MCINTYRE V. GRIGG
A CASE COMMENT: PUNITIVE DAMAGES AND MORE

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On November 6, 2002 the Ontario Court of Appeal released its decision in ***McIntyre v. Grigg***. The appeal was much anticipated by the Insurance Industry and Bar given the Jury's decision to award punitive damages as against a negligent Defendant.

Although the majority of the Court ultimately sided with the Jury and upheld the decision to award punitive damages, it reduced the quantum of same from $100,000.00 to $20,000.00. Further, Justice Blair in a strongly worded dissent would have allowed the appeal with respect to punitive damages.

Allstate, the insurer of the Defendant, is contemplating a leave application to the Supreme Court of Canada.

PUNITIVE DAMAGES

With respect to the punitive damage issue, the Court cited the general principle that:

1. Punitive damages are awarded to meet the objective of punishment, deterrence and denunciation of conduct; and

2. An award of punitive damages requires the Defendant to have engaged in extreme misconduct.

In addition, in the context of an negligence action the Court held the Defendant's misconduct must be intentional and deliberate.

Although punishment in a separate proceeding for the same misconduct was a factor of significant importance, the Court adopted what it called the "disproportionality" test set out by Justice Binnie in the ***Whiten*** decision in which he stated:

> 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 disproportionality 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.

Applying these general and specific principles to the facts of the case before them, the Court held that drinking and driving was a "social evil" which required general deterrence.

The Defendant Grigg's conduct was deliberate and intentional and "he showed a conscious and reckless disregard for the lives and safety of others". [**Editorial Note:** Thereby equating a conscious and reckless disregard for safety with extreme misconduct.]

Although Grigg had been convicted of careless and driving and fined $500.00 the Jury clearly had found that fine disproportionate to the level of outrage it wished to express.

On the issue of the appropriate quantum, the Court noted that:

1. Quantum must be proportionate to the blame worthiness of the Defendant's conduct;

2. Quantum must be proportionate to the degree of vulnerability of the Plaintiff;

3. Quantum must be proportionate to the harm directed specifically at the Plaintiff;

4. Quantum must be proportionate to the need for deterrence;

5. Quantum must be proportionate after taking into account other penalties which had already been assessed.

In reducing quantum from $100,000.00 to $20,000.00 the Court noted that the Defendant's misconduct was an isolated event. There was no relationship between the parties. The harm was not directed specifically at the Plaintiff and the Defendant has already been punished.

In his dissent Justice Blair was of the view that punitive damages were not appropriate on the basis that such an award in this case as in most "drinking and driving" cases would be contrary to the general principles underpinning punitive damages.

The objective of deterrence would not be met as the Defendant like most Defendants in similar cases would be insured. In his view the standard Owner's Policy provided an insured indemnification for "any payment that the law requires" including punitive damages.

Statistically the Defendant's behaviour in drinking and driving was not extreme. "As deplorable as the reality is, personal injuries arising from impaired driving cases are far from exceptional in our society".

In his view, an award of punitive damages in such circumstances would result in a social cost which would be passed on to all drivers and would inevitably result in significant windfall recoveries.

The decision by the majority and comments by Justice Blair in dissent may have far reaching implications for both insureds and insurers. At the same time, however, the Court dealt with other damage and liability issues.

GENERAL DAMAGES

In terms of damages the Defendants had appealed against the Jury's decision to award general damages in the amount of $250,000.00.

On the facts of the case, although the Plaintiff had suffered a closed head injury and a number of orthopaedic injuries she had been able to return to University and perform at a reasonable level.

Although the Court suggested that the award was perhaps "generous" it was not "beyond the scope of reasonable" to amount to a wholly erroneous estimate of general damages. As it was not beyond a reasonable scope, the Court declined to interfere.

AGGRAVATED DAMAGES

With respect to the issue of aggravated damages, the Jury had awarded $100,000.00 in aggravated damages as a separate head of damage.

As a general principle the Court noted that general damages were to be assessed as part of non-pecuniary damages, not as a separate head of damage and were to be awarded specifically to compensate a Plaintiff for additional emotional harm. In so doing it allowed the appeal with respect to aggravated damages.

COMMERCIAL HOST LIABILITY

The Defendant McMaster Student Union Incorporated, "McMaster" had appealed the Jury's decision to find it both liable and apportion liability thirty percent.

The Court did not interfere with the Jury's decision on either point.

With respect to the issue of liability, McMaster owned the Plaintiff a duty of care both at Common Law and under the *Liquor Licence Act.*

There was evidence upon which a jury could find a breach of those duties.

The Court was of the view that the combination of the Defendant's blood alcohol level and expert testimony to the effect of that level would suggest that the Defendant was showing visible signs of impairment.

It noted that McMaster led limited evidence on the issue of impairment, specifically calling one employee.

There was further evidence that the "Smart Serve" protocols were not followed.

In terms of apportionment, although thirty percent was at the high end it not out of the range of findings in other Commercial Host Liability cases. [**Editorial Note:** Of note, the Jury was not charged on the issue of apportionment.]

CONCLUSION

If in fact leave is sought, and obtained, it would not surprise the writer if there were multiple interveners including the IBC and Mothers Against Drunk Driving. (MADD).

We could be looking at more social discussion akin to issues raised before the Court in ***Childs v. Desmoreaux.***

It will be interesting to see how "progressive" the Court is this time around or whether or not Justice Blair's dissent ultimately finds favour.