Will Failure to Admit Liability in a Timely Fashion Give Rise to Punitive Damages? The Law after *McCabe*

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The Ontario Court of Appeal recently released *McCabe v. Roman Catholic Episcopal Corporation for the Diocese of Toronto, in Canada*[1] ("*McCabe*"), and this decision certainly begs the question: Does failing to admit liability in a timely fashion create the risk of a punitive damages award?

The short answer is likely no. However, this paper will delve deeper and consider the fundamental principles underlying vicarious liability and punitive damages. It will also contemplate the impact of fiduciary relationships on punitive damages, some insurance coverage complications and where the law stands following *McCabe*.

Ultimately, this paper will argue that failure to admit liability in a timely fashion should not give rise to an award of punitive damages. A defendant has the right to make a plaintiff prove his or her case. When the plaintiff has amassed a body of evidence that

[1] 2019 ONCA 213.

would discharge his or her burden of proof with respect to liability, and the defendant still fails to admit liability, then that late admission or failure to admit liability, most especially where vicarious liability is concerned, should be dealt with by means of a costs sanction.

Vicarious Liability

Vicarious liability is a finding of responsibility in the absence of actual fault. It is the law's imposition of blame on one person for the tort of another, despite the first person not having committed the wrongful act.[2]

The two fundamental policy concerns underlying the imposition of vicarious liability are the provision of a just and practical remedy for the harm and deterrence of future harm.[3] As Justice McLachlin stated in *John Doe v. Bennett*:[4]

> ***Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future.***[5]

[2] Klar, Jeffries, *Tort Law*, 6th ed. (Carswell, 2017), p. 774.
[3] *Bazley v. Curry*, [1999] 2 S.C.R. 534, ["*Bazley*"].
[4] 2004 SCC 17.
[5] *Ibid* at para 20.

In determining whether an employer is vicariously liable for an employee's "***unauthorized, intentional wrong in cases where precedent is inconclusive,***" the Supreme Court of Canada has reasoned that courts should be guided by the following principles:

1. ***They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct."***

2. ***The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.***

3. ***In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:***

    a. ***the opportunity that the enterprise afforded the employee to abuse his or her power.***
    b. ***the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);***
    c. ***the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;***
    d. ***the extent of power conferred on the employee in relation to the victim;***
    e. ***the vulnerability of potential victims to wrongful exercise of the***

employee's power.[6]

Vicarious liability was an important, although subtle, consideration in *McCabe*. There, a majority of the Court of Appeal overturned a jury award of punitive damages against an employer who did not admit vicarious liability until the start of trial.

This case is interesting on a number of fronts, but is especially instructive when considering the fundamental principles underlying both vicarious liability and punitive damages, and the interplay between the two.

The McCabe Trial Decision

The *McCabe* decision was based on an historical sexual abuse claim. In such claims, it is common that the person who committed the abuse is either impecunious, or as is often the case, deceased. The key defendant is almost always the institution which employed the abuser, and the key issue is whether that employment relationship can lead to a finding of liability on the institution, even though the institution itself did nothing wrong.

In *McCabe*, the respondent had brought an action against the Roman Catholic Episcopal Corporation for the Diocese of Toronto (the "Diocese") as a result of sexual abuse by a now-deceased priest when the respondent was eleven years old.

[6] *Bazley*, supra note 3 at para 41.

The Diocese denied liability throughout the course of litigation. The Diocese then admitted vicarious liability on the first day of trial. As a result of this admission, the trial proceeded solely on the issue of damages. The jury ultimately awarded the plaintiff general and aggravated damages of $250,000, loss of income of $280,000, treatment expenses of $5,000, and punitive damages of $15,000.

The award of punitive damages had been based on the fact that the Diocese's failure to admit liability "***caused the fragile respondent to suffer pain***".[7]

The Diocese appealed on multiple grounds, including that the award of punitive damages was unwarranted. The Diocese's position with respect to punitive damages was as follows:

> ***The award of punitive damages is unwarranted. It was argued on the basis that the [Diocese] failed to admit vicarious liability for the abuse until the first day of trial. The [Diocese] did not commit an intentional tort to attract a claim of punitive damages. The admission of liability on the first day of trial was not conduct of a malicious, oppressive or high-handed nature***.[8]

[7] *McCabe*, *supra* note 1 at para 52.
[8] *Ibid* at para 36.

The Court of Appeal Decision

The Court of Appeal split on whether the trial judge erred in permitting the jury to decide whether the Diocese's failure to admit liability until the first day of trial could result in an award of punitive damages.

The Dissenting Opinion

Benotto, J.A., in dissent, found that the question of punitive damages should rightly have been left to the jury. The Diocese's strategic decision not to admit responsibility to a vulnerable victim of abuse, given the circumstances, was egregious and was deserving of condemnation.

She first provided a useful overview of the nature of punitive damages, noting punitive damages are meant to punish wrongful acts so malicious and outrageous that they are deserving of punishment on their own. There must be an independent actionable wrong, which she points out can include breach of a fiduciary obligation.

She then reviewed a number of cases where punitive damages had been awarded due to litigation conduct. Such conduct, she points out, can represent an independent actionable wrong that could give rise to the award punitive damages.

Here, the Diocese's "***strategic decision not to admit responsibility to a vulnerable victim of abuse – given these circumstances – is uniquely egregious***"[9] and "***caused the fragile respondent to suffer pain***" and was deserving of condemnation.[10]

Benotto, J.A. relied on evidence from Mr. McCabe's expert psychologist, who had explained during the trial that the trauma suffered by Mr. McCabe was made worse by the fact that liability was denied and by the fact that he would have to prove that the events of the sexual assault occurred. In that doctor's opinion, this re-victimized Mr. McCabe and caused him to be fragile, stressed and anxious.

Benotto, J.A. added:

> ***In my view the jury's award was a symbolic condemnation of the Diocese's conduct in failing to admit liability despite knowledge of additional harm to Mr. McCabe. To overturn the jury's determination would be to sanction the conduct.***[11]

The Majority Opinion

Roberts, J.A. and Strathy, C.J.A. disagreed with Benotto, J.A. on the issue of punitive damages, and found that the trial judge erred in leaving the issue to the jury. In doing so, the trial judge had created "***a new and unprecedented category of punitive damages arising out of the timing of the appellant's admission of liability***".[12] Roberts, J.A. noted

[9] *Ibid* at para 49.
[10] *Ibid* at para 52.
[11] *Ibid* at para 59.
[12] *Ibid* at para 63.

that there is no basis in law for such an award, and in fact, there was no evidence of any misconduct.

Roberts, J.A. explained:

> ***In determining whether punitive damages should be granted, the court must ask two threshold questions: first, what is the impugned conduct; and, second, whether the impugned conduct rises to the level of egregious misconduct warranting the exceptional award of punitive damages.***[13]

She found that the Diocese was "***perfectly entitled***" to not admit liability until the opening of trial, and that its exercise of its litigation rights "***cannot be characterized as egregious misconduct warranting punitive damages.***"[14]

Roberts, J.A. noted that in all of the cases relied on by Benotto, J.A., there were findings that the misconduct in the litigation was a continuation of the tortious misconduct which gave rise to, and was the subject of, the action in the first place.

Here however, the Diocese did not deliberately inflict pain on the respondent, nor did it abuse him. This is a key distinction, and one that highlights the principals underlying an admission of vicarious liability. The Diocese's litigation strategy was not a continuation of tortious conduct which gave rise to its liability to the respondent. Quite to the contrary, the Diocese's liability was without fault, and therefore the decision on when to admit

[13] *Ibid* at para 67.
[14] *Ibid* at para 69.

liability was completely unrelated to its role in the harm committed against the respondent.

As Roberts, J.A. found, the delay in the admitting of vicarious liability, alone, could not be characterized as egregious misconduct justifying an award of punitive damages. The Diocese was perfectly entitled to not admit liability until the opening of the trial:

> ***Punitive damages cannot be awarded solely for the failure or delay of a defendant to admit liability. To create such a category of punitive damages would completely undermine the foundation of the litigation process. A defendant is under no obligation to admit liability and, subject to attracting the elevated costs consequences I refer to below, may put the plaintiff to the strict proof of his or her allegations, no matter how painful the litigation process proves to be for the plaintiff, without fear of invoking a punitive damage award…Unfortunately, that is the nature of the litigation process."***[15]

Absent this strong message from the majority, one could envision a significant increase in the number of plaintiffs leading evidence of the pain caused in having to prove their case at trial, in an attempt to be awarded punitive damages - pain in explaining how he was rear-ended in order to prove liability for a car accident, pain in having to talk about how she slipped on the sidewalk, or the stress of having to discuss changes in a marital relationship or a job reassignment. Surely these scenarios, even where there is a power imbalance, should not demand a defendant admit liability or admit that the damages claimed are reasonable. We are not at the point where there is an obligation on a

[15] *Ibid* at para 72.

defendant to conduct litigation in a way that would avoid any further pain and stress on the plaintiff, for fear of being accused of malicious and high handed conduct.

Roberts, J.A. added that it was procedurally unfair to the Diocese to allow the respondent to put forward a new basis for punitive damages that had not been pleaded.

Mr. McCabe had alleged that the Diocese was vicariously liable for the punitive damages claimed against Father Robert. This allegation was rightly rejected by the trial judge, as the foundational principals for punitive damages would be absent if applied on the basis of vicarious liability for the misconduct of another. The same essential reasoning applies to some insurance coverage considerations discussed below, but regardless, Mr. McCabe should not have then been able to raise a new theory for punitive damages based on the Diocese's delay in admitting liability.

The final issue was that of costs. Citing section 131 of the *Courts of Justice Act*, Rule 57.01 of the *Rules of Civil Procedure*, and the court's "***inherent jurisdiction to control its process to prevent an abuse of process***",[16] Roberts, J.A. reasoned that, while the Diocese's denial of liability did not attract an award of punitive damages, it may give rise to a "***considerable costs sanction***".[17]

[16] *Ibid* at para 77.
[17] *Ibid* at para 76.

Further Principles of Punitive Damages

Punitive damage awards allow civil courts to impose fines for conduct which they find worthy of punishment. The court remits this fine to the plaintiff who, already fully compensated by the compensatory portion of the damages, becomes, by definition, overcompensated. The theory of punitive damages is that they serve as retribution, deterrence and denunciation for conduct which a court finds reprehensible.

As Roberts, J.A. noted in *McCabe*, punitive damages are "***not meant to be compensatory, but instead act as a deterrent for exceptional misconduct***".[18] She noted that punitive damages should not be granted where "***the compensatory damages awarded suffice as a deterrent***".[19]

In *Whiten v. Pilot Insurance Co.*,[20] the Supreme Court of Canada noted that punitive damages are awarded against a defendant in exceptional cases for "***malicious, oppressive and high-handed***" misconduct that "***offends the court's sense of decency***".[21] Punitive damages are limited to misconduct that "***represents a marked departure from ordinary standards of decent behaviour***".[22]

[18] *Ibid* at para 64.
[19] *Ibid*.
[20] 2002 SCC 18.
[21] *Ibid* at para 36, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.).
[22] *Ibid*.

In *Whiten*, the Court emphasized the importance of proportionality when considering punitive damages awards. The Court indicated that a proper award must look at proportionality in several dimensions, including:

- proportionate to the blameworthiness of the defendant's conduct;
- proportionate to the degree of vulnerability of the plaintiff;
- proportionate to the harm or potential harm directed specifically at the plaintiff;
- proportionate to the need for deterrence;
- 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; and,
- proportionate to the advantage wrongfully gained by a defendant from the misconduct.

The Impact of Fiduciary Relationships on Punitive Damages Awards

As noted, in finding that the question of punitive damages should have been put to the jury, Benotto, J.A. considered the fact that the plaintiff in *McCabe* was a vulnerable victim of abuse. The existence of a fiduciary relationship between a plaintiff and defendant may be a consideration in whether to award punitive damages.

In *Whiten*, it was noted that "***it is in the nature of the remedy that punitive damages will largely be restricted to intentional torts [...] or breach of fiduciary duty [...]***".[23] The Court also noted that an independent actionable wrong "***can be found in breach of a distinct***

[23] *Ibid.*

and separate contractual provision or other duty such as a fiduciary obligation".[24] However, the fact that punitive damages may result from breaches of fiduciary duty is different from the notion of punitive damages stemming from *litigation conduct* where there is a fiduciary relationship between the parties.

As noted above, in *Whiten*, the Court pointed to the degree of vulnerability of the plaintiff as a factor in terms of the proportionality of punitive damages awards.

In *McCabe*, Benotto J.A. noted the "***extreme power imbalance and vulnerability of the wronged party are significant features***" when considering the possible breach of fiduciary obligation. However, she does not specifically find that a breach of fiduciary duty is the underlying actionable wrong. Instead, she looks specifically to the "***litigation conduct***" as the actionable wrong, with the vulnerability of the plaintiff as a factor in her determining the egregiousness of appellant's conduct. The fiduciary relationship was not itself the basis for the punitive damages award.

It may be the case that, where a fiduciary duty is owed to a plaintiff, a defendant has a higher level of responsibility in appropriately conducting litigation than he or she would in an action where the parties are unconnected and where there is no fiduciary relationship owed.

[24] *Ibid* at para 82.

Nevertheless, a fiduciary relationship should not jeopardize a defendant's right to make a plaintiff prove his or her case. It is up to the plaintiff to amass a body of evidence that would discharge his or her burden of proof with respect to liability.

Punitive Damages and Insurance Coverage

There are some practical considerations not addressed by the Court of Appeal, but with real consequences, if a late admission of liability gives rise to punitive damages – insurance coverage issues.

Generally, institutions such as the Diocese will have liability insurance which provides them with coverage for negligent acts and for vicarious liability for historical intentional torts such as sexual abuse. The insurer controls the defence of the action, and indemnifies the insured following settlement or judgment.

Although commercial liability policies are not required to follow a standard form, most do follow one of the formats adopted by the Insurance Bureau of Canada ("IBC"). Recent IBC forms grant coverage for "***compensatory damages***" because of bodily injury. As noted, punitive damages are not compensatory, and therefore would not fall within the coverage grant of these more recent policy forms. Further, some more recent polices have specific exclusions for intentional criminal acts and abuse claims.

Many historical liability policies, quite possibly like one at play in *McCabe*, were silent on the issue of abuse and did not specifically restrict coverage to "***compensatory***" damages. However, insurers have generally taken the position that punitive damages would not be covered under a liability policy regardless of the wording of the coverage grant.

The basis of this position is that it would be against public policy to interpret an insurance policy as providing coverage for punitive damages. You should not be able to transfer the obligation to serve a penalty imposed by law on another. It would be analogous to trying to enforce a contract that would have another person serve your prison term once sentenced for an intentional criminal act. Doing so ignores the basis for the award in the first place, to the same degree as finding an employer vicariously liable for punitive damages awarded against an employee.

Assuming the punitive damages award would not be covered under an otherwise responding liability insurance policy, what happens then? In most scenarios, the *litigation conduct* decision giving rise to the punitive award would not have been made by the institution. It would have been made by counsel defending the institution on behalf of the institution's insurer. Remember further, that the institution did nothing wrong. How can an award of punitive damages in this scenario fulfill the public policy rationale behind such damages?

If we apply the same example to a costs sanction rather than punitive damages, we see the merits of that option. If the consequence of a failure to admit liability in a timely

manner is a costs sanction, then the insurer directing the litigation would be the one to cover the costs, not the defendant him or herself.

Fairness would dictate that the individual directing the litigation should be the one punished for failure to admit liability in a timely manner, in a case where such punishment is warranted at all. For this reason, a failure to admit liability in a timely manner should result in a costs sanction rather than an award of punitive damages.

Where are we after McCabe?

Can failing to admit liability in a timely manner be considered reprehensible conduct, or constitute a "***marked departure from ordinary standards of decent behaviour***" and "***offend the court's sense of decency***"? The answer to that question is most likely no, although there are some possible exceptions.

For example, Roberts, J.A points out that there was no evidence in *McCabe* that the Diocese's liability was inevitable. Further, as discussed in detail above, although the Diocese may have had a fiduciary relationship with the plaintiff, its liability to him was in the absence of direct fault.

Consider then if it was the abusive priest who had not admitted liability. Further, that he had withheld this admission, where that finding was inevitable, with the intention of causing greater pain and suffering to the plaintiff. That certainly could be considered

reprehensible conduct worthy of condemnation, and one would assume that is a scenario where an award of punitive damages would be consistent with both the majority and minority reasoning in the *McCabe* decision.

Absent those types of findings, however, a failure to admit liability in a timely fashion should not lead to an award of punitive damages. Further, the reasoning from Roberts, J.A. suggests that this finding would not apply only to admissions of vicarious liability, but to liability admissions in general.

Punitive damages are about punishment. There are multiple reasons for which defendants should not be punished for failing to admit liability. In situations where the issue is vicarious liability, the party being punished is not the party who committed the wrongful act. Further, while a fiduciary relationship may be considered in terms of whether the litigation conduct of a defendant is egregious, ultimately, that fiduciary relationship should not jeopardize a defendant's right to make a plaintiff prove his or her case.

When the plaintiff has amassed a body of evidence that would discharge his or her burden of proof with respect to liability, and the defendant still fails to admit liability, then that late admission of liability or failure to admit liability should be dealt with by means of a costs sanction.