WHITEN V. PILOT INSURANCE CO.: THE UNOFFICIAL DEATH OF THE INDEPENDENT WRONG REQUIREMENT AND OFFICIAL BIRTH OF PUNITIVE DAMAGES IN CONTRACT

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I. INTRODUCTION

Three years have passed since the Supreme Court of Canada rendered its controversial decision in *Whiten v. Pilot Insurance Co.*[1] In that case, the court affirmed an almost unprecedented punitive damage award by a jury of one million dollars against an insurance company.[2] More importantly, the *Whiten* decision appears to be the first attempt by the Supreme Court to construct a comprehensive set of rules and principles in light of which punitive damages cases should be decided in the future. While the extraordinary monetary sanction upheld by the court has attracted much attention in legal and commercial circles,[3] it seems that other aspects of the decision,

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1. [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 156 O.A.C. 201.
2. For other extraordinary awards of punitive damages in Canada, see *Lubrizol Corp. v. Imperial Oil Ltd.* (1994), 84 F.T.R. 197, 58 C.P.R. (3d) 167 (T.D.) ($15 million for patent infringement), revd [1996] 3 F.C. 40, 67 C.P.R. (3d) 1, 197 N.R. 241 (C.A.); *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533, 69 O.R. (2d) 65, 34 O.A.C. 241 (C.A.) (approximately $1.5 million against a bank for breach of trust and conspiracy); *Colborne Capital Corp. v. 542775 Alberta Ltd.* (1995), 30 Alta. L.R. (3d) 127, [1995] 7 W.W.R. 671, 171 A.R. 241 (Q.B.) ($1 million for fraud, conspiracy and other misconduct in contractual commercial relations), vard [1999] 8 W.W.R. 222, 188 W.A.C. 201, 69 Alta. L.R. (3d) 265 (C.A.); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, 84 O.A.C. 1 ($800,000 for libeling a Crown prosecutor).
3. A simple search in the Google.com search engine made on June 23, 2004 revealed dozens of short commentaries on the *Whiten* decision, mostly published on law firms'

especially the question of its impact on the availability and scope of punitive damages, have not so far received the full academic attention they deserve.[4] This article attempts to bridge the gap by analyzing those aspects of the *Whiten* decision that are relevant to this question. Its object is to demonstrate the various ways in which *Whiten* transformed the infrastructure of the Canadian law of punitive damages, especially, but not only, in the area of contracts. It should be stressed at the outset that the purpose of the analysis is neither to evaluate the propriety of the *Whiten* decision itself nor to contribute to the ongoing debate as to the proper role of punitive damages in civil and commercial litigation.[5] Rather, this article

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websites or in insurance and lawyers' magazines. See *e.g.* Chris T. Blom, "*Whiten v. Pilot*: Has the Pendulum Swung?" (Miller Thomson LLP, *Insurance Newsletter*, March 2002, available at <http://www.millerthomson.ca/issue.asp?NL=5&Year=2002&Season=8>)(date accessed February 9, 2005); William Blakeney, "*Whiten v. Pilot*: End of a Saga" (*Canadian Underwriter*, April 2002, available at <http://www.canadianunderwriter.ca/issues/ISarticle.asp?catID=408&id=66093&story_id=ACU58873&issue=04012002> (date accessed February 9, 2005)); "Canada's Supreme Court Raises the Bar on Punitive Damages Awards" (Torys LLP, February 28, 2002, available at <http://www.torys.com/publications/pdf/CM02-2T.pdf> (date accessed February 8, 2005)); Roger G. Oatley, "Punitive Damages in Canada: *Whiten v. Pilot Insurance*, 'the insurer from hell'" (2002), 3 Adv. Soc. J. 14.

4. Two exceptions, which discuss in some detail the potential latent in *Whiten* for expanding the scope of punitive damages in contract, are: Craig E. Jones and John C. Kleefeld, "*Whiten v. Pilot*: Safe Harbour for Punitive Contract Damages?" (2002), 60 Advocate 507; Stephane Beaulac, "A Comparative Look at Punitive Damages in Canada" (2002), 17 Sup. Ct. L. Rev. (2d) 351 at pp. 364-71. The problem of controlling jury punitive damage awards in light of *Whiten* is discussed in Rudy V. Buller, "Controlling Jury Awards of Punitive Damages" (2003), 36 U.B.C. L. Rev. 357. Another recent discussion of the *Whiten* decision and its possible implications is provided by John D. McCamus, "Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada" (2004), 41 San Diego L. Rev. 1491. For a recent vigorous and extensive critique of the decision and reasoning in *Whiten* see John Swan, "Punitive Damages for Breach of Contract: a Remedy in Search of a Justification" (2004), 29 Queen's L.J. 596.

5. In the United States the bulk of legal literature dealing with the normative, theoretical and pragmatic issues raised by punitive damages is immense. In Canada the subject has attracted much less academic attention, and thorough analyses are comparatively rare. Two major Canadian contributions to the literature are the Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) and an article published in the United States by Bruce Chapman and Michael Trebilcock, "Punitive Damages: Divergence in Search of a Rationale" (1989), 40 Alabama L. Rev. 741. Other sources dealing with the desirability of punitive damages in tort and in contract include: G.H.L. Fridman, "Punitive Damages in Tort" (1970), 48 Can. Bar Rev. 373; Harry Krasnick, "Punitive Damages in Contract" (1978), 36 The Advocate 11; David E.R. Venour, "Punitive Damages in Contract" (1988), 1 Can. J.L. & Juris. 87. For a powerful criticism of punitive damages from a corrective justice perspective, involving

attempts to clarify the present state of the law and to speculate on the influence of *Whiten* on future case law in this area.[6]

The analysis starts with a brief discussion of the pre-*Whiten* case law, and the limitations that were imposed on the availability of punitive damages by the Supreme Court's leading decision in *Vorvis*[7] and its progeny. Next, I address the *Whiten* decision itself demonstrating how, without explicitly overruling any of those prior limitations, it actually rejected, relaxed or bypassed most if not all of them, thereby bringing about the unofficial demise of the independent wrong requirement. Finally, I examine the possible impact of *Whiten* on future case law. While *Whiten* significantly expands the potential scope of the punitive damages doctrine, it is difficult to predict the extent to which this potential will actually be realized in subsequent judicial decisions. Nevertheless, it does seem reasonable to expect that, encouraged by the Supreme Court's favourable attitude towards the idea of civil punishment, courts sympathetic to the concept of punitive damages will tend to award or allow them more liberally than before. It also seems reasonable to predict that because of the decline of the "independent wrong" requirement, the post-*Whiten* case law will be characterized by a straightforward and substantive approach rather than the more formalistic approach reflected in much of the pre-*Whiten* case law.

II. A SHORT HISTORY OF *WHITEN*

On the night of January 18, 1994, an accidental fire burned down the Whiten's family residence and all its contents. During the evacuation, Mr. Whiten suffered frostbite to his feet, and was confined to a wheelchair for some time. After having made a single payment of $5,000, enough to cover living expenses for about two months, Pilot Insurance Co., the Whitens' insurance company, decided to cut off all payments, alleging the Whitens had fraudulently set fire to their own house. Pilot's denial of the Whitens' claim for $345,000 under the

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the *Whiten* decision, see Ernest J. Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003), 78 Chi-Kent L. Rev. 55, especially at pp. 84-102.

6. Although I admit to supporting the concept of civil punishment, my criticisms in some of the following footnotes of the Supreme Court's decision in *Vorvis* should not be taken as arguments in favor of punitive damages but rather as pointing out the inconsistency of *Vorvis* with the rationales of this doctrine.

7. *Vorvis v. Insurance Corp. of British Columbia* (1989), 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, [1989] 4 W.W.R. 218.

policy was based solely on the family's problematic financial situation. Despite three different expert reports to the contrary, the company persisted in its denial for a substantial period of time, forcing the Whitens to choose between giving up their right to the full amount of the policy and engaging in costly litigation. They chose the latter option. Daphne Whiten brought action in Ontario, where the case was tried before a jury. The jury found Pilot guilty of bad faith breach of the insurance policy, and awarded Whiten $318,252 in compensatory damages and one million dollars in punitive damages.[8] The insurer appealed. The Court of Appeal upheld the jury's decision to award punitive damages but concluded (Laskin J.A. dissenting) that the award was excessive and should be reduced to $100,000. This decision was appealed by both sides to the Supreme Court.

Two specific questions faced the judges of the Supreme Court. First, did the insurer's conduct justify an award of punitive damages? Second, could the one million dollar punitive damage award be considered reasonable and rational in the circumstances of this case? After a lengthy and thorough analysis of the facts and the law the court unanimously answered yes to the first question and almost unanimously (LeBel J. dissenting) answered yes to the second as well. The court held that the insurer had violated its duty of good faith to the insured, and that this violation constituted an independent actionable legal wrong for which punitive damages should be awarded having regard to the circumstances of the case. As to the size of the award, the court concluded that while it was higher than the damages the court would itself have awarded, it was nevertheless "within the rational limits within which a jury must be allowed to operate".[9] As a result, the court allowed the appeal and dismissed the cross-appeal.

III. THE IMPACT OF *WHITEN* ON THE AVAILABILITY OF PUNITIVE DAMAGES IN CANADA

1. A Preliminary Note

The majority opinion delivered by Binnie J. in *Whiten* is the most extensive treatment of punitive damages to be found in Canadian case law. It includes a comparative survey of the legal status of

8. The trial judge added pre-judgment interest and costs on a solicitor-client basis.
9. *Whiten*, *supra*, footnote 1, at p. 658.

punitive damages in Canada, England, Australia, New Zealand and Ireland. More importantly, it outlined the main guidelines and considerations relevant to the decision whether to award punitive damages against a defendant and in what amount, thereby filling a serious gap that existed in Canadian law.[10] In this respect, the *Whiten* decision should be considered an important stage in the development of punitive damages in Canada, regardless of its impact on the scope of the doctrine. This particular issue will be the focus of the following analysis.

2. The Pre-*Whiten* Era: *Vorvis* and its Progeny

One cannot fully appreciate the legal significance of *Whiten* without first referring to its legal background, and in particular to the Supreme Court's decision in *Vorvis*,[11] and the cases following its path. In *Vorvis*, a case of wrongful dismissal, the Supreme Court explicitly recognized for the first time the authority to award punitive damages in contract cases.[12] Nonetheless, and quite paradoxically, the court imposed a number of general constraints on the availability of punitive damages.[13]

First, the court laid down a new rule, according to which punitive damages could only be imposed on a defendant if she was shown to have committed an "actionable wrong". The court said:

> What is it that is punished [by punitive damages]? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff.[14]

10. The discussion is to be found, respectively, at pp. 621-34 and 647-58. Some very general principles were laid down in *Hill v. Church of Scientology, supra,* footnote 2, but the court in *Whiten* rightly admitted that "The Court on this occasion has an opportunity to clarify further the rules governing whether an award of punitive damages ought to be made and if so, the assessment of a quantum that is fair to all parties." *Whiten, supra,* footnote 1, at p. 622.
11. *Supra,* footnote 7.
12. "In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award." *Vorvis, ibid.*, at p. 207 (*per* McIntyre J.).
13. As will be demonstrated, some of these constraints restrict the availability of punitive damages not only in the contractual context but also in any civil context.
14. *Vorvis, supra,* footnote 7, at p. 206. In fact, this rule is far from new, if one takes it as no more than a restatement of the well entrenched rule that punitive damages can only

Second, although the need for an independent tort was not explicitly announced in *Vorvis*, subsequent case law interpreted the decision as requiring the "actionable wrong" to be "separate and independent" from the breach of contract alleged by the plaintiff.[15]

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be awarded where the plaintiff has established a cause of action against the defendant. It is indeed an innovation, however, if it purports to exclude — in deciding a punitive damage claim — any consideration of behavioural elements that do not in themselves constitute a separate cause of action (such as the state of mind of the defendant, her illicit motive, or other immoral acts that do not necessarily amount to a violation of a legal duty). Indeed, in her dissenting opinion in *Vorvis*, Wilson J. criticized this last version, which she thought to have been adopted by the majority. She said: "I do not share my colleague's view that punitive damages can only be awarded when the misconduct is itself an 'actionable wrong' . . . Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not." *Ibid.*, at pp. 223-24. In my view, the preferable — and until *Vorvis* the traditionally accepted rule — lies between the majority and the minority formulations. That is, the commission of an actionable wrong is indeed a condition precedent for the establishment of a claim to punitive damages (a fact that the minority seems to ignore), but this does not mean that they are imposed only in response to the actionable wrong itself (an assertion that seems to have been made by the majority). Rather, punitive damages are typically imposed in response to a *course of conduct*, consisting of a set of actionable and non-actionable behavioural elements (objective and subjective, physical and mental) and as a whole justifying punishment. As will be shown later, this traditional rule seems to re-emerge from the *Whiten* decision (see especially text accompanying footnote 43, *infra*).

15. One of the first cases to clarify the need for a separate wrong, independent from and additional to the breach of contract, was *Taylor v. Pilot Insurance Co.* (1990), 75 D.L.R. (4th) 370, [1991] I.L.R. ¶1-2677 (Ont. Ct. (Gen. Div.)). There, two motions to strike out two punitive damage claims (against an insurance company and against an employer) were granted on the basis of lack of an independent wrong. This interpretation of the "actionable wrong" requirement was adopted by future case law and later approved by the Supreme Court itself. See *e.g. Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 74 and 78, 152 D.L.R. (4th) 1, [1999] 4 W.W.R. 86: "there was insufficient evidence to support a finding that the respondent's actions constituted a separate actionable wrong either in tort or in contract . . . I [therefore] conclude that the appellant is unable to sue in either tort or contract for 'bad faith discharge'". See also *McKinley v. BC Tel.*, [2001] 2 S.C.R. 161 at para. 86, 200 D.L.R. (4th) 385, [2001] 8 W.W.R. 199: "McIntyre J. held that . . . such [punitive] damages may be awarded where the defendant's conduct constituted a separate, actionable wrong, independent of the dismissal itself." The independent wrong requirement was mentioned with approval by Binnie J. in *Whiten, supra*, footnote 1, at p. 614, where he cited Laskin J.A. (dissenting in part) in the Ontario Court of Appeal, to the extent that the insurer had committed an "independent actionable wrong" and that the "obligation to act in good faith is *separate* from the insurer's obligation to compensate its insured for a loss covered by the policy". For additional references implementing the "independent/separate wrong" test see Harvin D. Pitch and Richard M. Snyder, *Damages for Breach of Contract* (Toronto, Carswell, 1989, looseleaf, updated to 2003), s. 4.4(c), footnote 66 (punitive damages) and s. 4.3(c), footnote 51.5 (aggravated damages).

This requirement excluded the possibility of basing an award of punitive damages on a contractual cause of action, since it necessitated something "separate" and "additional" from any such breach. Under this analysis, no matter how reprehensible a breach of contract may seem to the jury/court or how aggravating the circumstances, punitive damages cannot be awarded unless the breach of contract was accompanied by another and separately identifiable actionable wrong.[16]

Third, the court in *Vorvis* seems to have settled the rule that the "separate and independent actionable wrong" must be sufficiently offensive and extreme to justify, *in and of itself*, a punitive damage award. In other words, the plaintiff must always be able to point to at least one discrete wrongful act on the part of the defendant that is reprehensible enough, standing alone, to deserve punishment and condemnation.[17]

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16. The main puzzle that remained unanswered after *Vorvis* (and in fact even after *Whiten;* see text accompanying footnotes 44-49, *infra*) concerns the justification for this restriction. If the defendant's conduct is reprehensible, why does it matter whether this reprehensibility is based upon a breach of the contract — which itself is actionable — or on some other non-contractual cause of action? This criticism is somewhat echoed in an article written by Professor Feldthusen, in which he said:

> In the typical employment or insurance contract case, additional support for punitive damages rests in the abuse of contractual power. This is the reason why there may not exist, and should not be required to exist, an independently actionable wrong. The case for punitive damages does not depend on the defendant's conduct having been exceptional in any manner independent of the breach of contract.

See Bruce Feldthusen, "Recent Developments in the Canadian Law of Punitive Damages" (1990), 16 C.B.L.J. 241 at p. 257. The difficulty is exacerbated if one considers breaches of contract as "independent actionable wrongs". For if this is the case, why do we need to find more than one breach of contract in order to justify the punitive damage award? Why cannot one reprehensible breach (which is itself an actionable wrong) suffice? Indeed, it seems to me that this line of thought has led the literature and much of the case law to assume that in requiring an "independent actionable wrong" the *Vorvis* court could not have contemplated additional contractual breaches, but only additional torts (or at the most, any additional non-contractual wrongs). As we shall see, this assumption was rejected by the Supreme Court in *Whiten.* In fact, it had been rejected five years earlier in *Wallace, supra,* footnote 15, where the Supreme Court explicitly acknowledged the possibility of the "separate" actionable wrong being contractual.

17. Indeed, it seems quite evident that this very understanding of the "actionable wrong" requirement led the Supreme Court in *Vorvis* to dismiss the employee's claim for punitive (and aggravated) damages. For although the court had admitted the employer's humiliating the employee to have been "most offensive" and "unjustified", that act did not seem, in and of itself, reprehensible enough to justify punishment: "This conduct [humiliating the employee prior to the wrongful dismissal itself] however, was not considered sufficiently offensive, standing alone, to constitute actionable wrong . . .

Although this limitation is not emphasized in the case law or the legal literature, its practical significance should not be underestimated. It prevents the courts, at least in theory, from reacting to the defendant's behaviour as a whole, and from assessing the overall gravity of that behaviour. Instead, it requires courts and juries to identify one specific actionable act (or omission) in and of itself reprehensible enough to deserve punishment — independently of the breach of contract, and independently of any other offensive act the defendant may have committed (whether or not actionable in itself). If no such act can be identified, punitive damages may not be awarded.[18]

Fourth, and again without any explicit statement to this effect in *Vorvis*, the assumption of most courts and commentators prior to *Whiten* seems to have been that by requiring an independent "wrong" the *Vorvis* court most probably meant an independent "tort".[19]

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and in my view was not of such nature as to justify the imposition of an award of punitive damages." *Vorvis, supra,* footnote 7, at p. 209. The result might have been different had the court taken a wider view of the employer's behaviour, including the early humiliation, the later wrongful dismissal itself (*i.e.*, the contractual breach) and the unfair treatment of the plaintiff following his dismissal. Indeed, this was the minority's position in *Vorvis*.

18. This innovation of *Vorvis* seems consistent with neither the traditional approach of the common law to punitive damages nor the rationales of this doctrine. Punitive damages are not regularly imposed as a punishment for one discrete wrong or injury, but rather in response to an antisocial pattern of behaviour, reflecting reckless indifference to others' rights. The truth of this claim cannot properly be established within the limits of this article. However, a short glance at the facts of most, if not all, of the cases discussed in *Vorvis* and in *Whiten* reveals that in awarding punitive damages the courts usually examine and evaluate the defendant's behaviour as a whole, and do not focus exclusively on a single violation, severe as it may be. Moreover, even where a single wrongful act is reprehensible in itself (this is likely to occur mostly in cases of intentional torts that require an aggravated mental state, such as deceit) the punitive damages, if awarded, would usually be a response not only to the wrong itself, but also to other aggravating circumstances present in the case. See *e.g. Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 at para. 81, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193: "Torts such as deceit or fraud already incorporate a type of misconduct that to some extent 'offends the court's sense of decency' . . . yet not all fraud cases lead to an award of punitive damages [but only those accompanied by other aggravating circumstances]." In sum, punitive damages are typically awarded not for one single actionable wrong, but in response to reprehensible *courses of conduct*, consisting of both actionable and non-actionable acts or misdeeds. See also *supra*, footnote 14.

19. Beaulac, *supra,* footnote 4, at p. 366: "The ruling [in *Vorvis*] led several commentators to suggest that, in order for punitive damages to be available in a contractual context, there must be a 'tort' (which is sufficiently reprehensible) in addition to the breach of contract." See also Jamie Cassels, *Remedies: The Law of Damages* (Toronto,

In other words, despite its manifest willingness to reconsider and abandon the traditional rule limiting punitive damages to tort actions only, the *Vorvis* decision turned out as merely entrenching the old regime.[20] Its only innovation, if any, was in emphasizing the traditional rule recognizing the right of an aggrieved party to a contract to rely on a parallel or additional cause of action in tort.[21]

Nevertheless, it should be noted that the assumption that punitive damages were not available absent an independent tort was not subsequently accepted by all courts, some of which were willing to recognize as independent wrongs breaches of fiduciary duties as well as breaches of the duty of good faith.[22]

Irwin Law, 2000) at p. 277: "In *Vorvis*, the majority judgment suggests that punitive damages will never by available in contract, unless the breach is also a tort." In my view, few reasons justify the above mentioned assumption: First, as noted above (at footnote 16) the very demand for an independent wrong does not make much sense if the extra wrong could be contractual (for further elaboration on this point see text accompanying footnotes 44-49, *infra*). Secondly, the *Vorvis* court did not even consider the possibility of framing the employer's offensive behaviour (prior to the wrongful discharge) as an independent breach of a contractual implied duty, a duty of good faith or a fiduciary duty. This might indicate that what the court had in mind was indeed an independent cause of action in tort. Third, in establishing the "actionable wrong" requirement the court relied, *inter alia*, on rule 355 of the *Restatement (Second) of Contracts* (St. Paul, 1981), which states: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." Had the court not been guided by such an assumption, it is difficult to comprehend its relying on the American Restatement. Fourth, the court mentioned in this context *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228, [1981] 3 W.W.R. 481, 30 B.C.L.R. 286 (C.A.) where the breach of contract in question constituted a wrong of negligence.

20. Indeed, in a case following *Vorvis* the trial judge admitted that he had found the majority's position in *Vorvis* "ambiguously ambivalent" since "Taken to its logical conclusion on this basis, the punitive damages [according to *Vorvis*] are an award for the tort infliction, not purely for the breach of contract. In other words, the breach of contract action would merely be parallel with the tort action." *Taylor, supra*, footnote 15, at pp. 374-75.

21. This basic tenet of the common law was reaffirmed in Canada in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at para. 51, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, application for rehearing 42 D.L.R. (4th) vii, application to vary judgment granted on rehearing [1988] 1 S.C.R. 1206: "where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence".

22. See *e.g. Ferguson v. National Life Assurance Co. of Canada* (1996), 36 C.C.L.I. (2d) 95, [1996] I.L.R. ¶1-3316 (Ont. Ct. (Gen. Div.)), affd 102 O.A.C. 239 (C.A.) (unjustifiably terminating disability payments by an insurance company viewed as violation of duty of good faith and justifying punitive damages); *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449, [1992] 4 W.W.R. 577 (wrongful sexual relations between doctor and patient were viewed by McLachlin J. (as she then was) as breach

A further step towards abandoning this assumption was made in 1997 in the *Wallace* decision,[23] where the Supreme Court clearly recognized the possibility of basing an independent wrong on a separate and independent breach of the same contract.[24]

This liberal language, however, was not applied in *Wallace* itself, where the majority explicitly refused to view the bad faith dismissal of an employee as either a tort or an implied breach of contract.[25] Moreover, the *Wallace* court refused to recognize the admitted violation of the duty of good faith on the part of the employer as an independent wrong, and therefore denied the employee's claim for aggravated and punitive damages on the basis of such violation.[26]

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of fiduciary obligation and as such a basis for punitive damages); *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282, 76 D.L.R. (4th) 138, 46 C.P.C. (2d) 209 (C.A.), supp. reasons 76 D.L.R. (4th) 138 at p. 176, leave to appeal to S.C.C. refused 83 D.L.R. (4th) vii, 9 W.A.C. 80*n sub nom. Charpentier v. Huff* (punitive damages against a fiduciary for dishonest investments practices). See also Stephen M. Waddams, *Dimensions of Private Law* (Cambridge, CUP, 2003), at p. 73: "Breach of fiduciary duty, though not a common law tort, is a wrong." For an extended list of Canadian cases in which lower courts attempted to turn some egregious breaches of contract into independent actionable wrongs (usually torts), see Pitch and Snyder, *supra*, footnote 15, sec. 4.4.(c), at notes 69.2-74. These cases deal almost exclusively with breaches of either employment or insurance contracts. See *e.g. Independent Order of Foresters v. Prime Air Freight Inc.* (1991), 4 B.L.R. (2d) 60 (Ont. Ct. (Gen. Div.)) at para. 37 (Haley J.): "In the normal course punitive damages are not awarded for breach of contract except in wrongful dismissal cases." An interesting example of a punitive damage award imposed in a purely commercial context is *968703 Ontario Ltd. v. Vernon* (2002), 58 O.R. (3d) 215, 155 O.A.C. 386, 22 B.L.R. (3d) 161 (C.A.). In this case, decided only two days before *Whiten*, the Ontario Court of Appeal upheld an award of $5,000 in punitive damages for a pure breach of contract by an auctioneer, who did not transfer the proceeds from a sale to the plaintiff as agreed upon between the two. The court mentioned the independent wrong requirement, but said it had been met, since the breach of contract was also independently a breach of a fiduciary duty (*ibid.*, at para. 25). It might be worth noting that in the United States the concept of a "breach of a fiduciary duty" has been one of the main techniques used by the courts to expand the scope of punitive damages in contract. The seminal case is *Brown v. Coates*, 253 F. 2d 36 (D.C. Cir. 1958). For an illuminating discussion of this technique as well as others see *e.g.* Timothy J. Sullivan, "Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change" (1977), 61 Minn. L. Rev. 207 at pp. 226-29.

23. *Supra*, footnote 15.
24. See text accompanying footnote 15, *supra*. Under the circumstances, though, the court rejected this possibility, as it was unwilling to recognize an implied contractual term that the employee would not be fired except for cause or for legitimate business reasons (*ibid.*, at para. 75).
25. *Ibid.*, at paras. 75-78. See especially the quotation accompanying footnote 15, *supra*.
26. Under the circumstances, the employer fired the plaintiff not only without prior notice (which constituted breach of contract) but in an objectionable manner and without reasonable cause (which constituted a breach of the duty of good faith). The majority

And so, until *Whiten*, the general impression of the legal community seems to have remained the same, namely, that egregious breaches of contract could not give rise to an award of punitive damages absent an independent cause of action in tort.[27]

An additional and fifth limitation arising out of *Vorvis* is the court's ruling that the defendant's reprehensible conduct must not only be independently actionable, but must also be the cause of actual damage to the plaintiff.[28]

While this restriction has not hitherto attracted much attention, it is no less an obstacle for the availability of punitive damages in contract disputes than in other civil cases, since it eliminates the

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was willing to recognize the existence of good faith obligations between employers and employees, and to view the employer's bad faith in that case as justifying extension of the notice period. However, the court was not prepared to view it as a basis for an award of aggravated or punitive damages. The minority opinion, however, delivered by McLachlin J. (as she then was) held that "The action for breach of this duty [of good faith] supplements the independent causes of action in contract and tort previously recognized." (at para. 131) and recognized such a breach as a possible basis for both punitive and aggravated damages. This view was clearly adopted by the Supreme Court in *Whiten*. See text accompanying footnote 42, *infra*.

27. The assumption that punitive damages are not available for separate breaches of contract was echoed in a decision rendered by the Ontario Court of Appeal only a few weeks before *Whiten* was decided. In *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813, 209 D.L.R. (4th) 411, 155 O.A.C. 103, Laskin J.A. said (at para. 44): "Although the requirement of an independent actionable wrong does not easily explain some of the breach of contract cases where punitive damages have been awarded and though it has been criticized by several academics, it remains the current law in Canada." For other sources reflecting this assumption see *supra*, footnote 19.

28. The basis of this requirement is to be found in the words of the *Vorvis* court cited *supra*, at footnote 14 ("an actionable wrong which caused the injury complained of by the plaintiff"). This formulation does not seem an unintentional slip of the tongue, since later in the judgment, while referring to *Robitaille* (*supra*, footnote 19) the court found it important to mention that apart from the "offensive attitude and conduct of the defendant" this behaviour "was, as well, causative of the injury suffered" (*ibid.*, at p. 207). The court also quoted Clement J.A. in *Paragon Properties Ltd. v. Magna Investments Ltd.* (1972), 24 D.L.R. (3d) 156 at p. 167, [1972] 3 W.W.R. 106 (Alta. C.A.), stating that: "The basis of such an award [of punitive damages] is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality." This limitation was implemented in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687, 130 O.A.C. 373, [2000] I.L.R. ¶1-3826 (C.A.), leave to appeal to S.C.C. refused 191 D.L.R. (4th) vi where the Court of Appeal refused to uphold a punitive damage award against an insurer *inter alia* on the ground that its bad faith breach of the contract had not caused any damage to the insured (*ibid.*, at para. 72). See also Pitch and Snyder, *supra*, footnote 15, ch. 4, at p. 52, stating that: "To establish the claim [for punitive damages] it [*Vorvis*] held that the conduct complained of had to both constitute an independent actionable wrong, and had to have been the cause of damages."

possibility of awarding punitive damages against outrageous violations of rights that have not materialized (or have not been proven to materialize) into a compensable head of damages.[29]

Finally, apart from any formulations of positive law, the majority opinion in *Vorvis* expressed a very reserved, not to say unfavourable, approach towards the punitive damages doctrine in general,[30] and towards its role in contract cases in particular.[31]

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29. This limitation also seems to be inconsistent with the rationales of the doctrine. It rests on the controversial assumption that punitive damages are intended to address outrageous *injury* in the sense of actual damage or loss, while in fact their widely accepted goal is to punish anti-social *behaviour*, typically manifested in reckless indifference to the rights of others. This is obvious from the various judicial formulations of the conduct subject to punitive damages. Those formulations — many of which the *Vorvis* court itself quoted — do not usually make reference to the question of whether or not any actual damage was proven, but focus instead on the defendant's attitude towards the plaintiff's rights. Indeed, in most American jurisdictions it is well settled that punitive damages may accompany an award of nominal damages. See, *e.g. Restatement (Second) of Torts* (St. Paul, 1977) s. 908, Comment c: "Punitive damages are today awarded when there is substantial harm and when there is none . . ." In Canada see *e.g. Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 at para. 48, [1997] 10 W.W.R. 752, 36 B.C.L.R. (3d) 350 (S.C.): "An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."; Ken D. Cooper-Stephenson, *Personal Injury Damages*, 2nd ed. (Toronto, Carswell, 1996), at p. 98: "[punitive damages] can be awarded despite the plaintiff's having suffered no loss at all".

30. The court opened its analysis of the issue of punitive damages stating that: "[p]roblems arise for the common law wherever the concept of punitive damages is posed" (*supra*, footnote 7, at p. 205) and went on to describe some of the main concerns and problems with punitive damages — without mentioning any arguments in favour of the doctrine.

31. This became evident after the court asserted its belief that punitive damages in contract cases, although permissible in theory, would be "very unusual". The only explanation the court offered for this prediction relied on the supposed differences between the purposes of compensatory damages in torts and in contracts. In the court's view, while the former intend to make the plaintiff whole, the latter do not. This argument seems problematic, since even if this description had been correct (which is doubtful, as contract damages are also compensatory and do intend to "make the plaintiff whole"), it is still difficult to see how this distinction should bear upon the issue of punitive damages, which are non-compensatory. Another indication of the court's reserved approach toward the role of punitive damages in contract is found in that although the court admitted the defendant's behaviour to have been "unjustified" and "most offensive", it ignored the possibility of viewing this harsh behaviour as giving rise to an independent tort, namely, the tort of "intentional infliction of mental distress", the preconditions of which seem to have been fulfilled under the circumstances of the case (as stated earlier, the court ignored other possibilities as well, such as recognizing this conduct as a separate breach of the contract, the duty of good faith, or a fiduciary duty). For a case where in similar circumstances aggravated damages were awarded against an employer on the basis of committing an independent wrong of intentional infliction of mental distress see *Prinzo v. Baycrest Centre for Geriatric*

To conclude, although *Vorvis* could be taken to clearly expand the scope of punitive damages in contract, the new limitations it imposed on their availability together with the cautious approach of the court in fact turned *Vorvis* into a considerably conservative judgment. It is therefore not at all surprising that in the years following *Vorvis* the general approach of Canadian case law to punitive damages has been very restrictive, especially when applied to contractual disputes.[32]

3. The *Whiten* Ruling — Transforming the Infrastructure of Punitive Damages Law

In Canadian terms, the willingness of the *Whiten* court to approve a one million dollar punitive damage award against a business entity as punishment for corporate misbehavior, is striking even standing alone.[33]

However, it seems that this decision should be regarded as even more revolutionary than is generally perceived if one considers its wider legal significance, *i.e.*, its effect on the legal infrastructure of

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Care (2002), 60 O.R. (3d) 474, 215 D.L.R. (4th) 31, 161 O.A.C. 302 (C.A.) (punitive damages were not awarded, since not necessary for deterrence).

32. This is well manifested in a long line of cases, in which courts of different instances have disallowed claims for punitive damages (as well as aggravated damages) against a contracting party. For an extended list of relevant cases see Pitch and Snyder, *supra*, footnote 15, s. 4.4(c), footnote 66 (punitive damages) and s. 4.3(c), footnote 51.5 (aggravated damages). The authors conclude that "the result of said decision [*Vorvis*] had virtually emasculated any right to claim and recover such [punitive] damages . . . The ability of those courts [lower courts that in the past had been willing to use the doctrine in contract actions] to continue this practice is now much more restrictive in light of *Vorvis*." (*ibid.*, ch. 4, at pp. 45, 52 and 53). See also G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto, Carswell, 1996), p. 750: "Indeed . . . since *Vorvis* . . . most [cases] have been cases in which punitive damages were not allowed . . . the occasions when such damages will be awarded [in contract actions] will be severely limited, in accordance with the tenor of the language employed [in *Vorvis*]". Nevertheless, as mentioned earlier, even before *Whiten* was decided there were some activist decisions in which punitive damages were awarded for egregious breaches of contract. See references *supra*, at footnote 22. The influence of *Vorvis* is seen also in the fact that until *Whiten* the size of punitive damage awards in contract cases was kept comparatively low. See *Whiten*, *supra*, footnote 1, at paras. 134 and 136.

33. The psychological effect of *Whiten* is manifested by the wave of reactions that it has generated among businessmen, journalists and academics alike. An advanced search in the Google search engine for the phrase "*Whiten v. Pilot*" made on July 5, 2004 discovered an impressive number of no less than 450 documents and web pages that mention the *Whiten* decision, including dozens of short comments (see *e.g.* references cited *supra*, at footnote 3). Nevertheless, as stated earlier, the academic literature dealing with the implications of this decision is still relatively scarce. See *supra*, footnote 4.

the law of punitive damages in Canada. Briefly, I claim that the *Whiten* court, while not explicitly overruling *Vorvis*, actually abandoned the assumptions underlying that decision, and relaxed most, if not all, of the limitations it imposed on the scope and availability of punitive damages.

First of all, and probably influencing all the other points to be discussed below, in clear contrast to the *Vorvis* court, the *Whiten* court openly expressed its favourable view of the idea of civil punishment in general, and of the punitive damages doctrine in particular.[34] Furthermore, while admitting punitive damages in general to be "very much the exception rather than the rule",[35] the court — again in opposition to the *Vorvis* court — did not expressly state or otherwise imply that punitive damages should be expected to appear in contract cases less frequently than in tort cases. On the contrary, the court emphasized that "the attempt to limit punitive damages by 'categories' does not work" and that "The control mechanism lies not in restricting the category of case, but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action."[36]

Second, in response to the argument that the punitive damage award was misconceived, since the plaintiff did not prove or even

34. The court made this point very clear when at the outset of the analysis it stated: "Punishment is a legitimate objective not only of the criminal law but of the civil law as well. Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law . . . Over-compensation of a plaintiff is given in exchange for this socially useful service." *Whiten, supra,* footnote 1, at p. 617. It is important to note that none of the six majority judges expressed any reservation regarding these general remarks of Binnie J. On the other hand, in his dissenting opinion, LeBel J. thoroughly addressed this general issue of principle. While not explicitly implying that the doctrine should be abolished, he made clear that in his view there are "inherent difficulties in the nature of punitive damages", which raise "doubts as to their proper place in the law of torts": *Whiten, supra,* footnote 1, at p. 670. These remarks are much in line with the words of McIntyre J. in *Vorvis, supra,* footnote 30. The majority's liberal approach to the use of punitive damages is also reflected in the latitude it allowed the jury in imposing a sum that was considered "more than this court would have awarded", as well as by the court's unwillingness to establish a "ratio test" for reasonability of awards, arguing that applying such a test would undermine the effective realization of the goals of punishment and deterrence: *Whiten, supra,* footnote 1, at paras. 128 and 127 respectively.

35. *Ibid.*, at p. 645.

36. *Ibid.*, at p. 634. Ironically enough, the court tried to minimize the revolutionary dimension of its own approach by attributing it to the *Vorvis* decision, stating that: "the attempt to limit punitive damages by 'categories' does not work and was rightly rejected in Canada in *Vorvis*". As demonstrated above, the *Vorvis* court's approach was much more reserved and restricted than it appeared at first sight.

allege that she had been actually injured by the insurer's bad faith, the court opined that such proof was not necessary, since "punitive damages are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss".[37]

Third, the Supreme Court made it unequivocally clear that the "actionable wrong" requirement established in *Vorvis* should not be given a narrow interpretation identifying "wrong" with "tort".[38] It explicitly declared that punitive damages could be awarded for reprehensible conduct involving breach of any kind of legal obligation — contractual and non-contractual alike.[39] One such obligation is the implied contractual duty of good faith and fair dealing. In the circumstances of the case, the insurer's clearly unjustified denial of

37. *Whiten*, *supra*, footnote 1, at p. 644. Nevertheless, the court found it useful to add that, in any event, there was enough evidence to prove that the bad faith denial of the claim enhanced the financial and emotional loss of the insured. Formally, this may somewhat reduce the authoritative weight of the court's view on this issue, but in practice the view expressed by the court will probably still have a significant effect on future case law.

38. "In my view, a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an 'actionable wrong' within the *Vorvis* rule, which does not require an independent tort." (*ibid.*, at p. 639). This liberal approach of the Supreme Court was revealed, in a less explicit way, a few years earlier in *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, 178 D.L.R. (4th) 385, [2000] 1 W.W.R. 1. There, the court upheld an award of punitive damages against a bank for acting harshly and unfairly towards a debtor in a way that "seriously affronts the administration of justice". The Supreme Court emphasized that "the bank's conduct did not have to rise to the level of fraud, malicious prosecution, or abuse of process to justify an award of exemplary damages", thereby indicating that an independent tort was not a precondition for an award of punitive damages: *ibid.*, at para. 28.

39. In reaching this conclusion the court relied not only on formal arguments concerning the supposed subjective intention of the *Vorvis* court, but also on a substantive argument. According to the latter, requiring proof of a tort would be "pure formalism" in cases where the defendant's conduct, though not in itself tortuous, deserves punishment and could be viewed as violating a contractual or a fiduciary obligation: *Whiten*, *supra*, footnote 1, at pp. 639-40. The fact that the court focused on the breach of duty (rather than on the cause of action) might even imply that a breach of duty of care in tort could count as an "actionable wrong", even without proof of foreseeable injury. The wide interpretation given in *Whiten* to the *Vorvis* "actionable wrong" requirement was immediately implemented by subsequent case law. See *e.g.* the statement of the Ontario Court of Appeal rendered only a few months later in *Ferme Gerald Laplante & Fils Ltée. v. Grenville Patron Mutual Fire Insurance Co.* (2002), 61 O.R. (3d) 481 at para. 71, 217 D.L.R. (4th) 34, 164 O.A.C. 1 (C.A.), leave to appeal to S.C.C. refused 225 D.L.R. (4th) vi: "The Supreme Court in *Whiten* . . . held that, in order to found a claim for punitive damages in a contract case, there must be an independent actionable wrong. The wrong in question may be a tort, but need not be. It is sufficient if it can form the basis of an independent cause of action at law."

the insured's claim constituted not one but two separate and independent causes of action: (1) a simple breach of the insurance contract (in not paying the loss without any excuse under the contract); and (2) a separate and independent breach of the insurer's implied contractual duty to act fairly towards the insured (in processing the claim in an objectionable manner).[40] The court implicitly andindirectly overruled not only the fourth limitation imposed by *Vorvis*,[41] but also its 1997 decision in *Wallace*, where the majority (McLachlin J. dissenting) refused to recognize the possibility of founding an award of punitive or aggravated damages on a bad faith termination of an employment contract.[42]

Fourth, while not explicitly rejecting the *Vorvis* demand for singling out one separate and discrete actionable wrong (as opposed to the traditional search for a course of wrongful conduct) the court's description of the insurer's punishable behaviour reveals a clear deviation from this demand. This is evident from the fact that, as opposed to *Vorvis*, the court did not focus on any single act of the insurer as the basis for the punitive award. Rather, it relied on a series of different acts and misdeeds (mainly, various unjustified denials of the insured's claim at different stages) that altogether and as a whole presented a pattern of extreme misbehavior.[43]

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40. "A breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss." *Whiten*, *supra*, footnote 1, at p. 639.
41. See text accompanying footnotes 19-27, *supra*.
42. See *supra*, footnotes 15 and 26. This contradiction between *Wallace* and *Whiten* was noticed by the Ontario Court of Appeal in *Prinzo, supra*, footnote 31, at para. 34.
43. The court emphasized that the insurer's conduct was "persisted in over a lengthy period of time" and that there is a need to show it that its "bad faith *dealing* with this loss claim was not a wise or profitable *course of action*" (*ibid.*, at pp. 650 and 648, respectively). The court also mentioned (at para. 83) a case where a trial judge ordered punitive damages against an insured, without requiring a separate tort, but instead relying on "a deliberate *course of conduct* to misrepresent facts to the defendant in order to continue to collect disability benefits": *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 at paras. 84-85, 33 C.C.L.I. (2d) 238, [2002] I.L.R. ¶1-4062 (Q.B.). It is worth noting that the very finding of bad faith (as opposed to the finding of a commission of a tort or a breach of contract) is usually based not on one discrete act, but rather on problematic courses of conduct. This point has been made in the case law, especially in the insurance context. See *e.g. 702535 Ontario, supra*, footnote 28, at para. 30: "What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim." This will make the erosion of the *Vorvis* limitation discussed here very likely in cases such as *Whiten*, where the court chooses to base the award on bad faith (rather than on a specific breach of the contract).

Fifth, without formally overruling the requirement for a separate "independent wrong", the broad interpretation given by the court to the term "wrong" seems to have left the requirement of a separate wrong without any rational purpose. If, as stated in *Whiten* (and earlier in *Wallace*) a breach of contract is itself an actionable wrong, what could possibly be the logic or justification in searching for another separate and independent contractual breach in order to justify the punitive damage award? In other words, if an "additional" reprehensible breach could serve as the basis for the award, why could not the "main" or "first" breach fulfil that purpose alone, as long as it is reprehensible enough?[44]

Indeed, it may be suggested that, but for its deference to precedent and legal tradition, the *Whiten* court would have gladly done away with this formalistic limitation, embracing the minority opinion in *Vorvis*. Instead, it preferred to pay *Vorvis* lip service, and thus preserved (or at least prevented the total eradication of) the myth that punitive damages in contract were never to be awarded absent an independent wrong. Realistically speaking, one may argue that the preservation of the "independent wrong" myth is responsible for the willingness of the court in *Whiten* (as well as a number of lower courts before it)[45] to recognize the duty of good faith as a separate source of obligation between parties to contracts. Assuming that a pure breach of contract (*i.e.*, a breach that does not give rise to a parallel action in tort or otherwise) could not itself justify punitive or aggravated damages, this new form of liability enables a court willing to grant such awards for an egregious breach of the contract to do so without expressly rejecting the *Vorvis* rule.[46] Relying on the concept of a separate breach of an obligation of good faith serves here as a substitute for a more direct and overt recognition of the court's authority to award punitive and aggravated damages for egregious breaches of contract.[47] In my view, rather

44. With respect to this puzzle, see also the discussion at footnote 16, *supra*.

45. See *e.g. Ferguson, supra*, footnote 22.

46. However, even this line of justification is problematic, since the *Whiten* court explicitly describes the duty of good faith as a contractual duty (See footnote 38, *supra*.) Whether the duty of good faith is a contractual or an extra-contractual duty imposed by the law is an open question in Canadian law. It was shortly discussed by Shannon K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 Can. Bar Rev. 70 at p. 77.

47. In fact, a parallel but slightly different process has taken place in the United States. There, the duty of good faith in the performance of contracts is generally regarded as an implied contractual obligation. Therefore, American courts found it necessary

than faithfully describing what the courts are actually doing, in many cases this amounts to no more than playing with words.[48] In fact, in most bad faith cases, what the courts are punishing is nothing more than an intentional and unjustified breach of a contractual right (express or implied) which for sake of convenience and out of respect to precedent they prefer to present as giving rise to a "separate" and "independent" wrong.[49]

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to establish tort liability in order to overcome the traditional rule against punitive damages in contract. Hence, following the initiative of the Supreme Court of California, many American courts in the 1970s and 1980s recognized that in proper cases such breaches of good faith should be viewed as creating an independent cause of action in tort. This new tort of "bad faith breach of the implied covenant of good faith and fair dealing" (sometimes simply called the "bad faith tort") was recognized mainly, but not only, in the field of insurance contracts. The situation in the United States is further discussed below, in the text accompanying footnotes 55-58. Other concepts that were developed in order to realize similar objectives are the tort of "intentional infliction of mental distress" and the "breach of fiduciary duty" concept. In recent years, Canadian courts have been moving in the same direction (see *e.g. supra*, references at footnote 22). Indeed, in his dissenting opinion in the Court of Appeal in the *Whiten* case, Laskin J.A. confessed that had he thought *Vorvis* required a tort, he would have been willing to recognize the bad faith of the insurer as giving rise to a cause of action in tort (see paras. 27 and 28 of his judgment).

48. The inspiration for this metaphor comes from the words of Taylor J. in *Uren v. Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118 at p. 152 (Aust. H.C.), stating that "in seeking to preserve the distinction [between aggravated and punitive damages] we shall sometimes find ourselves dealing more in words than ideas".

49. The artificiality of the attempt to distinguish between breach of the contract and breach of the duty of good faith is manifested in the following lines written by a Canadian author in an attempt to explicate this distinction: ". . . an allegation of bad faith is not the same as a simple allegation of breach of contract. The latter may arise whenever an insurer errs in its interpretation of the facts, policy or law. The former arises only when such an error is committed knowingly and without basis." Denis W. Boivin, "Wrongful Denial of Insurance Benefits: A Canadian Perspective" (1999), 7 Tort L. Rev. 52 at p. 68. In other words, when a breach of contract is done innocently or negligently, it is only a breach of contract, whereas if the breach is intentional and unjustified, it gives rise to a separate and independent cause of action. But then again, why not simply admit that certain breaches of contract may deserve punishment (when committed knowingly and with no justification) while others may not (just as certain intentional tortious acts may well justify punitive damages, while others may not)? Prior to *Whiten* the answer should have been that this distinction enables the courts to bypass the independent wrong requirement. However, after *Whiten* this fiction is no longer necessary, since a pure breach of contract may clearly qualify as a "wrong". This realistic analysis was supported to some extent by a recent critique of the *Whiten* decision, which described the independent wrong requirement as: "a requirement that can be so easily satisfied by just dividing up the defendant's contractual obligations into little pieces": Swan, *supra*, footnote 4, at p. 616.

Finally, while leaving the "actionable wrong" requirement apparently intact, it is the author's view that the *Whiten* court may be viewed as rejecting the normative principle supporting this requirement, namely, the principle that in a civilized society only behavioral elements that are actionable *per se* can be punished by a court.[50] By not requiring the plaintiff in *Whiten* to prove a single wrongful act egregious enough in itself to justify punishment, and relying instead on a series of legally as well as morally objectionable acts,[51] the court seems to have abandoned this principle. In its place it re-adopted the traditional approach to punitive damages, and the one adhered to by the minority opinion in *Vorvis*. According to this view, the objectionable character of the defendant's conduct is rooted not so much in his committing the factual elements constituting the plaintiff's cause of action as in his state of mind and other aggravating elements that do not necessarily in themselves give rise to any independent cause of action.[52]

To sum up, careful analysis of the Supreme Court's decision in *Whiten* shows that, notwithstanding the court's attempts to align itself with the pre-*Whiten* case law, what actually occurred in this judgment is a silent revolution by which the whole infrastructure of the law of punitive damages was completely transformed. For the sake of clarity and convenience, the various aspects of this transformation are summarized in the following table:

Issue in Question		State of the Law in the Pre-*Whiten* Era	State of the Law in the Post-*Whiten* Era
1	Attitude towards punitive damages in general	Unfavourable. Punitive damages are inherently problematic.	Favourable. Punitive damages, although not the rule but rather the exception, are an important and legitimate legal tool in appropriate cases.
2	Attitude towards punitive damages in contract cases	Very rare. Much rarer than in tort cases.	Punitive damages are generally an exceptional remedy. There should be no categorical difference between the frequency of awards in contract and tort cases.

50. See quotation at footnote 14, *supra*.
51. For a detailed description of the various objectionable acts and misdeeds on the part of the insurer see paras. 1-25 of the majority opinion, *supra*, footnote 1.
52. For elaboration on this point see *supra*, footnotes 18 and 43 and accompanying text.

3	In awarding punitive damages, is there a need to point out a single actionable wrong reprehensible enough in and of itself to deserve punishment? Why?	Yes. Absent such a specific wrong, punishment should not be inflicted in a civilized society.	No. What the law requires is a wrongful course of conduct deserving of punishment, not necessarily a single wrongful act deserving of punishment. The defendant is punished not so much for the very commission of an actionable wrong, but rather for his overall misbehavior, to be assessed in light of all circumstances.
4	Is the existence of an actionable wrong a pre-condition for an award of punitive damages? In what sense?	Yes, the commission of an actionable wrong is the very reason for punishing the defendant.	Yes. But only in the sense that a violation of the plaintiff's right is a condition precedent to her claim for punitive damages. The defendant is punished not necessarily for a specific actionable wrong she committed, but rather for her overall misbehaviour.
5	Is there a need to prove that the defendant's behaviour caused actual injury to the plaintiff?	Yes. Punitive damages are awarded in response to an actionable wrong that caused injury.	No. Punitive damages address conduct and not damage, and therefore could be awarded independently of any actual injury.
6	What could qualify as an "actionable wrong"?	Probably only a tort. Possibly also other non-contractual breaches such as a breach of a fiduciary duty, but not a breach of the duty of good faith, and most probably not a breach of contract.	Every violation of any kind of civil obligation, including a tort, breach of a fiduciary obligation, and breach of contract. Bad faith breaches of contract can be viewed as a breach of a separate duty of good faith and fair dealing. Arguably even a breach of duty of care in negligence (with proof of no actual damage) can qualify as an independent wrong (since actual damage is unnecessary).

7	In contract cases, is there a need to prove a "separate independent wrong" in addition to the breach of contract itself?	Yes. Since a pure breach of contract most probably would never justify punishment.	In judicial rhetoric still yes. However, the limitation cannot be justified any more, since according to *Whiten* a breach of contract is an actionable wrong for which punitive damages could be awarded. In practice, judges might still rely on the "independent wrong" requirement, but will be able to satisfy it easily by invoking the idea of a separate breach of the duty of good faith, or of a separate implied contractual obligation.

If the analysis offered in this section is correct, one must conclude that *Whiten* has almost totally transformed the infrastructure of the law of punitive damages. Therefore, at least on the level of principle, and until further restrictions are imposed by subsequent decisions, it should be clear that in the post-*Whiten* era punitive damages can be claimed, considered and awarded in a much wider spectrum of factual circumstances than ever before.

Allowing a punitive award to be based on a breach of duty of any kind, including a purely contractual duty, has the effect of transforming punitive damages from a tort discipline into a general civil doctrine. Such a move equates the status of punitive damages in contract with their status in actions based on tort.[53] From an historical point of view, this is a major legal change that the vast majority of common law jurisdictions have not yet adopted.[54]

53. Truly, the *Whiten* court still refers to punitive damages in terms of a rare remedy in contract cases, but the same view is expressed with regard to the doctrine's status in torts. See *supra*, footnote 36 and accompanying text.

54. Most common law systems still hold on to the traditional rule that punitive damages are allowed only for torts, and not for breaches of contract, however reprehensible. In England the authority is still *Addis v. Gramophone Company Ltd.*, [1909] A.C. 488 (H.L.). This traditional rule has not been challenged in Australia and Ireland, and has been expressly adopted in New Zealand (see *e.g. A. v. B.*, [1972] 1 N.Z.L.R. (S.C. New Plymouth) 673). In the U.S. a substantial number of states allow punitive damages in contract cases, but usually only on the basis of a tort theory. The only two states where the Supreme Court has officially and unequivocally abolished the historical distinction are Idaho and New Mexico. See *Boise Dodge v. Clark*, 453 P.2d 551 (Idaho 1969); *Hood v. Fulkerson*, 699 P.2d 608 (N.M. 1985). It might be of interest to add that the widest recognition of the doctrine is to be found in the Philippines, a mixed jurisdiction where the Civil Code explicitly authorizes the award of exemplary damages not

Furthermore, in recognizing the contractual duty of good faith as a source of obligation, the breach of which could justify an award of punitive damages, the court clearly signaled its willingness to punish violations not only of express terms but also of terms implied — in fact or in law — in the contractual relationship. In other words, after *Whiten* it is not simply infringements that were clearly contemplated by the parties in entering into the contract that are subject to scrutiny and punishment, but indeed any conscious and unjustified behaviour significantly harmful to the basic interests of the other party.

It is interesting to note that the court in *Whiten* followed a course similar to that taken by the Supreme Court of California in 1973 when it first awarded punitive damages against an insurer for denying a justified claim of its insured based on the notion of a bad faith breach of the duty of good faith.[55] Today, this "bad faith tort" is recognized in the majority of American jurisdictions as a source of civil liability, including liability for punitive damages, but is generally confined exclusively to the area of insurance contracts.[56] However, in some states it has been extended to include other contracts such as employment, banking and others that like the typical insurance contract could be characterized by "special relationships" between the parties.[57] A small number of states have gone even

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only for breach of contract, but also for breach of restitutionary obligations ('quasi-contract'). *Civil Code of the Philippines* (1949) Art. 2232 (available at <http://www.chanrobles.com/civilcodeofthephilippines.htm> (date accessed February 18, 2005)).

55. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566 (S.C. 1973). This notion was developed much earlier in the Supreme Court of California, but until *Gruenberg* had not been used to award punitive damages. The two milestones that could be viewed as harbingers of *Gruenberg* are *Comunale v. Traders Gen. Ins. Co.*, 50 Cal. 2d 654 (S.C. 1958) and *Crisci v. Security Ins. Co.*, 426 P.2d 173 (S.C. 1967).

56. "To this day, the majority of states still recognize a separate contract, tort, or hybrid bad faith cause of action for breach of the implied covenant of good faith arising from an insurance contract, that allows for damages beyond those permitted in a simple breach of contract action. However, this claim has been largely confined to dealings between an insured and its insurer, and generally is not implicated by breaches between parties having any other 'special relationship'." Seth W. Goren, "Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance" (2003), 37 U.S.F. L. Rev. 257 at pp. 275-76. For other useful surveys see Guy O. Kornblum, "The Current State of Bad Faith and Punitive Damages Litigation in the U.S." (1988), 23 Tort & Ins. L.J. 812; Roger C. Henderson, "The Tort of Bad Faith in First-Party Insurance Transactions after Two Decades" (1995), 37 Ariz. L. Rev. 1153.

57. In California such expansion was first approved by the Supreme Court in *Tameny v. Atlantic Richfield Co.*, 164 Cal. Rptr. 839 (S.C. 1980). For relevant surveys see *e.g.*: Note, "Good Faith and Fair Dealing in Illinois: An Application in the Employment

further and have recognized, for some time, the possibility of applying the "bad faith tort" to ordinary commercial contracts, even in the absence of 'special relationships' between the parties.[58]

It remains to be seen which course will be followed by Canadian courts in the future.

4. The Post-*Whiten* Era: *Whiten*'s Influence on Future Case Law

The developments described above could raise at least two different kinds of questions or reactions. First, at the normative level, one could wonder whether the changes described above are desirable. As mentioned earlier, notwithstanding its importance, this question is outside the scope of this article. Second, on a more positive level, one might speculate on the actual effect of the *Whiten* judgment on future case law. How and to what extent could the *Whiten* case be expected to influence actual rulings of lower courts in the future? Should we expect a wave of litigation and an abrupt increase in frequency and in amount of punitive damages awards?[59]

Context" (1987), U. Ill. L. Rev. 183; Jane P. Mallor, "Punitive Damages for Wrongful Discharge of At Will Employees" (1985), 26 William & Mary L. Rev. 449. An even wider approach was adopted by the California Supreme Court in the seminal case of *Seaman's Direct Buying Services v. Standard Oil Co.*, 206 Cal. Rptr. 354 (S.C. 1984) which was later overruled in California. In that case the court held that "In holding that a tort action is available for breach of the covenant [of good faith and fair dealing] in an insurance contract, we have emphasized the 'special relationship' between the insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility . . . no doubt there are other relationships with similar characteristics and deserving similar treatment." (*ibid.*, at p. 362). But this liberal approach was later totally rejected in *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (S.C. 1995).

58. The most notable example being *Nicholson v. United Pacific Insurance Co.*, 710 P.2d 1342 (Mont. 1985) (later reversed in *Story v. Bozeman*, 791 P.2d 767 at pp. 774-76 (Mont. 1990)). For other comparatively liberal approaches see *e.g. Rawlings v. Apodaca*, 726 P.2d 565 at pp. 574-76 (Ariz. 1986); *K Mart Corp. v. Ponsock*, 732 P.2d 1364 at pp. 1368-73 (Nev. 1987). The bad faith tort and its possible application to commercial contracts have been widely discussed in the American legal literature, especially during the mid-1980s. See *e.g.* John Monaghan, "Extending the Bad Faith Tort Doctrine to General Commercial Contracts" (1985), 65 B.U. L. Rev. 355; Sandra Chutorian, "Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm" (1986), 86 Colum. L. Rev. 377; Glenn E. Tremper, "Commercial Bad Faith: Tort Recovery for Breach of Implied Covenant in Ordinary Commercial Contracts" (1987), 48 Mont. L. Rev. 349.

59. This scenario, so it seems, was the first impression of some lawyers and insurance companies. See, *e.g.*, "Court upholds $1 million punitive award against Pilot" *Canadian Underwriter* (March 2002): "A legal source serving the insurance industry

Or should we rather understand *Whiten* as an exceptional case which, though important in its elaboration of the existing rules on punitive damages, does not alter them in any dramatic way that could generate a major legal change?[60]

In my view, the answer lies somewhere in between. On the one hand, as demonstrated in the previous sections, I believe it would clearly be a mistake to view *Whiten* as merely an instance of bold judicial implementation of the punitive damages doctrine. As argued above, the court's various liberal statements regarding the availability of punitive damages are consistent with each other, as well as with the court's generally favourable approach to civil punishment, and together they reflect a profound legal change. On the other hand, despite my claim that *Whiten* basically transformed the infrastructure of the law in this area, it is not clear to what extent the potential for increase in frequency (and size) of punitive damage awards will actually be realized in the future. It seems to me that the extent to which judges will be influenced by a given precedent depends upon a variety of factors, including: (1) the degree of authority the higher court holds over lower courts within the legal system at hand; (2) previously held opinions or ideological inclinations of judges in the lower courts regarding the issue at stake; (3) the strength and clarity of the normative message that underlies the judgment; (4) the clarity of the new legal rule formulated by the upper court; and (5) the degree of discretion and latitude the rules governing the administration of the legal institution in hand allow and require from a judge implementing them.

Assuming the Supreme Court exerts a significant degree of influence on trial and appellate judges and leaving aside the empirical (though interesting) question of the division of Canadian judges on the question of the desirability of punitive damages, the last three factors mentioned above all undermine to some extent our ability to

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says the Supreme Court's ruling has set a new precedent in the application of punitive awards in Canada. Insurers will have to increase their contingency reserves . . . with future punitive court awards expected to rise in both number and value."

60. See *e.g.* interview with Scott Maidment, "Punitive Damages and Corporate Conduct — Some Lessons for Senior Management" (April 2002), available at <http://www.mcmillanbinch.com/Upload/Publication/Litigation_Bulletin_0402.pdf> (date accessed February 18, 2005): "Punitive damages will continue to be rare notwithstanding the Supreme Court's decision in *Whiten v. Pilot*, and large punitive damage awards will be rarer still." See also Torys, *supra*, footnote 3, at p. 2: "While the number and dollar amount of claims for punitive damages will likely go up, this does not have to mean that the number and amount of successful awards must also go up."

forecast unequivocally a significant increase in the availability of punitive damages in contract disputes following the *Whiten* decision. First, while the favourable approach of the Supreme Court to punitive damages is unmistakable, it is not at all clear from the judgment whether the court actually regards a significant expansion in the scope, frequency or size of punitive damages as a desirable development for Canadian law. Indeed, while the court clearly upheld the legitimacy of the doctrine, it also emphasized its belief that punitive damages are and should remain an extraordinary remedy.[61] It also made clear that in the contractual context such damages are to be awarded very cautiously, especially in commercial disputes between parties with approximately equal bargaining power.[62] This seems to indicate that the court would probably not approve of a drastic increase in frequency and size of punitive awards, especially in the contractual field, as well as in other contexts.

Second, the court's position regarding the preconditions for an award of punitive damages was not clearly stated in the judgment.[63]

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61. "[T]he primary vehicle of punishment is the criminal law (and regulatory offences) . . . punitive damages should be resorted to only in exceptional cases and with restraint." *Whiten*, *supra*, footnote 1, at p. 635. See also text accompanying footnote 35, *supra*.

62. "[T]his factor [vulnerability of the plaintiff] militates *against* the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest." *Whiten*, *supra*, footnote 1, at para. 115. Indeed, in *Performance*, *supra*, footnote 18, the Supreme Court upheld a decision of the Court of Appeal for Alberta overruling a judgment of $200,000 in punitive damages against a contracting party for fraudulently signing and later insisting on the written terms of a contract, despite knowing that they do not reflect the parties' prior oral understanding. While denouncing the defendant's deceitful conduct as "reprehensible" and reflecting a "contemptuous disregard for [plaintiff's] rights under the verbal agreement" (at para. 80), the court reasoned that "[t]his was a commercial relationship between two businessmen . . . [t]here was no abuse of a dominant position" (at para. 88) and that "a falling out between business partners [does not] usually attract an award of punitive damages". (at para. 29). The Supreme Court expressed its conservative view of the role of punitive damages in the commercial context in another decision, where after upholding a punitive damage award against a bank for misbehaviour towards its client, it found it important to emphasize that "an award for exemplary damages in commercial disputes will remain an extraordinary remedy": *Royal Bank*, *supra*, footnote 38, at para. 29.

63. This stands in striking opposition to the systematic and elaborate discussion in the judgment of the considerations relevant to deciding whether an award should be made and in what sum. In my view, the distinction between the preconditions for an award of punitive damages and the further considerations relevant to deciding whether under the circumstances an award is justified, is a most important one that has been largely

While expressly rejecting the narrow approach to the independent wrong requirement, the court avoided direct confrontation with its prior rulings on the subject (mainly *Vorvis* and *Wallace*). Instead of elucidating the reasons for rejecting the premises of the old case law, it preferred to present its decision as a simple application or extension of the existing rules. This obscures the innovative aspects of the decision, and might prevent lawyers and courts from realizing that after *Whiten* the formal classification of the defendant's wrongful behavior is irrelevant in a claim for punitive damages. This vagueness will also make it easier for conservative courts to adhere to the older approach of the Supreme Court, by ignoring the liberal spirit emerging from the decision.[64]

Another difficulty concerns the scope of application of the *Whiten* principles. Does the court's favourable attitude towards the idea of implementing the doctrine in the contractual context only apply to insurance cases, or does it apply generally to other civil and contractual contexts? And what about the scope of the duty of good faith and fair dealing, the breach of which was the basis for the punitive award in *Whiten*? Does this duty exist in every contract?[65] Is it unique to insurance contracts alone? If it is not so restricted, which other contractual relationships could give rise to such an obligation?[66] The

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neglected in both case law and legal literature. It creates a clear divide between the preliminary requirement for punitive damages (namely, the commission of a conscious and unjustified act amounting to a breach of an obligation) with regard to which the court's discretion is somewhat more limited, and the more open-ended second-stage tests for identifying "reprehensibility".

64. Indeed, in a sense, this is the very thing the *Whiten* court seems to have done with respect to its prior rulings in *Vorvis* and *Wallace*. As one commentator has critically observed, the *Whiten* court applied a "deviously limited interpretation of the literal meaning of Justice McIntyre's reasons in *Vorvis*": Beaulac, *supra*, footnote 4, at p. 367.

65. Such a general duty has long been recognized by most American courts. The seminal case is *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E.163 (N.Y. 1933). See also *Restatement (Second) of Contracts* (St. Paul, 1981), rule 205. For a discussion of the status of this principle in the United States see *e.g.* Steven J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1989), 94 Harv. L. Rev. 369. In Israel, the duty of good faith in performance of contracts is founded in article 39 of the 1973 Contracts Statute (General Part), which reads: "In the performance of an obligation arising out of a contract one should behave in an acceptable manner and in good faith; the same should apply to the use of a right arising out of a contract." For discussions of the status and content of the duty of good faith in Canada see *e.g.* O'Byrne, *supra*, footnote 46; David Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999), 62 Sask. L. Rev. 201.

66. As noted above, in *Wallace*, *supra*, footnote 15, the Supreme Court recognized the duty of employers to act in good faith while dismissing their employees, but limited

judgment leaves these questions open for future treatment by the courts. Accompanied by the vagueness mentioned above, this silence opens the door for more conservative courts to limit the scope of punitive damages in contract actions by choosing to restrict the scope of the duty of good faith to specific categories such as insurance, employment or other contracts that create obvious fiduciary-like relationships.[67] To be sure, such limitations, if imposed, could still be bypassed by a court willing to expand the scope of punitive damages. After *Whiten* such a court should face no difficulty in awarding punitive damages against a party to a commercial contract, based directly on a separate/independent breach of an implied contractual duty. Such a duty could be recognized *ad hoc* without necessarily extending the duty of good faith into the commercial sphere.[68] Nevertheless, the fact that this was not done in *Whiten* could present an obstacle for applying such a direct "contractual approach" in the future. Moreover, conservative judges will probably continue to "play with words", relying on the independent wrong requirement which was not explicitly abandoned in *Whiten*, in order to limit the use of punitive damages in contractual disputes.

In sum, although *Whiten*'s spirit seems to resist the creation of any sharp distinctions in order to limit the scope of punitive damages,[69] the decision itself does not seem to disallow the future development of limiting principles as long as these could be justified on sound policy considerations rather than on mere habitual antagonism towards the punitive damages doctrine.

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the remedies available for this kind of breach (see *supra*, footnote 26). In a post-*Whiten* case, a trial court awarded $10,000 in punitive damages for an egregious breach of a franchise agreement, stating that the franchisor's behaviour violated its duties of good faith thereby constituting an independent, actionable wrong: *Katotikidis v. Mr Submarine Ltd.* (2002), 26 B.L.R. (3d) 140 (Ont. S.C.J.), supp. reasons 29 B.L.R. (3d) 258.

67. As one article has put it: "*Whiten* was not decided with ordinary commercial contracts in mind": Jones and Kleefeld, *supra*, footnote 4, at p. 507. Indeed, as noted above, this was the path followed by the majority of American courts. See text accompanying footnotes 56 to 58, *supra*.

68. Indeed, in *Whiten* itself such a course may have been taken by the trial and appellate courts had they not felt a need to base the punitive damage award on a non-contractual cause of action. The unjustified denial of the insured's claim — which they defined as a breach of duty of good faith — could have alternatively been interpreted as a breach of an implied contractual obligation (namely, the obligation not to deny payment, and so delay it, with groundless excuses).

69. See *e.g.* the text accompanying footnote 36, *supra*.

Third, the authority to award punitive damages is discretionary by its very nature. It requires weighing and integrating a variety of considerations.[70] Even when the preconditions for an award are clearly satisfied, the tests for deciding whether the defendant's behavior should be considered reprehensible enough to justify punishment are inherently vague, and the result of their application remains uncertain. This factor will always enable judges less enthusiastic about awarding punitive and aggravated damages to refrain from doing so, even where the preconditions are fulfilled, *i.e.*, even in cases of conscious and unjustified wrongdoing.[71]

All this leads to an important conclusion: Although *Whiten* lowered the preliminary bars facing a plaintiff seeking punitive damages and significantly expanded the potential availability of punitive damages, such an expansion should not be viewed as a necessary or even natural consequence of this case. In other words, it is my view that while clearly reinforcing the status of punitive damages in private law, contract law not excluded, *Whiten*, like similar precedents before it, cannot itself guarantee a significant increase in the frequency or size of punitive damage awards in the future. The permission to sail the seas has now been granted, but it remains to be seen whether the passengers and the crew are willing to lift the anchor.[72]

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70. The listing of these considerations is one of the main contributions of the *Whiten* judgment. See esp. paras. 112 to 126 of the majority's opinion.

71. A good example is *Ferme Gerald Laplante*, *supra*, footnote 39, decided by the Ontario Court of Appeal several months after *Whiten*. There, the majority thought a punitive damage award was unnecessary notwithstanding the fact that the defendant's behaviour was reprehensible, while on the same facts the minority judge recommended an award of $200,000. For a more elaborate description of the case see *infra*, footnote 78. Another interesting example is *Millar v. General Motors of Canada Ltd.* (2002), 27 B.L.R. (3d) 300 (Ont. S.C.J.). In this case, decided a few months after *Whiten*, the Ontario Superior Court of Justice refused to award punitive damages against a car dealer for a series of breaches of its contractual duties towards the customer. Under the circumstances, the car dealer's behaviour reflected a clear disregard of the customer's justified claims and of his efforts to get his car repaired. The dealer also made a misleading report to the customer credit company, and refused to acknowledge responsibility throughout the legal proceedings, with no reasonable basis. The court described the defendant's conduct as "deplorable", and said that "There is no question the defendants took advantage of their position of commercial power." Still, and though acknowledging that "the quantum of damages awarded in this case may not be a deterrence to corporate defendants in meeting their obligations to customers in the future", the court found no difficulty in dismissing the claim for punitive damages, stating that "I do not ascribe to this conduct a level of maliciousness or reprehensibility that would constitute entitlement to punitive damages." (*ibid.*, at p. 322).

72. Hence, provincial appellate courts opposing the idea of punitive damages will probably not take advantage of this "permission", even though it has been granted. For a

Nonetheless, in my view three major changes should be expected to take place in the post-*Whiten* era: First, the "death" or at least major decline of the "independent wrong" requirement as a significant threshold test to punitive and aggravated damage claims will most probably invite more contractual plaintiffs to seek such awards, at least until more guidelines are provided by future case law as to the scope of the duty of good faith and fair dealing.

Second, it is reasonable to expect that the liberal approach reflected in the opinion will bring about at least a moderate increase in the number of punitive damage judgments, and in their size.[73] Under the assumption that most of the lower courts are at least to some extent influenced by the Supreme Court's favourable approach to punitive damages, such a development seems more than likely, at least with regard to judges that are not resentful of the very idea of civil punishment.[74]

Third, and in my view most clearly, I predict a substantial change in the rhetoric and in the way claims for punitive damages (and aggravated damages) are handled. Prior to *Whiten* a major issue in contract actions in which such claims were brought was the existence (or non-existence) of a separate independent wrong, usually a tort.[75]

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clear example of such a skeptical approach to the use of punitive damages see *e.g.* the words of the Alberta Court of Appeal in *Colborne, supra*, footnote 2, at para. 292:

> it is not idle to remember that neither the Court of Queen's Bench nor the Court of Appeal of Alberta, in the exercise of their civil jurisdiction, are courts of morality, or the civil keepers of the business community. Each court administers a statutory and parallel criminal jurisdiction that may be better suited to punitive courtroom reprisal. That alternate jurisdiction may administer sanctions other than judicial outrage and crushing monetary awards in cases where proven misconduct is found and is deserving of publicity and money punishment to deter others in future.

73. An example of the possible influence of *Whiten* is *Khazzaka v. Commercial Union Assurance Co. of Canada* (2002), 66 O.R. (3d) 390, 162 O.A.C. 293, 43 C.C.L.I. (3d) 90 (C.A.). There, the Ontario Court of Appeal approved a $200,000 punitive damage award against an insurer for denying in bad faith the insured's claim. Although acknowledging that the bad faith of the insurer in this case was less egregious than in *Whiten*, the Court of Appeal awarded double the amount it had originally found appropriate in *Whiten* (namely, $100,000). For another recent substantial award in a contractual setting see *e.g. C.C. Petroleum Ltd. v. Allen* (2002), 26 B.L.R. (3d) 47, 35 C.B.R. (4th) 22 (Ont. S.C.J. (Comm. List)) ($300,000 for fraud and conspiracy on the part of the managers of a company), vard 36 B.L.R. (3d) 244, 46 C.B.R. (4th) 221 (C.A.) (no fraud has been proven and punitive damages not appropriate for failure to pay for a service).

74. As noted above, conservative judges will almost always be able to conclude that the defendant's behaviour, although morally unacceptable and offensive, was not reprehensible enough to deserve an extra-compensatory monetary sanction.

75. See *supra*, footnote 15 and accompanying text. For example, in a wrongful dismissal case, the British Columbia Court of Appeal denied a claim for punitive and aggravat-

Once this requirement is abandoned or at least interpreted broadly and loosely as it was in *Whiten*, every intentional breach of a contractual term (including an implied term) becomes a *prima facie* candidate for an award of punitive damages.[76] Therefore, after *Whiten*, cases where a punitive damage claim is struck out summarily for lack of an "independent wrong"[77] should become much rarer. In addition, I expect future judgments to give much more weight to the assessment of the defendant's behavior as a whole than to the question of whether it gives rise to any specific independent/separate wrong.[78]

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ed damages against an employer who dismissed his employee in an objectionable manner, relying on the following formalistic analysis of the trial judge:

> While I am satisfied that the plaintiff suffered considerable mental distress as a result of the allegations made, of the treatment she received when she returned from holidays when she was constructively dismissed, and of the reasons given to her for her termination, I cannot be satisfied that these matters give rise to a separate cause of action so as to allow the plaintiff to recover punitive damages. While it may well [be] that the plaintiff has separate causes of action arising out of the allegations made against her after her termination, those causes of action are not set out in the Statement of Claim of the plaintiff.

Clendenning v. Lowndes Lambert (B.C.) Ltd. (2000), 193 D.L.R. (4th) 610 at para. 60, 237 W.A.C. 188, 82 B.C.L.R. (3d) 239 (C.A.). The analysis is formalistic in two respects: first, it ignores the possibility of basing the punitive damage award on a contractual breach (or a breach of the duty of good faith); second, it ignores facts that were proven in court on the sole basis that those facts were not explicitly set out in the statement of claim as the basis for the award. After *Whiten* both arguments should seem problematic, since an implied contractual breach could qualify as an independent wrong, and since the defendant's conduct should be assessed as a whole and punitive damages awarded not for discrete acts but for wrongful courses of conduct. Furthermore, in *Whiten* the court rejected a similar formalistic argument on the part of the insurer, stating that even if some particular facts justifying the punitive damage award were missing from the statement of claim, this should not bar the award, as long as the defendant was alerted to the risk of punitive damages: *Whiten, supra,* footnote 1, at paras. 84-91.

76. The point is further explicated *supra*, in the text following footnote 54.

77. See *e.g. Taylor, supra,* footnote 15.

78. Indeed, an examination of the post-*Whiten* case law at the superior and appellate court levels already partly seems to support this prediction. For example, in *McKinley, supra,* footnote 15, decided a year before *Whiten*, a central issue was whether the employer's harsh treatment of the employee gave rise to an actionable wrong (such as incrimination or intentional infliction of mental distress) separate from the dismissal itself. However, in *Performance, Whiten's* twin decision, the issue of whether a punitive damage award was warranted for fraudulent behaviour was thoroughly discussed, without even mentioning the independent wrong requirement. Another good example is the decision of the Ontario Court of Appeal in *Laplante, supra,* footnote 39. There, in a complex insurance dispute, decided several months after *Whiten,* the jury awarded $750,000 against the insurer for the bad faith handling of the insured's claim. On

To summarize this point, I predict that although formalistic arguments such as "lack of independent wrong" will probably not cease to be raised by lawyers and addressed by judges, the role of such arguments in decisions on punitive as well as aggravated damages will gradually become much less significant. Furthermore, in light of *Whiten* and its inconsistency with the whole concept of an "independent wrong", one should not be surprised to see this concept explicitly abolished and abandoned in a succeeding decision of the Supreme Court.

IV. CONCLUSION

By providing a careful analysis of the controversial decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.* and by contrasting it with the pre-*Whiten* case law, this article endeavoured to clarify the impact of this decision on the status and availability of punitive damages in Canada mainly, but not only, in the contractual sphere. I argued that, while not explicitly confronting any of its

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appeal, the insurer contended that it had no idea for which conduct it had been so harshly punished, and argued that this had been unclear even to the jury, as they were not informed of the need to identify an independent wrong, and therefore did not spell out what exact behaviour of the insurer was punished. Unsurprisingly, and in the absence of a non-contractual independent wrong, the insured submitted in response, that in delaying and denying parts of the claim the insurer breached its duty to act fairly and in good faith during the course of assessing its claim. Charron J.A., speaking for the majority of the court, accepted that the duty of good faith was breached but refused to view the breach as alone justifying punishment, let alone in the sum awarded by the jury. On the other hand, Weiler J.A., dissenting, thought that "It was open to the jury to decide that it did not wish to license [the defendant] to breach its duty of good faith in this manner" but that $200,000 in punitive damages were the highest amount that could be justified under the circumstances (*ibid.*, at para. 109). While still basing the claim upon the independent breach of the duty of good faith (and not directly upon a breach of the contract) both the majority and the minority did not deal with the formal classification of the conduct, but concentrated mainly on the question of whether it had been reprehensible enough to justify extra-compensatory punishment. Finally, two examples could be brought from the post-*Whiten* Ontario Superior Court decisions. In *Millar*, *supra*, footnote 71, at pp. 321-22, the court discussed the possibility of awarding punitive damages in a pure contractual claim, finally refusing to do so, not finding the defendants' conduct reprehensible enough. The court mentioned the fact that in light of *Whiten* no tort is required, and went on to discuss the defendants' conduct and whether it deserved punishment with no attempt to allot this conduct into any formal category of civil liability. And in *IT/NET Ottawa Inc. v. Berthiaume* (2002), 29 B.L.R. (3d) 261 (Ont. S.C.J.), the same court awarded $2,000 in punitive damages against a management consultant for knowingly and unjustifiably breaching his contract with his employer, without any mention whatsoever of the independent wrong requirement.

prior rulings, the court in *Whiten* virtually abandoned most of the premises and relaxed most of the limitations that were established in its 1989 seminal decision in *Vorvis v. Insurance Corp. of British Columbia*, thereby transforming the infrastructure of the law in this field. Notwithstanding, the analysis led me to conclude that *Whiten* lacks the characteristics of a revolutionary decision, and will probably not bring about a major or dramatic increase in the frequency and size of punitive damage awards. Nevertheless, this decision does reflect a profound, though largely subtle deviation from the conservative, formalistic and sometimes even hostile approach to punitive damages that governed a substantial part of the pre-*Whiten* case law. The practical significance of this move depends mainly on the reaction of lower courts to it, and their willingness actually to expand the scope of punitive damages in light of the guidelines proposed by the Supreme Court. Whether or not such an expansion is to be welcomed is an important question that was not dealt with in this article. Those who believe that punitive damages have a vital role to play in civil litigation will applaud the ideological shift brought by *Whiten*. For those who are apprehensive about an expansion of this doctrine, there remains the hope that in future cases judges will resist the temptation to realize the enormous potential latent in the *Whiten* judgment. Be it as it may, *Whiten* should be recognized as a major turning point in the legal history of punitive damages in Canada and therefore as deserving careful study by lawyers, practitioners and academics alike.