in defamation cases were also modest yet the jury's large award in Hill was upheld both by this court and by the Supreme Court of Canada. [See Note 12 at end of document.] Therefore, I do not find persuasive Pilot's argument that the punitive damages in this case should be limited by previous awards. Moreover, Hill was awarded $500,000 for aggravated damages in addition to the $300,000 in compensatory damages and $800,000 in punitive damages. Although a distinction exists between aggravated damages and punitive damages, [See Note 13 at end of document.] this distinction is "more of words than ideas" [See Note 14 at end of document.] and an award of aggravated damages, by its very nature, tends to contain a punitive element. No aggravated damages were awarded in the present case. The willingness of this court and the Supreme Court of Canada to uphold the large amount of damages awarded to Mr. Hill for his suffering and for punishment and deterrence of the Church of Scientology , demonstrates that the lesser total damages awarded to the Whitens is not unreasonable. Moreover, for the reasons I have already expressed, the goal of deterrence is very important in first party insurance cases. Insurers annually deal with a multitude of claims from their insureds. The punitive damages awarded in the present case should serve to deter Pilot and other insurance companies from acting in a similar manner. The effect of deterring the kind of defamation practised by the Church of Scientology, though important, is not likely as far reaching.

Comparing Hill with this case, an award of $1 million for Daphne Whiten seems reasonable.

Finally, in recent years, both the courts and the legislatures have increased the amount of fines for companies who have acted irresponsibly or contrary to the public interest. For instance, the Ontario Occupational Health and Safety Act, R.S.O. 1990, c. 321, was amended in 1990 to increase the maximum fine for a breach of the statute from $25,000 to $500,000. [See Note 15 at end of document.] Fines recently imposed for breaches of the Competition Act routinely exceed $1 million, and in one case in 1998 totalled $16 million against one company. [See Note 16 at end of document.] This trend reflects an acknowledgement by judges and legislators that larger fines are needed to deter and punish companies for socially unacceptable behaviour.

For these reasons, I am not persuaded that the award of punitive damages of $1 million is unreasonable. I would dismiss the appeal with costs.

FINLAYSON J.A. (CATZMAN J.A. concurring): -- I have had the benefit of reading the judgment of Laskin J.A. and agree with his reasons and conclusions as to the first issue, namely: Was Daphne Whiten entitled to an award of punitive damages? I agree that the answer is in the affirmative and I am unable to improve on my colleague's analysis. However, I am unable to agree with him on the second issue: Is the award made by the jury, of $1 million excessive? In my opinion, it is.

I am not entirely happy with the trial judge's charge to the jury on the issue of punitive damages, but 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.

A quick review of recent cases illustrates the basis of my concern with the quantum of damages awarded below. Labelle v. Guardian Insurance Co. of Canada (1989), 38 C.C.L.I. 274, [1989] I.L.R. 1-2465 (Ont. H.C.J.), involved circumstances not dissimilar to those in this appeal. There, the defendant insurer had refused to settle the insured's claim arising from a fire in her home, forcing her to borrow money in order to make the necessary repairs. The adjuster engaged by the defendant was arrogant, unreasonable, and insulting. Only some four months after the fire did the defendant admit that it had any legal responsibility to its insured. Having found that the defendant failed to act promptly and fairly, and that it had proceeded with wanton and reckless disregard for the rights of the insured, Trainor J. concluded at p. 299:

> . . . the cumulative effect of all of these matters has led me to the conclusion that the defendant deliberately embarked upon a course of action designed to starve the plaintiff into submission.

Trainor J. awarded $10,000 in punitive damages and solicitor and client costs.

In Adams v. Confederation Life Insurance Co. (1994), 25 C.C.L.I. (2d) 180, 18 Alta. L.R. (3d) 324 (Q.B.), the plaintiff was a nurse who sought a declaration that she was entitled to long term disability payments under a group disability policy. She suffered from fibromyalgia and depression. The defendant insurer had commenced paying her benefits and then cut them off despite receiving independent reports confirming the existence of the disability. The defendant persisted in its refusal to allow benefits and placed the plaintiff under surveillance. It also demanded a court ordered medical examination but refused to accept its findings. The trial judge awarded $7,500 for punitive damages but declined to award costs on a solicitor and client basis.

In Ferguson v. National Life Assurance Co. of Canada (1996), 36 C.C.L.I. (2d) 95, [1996] I.L.R. 1-3316 (Ont. Gen. Div.), affirmed (1997), 102 O.A.C. 239 (C.A.), a bus driver made a

claim under a group disability policy based on anxiety and depression. Notwithstanding that the plaintiff lived in Ottawa, the defendant insurer caused him to travel to Montreal on short notice to be assessed by a psychologist who it had misrepresented to be a psychiatrist. The defendant also falsely asserted that there was no other specialist in the Ottawa area who was qualified to make the assessment. The defendant insurer was aware that the insured suffered from agoraphobia (a morbid dislike of public places) and it is difficult to accept that this insistence on travelling to Montreal was not a form of harassment. However, the plaintiff did travel to Montreal; the trial judge found that the trip was a nightmare for him. She also found that the defendant never intended to make an appointment for the plaintiff in the

Ottawa area and intended that the insurer was to see its particular choice of expert in Montreal. In addition, the trial judge found the expert to be lacking in both competence and objectivity.

In awarding punitive damages, Bell J. found:

> I conclude that this is one of those rare cases where the defendant's conduct has been so harsh, calculated, reprehensible, malicious and extreme as to be deserving of full condemnation and punishment. In these circumstances an award of punitive damages is justified.

She awarded $7,500 in punitive damages and solicitor and client costs on the basis of an application of the sanctions respecting settlement offers imposed by Rule 49 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The award was upheld on appeal to this court.

Over and above these cases, two recent appellate awards of punitive damages arising from claims for wrongful dismissal further demonstrate that this award cannot be supported. In Ribeiro v. Canadian Imperial Bank of Commerce (1989), 67 O.R. (2d) 385, 24 C.C.E.L. 225 (H.C.J.), the plaintiff was awarded $10,000 in punitive damages after the defendant bank had dismissed him on the basis of a completely untrue

allegation of fraud. On appeal to this court, the award of punitive damages was increased to $50,000; see Ribeiro v. Canadian Imperial Bank of Commerce (1992), 13 O.R. (3d) 278, 44 C.C.E.L. 165 (C.A.). Similarly, in Francis v. Canadian Imperial Bank of Commerce (1994), 21 O.R. (3d) 75, 120 D.L.R. (4th) 393 (C.A.), this court increased an award of punitive damages to $40,000 from the $15,000 awarded at trial. There, the defendant bank had wrongfully dismissed the plaintiff on the basis of a shoddy and biased report of its investigator, who had wrongfully accused the employee o f fraud and serious moral turpitude.

In the case in appeal, in addition to the $1 million award for punitive damages, the respondent received her claim in full, pre- and postjudgment interest and costs on a solicitor and client basis. In arguing that the punitive award should be upheld, the respondent stresses that punitive damages serve a two-fold purpose. The first is retributive, i.e., to punish the defendant (appellant) for malicious conduct. The second is to deter acts deemed socially unacceptable and consequently to discourage the perpetuation of objectionable corporate policies. While acknowledging that the award in this case is very large, the respondent cites three cases where damage awards of at least $1 million have been made, and one of $800,000. They are Lubrizol Corp. v. Imperial Oil Ltd., [1994] F.C.J. No. 1441 (T.D.) ($15 million), appeal allowed on other grounds, [1996] F.C.J. No. 454 (C.A.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.) (over $2 million); Colborne Capital Corp. v. 542775 Alberta Ltd. (1995), 30 Alta. L.R. (3d) 127, 22 B.L.R. (2d) 226 (Q.B.) ($1 million); and Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 ($800,000).

None of these cases is remotely similar to the one in appeal. They are not bad faith defences to insurance claims and reflect fact situations that are unique to the particular litigation. Moreover, they all reflect the concern of the courts with respect to "objectionable corporate policies" and the trial judgments in three of them emphasized the need to force tortfeasors to disgorge profits flowing from their actions. In

Lubrizol, a patent infringement case, the defendant continued to sell the infringing product in "flagrant" and "callous" contempt of an interlocutory injunction and reaped "enormous" profits. The award was set aside on appeal for lack of evidence and the matter remitted to trial for a fresh assessment. In Claiborne, the award of punitive damages was fashioned to ensure that the defendant did not profit from the sale of shares in the plaintiff corporation that the defendant had acquired through a tortious conspiracy. In Hill v. Church of Scientology, the plainti ff was libelled as part of a corporate strategy of punishing any person on its "enemies list". This designation was accepted as evidence of the malicious intention of the Church of Scientology to "neutralize" the plaintiff, a Crown Attorney acting within the scope of his employment. Characterizing the defendant's libel as "devastating" and "a continuing attempt at character assassination", the Supreme Court of Canada upheld punitive damages in the amount of $800,000 where the combined awards of general and aggravated damages were insufficient to achieve the goal of punishment and deterrence.

As for Colborne Capital, the defendant had stood to gain $15 million if its fraudulent scheme had succeeded; it was on this basis that the trial judge awarded $1 million in punitive damages. However, since this appeal was argued before us, the Court of Appeal for Alberta has overturned the trial decision, vacating the award of punitive damages; see [1999] A.J. No. 33 (C.A.). At para. 296 the court indicated that, as there was in fact no pecuniary gain to the defendant, and thus there were no profits to disgorge, and as the award of compensatory damages had indemnified the plaintiffs, there was:

> . . . no severable rational purpose sustaining a duplicated and substantial punitive damage award. As a head of damage, it had already been met within the compensatory award of pecuniary damages, interest, and a broad-gauged award of legal costs . . .

In the case in appeal, there is nothing in the evidence to suggest that the conduct so rightly condemned was the product of a corporate strategy by the appellant insurer to avoid

payment of all policy claims or to discourage its insureds from making claims. Nor is there any suggestion that the defendant has profited from its actions. Rather, it appears to have been an isolated instance for which the appellant's trial counsel should take full responsibility, both for the manner in which the claim was processed and because of the way that the trial was conducted. This certainly was the view of the trial judge. I will not repeat the excerpt of the trial judge's charge to the jury which is set out by Laskin J.A. in his reasons, but wish only to highlight that the trial judge blamed trial counsel for directing and co-ordinating the expert evidence in support of the meritless arson defence that was maintained to the bitter end by the defendant insurer. As the trial judge put it:

> I respectfully express the view that his enthusiasm for his client's case appears to have caused him to exceed the permissible limits which ought to confine a lawyer in the preparation of witnesses.

While properly holding the appellant insurer fully accountable for the conduct of the lawyer it retained, the respondent insured does not attempt to elevate the appellant insurer's conduct above the level of the particular case. As she puts it in her factum:

> The behaviour towards which the award of punitive damages was directed in this case was Pilot's malicious conduct in handling Mrs. Whiten's claim. On January 18, 1994 the Whitens lost their home and their belongings. They had tried to protect themselves against precisely this type of disaster by obtaining and paying for insurance. When the disaster occurred, the Whitens, like other insureds, were dependent on the insurer to handle the claim fairly and in good faith. Instead, Pilot acted maliciously. It abused the power imbalance in the relationship and refused to pay a claim it knew, or by any reasonable standard ought to have known, was valid. There is evidence to suggest that Pilot's conduct was motivated by a desire to force the Whitens to compromise the claim at a discount. Pilot utterly disregarded the rights of its insured. This type of conduct should be deterred.

I accept the above description of the conduct of the appellant and, as I have already acknowledged, it embraces the indicia that merit an award of punitive damages. However, there is no justification for an award of $1 million over and above an award compensating the respondent insured for her claim in full along with solicitor and client costs that reimburse her for the expense of pursuing this claim to judgment. This award for punitive damages was added to a claim for compensatory damages that can and was assessed with precision. Accordingly it must stand alone in achieving the goal of punishment and deterrence.

As was said by Cory, J. for the majority of the Supreme Court of Canada in Hill v. Church of Scientology, supra, at pp. 1208-09:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and direction on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

Reference may also be had to the decision of this court in Walker v. CFTO (1987), 59 O.R. (2d) 104 at pp. 120-21, 37 D.L.R. (4th) 224 (C.A.).

I agree that an award of punitive damages does serve a rational purpose in this case and that it is rationally required to act as deterrence. However, $1 million is excessive. This case does not demonstrate that there was such insidious, pernicious and persistent malice as would justify an award of this magnitude. Nor did the defendant insurer profit by its intransigence. In my opinion, an award of $100,000 would be sufficient to act a deterrent to this insurer and cause it to take the corporate steps necessary to ensure that in future it is properly apprised of the nature and kind of the defence its claims adjusters and counsel are advancing to any claim by a policy holder.

In holding that an award of $100,000 is appropriate in this case, I find guidance from the decision of the United States Supreme Court in Pacific Life Insurance Co. v. Haslip, 499 U.S. 1 (1990). Although that case turned on the interpretation of the Fourteenth Amendment and its impact, if any, on the award of punitive damages, the court did have occasion to examine what criteria are to guide appellate courts in their review of jury awards of punitive damages. In upholding a jury award of $1 million, Mr. Justice Blackmun, for the majority, listed the factors that are to be considered in determining whether an award is reasonably related to the goals of deterrence and retribution. He said at p. 21:

> . . . (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of the litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Blackmun J. made some remarks, which while specific to the law of Alabama, I find to be apposite in this instance. He said at p. 22:

> . . . postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offence and have some understandable relationship to compensatory, damages. While punitive damages . . . may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the fact

> finder must be guided by more than the defendant's net worth . . . plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Finding an appropriate quantum in cases such as this is always a delicate matter involving the principled exercise of discretion and the balancing of factors such as those enumerated by Blackmun J., supra. As stated by McIntyre J. in Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085 at pp. 1104-05, 58 D.L.R. (4th) 193, "all authorities accept the proposition that an award of punitive damages should always receive the most careful consideration and the discretion to award them should be most cautiously exercised." In this appeal, the task before us is to find a quantum that adequately speaks to the damages found by the jury, and that might be reconcilable with guiding principles and quanta found in the Canadian cases discussed at the outset of these reasons. It also requires that we find an amount that, while doing justice to this individual plaintiff, is not so great so as to overstate the nature of the defendant's conduct. In finding an appropriate quantum, we must r emind ourselves that the common law proceeds by induction, moving incrementally from case to case. In my opinion, having regard to the facts of this case and the criteria discussed above, an award of $100,000 adequately penalizes the defendant without overstating the gravity of its conduct.

Accordingly, for the reasons set out above, I would allow the appeal, set aside the award of $1 million for punitive damages and substitute an award of $100,000 in its place. The cross-appeal had been settled and no other part of the judgment below was challenged. The appellant does not ask for costs of the appeal and none are awarded.

Appeal allowed.

Notes

Note 1: Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 at p. 208.

Note 2: See Hill, at p. 1208.

Note 3: See Maschke v. Gleeson (1986), 54 O.R. (2d) 753, [1986] I.L.R. 1-2063 (C.A.).

Note 4: See Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 18 O.R. (3d) 663, 115 D.L.R. (4th) 37 (C.A.); S.M. Grant and L.R. Rothstein, Lawyers' Professional Liability, 2nd ed. (1998), at pp. 225-28.

Note 5: See Ferguson v. National Life Assurance Co. of Canada (1996), 36 C.C.L.I. (2d) 95 at p. 135, [1996] I.L.R. 1-3316 (Ont. Gen. Div.) affirmed (1997), 102 O.A.C. 239; Adams v. Confederation Life Insurance Co. (1994), 25 C.C.L.I. (2d) 180 at pp. 204-05, 18 Alta. L.R. (3d) 324 (Q.B.); Atlantic Steel Industries Inc. v. CIGNA Insurance Co. of Canada (1997), 33 O.R. (3d) 12 at 19 (Gen. Div.); and Janmohamed v. Co-operators General Insurance Co. (1997), 45 C.C.L.I. (2d) 262 at p. 266 (Alta. Q.B.)

Note 6: At pp. 97-99.

Note 7: For American cases, Crisci v. Security Ins. Co., 66 Cal.2d 425 (1967 S.C.); Silberg v. California Life Insurance Company, 11 Cal.3d 452 (1974 S.C.); Gruenberg v. Aetna Insurance Company, 9 Cal.3d 566 (1973 S.C.); and Egan v. Mutual of Omaha Insurance Company, 24 Cal.3d (1979). For Australian cases, see Gibson v. Parkes District Hospital (1991), 26 N.S.W.L.R. 9 (App.C.L.); and Dorrough v. Bank of Melbourne Limited (1995), No. Q.G. 196 of 1993 (Fed. Crt. Gen. Div.).

Note 8: See Labelle v. Guardian Insurance Co. of Canada (1989), 38 C.C.L.I. 274, [1989] I.L.R. 1-2465 (Ont. H.C.); Ferguson v. National Life Assurance Co. of Canada; Adams v. Confederation Life Insurance Co. and Kusalic c. Zurich Cie d'assurances (1995), 37 C.C.C. (2d) 120 (Que. S.C.)

Note 9: See Ribeiro v. Canadian Imperial Bank of Commerce (1992), 13 O.R. (3d) 278, 44 C.C.E.L. 165 (C.A.); and Francis v. Canadian Imperial Bank of Commerce (1994), 21 O.R. (3d) 75, 120 D.L.R. (4th) 393 (C.A.)

Note 10: See BMW of North America Inc. v. Gore, 116 S.Ct. 1589 (1996 U.S.S.C.).

Note 11: See Lubrizol Corp. v. Imperial Oil Ltd., [1994] F.C.J. No. 1441 (T.D.), appeal allowed on other grounds [1996] F.C.J. No. 454 (C.A.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.).

Note 12: The highest previous award appears to have been $50,000. See Brown, The Law of Defamation in Canada, 2nd ed., loose-leaf, at p. 25-124.

Note 13: For aggravated damages, the defendant's misconduct is relevant only so far as it affects the plaintiff's feelings.

Note 14: Fleming, The Law of Torts, 9th ed. (1998), at p. 274.

Note 15: An Act to Amend the Occupational Health and Safety Act, S.O. 1990, c. 7, s. 35.

Note 16: Francine Matte, Q.C., then Acting Director of Investigation and Research for the Competition Bureau, in a speech at the 23rd Annual Conference on International Antitrust Law and Policy in October 1996, said: "these results demonstrate a tougher attitude of the courts to competition offences". The large fines imposed for price-fixing and market-sharing conspiracies were also recently outlined by the Competition Bureau's Director of Investigation and Research, Konrad von Finckenstein, Q.C., in a speech he gave to the Canadian Bar Association Competition Law Section Annual Meeting on September 25, 1998. The Director outlined three examples of fines imposed in late 1997 and 1998 of $16 million, $3.5 million and $2.65 million; see also Industry Canada, News Release 8120 (October 21, 1998); Industry Canada, News Release 8043 (July 23, 1998); Industry Canada, News Release 7851 (December 19, 1997); Industry Canada, News Release 7416 (April 26, 1996).