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Punitive Damages in Canada: *Smith v. MegaFood*

LEWIS KLAR*

I. INTRODUCTION

Defendant MegaFood, Ltd., appeals a trial judgment that found it liable in negligence to the plaintiff James Smith. Smith suffered third degree burns on his inner thighs, buttocks and groin area as a result of spilling hot coffee that he had purchased at one of the defendant's restaurants. The incident occurred when Smith placed the cup of coffee between his legs while driving his car. While steering his vehicle with one hand, Smith attempted with his free hand to pry open the cover from the cup of coffee. The cup overturned and the coffee spilled on Smith, causing severe burns.

A jury found MegaFood negligent and awarded Smith \$100,000 in compensatory damages and \$3.5 million in punitive damages. MegaFood appeals only the punitive damages award.

II. THE CAUSE OF ACTION

Several liability issues are not addressed on appeal, but nonetheless merit a brief discussion. As noted above, Smith's action against MegaFood is based on the tort of negligence. Smith alleged, and the jury found, that MegaFood owed a duty to take reasonable care as to the coffee it sold to its customers, and that MegaFood breached this duty in two respects.

First, MegaFood's decision to serve its coffee at a temperature of eighty-two degrees Celsius (180 degrees Fahrenheit) was unreasonable in light of the industry standard of sixty-six degrees Celsius (150 degrees Fahrenheit).

* Professor and Associate Dean of Law, University of Alberta. I would like to thank my colleagues Professor Ted DeCoste and Ms. Janice Ayotte for their generous help in my preparation of this Article.

Second, even assuming MegaFood's decision to serve coffee at such a high temperature was not unreasonable, MegaFood negligently failed to warn its customers of the danger of its extreme temperature. Although the coffee was appropriate for drinking and was heated to a temperature most consumers preferred, its hot temperature posed too great a danger in the event of a spill.

MegaFood's knowledge of this danger is evidenced by hundreds of prior spills that resulted in 750 lawsuits. In his complaint, Smith claimed that MegaFood either should not have served him this coffee or, alternatively, should have warned him that its coffee was significantly hotter than that ordinarily served by fast food operators. Smith further alleged that had MegaFood warned him about the temperature of the coffee, he would have taken special precautions to ensure that he did not spill it.

Although I would not have found MegaFood liable for negligence in this case, it is not my role to disturb the jury's finding on appeal. Curiously, however, the jury failed to find the plaintiff contributorily negligent, despite Canadian law that would clearly have supported such a finding.

Steering an automobile with one hand, while attempting with the other to pry open the cover from a cup containing a hot beverage delicately placed between one's legs, is both risky and dangerous. The plaintiff is indeed fortunate that he did not cause a serious traffic accident. Another, more difficult, liability issue deserving attention is whether plaintiff's action could have been based in contract rather than tort. Could the plaintiff have argued that MegaFood breached an implied term of its contract with him? A Canadian contract for the sale of goods implies that the product sold is both reasonably fit for its purpose and is of merchantable quality. A dangerously defective good is not merchantable.

Moreover, this is a strict obligation requirement. The difficulty with a contract argument from the facts of this case is that it is unclear whether the coffee served to Smith was dangerous and defective. Because an award of punitive damages is much less likely in a breach of contract case than in a tort case, the plaintiff wisely avoided the contract route and pursued the more favorable tort action. This is permissible under the concurrent liability approach adopted by Canadian law.

III. THE PUNITIVE DAMAGES AWARD

The issue on this appeal is the appropriateness of the jury's decision to award the plaintiff \$3.5 million in punitive damages. A Canadian jury clearly has the power to award punitive damages in a civil case.

Furthermore, appellate courts will not generally overturn jury findings, particularly those involving punitive damages awards.¹ A jury award can be overturned, however, when it is so unreasonable as to be perverse.

The \$3.5 million punitive damages award departs from Canadian precedent. The decision to award any punitive damages to a plaintiff in this type of products liability case is a first in Canadian jurisprudence. I disagree with this decision because I believe that punitive damages should not be awarded *in any tort case*. The *raison d'être* of Canadian tort law is to provide justice to persons injured by others' wrongful conduct, by requiring wrongdoers to pay for the injury that they have caused. Any benefits flowing from this process, such as compensating disabled individuals, punishing wrongdoers, or deterring wrongdoing, should be considered merely incidental. Once the focus of the process or, as here, a tort judgment converts these incidental benefits into tort's principal purposes, tort law has strayed off course. This becomes most evident when awarding punitive damages. Whatever purposes punitive damages awards are designed to achieve, compensation is not among them. The attempt to use tort law to further the goals thought to be achieved through the award of punitive damages is illogical and produces haphazard and inefficient results.

Notwithstanding these theoretical objections, Canadian tort law allows punitive damages in some types of cases. The ambivalence of the law regarding punitive damages, however, is reflected in the size and frequency of awards in tort cases. As noted above, no product liability case in Canada has resulted in a punitive

1. It should be noted that in Canada, civil trials are generally tried only before a judge. Although the frequency of the use of jury trials in personal injury cases differs between Canadian provinces, jury trials are relatively rare in Canada, when compared with their incidence in the United States. This case may show that our decision to utilize juries rarely in personal injury cases is a good one.

damages award.² Upholding the jury's decision to award punitive damages in this case would be unprecedented. Nevertheless, and despite my own disagreement with it, it is my opinion that Canadian case law can support the jury's decision to award punitive damages in this case, although it cannot support the jury's decision to award \$3.5 million.

A. *The Purpose of Punitive Damages*

1. Punishment

Although they can be awarded for the same types of conduct, punitive and aggravated damages should not be confused. The principal purpose of punitive or "exemplary" damages is to punish wrongdoers by increasing the damages awards made against them. Although punitive damages are awarded to plaintiffs, they are not awarded in order to compensate victims. In contrast to punitive damages, "aggravated" damages serve a compensatory function and are awarded to recognize that the defendant's misconduct aggravated the plaintiff's injuries. Therefore, where the outrageous nature of a defendant's misconduct exacerbates a plaintiff's injury, an increase in the compensatory damage award is appropriate. This is the case, for example, where the defendant's outrageous behavior aggravates the injury to the plaintiff's security, self-esteem, or reputation.³

The leading case on the purpose of punitive damages and the circumstances under which they can be awarded is the Canadian Supreme Court's decision in *Vorvis v. Insurance Corporation of British Columbia*.⁴ Although not a tort case, *Vorvis* emphasized that punitive damages are designed to punish defendants.⁵ The decision to award them must be exercised with caution. Consistent with this goal of punishment, courts have dramatically described conduct that warrants punishment as "harsh," "vindictive," "reprehensible and malicious in nature," "extreme," and exhibiting

2. ONTARIO LAW REFORM COMMISSION, REPORT ON EXEMPLARY DAMAGES, 13 (1991) [hereinafter COMMISSION].

3. For a discussion regarding the distinction between punitive and aggravated damages, see generally *id.* at 27-30.

4. 58 D.L.R.4th 193 (1989) (Can. S.C.).

5. *Id.* at 201, 206.

“high-handedness,” “contempt of the plaintiffs’ rights,” or “disregard of every principle of decency.”⁶

In keeping with this, typical Canadian punitive damages cases involve proof of sexual assault, incest, battery, intentional infliction of mental suffering, defamation, trespass, and deliberate unlawful conduct in business relations, such as fraud and intimidation.⁷ Such misconduct “offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is . . . warranted.”⁸ Furthering the goal of punishment, courts have also held that punitive damages can only be awarded if the compensatory damages awarded are an insufficient punishment or deterrence.⁹

The legitimacy of awarding punitive damages in civil cases in order to punish defendants for morally reprehensible behavior is firmly embedded in Canadian law. This Canadian practice, however, is not theoretically sound. In fact, serious theoretical and practical objections may be raised against any award of punitive damages in tort.

At its root, the tort law process represents a system of corrective justice that remedies the wrongdoer’s unlawful conduct committed against a victim. According to Professor Weinrib, the elements of the negligence action—duty, breach, causation, and damages—and the manner in which they are defined and established, can only be explained by reference to tort law’s normative purpose.¹⁰ Tort law should not be used to expedite or implement public policy goals. The reason for this is clear. Tort law’s internal structure and requirements, not having been formed with instrumentalist goals in mind, ensure that tort law will not be very effective at delivering public policy goals. If punishing and deterring wrongdoers, or compensating the injured, are worthwhile goals for society to pursue, there are better mechanisms than tort law.

The case of punitive damages well illustrates Professor Weinrib’s point. As explained above, the purpose of punitive

6. *Id.* at 208-09.

7. See generally *Robitaille v. Vancouver Hockey Club*, 124 D.L.R.3d 228, 250 (1981) (B.C.C.A.) (citing *Dennison v. Fawcett*, 12 D.L.R.2d 537, 542 (1958)).

8. *Vorvis v. I.C.B.C.*, 58 D.L.R.4th 193, 208 (1989) (Can. S.C.).

9. *Hill v. Church of Scientology*, 114 D.L.R.4th 1, 149-50 (1994) (Ont. C.A.).

10. See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 515 (1989).

damages in Canadian law is to punish defendants for outrageous conduct.¹¹ Tort law is an insensible and inefficient means to achieving this goal. In order to punish a defendant by utilizing the private action in tort, one is forced to overcompensate, often massively, the plaintiff.

In *MegaFood*, Smith's injuries were fully restored by his receipt of \$100,000 in compensatory damages. In order to punish a wealthy corporation such as MegaFood, Smith now becomes the fortuitous recipient of a huge sum of money that bears no relationship to his injuries, needs, or even the wrong committed against him. An award of punitive damages to a charitable fund for burn victims could have equally accomplished MegaFood's punishment. Furthermore, although the public has an interest in punishing MegaFood for its wrongful conduct, ultimate control of both the "prosecution" and the outcome lies with Smith, a private person. Had Smith decided to settle or not to sue, this would have frustrated the goal of punishing MegaFood. Despite MegaFood's conduct in serving Smith extremely hot coffee, there could, and would have been no tort suit—and therefore no punishment of MegaFood—without Smith's injury. In short, if public policy dictates that MegaFood be punished, and hence be deterred from further negligent conduct, tort law is not the proper vehicle to accomplish this objective.

One may question the effectiveness or fairness of punitive damages. The quantification of the award and the "offences" for which awards are made are vaguely defined.¹² In determining whether punitive damages are warranted, courts consider factors that in other contexts would be unfair. For example, because the severity of the punishment will often depend upon the defendant's wealth, courts will consider a defendant's ability to pay in determining the size of a punitive damages award.¹³ Furthermore, punitive damages will not be awarded if compensatory damages are large and considered adequate punishment.¹⁴ This is true even when the extent of the injury and compensatory damages awarded bear no necessary relationship to the reprehensibility of the punished conduct.

11. See *supra* Part III.A.1.

12. COMMISSION, *supra* note 2, at 54.

13. *Id.* at 50.

14. *Id.* at 54.

Because punitive damages are awarded in order to punish defendants but the recipients of these awards are plaintiffs, the punitive function of the award frequently becomes confused with the compensatory function of tort law. This tension between punishment and compensation raises interesting questions and highlights punitive damages' ambiguity of purpose. For example, there is uncertainty as to whether defendants who already have been criminally punished should be immune from additional punishment through punitive damages. Moreover, some jurisdictions prohibit punitive damages awards in favor of a deceased victim's estate,¹⁵ although who brings the action is theoretically irrelevant in terms of punishing the defendant. Other questions also arise. Should punitive damages be awarded against corporations or only their individual directors? Should there be vicarious liability for punitive damages? Should there be liability insurance against punitive damages? Should different burdens of proof or rules of evidence exist for punitive damages in civil actions? These questions are difficult to analyze in the tort law context because tort law is not designed to deal with issues of punishment. The introduction of punitive damages to foreign soil creates difficulties.¹⁶

An award of \$3.5 million dollars in a product liability case such as this suggests that punishing the defendant was not the jury's *primary* motive. Smith's argument that MegaFood's decision to maximize profits by ignoring the risks of injury was so reprehensible as to warrant such a large monetary penalty is not persuasive. The jury, more likely, intended to regulate MegaFood's conduct by making it financially prohibitive for it to sell very hot beverages in the future. Neither tort law nor the existing Canadian approach to punitive damages awards mandates this type of food regulation activity. In tort, injunctions are not normally available to remedy a plaintiff's wrong, unless damages are insufficient to compensate the victim. This, however, is not the case here. Damages are perfectly suited to compensate for the plaintiff's injury. Tort law neither prohibits conduct nor licenses it, but remedies wrongs that have occurred. Canadian law rejects the notion that the private right of action should, as a matter of public policy and safety, regulate the food and drug industry. Government regulators are

15. *Id.* at 59.

16. For a good discussion of these and other issues, see generally *id.*

well aware of the numerous accidents and successful law suits resulting from the sale of hot beverages. They have chosen not to address this matter by allowing the sale of very hot coffee. Tort law does not function to intervene and decide otherwise.¹⁷ Hence, even if I uphold the jury's decision to award some punitive damages in this case, I would only do so to punish and not to regulate.

Despite these serious theoretical and practical objections, even Canadian judges and juries are attracted to punitive damages and occasionally award them. Several reasons may explain this phenomenon. First, punitive damages awards allow courts to "vent" and to express their moral outrage concerning certain types of misbehavior. Although tort law is not the ideal vehicle for this, punitive damages awards enable civil courts to send signals to society, the wrongdoer, and other potential wrongdoers that outrageous torts may carry a high price.¹⁸ Second, awarding punitive damages may have an educational and deterrent effect on others. In view of the limited types of cases in which punitive damages are actually awarded—usually those involving sexual assault, incest, battery, defamation, trespass, fraud, and intimidation—the educational and deterrent effect of punitive damages must surely be rather small. Those who commit such criminal or reprehensible acts are already aware that such conduct is wrong and can result in prosecution and punishment. Perhaps the one area where the deterrent and educational signals of punitive damages may be most useful is in non-criminal conduct, such as negligence. Ironically, however, Canadian law is very reluctant to award punitive damages in this area.¹⁹

Admittedly, courts may actually be awarding punitive damages in order to compensate victims who otherwise might be

17. How effective would this type of regulation be? Clearly, it would not be enforceable, except by means of a private right of action brought by a victim. Even then, the guidelines for serving hot beverages would be vague. Assuming that serving hot beverages at eighty-two degrees Celsius is considered unreasonable, at what temperature should beverages be served? The tort judgment, even if it did address this point, could not bind other establishments. Tort law is neither an appropriate forum for making, nor enforcing, such a determination. This is not to say that tort judgments declaring certain conduct unreasonable do not influence behavior. Rather, the argument is that tort damages should not be deliberately set at an amount deemed high enough to prevent unreasonable behavior. Damages should only reflect the wrong done to the victim.

18. COMMISSION, *supra* note 2, at 17.

19. *See id.* at 13, 23, 25.

entitled to little compensation. Punitive damages may in fact serve as the only incentive for victims to initiate litigation in some cases of deliberate wrongdoing where little actual damage was caused.²⁰ The desire to use punitive damages in order to compensate is inappropriate, however, and runs contrary to the intended purpose behind punitive damages. If the courts view compensatory damages awarded in certain types of cases as inadequate to compensate the victim fairly, an increase in the compensatory damages award—either through an award of general or aggravated damages—is the more appropriate solution.

2. Preventing Unjust Enrichment by the Tortfeasor

In some cases, punitive damages may theoretically prevent a wrongdoer from incurring a profit as a result of his wrongful conduct or from “getting away” with the wrong.²¹ Only a few cases, however, indicate that this was a factor in explaining a punitive damages award. In *Nantel v. Parisien*,²² for example, a developer wished to build on land it had just purchased. The presence of the plaintiff’s small boutique shop on the land, however, prevented the developer from doing so. Rather than negotiating with the owner, the developer simply demolished the boutique. Had the court awarded the plaintiff only the fair and reasonable compensation for her destroyed boutique, the developer would have achieved through its flagrant wrong what it had desired. The court, therefore, awarded an additional \$35,000 in punitive damages in order to show the defendant that such conduct will not go unpunished.²³

Similarly, in *Claiborne Industries v. National Bank of Canada*,²⁴ a case involving fraud in banking and stock acquisitions, the court prevented the defendant from recouping part of the compensatory damages award made against it from the sale of defendant’s wrongfully acquired shares by “grossing up” the award with punitive damages.

This rationale for awarding punitive damages does not apply to the case against MegaFood. Undeniably, MegaFood’s decision

20. *Id.* at 17-18.

21. *See id.* at 17.

22. 18 C.C.L.T. 79 (1981) (Ont. S.C.).

23. *Id.* at 80.

24. 59 D.L.R.4th 533, 564-67 (1989) (Ont. C.A.).

to serve coffee heated to a dangerously high temperature and to risk liability as a result of its actions was motivated by profit. Although in the general sense MegaFood was attempting to benefit from its tort, the profit from its wrongdoing cannot be calculated in relation to each specific transaction, as is ordinarily the case in this category. If punitive damages are to be awarded for this type of systematic wrongdoing—which was not aimed at specific transactions and victims—it must be based on a desire to punish the defendant for the morally reprehensible nature of its conduct.

B. Punitive Damages in Negligence Cases

Based on the intentional wrongdoing cases, MegaFood's conduct did not descend to such a low level of decency and immorality as to warrant punitive damages. Nevertheless, the issue remains whether MegaFood's conduct warrants an award of punitive damages under a negligence theory.

Although only negligent, MegaFood's conduct entailed a strong element of deliberate wrongdoing. Smith's accident was not the first that could be attributed to the high temperature of MegaFood's coffee. MegaFood's decision to serve coffee at such a high temperature was deliberate and with knowledge of the risk of injury. The record indicates that MegaFood's serving of hot beverages caused numerous accidents resulting in severe injuries and 750 successful lawsuits. Despite this, and with knowledge that customers may not be fully aware of the risk of spilling their coffee, MegaFood failed to warn its customers of the dangerously high temperature. Instead, it chose to sacrifice the safety of a very small percentage of its customers in order to satisfy the coffee tastes of its other customers, thereby gaining a business advantage over its more safety-conscious competitors in the fast food business.

The fact that the cause of action against MegaFood is negligence is not in and of itself a fatal impediment to an award of punitive damages. A few Canadian authorities support awards of punitive damages in negligence cases. One of the leading cases is *Robitaille v. Vancouver Hockey Club*.²⁵ Robitaille played hockey for the National Hockey League team, Vancouver Canucks.

25. 124 D.L.R.3d 228 (1981) (B.C.C.A.).

Although he was injured, his team ordered him to play hockey. While playing, he suffered another injury. Robitaille proved that the medical staff employed by the hockey club ignored his injury. In a subsequent game, Robitaille suffered a third injury, which permanently disabled him and terminated his career. Robitaille successfully sued his employer and recovered compensatory damages as well as \$35,000 in exemplary damages.²⁶ *Robitaille* was a negligence action based on his employer's duty to take reasonable care to provide a safe working environment.

*Coughlin v. Kuntz*²⁷ is another negligence case where the plaintiff was awarded punitive damages. In this action, a patient sued his doctor for negligent medical treatment. The treatment performed by the doctor was unorthodox and experimental. The trial judge, while conceding that an award of punitive damages in a medical malpractice case is rare, awarded \$25,000 in punitive damages to the plaintiff. Defendant's arrogance and obsession with his own innovative methods led the trial judge to find the defendant's conduct sufficiently reprehensible to justify the award. The Court of Appeals affirmed the award, noting that "where the defendant deliberately exposes the plaintiff to a risk without justification, an award of exemplary damages may be appropriate."²⁸

It would be artificial and undesirable to limit punitive damages to torts involving deliberate wrongs. There should be no rule that prevents punitive damages from being awarded in negligence cases, where the negligence itself is particularly outrageous. Because the purpose of punitive damages is to punish reprehensible behavior, even negligent behavior in certain circumstances may qualify.

1. Must the Negligence be Directed at the Specific Plaintiff?

The facts of this case may pose a more serious obstacle to an award of punitive damages. Some Canadian authorities require that the defendant's reprehensible conduct be directed at the *specific* plaintiff before awarding punitive damages. According to these authorities, the mere fact that the defendant's conduct merits punishment does not justify an award of punitive damages.

26. *Id.* at 252.

27. 17 B.C.L.R.2d 365, *aff'd* 42 B.C.L.R.2d 108 (1990) (B.C.C.A.).

28. *Coughlin v. Kuntz*, 2 C.C.L.T.2d 42, 54 (1990).

Rather, the conduct must be "consciously directed against the person, reputation, or property of the plaintiff."²⁹ Therefore, because MegaFood's conduct clearly did not meet this requirement, the award must be rejected.

In both *Robitaille* and *Coughlin*, this requirement was met because the behaviors that warranted the award of punitive damages were directed at specific plaintiffs. *Robitaille*, however, suggested that the requirement of specific intent should be reconsidered and may no longer be good law.³⁰ Similarly, the *Coughlin* court did not focus on specific intent, but rather on the defendant's reprehensible conduct.³¹

*Vlcek v. Koshe*³² specifically addressed this issue. This case involved allegations of negligence against the manufacturers of Honda All Terrain cycles with respect to the design and manufacture of these vehicles. The plaintiff was seriously injured when she was thrown from one of these vehicles. The plaintiff sought a ruling as to whether punitive damages may be awarded in a product liability case of this nature. The defendants argued that because the acts of negligence were not specifically and intentionally directed at the plaintiff, punitive damages could not be awarded. The court weighed what appeared to be conflicting judgments in this area and concluded that defendant's conduct should be given greater weight in determining whether plaintiff should be entitled to a punitive damages award.³³ The fact that the conduct was specifically and consciously directed at the plaintiff is a factor to consider, but specific intent is not a prerequisite.³⁴ The court conceded that, even in the absence of specific intent, certain conduct may be sufficiently malicious or reckless to merit condemnation by way of punitive damages. Furthermore, punitive damages may be awarded in a products liability case "if the circumstances so warrant."³⁵ Motions to appeal this ruling were subsequently denied and, thus, the ruling stands as good law. Unfortunately, the action was subsequently settled and there was no judgment on the merits of the case.

29. *Kaytor v. Lion's Driving Range*, 35 D.L.R.2d 426, 430 (1962) (B.C.S.C.).

30. *Robitaille*, 124 D.L.R.3d at 250-52.

31. *Coughlin*, 17 B.C.L.R.2d at 398.

32. 52 D.L.R.4th 371 (1988) (B.C.S.C.).

33. *Id.* at 375.

34. *Id.*

35. *Id.*

I would agree with *Vlcek* that specific intent is not, and should not be, required for a punitive damages award. If, as authority suggests, the court's concern is to punish the wrongdoer's morally reprehensible conduct, it should not be critical whether that conduct was random or directed at a specific victim. Nonetheless, it still remains to be determined whether MegaFood's conduct in this case met the required standard of reprehensible conduct.

2. Systematic vs. Isolated Wrongdoing

It is necessary to reflect on why MegaFood's conduct might shock the conscience of right-thinking persons to such an extent as to warrant monetary punishment. Was the conduct exhibited in this case, namely, the selling of a hot beverage to Smith without warning him of the associated dangers, viewed in itself, a morally reprehensible act? Or was the award of punitive damages levied in order to punish MegaFood for its overall conduct, taking into account the prior victims and MegaFood's intention to continue with its negligent business practice in the future? Canadian punitive damages theory supports the award of punitive damages in the former, but not the latter case.³⁶

Punitive damages are not awarded in Canada to punish a defendant for systematic, wrongful conduct, but rather to punish a defendant for conduct which is reprehensible in a *specific* case. Therefore, a jury should not award punitive damages against a defendant in favor of one plaintiff because it is unhappy that the defendant has followed a course of conduct in the past, and intends to continue to do so in the future. As noted above, punitive damages are not awarded in Canada to regulate behavior by making a course of conduct economically prohibitive. As the Ontario Law Reform Commission ("Commission") explained in its *Report On Exemplary Damages*, an award of punitive or exemplary damages pertains only to the conduct that injured the plaintiff.³⁷ The Commission stated that this approach:

[m]ore than anything else, limits the quantum of exemplary damages awards in Canada. It does so at the cost of rendering exemplary damages relatively ineffective as a vehicle with which to control systematic wrongdoing. For example, if exemplary damages were awarded in a products liability case in Canada,

36. COMMISSION, *supra* note 2, at 15.

37. *Id.*

they would be quantified with reference solely to the conduct that injured the specific plaintiff. In contrast, in many cases in the United States, it appears the award is given to deter and punish the defendant for a general course of conduct that injured, or exposed to the risk of injury, many parties other than the plaintiff. This more than anything else has led to large awards, duplicative punishment for the same act or course of conduct, racing to file the first suit, and complex proposals to alleviate these problems.³⁸

This is not to say that the defendant's knowledge of the danger is irrelevant in determining whether its conduct is reprehensible in a specific case. For instance, MegaFood was found negligent in part because it was well aware from previous experience that its conduct was not only dangerous, but legally negligent. This may be sufficient to convince a judge or jury that the defendant showed a flagrant disregard for the safety and rights of the plaintiff, and would justify an award of punitive damages to Smith. It would be wrong, however, for this court or the jury to use an award of punitive damages to teach MegaFood a lesson on behalf of all other previous and future victims. Furthermore, it would be contrary to Canadian law if the jury's decision to award punitive damages was based on its desire to impose economic deterrence on MegaFood and to enjoin it from selling coffee at an unreasonable temperature. Only if the conduct displayed was sufficiently outrageous with respect to Smith, can punitive damages legitimately be awarded.

C. The Amount of the Award

The jury's decision to award the plaintiff \$3.5 million dollars is unreasonable. Not only is this award clearly out of line with all other punitive damages awards in Canada, it also indicates that the jury fundamentally misunderstood the purpose of punitive damages awards in Canadian law.

There has been only one Canadian punitive damages award over \$1 million, which was awarded in the unusual case of *Claiborne Industries v. National Bank of Canada*.³⁹ *Claiborne* involved conduct constituting conspiracy and fraud. As a result of a series of complex transfers of funds to companies controlled by

38. *Id.* at 14-15.

39. 59 D.L.R.4th 533 (1989) (Ont. C.A.).

the Chairman of the Board of Directors of the plaintiff company, the plaintiff was defrauded of millions of dollars. The court found the defendant bank a party to the conspiracy. Because the fraudulent transactions themselves depreciated the value of the shares, in assessing exemplary damages, the court took into account the amount of profit gained by the bank from purchasing the defrauded company's shares at the depreciated value. The court recognized that once the embezzled money was repaid to the company, the company shares owned by the bank would rise to their pre-theft values. Thus, the bank could resell all of its shares at a profit, thereby recovering, according to the judge's estimates, seventy percent of the amount of damages it was required to pay. In order to prevent this, the court provided a formula for assessing sufficient exemplary damages to offset the profit. According to one account, this amount would be approximately \$5 million.

The *Claiborne* judgment cannot be regarded as authoritative, or even relevant, in estimating typical punitive damages awards. First, the amount was not based on the reprehensible nature of the defendant's conduct, but on the desire to prevent the defendant from profiting from its acts. The amount was arrived at on a mathematical formula. Second, it is unclear whether the decision was correct in preventing profit. In fact, the Commission specifically critiqued this aspect of *Claiborne*.

Other than the *Claiborne* judgment, there are no \$1 million punitive damages awards in Canada.⁴⁰ In fact, there are only three cases where the punitive damages award exceeds \$100,000. The highest punitive damages award was \$800,000, awarded in *Hill v. Church of Scientology*,⁴¹ a defamation case. In affirming the jury award, the Court of Appeals stressed the malicious and egregious nature of the defendant's conduct.⁴² The defendant had repeatedly libelled the plaintiff, an attorney, by accusing him of breaching a court order and misleading a judge. The defendant even instituted a motion against the plaintiff for contempt of court. What particularly struck the court was the defendant's continued "character assassination"⁴³ of the plaintiff and its "unceasing and apparently unstoppable campaign to destroy . . . [him] and his

40. COMMISSION, *supra* note 2, at 9, 25.

41. 114 D.L.R.4th 1 (1994) (Ont. C.A.).

42. *Id.* at 150.

43. *Id.* at 151.

reputation.”⁴⁴ The punitive damages award was based not only on the desire to punish the defendant but also to deter him from continuing to slander plaintiff. The jury considered \$800,000 an appropriate “fine” or “penalty,” apparently because it matched the \$800,000 award of compensatory damages.⁴⁵ In upholding the jury’s award, the Court of Appeal may have been influenced by the fact that after the jury’s verdict, the defendant continued its attack on the plaintiff.⁴⁶

MegaFood’s conduct is hardly comparable to the defendant’s conduct in *Church of Scientology*. Although both cases reflect the defendant’s persistence and unwillingness to alter its behavior, *MegaFood* is distinguishable in that the defendant did not act with malice or direct its conduct at the plaintiff.

The second award exceeding \$100,000 occurred in *MacDonald Estate v. Martin*,⁴⁷ which involved a business dispute. Although the facts of this case differ from those in *MegaFood*, I find interesting the Appellate Court’s view of the punitive damages award. The trial judge awarded \$500,000—a figure described by the Court of Appeals as the highest award of its kind in Canadian judicial history.⁴⁸ Exercising the “restraint” of Canadian courts in this area and keeping in mind the purposes behind punitive damages, the Court of Appeals reduced the award to \$250,000.⁴⁹

The third award over \$100,000 occurred in *Mustaji v. Tjin*,⁵⁰ which involved a breach of contract and fiduciary duty. The jury awarded \$175,000 in punitive damages for conduct it considered offensive to community standards.⁵¹ As is typical of these cases, the defendant specifically directed the conduct at the plaintiff.⁵²

Aside from these cases, typical punitive damages awards in Canada are very modest—well under \$100,000 and, in most cases, under \$50,000.⁵³ Generally, punitive damages awards in cases involving extremely reprehensible and outrageous conduct vary from \$5,000 to \$50,000. In one case, the plaintiff was awarded

44. *Id.* at 152.

45. *Id.* at 2 (made up of \$300,00 in general and \$500,000 in aggravated damages).

46. *Church of Scientology*, 114 D.L.R.4th 1, 153-54 (1994) (Ont. C.A.).

47. 58 D.L.R.4th 67 (1994) (Manitoba C.A.).

48. *Id.*

49. *Id.*

50. Vancouver Registry No. C932366 (1995) (B.C.S.C.).

51. *Id.*

52. *Id.*

53. COMMISSION, *supra* note 2, at 23.

\$12,500 in punitive damages for sexual assaults committed by her uncle when she was a child. In a violent rape case involving death threats, the punitive damages award was \$40,000. In a sexual battery case between a doctor and his patient, the Canadian Supreme Court awarded the plaintiff \$25,000 in punitive damages. Finally, in a case involving incest, the Canadian Supreme Court affirmed a punitive damages award of \$40,000. These are typical awards for conduct of the most heinous nature.

I do not suppose that in awarding Smith \$3.5 million, the jury suggested that MegaFood's conduct was more reprehensible than the torts described above. Surely it was not. The jury did, however, send an economic message to MegaFood, and presumably to others in the industry, that the practice of serving coffee at eighty-two degrees Celsius is unacceptable. The \$3.5 million award was an economic deterrence, accounting for the wealth of the defendant and the profits it earns from its highly successful business. The plaintiff was merely the fortuitous "windfall" recipient. No other rational explanation exists for the amount of this award. Far more grievously injured plaintiffs than Smith, in circumstances involving considerably more reprehensible behavior, have received either little or no punitive damages.

Canadian tort law does not support the jury's approach. It is the government regulators' and not the courts' job to determine whether a company's practices in the fast food industry are unacceptable. Creating instant millionaires out of unfortunate, but otherwise indistinguishable, victims of negligent behavior is not sound public policy.

Because the jury determined that MegaFood's conduct was reprehensible, and this decision was not so unreasonable as to be perverse, I would affirm the jury's decision to award some punitive damages. I reject, however, the amount of the award on the theory that a punitive damages award should not be used to regulate this type of behavior. An award of \$50,000 against MegaFood would be consistent with both the purpose of punitive damages and the typical size of awards for reprehensible behavior. This amount is sufficient to reflect this Court's view that MegaFood's conduct in deliberately risking Smith's safety by pursuing what it knew was a negligent act was reprehensible. Although this award would exceed most other punitive damages awards in Canada, the defendant's wealth should be considered. Should the defendant's decision to continue serving its coffee at

warning its consumers result in another accident, the next punitive damages award will likely reflect my decision in this case. Having once been punished and still undeterred, MegaFood's conduct would demonstrate an even more flagrant disregard for the next plaintiff's safety.

IV. CONCLUSION

The Canadian law of punitive damages is uncertain and undeveloped. The law is unclear as to which torts merit punishment or what the quantum of the awards should be. Generally, punitive damages awards have been limited to wrongs that reflect the most heinous types of behavior.⁵⁴ Most negligent actions and other types of inadvertent wrongdoings have generally been excluded from the purview of punitive damages.⁵⁵ Even where punitive damages are awarded, the amounts of the awards are very small and often unpredictable.⁵⁶ The following conclusions can, however, be drawn regarding punitive damages in Canada:

(a) Punitive damages serve to punish defendants for morally reprehensible behavior;

(b) Generally, only intentional and deliberate wrongdoing directed at a specific plaintiff merits a punitive damages award;

(c) Although infrequent, punitive damages can be awarded in negligence cases where the negligence exhibited a flagrant disregard of the plaintiff's rights;

(d) Punitive damages may even be awarded where the negligent conduct was not directed at the specific plaintiff;

(e) In cases of systematic negligence, and more particularly in product liability cases, the fact that the wrongdoing of the defendant has injured other victims can be a factor in determining whether the defendant's conduct was reprehensible. Punitive damages, however, cannot be awarded in one case in order to punish the defendant for its wrongful conduct in relation to other victims, or to regulate behavior.

Reluctantly, I would affirm the jury's decision to award *some* punitive damages against MegaFood. MegaFood's flagrant conduct, of which it has been warned 750 times in the past, showed a callous disregard for Smith's safety. My decision is inconsistent

54. COMMISSION, *supra* note 2, at 38.

55. *Id.* at 9, 23, 25.

56. *See id.* at 25.

with precedent Canadian tort law. I believe, however, that there is a sound basis for this decision in the established principles and purposes of punitive damages.

