

Noteworthy

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HUGHES AMYS_{LLP}
BARRISTERS & SOLICITORS

by Richard Horak &
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Introduction

In *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Company* [2002] O.J. No. 3588 (*Laplante*), the Ontario Court of Appeal has provided further guidance regarding the awarding of punitive damages in Canada. While at first blush this decision might appear to be a victory for insurers, in our view any celebration may be short-lived.

In *Laplante* the jury awarded the Plaintiff \$488,389 in compensatory damages and an additional \$750,000 in punitive damages. However, the majority of the Court of Appeal set aside the award of punitive damages.

The jury award in *Laplante* evinces the willingness to extend the award of punitive damages to contract disputes. Specifically, it reminds insurance companies of the duty to act in utmost good faith at all stages of dealing with the insured. While the Court of Appeal decision sets a high threshold and suggests that punitive damages will only be awarded in extraordinary cases of clear malice, we believe that insurers should remain concerned about potential exposure in future cases.

Facts

On October 27, 1993 a fire broke out in the barn of Ferme Gérald Laplante & Fils Ltée (“Laplante”). The Laplante dairy farm sustained losses consisting of a destroyed barn and silos, as well as dead and damaged livestock.

In the two months following the fire, Grenville paid Laplante \$612,923 on the policy. As of January 1995, Grenville had paid \$980,000 for losses sustained in the fire.

Laplante, however, contended that an additional \$700,000 was owing. Grenville found a number of aspects of Laplante’s claim to be contentious, including losses relating to the livestock, the silos and the loss of earnings.

The Appeal

Grenville’s Overall Handling of Laplante’s Claim

Many of the issues on appeal, detailed below, centered on Laplante and Grenville’s differences in interpreting what is and is not covered under the insurance policy. These disputes over the meaning and effect of terms and warranties were resolved by the application of established principles of contract law.

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However, Grenville's overall failure to at least pay those amounts that it agreed were owing to Laplante, added a bad faith insurance claim to the alleged breach of contract.

From the outset, it was clear that Laplante should at least be compensated by Grenville for the cow and the bull that died in the fire. It was also clear that Laplante should have been paid at least the lost earnings which Grenville calculated were owing. It was moreover clear that Grenville should have paid at least 50% of the silo damages, for which Laplante was indisputably covered for under the co-insurance clause. Grenville's delay in making these payments led the jury to question whether the insurance company acted in good faith, or was attempting to force Laplante to accept a monetary settlement for less than it was entitled to under the policy. The jury found that Grenville acted perfidiously and therefore awarded punitive damages.

Reasoning Of The Majority

Purpose of Punitive Damages

Writing for the majority, Justice Charron stated:

“(t)he single most important feature of punitive damages that must be kept firmly in mind is that their purpose is not to compensate a plaintiff but to *punish* a defendant for its misconduct, to *deter* the defendant and others from similar misconduct in the future, and to *denounce* the miscon-

duct as meriting society's condemnation. As such, as stated in *Whiten*, ‘punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)’.”

Faced with the jury's award of punitive damages, the Court of Appeal queried whether the case before it was a “...commercial dispute about the interpretation of a contract and the quantum of a complex

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claim” (para 62), or a bad faith insurance claim, where Grenville tactically attempted to force Laplante to settle for less than it was legally entitled to receive under the insurance policy.

The Court stated that the standard of review applicable to punitive damages is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct (*Whiten v. Pilot Insurance Co.* [2002] S.C.J. No. 19 at para 96.) The Court also noted that punitive damages are often limited to cases of intentional torts or breaches of fiduciary duties. Punitive damages are rarely awarded in contract cases.

Duty to Act in Utmost Good Faith

In *Whiten*, the Supreme Court of Canada found that in insurance contracts the independent actionable wrong was the breach of the contractual duty to act in utmost good faith. The insurer-insured relationship is founded upon the mutual obligation to disclose all material facts in order to assure that the insurance policy accurately reflects the actual risks being undertaken (*Carter v. Boehm* (1766), 97 E.R. 1162 (K.B.) at p.). The power imbalance between the insurer and the insured, however, has extended the duty to act in utmost good faith to require that the insurer “...act promptly and fairly at every step of the claims process.” (para 76)

The case law surveyed by the Court of Appeal revealed that the duty to act in utmost good faith has been interpreted to mean that insurance companies have a positive obligation to pay claims in “...a timely manner where there is no reasonable basis to contest coverage or to withhold payment.” (para 76). The jury found that Grenville's failure to indemnify Laplante for the cow and the bull, 50% of the silo damages and the assessed earnings loss was a breach of the insurer's duty to act in utmost good faith.

No Punitive Damages: A Hard-Fought Commercial Dispute Between Two Sophisticated Parties

Pursuant to *Whiten* and *Vorvis*, the Court of Appeal stated that in addition to the requirement of

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an independent actionable wrong the following conditions must be satisfied in order for there to be an award of punitive damages.

1. The defendant's conduct must be so malicious, oppressive and high-handed that it offends your sense of decency.
2. The defendant's conduct must be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.
3. The conduct of the defendant must be extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment (para 60).

The Court found "...that no reasonable jury, properly instructed, could conclude that the conduct in question was so outrageous or extreme as to warrant punishment." (para 86). It is unacceptable for a jury to hold an insurer's denial of an ultimately successful claim to be conduct necessitating punitive damages.

The contentious aspects of Laplante's claim were commercially complex and legally equivocal. As an insurer, Grenville had a business right and legal duty to ensure that benefits were paid out properly and precisely in accordance

with Laplante's policy. It was obliged to investigate, Laplante's claims to the best of its abilities. The Court found that "(t)he record suggests...that this was a hard-fought commercial dispute between two sophisticated parties." (para 101)

Reasoning Of The Dissent

Analysis

In her dissent, Justice Weiler found that Grenville was not entitled to delay months and years before making payment for losses suffered and subsequently incurred by Laplante. Settlement negotiations cannot excuse the failure to pay. Hence, "(i)t was open to the jury to decide that it did not wish to licence Grenville to breach its duty of good faith in this manner and to denounce this marked departure from ordinary standards of decent behaviour by awarding punitive damages." (para 110).

Quantum of Damages

After concluding that an award of punitive damages against Grenville was justified, Justice Weiler had to consider the quantum of damages. Often, the uncertain and anomalous nature of punitive damages results in a conservative sum. Exceptional facts, however, can result in extraordinary awards. The difficulty in the quantification of punitive damages is in finding the right scale for an award that does not compensate but deters, denounces and redistributes. This is a daunt-

ing task. After all, what is the appropriate measure for moral turpitude?

Justice Weiler concluded that \$200,000 in punitive damages ought to be awarded against Grenville. In her assessment, Justice Weiler found that the quantum of damages must rationally accomplish its purpose. Therefore, she applied the proportionality test devised by Justice Binnie in *Whiten* (see *Whiten* supra at paras. 111-126).

Plaintiff's Vulnerability

In finding that Grenville violated its duty to act in utmost good faith toward its insured, Justice Weiler affirmed that Laplante's vulnerability was a factor in determining whether punitive damages were to be awarded, and in assessing the quantum of those damages. However, it is important to note that "(i)t is not essential that the independent actionable wrong actually cause financial damage to the plaintiff." (para 132).

As an insured who had suffered severe losses, Laplante was financially and emotionally vulnerable to Grenville's non-payment and delays. Laplante's vulnerability, however, is significant only because it assists in gauging Grenville's conduct. "The fact that Laplante managed to survive the loss of income in the year following the fire does not detract from the fact Grenville's conduct was a marked departure from the ordinary standard of

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human behaviour.” (para 137).

Conclusion

Utmost Good Faith and Fiduciary Duties

While the majority of the Court of Appeal re-affirmed the award of punitive damages as the pre-

serve for extraordinary cases of malice, the dissent and jury verdict suggest that this standard is somewhat more flexible. Determining on which side of the line particular conduct will fall remains a difficult decision. Notwithstanding the decision of the majority in *Laplante*, in our view the scope for awards of punitive damages remains

broad. The conclusion that this was a “hard fought commercial dispute between two sophisticated parties” is one which we suspect may not often be applied in disputes between insurers and insureds. An insurer who fails to promptly pay what it feels is owing, particularly where the effect of non-payment is to exert significant



Liquor Liability - Settlement of *Hunt v. Sutton*

by *Richard Horak*

The infamous case of *Hunt v. Sutton*, in which the Court of Appeal overturned the decision of Mr. Justice Marchand and ordered a new trial (see Noteworthy 2002, Volume 7), has now been settled. We will accordingly have to wait for another case to make its way through the courts in order to clarify this developing area of the law.

In *Hunt*, the Plaintiff had attended at her employer’s office Christmas party and consumed alcohol. After leaving the party

she went to a nearby pub, where she stayed for approximately 90 minutes. She ultimately was involved in a motor vehicle accident later that evening when she lost control of her vehicle, which crossed over the centre line and came into collision with an oncoming vehicle.

Although the trial judge took the case away from the jury and found 25% liability on the Defendant employer (75% fault resting with the Plaintiff), the Court of Appeal concluded that the trial

judge had erred in removing the

case from the jury. While noting that it was up to the jury to make a finding of fact as to whether the actions of the employer were “reasonable” in the circumstances, the court emphasized that where an employer serves alcohol to its employees, the duty of care which arose might well extend beyond the workplace.

While it is somewhat disappointing that the *Hunt* case has been settled, we have little doubt that it will not be long before another similar case is brought forward.