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Punitive Damages in Canada: Can the Coffee Be Too Hot

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Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?

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I. INTRODUCTION

This paper is based on the given fact scenario in which the plaintiff, Mr. Smith, is scalded by coffee purchased at a "drive through" window operated by the defendant MegaFood. Assume for the purposes of this analysis that Smith bought the hot coffee at a Canadian[1] branch of MegaFood and that the accident occurred in Canada.[2] Based on the foregoing, this paper will explore whether Mr. Smith is entitled to recover punitive damages, and if so, in what amount.

Punitive damages remain rare in any type of Canadian tort case. They are almost never awarded in negligence, which is the basis of Smith's claim. Although no rule prohibits punitive damages in negligence, the authorities are few and cautious. Smith must establish that MegaFood's conduct toward him was exceptionally objectionable, outrageous, callous, or reprehensible to recover any punitive damages at all. "Exceptionally objectionable conduct"

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1. The Province of Quebec has its own civil code quite different from the common law of punitive damages. The common law of punitive damages is more or less uniform in the other nine Canadian provinces. This article is restricted to the common law analysis. For the civil law position, see DANIEL GARDNER, L'EVALUATION DU PREJUDICE CORPOREL 35-40 (1994).

2. During October through May, coffee served at a Canadian "drive-through" at 180 degrees Fahrenheit would cool considerably by the time it reached the car. Arguably, it might be difficult to serve hot coffee during a Canadian winter, unless it started out at 180 degrees. On the other hand, relatively few people buy hot coffee during Canada's hot, muggy summers. Therefore, this paper further assumes that Mr. Smith's accident occurred in early June or mid-September, perhaps during one of Canada's windows of Southern California weather.

encompasses something much worse than basic retailer negligence. Even proof of MegaFood's knowledge that its coffee would burn customers may not suffice to meet this standard.

Assuming punitive damages are awarded in a Canadian tort case, the likelihood of an award of $3.5 million is virtually nonexistent. Civil juries are less common in Canada than in the United States. Canadian judges are often "principled conservatives," careful to respect the legislature's role. Few Canadians would want to enrich Mr. Smith by $3.5 million, as massive disparity in wealth remains suspect here. Restraint is part of our national identity; our citizens do not like notoriety or controversy. Canadians would rather not make a fuss, and they regard flamboyant jury awards as part of the U.S. legal culture. Such awards, and the press coverage they generate, strike Canadians as undignified. At best, we might allow a moderate punitive award against MegaFood.

The doctrine on this subject is sparse, but consistent with the more intuitive approach taken above. Part II of this Article sets out the basic law of punitive damages in Canada. Part III explores the difference between punishment and deterrence as a rationale for punitive damages. Part IV analyzes potential rules for negligence. Part V discusses the rules governing quantification of punitive damages. Part VI concludes that a Canadian Court would balk at such a large punitive damages award.

II. THE BASIC CANADIAN LAW OF PUNITIVE DAMAGES

When analyzing Canadian common law, the best place to begin is with the common law of England. The leading English authority on punitive damages is *Rookes v. Barnard*,[3] a 1964 decision of the House of Lords. In *Rookes*, Lord Devlin drew a distinction between two related concepts, aggravated damages and exemplary damages. He also restricted exemplary damage awards, generally taken as synonymous with punitive damages, to two categories of cases.[4]

Lord Devlin defined aggravated damages as a special category of compensatory damages used to redress special injury to the plaintiff's dignity or pride.[5] Only malevolence or spite or similar

3. [1964] 1 All E.R. 367.
4. *Id.* at 407.
5. *Id.*

outrageous conduct by the defendant could trigger aggravated damages. In other words, aggravated damages were allowed upon proof of the same type of objectionable conduct used to justify punitive damages in most other jurisdictions. Lord Devlin did not clarify why particularly egregious conduct is required to justify aggravated damages.[6] The better explanation is that Lord Devlin preferred to describe as "aggravated damage cases" the many punitive damages precedents that lay outside his restrictive categories.[7] At that time, the House of Lords refused to overrule its decisions.[8] Lord Devlin then needed some doctrinal device to distinguish the previous inconsistent authority.

In contrast to the compensatory function of aggravated damages, Lord Devlin stated that the proper purpose of exemplary or punitive damages was to punish and deter.[9] After *Rookes*, punitive damages were only available at common law in two categories of cases: (1) cases involving oppressive, arbitrary, or unconstitutional action by government servants; and (2) cases in which the defendant's conduct was calculated to make a profit in excess of compensatory damages, making it necessary to award punitive damages to teach that tort does not pay.[10]

Many lower Canadian courts rejected the scope of Lord Devlin's restrictions on punitive damages. It was not until 1989 that the Canadian Supreme Court affirmed the lower courts' holdings and clarified the law of punitive damages in Canada.[11] In *Vorvis v. Insurance Corporation of British Columbia*,[12] the Supreme Court explicitly refused to restrict punitive damages awards to the two categories adopted in *Rookes*.[13] The Court recognized that, in addition to the two *Rookes* categories, "exceptionally objectionable conduct" could also justify punitive damages in Canada.[14] The court held that punitive damages could be awarded for conduct deserving of punishment because of

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6. *See generally id.*
7. *Id.*
8. *Rookes*, [1964] 1 All E.R. at 467.
9. *Id.* at 407.
10. *Id.* at 410.
11. Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 1104-05 (Can.).
12. *Id.*
13. *Id.* at 1105; *see Rookes*, [1964] 1 All E.R. 367.
14. *Vorvis*, [1989] 1 S.C.R. at 1107-08.

its "harsh, vindictive, reprehensible and malicious nature."[15] Other descriptions of such exceptionally objectionable conduct in Canadian cases include flagrant, deliberate, outrageous, contemptuous, evil, callous, brutal, malevolent and cruel.[16] As discussed below, this same test for punitive damages applies in a negligence action.

Oddly, the *Vorvis* court also endorsed the concept of aggravated damages found in *Rookes*.[17] It is, of course, unnecessary to retain a concept of aggravated damages triggered by precisely the same conduct that justifies punitive damages. Today in Canada, harsh, vindictive or reprehensible conduct can, and often does, result in an award of aggravated damages and another award of punitive damages. In the hypothetical case, Mr. Smith has not suffered particular damage to his pride or dignity to justify an award of aggravated damages.

Rookes expressed another important condition for punitive damages that is a part of Canadian law: the plaintiff must have been the victim of behavior that is the object of punishment.[18] Canadian cases have elaborated on this requirement. The defendant's exceptional conduct towards the plaintiff cannot be punished unless that conduct caused the very loss at issue in the action.[19] Some cases require the defendant's conduct to specifically target the plaintiff.[20] If these conditions are satisfied, the fact that the defendant has also injured other persons is irrelevant when quantifying punitive damages for the plaintiff. The defendant is punished only for conduct directed at the plaintiff.

Therefore, Smith could recover punitive damages in Canada under two different theories. The most common theory is an attempt to classify MegaFood's conduct as exceptionally objectionable—arbitrary, outrageous, reprehensible, or evil. Alternatively,

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15. *Id.*

16. *See* Couglin v. Kuntz, 17 B.C.L.R.2d 365, *aff'd* 42 B.C.L.R. 108 (1990) (B.C.C.A.); Di Domenicantonio v. Canadian Nat'l Ry., No. 246/86/CA, 1988 N.B.J. No. 133 WL, Quick Law, at *1 (Ct. App. Feb. 26, 1988); Vlchek v. Koshel, 52 D.L.R. 371, 372 (1988) (B.C.S.C.); Kaytor v. Lions Driving Range, 35 D.L.R.2d 426, 429-30 (1962) (B.C.S.C.); Claiborne Indus. v. Nat'l Bank of Can., 59 D.L.R.4th 533, 565 (1989) (Ont. C.A.).

17. *Vorvis*, [1989] 1 S.C.R. at 1097-1104; *see* Rookes v. Barnard, [1964] 1 All E.R. 367.

18. *Rookes*, [1964] 1 All E.R. 367, 411.

19. Guarantee Trust Co. of Can. v. Public Trustee, 20 O.R.2d 247 (1978) (H.C.); *See also Vorvis*, [1989] 1 S.C.R. at 1085.

20. *See Kaytor*, 35 D.L.R.2d 426; *Di Domenicantonio*, 1988 N.B.J. No. 133; *contra Vlchek*, 52 D.L.R.3d 371.

he might sue under a "tort for profit" theory. Under either theory, Smith must satisfy the relational requirements: that he was a victim of the conduct in question, possibly a targeted victim, and that the conduct in question caused his injury.

III. THE PURPOSE OF PUNITIVE DAMAGES

Lord Devlin asserted in *Rookes* that the purpose of punitive damages was to punish and deter.[21] He may have been unaware that these are not necessarily compatible goals. Both the awarding of punitive damages in negligence, and the proper size of such an award depends on which rationale governs the legal rule. In Canada, the punitive rationale governs. A $3.5 million award for the purpose of punishment, however, is improbable.

Punishment is based on retribution, a matter of just desserts. Based on this view, punishment is a debt to society. One looks back at the conduct at issue to determine whether punishment is deserved and, if so, in what measure. The punishment should be proportionate to the gravity of the act deserving of punishment. Typically, advertent wrongdoing—conduct the defendant knew or should have known was wrong—is punished.[22]

Punishment also has a deterrent effect. Deterrence seeks to influence the behavior of all potential actors, not just the future conduct of a particular defendant. Rational actors are assumed to weigh the anticipated costs of transgressions against the anticipated prospective benefits. The prospect of punishment may affect future conduct. This idea is captured when we speak of punishing someone to teach him, or her, a lesson. Perhaps this is what Lord Devlin meant when he said the purpose of exemplary damages was to punish and deter.[23] As long as one looks backward, however, to determine the proper proportionate measure of punishment, the deterrent effect of retributive punishment is incidental.

The first question to ask is, "How much deterrence do we want?" Sometimes the legislature answers this question precisely. One can imagine a jurisdiction that statutorily prohibits marketing beverages at a temperature higher than 150 degrees. Negligence law only addresses the deterrence of unreasonable conduct. In

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21. Rookes v. Barnard, [1964] 1 All E.R. 367.

22. Bruce Feldthusen, *Punitive Damages in Contract and Tort*, 16 CAN. BUS. L.J. 241, 247 (1990).

23. *Rookes*, [1964] 1 All E.R. at 407.

that regime, an economic analysis helps us to be more precise. Legal economists propose an efficient, or cost-justified, number of accidents,[24] labelled as a "market for accidents." In this market, society effectively agrees to a trade-off between accident costs and prevention costs. Anticipated tort damages impel potential defendants to account for accidents in defendants' cost structure. The anticipated tort damages are then built into and reflected in output and pricing decisions. The higher the anticipated accident cost, the higher the product's price. At a higher price, fewer products are sold. The fewer products sold, the fewer the product-related accidents. If the anticipated accident cost is high enough, the product will be priced off the market. Otherwise, consumers get the accident rate they are willing to accept in return for the benefits of the product.

The theory of the perfect "market for accidents," however, is not borne out in practice. One reason is that price-setters frequently err on the side of optimism and set anticipated accident costs lower than the true accident costs. Tort liability only works to deter inefficient accidents when anticipated damages accurately reflect the true cost of accidents. This requires full and accurate compensation of each victim in every case. The rational actor generates the cost-justified number of accidents when faced with the prospect of such "perfect" liability.

It is doubtful that compensatory damages are a full and accurate measure of total social accident costs. Many emotional or related financial losses to family and employers, for example, will not be recoverable. It is also unlikely that every potential defendant expects to be caught and held liable for every accident they negligently cause. Therefore, to make civil liability an effective market deterrent for accidents, it is necessary to "gross up" compensatory damages.[25] This would correct defendants' expectations that they might escape from paying the full costs in every case. The terms "punitive" or "exemplary" damages could describe such a deterrence "gross up." The proper deterrence measure could exceed, or be less than, the retributive measure.

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24. A working definition of a "cost-justified" accident would be an accident that rational, risk-neutral, informed consumers would be willing to risk rather than pay to prevent.

25. Feldthusen, *supra* note 22, at 250.

There is no reason to expect that a proper measure of one will be in any way related to an appropriate measure of the other.

No single Canadian judicial decision has explored the implications of these inconsistent rationales for punitive damages. No decision has conclusively accepted one rationale over the other. While the term exemplary damages suggests deterrence, and the term punitive damages suggests punishment, many cases, like *Rookes*, use the terms interchangeably.[26] Parsing phrases from *Vorvis* lend mild support for punishment over deterrence.[27] Despite the lack of clear evidence, the common law of punitive damages in Canada, as it has developed to date, is predicated on punishment, not economic deterrence.

One would search in vain, in judicial opinions or in the general legal literature and economics journals, for any discussion of a deterrence "gross up," or the like. Most judges and lawyers would find the economic deterrence arguments bizarre, if not incomprehensible. Any references in such literature to deterrence would be consistent with the incidental deterrent effect of any punishment.

The basic requirement that the defendant's misconduct be exceptional is only consistent with the punishment rationale, not the deterrence rationale. There is no reason to require the defendant to act outrageously, maliciously, or with reckless and wanton disregard, if deterrence is the goal. Strictly speaking, there is no reason to require the defendant to do anything wrong if deterrence is the goal.[28] The defendant is merely a means to an end. A deterrence "gross up" is appropriate for ordinary negligence because it might encourage potential defendants to act more carefully.

The concept of corrective justice best explains ordinary tort doctrines. This concept requires an unmediated response from wrongdoer to victim. The requirement that the punitive damages award relate to the particular wrong done to the particular victim is consistent with notions of corrective justice. That requirement makes no sense under deterrence rationale, however, where the

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26. Rookes v. Barnard, [1964] 1 All E.R. 367.

27. *See* Vorvis v. Insurance Corp. of B.C., [1989] 1 S.C.R. 1085 (Can.).

28. To make this seem less farfetched, consider the case for punitive damages against an employer whose liability is strict, based on respondeat superior.

particular parties are used as means to achieve some greater social goal.

Punitive damages awards in Canada tend to be both unusual and very small. A 1990 study of reported decisions in Ontario, Canada's most populous province, revealed that the highest punitive damages award was $50,000.[29] The great majority of punitive damages were for less than $25,000.[30] Court files revealed that the median punitive damages award was approximately twenty percent of the compensatory damages awarded in the same case.[31] These awards were often large enough to comport with the retributive theory, but seldom large enough to constitute a meaningful general deterrent.

IV. PUNITIVE DAMAGES IN NEGLIGENCE

This section addresses the relatively undeveloped law of punitive damages in negligence. Keeping the punitive rationale in mind may illuminate some of the issues. The punitive rationale also plays an important role in the discussion of quantum.

If Smith is going to recover punitive damages from MegaFood, he must convince the court to award them in a negligence action. According to the *Vorvis* Court, punitive damages are not available for breach of contract unless the conduct complained of constitutes an independently actionable wrong.[32] In Canada, there is no common law doctrine of strict product liability or similar tortious warranty, and nothing in the facts supports an action in intentional tort.

Canadian law does not bar recovery of punitive damages in negligence. In fact, the possibility of punitive damages in negligence, however slim, was endorsed judicially eighty years ago in a passage that continues to be quoted today:

> In the cases of personal injuries occasioned by negligence, exemplary, vindictive, retributory, or punitive damages cannot be recovered

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29. Neil Vidmar & Bruce Feldthusen, *Exemplary Damage Claims in Ontario: An Empirical Profile*, 16 CAN. BUS. L.J. 262, 264 (1990). A striking exception was the $4.8 million punitive damages award made by the Court of Appeals in Claiborne Indus. v. Nat'l Bank of Can., 59 D.L.R.4th 533 (1989)(Ont. C.A.). This is less exceptional than it appears because the rationale was restitutionary in a tort for profit situation. *Id.* In my opinion, the *Claiborne* case was also wrongly decided. *See* Feldthusen, *supra* note 22, at 248-51.

30. Vidmar & Feldthusen, *supra* note 29, at 264.

31. *Id.* at 265.

32. Vorvis v. Insurance Corp. of B.C., [1989] 1 S.C.R. 1085 (Can.).

> unless there was such entire want of care as to raise a presumption that the defendant was conscious of the probable consequences of his carelessness and was indifferent, or worse, to the danger of the injury to other persons.[33]

Only two decisions, however, have awarded punitive damages in negligence,[34] and no developed body of case law governs the possible intricacies of punitive damages in negligence. Much of what follows, therefore, is supposition.

Under the punishment rationale, punitive damages should be awarded only for advertent negligence, not for spur-of-the-moment acts of individual carelessness. Relevant Canadian case law is consistent with this approach, and Smith easily satisfies this requirement here. Regardless of what MegaFood knew or should have known when it originally decided to sell coffee at 180 degrees, it was put on notice after being subjected to 750 lawsuits.

Interestingly, in products liability cases of this sort, establishing negligence may be more problematic than establishing advertence. One argument is that MegaFood is negligent for simply marketing coffee at 180 degrees, knowing that it could cause third degree burns. Our legal test asks whether the defendant was "unreasonable" under the circumstances. The customary conduct of competitors provides some, but not conclusive, evidence on that question.

The "Hand formula" approach,[35] arguably a more articulate version of the reasonable care standard, asks whether the severity of the foreseeable burn injuries discounted by their probability exceeded the aggregate benefits to consumers who prefer piping hot coffee.[36] Possibly they do not, especially in Canada where, due to the colder climate, the probability of injury is presumably lower and the need for hot coffee is presumably greater than in many U.S. states. MegaFood should argue that piping hot coffee is a distinctive and valued consumer product. An argument of this sort might convince a judge, and even a jury. Important for present purposes is that the deliberate decision to expose some members of the population to a known risk of personal injury is

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33. Jackson v. Canadian Pacific Ry. Co., 24 D.L.R. 380, 387 (1915) (Alta. C.A.).

34. Coughlin v. Kuntz, 17 B.C.L.R.2d 365, *aff'd* 42 B.C.L.R.2d 108 (1990) (B.C.C.A) ($25,000 for medical negligence); Robitaille v. Vancouver Hockey Club, Ltd., 124 D.L.R.3d 228 (B.C. Ct. App. 1981).

35. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

36. *Id.*

not by definition negligence, let alone negligence of the exceptional sort that would justify punitive damages. If punitive damages are to be awarded in cases like this, careful instructions to the jury are necessary.[37]

A better argument is that MegaFood was negligent in failing to warn consumers who prefer hot coffee that they assume the risk of third degree burns. The pure market for accidents, discussed above, requires that all parties be fully informed. MegaFood is in the best position to provide this information about its product. After many burns occur, one could argue that MegaFood's failure to warn was advertent and exceptionally objectionable, warranting punitive damages.

Even better evidence would be to show that MegaFood failed to provide warnings with the knowledge that such warnings would cause the demand for 180 degree coffee to drop and make coffee sales unprofitable.[38] Such evidence would serve as an admission that the market for accidents is not working, and that MegaFood was exploiting the market's malfunction for profit. This might be classified as exceptionally objectionable conduct. It might also be addressed under the tort for profit rationale, discussed below.

Smith may face a further hurdle. Some Canadian cases have held that to recover punitive damages, the plaintiff must have been a specifically targeted victim of the defendant's advertent negligence.[39] In other words, conduct that exposes an undefined segment of the population to a risk of injury, however egregious, may not justify an award of punitive damages to those who happen to be injured. In effect, punitive damages in negligence are limited to situations that are all but technically governed by intentional torts.[40] Provided that the requirement of exceptional conduct is

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37. *See Robitaille*, 124 D.L.R.3d at 250 (citing Michael Carlton Garrett, *Allowance of Punitive Damages in Product Liability Claims*, 6 GA. L. REV. 613, 626 (1972) ("Therefore, such extraordinary damages should not be predicated on the mere showing that the plaintiff was injured due to a defective product which was manufactured or distributed by the defendant.")).

38. The proper measure of accident avoidance cost is not the private cost to MegaFood of losing business, but the social cost, the value of 180 degree coffee to the informed consumers who would still have preferred it.

39. *See* Kaytor v. Lions Driving Range, 35 D.L.R.2d 426, 429-30 (1962) (B.C.S.C.); Di Domenicantonio v. Canadian Nat'l Ry., No. 246/86/CA, 1988 N.B.J. No. 133 WL, Quick Law, at *1 (Ct. App. Feb. 26, 1988); *contra* Vlchek v. Koshel, 52 D.L.R.3d 371 (1988) (B.C.S.C.).

40. In fact, the only two relatively recent cases to have made a punitive damages award in negligence are consistent with this requirement, although the courts did not

taken seriously, and provided that MegaFood were punished only for what it did to Smith, I do not see any justification for the targeting requirement. Nevertheless, this remains unresolved.

Smith might attempt to satisfy the targeting requirement by claiming that MegaFood is vicariously liable for the acts of the employee who "targeted" him by serving him the coffee. A vicarious liability claim would change the standard of care analysis.[41] The server's conduct, even if negligent, may not meet the exceptional conduct threshold. The defendant's wealth, however, is a relevant consideration in quantifying an award of punitive damages. Presumably, a judge or jury would consider the wealth of the server, not the employer, and therefore would be unlikely to give an award of $3.5 million. The no-fault theory of respondeat superior provides further complication by holding the employer strictly liable for punitive damages. Punishment is predicated on fault. Many Canadian courts have imposed punitive damages vicariously, but have not addressed theoretical problems with doing so.[42]

To summarize, Smith may be entitled to an award of punitive damages if the court rejects the requirement that the defendant specifically targeted the plaintiff. The most promising theory for recovery is based on the allegedly advertent and exceptionally objectionable conduct of MegaFood in marketing dangerously hot coffee without a warning.

V. THE SIZE OF THE AWARD

We turn now to the question of quantum. Based on intuition alone, the chances of a Canadian judge or jury awarding punitive damages in the million-dollar range on anything but a theory of restitution are virtually nonexistent. In the unlikely event that such an award materialized at trial, it would probably not survive an appeal.[43] In this context, Canada is a more conservative

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specify targeting as a requirement. *See* Robitaille v. Vancouver Hockey Club, Ltd., 124 D.L.R.3d 228 (B.C. Ct. App. 1981); Coughlin v. Kuntz, 17 B.C.L.R.2d 365, *aff'd* 42 B.C.L.R.2d 108 (1990) (B.C.C.A.).

41. *See Di Domenicantonio*, 1988 N.B.J. No. 133 (discussing vicarious liability); *Robitaille*, 124 D.L.R.3d at 243.

42. *Di Domenicantonio*, 1988 N.B.J. No. 133; *Robitaille*, 124 D.L.R.3d at 243.

43. By way of comparison, consider the case for non-pecuniary damages in catastrophic personal injury cases. The Supreme Court of Canada, quite independent of any legislative initiative or public pressure, has imposed a cap on non-pecuniary loss of

country than the United States. Having said that, I will explore how far Canadian law might be pushed in support of a $3.5 million award.

A. Deterrence Rationale

Depending on the evidence, $3.5 million might be an appropriate deterrence "gross up." An award of this size might be necessary to make MegaFood account for the true cost of accidents. Ordinarily, the court or jury will have difficulty quantifying the award on such a basis. Over-deterrence becomes a concern, especially in negligence. It is not implausible, however, that major corporations like MegaFood accumulate information regarding accident costs. If such information became available to Smith's lawyer, and in turn to a Canadian court, a $3.5 million award is plausible. The deterrence rationale, however, is not yet and is unlikely to become part of general Canadian common law. For the reasons given below, I doubt that Canadian courts would want to enrich Smith to that extent.

B. Retributive Rationale

A punitive rationale also fails to justify a $3.5 million award. Retributive punishment is intended to be proportionate to the wrong. If "the wrong" includes the total of every wrong done to every consumer exposed to the risk of burn, plus all wrongs done to every person who was in fact burned, $3.5 million becomes as plausible a number as any. In Canadian law, the plaintiff may only recover punitive damages for the wrongs actually done to him.[44] Smith could recover an amount thought proportionate to the conduct that injured him. His award should not reflect the desire to punish wrongs done to others. The amount of the wrong done to Smith would thus be considerably less than $3.5 million.

There is a certain doctrinal purity to accounting for only the wrongdoer and the victim. They are the only parties to the action. This requirement also addresses punitive damages from the perspective of both parties. Even if we want to punish MegaFood to the extent of $3.5 million, on what theory would we want Smith alone, of all the potential plaintiffs, to recover that amount?

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approximately $200,000 (in 1995 U.S. dollars). *See* Andrews v. Grand & Toy Alta. Ltd., [1978] 2 S.C.R. 229 (Can.).

44. *See* Vorvis v. Insurance Corp. of B.C., [1989] 1 S.C.R. 1085, 1104-10 (Can.).

Punitive damages might be seen as an incentive for privatized law enforcement. This "bounty-hunter" argument would not be well received in Canada. Even if it were, $3.5 million is an excessive bounty. There are related problems. Should the bounty go to the first case to reach a jury? Are we sure another plaintiff will not get another $3.5 million in another jurisdiction? On the other hand, requiring case-by-case litigation for the purpose of punishing a general course of conduct is cumbersome in the extreme. Perhaps class actions, a vehicle still in its infancy in Canada, would strike the right compromise.

C. Tort for Profit Rationale

Lord Devlin's tort for profit justification for punitive damages is also part of Canadian law. It is unclear, however, whether the purpose of a such an award is to teach: (1) that tort does not pay, (2) that tort calculated to pay does not pay, or (3) that tort cynically calculated to pay does not pay. Nor is it clear whether the concern is with torts that do pay or with torts committed in the hope they might pay.

In almost any product liability negligence case, the tort might be classified as tort for profit. Clearly, neither Lord Devlin nor any Canadian court would allow punitive damages in each such case. It seems reasonable to have liability for "tort calculated to pay" in the case of deliberate tort for profit. In the MegaFood case, if Smith can prove that MegaFood deliberately avoided warning its consumers in order to profit from their ignorance, and if, as seems likely, it actually did profit, this would justify an award of punitive damages. I see no reason to further require cynical calculation or further exceptional conduct. Nor do I see that proceeding under this theory advances the plaintiff's case for punitive damages beyond that of the basic exceptional conduct rationale. It might, however, affect the appropriate size of the award.

Under either the deterrence or punitive rationales, quantifying the award involves much guesswork. Smith's case may be stronger if he could prove that MegaFood actually profited from its wrong in the amount of $3.5 million. The judge or jury would then have confidence that it would be appropriate to punish MegaFood to that extent. Such an award merely restores the status quo ante and would not constitute punishment. Nor would it achieve deterrence unless the probability of perfect sanctions was a

deterrent, in which case an even larger award might be appropriate.

The general problems with Smith alone recovering the $3.5 million, however, remain. For that reason alone, a Canadian court would likely balk at such a large award, even if documented on an unjust enrichment basis.[45] I think Smith would be restricted to the profit MegaFood made at his personal expense. This is what Lord Devlin had in mind.[46] Obviously, based on the foregoing, Smith would do better seeking retributive punishment rather than recovery of the profit MegaFood made in selling him the coffee.

VI. CONCLUSION

I do not claim the Canadian solution to this problem is superior to others. By requiring case-by-case punishment, we are either incurring unnecessary transaction costs or, more likely, we are allowing a good deal of conduct deserving of punishment to go unreproached. Much can be said in favor of more extensive punishment and civil deterrence effected through punitive damages awards. Indeed, one might make an even stronger case for punitive damages in Canada than in the United States, because the Canadian case is likely to be heard by a judge alone.

No one, certainly no unsuspecting person, should be burned to satisfy a general consumer preference for dangerously hot coffee. Yet the prospect of paying compensatory damages to 750 other victims did not change MegaFood's practice. This suggests that some sort of deterrence "gross up" is in order. A $3.5 million jury award, paid to a single victim, may be an unsophisticated response. I am uncertain that such a response is better than doing little or nothing, as might be the case in Canada. Fortunately, in this case, if MegaFood alters its behavior in the United States, it will likely do so in Canada as well. This is one benefit of Canada being a branch plant economy.

The Canadian regime best reflects the theoretical underpinning of tort as understood in our culture. Compensating accident victims is an accepted part of our tort law. Punishing wanton, reckless, or outrageous conduct through the civil system is

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45. *But see* Claiborne Indus. v. Nat'l Bank of Can., 59 D.L.R.4th 533 (1989) (Ont. C.A.). Using the tort for profit rationale, the court, perhaps unwittingly, awarded $4.2 million in punitive damages to plaintiffs who had not been wronged to that extent by the conduct in issue.

46. *See* Rookes v. Barnard, [1964] 1 All E.R. 367, 411.

accepted in rare cases only, and then only in judicious amounts. We are not yet ready to delegate to judges, much less to juries, the task of regulating and punishing industry with million dollar punitive damages awards, especially in the absence of legislative direction. Nevertheless, the pull of U.S. culture, legal and otherwise, is powerful.