

Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada

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I. INTRODUCTION

The anomalous nature of punitive or exemplary damage awards in civil cases has often been the subject of comment in English jurisprudence and in the decisions of courts in other common law jurisdictions within the British Commonwealth. Thus, in the leading opinion of the House of Lords decision in *Rookes v. Barnard*,² Lord Devlin observed that the recognition of punitive damages, which he favored to a limited degree, involved “admitting into the civil law a

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2. [1964] A.C. 1129 (H.L.).

principle which ought logically to belong to the criminal.”³ The lack of procedural safeguards normally associated with punishment, the enrichment of the plaintiff rather than the state by the imposition of a civil fine, and the inherent difficulty of quantifying such awards with resulting doctrinal uncertainty have conspired, in the English tradition at least, to justify caution and restraint in the making of such awards. Indeed, in *Rookes v. Barnard* itself, the English law of punitive damages approached the brink of extinction. Such awards were preserved in that case for application only in tort law and essentially in only two types of cases. The first type included claims arising from oppressive, arbitrary, or unconstitutional acts of public servants, or, as Lord Devlin described it, “the arbitrary and outrageous use of executive power.”⁴ The second type of cases included those in which the defendant’s conduct was calculated to make a profit that exceeded the compensation available to the plaintiff.⁵ Until quite recently, the rules set forth in *Rookes v. Barnard* settled the boundaries for punitive damage awards in English law.

At the same time, however, some support for the making of such awards can be found. Lord Devlin himself expressed the view that punitive damage awards played a very useful role in the two categories of cases identified in *Rookes v. Barnard*.⁶ Further, the restriction of English awards to these two categories of cases has attracted criticism over the years. More particularly, the English Law Commission, in its report entitled *Aggravated, Exemplary and Restitutionary Damages*, recommended a much broader potential availability of such awards in the context of tort law and in claims arising from equitable wrongdoing.⁷ Even for such enthusiasts, however, the extension of damage awards into the context of claims for damages for breach of contract, where no tort has been committed, have typically been considered to be beyond the pale.

Thus, the Law Commission itself recommended against extending awards of punitive damages into the contractual context. The Commission offered a number of reasons in support of this recommendation, some more convincing, one might think, than others. Thus, “a contract is a private

3. *Id.* at 1226.

4. *Id.* at 1223; *see also* *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1077–78 (H.L.) (noting that the doctrine also applies to police and other local authorities improperly exercising rights of search or arrest without warrant).

5. *Rookes*, [1964] A.C. at 1226.

6. *Id.*

7. LAW COMM’N, *AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES* 184–88 (1997) [hereinafter *AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES*]. For a critical assessment, see Peter Jaffey, *The Law Commission Report on Aggravated, Exemplary and Restitutionary Damages*, 61 *MOD. L. REV.* 860 (1998).

arrangement in which parties negotiate rights and duties, whereas the duties which obtain under the law of tort are imposed by law; it can accordingly be argued that the notion of state punishment is more readily applicable to the latter than to the former.”⁸ It further argued that “the need for certainty is perceived to be greater in relation to contract than tort,” thus rendering the discretionary features of exemplary damage awards unattractive.⁹ The Commission noted that exemplary damages had never been awarded for breach of contract in the past, that the awarding of exemplary damages would tend to discourage efficient breach of contract, and that contract, unlike tort law, typically involved pecuniary rather than nonpecuniary losses with respect to which exemplary awards were less appropriate.¹⁰

Other considerations may be thought to weigh against punitive damages in contract. It can be argued that, to the extent that punitive damage awards punish defendants who have inflicted anxiety and other mental suffering on plaintiffs, such injuries can be more directly and appropriately addressed by awards of compensatory damages relating to such injuries. Farnsworth suggests that American courts also exhibit a reluctance to grant awards of punitive damages in the context of pure contractual breach, and offers the proposition that damages for breach of contract are essentially compensatory in nature as an explanation for this phenomenon.¹¹

Against this background, it may occasion some surprise, even to Canadian observers, that the Supreme Court of Canada has blessed, in recent years, punitive damages awards in pure breach of contract cases. The Supreme Court reaffirmed this development in its recent and leading decision in *Whiten v. Pilot Insurance Co.*¹² As the majority opinion of the Court noted in that case: “Critics of punitive damages warn against an ‘Americanization’ of our law that, if adopted, would bring the administration of justice in this country into disrepute.”¹³ Indeed, it is probably true that quite apart from specialists with a particular interest in this topic, Canadians more generally have an impression of American experience with punitive damages awards that is not viewed altogether

8. AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, *supra* note 7, at 118.

9. *Id.*

10. *Id.*

11. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 194–98 (3d ed. 2004).

12. [2002] 1 S.C.R. 595, 596.

13. *Id.* at 618–19 (*per* Binnie, J.).

favorably. Canadian appreciation of American experience results, no doubt, in large measure from media coverage of high-profile American cases. Many readers of the Canadian daily press would be aware, for example, of the 1994 award in the *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, where an Alabama jury awarded the plaintiff \$2.7 million in punitive damages at trial.¹⁴ The plaintiff had suffered burns from opening a cup of scaldingly hot McDonald's coffee and spilling it on her lap in the front seat of an automobile.¹⁵ The fact that the trial judge reduced the jury award to a much less impressive \$480,000¹⁶ would not have significantly reduced its impact on a Canadian reader as evidence of a legal system out of control.

Often these cases have had a Canadian dimension. The remarkable result in *Pennzoil Co. v. Texaco Inc.*¹⁷ led the defendant Texaco to liquidate its interest in its Canadian subsidiary, Texaco Canada, in order to pay the award. Canadian opera fans were temporarily distressed by the loss of Texaco Canada's sponsorship of a favorite Saturday afternoon radio program. A Canadian funeral home chain, the Loewen Group, Inc., was brought close to insolvency in 1996 by a \$500 million award in punitive damages granted by a Mississippi jury.¹⁸ The claim concerned Loewen's alleged refusal to perform an agreement to buy two funeral homes from the former Mayor of Biloxi.¹⁹ The properties in question had a value of approximately \$8.5 million. To avoid bankruptcy, the Loewen Group eventually settled the claim for an amount variously reported in the range of \$150 to \$175 million.²⁰

Accordingly, it is not surprising that, in *Pilot Insurance*, the Supreme Court of Canada acknowledged that Canadian critics of punitive damages awards draw support from their understanding, or perhaps

14. No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994). This case, together with *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), were referred to by Justice Binnie as decisions relied upon by critics of the American law on punitive damages. See *Pilot Ins. Co.*, [2002] 1 S.C.R. at 618.

15. See Debra Lyn Bassett, "I Lost at Trial—In the Court of Appeals!": *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1179 n.315 (2001) (discussing the facts of *Liebeck*, 1995 WL 360309).

16. *Id.*

17. See 481 U.S. 1 (1987) (holding that comity prevents federal courts from blocking a state judgment awarding punitive damages); see also Comment, *Texaco Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 FORDHAM L. REV. 767 (1986) (providing analysis of the federalism issue raised by *Pennzoil*); JAMES SHANNON, *TEXACO AND THE \$10 BILLION JURY* (1988).

18. The case is described in MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* 158–59 (1998). See also Jonathan Harr, *The Burial*, NEW YORKER, Nov. 1, 1999, at 70; Barrie McKenna, *Loewen Action Called a Threat to U.S. Justice*, CAN. BUS., Nov. 25, 1998, at B7 (providing description of settlement).

19. BOOT, *supra* note 18, at 158.

20. *Id.* at 159.

misunderstanding, of American experience. It is also not surprising that in this case the Supreme Court attempted to craft an approach to the awarding of punitive damages that would avoid the worst excesses of American experience. As we shall see, however, whether the Court succeeded in attaining that laudable objective remains, as yet, unclear.

II. RECOGNITION

The unlikely story of the Canadian embrace of punitive damages for breach of contract arose in the context of wrongful dismissal cases, and, more particularly, in the context of dismissal with an imputation. In an employment contract of indefinite duration there is, of course, an implied term requiring the employer to give reasonable notice to the employee of an impending dismissal. Thus, in the typical wrongful dismissal case, the employee who has not received reasonable notice sues for damages for breach of that implied term. Where the wrongful dismissal is accompanied with false allegations of employee misconduct or other forms of harassment, the courts may consider awarding additional damages to an employee who claims to have been injured by conduct of this kind. The traditional response of English law, followed until recent years in common law Canada, was that no such damages claim was available on a breach of contract theory. In the 1909 decision in *Addis v. Gramophone Co.*, the House of Lords held that, in a wrongful dismissal claim, no compensation can be awarded for the manner of dismissal.²¹ To the extent that the employee had suffered injuries as a result of, for example, defamation, the employee should be left with whatever tort remedies might be available.²²

The novel idea that punitive damages might be awarded in the wrongful dismissal context appears to have been first mooted in a decision of Justice Linden—perhaps by no coincidence, one of Canada's leading torts scholars²³—in *Brown v. Waterloo Regional Board of Commissioners of Police*.²⁴ Justice Linden opined that although exemplary damages for breach of contract were not available in the particular circumstances of the case, there was no general rule against awarding

21. [1909] A.C. 488 (H.L.).

22. *Id.*

23. ALLEN M. LINDEN, *CANADIAN TORT LAW* (7th ed. 2001).

24. [1982] 136 D.L.R. (3d) 49 (Ont. High Ct.) *var*d [1983] 150 D.L.R. (3d) 729 (Ont. C.A.).

such damages.²⁵ The point was taken up by the Supreme Court of Canada in *Vorvis v. Insurance Corp.*²⁶ in 1989. The Court again offered the view that although such an award would be inappropriate on the facts of that case, punitive damages could indeed be awarded in the context of a claim for breach of contract damages.²⁷

The claim in *Vorvis* was for a wrongful dismissal. The plaintiff lawyer was abruptly terminated by his employer, a government automobile insurance plan, without cause and without reasonable notice. Prior to the dismissal, the plaintiff's supervisor, who considered the plaintiff to be conscientious to a fault, engaged in detailed and, perhaps, heavy-handed supervision of the plaintiff's work.²⁸ In addition to claiming wages that he would have earned during a reasonable notice period, the plaintiff sought aggravated and punitive damages.²⁹ The Supreme Court majority held that "while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract."³⁰ For such an award to be appropriate, the conduct of the defaulting party must be "of such a nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature."³¹ Again, "the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."³² However, although the facts of the case indicated that the supervisor had treated the plaintiff "in a most offensive manner,"³³ the conduct was not of such a nature as to justify an award of punitive damages.³⁴

Three aspects of the Court's reasoning in the *Vorvis* case are of a particular interest in the present context. First, the majority opinion of Justice McIntyre indicated a clear awareness of the anomalous or "peculiar" nature of punitive damages awarded "in the absence of the procedural protections for the defendant [which are] always present in criminal trials where punishment is ordinarily awarded . . ."³⁵ Further, Justice McIntyre indicated an awareness of the problematic aspects of extending punitive damages awards from their then existing home of tort actions to breach of contract cases. In a tort case, the defendant is "under a legal duty to use care not to injure his neighbour, and the

25. *Id.* at 61, 66.

26. [1989] 1 S.C.R. 1085.

27. *Id.* at 1086–87.

28. *Id.* at 1085.

29. *Id.* at 1086.

30. *Id.* at 1107.

31. *Id.* at 1107–08.

32. *Id.* at 1108.

33. *Id.* at 1107.

34. *Id.* at 1110.

35. *Id.* at 1104.

neighbour has in law a right not to be so injured and an additional right to compensation where injury occurs.”³⁶ On the other hand,

... In an action based on a breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant has breached the contract, the remedies open to the plaintiff must arise from that contractual relationship, that ‘private law’, which the parties agreed to accept.³⁷

However, Justice McIntyre opined that the distinction between the nature of tortious liability and liability for breach of contract did not provide a reason to refuse extending punitive damages into the latter context. Rather, it served as a basis for surmising that an award of punitive damages would be “very rare in contract cases.”³⁸ Beyond the suggestion that the difference between the two forms of liability did not preclude the punitive damages awards in the contractual context, the Court offered no reasoned explanation for the proposition that punitive damages should be extended into the purely contractual arena. Presumably, the Court felt that it was necessary or desirable to do so in order to provide a disincentive for conduct that, although “harsh, vindictive, reprehensible and malicious,”³⁹ is not tortious in nature.

Second, Justice McIntyre’s reason for declining to award punitive damages on the facts of *Vorvis*, though clearly expressed and quite defensible, has created a trail of confusion in subsequent cases. Justice McIntyre was of the view that the heavy-handed supervision exercised by the plaintiff’s supervisor was not “sufficiently offensive, standing alone, to constitute actionable wrong”⁴⁰ Justice McIntyre indicated that the only basis for the imposition of punishment “must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff.”⁴¹ Such an approach, as Justice McIntyre noted, was consistent with the American rule that awarded punitive damages in a contract case only when the breach of contract also constituted a tort for which punitive damages would be recoverable.⁴² The supervisor’s heavy-handed supervision appeared to be neither tortious nor a breach of any term of the employment contract. More

36. *Id.* at 1107.

37. *Id.*

38. *Id.*

39. *Id.* at 1107–08.

40. *Id.* at 1110.

41. *Id.* at 1106.

42. *Id.* (referring to RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981)).

particularly, it appears that Justice McIntyre considered that this conduct did not constitute a breach of the term requiring the employer to give reasonable notice of termination.

This reasoning appears unexceptionable. Justice McIntyre was simply reiterating the proposition that in the absence of a breach of a duty of some kind, punitive damages cannot be awarded. In subsequent cases, however, it has been assumed by courts, including the Supreme Court of Canada, that Justice McIntyre simply precluded the possibility that punitive damages could ever be awarded for the offensive manner in which a notice of dismissal is effected. Further, later courts have struggled with the notion of whether an award of punitive damages is permissible, then, only where there exists an independent “actionable wrong” other than the principal breach of contract with respect to which damages are claimed. The answer to this question, surely, should be that if the principal breach of contract in issue is sufficiently offensive in nature, the holding in *Vorvis* suggests that punitive damages would be available, notwithstanding the absence of any additional breach of duty, whether tortious or contractual. The problem, as Justice McIntyre saw it in *Vorvis*, was that the offensive conduct allegations related to the manner of supervision leading up to the decision to dismiss, rather than to the manner in which the employer breached the reasonable notice requirement. While it may be difficult to imagine circumstances where the manner of giving unreasonable notice is so offensive as to warrant an award of punitive damages, nothing in the reasoning of Justice McIntyre in *Vorvis* precludes this possibility.

The third point of interest is the approach taken to the same issue by Justice Wilson who, in her dissent on this point, would have awarded punitive damages. Justice Wilson disagreed with what she characterized as Justice McIntyre’s view that “punitive damages can only be awarded when the misconduct is in itself an ‘actionable wrong.’”⁴³ Rather, in her view, “the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature.”⁴⁴ On the present facts, the employer had engaged in “reprehensible conduct . . . towards a sensitive, dedicated and conscientious employee. The appellant was harassed and humiliated and . . . ultimately dismissed for no cause after a sustained period of such treatment.”⁴⁵ Thus, Justice Wilson appears to be suggesting that even in the absence of a breach of duty, whether tortious or contractual, punitive damages may be awarded.

43. *Id.* at 1130.

44. *Id.*

45. *Id.* at 1130–31.

Another plausible interpretation of her view, however, is that the humiliating nature of the dismissal notice renders the breach of the requirement to give reasonable notice a sufficiently offensive character to attract an award of punitive damages. However, one might object to this interpretation of Justice Wilson's views by arguing that Justice Wilson did not draw a clear distinction between the conduct leading up to the decision to dismiss and the manner of the dismissal itself, a distinction which is implicit in Justice McIntyre's reasoning, and which does appear to ground his decision.

Subsequently, Canadian courts have taken the view that the *Vorvis* decision does require that in addition to finding that a principal breach of contract sounding in damages has occurred, one must find, in order to grant an award of punitive damages, that the offensive conduct constitutes a separate actionable wrong in the form of either tortious misconduct or an additional breach of contract.⁴⁶ Indeed, in the particular context of wrongful dismissal, the Supreme Court of Canada expressed the view that punitive damages cannot be awarded with respect to an offensive manner of giving termination notice on the theory that punitive damages can only be awarded where there is, in addition to the failure to give reasonable notice, a separate actionable wrong.

In *Wallace v. United Grain Growers Ltd.*,⁴⁷ the Court affirmed this view, however it further held that an employer who engages in "callous and insensitive treatment"⁴⁸ in dismissing an employee, though not liable for punitive damages, may attract liability in the form of an extension of the required reasonable notice period.⁴⁹ This is so, in the Court's view, even though the misconduct cannot be held to be a breach of an implied term to dismiss only in good faith. Such a term, in the majority's view, should not be implied into the employment contract as it would

46. See, e.g., *Marshall v. Watson Wyatt & Co.*, [2002] 209 D.L.R. (4th) 411, 426 (Ont. C.A.); *Schimp v. RCR Catering Ltd.*, [2004] 236 D.L.R. (4th) 461, 480-81 (N.S.C.A.). In New Brunswick, however, this confusion has been cleared up by legislation providing that in a claim for "aggravated, exemplary or punitive damages, it is not necessary that the matter in respect of which those damages are claimed be an actionable wrong independent of the alleged wrong for which the proceedings are brought." Law Reform Act, R.S.N.B., Ch. L-1.2, § .3(1) (1993) (Can.).

47. [1997] 3 S.C.R. 701, 705.

48. *Id.* at 740. Justice Iacobucci further characterized such conduct as "bad faith conduct in the manner of dismissal," and offered as illustrations thereof "conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive." *Id.* at 740, 743.

49. *Id.* at 705.

constitute an undesirable fetter on the employer's capacity to dismiss without cause and upon reasonable notice.⁵⁰ Thus, at least in the wrongful dismissal context, the Court appears to have taken the rather surprising view that even in the absence of a breach of duty, be it tortious or contractual, compensation can be awarded. In a vigorous dissent, Justice McLachlin suggested that a clearer and sounder approach would be to hold that a term is to be implied in the employment contract that the employer must not engage in such conduct. The breach of such term could thus clearly and directly lead to an award of damages, including potentially, punitive damages.⁵¹

To some extent, these difficulties arise from a failure to draw a clear distinction between the manner in which the decision to dismiss is reached as opposed to the manner of the dismissal itself. The approach that Justice McLachlin advocated in her dissent avoids the confusion that results from this deficiency by implying a term, which imposes obligations of good faith conduct relating to the dismissal of an employee.⁵² Calculation of the notice period, for Justice McLachlin, then, can be and should be restricted to an assessment of those factors, including the manner of dismissal, that may have an impact on the "difficulty of finding replacement employment."⁵³

In the majority view, however, the Canadian law of wrongful dismissal appears now to have reached the position where punitive damages relating to the manner of dismissal are not available. Nevertheless, curiously, an employer who behaves in a "callous and insensitive" manner relating to the dismissal of an employee is vulnerable to an extension of the period of reasonable notice period, even though the conduct in question may not, in itself, constitute a breach of either tortious or contractual duties. Damages awarded on this basis appear to constitute punitive damages for wrongful dismissal by another name.⁵⁴

50. *Id.*

51. *Id.* at 748–49, 757, 762–64.

52. *See id.* at 762 (placing reliance on academic commentary supporting the recognition of an implied term of this kind); *see, e.g.*, Randall B. Schai, *Aggravated Damages and the Employment Contract*, 55 SASK. L. REV. 345 (1991) (suggesting that the addition of an implied condition of good faith to employment contracts would align such agreements with modern realities); Geoffrey England, *Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm*, 20 QUEEN'S L.J. 557 (1995) (observing that lack of empirical research on the effect of lengthening the notice period in dismissal cases hampers judges from effectively balancing the rights of employees with the employer's efficiency concerns).

53. *Wallace*, [1997] 3 S.C.R. at 751.

54. In the wake of *Wallace*, several Canadian courts have awarded damages calculated on the basis of an extended notice period in order to reflect harsh treatment in the manner of dismissal. *See, e.g.*, *Cassady v. Wyeth-Ayerst Can. Inc.*, [1998] 163 D.L.R. (4th) 1, 12 (B.C.C.A.); *Montague v. Bank of N.S.*, [2004] 69 O.R. (3d) 87, 94 (Ont. C.A.).

Putting to one side the unsatisfactory complexities of the current Canadian law on wrongful dismissal, it was clearly accepted that, as a result of the decision in *Vorvis*, punitive damages had become potentially available in Canadian law for breach of contract. It was only in the later decision in *Whiten v. Pilot Insurance Co.*,⁵⁵ however, that the Supreme Court of Canada actually approved an award of this kind. In this case, the Court upheld an award of \$1 million in punitive damages against a defendant insurer who had breached its implied contractual duty to handle claims by an insured in such fashion as to meet a standard of good faith and fair dealing.⁵⁶ The defendant had conceded that it had breached this duty on the facts of this case.⁵⁷

The facts were propitious for a punitive damages claim.⁵⁸ The claimant's home had been destroyed by an accidental fire. The claim under her insurance policy with the defendant was met with skepticism and, ultimately, indefensibly harsh treatment. Indeed, over advice to the contrary of an independent insurance adjuster, the insurance industry's Crime Prevention Bureau, the fire department, and an engineering expert and a firefighter, both retained by the defendant insurer, the defendant persisted in the view that the fire resulted from arson committed by the plaintiff and her husband.⁵⁹ Acting on this theory, the insurer terminated interim payments to the claimant, being well aware that the plaintiff and her husband were in precarious financial circumstances, in an apparent attempt to coerce an unfairly low settlement amount.⁶⁰ Further, the defendant forced the claimant to litigate her claim at an estimated cost of \$320,000.⁶¹ At trial, the jury awarded approximately \$318,252 in compensatory damages and an additional amount of \$1 million as punitive damages.⁶² The Ontario Court of Appeal reduced the punitive damage award to \$100,000, though one dissenting member of the panel would have dismissed the appeal.⁶³

However, on further appeal, the Supreme Court of Canada restored the jury award. Characterizing the conduct of the defendant insurer as that

55. [2002] 1 S.C.R. 595, 596.

56. *Id.* at 596–97.

57. *Id.* at 604, 608.

58. *Id.* at 596.

59. *Id.* at 605–08, 611.

60. *Id.* at 607.

61. *Id.* at 603.

62. *Id.* at 613.

63. *Id.* at 604, 614–15.

of having “behaved abominably”⁶⁴ the Court had no difficulty in finding that the defendant had behaved in a “malicious, oppressive and high-handed” manner that “offends the court’s sense of decency.”⁶⁵ On this occasion, however, the Court engaged in an extended analysis of the history and purposes of the punitive damages awards. This led the Court to offer a series of conclusions concerning the general nature and role of the punitive damages award. On behalf of the majority, Justice Binnie stated that “[p]unishment is a legitimate objective not only of the criminal law but of the civil law,”⁶⁶ and that punitive damages “serve a need that is not met either by the pure civil law or the pure criminal law.”⁶⁷ Thus, in the present case, only the claimant could be rationally expected to invest \$320,000 of costs in the attempt to prove that the defendant had acted in bad faith. An award that undoubtedly overcompensates the plaintiff is given “in exchange for this socially useful service.”⁶⁸

After a lengthy survey of developments in England, Australia, New Zealand, Ireland, and the United States, Justice Binnie concluded that the English attempt to limit punitive damages by “categories” did not work and had been rightly rejected by Canadian courts.⁶⁹ Further, he indicated that there exists a “substantial consensus” that the general objectives that punitive damages serve are retribution, deterrence of the wrongdoer and others, and denunciation.⁷⁰ Additionally, while conceding that the primary punishment vehicle is the criminal law and that successful prosecution had in some jurisdictions been held to preclude punitive damages, Justice Binnie thought that prior punishment for the defendant’s misconduct in issue should be considered merely another factor in making a punitive damages award, “albeit a factor of potentially great importance.”⁷¹ Further, Justice Binnie expressed the view that the incantation of “time-honoured pejoratives, (‘high-handed’, ‘oppressive’, ‘vindictive’, etc.) provide[d] insufficient guidance”⁷² In formulating more satisfactory guidance in making such awards, emphasis was to be placed, in his view, on the need to promote rationality, proportionality, and sensitivity to the particular circumstances of the case.⁷³ Finally, he suggested that it may be rational to employ a punitive damages award to

64. *Id.* at 617.

65. *Id.* (quoting *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1208).

66. *Id.* at 617.

67. *Id.*

68. *Id.*

69. *Id.* at 634.

70. *Id.* at 635.

71. *Id.*

72. *Id.* at 636.

73. *Id.* at 636–37.

relieve a wrongdoer of its profit.⁷⁴ As we shall see, Justice Binnie returned to a number of these themes in attempting to fashion a set of control mechanisms that are intended to preclude the making of excessive punitive damages awards.

While the majority's analysis admirably set the stage for the attempt to craft limitations on the punitive damages awards, less analytical rigor was applied to the question whether such awards ought to be extended beyond tort to the pure contractual breach context. The majority essentially adopted the view that the Court had previously settled the matter in the *Vorvis* case.⁷⁵ Unfortunately, however, the Court perpetuated the notion that had plagued reasoning in the lower courts after *Vorvis* that such awards could be made only if the offensive conduct constituted a separate "actionable wrong."⁷⁶ The Court backed into this difficulty by asking whether breach of contract, rather than tort, could constitute such a separate actionable wrong.⁷⁷

In answering this question, the majority placed emphasis on the fact that Justice McIntyre chose to use the expression "actionable wrong"⁷⁸ rather than the term "tort," which is employed in the *Restatement of Contracts*.⁷⁹ It further noted that the possibility of punitive damages for breach of contract appeared to have been conceded by the Court in a subsequent case.⁸⁰ Moreover, the majority suggested that "the requirement of an independent tort would unnecessarily complicate the pleadings, without in most cases adding anything of substance."⁸¹ The majority's survey of comparative experience did not observe that in the jurisdictions in question, including the United States, punitive damages are not typically awarded in pure breach of contract claims. The recent English Law Commission recommendation that exemplary or punitive damages ought not be awarded in the context of contractual breach⁸² was not referred to, nor was any response offered to the Commission's arguments in support of that recommendation.

Although the Court in *Pilot Insurance* rejected the restriction observed

74. *Id.* at 636.

75. *Id.* at 637.

76. *Id.* at 638–39.

77. *Id.* at 637, 639.

78. *Id.* at 639.

79. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

80. *Pilot Ins. Co.*, [2002] 1 S.C.R. at 639.

81. *Id.*

82. AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, *supra* note 7, at 185.

elsewhere of limiting punitive damages to tortious wrongdoing, the Court, as we have noted, retained and applied the *independent actionable wrong* requirement said to derive from the previous decision of the Court in *Vorvis*.⁸³ Thus, in order to grant a punitive damages award on the facts of *Pilot Insurance*, it would be necessary to find that, in addition to the breach of contract constituted by the failure to pay the claim, a further independent actionable wrong, whether a tort or a breach of contract, also occurred. In the Court's view, this requirement was met on the facts of *Pilot Insurance* because the defendant's abominable behavior constituted a breach of the insurer's implied duty of good faith and fair dealing, which requires the insurer to process claims in a prompt and fair manner.⁸⁴

As indicated above, the independent "actionable wrong" requirement appears to stem from a misreading of Justice McIntyre's reasons in the *Vorvis* case. Moreover, no explanation was given for the proposition that although one single breach of duty suffices for punitive damages in a tort context, punitive damages in contract require two breaches of duty. Indeed, it appears that no coherent justification can be offered for the latter requirement. It thus appears likely that, in due course and in an appropriate case, Canadian appellate courts, including the Supreme Court of Canada, will come to the conclusion that the circumstances of a single breach of contract could be such as to give rise to an appropriate punitive damages award.

Notwithstanding this inelegant source of continuing analytical difficulty, the decision in *Pilot Insurance* plainly establishes a jurisdiction to award punitive damages in a breach of contract case. The case is also noteworthy, however, for the Court's attempt to craft a series of control mechanisms that will limit such awards, a topic to which we now turn.

III. CONTROL MECHANISMS

Perhaps the most remarkable feature of the Supreme Court's decision in *Pilot Insurance* is the Court's attempt to set out an extensive set of guidelines for both trial judges and appellate courts in order to reign in and control the potential for excessive punitive damage awards. The Court essentially identified three different types of guidelines. First, the Court sought to structure the trial judge's charge to the jury in a fashion that would caution, if not ensure, restraint in the making of such awards.⁸⁵ Second, the Court indicated that the level of scrutiny that

83. *Pilot Ins. Co.*, at 637–39.

84. *Id.* at 596–97.

85. *Id.* at 644–47.

appellate courts exercise in reviewing such awards was to be at a higher level than that normally exercised in supervising damage awards.⁸⁶ Third, the Court crafted an extensive set of guidelines setting a standard of “rationality” that punitive damage awards must meet.⁸⁷

Structuring the Jury Charge. The jury charge that the trial judge gave in *Pilot Insurance* was rather sparse. Accordingly, the respondent had argued that the trial judge had not offered adequate guidance to the jury.⁸⁸ While the Court conceded that the trial judge’s charge was, indeed, “skeletal,”⁸⁹ it agreed, albeit with “some hesitation,”⁹⁰ with the unanimous view of the Court of Appeal below, that the jury charge had covered the essentials, however lightly. As a general matter, however, Justice Binnie suggested that the jury charge should not leave the jurors “to guess what their role and function is.”⁹¹ To that end, in his view, it would be helpful if the jury charge placed emphasis on a number of points.

First, the exceptional nature of punitive damages should be stressed, placing emphasis on the usual string of pejoratives identifying conduct that “departs to a marked degree from ordinary standards of decent behaviour.”⁹² Further, the jury should be advised that damages are to 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.”⁹³ Additionally, the jury should be instructed that the purpose of punitive damages is not to compensate, but rather to give the defendant his or her just dessert, to deter the defendant and others from similar misconduct in the future, and to mark the community’s collective condemnation of what has happened.⁹⁴ Thus, punitive damages are to be awarded only where compensatory damages are inadequate, and only in an amount that is necessary to rationally accomplish these purposes. The jury also should be plainly told that the plaintiff will keep the punitive damages as

86. *Id.* at 649–50.

87. *Id.* at 647–49.

88. *Id.* at 644.

89. *Id.*

90. *Id.* at 647.

91. *Id.* at 644.

92. *Id.* at 645.

93. *Id.*

94. *Id.*

a “windfall”⁹⁵ in addition to compensatory damages, and that judges and juries in our system of law have usually found that “moderate awards . . . are generally sufficient.”⁹⁶ Further, the jury should be advised to have regard to other fines or penalties suffered by the defendant, and to award punitive damages only where the misconduct would be otherwise unpunished or inadequately punished. Although Justice Binnie concluded by indicating that the use of any particular expression was not obligatory, it was nonetheless incumbent on the trial judge to “emphasize the nature, scope and exceptional nature of the remedy, and fairness to both sides.”⁹⁷

Standard for Appellate Scrutiny. In exercising supervision over punitive damages awards, the role of appellate courts was envisaged by the *Pilot Insurance* majority to be a more muscular one than is exercised with respect to general damage awards. With respect to the latter, courts may only intervene if the award is “so exorbitant or so grossly out of proportion [to the injury] as to shock the court’s conscience and sense of justice.”⁹⁸ In the context of punitive damages, however, Justice Binnie indicated that the emphasis must be on the appellate Court’s obligation to ensure that the award is the product of reason and rationality. In his view, “[t]he focus is on whether the court’s sense of reason is offended rather than on whether its conscience is shocked.”⁹⁹ As we shall see, Justice Binnie spelled out in great detail the applicable standard of review—rationality—in an attempt to set a standard that would effectively confine the discretion exercised by judge or jury at trial. What is envisaged, however, is a discretion to award punitive damages within a range bounded by rationality at either end of the range. The Canadian Supreme Court did not opt, then, for the type of *de novo* appellate review adopted in the modern U.S. authorities.¹⁰⁰ We will return to this point.

Confining the Discretion to Award Punitive Damages. The standard of rationality to be applied in appellate scrutiny of punitive damage awards is obviously a device designed to structure and confine the discretion of judge and jury to award punitive damages at trial. This test applies both to the threshold question of whether to award punitive damages at all and to the issue of quantum. With respect to the

95. *Id.*

96. *Id.*

97. *Id.* at 646.

98. *Id.* at 649 (quoting *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1194).

99. *Id.* at 650.

100. *Cooper Indust., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001); see also Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411 (2002) (evaluating the appropriate role of the jury in awarding punitive damages).

threshold question, it must be considered whether the award of punitive damages constituted a “rational response” to the defendant’s misconduct. One must assess whether such an award was rationally required to meet the objectives served by punitive damages. On the facts of *Pilot Insurance*, the Court had little difficulty reaching an affirmative conclusion on this point. The award had apparently answered the jury’s perceived need for “retribution, denunciation and deterrence.”¹⁰¹ The Court agreed that this was “an exceptional case that justified an exceptional remedy.”¹⁰²

Turning to the question of quantum, however, the Court developed a much more elaborate set of guidelines to determine “whether a reasonable jury, properly instructed, could have concluded that an award in that amount, *and no less*, was rationally required to punish the defendant’s misconduct.”¹⁰³ In determining the critical issue of rationality, the key to applying that standard rests on a concept of “proportionality.” “A disproportionate award overshoots its purpose and becomes irrational.”¹⁰⁴ In the Court’s view, there are six aspects to the proportionality criterion. First, the award must be proportionate to the “blameworthiness” of the defendant’s conduct in the light of such considerations as whether the misconduct was planned and deliberate, the nature of the defendant’s motive, its persistence in the conduct, any attempted cover-up or concealment, awareness of the wrongful nature of the conduct, whether the defendant profited from the misconduct, and whether the interest violated by the misconduct was deeply personal to the plaintiff, as, for example, in the case of injury to the plaintiff’s professional reputation.¹⁰⁵

Second, the award must be proportionate to the degree of the plaintiff’s vulnerability.¹⁰⁶ Thus, the fact that the defendant has taken advantage of a significant power imbalance between the parties will be a relevant consideration. For this reason, the Court observed that this factor militates against the award of punitive damages in most commercial situations.¹⁰⁷ Indeed, in the Court’s contemporaneously released decision in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*,¹⁰⁸ the Court struck down a punitive damages award of \$200,000 in the context of

101. *Pilot Ins. Co.*, [2002] 1 S.C.R. at 648.

102. *Id.* at 649.

103. *Id.* (emphasis added).

104. *Id.* at 650.

105. *Id.* at 651.

106. *Id.* at 652–53.

107. *Id.* at 653.

108. [2002] 1 S.C.R. 678, 679.

a dispute concerning a proposed real estate development. Although the defendant's conduct had been fraudulent and reprehensible, the Court emphasized that this was a commercial relationship between two businessmen and, further, that the facts did not reveal an "abuse of a dominant position."¹⁰⁹ In the particular circumstances, then, neither the award of punitive damages itself nor the particular quantum met the test of rationality.¹¹⁰

Third, the award must be proportionate to the actual or potential harm directed specifically at the plaintiff.¹¹¹ A punitive damages award would not be appropriate where the plaintiff was merely a peripheral or minor victim of the defendant's wrongdoing. Fourth, the award must be proportionate to the need for deterrence.¹¹² In fashioning a rational response to the need for deterrence, it would be appropriate to determine whether the misconduct in question is typical of the defendant's conduct in a more general way. It may also be relevant to consider the "financial power"¹¹³ of the defendant in circumstances where a more substantial award is required, as a result, to achieve effective deterrence. Thus, the punishment "should 'sting.'"¹¹⁴ Justice Binnie cautioned, however, that this factor is of limited importance, and that, as a matter of general practice, the defendant's financial worth ought not be mentioned to a jury prior to the liability determination.¹¹⁵

Fifth, the award must be proportionate in the light of other penalties, both civil and criminal, to which the defendant has been or will likely be subject.¹¹⁶ Finally, the award should be proportionate to the advantage gained or profits made through the misconduct.¹¹⁷ With respect to this latter point, the Court made no mention that in the context of tortious and other forms of wrongdoing, an accounting of profits and other similar remedies would more directly achieve a profit-stripping function.¹¹⁸

In setting out as the standard for appellate review the test that a reasonable jury, properly instructed, could have concluded that an award in the amount in question "and no less" was rationally required,¹¹⁹ it may

109. *Id.* at 712.

110. *Id.* at 714.

111. *Pilot Ins. Co.*, [2002] 1 S.C.R. at 653–54.

112. *Id.* at 654–55.

113. *Id.* at 654.

114. *Id.* at 655.

115. *Id.* at 654–55.

116. *Id.* at 655.

117. *Id.* at 656.

118. For discussion of this point, see PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 748–52 (2d ed. 2004).

119. See *Pilot Ins. Co.*, [2002] 1 S.C.R. at 649 ("[T]he test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, *and no less*, was rationally required to punish the defendant's misconduct.").

appear that something approximating *de novo* review is envisaged by the Court. This, however, does not appear to be the case. In applying the test to the actual award in *Pilot Insurance*, Justice Binnie indicated that although he would not himself have awarded \$1 million in punitive damages on these facts, the award was, nonetheless, “within the rational limits within which a jury must be allowed to operate.”¹²⁰ The jury had been adequately instructed that it should make an award of punitive damages “if, but only if”¹²¹ the award of compensatory damages was insufficient. “The award was not so disproportionate as to exceed the bounds of rationality.”¹²² In response to the defendant’s objection that prior to this judgment, the highest previous punitive damages award in an insured bad faith case was \$50,000, the Court observed that “[o]ne of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.”¹²³

IV. THE AFTERMATH

The decision of the Supreme Court of Canada in the *Pilot Insurance* case is obviously a remarkable one for a number of reasons. Although the Court recognized the potential availability of punitive damages in the contractual context several years earlier in the *Vorvis* case, *Pilot Insurance* is the first decision in which it approved a punitive damages award that, at least to a Canadian observer, looks more American in its quantum than its predecessors. In the absence of empirical study of the decision’s practical effects, one may nonetheless confidently predict that the decision has provoked greater frequency in the pleading of claims for substantial punitive damages awards. At the same time, however, the practical impact of the court-fashioned control mechanisms to limit such awards can only be the subject of speculation.

Nonetheless, there is at least some evidence in recent appellate decisions that Canadian courts will indeed exercise the supervisory jurisdiction committed to them by the *Pilot Insurance* decision. Two recent decisions by the Ontario Court of Appeal are of interest. In *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.*,¹²⁴ the court reversed a jury award of punitive damages in

120. *Id.* at 658.

121. *Id.*

122. *Id.*

123. *Id.* at 661–62.

124. [2002] 217 D.L.R. (4th) 34 (Ont. C.A.).

another insurer bad faith case. Following upon a fire at the plaintiff's farm, a hard fought dispute took place between the plaintiff farmer and the defendant insurer. By the time of trial, although the insurer had already paid out to the plaintiff \$1.17 million, a number of disputed items remained. The jury awarded an additional \$488,389 in compensatory damages and \$750,000 in punitive damages.¹²⁵ The Court of Appeal held that although the jury could have found that a breach of the good faith duty had occurred, the jury could not rationally have concluded that an award of punitive damages was required to punish the defendant's misconduct.¹²⁶

Similarly, in a wrongful dismissal case, *Prinzo v. Baycrest Centre for Geriatric Care*, the court set aside a \$5,000 award for punitive damages.¹²⁷ Even though the employer's treatment of the plaintiff at the time of dismissal had amounted to the tort of intentional infliction of mental suffering, an award of damages for mental distress had effectively compensated for the wrong. Accordingly, in the court's view, an award of punitive damages was not necessary for deterrence purposes and served no rational purpose.¹²⁸ Although the same court upheld a substantial punitive damages award in another case,¹²⁹ at least for the moment, such decisions offer some comfort to those observers who worry that *Pilot Insurance* has indeed introduced an Americanization of the punitive damages awards in common law Canada.

V. THE PERCEIVED NEED OR ROLE

Although the Supreme Court of Canada offers an extensive and scholarly analysis of the history, comparative experience, and the means of structuring punitive damages awards, there is one glaring omission in its opinion. Mainly, this omission stems from the absence of a careful assessment of whether there is a need or a clear role for the punitive damages concept in the context of pure or mere breaches of contract. The early experience strongly suggests that the claims for punitive damages of this kind will arise principally in the context of bad faith insurance claims, and claims for wrongful dismissal in circumstances where the employer has coupled dismissal with an imputation, other bad faith, or abusive conduct. Consequently, in assessing the contribution made by *Pilot Insurance*,¹³⁰ it may be useful to consider briefly the prior

125. *Id.* at 36–37.

126. *Id.* at 35.

127. [2002] 60 O.R. (3d) 474, 475 (C.A.).

128. *Id.* at 475–76.

129. See *Khazzaka v. Commercial Union Assurance Co. of Can.*, [2002] 66 O.R. (3d) 390 (C.A.) (representing a case with facts similar to *Pilot Insurance Co.* and decision upholding jury award of \$200,000 in punitive damages).

130. *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595.

Canadian law concerning punitive damages as it might apply in these two contexts. Further, as punitive damages claims often arise in the context of abusive treatment that may potentially cause psychological stress or injury, it will also be useful to briefly consider the availability of compensation for such injuries in these contexts.

With respect to punitive damages, it is well-established Canadian law that punitive damages are not narrowly restricted to the two categories of tort claims that the House of Lords identified in *Rookes v. Barnard*.¹³¹ Punitive damages are generally available in the context of tort claims and, more particularly, in the context of negligence claims, provided that the negligence exhibits a degree of callousness that warrants a punitive damages award. In the leading case of *Robitaille v. Vancouver Hockey Club Ltd.*,¹³² the plaintiff was a professional hockey player who suffered a serious spinal injury that was misdiagnosed by the defending team's physician. After an initial injury, the team's management ignored Robitaille's request for medical treatment, considered his continuing complaints concerning symptoms unfounded, and pressured the plaintiff to continue playing by threats of suspension. In a subsequent game, Robitaille was further injured and suffered a permanent and disabling spinal cord injury.¹³³ The British Columbia Court of Appeal upheld a punitive damages award at trial on the basis that the defendant's negligence was "such as to merit condemnation."¹³⁴ Although the test for the availability of punitive damages in a tort context has been variously stated, the Supreme Court emphasized in *Norberg v. Wynrib*¹³⁵ that it was not necessary to meet the threshold of "harsh, vindictive or malicious" conduct suggested in *Vorvis*,¹³⁶ but it was sufficient to establish that the conduct was "reprehensible and it was of a type to offend the ordinary standards of decent conduct in the community."¹³⁷

Turning to damages for mental distress resulting from contractual breach, the position under traditional Canadian and English common law doctrine was that such damages were not available. In the latter part of

131. *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.).

132. [1981] 124 D.L.R. (3d) 228 (B.C.C.A.); *see also* *A. v. Bottril*, [2003] 1 A.C. 449 (P.C.) (providing that inadvertent negligence can give rise to punitive damages where the conduct is so outrageous as to warrant condemnation and punishment).

133. *Robitaille*, 124 D.L.R. (3d) at 229–32.

134. *Id.* at 251.

135. [1992] 2 S.C.R. 226.

136. *Id.* at 268.

137. *Id.*

the twentieth century, however, English and then Canadian courts recognized claims of this kind. The leading English case, *Jarvis v. Swans Tours Ltd.*,¹³⁸ is a classroom favorite in which a solicitor's high hopes for a pleasurable two-week Swiss vacation—fueled by claims made in the defendant's brochure—were dashed when virtually all of the advertised virtues of the experience proved to be either nonexistent or below par. The Court of Appeal awarded damages for the resulting mental aggravation.¹³⁹ The nature of this case and subsequent authorities provided a basis for the conclusion that at least in English law, such claims were restricted to contractual contexts in which the object of the agreement was to provide a pleasurable experience, or, at least, to ensure one's peace of mind.¹⁴⁰

The House of Lords recently clarified the English doctrine on this point in *Farley v. Skinner*.¹⁴¹ The plaintiff, a prospective purchaser of a country property, retained the defendant surveyor to inspect the property and, *inter alia*, asked him to investigate whether the property would be seriously affected by aircraft noise given its proximity to Gatwick International Airport. Reassured on the latter point by the defendant, the plaintiff acquired the property and, upon moving in, discovered that the defendant's advice on this point was seriously in error. The purchaser brought a claim for non-pecuniary damages for the loss of tranquility resulting from the substantial presence of aircraft noise on the property. The defendant argued in response that such damages could only be claimed where the very object of the contract is to provide pleasure, relaxation, or peace of mind, and that a contract with a surveyor to inspect a property did not come within that category of agreements.¹⁴² The House of Lords allowed the claim, however, on the basis that it was sufficient if "a major or important object of the contract is to give pleasure, relaxation or peace of mind."¹⁴³ Thus, in this case, where the contract to inspect included a particular undertaking concerning airplane

138. [1973] Q.B. 233 (C.A. 1972).

139. *Id.*

140. Thus, claims have been allowed against solicitors whose failure to provide service at a reasonable level of skill and care foreseeably caused mental distress to the client. *See, e.g.,* Heywood v. Wellers, [1976] Q.B. 446, 447 (C.A. 1975) (representing mishandled attempt on behalf of female client to restrain a man from molesting her); Hamilton Jones v. David & Snape (a firm), [2004] 1 All E.R. 657, 658 (Ch. 2003) (illustrating negligent failure to prevent removal of client's children from jurisdiction); *see also* P.A. Wournell Contracting Ltd. v. Allen, [1979] 100 D.L.R. (3d) 62 (N.S.T.D.) (involving solicitor's failure to incorporate company), *rev'd on other grounds*, [1980] 108 D.L.R. (3d) 723 (N.S.C.A.); Boudreau v. Benaiah, [2000] 182 D.L.R. (4th) 569 (Ont. C.A.) (conducting negligent defense of criminal charges).

141. [2001] 4 All E.R. 801 (H.L.).

142. *Id.*

143. *Id.* at 812.

noise that had such an object, damages for consequential mental distress were available.

In Canada, however, it is unlikely that even this limitation exists on the availability of damages for mental distress. Canadian courts have applied the *Jarvis* doctrine in cases in which the agreements breached cannot be characterized as providing for pleasure or peace of mind.¹⁴⁴ They have also accepted that the *Jarvis* doctrine may apply in the context of wrongful dismissal cases,¹⁴⁵ though in *Vorvis*,¹⁴⁶ the majority of the court emphasized that, as with punitive damages, it was necessary to find that the mental injury resulted from an independently actionable wrong. In this context, the purport of the opinion is simply to suggest that where the mental injury results from the employer behavior preceding the wrongful dismissal, it is necessary to show that the employer's behavior is itself actionable.

In dissent, Justice Wilson stated perhaps more accurately the governing Canadian principle to the effect that "aggravated damages for mental suffering may be awarded in breach of contract cases . . . [where] the parties should reasonably have foreseen mental suffering as a consequence of a breach of the contract at the time the contract was entered into."¹⁴⁷ On this view, presumably, the English requirement that the contract contain at least one aspect designed to provide pleasure or peace of mind is considered to be simply a proxy for the reasonable foreseeability test. Accordingly, there is no compelling reason not to simply apply the test itself. In *Vorvis*, Justice Wilson appears to have accepted that the manner of wrongfully dismissing an employee might give rise to a claim of this kind.¹⁴⁸

144. See, e.g., *Zuker v. Paul*, [1982] 135 D.L.R. (3d) 481, 481–82 (Ont. Div. Ct.) (representing breach of warranty of title to automobile); *Taylor v. Gill*, [1991] 3 W.W.R. 727 (Alta Q.B.) (involving noncompletion of sale of residential premises); *Gourlay v. Osmond*, [1991] 104 N.S.R.2d 155 (Trial Div.) (involving noncompletion of purchase of residential premises); *Kempling v. Hearthstone Manor Corp.*, [1996] 137 D.L.R. (4th) 12 (Alta. C.A.) (involving noncompletion of sale of condominium unit).

145. See, e.g., *Brown v. Waterloo Reg'l Bd, of Comm'rs of Police*, [1983] 150 D.L.R. (3d) 729 (Ont. C.A.) (stating that damages for mental distress could be awarded where reasonably foreseeable consequence of dismissal); see also *Kopij v. Metro. Toronto (Municipality)*, [1996] 29 O.R. (3d) 752 (General Div.) (holding damages available for mental distress where violation of procedural fairness in dismissal is negligent and where distress is reasonably foreseeable).

146. *Vorvis v. Ins Corp.*, [1989] 1 S.C.R. 1085.

147. *Id.* at 1113–14.

148. *Id.* at 1118.

Applying these principles, first, to the context of bad faith insurance claims, it is not at all obvious that the recognition of punitive damages for pure breach of contract was necessary in order to bring about the result achieved in *Pilot Insurance*. Indeed, it is not obvious that the doctrine pronounced in *Pilot Insurance* was correctly applied to the facts of that case. Under prior Canadian law, it is clear the defendant insurer would be vulnerable to a claim for punitive damages if its conduct had been tortious. Although no finding on this point was made by the Court, there can be little doubt that *Pilot Insurance* had committed a tort. Even if one accepts the position taken by its representatives that they genuinely believed that Mrs. Whiten had committed arson,¹⁴⁹ their conduct appeared negligent. Further, the conduct would appear to meet the threshold set out in *Robitaille*,¹⁵⁰ requiring manifestation of a callous disregard for the plaintiff's interests.¹⁵¹

If this is correct, it then follows that the entire discussion of the punitive damages awards for pure breach of contract is simply unnecessary to the decision in the *Pilot Insurance* case. More generally, there is very little basis for thinking that punitive damages should have a role to play in circumstances where an insurer is guilty of lesser forms of wrongdoing. If the insurer had merely engaged in negligent conduct which did not manifest a callous disregard for the interests of the insured, even the *Pilot Insurance* Court would not likely have awarded punitive damages. Further, it is all the more unlikely that such an award would be made in a case where the insurer's conduct fell short of negligence but nonetheless exposed the insurer to liability for mere breach of the implied covenant to process claim in good faith. Therefore, apart from cases already covered by the *Robitaille* principle, the role for punitive damages for pure breach of contract in bad faith insurance cases, as a practical matter, appears to be very limited, if not nonexistent.

When one considers the application of the aggravated or mental distress damages line of authority to the *Pilot Insurance* fact situation, it seems doubtful that the *Pilot Insurance* principle itself was properly applied to the facts of that case. Prior to *Pilot Insurance*, Canadian law has clearly established that damages for mental distress may be awarded in a case where the mental distress results from bad faith conduct of an insurer in the course of processing a plaintiff's claim.¹⁵² Curiously, in

149. *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 612.

150. *Robitaille v. Vancouver Hockey Club Ltd.*, [1981] 124 D.L.R. (3d) 228 (B.C.C.A.).

151. *Id.* at 248.

152. *See, e.g.*, *Warrington v. Great-West Life Assurance Co.*, [1996] 139 D.L.R. (4th) 18 (B.C.C.A.) (holding that where there is a persistent refusal to pay disability

Pilot Insurance, no claim for aggravated damages to compensate Mrs. Whiten for her undoubted mental distress was advanced. It is unclear why this was the case. Even an unusually resilient personality would have suffered a great deal of distress as a result of the abysmal treatment that the defendant insurer afforded to the Whitens. Their distress was surely many times more severe than the level of anxiety suffered by solicitor Jarvis as a result of his disappointing Swiss vacation,¹⁵³ and a substantial award on this basis would appear warranted. Thus, it is not actually correct to suggest, as the Supreme Court suggested in *Pilot Insurance*, that the *Pilot Insurance* jury applied its collective mind to the question of whether punitive damages should be awarded “if but only if,” compensatory damages were insufficient to meet the needs of the situation.¹⁵⁴ The whole range of compensatory damages was simply not considered by the jury.

Thus, the *Pilot Insurance* principle itself appears to have been misapplied. It is possible, of course, that the *Pilot Insurance* jury might have awarded punitive damages on top of a substantial award for mental distress. It is of interest, however, that in *Prinzo*,¹⁵⁵ noted above, the Ontario Court of Appeal overturned an award for punitive damages at trial on the basis that the misconduct in question had resulted in an award of damages for the plaintiff’s resulting mental distress and, accordingly, a further award of punitive damages “[was] not necessary for deterrence purposes . . . [and therefore] serve[d] no rational purpose.”¹⁵⁶ It might well be, then, that the *Pilot Insurance* jury, if properly instructed, might have made a substantial award for damages for mental distress and come to a similar conclusion. Therefore, the practical application of the *Pilot Insurance* doctrine of punitive damages for pure breach of contract may be severely limited.

benefits, damages will be awarded for reasonably foreseeable mental distress); *McIsaac v. Sun Life Assurance Co. of Can.*, [1999] 173 D.L.R. (4th) 649 (B.C.C.A.) (holding that mental distress resulting from refusal to pay benefits under disability insurance compensable as such a contract is to provide “peace of mind”); *Eddie v. Unum Life Ins. Co. of Am.*, [1999] 177 D.L.R. (4th) 738 (B.C.C.A.) (holding that insurer made no reasonable effort to assess medical condition before refusing disability benefits and awarding damages for mental distress); *Clarfield v. Crown Life Ins. Co.*, [2000] 50 O.R. (3d) 696 (Sup. C.J.) (holding that delay in handling and rejection of disability claim relating to mental illness rendered damages for resulting anxiety recoverable).

153. *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233 (C.A. 1972).

154. *Pilot Ins. Co.*, [2002] 1 S.C.R. at 658.

155. *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] 60 O.R. (3d) 474 (C.A.).

156. *Id.* at 498.

The *Pilot Insurance* court also offers little guidance as to what role punitive damages should play in the bad faith insurance context at an institutional level. Is the punitive damages award meant to be a device to fill the gaps in the enforcement activities of the insurance regulators? Are punitive damages to be awarded in larger measure or more frequently in contexts in which the wrongdoing of the insurer appears to be of a systemic nature? In such cases, should a plaintiff such as Mrs. Whiten recover all of the appropriate *fine*, or should the bringing of a representative claim be a precondition for recovery of the entire amount in provinces that have modern class actions legislation?

The *Pilot Insurance* Court barely hints at answers to important questions of this sort. The *Pilot Insurance* Court did not openly address systemic issues. It appeared to accept the finding at trial that “there is no evidence this case represents a deliberate corporate strategy as opposed to an isolated, mishandled file that ran amok.”¹⁵⁷ On the other hand, the Court went on to observe that “Pilot declined to call evidence to explain *why* this file ran amok, and what steps, if any, have been taken to prevent a recurrence.”¹⁵⁸ We are left to assume that such evidence might have resulted in a reduction of the punitive damages award. Further, the Court’s response to the submissions of the intervening industry representative, the Insurance Council of Canada, hints at judicial skepticism concerning industry practice and the regulation thereof. The Council submitted that the disciplining of the insurance industry should be left to the provincial regulators.¹⁵⁹ Justice Binnie replied that nothing in the appeal record indicated that the regulator “took an interest in this case prior to the jury’s unexpectedly high award of punitive damages.”¹⁶⁰ Further, the Court observed that, to the extent that a defendant had otherwise suffered punishment, either civil or criminal, for the misconduct in question, “the need for *additional* punishment in the case before the court [was] lessened and [might] be eliminated.”¹⁶¹ Although such remarks are perhaps suggestive of the Court’s interest in broader systemic issues, the role of punitive damages in attacking systemic problems in the insurance industry, for example, is not explicitly identified as a function of the doctrine nor are the implications of deploying the doctrine in this fashion addressed by the Court.

When one considers the application of prior punitive damages law and the law of compensation for mental distress in the context of wrongful dismissal, Canadian law is, as we have seen, in something of a state of

157. *Pilot Ins. Co.*, [2002] 1 S.C.R. at 659–60.

158. *Id.* at 660.

159. *Id.* at 656.

160. *Id.*

161. *Id.* at 655.

disarray. With respect to punitive damages, subsequent interpretations of the *Vorvis* decision, confirmed by Justice Binnie in *Pilot Insurance*,¹⁶² have adopted the curious position that punitive damages may be awarded for breach of contract only where a second breach of contract or tort has occurred, in addition to the principal breach of contract with respect to which the claim has been advanced.¹⁶³

As far as claims for mental distress damages resulting from wrongful dismissal are concerned, subsequent interpretations of the *Vorvis* decision have created a similar point of difficulty. Canadian courts have generally accepted that damages for mental distress cannot be awarded unless there exists an independent and actionable second wrong.¹⁶⁴ Without doubt, the real reason why Justice McIntyre in *Vorvis* required a separate actionable wrong,¹⁶⁵ as he attempted to explain, was that the failure to give reasonable notice constituting the breach was not itself likely to either cause mental distress or be sufficiently heinous to provide a basis for the punitive damages award. The allegedly wrongful act in *Vorvis* was not the giving of insufficient notice but, rather, the careful supervision or, from the employee's perspective, the harassment that preceded his dismissal. Justice McIntyre's point, then, was that the conduct complained of must itself constitute a breach of a contractual or tortious duty. If the law of wrongful dismissal has arrived at an unsatisfactory state in Canadian law, however, we may note that nothing in the *Pilot Insurance* decision appears to resolve the difficulty. It unhelpfully preserves the independent actionable wrong requirement for punitive damages. It offers no guidance with respect to damages for mental distress.

If the apparent inability of Canadian courts to award the damages for mental distress, relating to the manner in which the decision to dismiss is

162. *Id.* at 637–41.

163. The Supreme Court itself confirmed this point in *McKinley v. BC Tel.*, [2001] 200 D.L.R. (4th) 385, 416–17 (Can.); *see also* *Beaird v. Westinghouse Can. Inc.*, [1999] 43 O.R. (3d) 581, 591–92 (C.A.); *Noseworthy v. Riverside Pontiac-Buick Ltd.*, [1998] 168 D.L.R. (4th) 629 (Ont. C.A.); *Marshall v. Watson Wyatt & Co.*, [2002] 57 O.R. (3d) 813, 828 (C.A.); *cf.* *Francis v. Canadian Imperial Bank of Commerce*, [1994] 21 O.R. (3d) 75 (C.A.).

164. *See* *Wurster v. Universal Envtl. Servs. Inc.*, [1998] 167 D.L.R. (4th) 166 (Ont. C.A.) (holding that alleged mistreatment prior to the decision to dismiss is not an independent actionable wrong); *Noseworthy*, [1998] 168 D.L.R. (4th) 629 (holding that dismissal accompanied by unfounded accusations of misconduct is not an independent actionable wrong).

165. *Vorvis v. Ins. Corp.*, [1989] 1 S.C.R. 1085, 1106.

communicated, is considered problematic, the most coherent solution to the problem would be, as Justice McLachlin suggested in her dissenting opinion in *Wallace*, to imply a term not to engage in bad faith conduct in the course of dismissing an employee.¹⁶⁶ Presumably, on the reasoning in *Pilot Insurance*, the breach of such a term could give rise to a claim for punitive damages. Certainly, it could give rise to a claim for damages for mental distress. As we have seen, however, the majority in *Wallace* rejected this approach and favored the surprising view that where a dismissal is conducted in a bad faith manner, the period of reasonable notice may be extended. Since the misconduct, according to the majority view, does not constitute a breach of a contractual term, punitive damages are presumably unavailable. The important point for present purposes, however, is that the approach adopted in *Pilot Insurance* with respect to punitive damages would appear to have no impact on, or practical application within, the context of wrongful dismissal cases.

VI. CONCLUSION

Recognition of the availability of punitive damages for pure breach of contract by the Supreme Court of Canada in the *Pilot Insurance* case is, at best, a mixed blessing for Canadian law. On the positive side of the balance, the decision crafts a set of controls to be employed by trial judges and appellate courts in both restricting the frequency of such awards and controlling their quantum. The principal devices set out in the opinion are elaborate instructions to be administered by trial judges to juries and, no doubt, to themselves, and the assertion of a jurisdiction to review such awards and their quantum on appellate review on the basis of a rationality test. Of these two devices, the latter is the most likely to enjoy success.¹⁶⁷

Accordingly, it is regrettable that the Court did not opt for *de novo*

166. *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 748–49.

167. For an account of experimental studies offering discouraging evidence of the ability and/or willingness of juries to follow even rather precise instructions on how to calculate punitive damages, see W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 HARV. J. ON LEGIS. 139 (2002) (advancing the thesis that the nature of the task in awarding a specific dollar amount for punitive damages is poorly designed and one that juries cannot be expected to perform well and reviewing possible reforms). See also Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998) (concluding that in personal injury cases juries often struggle with converting their moral judgments into dollar figures); David A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment*, 39 HARV. J. ON LEGIS. 121 (2002) (reporting that two experimental studies indicate that (1) mock jurors punish companies who have balanced risk of harm against cost of safety in manufacturing products, and (2) mock jurors are unable or unwilling to follow a set of model jury instructions designed to produce efficient damage awards).

review at the appellate level. Such review would not only constitute a more effective controlling device, it might conduce to greater uniformity in the making of awards. Further, it may be considered a somewhat backhanded compliment to the decision to suggest that if the analysis set out in this article is correct, the decision is not likely to be of much practical effect in increasing the frequency of punitive damage awards, at least in the contexts of bad faith insurance and wrongful dismissal cases. One might take the view that the punitive damages in contract case was let out of the bag when Canadian courts determined to allow such damages in the context of negligent misconduct, albeit misconduct which meets the requisite threshold of callousness.¹⁶⁸ Indeed, punitive damages could have been awarded in *Pilot Insurance* on the basis of this principle. Further, it has been suggested above that even after *Pilot Insurance*, it is unlikely that punitive damages will be awarded in bad faith insurance cases that would not be captured by the same principle. The net effect of *Pilot Insurance* may therefore be to provide clearer means for appellate control of the punitive damages award at trial.

For those who see the awarding of punitive damages in civil cases as nothing other than an inappropriate confusion of the purposes of criminal and civil law, the *Pilot Insurance* decision's contribution is irredeemably negative. The fact that Justice Binnie, on behalf of the *Pilot Insurance* court, refers to the defendant insurer's misconduct as "the offence"¹⁶⁹ may not surprise such observers. Those who have greater tolerance for punitive damage awards in contract cases may nonetheless find the *Pilot Insurance* decision disturbing. The amount of the award—blessed by the Court as within the limits of rationality—is impressively large to Canadian observers. Moreover, even if one accepts the analysis set out above concerning bad faith insurance and wrongful dismissal claims, it is quite possible that trial judges and juries will employ *Pilot Insurance* to expand the role of punitive damages in other contractual settings. For those who, like myself, see little merit in extending the scope of punitive damages in the contract context beyond cases of breach of contract that also constitute tortious wrongdoing, the decision disappoints by failing to supply a convincing reason for making such an extension.

168. See *Robitaille v. Vancouver Hockey Club Ltd.*, [1981] 124 D.L.R. (3d) 228 (B.C.C.A.) (awarding punitive damages for negligent failure to provide adequate medical treatment of hockey player).

169. *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595, 659.

Moreover, it is certainly the case that the *Pilot Insurance* court does not offer a view of the institutional role that punitive damages should play in, for example, the bad faith insurance context. It is arguable that courts are neither well equipped nor well advised to attempt to regulate the insurance industry through the awarding of punitive damages.¹⁷⁰ Be this as it may, it is clearly the case that the *Pilot Insurance* court took the plunge of recognizing punitive damages for pure breach of contract without any indication of the consequences of doing so at the level of institutional design. Nor did the court consider the relevance of systemic issues within the industry in question with respect to the awarding of punitive damages in a particular case and with respect to issues of quantum. On matters such as these, Canadian courts will no doubt be looking southward in the years to come for inspiration and wisdom.

170. For a clear statement of the view that they are neither, see John Swan, *Punitive Damages for Breach of Contract: A Remedy in Search of a Justification*, 29 QUEEN'S L.J. 596, 628–34 (2004).