

AGGRAVATED AND PUNITIVE DAMAGES

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Overview

- The same conduct may give rise to aggravated and/or punitive damages
- Aggravated damages are compensatory while punitive damages are intended to be punishment for wrongdoing
- Aggravated damages require proof of injury while punitive damages do not
- Punitive damages require a separate actionable wrong (i.e. a breach of the duty of good faith) whereas aggravated damages may only require evidence of injury resulting from a breach of the contract (i.e. mental distress caused by breach of a “peace of mind” contract)
- While it may be presumed that the upper limit on damages established by the Supreme Court in the trilogy (the “cap”) likely applies to aggravated damages there is no upper limit on punitive damages.

Aggravated Damages

- Aggravated damages are available as additional compensation if the insured establishes that a breach of that contract caused her mental distress. (*Fidler*)
- There must be actual evidence of aggravation and mental distress. (*Fidler*)
- However, no independent, extra-contractual actionable wrong need be proven for such damages to be awarded. (*Fidler; Warrington*)
- Nor is the nature of the insurer's conduct, other than the fact of breach, material since the purpose of such damages is compensatory and not punitive (*Fidler; Warrington*)
- No one rule as to damages can be adopted to fit every case - as the circumstances differ, so must the rule.
- Damages are more modest and are tied to the evidence of injury to the plaintiff. The typical range is from \$10,000 to \$100,000 but more often at the lower end.

Punitive Damages

- Exemplary damages (synonymous with “punitive damages”) are an award made not for the purpose of compensating the plaintiff but for punishing the defendant.
- Punitive damages may only be awarded for breach of an independent actionable wrong. (i.e. a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss)
- 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.
- Damages have ranged from \$10,000 to \$1,000,000
- 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.
- The essential points for an award of punitive damages were set out by Justice Binnie in *Whiten v. Pilot*:
 1. Punitive damages are very much the exception rather than the rule;
 2. Imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.
 3. Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant,
 4. Having regard to any other fines or penalties suffered by the defendant for the misconduct in question.
 5. Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.
 6. Their purpose is not to compensate the plaintiff, but
 7. to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened.

8. Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and
9. they are given an amount that is no greater than necessary to rationally accomplish their purpose.
10. While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages.
11. Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

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CASE	APPEAL CRT	YEAR	DECISION / CONDUCT
Plester v. Wawanesa Mutual Insurance Co.	Ontario	2006	<ul style="list-style-type: none"> • <u>Aggravated Damages</u>: There was a case for the jury based upon the allegation of arson and the ultimate finding of bad faith on the part of Wawanesa by the jury. However, the award of \$175,000 was grossly excessive and reduced to \$50,000 • <u>Punitive Damages</u>: Appeal of \$525,000 in punitive damages dismissed. Court concluded that the bare and unproven suspicion of arson by insurer was sufficient to support punitive award. • <u>Conduct</u>: Wawanesa maintained its denial of coverage on suspicion of arson. Implicit to the decision is that something more than bare suspicion is required.
Fidler v. Sun Life Assurance Co. of Canada	British Columbia	2004	<ul style="list-style-type: none"> • <u>Aggravated Damages</u>: The award for aggravated damages was justified despite the lack of evidence of Fidler's financial hardship, because Fidler had suffered mental distress due to the discontinuance of her benefits. \$20,000 awarded • <u>Punitive Damages</u>: Sun Life's conduct was arbitrary and high-handed. It breached the duty of utmost good faith to Fidler by a sufficient degree to be deserving of the punishment of punitive damages. \$100,000 awarded. • <u>Conduct</u>: Sun Life terminated her benefits on the basis of videotape surveillance conducted in 1996. When Fidler protested, Sun Life informed her that she should undergo an independent medical exam. Although Fidler consented to the IME in October 1997, Sun Life did not schedule the examination until September 1998. The 1998 IME was unclear

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			<p>as to Fidler's ability to return to work. In December 1998, Sun Life presented Fidler with a cheque for three months' benefits as a good will gesture, and informed her that her file was closed. That decision resulted in significant financial hardship to the Fidler.</p> <ul style="list-style-type: none"> • <u>Note:</u> Trial judge did not find that Sun Life's conduct amounted to bad faith. It was the Court of Appeal that awarded \$100,000 in punitive damages. • This case is under appeal to the Supreme Court of Canada
D.E. v. Unum Life Insurance Co. of America	British Columbia	1999	<ul style="list-style-type: none"> • <u>Aggravated Damages:</u> Court awarded DE \$15,000. Unum breached the contract when it insisted on objective clinical evidence of DE's disability. The trial judge also rejected Unum's argument that DE had failed to mitigate her damages because she did not lose weight or quit smoking. Per Court of Appeal: There was significant evidence to conclude that DE was disabled. She did not have to establish the precise cause of her disability, and she satisfied the requirements of the policy. • <u>Conduct:</u> Unum's medical advisor failed to take any reasonable steps to assess disability claim. Medical advisor ignored evidence supplied by DE in favour of informal assessment performed by an I.E. physician. Unum held DE to an inappropriate standard of proof.
Warrington v. Great-West Life Assurance Co.	British Columbia	1996	<ul style="list-style-type: none"> • <u>Aggravated Damages:</u> Court awarded \$10,000. Trial judge found that "something more than mere failure to pay" was necessary for a "lack of good faith and fair dealing" to be shown.

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			<ul style="list-style-type: none"> • <u>Conduct</u>: The trial judge found that the insurer had discontinued the payment of benefits after two weeks when it was "aware, or ought reasonably to have been aware, that the plaintiff was entitled to benefits under the terms of the policy"
Lyons v. Canada Life Assurance Co.	Ontario	2002	<ul style="list-style-type: none"> • <u>Aggravated Damages</u>: Court set aside jury award of \$235,000 on grounds that the judge's charge failed to adequately address issue of award. New trial ordered. • <u>Punitive Damages</u>: Court set aside jury award of \$25,000 on grounds that the jury had not been properly charged. New trial ordered. • <u>Conduct</u>: The claim for aggravated damages was based on the fact that as a result of breach of contract by Canada Life and its failure to make payments, Lyons's depression was aggravated. The claim for punitive damages was advanced on the basis that Canada Life acted so inappropriately punitive damages were required.
Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.	Ontario	2002	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: Jury award of \$725,000 set aside. Court concluded that jury could reasonably have concluded that insurer breached its duty to act fairly and in good faith in failing to pay promptly those amounts it reasonably believed were owing under policy but no reasonable and properly instructed jury could conclude that insurer's conduct was so outrageous or extreme as to warrant punishment or that award of punitive damages was rationally required to punish insurer's misconduct.

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			<ul style="list-style-type: none"> • <u>Conduct</u>: The jury may have felt strongly against the defendant for what it found to be its wrongful denial of the plaintiff's claim for substantial amounts. There was little evidence beyond speculation to support the contention that the defendant abused its position or power and purposely set out to force the plaintiff into an unreasonable settlement. The record suggested, rather, that this was a hard-fought commercial dispute between two sophisticated parties. Although it was open to the jury to disapprove of the position taken by the defendant in the overall negotiation of the contentious parts of the claim, and even to find that in some respects it had breached its duty of good faith in failing to pay what was clearly owed under the policy, the evidence could not reasonably support the finding that an award of punitive damages
Whiten v. Pilot Insurance Co	Supreme Court	2002	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: Court restored jury award of \$1 million. • <u>Conduct</u>: The appellant's family was in very poor financial shape. Ultimately this confrontation led to a protracted trial based on the respondent's allegation that the family had torched its own home, even though the local fire chief, the respondent's own expert investigator, and its initial expert all said there was no evidence whatsoever of arson. The respondent's position was wholly discredited at trial and its appellate counsel conceded that there was no air of reality to the allegation of arson.
McIsaac v. Sun Life Assurance Co. of Canada	British Columbia	1999	<ul style="list-style-type: none"> • <u>Aggravated Damages</u>: Judge awarded \$8,500 for mental distress.

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			<ul style="list-style-type: none"> • <u>Conduct</u>: The intention or motivation of Sun Life in terminating the total disability benefits is immaterial to the claim. That is, the relevant questions are whether the contract is one for which a claim for mental distress can be made and whether the refusal to pay the benefits caused the Plaintiff mental distress. The Court amplified the reasons in Warrington. • <u>Note</u>: Application for Leave to Appeal dismissed
Barker (c.o.b. Mike Barker Auto Sales) v. Zurich Insurance Co.	Ontario	2001	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: Jury award of \$250,000 set aside as untenable. • <u>Conduct</u>: Appears Jury advised that Zurich had failed to respond in timely manner, did not instruct insured on reason for denial, agent for Zurich trespassed on property. None of those grounds were sufficiently particularized to support award of punitive damages.
Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.	Ontario	2005	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: Trial judge awarded \$2,000,000 to Mazza and \$500,000 to Pereira. Court of Appeal ordered new trial. • <u>Conduct</u>: No basis that insureds committed fraud in proof of loss forms. It appears that there was evidence demonstrating that the insurer prejudged the merits of the claims; evidence that the insurer conducted a biased investigation; and evidence suggesting that at least some of the defences relied on were without merit. However, the amount awarded by the jury was irrationally high.
702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London	Ontario	2000	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: No award for punitive damages made by judge. Decision upheld on Appeal.

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			<ul style="list-style-type: none"> • <u>Conduct</u>: The breach by Lloyd's of its duty of good faith was an independent actionable wrong from its failure to indemnify under the policy. However, Court of Appeal concluded that the breach did not cause damage to the appellants. Consequently, first part of Whiten test not met.
Deb v. American Life Insurance Company et al.	Ontario	1998	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: No award made for punitive damages because of finding that insured not entitled to disability coverage. • <u>Conduct</u>: The trial judge stated that had he found that the appellant was entitled to the disability insurance he would have awarded punitive damages as a result of the behaviour of the respondents, basically because they provided insurance in this jurisdiction and failed to deal with the claim of the appellant in a reasonable manner, given the nature of the insurance. • <u>Note</u>: Court of Appeal concluded that insurer's conduct more appropriately addressed through the use of costs
Khazzaka o/a E.S.M. Auto Body v. Commercial Union Assurance Company of Canada	Ontario	2002	<ul style="list-style-type: none"> • <u>Punitive Damages</u>: Award by Jury of \$200,000 affirmed on appeal. • <u>Conduct</u>: Independent adjuster retained by insurer acting unreasonably and in bad faith in doggedly pursuing his belief in suspicious origins of fire while ignoring evidence to contrary.