



Current Articles 2005 – January

Punitive Damages

Actions for “punitive damages” seem to be the buzzword ever since the Supreme Court of Appeal in the *Whiten vs. Pilot* case allowed the large punitive award. Although a lower court reduced the punitive award from \$1 million to \$100,000 the Supreme Court of Canada restored the jury award of \$1 million in punitive damages.

Punishment is part of what law is all about. In criminal law punishment is by means of fines, imprisonment, restrictions etc. In a civil suit the plaintiff, if successful, is awarded damages, which are primarily designed to put the plaintiff back in the original position before the wrongdoing. In summary these compensatory damages are calculated by putting a dollar value on the plaintiff’s loss.

Punitive damages, or sometimes referred to as “exemplary damages”, are designed to punish the wrongdoer. They are awarded if the plaintiff’s conduct is considered to be bad in reference to a highhanded attitude, malicious, capricious, reprehensible, etc. Since punitive awards are intended to “punish” there would be no punishment on the plaintiff if the punitive dollar award were covered by insurance. Therefore, coverage for punitive damages is rarely covered by insurance in Canada. (There is coverage in the USA, but the insurance only pays a portion of the loss leaving an element of punishment on the plaintiff)

Appeal courts are unpredictable in their decisions. In *LaPlante et al vs. Grenville Patron Mutual Insurance Co.* a jury trial awarded \$750,000 in punitive damages. **The Ontario Court of Appeal overturned the entire award.** In *Khazzaka vs. Commercial Union* in which the insurer was alleging “arson”, the jury awarded \$200,000 in punitive damages and the Ontario Court of Appeal upheld that award. In *Barker vs. Zurich Insurance* involving a vehicle theft claim, the jury awarded \$250,000 in punitive but the Ontario Court of Appeal overturned the entire award. The original finding was based on that the insurer did not respond in a timely fashion, did not advise the insured as to the reason for the delay in settling, trespass by the insurer on the insured’s property, adjusters were alleged to be “not professional and in bad faith”, etc. Madam Justice Charron, who overturned the award, said she had reservations as to whether the vehicle was, in fact, stolen at all and agreed that the insurer had reason to involve the I.C.P.B. and carry on an investigation. She found no basis for the jury’s findings with respect to the conduct of the insurer, nor with respect to any damage to the insured’s reputation.

The next possible punitive awards may involve brokers as well in regard to their conduct in placing coverage, giving advice and in general breaching the standard of care expected of a broker. Does your E & O policy cover punitive awards??? One policy reviewed stated that it addressed **liability imposed by law for damages caused by...** But does not limit the damages to a compensatory award.

A recent decision awarded a pedestrian \$900,000 who was hit by a driver with blood alcohol level almost three times the legal limit. The award included \$100,000 in punitive damages, \$250,000 in general damages and \$100,000 for aggravated damages. The question arose as to whether an auto policy would respond to punitive damages. Although the lawyer for IBC stated that it is questionable whether the auto policy should cover punitive damages the plaintiff's lawyer stated " But I don't read it that way!" The auto policy (OAP1) Section 3.3 states, "we will make payments on your behalf or other insured persons' behalf that the law requires..." It does not limit payments to compensatory awards only. May we expect an amendment to the OAP1?

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