A COMPARATIVE LOOK AT PUNITIVE DAMAGES IN CANADA

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I. INTRODUCTION

Perhaps borrowing from Marx and Engels, who spoke of the "spectre of communism,"[1] the latest decision of the Supreme Court of Canada on punitive damages in Anglo-Canadian common law, *Whiten v. Pilot Insurance Co.*,[2] opens by referring to the "spectre of uncontrolled and uncontrollable awards of punitive damages in civil actions."[3] With those words — reminiscent of the restrictiveness of Lord Devlin's speech in *Rookes v. Barnard*[4] — one would think that the approach to this *sui generis* remedy in the common law tradition would be the same as that in the civil law which, in its purist form, does not recognize exemplary damages.[5] Indeed, since the 17th century, authors

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1 See Marx and Engels, *Communist Manifesto* (1992), at 1, first published in 1848, which famously begins: "A spectre is hunting Europe — the spectre of communism."

2 2002 SCC 18 ["*Whiten*"]. The decision was split 6:1; Binnie J. writing for the majority and LeBel J. dissenting. There was another judgment delivered in tandem, also dealing in part with the issue of punitive damage: *Performance Industries Ltd. v. Sylvan Lake & Tennis Club Ltd.*, 2002 SCC 19. The latter was likewise split 6:1, and essentially applied the rules on punitive damages developed in *Whiten*.

3 *Whiten*, at para. 1 [emphasis added].

4 [1964] A.C. 1129 ["*Rookes*"].

5 The terminology used in the legislation and the case law to refer to non-compensatory damages, both in Anglo-Canadian common law and in Quebec civil law, includes "punitive" damages and "exemplary" damages. In *Whiten*, the Supreme Court of Canada favoured the term "punitive," without elaborating on the reasons behind its choice. The present paper uses both expressions to insist that they are synonymous and, for comparative purposes, to make sure the reader knows that the concepts are identical even though the terminology utilised in the legislation of different jurisdictions varies.

of doctrine like Jean Domat[6] and Robert Joseph Pothier[7] have categorically rejected the contention that any branch of private law ought to pursue objectives other than compensation, leaving it exclusively to the criminal law (*"droit pénal"*) to punish and deter.[8]

Such a picture of extremely limited, if not prohibitive, use of punitive damages, however, does not reflect the situation of this non-compensatory remedy in Canada, both in common law jurisdictions and, more surprisingly, in the Quebec civilian system of private law.[9] This paper examines the law of exemplary damages in Canada, with a focus on the developments in the Supreme Court of Canada during the late 80s and early 90s in common law (section I) and during the mid-90s in civil law (section II).[10] A comparative method is adopted when appropriate, considering foreign common law jurisdictions (Great Britain, Australia, and the United States of America), but mainly comparing Anglo-Canadian common law and Quebec civil law. Section III examines more particularly the reasons of the Supreme Court of Canada in *Whiten* and the conclusion attempts to draw some lessons for the Quebec civilian jurisdiction.

II. ANGLO-CANADIAN COMMON LAW

Like most of Anglo-Canadian common law,[11] especially that dealing with private law issues, there is a direct connection — even a continuing filiation — between our principles dealing with punitive damages and those in Great Britain, although there are some important divergences with regard to this remedy. The leading case of the House of Lords on the question is *Rookes*, decided in 1964,

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[6] See Remy (ed.), *Oeuvres complètes de J. Domat* (new ed. 1828), Book II, Part VIII, Section IV.

[7] See Bugnet (ed.), *Oeuvres de Pothier* (2nd ed. 1861), no. 116 *ff.*

[8] See Viney and Markesinis, *La réparation du dommage corporel: essai de comparaison des droits anglais et français* (1985), at 54-56.

[9] It is worth pointing out that the civil law applicable in the province of Quebec is limited to "private law" subjects, such as contracts, torts, property, judicial remedies, family law, *etc.*, as opposed to "public law" subjects, such as criminal law, constitutional law, administrative law, *etc.* See generally, Tetley, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)" (2000), 60 Louisiana L. Rev. 677.

[10] See, generally, Feldthusen, "Recent Developments in the Canadian Law of Punitive Damages" (1990), 16 Can. Bus. L.J. 241; and Pratte, "Le rôle des dommages punitifs en droit québécois" (1999), 59 R. du B. 447.

[11] See Glenn, "Persuasive Authority" (1986-87), 32 McGill L. Rev. 261; and Bronaugh, "Persuasive Precedent" in Goldstein (ed.), *Precedent in Law* (1987), 217.

where Lord Devlin adopted an extremely narrow view of exemplary damages by reducing the situations where non-compensatory damages are available to three specific categories, namely, (i) "oppressive, arbitrary, or unconstitutional action by the servants of the government,"[12] (2) the so-called "torts for profit," and (3) where expressly authorized by legislation.

This restrictive approach to awarding punitive damages was strongly criticized. Notably, the Court of Appeal in England, per Lord Denning, tried to dismiss the "categories" test in *Broome v. Cassell*,[13] audaciously writing:

> This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by *Rookes v. Barnard* are so great that the judge should direct the juries in accordance with the law as it was understood before *Rookes v. Barnard*. Any attempt to follow *Rookes v. Barnard* is bound to lead to confusion.[14]

The case did reach the House of Lords[15] and, before reiterating the applicability of categories, Lord Reid gave the following stern rebuke:

> It seems to me obvious that the Court of Appeal failed to understand Lord Devlin's speech, but whether they did or not, I would have expected them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House. That *aberration* of the Court of Appeal has made it necessary to re-examine the whole subject and incidentally has greatly increased the expense to which the parties to this case have been put.[16]

The issue of whether this restrictive approach, based on categories of situations which may give rise to punitive damages, should be adopted was examined by the Law Commission for England and Wales, which concluded that such limitations were neither based on "sound principle" nor "sound policy."[17] While recommending that punitive damages be expanded, the Commission also stated that such

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[12] *Rookes*, at 1226.

[13] [1971] 2 Q.B. 354 (C.A.).

[14] *Ibid.*, at 384.

[15] *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027.

[16] *Ibid.*, at 1084 [emphasis added].

[17] Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages*, Law Commission No. 247 (1997), at para. 1.2.

awards be "consistent, moderate and proportionate."[18] Since then, British courts have developed some guidelines to keep the awards and the quanta of punitive damages under control.[19] They include the so-called "if, but only if" test, according to which exemplary damages are awarded *if, and only if,* compensatory damages are inadequate on their own to punish and deter the defendant. As well, the relevant factors to determine the quantum were set out, such as the gravity of the act, the existence of multiple plaintiffs or defendants, the good faith of the defendant, and if criminal law sanctions existed.

Like Australia,[20] Canada explicitly rejected the British "categories" test in the Supreme Court decision, *Vorvis v. Insurance Corporation of British Columbia.*[21] It was a wrongful dismissal case based on an employment contract, which included a claim for exemplary damages founded on the offensive manner in which the employee was treated. Justice McIntyre, for the majority, refused to limit such damages to certain categories; rather, he formulated the rule as follows:

> When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? 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.[22]

Dissenting in part, Wilson J. (L'Heureux-Dubé J. concurring) would have preferred an even less narrow test:

> I do not share my colleague's view that punitive damages can only be awarded when the misconduct is in itself an "actionable wrong." In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious

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[18] *Ibid.*, at para. 82.

[19] See MacKay (ed.), *Halsbury's Laws of England* (1998), Vol. 12(1), at para. 1115-1117; and McGregor, *McGregor on Damages* (1997), at para. 461-470.

[20] See *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), C.L.R. 118 (Aus. H.C.). Likewise, for New Zealand, see *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81 (C.A.).

[21] [1989] 1 S.C.R. 1085 ["*Vorvis*"].

[22] *Ibid.*, at 1106 [emphasis added].

> nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.[23]

In the end, the majority dismissed the appeal and held that the conduct was not sufficiently offensive to constitute an actionable wrong calling for punitive damages.

The issue of non-compensatory damages was again addressed by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*,[24] a libel and slander case with Charter overtones. Justice Cory wrote that punitive damages can be awarded in cases "where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency."[25] He also stated clearly that the aim of punitive damages pertained to punishment and deterrence, not to compensation for the injury suffered. The "if, and only if" test was also adopted:

> punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.[26]

Hill also enunciated what is now referred to as the "rationality" test, meaning that an award for exemplary damages will be considered adequate when it is *rationally* required to punish and deter the conduct at issue:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the Court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?[27]

Therefore, unless the exemplary damages can be justified rationally, they should not be granted at all by the judge or jury, and if they were, an appellate court could reduce or set aside the award.

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[23] *Ibid.*, at 1130.
[24] [1995] 2 S.C.R. 1130 ["*Hill*"].
[25] *Ibid.*, at 1208.
[26] *Ibid.*, at 1208.
[27] *Ibid.*, at 1208-1209.

III. QUEBEC CIVIL LAW

In the civilian family, unlike in common law, the idea that damages could be awarded in a civil suit for purposes other than *restitutio in integrum* was, traditionally, rejected.[28] The Quebec civil law, accordingly, refused to pursue objectives of punishment and deterrence when awarding damages. For instance, here is what Taschereau J. (later Chief Justice) wrote in the 1955 decision, *Chaput c. Romain*:[29]

> En vertu de 1053 C.C. l'obligation de réparer découle de deux éléments essentiels: un fait dommageable subi par la victime, et la faute de l'auteur du délit ou du quasi-délit. Même si aucun dommage pécuniaire n'est prouvé, il existe quand même, non pas un droit *à des dommages punitifs ou exemplaires, que la loi de Québec ne connaît pas*, mais certainement un droit à des *dommages moraux*. La loi civile ne punit jamais l'auteur d'un délit ou d'un quasi-délit; elle accorde une compensation à la victime pour le tort qui lui a été causé. La punition est exclusivement du ressort des tribunaux correctionnels. *French* v. *Hétu* (1908), 17 B.R. 429, *Guibord v. Dallaire* (1931), 53 B.R. 123, *Goyer v. Duquette* (1937), 61 B.R. 503, à la p. 512, *Duhaime v. Talbot* (1937), 64 B.R. 386, à la p. 391. Le dommage moral, comme tout dommages-intérêts accordés par un tribunal, a exclusivement un caractère compensatoire.[30]

More recently, however, there has been some "pollution"[31] of this purist form of civil law in the jurisdiction of Quebec, due to the adoption of several statutes which make it possible to award exemplary damages in civil proceedings when specific circumstances are met. They include the *Tree Protection Act*,[32] the *Consumer Protection Act*,[33] *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*,[34] *An Act Respecting Collective Agreement Decrees*,[35] *An Act Respecting Prearranged Funeral Services*

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[28] See, however, Viney, *La responsabilité civile dans sa fonction de peine privée* (1995), who advocates an official private sanction role for the civilian law of civil responsibility.

[29] [1955] S.C.R. 834.

[30] *Ibid.*, at 841 [emphasis in original].

[31] This is the negative opinion about punitive damages in the Quebec civil law system expressed by some commentators. See, for instance, Gardner, "Les dommages-intérêts: une réforme inachevée" (1988), 29 C. de D. 883, at 905.

[32] R.S.Q., c. P-37, art. 1.

[33] R.S.Q., c. P-40.1, art. 272.

[34] R.S.Q., c. A-2.1, art. 167.

[35] R.S.Q., c. D-2, art. 31.

and Sepultures,[36] and *An Act Respecting the Regie du Logement*.[37] It must be pointed out, however, that punitive damages are very exceptionally awarded in Quebec, even more so than in Anglo-Canadian common law because, as L'Heureux-Dubé J. wrote in *Béliveau-St-Jacques v. FEESP*,[38] it is a remedy that "does not originate in the civil law's fundamental principles of liability."[39]

Since 1994, the new *Quebec Civil Code* explicitly provides, at article 1621, that it is necessary to have legislative authorization in order for a court of justice to have competence to award punitive damages. The provision reads:

> Art. 1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.
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> Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

It is thus expressed, *inter alia*, that the objective of punitive damages in the Quebec civil law is "prevention," which is undoubtedly related to the common law 'punishment' and 'deterrence."[40]

In 1996, there was a trilogy of cases at the Supreme Court of Canada on punitive damages in Quebec civil law, consisting of *Béliveau-St-Jacques, Quebec (Public Curator) v. Syndicat national des employés de l'Hôpital St-Ferdinand*,[41] and *Augustus v. Gosset*.[42] From this series of decisions, it is clear that the principal legislative instrument authorizing exemplary damages in Quebec is the provincial

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[36] R.S.Q., c. A-23.001, art. 17.

[37] R.S.Q., c. R-8.1, art. 54.10. Also applicable in this context are articles 1899, 1902 and 1968 of the *Quebec Civil Code*.

[38] [1996] 2 S.C.R. 345 ["*Béliveau-St-Jacques*"].

[39] *Ibid.*, at 363 (L'Heureux-Dubé J., dissenting in part). It is worth pointing out that the initial proposal in the *Avant-projet du Code civil du Québec*, at art. V-290, O.R.C.C., which suggested generalizing exemplary damages in all cases of deliberate or gross fault, was not included in the *Quebec Civil Code*.

[40] See, generally, P. Roy, *Les dommages exemplaires en droit québécois: instrument de revalorisation de la responsabilité civile*, doctoral thesis, University of Montreal, 1995.

[41] [1996] 3 S.C.R. 211 ["*Hôpital St-Ferdinand*"].

[42] [1996] 3 S.C.R. 268 ["*Augustus*"].

Charter of Human Rights and Freedoms.[43] Article 49 of this "quasi-constitutional" legislation provides:

> Art. 49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

Given the scope of the *Quebec Charter* and its impact on private law, some commentators have argued that exemplary damages have now become part of the jurisdiction's general law of civil responsibility.[44]

The decision in *Béliveau-St-Jacques*[45] further supports the contention that, although an exceptional remedy, punitive damages have found a legitimate place within Quebec civil law because the Court adopted the so-called "overlapping theory" (known as the "*théorie du chevauchement*" in Quebec legal literature),[46] according to which the *Civil Code* and the *Quebec Charter* rules on civil responsibility coincide. This was opposed to the "autonomy thesis" of the *Quebec Charter* regime, to the effect that a parallel scheme of civil responsibility

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[43] R.S.Q., c. C-12 ["*Quebec Charter*"]. See, generally, Dallaire, *Les dommages exemplaires sous le régime des chartes* (1995), at 25 *ff*.

[44] See Perret, "De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec" (1981), 12 R.G.D. 121; and Baudouin and Deslauriers, *La Responsabilité Civile* (5th ed. 1998), at 184.

[45] On this case, see Drapeau, "Les conséquences de l'arrêt Béliveau-St-Jacques sur les droits de recours des victimes de harcèlement discriminatoire ayant causé une lésion professionnelle," in *Développements récents en responsabilité civile* (1997), 1; Langevin, "L'affaire Béliveau-St-Jacques: une bonne affaire pour les victimes de harcèlement?" in *Développements récents en responsabilité civile* (1997), 47; and Vézina, "L'arrêt Béliveau-St-Jacques et l'exclusion du droit commun de la responsabilité en vertu de la loi sur les accidents du travail et les maladies professionnelles: analyse des notions de lésion professionnelle et de préjudice," in *Développements récents en responsabilité civile* (1997), 85.

[46] This position was advocated by the majority of Quebec commentators: see Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile?" (1984), 44 R. du B. 222; Caron, "Le droit à l'égalité dans le Code civil et dans la Charte québécoise des droits et libertés" (1985), 45 R. du B. 345; Delwaide, "Les articles 49 et 52 de la Charte québécoise des droits et libertés: recours et sanctions à l'encontre d'une violation des droits et libertés garantis par la Charte québécoise," in *Application des Chartes des droits et libertés en matière civile* (1988), 95; and Perret, *supra*, note 44.

existed by virtue of this instrument of human rights protection.[47] More particularly, the majority in *Béliveau-St-Jacques*, *per* Gonthier J., held that a violation of a guaranteed right constituted an "unlawful interference" under article 49, paragraph 1, and amounted to a "civil fault" (*"faute civile"*) pursuant to article 1457 of the *Quebec Civil Code* (formerly article 1053 of the *Civil Code of Lower Canada*), the general provision for extra-contractual responsibility.[48]

Furthermore, in *Hôpital St-Ferdinand* and *Augustus*[49] — unanimous decisions per L'Heureux-Dubé J. — the Supreme Court explained the meaning of "intentional interference," the criterion used to award punitive damages under article 49, paragraph 2, *Quebec Charter*. Adopting a large and liberal construction of the expression, it was held that:

> ... there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probably consequences that his or her conduct will cause.[50]

Also, this "test is not as strict as specific intent, but it does go beyond simple negligence,"[51] and "an individual's recklessness, however wild

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[47] On this, see Otis, "Le spectre d'une marginalisation des voies de recours découlant de la Charte québécoise" (1991), 51 R. du B. 561; and Drapeau, "La responsabilité pour atteinte illicite aux droits et libertés de la personne" (1994), 28 R.J.T. 31.

[48] Article 1457, *Quebec Civil Code*, reads:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or *law*, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
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> [emphasis added].

The reference to "law" in the first sentence clearly indicates that infringement of a legal norm established by legislation constitutes a "fault," which of course confirms that there ought to be an integral overlap between the *Quebec Charter* regime and the general civil responsibility scheme set out in the *Quebec Civil Code*. See *Béliveau-St-Jacques*, *supra*, note 38, at 405 (*per* Gonthier J., for the majority).

[49] On these cases, see D. Gardner, "Réflexions sur les dommages punitifs et exemplaires" (1998), 77 Can. Bar Rev. 198; and Pratte, "Les dommages punitifs: institution autonome et distincte de la responsabilité civile" (1998), 58 R. du B. 287.

[50] *Hôpital St-Ferdinand*, *supra*, note 41, at 262.

[51] *Ibid.*

and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test."[52]

This pronouncement indeed resolved the controversy over the expression "intentional interference" which, it was argued, could refer to the concepts of "gross fault," "fraudulent fault" or "intentional fault," on the one hand,[53] or could refer to the fact that the defendant wanted the consequences of his wrongful act, on the other.[54] Justice L'Heureux-Dubé favoured the second position and explained that because an "unlawful interference" at article 49, paragraph 1, *Quebec Charter*, pertains to the *result* of the wrongful conduct infringing upon the guaranteed right, it is also the *result* of this conduct that the court must examine to know whether or not it is also an "intentional interference" at article 49, paragraph 2, giving rise to possible punitive damages. "In other words," wrote the Court, "for unlawful interference to be characterized as 'intentional', the person who committed the interference must have *desired the consequences* that his or her wrongful conduct would have."[55]

From a comparative perspective, it is therefore interesting to note that, pursuant to the principal regime under which punitive damages are authorized by law in the jurisdiction of Quebec — that is, the *Quebec Charter* — the test to decide the possibility of a non-compensatory award is materially different from its Anglo-Canadian counterpart. According to *Hill*, the common law criterion is whether "the *misconduct* of the defendant [was] so outrageous that punitive damages were rationally required to act as deterrence."[56] In *Vorvis*, the majority spoke of a *conduct* that had to be "harsh, vindictive, reprehensible and malicious."[57] No matter what the "epithets"[58] used, it must be pointed out that they all pertain to the *conduct* of the de-

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[52] *Ibid.*

[53] See, for instance, article 1474, paragraph 1, *Quebec Civil Code*, which provides:

> A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

[54] See the judgments of the Quebec Court of Appeal in *Augustus v. Gosset*, [1995] R.J.Q. 335, at 372-73, and in *Association des professeurs de Lignery (A.P.L.) v. Alvetta-Comeau*, [1990] R.J.Q. 130, at 136.

[55] *Hôpital St-Ferdinand*, *supra*, note 41, at 260 [emphasis added].

[56] *Hill*, [1995] 2 S.C.R. 1130, at 1209 [emphasis added].

[57] *Vorvis*, [1989] 1 S.C.R. 1085, at 1108.

[58] It was Lord Diplock, in *Cassell & Co. Ltd. v. Broome*, *supra*, note 15, at 1129, who referred to this list of adjectives as the "whole gamut of dyslogistic judicial *epithets*." [emphasis added].

fendant, that is, to the wrongful act which commands punishment and deterrence. Put another way, unlike what is prescribed in article 49, paragraph 2, *Quebec Charter*, it is not the *result* of the conduct, but the *conduct* itself that is the object of examination in Anglo-Canadian common law, in order to decide whether or not punitive damages may be awarded.

IV. Recent Developments at the Supreme Court of Canada

With *Whiten*, the Supreme Court addressed several important outstanding questions about punitive damages. There is little doubt that many aspects of this Anglo-Canadian common law case, on appeal from the Ontario Court of Appeal, will be relevant to the civilian rules governing this non-compensatory remedy. A brief review of the facts, judicial history, issues, and the actual decision is first in order.

1. Whiten v. Pilot Insurance Co.

Whiten was the owner of a house that was destroyed by fire in 1994 and the insurance company, Pilot, contested her compensation claim. After adopting a confrontational attitude, Pilot eventually refused the claim, alleging that Whiten had set fire to her own home. However, there was no evidence of arson and, in fact, the local fire chief and even Pilot's investigators found no support for such allegations. This was in effect an abusive stratagem to force Whiten, who was in a weak negotiation position because of her family's poor financial situation, to accept a deal that obviously did not represent the true value of the house. At trial, the arson allegations fell through and it was clear that the insurer had failed in its duty of good faith and fair dealing. The jury awarded $1,000,000 in punitive damages to Whiten, in addition to compensatory damages of over $300,000.

This quantum of a million dollars in punitive damages was accepted by Matlow J. of the Ontario Court (General Division), however, he found it "very high and perhaps without precedent."[59] At the Ontario Court of Appeal, the majority allowed the appeal in part and reduced the award of exemplary damages to $100,000. For the

[59] Observations reproduced at para. 30 of the decision in *Whiten* (1996), 132 D.L.R. (4th) 568 (Ont. Gen. Div.); affd (1996), 170 D.L.R. (4th) 280 (C.A.); affd 2002 SCC 18.

majority, Finlayson J. opined that, in spite of the unacceptable conduct of Pilot, the quantum was "simply too high."[60] Dissenting, Laskin J. would have deferred to the decision of the jury. Before the Supreme Court of Canada, the only issue on appeal was the awarding and the quantum of punitive damages, which was raised back to the initial amount of $1,000,000.

Writing for the majority, Binnie J. preliminarily dealt with two controversial points concerning this remedy, namely, the argument that punishment and deterrence should be purposes pursued by criminal law, and the criticism that high awards of exemplary damages constitute an "Americanisation" of Anglo-Canadian law. As regards the first objection, he stated most forcefully that punishment is a legitimate objective of civil law (*i.e.*, private law) and that punitive damages "serve a need that is not met either by the pure civil law or the pure criminal law."[61] With respect to the pejorative comparison with the United States of America, Binnie J. rejected it, referring to the deep roots of this judicial remedy in Canadian case law,[62] and to the ancient practice of forcing the defendant, for punishment purposes, to pay a sum equal to a multiple of what is required for compensation.[63]

Then, after an elaborate comparative study of other common law jurisdictions (Great Britain, Australia, New Zealand, Ireland, and the United States of America) on exemplary damages issues, the majority drew the following 10 conclusions. First, Binnie J. confirmed that the British "categories" approach ought to be rejected and said that the nature of punitive damages generally restricted them to actions for intentional torts[64] or for violations of fiduciary obligations,[65] although they could exceptionally be granted in contractual actions[66] or even in cases of negligence and nuisance.[67] Second, there

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[60] (1999), 42 O.R. (3d) 641, at 661 (C.A.).

[61] *Whiten*, 2002 SCC 18, at para. 37.

[62] See, for instance, *Wilkes v. Wood* (1763), 98 E.R. 489 (K.B.); and *Huckle v. Money* (1763), 95 E.R. 768 (K.B.).

[63] *Whiten*, *supra*, note 61, at para. 41.

[64] For example, see *Hill*.

[65] For example, see *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 13.

[66] For example, see *Vorvis*, *supra*, note 57.

[67] For example, see *Denison v. Fawcett*, [1958] O.R. 312 (C.A.); and *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228 (B.C. C.A.). See also the recent judgment of the Judicial Committee of the Privy Council on appeal from the New Zealand Court of Appeal, in *"A" v. Bottrill*, [2002] U.K.P.C. 44, a split decision deliv-

was a large consensus that "the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation."[68]

Third, exemplary damages are an exceptional remedy and, in deciding to award them, consideration should be given to whether criminal or penal sanctions were imposed in relation to the same conduct. Fourth, beyond the epithets used ("high-handed," "oppressive," "vindictive," *etc.*), the approach adopted should call for more principles and less exhortation. Fifth, the *Hill* "rationality" test ought to apply both in deciding whether to award punitive damages and in evaluating the quantum. Sixth, this remedy is appropriate in situations where the defendant obtained a financial advantage from his or her wrongful act. Seventh, the case law seems not to favour formulas like ceilings or ratios between compensatory and non-compensatory damages (unless provided by statute). Eighth, proportionality should be the "governing rule for quantum,"[69] so that there must be a rational link between the objectives of retribution, deterrence and denunciation, and the award of punitive damages; the "if, and only if" test enjoys broad support for that purpose. Ninth, when a jury decides the issue, the judge ought to give a sufficiently precise directive regarding exemplary damages. Tenth, the standard of review on appeal of a decision on non-compensatory awards should not be as stringent as for compensatory awards.

Having made these general points, Binnie J. looked more particularly at six questions raised by the present case. First, whether it was possible to award punitive damages in an action based on contract, which was answered in the affirmative. Second, whether this remedy should be explicitly requested in the statement of claim, which was answered in the affirmative because of the rules on fair notice and opportunity to respond before punishment is imposed. Third, whether the directives on exemplary damages here given to the jury by the judge were adequate, which was answered in the affirmative. Fourth, whether reference to ratios between compensatory and non-compensatory damages should be favoured, which was answered in the negative because the objectives those two types of remedies pursue are unrelated. Fifth, whether it was appropriate in the present

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ered on September 6, 2002, wherein the majority allowed punitive damages for medical professional negligence.

[68] *Whiten*, *supra*, note 61, at para. 68.

[69] *Ibid.*, at para. 74.

case to award punitive damages, which was answered in the affirmative. Finally, whether the original quantum of $1,000,000 was "rational," which was answered in the affirmative.

2. Punitive Damages in Contracts

One of these questions, in particular, is worth exploring in greater detail and with a comparative perspective, namely, that of *contractual* exemplary damages. The traditional position in Anglo-Canadian common law is that exemplary damages cannot be awarded in cases of breach of contract. The underlying idea of this positivist rule relates to the freedom of the parties to contract, namely, that one can decide to respect his or her promise, or one can decide to violate it and instead pay damages in compensation. This is what Waddams wrote:

> Exemplary damages are not normally awarded for breach of contract. This rule is based on the assumption underlying much of contract law that a breach of contract, coupled with an offer to pay just compensation, does no harm to the plaintiff, is not morally wrong, and may be desirable on the grounds of efficiency.[70]

This rule, however, was always somewhat controversial, as the following judicial comment shows:

> [T]o allow the imposition of punitive damages in tort actions and to deny them without exception for breach of contract standing alone is a mechanical classification without sound and legitimate basis.[71]

The first significant development in the area came with the Supreme Court of Canada's decision in *Central Trust Co. v. Rafuse*,[72] which stated that the wrongful act of the defendant may lead to

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[70] Waddams, *The Law of Damages* (2nd ed. 1991), at 11-14 (footnotes omitted). See also Holmes, "The Path of the Law" (1897), 10 Harv. L. Rev. 457, at 462, who wrote: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else." For a rigorous analysis of the contemporary challenges facing judicial remedies in contracts, see Farnsworth, "Legal Remedies for Breach of Contract" (1970), 70 Columbia L. Rev. 1145.

[71] *Thompson v. Zurich Insurance Co.* (1984), 5 C.C.L.I. 251, at 262 (Ont. H.C.). See also *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 136 D.L.R. (3d) 49 (Ont. H.C.); *Edwards v. Lawson Paper Converters Ltd.* (1984), 5 C.C.E.L. 99 (Ont. H.C.); *Centennial Centre of Science and Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253 (H.C.); and *Dale Perusse Ltd. v. Kason* (1985), 6 C.P.C. (2d) 129 (Ont. H.C.).

[72] [1986] 2 S.C.R. 147 ["*Central Trust*"].

(concurrently or alternatively) an action in tort and/or an action in contract. In Quebec, a similar situation of possible option between a contractual action and an extra-contractual action used to exist, based on the case *Wabasso Ltd. v. National Drying Machinery Co.*[73] This ruling was set aside in 1994, however, with the adoption of the new *Quebec Civil Code* which, at article 1458, paragraph 2, prohibits the choice of action by imposing the contractual regime whenever there is such an agreement between the parties.

In *Central Trust*, which dealt with the professional liability of a lawyer, Le Dain J. explained that a contract between the parties does not affect the duty of care owed by the defendant to the plaintiff in an action based on negligence at common law. He wrote:

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.[74]

This reasoning on the dynamics between torts and contracts allows one to argue that the existence of a contractual link between the parties does not bar the possible award of punitive damages based on a cause of action in torts. The necessary element, however, is that the breach of contract is accompanied by tortious conduct that calls for punishment.

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[73] [1981] 1 S.C.R. 578. This rule was later confirmed in *Air Canada v. McDonnell Douglas Co.*, [1989] 1 S.C.R. 1554.

[74] *Central Trust*, *supra*, note 72, at 205.

This is how the argument, according to which, in principle, it should not be impossible to award non-compensatory damages in an action based in contract, originated. What followed was the statement by McIntyre J. in *Vorvis* — already alluded to[75] and reproduced by Binnie J. in *Whiten*[76] — which suggests that a court can order the defendant to pay punitive damages in a contract case, provided there is a distinct cause of action, separate from the contractual relationship between the parties. This was referred to as the "commission of an actionable wrong,"[77] an expression picked up by lower courts.[78] The ruling 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.[79]

This interpretation is also supported by the relevant provision of the *Restatement (2d) on the Law of Contracts*,[80] compiling the law applicable in the United States of America. Indeed, section 355 reads:

> 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.[81]

In *Vorvis*, McIntyre J. referred to this provision of American law,[82] and that extract of his reasons was reproduced by Binnie J. in *Whiten*.[83] Of course, the problem in the latter case was that, besides the breach of the insurance contract, the wrongful act of the defendant did not give rise to a cause of action in torts. Rather, it merely constituted a violation of a duty of good faith and fair dealing implied in the insurance contract.

This explains why the majority in *Whiten* emphasized that, strictly speaking, the Supreme Court of Canada never explicitly stated that

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[75] See *supra*, note 57.

[76] *Whiten*, *supra*, note 61, at para. 78.

[77] *Vorvis*, *supra*, note 57, at 1106.

[78] See, for instance, *Taylor v. Pilot Insurance Co.* (1990), 75 D.L.R. (4th) 370 (Ont. Gen. Div.).

[79] See, among many authors, Cassels, *Remedies: The Law of Damages* (2000), at 276: "In *Vorvis* the Court refused to award punitive damages in a wrongful dismissal case, holding that punitive damages are not available in contract unless the breach also amounts to an 'actionable wrong' (by which the Court seems to have meant a 'tort')."

[80] American Law Institute, *Restatement (2d) on the Law of Contracts* (1986).

[81] [Emphasis added].

[82] *Vorvis*, [1989] 1 S.C.R. 1085 at 1106.

[83] *Whiten*, 2002 SCC 18, at para. 78.

exemplary damages for breach of contract were limited to situations where there was also a cause of action in torts. In that regard, Binnie J. referred again to *Vorvis* where McIntyre J. wrote that the "termination of the contract on this basis by the employer is not *a wrong in law*."[84] Thus the terminology used did not refer to a "tort" *per se*, something on which the majority of the Court relied in order to hold that all "wrongs" giving rise to a cause of action fall within the ambit of the ruling in *Vorvis*:

> First, McIntyre J. chose to use the expression "actionable wrong" instead of "tort" even though he had just reproduced an extract from the *Restatement* which *does* use the word tort. It cannot be an accident that McIntyre J. chose to employ a much broader expression when formulating the Canadian test.[85]

With respect to this deviously limited interpretation of the literal meaning of Justice McIntyre's reasons in *Vorvis*, it is appropriate to note the irony that, while we thought the restrictive approach to statutory interpretation had finally been evacuated,[86] such a narrow method, focusing on the strict letter of legal prescriptions, has come back through the backdoor of the Court in a reincarnated form, namely, by identifying the *ratio decidendi* of a case. As the author wrote elsewhere,[87] similar to the old "forms of action" at common law, it seems that narrow literal interpretations of legal texts (legislative or case law) "we might have buried, but they still rule us from their graves."[88]

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[84] *Vorvis*, *supra*, note 82, at 1109 [emphasis added].

[85] *Whiten*, *supra*, note 83, at para. 80 [emphasis in original].

[86] See, as examples, the following recent judgments of the Supreme Court of Canada: *R. v. Davis*, [1999] 3 S.C.R. 759; *Francis v. Baker*, [1999] 3 S.C.R. 250; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Hydro Québec*, [1997] 3 S.C.R. 213; *Alberta (Treasury Branches) v. Canada (Minister of National Revenue)*, [1996] 1 S.C.R. 963; *R. v. Lewis*, [1996] 1 S.C.R. 921; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Creighton*, [1993] 3 S.C.R. 3; and *R. v. DeSousa*, [1992] 2 S.C.R. 944.

[87] Beaulac, "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000), 63 Sask. L. Rev. 581, at 616.

[88] Maitland, *The Forms of Action at Common Law* (1936), at 2. The whole sentence reads: "The forms of action we have buried, but they still rule us from their graves." This expression illustrates that, although the forms of action have lost their procedural significance since the English *Judicature Act, 1873*, they are still very relevant to several areas of substantive law, including contracts, torts, property, and restitution: Zweigert & Kötz, *An Introduction to Comparative Law* (2nd ed. 1987), at 205-207.

Justice Binnie also refered to the dissenting opinion of Wilson J. (L'Heureux-Dubé J. with her) in *Vorvis*, to the effect that the award of punitive damages for breach of contract should not be limited to cases where the conduct of the defendant also constitutes an actionable wrong. Rather, wrote Wilson J., "the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature."[89]

Moreover, Binnie J. must also reconcile a relatively recent statement of the Supreme Court of Canada with the position he wished to adopt here, namely, that it is not only when the wrongful act of the defendant is also a tort that exemplary damages will be possible in a contract case. Indeed, the decision in *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*[90] saw McLachlin and Bastarache JJ. quoting *Vorvis* to support the proposition that "the circumstances that would justify punitive damages for breach of contract *in the absence* of actions also constituting a tort are *rare*."[91] It is no less than a *tour de force* of "distinguishing" that allowed Binnie J. to say that this extract meant that misconduct other than tortious conduct could give rise to exemplary damages for breach of contract — "Rare they may be, but the *clear* message is that such cases do exist."[92] *La clarté se discerne grâce à l'oeil de celui ou celle qui la cherche!*

The majority held that awards of punitive damages in contract cases are not restricted to situations where the misconduct also constitutes a tort. It follows that *all wrongs* giving rise to a cause of action, separate from the contractual relationship between the parties, suffice to allow a grant of non-compensatory damages in a contractual context. "An independent actionable wrong is required," Binnie J. wrote, "but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation."[93] And one of these *distinct and separate contractual provisions* would be the duty of good faith and fair dealing, implicit in insurance contracts such as that in *Whiten*.

As a consequence of this ruling, the number of cases that could lead to such awards in actions based on contracts will increase con-

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[89] *Vorvis*, *supra*, note 82, at 1130.
[90] [1999] 3 S.C.R. 408.
[91] *Ibid.*, at 420 [emphasis added].
[92] *Whiten*, *supra*, note 83, para. 81 [emphasis added].
[93] *Ibid.*, para. 82.

siderably. One must recall that this non-compensatory remedy was originally used in the context of intentional torts — like assault and battery,[94] trespass to land,[95] and interference with chattels.[96] A major development occurred with the decision of the Court of Appeal of British Columbia in *Robitaille v. Vancouver Hockey Club Ltd.*,[97] which held that punitive damages were possible in negligence actions. Damages other than compensatory, however, are very exceptional in such actions because, by definition, negligence entails a state of mind lower than intention (usually amounting to mere "inadvertence"[98]), which would seldom be reprehensible enough to justify punishment and deterrence through an award of exemplary damages.

Whiten, therefore, opens the door wide to non-compensatory damages in breach of contract cases and, in the process, brushes aside the traditional rule based on the positivist and commercial idea, referred to earlier,[99] that a party can choose not to honour his or her contractual promise. Another, more modern argument supporting the limited use of punitive damages in contract cases, relates to law and economics[100] — so long as there is full compensation for the loss suffered, the law should not impede the parties to elect not to abide by their agreements because imposing a penalty upon the breaching party is uneconomical.

Now, what must be fully understood is how broad the categories of cases identified by Binnie J. are that may give rise to awards of exemplary damages for breach of contract. The only criterion is an *independent actionable wrong* which could give rise to a cause of action other than contractual. Further, as examples of such cases, the majority spoke generally of a "breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation."[101] It is

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[94] See, for example, *Delta Hotels Ltd. v. Magrum* (1975), 59 D.L.R. (3d) 126 (B.C. S.C.).

[95] See, for example, *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42 (B.C. S.C.).

[96] See, for example, *Camway Trucking Ltd. v. Toronto-Dominion Bank* (1988), 9 A.C.W.S. (3d) 164 (Ont. H.C.).

[97] (1981), 124 D.L.R. (3d) 228.

[98] See Cassels, *supra*, note 79, at 264.

[99] See *supra*, at note 70, and accompanying text.

[100] See Friedman, *An Economic Explanation of Punitive Damages* (1989); and, on law and economics generally, see Harris, *Legal Philosophies* (1980), at 42-47; Posner, *Economic Analysis of Law* (4th ed. 1992); and Becker, *The Economic Approach to Human Behaviour* (1976).

[101] *Whiten*, *supra*, note 83, para. 82.

hard to imagine a broader judicial illustration than this because, by associating contractual and fiduciary (based on equity) obligations with tort duties, the Court covers virtually all private law causes of action. In fact, the only remaining action would be restitution, which could arguably fall within the category of fiduciary obligations, that could be renamed "equitable obligations."

The duty of good faith and fair dealing (deemed sufficient in *Whiten*) provides a good example of the extremely large scope of the proposed test for awarding punitive damages in contract cases.[102] From a comparative point of view, we know in Quebec, since the Supreme Court of Canada's decision in *National Bank of Canada v. Houle*,[103] that the abuse of right theory, based on an implied contractual obligation of good faith — now codified at article 1375 *Quebec Civil Code*[104] — means that all contracts (commercial or not) may be judicially reviewed for conformity.[105] The obligation of good faith, accessory to the main agreement, has thus acted as a contractual moral norm in contracts for services,[106] mandates,[107] property leases,[108] distribution commercial contracts and franchises,[109]

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[102] See, generally, Will, "Punitive Damages for Bad Faith" (1997), 15 Can. J. Insurance L. 19.

[103] [1990] 3 S.C.R. 122.

[104] The provision reads: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished." More generally, the *Quebec Civil Code* prescribes a good faith duty at article 6: "Every person is bound to exercise his civil rights in good faith;" and prohibits abuse of rights at article 7: "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith."

[105] See Lefebvre, *La bonne foi dans la formation du contrat* (1998), at 1: "La résurgence de la bonne foi dans le droit n'est pas une problématique uniquement québécoise, elle est universelle. Dorénavant, ces préceptes doivent être considérés comme la mesure et la limite de la liberté contractuelle." [footnotes omitted].

[106] See, for example, *Drouin c. Electrolux Canada ltée*, [1988] R.J.Q. 950 (C.A.); *Imprimeries Stellac inc. c. Plante*, [1989] R.J.Q. 256 (C.A.); *Domtar inc. c. St-Germain*, [1991] R.J.Q. 1271 (C.A.); and *Standard Broadcasting Co. Ltd. c. Steward*, [1994] R.J.Q. 1751 (C.A.).

[107] See, for example, *Brousseau Ltd. c. Carrier Engineering Ltd.*, [1950] C.S. 371.

[108] See, for example, *Placements Lacroix et Dutil inc. c. Peoples, St. Michael Shops of Canada Ltd.*, [1984] C.S. 229; and *Téléson électronique inc. c. Développement Iberville ltée*, [1996] R.R.A. 995 (C.A.).

[109] See, for example, *Latreille Automobile Ltée c. Volvo Canada Ltd.*, [1978] C.S. 191; *Godbout c. Provisoir inc.*, [1986] R.L. 212 (C.A.); and *Supermarché A.G.R. inc. c. Provigo Distribution inc.*, [1998] R.J.Q. 47 (C.A.).

suretyships,[110] and not only in insurance contracts[111] (to which Binnie J. seems to think the idea of good faith will be limited in common law).

In light of the Quebec civil law experience on the question, it seems plausible that the concept of "good faith" has a large potential for growth, not yet exploited, in the Anglo-Canadian common law tradition. If this obligation develops along the civilian lines, the reasoning in *Whiten* is likely to mean that punitive damages will indeed be available in many cases of breach of contract. If this happens, the floodgates that were long kept closed for non-compensatory damages in contracts are likely to give way and, as a result, dramatically change the premises, even the very fabric, of contract law in Canada.

V. Conclusion

It is certainly appropriate to close this comparative study with a brief examination of the important elements that could, and should, be extracted from the decision in *Whiten* for the civil law in the province of Quebec.

First, the remarks on contractual punitive damages will not prove useful for the civilian jurisdiction. The principal legislative provision authorizing exemplary damages is article 49 *Quebec Charter*, which speaks of "unlawful and intentional interference," and based on the "overlapping theory" (*"théorie du chevauchement"*), the basic element of "unlawfulness" is associated with a "civil fault" (*"faute civile"*).[112] In civil law, however, the concept of "civil fault" is much larger than that of "wrong" in common law — it is indeed the basis for judicial remedies not only in tort, but also in contract.[113] Therefore, within the whole scheme of private law in a civilian system, which is based on the concept of *obligations* (contractual, extra-contractual),[114] exemplary

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[110] See the famous case, *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339. For another example, see *Garantie Co. d'assurance de l'Amérique du Nord c. Beaudet et Co. ltée*, [1996] R.R.A. 599 (C.A.).

[111] See, for example, *Travitian c. Zurich Co. d'assurances*, [1993] R.R.A. 170 (C.S.).

[112] See *Béliveau-St-Jacques*, at 405.

[113] See Baudouin and Deslauriers, *supra*, note 44, at 23*ff*.

[114] See Baudouin and Jobin, *Les Obligations* (5th ed., 1998), at 17:

> Dans la terminologie civiliste, le mot 'obligation' a un sens beaucoup plus précis. Elle est le lien de droit, existant entre deux ou plusieurs personnes, par lequel une personne, appelée débiteur, est tenue envers une autre, appelée créancier, d'exécuter une prestation consistant à faire ou à ne pas faire quelque chose, sous la menace d'une contrainte juridique.

damages are available in Quebec without any distinction between contract and tort situations, so long as they are authorized by law, as prescribed by article 1621, paragraph 1, *Quebec Civil Code*.

The second element is much more likely to find direct application in Quebec civil law, namely, the criteria to decide the availability and the quantum of punitive damages. Article 1621, paragraph 2, *Quebec Civil Code* expressly provides for some criteria, including the gravity of the fault, the financial situation of the defendant, the amount of compensatory damages, and whether the losses are covered by insurance (*i.e.*, a third person). There is no doubt that Binnie J.'s remarks in *Whiten* on the criteria to determine the "proportionality" between the award and the objectives of exemplary damages (headings which coincide in part with the civilian factors)[115] should apply *mutatis mutandis* in interpreting and applying article 1621, paragraph 2 in Quebec.[116]

More particularly, what was written about the factors that ought to be considered to determine the *gravity* of the defendant's misconduct is particularly apposite. They would include (i) the planned and deliberate nature of the act, (ii) the intent and motive behind the conduct, (iii) the period of time during which the outrageous conduct persisted, (iv) whether or not the defendant concealed or attempted to cover up his or her actions, (v) the fact that the defendant knew that his or her conduct was wrong, (vi) whether the misconduct brought a financial advantage to the defendant, and (vii) the fact that the interest impeded upon was known by the defendant to be

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[115] From para. 112 to para. 126 of the decision in *Whiten*, 2002 SCC 18, those headings read: "(i) Proportionate to the Blameworthiness of the Defendant's Conduct, (ii) Proportionate to the Degree of Vulnerability of the Plaintiff, (iii) Proportionate to the Harm or Potential Harm Directed Specifically at the Plaintiff, (iv) Proportionate to the Need for Deterrence, (v) Proportionate, Even After Taking Into Account the Other Penalties Both Civil and Criminal, Which Have Been or Are Likely to be Inflicted on the Defendant for the Same Misconduct, (vi) Proportionate to the Advantage Wrongfully Gained by a Defendant from the Misconduct."

[116] Indeed, although these remarks were made in a common law context, Quebec courts could certainly follow the proposed reasoning, with of course the required adjustments. This is what they did with the Supreme Court "trilogy" on personal injury damages — *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Board of School Trustees of School District No. 57*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287 — but with the caveat that the cases were adopted so long as they were compatible with the civil law tradition: see Baudouin and Deslauriers, *supra*, note 44, at 218; and, generally, D. Gardner, *L'évaluation du préjudice corporel* (2nd ed. 2002).

special to the victim (*e.g.*, deeply personal interests, irreplaceable objects, *etc.*).[117]

According to *Whiten*, the degree of vulnerability of the plaintiff (financial or otherwise) is another relevant circumstance, especially when there is an unequal relationship between the parties and an abuse of power by the defendant.[118] This should also be a most important factor in deciding the availability and the quantum of punitive damages in civil law, even more so when one considers that the *Quebec Charter* — which guarantees rights and freedoms that must inform judicial decisions — explicitly provides equality protections at article 10. Also, Binnie J.'s observation about taking into account other penalties, both civil and criminal, either imposed or that may be imposed for the same misconduct, should be applicable in *la belle province*.[119] Indeed, the expression "extent of the reparation for which he is already liable to the creditor" in article 1621, paragraph 2, *Quebec Civil Code*, ought to be interpreted liberally enough to include both civil and criminal sanctions.[120]

The third and last element in the *Whiten* decision that is of particular interest from a Canadian comparative point of view concerns the new emphasis placed by the Supreme Court on the *objectives* of punitive damages (punishment, deterrence and the new denunciation), away from the actual *characterisation* of the misconduct. Indeed, Binnie J. wrote that: "the incantation of the time-honoured pejoratives ('high-handed,' 'oppressive,' 'vindictive,' *etc.*) provides insufficient guidance (or discipline) to the judge or jury setting the amount"[121] of exemplary damages. The Court thus attempted to change the dynamics at work — "A more principled and less exhortatory approach is desirable."[122] This more Cartesian method of analyzing exemplary damages is most opportune for Quebec civil law, a member of the civilian legal family that prides itself on being rational, articulate and systematic.[123]

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[117] See *Whiten*, *supra*, note 112, at para. 113.

[118] *Ibid.*, at para. 114-116.

[119] *Ibid.*, at para. 118-123.

[120] In *Papadatos c. Sutherland*, [1987] R.J.Q. 1020, the Quebec Court of Appeal did not settle the question of whether or not such sanctions ought to be taken into account.

[121] *Whiten*, *supra*, note 112, at para. 70.

[122] *Ibid.*, at para. 70.

[123] See David & Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (10th ed. 1992), at 16-18; and, generally, Merryman, *The Civil Law Tradition — An Introduction to the Legal Systems of Western Europe and Latin America* (2nd ed. 1985).