Special Awards and the LAT
Clear Legislative Intent or Delegation

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Introduction

This paper intends to briefly cover the issue of extra contractual damages, in the form of a Special Award or Punitive Damages in light of the recent changes to the *Insurance Act* (the "Act"), and in particular, the new dispute resolution process under the Licence Appeal Tribunal (the "LAT").

Punitive Damages

The modern approach to the extra contractual award of "punitive damages" flows from two cases from the Supreme Court of Canada. First, in *Hill v. Church of Scientology of Toronto*, Cory J. found that punitive damages are awarded against a defendant in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency.'[1]

This idea was amplified in *Whitten v. Pilot Insurance*. There Justice Binnie set out the following principles to guide trial judges in their charges to juries:

> (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 in an amount that is no greater than necessary to rationally

[1] *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 196

> 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.[2]

The Special Award

During the time of FSCO, the jurisdiction for a Special Award came from the Act:

> 282. (10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory Accident Benefits Schedule, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time benefits first became payable under the Schedule.

Whiten was considered by Director Draper in the leading FSCO case of *Liberty Mutual Insurance Company and Perofsky*[3]. He found rationality and proportionality were seen as the basis of an appropriate award of punitive damages:

> Rationality refers to the need to relate the particular facts of the case to the underlying purposes of the legislation. In other words, what amount is large enough to further the goals of punishment and deterrence, but no larger than is needed to serve that purpose?
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> Proportionality refers to the need to ensure that the consequences imposed on the insurer are rationally related to the misconduct at issue. The Supreme Court of Canada identified various dimensions of proportionality for punitive damages, which I find relevant to special awards. The award should be proportionate to:
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> (i) the blameworthiness of the insurer's conduct;
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> (ii) the vulnerability of the insured person;
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> (iii) the harm or potential harm directed at the insured person;
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> (iv) the need for deterrence;

[2] *Whiten v. Pilot Insurance Co*., [2002] 1 SCR 595, 2002 SCC 18 (CanLII) at para 94
[3] *Liberty Mutual Insurance Company and Persofsky*,(FSCO P00-00041, January 31, 2003)

(iv) the advantage wrongfully gained by the insurer from the misconduct; and

(vi) should take into account any other penalties or sanctions that have been or likely will be imposed on the insurer due to its misconduct.

He went on to described the formula for calculating the maximum amount of a special award and he described the factors to consider in determining entitlement to and the amount of a special award.

1. Determine the benefits owing to the insured person, including interest calculated under the applicable version of the SABS

2. Decide whether the insurer unreasonably withheld or delayed the payment of these benefits. If so, the insurer will be ordered to pay a lump sum amount in addition to the benefits and interest calculated.

3. If the insurer did not act unreasonably in respect of all the benefits owing, determine the amount of the benefits that were unreasonably withheld or delayed, and the interest payable on these benefits under the applicable version of the SABS.

4. Determine the maximum special award that can be awarded under s. 282(10), Maximum special award = 50% x (benefits that were unreasonably withheld or delayed + interest on these benefits calculated under the SABS + compound interest calculated according to s. 282(10))

5. Consider the six factors above to determine an appropriate lump sum special award, not a percentage, that responds to the facts of the case and bears a reasonable relationship to other special awards, and does not exceed the maximum.

6. Provide reasons for concluding that the special award is payable, and for the amount of the award.

7. In the order, express the special award as a specific, lump sum amount. No interest is payable on this amount, except as part of the enforcement process.

It should be noted that FSCO (and their predecessors in the OIC) arbitrators have found they have great latitude to award Special Awards despite substantive benefits having been resolved and paid prior to the hearing[4] or even where the claimant having never sought a special award in their Application for Arbitration.[5]

[4] *Shaikh and Aviva Canada Inc* (FSCO A09-000013, December 30, 2009)
[5] *Anizor and Royal Insurance Company of Canada* (January 24, 1995), OIC A-0003702

What is also notable: there is little treatment of the issue of costs where a Special Award was sought, but not awarded. Defending a Special Award might have been an expensive endeavour for an Insurer, but this may only mean increased costs, as opposed to an increased scale.

The LAT

The jurisdiction of the LAT is spelled out in section 280 of the *Insurance Act*:

> Resolution of disputes
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> 280. (1) This section applies with respect to the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled.
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> Application to Tribunal
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> (2) The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1).
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> Limit on court proceedings
>
> (3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.

Two things jump out with regards to Special Awards. The first is that the Act is now silent about the jurisdiction of the LAT to award Special Awards. Section 282(10) was revoked when FSCO's jurisdiction was removed. The second is that the LAT has been given jurisdiction over "benefits".

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Very late into the LAT development cycle (in fact, only a few weeks prior to April 1, 2016), a new Section 10 of Regulation 664 appeared. Below find the two sections side-by-side:

282(10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory Accident Benefits Schedule, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time benefits first became payable under the Schedule.	(10) If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Licence Appeal Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory Accident Benefits Schedule, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule.

It is well known that Regulations are delegated or subordinate legislation. Like Acts, they have binding legal effect. Regulations are not made by the Legislature. They are made by persons or bodies to whom the Legislature has delegated the authority to make them. It is also well known that authority to make regulations must be expressly delegated by an Act.

The most quoted judicial treatment is from *Steeley Industries Ltd. and The Queen*:

> It is trite law that subordinate legislation must not only be within the terms of the statutory authority under which it is enacted but it must also not be repugnant to some general law. The subject is discussed in Odgers, Construction of Deeds, 5th ed. (1967), at p. 430, and also in Craies on Statute Law, 7th ed. (1971), at p. 327. In a much-quoted passage from *White v. Morley*, [1899] 2 Q.B. 34 at p. 39, Channell, J., said:
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> > "A by-law is a local law, and may be supplementary to the general law; it is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful."
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> And in *Gentel v. Rapps*, [1902] 1 K.B. 160 at p. 166, the same learned Judge said:

> "A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land."[6]

The question then is, where is the statutory authority for the creation of Section 10 of Regulation 664? Even if there is statutory authority, does it expressly alter the law where the Legislature has seen fit to revoke the power of adjudicators to award "Special Awards"? The closest provisions in the Act is found at Section 121(1) 26:

> 121. (1) The Lieutenant Governor in Council may make regulations,
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> 26. governing proceedings before the Licence Appeal Tribunal under section 280, including imposing time limits or limitation periods

And 280(6)

> (6) Without limiting what else the regulations may provide for and govern, the regulations may provide for and govern the following:
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> 1. Orders, including interim order, to pay costs, including orders requiring a person representing a party to pay costs personally.
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> 2. Orders, including interim orders, to pay amounts even if those amounts are not costs or amount to which a party is entitlement under the *Statutory Accident Benefits Schedule*.

This delegation is either so broad as to allow regulations to be made dealing with any aspect of dispute resolution under the LAT, or so narrow as to only deal with procedure and costs.

Still, the silence in this case may mean two things: either the new Act intends for Special Awards to disappear and the efforts to change this intent after the fact cannot succeed, or its perhaps intentionally broad and imprecise language in section 280(6) allows for the creation of law in this area by regulation, assuming statutory authority was granted to make the regulation.

A quick note about costs. The LAT rule 19.1 indicate that costs may be awarded where another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. There is some question as to if this is in the context of the dispute before the tribunal, or if the LAT will extend the analysis of this issue ~~t~~o the handling of the claim.

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[6] 1977 CanLII 1406 (ON SC), 17 O.R. (2d) 44 at page 46

Who's Jurisdiction is it anyways?

The enabling statute (the *Insurance Act*) indicates the LAT is to determine, "...entitlement to statutory accident benefits..." and Special Awards have never been part of the *SABS*, nor is there good law to suggest that they are "benefits".

If the Act occupies the field, and the legislative intent was to erase Special Awards, the Legislature may have had two ideas in mind:

1. extra contractual damages have no place in the dispute resolution process; or

2. extra contractual damages are the sole jurisdiction of the courts

Conversely, if the Regulatory body had the authority to "move" Special Awards into the regulation, and it not repugnant to the act, the Legislative intent was either to:

1. make the LAT the sole arbitrator of extra contractual damages, or

2. Special Awards remain with the LAT, punitive damages remain with the court.

Much of this hinges on the legislative intent to wipe out extra contractual damages or to wipe out actions as part of the dispute resolution process. From the new language of the Act, neither seems to be clear.

Obviously, an action in court provides a party with much greater discovery rights than the LAT does, and much longer timelines to develop their case. One final consideration for litigants in this issue is this: the issue of costs.

Arguably, the standard for a Punitive Damage award is much higher than that of a Special Award. If the only issue allowed in an action is Punitive Damages, there is much greater risk for an insured person of an adverse costs award in court, and it would behove them to only bring such actions in the most clear of cases.

Conclusion

The transition to the LAT is a challenging one for both Insureds and Insurers. Neither side is well served by uncertainty. The good news is that the LAT has made it their goal to deal with these issues quickly, so we should expect the first decisions sooner, rather than later.