

# **PUNITIVE DAMAGES IN MOTOR VEHICLE LITIGATION**

## **PART 1 - INTRODUCTION**

In *McIntyre v. Grigg et al* (2006) 83 O.R. (3d), 161, the Court of Appeal, for the first time, considered the issue of whether punitive damages were available in the context of a motor vehicle accident claim. I had the privilege of arguing this appeal after my partner David Smye obtained a very favourable verdict from a Hamilton jury. While the majority in the Court of Appeal upheld the jury's award for punitive damages, the quantum of the award was reduced substantially. This paper will review the facts of the accident and the majority's analysis and will offer a prediction for future punitive damage claims in motor vehicle accident litigation.

## **PART 2 - THE FACTS**

In September, 1996, Andrea McIntyre was a first year student at McMaster University. She was an avid and talented athlete. On the evening of the accident, she and some friends were leaving a McMaster pub when Andrea and another girl were struck by a vehicle operated by the defendant Andrew Grigg. Andrew Grigg was a professional football player with the Hamilton Tiger Cats. After football practice, he went to two drinking establishments and then ended up at the same McMaster pub where Andrea and her friends had been drinking.

Andrea and her friends were walking home beside a curb along a residential street adjacent to the pub. Witnesses testified that Andrew Grigg was driving a pick-up truck in an erratic and reckless fashion. He went through a stop sign, made a reckless wide right hand turn, was speeding and struck Andrea and her friend. The vehicle continued over the curb, sheered off a lamp post and came to rest adjacent to the sidewalk.

The defendant Grigg was eventually taken for a breathalyzer test. He failed the test and was charged with a number of criminal offences including "over 80", impaired driving causing bodily harm and operating a motor vehicle in a manner dangerous to the public causing bodily harm. Expert evidence lead at trial determined that, at the time of the accident, Grigg's blood alcohol concentration was likely in the range of 218 milligrams of alcohol in 100 milliliters of blood, being nearly three times the legal limit.

Ultimately, Grigg plead guilty to careless driving and received a \$500.00 fine. The criminal charges were all withdrawn because Grigg was not provided his rights to counsel before the breathalyzer tests were administered.

As a result of this accident, Andrea McIntyre suffered very serious physical and psychological injuries. The jury assessed general damages at

\$250,000.00. The defendants appealed the assessment of damages but it was upheld unanimously by the Court of Appeal.

### **PART 3 - THE PUNITIVE DAMAGE APPEAL**

At trial, the jury awarded Andrea \$100,000.00 for punitive damages. The defendant Grigg appealed. The majority, being then Chief Justice McMurtry and Justice Weiler, upheld the verdict but reduced the quantum for punitive damages to \$20,000.00. Justice Blair, in dissent, would have dismissed the claim for punitive damages. The majority analyzed the claim for punitive damages as follows:

- (i) The majority restated the general principles of punitive damages that have come out of numerous appellate authorities both from the Supreme Court of Canada and various appellate courts. Generally, punitive damages are awarded to meet the objectives of punishment, deterrence and denunciation of the defendant's conduct. Punitive damages are not meant to be compensatory in nature. They should only be awarded in exceptional cases. They should be awarded with restraint. Over the years, various cases have spoken of the type of conduct required to attract punitive damages. The conduct has been described in such ways as: malicious, oppressive, arbitrary and highhanded that offends the court's sense of decency; a marked departure from ordinary standards of decent behavior; harsh vindictive reprehensible and malicious; offends the

ordinary standards of morality or decency; arrogant and callous; egregious; highhanded and callous; arrogant, callous of the plaintiff's rights; deliberate, harsh, reprehensible and malicious; outrageous or extreme; highly unethical conduct which disregards the plaintiff's rights and recklessly exposing a vulnerable plaintiff to substantial risk of harm without any justification.

(ii) The Court considered whether punitive damages were generally available in a negligence action. Specifically, the Court of Appeal considered cases out of British Columbia where punitive damage claims in negligence actions had been rejected on the basis that the defendant's misconduct was not specifically directed to the plaintiff. For example, in *Nichols v. Guiel* (1983), 145 D.L.R. (3d), 186, the British Columbia Supreme Court refused to award punitive damages in a motor vehicle accident that injured the plaintiff and killed her husband. The defendant was accused of racing on the wrong side of the highway at an excessive speed. The trial judge found that the conduct of the defendant, although deliberately reckless, was not specifically directed at the plaintiff or her late husband and that this precluded an award of punitive damages. Fortunately, the majority rejected this line of reasoning. The majority found that if it was a requirement to advance a punitive damage claim that the defendant's misconduct be deliberately directed to the injured plaintiff, such a requirement could bar punitive damages in such litigation as

product liability cases. The majority concluded that punitive damage claims are available in negligence actions in Ontario so long as there was an intention on the part of the defendant to do the act or combination of acts that eventually caused the injury. It was not necessary that the defendant's misconduct be deliberately directed to the specific injured party.

(iii) Application to Drinking and Driving Cases

The majority relied on a number of Supreme Court of Canada criminal cases which have commented on the social evil of drinking and driving. For example, in *R. v. Bernshaw* (1995), 95 C.C.C. (3d), 193,

Justice Corey stated:

“Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalizations, drunk driving is clearly the crime which causes the most significant social loss to the country.”

On reviewing the facts of the case before it, the majority of the Court of Appeal concluded:

“In our view, the evidence before the jury was sufficient to meet the requirements that Andrew Grigg's conduct was deliberate and intentional. His decision to drink excessively and drive, his intoxication, and the evidence that he was speeding and driving erratically were key contributors to the cause of the accident. All of these factors demonstrate that on that night, Andrew Grigg showed a conscious and reckless disregard for the lives and safety of others.”

(iv) Importance of Punishment in Criminal or Regulatory Proceedings

Although the majority in the Court of Appeal held that, in the appropriate circumstances, punitive damage claims could be advanced in automobile accident litigation involving drinking and driving, the Court felt bound by a statement from Justice Binnie in his decision in *Whiten v. Pilot Insurance* [2002], 1 S.C.R. 595. In that case, which involved an insurer refusing to pay on a fire insurance policy, Justice Binnie had noted that the Ontario Law Reform Commission in its report on exemplary damages had recommended that courts should be entitled to consider the fact and adequacy of any prior penalties imposed in a criminal or similar proceeding brought against the defendant in considering a claim for exemplary or punitive damages. Specifically, Justice Binnie made the following comment:

“In Canada, unlike some other common law jurisdictions, such “other” punishment is relevant but it is not necessarily a bar to the award of punitive damages. The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment. The key point is that punitive damages are awarded “if, but only if” all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation. (Emphasis added)”

The majority of the Court of Appeal took the statement of Justice Binnie, although it may be obiter, to be binding upon them. Specifically,

the majority felt that it was bound to consider the punishment that had already been imposed upon Grigg on his plea of careless driving to determine whether such a fine was inadequate to accomplish the objectives of retribution, deterrence and denunciation which are applicable to punitive damage claims. The majority found that although Grigg had plead to, and received a fine for, careless driving, the evidence lead at the civil trial established that he was significantly impaired and that his conduct should normally warrant “a serious punishment”. The Court found that, generally speaking, where a defendant has already been punished for the same conduct that is in question at the civil trial, punitive damages will not serve a rational purpose as the sentence imposed in the criminal or regulatory proceedings will have already met the necessary objectives of retribution, deterrence and denunciation. The majority held that if a tortious act has already been sanctioned by the imposition of a criminal sentence, it is inappropriate to award punitive damages in a civil context. To do so would be to punish the wrongdoer twice for the same offence. However, the majority also held that where the civil proceedings establish that the criminal or regulatory sentence does not fully sanction the tortfeasor’s behavior, punitive damages may be awarded.

On reviewing the facts of the case before it, the majority concluded that it was one of “those rare instances” where the punishment of Grigg, in the criminal context, was disproportionate to his conduct. The majority

concluded that it was rational for the jury to find that punitive damages would denounce Grigg's conduct and given Grigg's fine of only \$500.00 on his guilty plea to careless driving, punitive damages would not amount to double punishment and would be a more appropriate punishment.

(v) The Quantum of the Punitive Damage Award

As with so many cases involving punitive damages, the Court of Appeal, although upholding the claim, substantially reduced the quantum of the award. Regrettably, the majority concluded that the award of \$100,000.00 was not rational to meet the objectives of retribution, deterrence and denunciation. The Court found that although Grigg's conduct was reprehensible and recklessly disregarded Andrea McIntyre's rights, it was apparently an isolated event. He did not flee the scene of the accident nor did he profit from his misconduct. This was not a case where the relationship between the plaintiff and the defendant was one where the defendant abused his power over a vulnerable plaintiff. In this case, the harm inflicted by Grigg was not specifically directed at the plaintiff. The majority also noted that Grigg had been punished for his conduct even though that punishment may have been inadequate for his wrongdoing. Based on those considerations, the majority found that the \$100,000.00 verdict was not rational to meet the objectives of retribution, deterrence and denunciation. The Court instead felt a more rational award was \$20,000.00.

#### **PART 4 - THE DISSENT**

Blair J. wrote a dissenting opinion which was, with respect, ill informed and misdirected. Although Blair J. agreed that the defendant Grigg's conduct was "clearly deserving of condemnation", he was not persuaded that an award of punitive damages advanced either the objectives of punishment or deterrence. Blair J. was clearly of the view that if the punitive damage award was allowed to stand, Grigg's automobile insurer would pay the claim pursuant to the standard automobile insurance policy which would do nothing to punish Grigg or deter others from drinking and driving. Additionally, Justice Blair was clearly concerned that an award of punitive damages in this case would open the flood gates for other claims. He stated:

"However, there is simply nothing on the record to distinguish this case from hundreds, if not thousands, of other similar cases. If punitive damages can be awarded on the facts of this case, they can be awarded in a great number of others where alcohol induced motor vehicle accidents lead to injury or death - and, they will be."

With respect, Justice Blair is in error when he suggests that the facts of the case before him are not distinguishable from hundreds or thousands of similar situations. The very obvious distinguishing fact of the case before him was that the defendant Grigg went virtually unpunished for his illegal and reprehensible behavior in driving with nearly three times the legal allowable amount of alcohol in his bloodstream. Justice Blair then went on to argue that it was "hard to conceive" of an impaired driving offence where a fine in the amount of \$100,000.00 (as awarded by the jury) or even a fine of \$20,000.00 (as

awarded by the majority) would be imposed. This is probably correct. Unfortunately, Justice Blair does not deal with the very simple reality that had the police done their job properly, the defendant Grigg would likely have been sentenced to a considerable period of incarceration and his driver's licence would have been suspended for a prolonged period of time. It is respectfully submitted that given the choice, virtually anyone charged with the serious offences that the defendant Grigg was initially charged with would prefer to pay a fine of \$20,000.00 rather than face a stiff prison sentence and have their driver's licence suspended for a prolonged period of time. It is respectfully submitted that Justice Blair's analysis in his dissent on the punitive damage claim is faulty and, fortunately, was a lone voice on the court.

## **PART 5 - THE FUTURE OF PUNITIVE DAMAGE CLAIMS IN MOTOR VEHICLE ACCIDENT CASES**

A careful reading of the majority decision in *McIntyre v. Grigg* leads one to conclude that although the door has been opened to make a punitive damage claim, the door is unlikely to swing very wide. Justice Binnie's comment in *Whiten*, as adopted by the majority, merits repeating:

"The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation."

Obviously, it is not enough that the evidence establishes the defendant's conduct to be reprehensible, reckless and a complete disregard for the plaintiff's rights. A key element in the analysis is whether the defendant has been found to be adequately punished for the conduct about which the plaintiff is suing. If the defendant received a punishment that is within the range typically handed out in similar cases, the plaintiff is unlikely to be successful in a claim for punitive damages. On the other hand, if the defendant's conduct, for whatever reason, has gone unpunished or inadequately punished, the plaintiff may well advance a claim in punitive damages. In this context, not only can the claim be advanced in cases involving drivers who are significantly impaired by alcohol. Punitive damage claims could also be advanced in conduct such as the more recent phenomena of streetcar racing which is claiming the lives of innocent people who use our streets.

At the time of the dictation of this paper, I have found no other case where punitive damages have been awarded in motor vehicle litigation. It will be interesting to see how and whether such claims develop and how open the courts will be to such claims given the confines that have been placed by the majority in the Court of Appeal.