THE AFTERMATH OF McINTYRE V. GRIGG

The reasons for judgment of our Court of Appeal in McIntyre, et al v. Grigg are now reported at (2006) 83 O.R. (3d) 161. The decision addresses a range of issues raised on the appeals taken from a 7-week jury trial presided over by Justice Fedak in Hamilton.

My partner, Robert Sutherland, was counsel for one of the defendants at trial, McMaster Student Union Inc., carrying on business as "The Downstairs John"[1], while the writer was counsel for that party in the Court of Appeal.

As mentioned at paragraph 46 of the reasons for judgment of the Court of Appeal, and to the eternal relief of my partner, the jury did not award aggravated or punitive damages against McMaster. As a result, it was counsel for Mr. Grigg that did the heavy lifting in the Court of Appeal on these issues, so I am going to defer to Sheldon Gilbert to address the weighty considerations arising out of those issues.

Having lived through the trial vicariously, as partners do, having read the transcripts generated by those seven weeks of proceedings and having endured the appeals, I will address some of the practical issues that I foresee coming down the pipe as a result of the decision in McIntyre and the evolving law in this area.

In short, I foresee that claims for punitive damages are going to become *de rigueur* in any accident case where the defendant's conduct contains a significant element of moral blameworthiness. This is going to alter the conduct of accident-generated tort litigation in cases of that nature from the pleadings stage through to discoveries and trial.

THE FACTS IN McINTYRE V. GRIGG

Andrew Grigg, a Hamilton Tigercat, and a fellow of some considerable capacity to consume alcohol, spent the evening in question in Hamilton at a couple of bars and restaurants. He arrived at the McMaster University Student Pub, The Downstairs John, at about midnight. He had three drinks over the space of an hour or so, he said. He met a young lady and left with her in his vehicle, but had to return for her purse. He lost control of his vehicle and struck a couple of young coeds, who were themselves on their way home from that same pub with a group of others.

[1] Robert Sutherland delivered a paper (from which I have unabashedly poached) at the January 27, 2007 gathering of Canadian Defence Lawyers in Halifax, Nova Scotia: *McMaster v. Grigg* "*Defensible Positions*", Canadian Defence Lawyers, January 24, 2007.

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On Mr. Grigg's evidence, he had consumed a modest amount of alcohol that evening but the breathalyser and expert toxicological evidence was to the effect that he had imbibed at least 15 drinks.

Charges of "over 80" and "impaired driving causing bodily harm" and "operation of a motor vehicle in a manner dangerous to the public, causing bodily harm" were laid and withdrawn as the breathalyser was administered before Mr. Grigg was informed of his right to counsel. Mr. Grigg pleaded guilty to "careless driving" and paid a $500 fine.

Andrea McIntyre, a bright, athletic, attractive and articulate young lady, suffered a badly broken femur, a possible head injury and serious psychological sequelae.

THE TRIAL DECISION

The jury divided liability 70% against Mr. Grigg and 30% against McMaster. They assessed general damages at $250,000, and fixed the financial losses of the plaintiffs at approximately $380,000. They awarded aggravated and punitive damages each in the sum of $100,000 against Andrew Grigg.

Although the plaintiffs claimed punitive damages and aggravated damages against McMaster, and pursued those claims with great vigour, the jury declined to award such damages against McMaster.

No *Family Law Act* damages were awarded in favour of the family members of Ms. McIntyre.

THE APPEAL DECISION

In the result, the liability split of 70/30 in favour of McMaster was maintained. As noted by the Court of Appeal at paragraph 37 of the reasons in McIntyre, counsel for McMaster at trial repeatedly requested that the jury be charged on the law with respect to the issue of the apportionment of liability, to the effect that in deciding the apportionment issue, it was necessary to weigh the relative moral culpability of both parties, and that concerning the law of taverner's liability, the jury ought to be told that the "lion's share of culpability, both morally and legally, should attach to the drinking driver".[2] This suggested charge was in opposition to the actual charge where the trial judge repeated plaintiff counsel's exhortation, "the bar supplied the bullets to Mr. Grigg and, in his drunken state, Grigg used the bullets".

At paragraph 38 of the McIntyre decision, the Court of Appeal points out that in the **absence of material misdirection or non-direction**, appellate courts will not interfere unless the verdict is plainly unreasonable and unjust. It is also mentioned that it would

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[2] See paragraph 37 of the McIntyre decision, citing Dryden v. Campbell Estate, [2001] O.J. No. 829, and Hague v. billings (1993) 13 O.R. (3d) 298 (C.A.).

have been preferable had the trial judge acceded to counsel's request that the jury be charged on the issue of apportionment. The court concludes that the apportionment was not outside of the range, that the jury was entitled to arrive at the verdict regarding apportionment that it did, and that the court was not going to interfere.

As a result of the able efforts of Sheldon Gilbert, the aggravated damages awarded by the jury were reduced to nil and the punitive damage claim was reduced from $100,000 to $20,000. *FLA* damages in favour of family members were awarded.

All in all, a fine day in the Court of Appeal for Mr. Gilbert except for the ruling of the Court of Appeal that costs were to be shared one-third each among Andrew Grigg (the driver), Thomas Grigg (the vehicle owner) and McMaster rather than being shared equally amongst the Grigg defendants on the one hand and McMaster on the other hand.

THE CHALLENGES THAT LIE AHEAD

Since the 1990s, the traditional function of tort law in the accident context has been to compensate victims for injuries caused by the behaviour of others.[3]

In a rather more learned piece than this, Kirk Stevens has examined the frontier of the "wild domain" of punitive damages and the shift entailed from the notion of compensation to the notion of punishment. The author makes the point that punitive damages are rooted in the desire to exact revenge and that juries are the most susceptible to the outrage that fuels the motivation to exact revenge.[4]

One might well take the view that given the comments of the majority in McIntyre as to the amount of punitive damages available in accident-related tort cases, we will not hear much more about the subject in light of the limited benefit available and the costs of extracting that benefit. I don't think that viewpoint is accurate.

Our plaintiff's bar contains a group of counsel that are exceptionally sharp, bellicose, well-informed and organized. Where there is an advantage to be seen, it will be taken. I expect we will see a radical increase in the number of punitive damage claims being forcefully advanced, and there is a least some indication from plaintiff's counsel that this is going to be the case.[5]

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[3] Lewis N. Klar, *Tort Law,* 3'rd ed., (Toronto: Thomson Carswell, 2003) at p. 11.

[4] Kirk F. Stevens, "Wild Justice on the Compensation/Punishment Frontier: An Attempt to Make Some Sense of Aggravated and Punitive Damages after Whiten" in The Law Society of Upper Canada, ed. *Special Lectures 2005*: The Modern Law of Damages (Toronto: Irwin Law, 2006) 427 and Kirk F. Stevens, "A Short Dispatch from the Wild Frontier: Recent Developments in the Law of Aggravated and Punitive Damages", National Update on Insurance Law and Coverage Disputes, Osgoode Hall Law School, York University Professional Development, 2007.

[5] Dean F. Edgell, *McIntyre v. Grigg*: Punitive Damages are Available in Negligence Cases: Without Prejudice, (Toronto, Harrison Inc., March 2007)

Experienced counsel know intuitively of the advantage of the high moral ground. Whether representing plaintiff or defendant, it has always been easier to achieve a good result when it is the **other** party that has done something morally repugnant regardless of who wound up injured or how the injuries occurred. It is tough to maintain the high moral ground when your client is one whose conduct has not only fallen below the standard of the ordinary reasonably competent motor vehicle operator, doctor, accountant, lawyer, etc. but where your client has been guilty of behaviour that offends the average person's sense of decency or that contains an element of moral blameworthiness or moral turpitude.

Pursuing claims for punitive damages against defendants in accident cases, plaintiffs' counsel will be asking the jury not only to rule on the alleged negligence of the defendant, but to address and rule on the issue of the need for punishment. This brings into play a set of human factors and emotions well beyond the usual, cerebral function of determining liability and assessing damages and engages the baser human drive – the desire to punish and exact revenge. This is a powerful tool in the plaintiff's arsenal.

The focus on the need to provide punishment can distract the whole trial process from what counsel may believe is the most important task at hand – determining the plaintiff's entitlement to damages and assessing liability. This can also, I would suggest, change the result of the apportionment process – juries are unlikely to find a plaintiff contributorily negligent in a situation where they have awarded punitive damages, for example. Even if unsuccessful, the mere process of adducing evidence to support claims for punitive damages may cause a shift in the liability result. Note, for example, the 4th ground for liability against McMaster, as found by the jury, referenced at paragraph 28 in the Court of Appeal decision in the McIntyre case, "No changes to enforcement of Smart Serve protocol post-accident". The evidence about post-accident conduct was adduced on the issue of punitive damages, and the use of that evidence spilled over into the finding of liability.

We are left with the majority decision in the McIntyre case confirming the justification for punitive damages being to meet the objectives of punishment, deterrence and denunciation of the defendant's conduct. In light of the novelty of this kind of claim in accident litigation, much remains to be learned about the process of generating the evidence needed to allow a jury to decide whether or not to punish, deter and denounce.

THE TEST OF ENTITLEMENT

Justice Blair, in dissent, at paragraph 126 of the McIntyre decision, refers to Lord Diplock's judgment in *Cassell & Co. Ltd. v. Broome,* [1972] A.C. 1027 (H.L.) where his Lordship was giving consideration to what conduct was needed to invoke "the whole gamut of dyslogistic judicial epithets". Justice Blair volunteers his own list of what he calls pejorative descriptors at paragraph 125, which include: "wanton or reckless", "contumelious", "deserving of the court's censure", "offending the court's sense of

decency", "malicious", "high-handed and heinous", "reckless disregard for the lives and safety of others". Justice Blair's point was that although the impugned conduct may attract such descriptors that is not, in and of itself, sufficient to support an award of punitive damages. The conduct in this case – reckless driving after the consumption of considerable alcohol – was simply not particularly unusual.

The majority, at paragraph 60 of the McIntyre case, set forth their own set of adjectives extracted from the authorities as describing the type of conduct required to attract punitive damages: "malicious", "oppressive", "arbitrary and high-handed that offend the court's sense of decency", "a marked departure from ordinary standards of decent behaviour", "harsh, vindictive, reprehensible and malicious", "offends the ordinary standards of morality or decency", "arrogant and callous", "egregious", "high-handed and callous", "arrogant, callous of the plaintiff's rights and deliberate", "harsh, reprehensible and malicious", "outrageous or extreme", "highly unethical conduct which disregard the plaintiff's rights" and, "recklessly exposing a vulnerable plaintiff to substantial risk of harm without any justification".

The difficulty one must address in the role of counsel on a case where punitive damages are claimed is trying to cut through this adjectival mishmash in order to answer the question of whether or not the case at hand is one where punitive damages likely will or will not be awarded. Unfortunately, there is little guidance available - the test is not one composed of nouns and verbs, but only adjectives.

In the McIntyre case, counsel for McMaster repeatedly brought motions to have the claims for punitive damages and aggravated damages struck as against McMaster on the basis that there was no evidence that would support such claims. Motions were refused at the stage where the plaintiff amended its pleadings some few months before trial, at the commencement of the trial and at the conclusion of the evidence.

The difficulty with such motions is that to succeed, one needs to show that the claim has essentially no chance of success and the decision of many judges currently will be simply to leave that issue to the jury. After all, there is no bright line that separates ordinary negligent behaviour from conduct that might be "outrageous or extreme" or that might "recklessly expose a vulnerable plaintiff to substantial risk of harm without justification" or be "arrogant and callous", or simply "egregious". Indeed, the application of any given dyslogistic judicial epithet will come down to subjective decision-making of the judge or the members of the jury – what is merely negligent to one could easily be egregious to another.

EVIDENTIARY CONSIDERATIONS

Claims for punitive damages very much widen the scope of what is relevant and therefore the scope of what is admissible as evidence.

In reducing the punitive damage award in the case at hand from $100,000 to $20,000, the court of Appeal in the McIntyre case were moved by the isolated nature of the misconduct of Mr. Grigg. What if the plaintiff had been able to show that the misconduct was repeated regularly both before and after the accident?

The issue of what is going to be relevant and admissible in terms of the conduct of a defendant in an accident case where negligence is alleged and punitive damages claimed, and the issue of what use can be made of any given piece of evidence is going to occupy some time in the courts.

It is obvious that it will be much easier to invoke a jury's wrath and to get them to punish a given tortfeasor for his or her behaviour if there is evidence that the conduct causing the incident in question was repeated both before and after the accident. For example, an isolated tumble down the stairs on a snowy day takes on a different light where evidence can be presented that on repeated occasions before the fall, the occupier in question failed to properly clear the snow despite complaints, warnings and the like and that the behaviour changed not a bit following the accident.

This takes us back to the desire to exact revenge or to act on outrage as referred to by Kirk Stevens. Who better to be the object of revenge and the subject of an exercise of moral outrage than the unrepentant?

CHANGE IN FOCUS: FROM COMPENSATING A PLAINTIFF TO PUNISHING A DEFENDANT

Experienced defence counsel know to beware of the sympathetic plaintiff. Andrea McIntyre herself was a likeable, attractive, young coed just starting to make her way in the world. This provided a nice contrast to Mr. Grigg.

A fair amount of time was taken up at the McIntyre trial with evidence not about Andrea McIntyre but evidence about Mr. Grigg and McMaster, all with a view to painting them both in an irresponsible and dislikeable light – Mr. Grigg for his drinking and poor driving and McMaster for its allegedly irresponsible and profit-driven behaviour.

The result, in my view, was generated by this combination. The jury were motivated to exact revenge on Mr. Grigg not so much because he strayed from the path of righteousness, but because in so doing he caused great harm to this particular plaintiff. I suggest the desire to exact revenge is more likely to come to the fore in any case where the plaintiff is likeable and vulnerable.

This focus on the defendant may also lead to the collateral result where the jury will be less likely to find a plaintiff contributorily negligent in circumstances where a significant portion of the trial is directed at the shortcomings of the defendant not necessarily related to the events giving rise to the accident.

COVERAGE ISSUES AND POTENTIAL CONFLICTS

It is beyond the scope of this paper to address the issue of whether or not there is coverage in Ontario under the Standard Automobile Policy for punitive damage awards. Current views run the gamut from it being “trite law” that there is no such coverage to Justice Blair’s view (obiter) that there is. However, it is by no means clear that a binding decision in the future that there is no such coverage, or revision to the wording of the Standard Automobile Policy, will necessarily be beneficial. There will be difficulties in the future regardless of whether any given claim for punitive damages is covered under the tortfeasors insurance policy or not.

Take, for example a fact scenario like McIntyre v. Grigg and assume no coverage for punitive damages. Further, assume that compensatory damages are in the range of up to $800,000 or thereabouts, with the plaintiff claiming several hundred thousand dollars in punitive damages on top of that. Liability is near hopeless, but not entirely so, and the defendant is dislikeable but has some assets and has his or her own lawyer defending the punitive damages aspect. Plaintiff’s counsel has refused an offer to admit liability in exchange for limiting the claims to the $1 million insurance limit (consistent with modern strategy) and you get the sense that some considerable effort is being made to assemble a full dossier of your insured’s pre and post-accident related misdeeds.

In those circumstances:

- Ought you to recommend that liability be admitted in circumstances where counsel defending the punitive damages claim strongly suggests that liability not be admitted for fear the policy limits will be breached?

- Will you be obliged to recommend that the insurer pays the full policy limits of $1 million in exchange for settlement of all claims in light of the fact that holding out for a more advantageous result may expose the insured not only to claims over the policy limits but to uninsured punitive damages claims on top of that?

- How, exactly, do you in practice defend all claims against an insured except those for punitive damages – what is it you leave for the other counsel for your client to do?

- How do you distance your client as a defendant on the insured claims from your client as a defendant on the punitive damages claim?

- How do you avoid having fellow counsel for the insured make a mess of your carefully laid strategy?

- If it is resolved that you are going to defend both the claims for compensatory damages and punitive damages, how is the work performed purely on the

punitive damages issue accounted for, in light of the modern principles involved in dealing with covered and non-covered claims – will there be any savings at all?[6]

CONCLUSION

While the facts giving rise to the result in McIntyre v. Grigg are not novel, the decision of the Court of Appeal opens the door to some interesting issues.

[6] William G. Scott and Eli Mogil, "Allocation of Defence Costs Between Covered and Uncovered Claims Prospective v. Retrospective Allocation", National Update on Insurance Law and Coverage Disputes, Osgoode Hall Law School, York University Professional Development, March 2007.