INTRODUCTION

THANK YOU FOR INVITING ME

I AM VERY PLEASED TO BE BACK. IT IS HARD TO BELIEVE IT HAS BEEN 15 YEARS SINCE I LAST SPOKE AT YOUR CONFERENCE

AND I'M HONOURED TO BE ASKED TO GIVE ONE OF THE KEYNOTE ADDRESSES

I UNDERSTAND BEING DESIGNATED A "KEYNOTE" SPEAKER IMPLIES A SPECIAL RESPONSIBILITY – TO SET THE TONE

ALLOW ME TO BEGIN BY HAVING A GO AT THAT

MANY OF YOU MAY HAVE HAD THE SAME EXPERIENCE AS ME WHEN ASKED WHAT YOU DO

YOU SAY: I'M A LAWYER AND THEY ARE MODERATELY IMPRESSED

WHEN THEY ASK WHAT KIND OF LAW, YOU SAY: INSURANCE LAW. THEY ARE LESS IMPRESSED

THEY THINK YOU ARE DULL, OR THAT YOU LIVE OFF THE MISFORTUNE OF OTHERS, OR BOTH

THERE'S DEFINITELY A STEREOTYPE. REMEMBER "RUMPOLE OF THE BAILEY"? THE TV SERIES ABOUT AN ECCENTRIC BARRISTER WHO DOES CRIMINAL LAW. HE'S VERY MUCH THE HERO FIGHTING FOR JUSTICE IN THE FACE OF ALL KINDS OF OBSTACLES, INCLUDING HIS NEMESIS, THE DULL, POMPOUS AND PEDANTIC HEAD OF CHAMBERS, BALLARD. TO ROUND OUT THE NEGATIVE IMAGE, BALLARD IS AN INSURANCE LAWYER – "KNOCK-FOR-KNOCK BALLARD" AS RUMPOLE CALLS HIM DISPARAGINGLY. HE'S S NOT MUCH INTERESTED IN JUSTICE.

WELL, THE "KEYNOTE" POINT I WANT TO MAKE IS THIS: BALLARD GETS A BUM RAP. THE STEREOTYPE IS MISPLACED

HERE IS WHY I THINK THAT

WHEN I WENT TO GRADUATE SCHOOL, ABOUT 40 YEARS AGO, I HAD NEVER GIVEN ANY THOUGHT TO INSURANCE OR INSURANCE LAW AS BEING OF PROFESSIONAL OR ACADEMIC INTEREST. BUT IN A COURSE TAUGHT BY A GREAT TEACHER I CAME TO APPRECIATE 2 BASIC THINGS:

1. THAT INSURANCE, IN ITS VARIOUS FORMS, IS ESSENTIAL TO THE ORDERLY FUNCTIONING OF SOCIETY. (IMAGINE THE AFTERMATH OF THE CHRISTCHURCH EARTHQUAKES WITHOUT THE PROBLEMS – EVEN GIVEN THE PROBLEMS)

2. FOR INSURANCE TO WORK AS IT SHOULD FOR THE GOOD OF SOCIETY, THERE HAS TO BE A PROPERLY FUNCTIONING SET OF RULES TO GOVERN IT – AND EXPERTS WHO KNOW HOW TO NAVIGATE THOSE RULES.

THE POINT THEN IS THAT, WE INSURANCE LAWYERS, INCLUDING THE MUCH MALIGNED BALLARD, ARE, IN OUR OWN WAY, JUST AS CONCERNED WITH NOBLE SOCIAL GOALS AS RUMPOLE.

IF THAT'S NOT A "KEY" NOTE FOR THIS CONFERENCE, I DON'T KNOW WHAT IS.

SO, WHAT IS THE HALLMARK OF A PROPERLY FUNCTIONING BODY OF INSURANCE LAW?

PERHAPS IT IS BECAUSE MY ASTROLOGICAL SIGN IS LIBRA THAT I BELIEVE THAT A PROPERLY FUNCTIONING BODY OF INSURANCE LAW IS ESSENTIALLY ABOUT BALANCE

THAT IS: THE LAW SHOULD ESTABLISH THE RIGHT BALANCE BETWEEN:

THE LEGITIMATE INTERESTS AND REASONABLE EXPECTATIONS OF INSUREDS, AND

THE LEGITIMATE NEEDS OF A FINANCIALLY SUSTAINABLE INSURANCE INDUSTRY

AND THAT, I THINK, IS AN APPROPRIATE CONTEXT FOR MY TOPIC TODAY:

INSURERS' LIABILITY FOR DAMAGES RELATING TO HANDLING OF CLAIMS – THE CANADIAN STORY

SOME OF YOU MAY RECALL THIS WAS THE TOPIC OF MY TALK TO THE CONFERENCE IN CHRISTCHURCH IN 2001.

(A VERSION WAS PUBLISHED IN (2002), NZ LAW REVIEW 453)

FOR THOSE OF YOU WHO WERE NOT AT THAT CONFERENCE – OR INEXPLICABLY CAN'T RECALL MY SCINTILLATING PRESENTATION, HERE'S A RECAP

THE CENTRAL THEME OF BAD FAITH

IN CANADA DAMAGES RELATING TO POST-LOSS CONDUCT BY AN INSURER FALL INTO 2 BROAD CATEGORIES:

1. PUNITIVE (EXEMPLARY) DAMAGES
2. AGGRAVATED DAMAGES

WHEN I SPOKE IN 2001 OUR UNDERSTANDING WAS THAT BOTH CATEGORIES REQUIRED A BREACH OF THE DUTY OF GOOD FAITH BY THE INSURER.

IN 2006 THAT CHANGED SOMEWHAT.

I'LL COME BACK TO THAT

YOU WILL KNOW THAT THE LONG STANDING CONCEPT OF GOOD FAITH IN INSURANCE LAW RELATED MAINLY TO DISCLOSURE WHEN THE CONTARCT OF INSURANCE IS NEGOTIATED.

250 YEARS AGO, WHEN GOOD FAITH IN RELATION TO INSURANCE WAS FIRST ARTICULATED, THE PRINCIPAL CONCERN WAS THAT THE INSURED HELD ALL THE CARDS IN TERMS OF KNOWLEDGE OF FACTS THAT DEFINED THE RISK. TO ADDRESS THE **INSURER'S VULNERABILITY** IN THIS REGARD, LORD MANSFIELD DEVISED THE DUTY OF UTMOST GOOD FAITH REQUIRING THE INSURED TO DISCLOSE ALL MATERIAL FACTS FULLY AND ACCURATELY WHETHER OR NOT ASKED ABOUT THEM.

THE DUTY WAS DESIGNED TO LEVEL THE PLAYING FIELD.

THE DUTY OF GOOD FAITH AT THE CLAIMS STAGE IS REALLY THE MIRROR IMAGE OF THAT

FOR VARIOUS REASONS, AT THE **CLAIMS** STAGE IT IS **THE INSURED** WHO IS OFTEN VULNERABLE AND THE INSURER HOLDS MOST OF THE CARDS

THE DUTY, AS UNDERSTOOD IN CANADA, IS INTENDED TO REDRESS THAT IMBALANCE AND PREVENT THE INSURER FROM TAKING ADVANTAGE OF ITS SUPERIOR BARGAINING POSITION UNFAIRLY – FOR EXAMPLE BY TRYING TO IMPOSE AN INADEQUATE SETTLEMENT ON A FINANCIALLY STRESSED CLAIMANT.

ELEMENTS OF THE DUTY

THE DUTY OF GOOD FAITH HAS 2 MAIN REQUIREMENTS:

1. CLAIMS MUST BE DEALT WITH IN A TIMELY FASHION
2. CLAIMS MUST BE DEALT WITH FAIRLY

ACCORDING TO A RECENT CASE (Z*URICH INS. V. BRANCO* 2015 SKCA 71) THIS INVOLVES SUCH REQUIREMENTS AS:

- ASSESSING CLAIMS IN A BALANCED MANNER
- ADVISING THE INSURED OF DECISIONS TAKEN WITH REASONS
- PAYING APPROVED CLAIMS PROMPTLY
- REFRAINING FROM REQUIRING THE INSURED TO SIGN AWAY FUTURE RIGHTS TO OBTAIN PAYMENTS FOR WHICH LIABILITY IS CONCEDED
- NOT DELAYING OR DENYING CLAIMS TO GAIN LEVERAGE OR TAKE ADVANTAGE OF VULNERABILITY

BUT AN INSURER **MAY** DELAY OR DENY A CLAIM (EVEN IF THE CLAIM IS ULTIMATELY FOUND TO BE VALID) ONLY IF THERE IS A DEFENSIBLE REASON FOR DOING SO.

THAT IS: THERE MUST BE A **"GENUINE ISSUE"** OF FACT, LAW OR POLICY INTERPRETATION

SO: AN INSURER GETS INTO TROUBLE IF THERE IS AN **UNREASONABLE** DELAY OR AN **UNJUSTIFIABLE** DENIAL OF A CLAIM

TYPICAL CASES

THE CASES THAT ARISE USUALLY INVOLVE SUSPICION ON THE PART OF THE INSURER THAT THE CLAIM IS FRAUDULENT.

THE MOST TYPICAL CASES INVOLVE SUSPECTED ARSON OR OTHER DELIBERATELY CAUSED LOSS

OR MALINGERING OR EXAGGERATION IN DISABILITY CLAIMS

WE ALL KNOW THAT CLAIMS MANAGERS AND ADJUSTERS TEND TO BE A SCEPTICAL BUNCH

[AN OLD PROFESSOR OF MINE USED TO JOKE THAT INSURANCE COMPANIES HAVE ONLY 2 DEPARTMENTS: PREMIUM COLLECTION AND CLAIMS DENIAL]

TO BE FAIR, INSURERS' SCEPTICISM RESULTS FROM HARD EXPERIENCE OF GENUINELY DODGY CLAIMS THAT GIVES RISE TO A WELL-DEVELOPED RADAR FOR SUCH CLAIMS

BUT OCCASIONALLY THAT CAN BE TAKEN TOO FAR

IN 2001 I TOLD YOU ABOUT ONE OF THE SEMINAL CASES IN THIS AREA

WHITEN V. PILOT INS. CO. [2002] 1 SCR 595

WHEN I SPOKE THE CASE HAD BEEN APPEALED TO THE SUPREME COURT OF CANADA BUT THE DECISION WAS STILL PENDING. HERE'S A REMINDER OF WHAT THAT CASE WAS ABOUT AND AN UPDATE ON THE FINAL DECSION.

THE CASE INVOLVED A FIRE LOSS – A HOUSE COMPLETELY DESTROYED

THE INSURED WAS UNEMPLOYED AND HAD RECENTLY DECLARED BANKRUPTCY – "RED FLAGS" TO AN CLAIMS ADJUSTER

BUT ALL THE EVIDENCE SURROUNDING THE FIRE SUGGESTED THAT IT WAS ACCIDENTAL

-THE FIRE WAS IN THE MIDDLE OF THE NIGHT- THE INSURED AND WIFE IN THE HOUSE IN BED

-18DEG CENTIGRADE OUTSIDE – THE COUPLE HAD TO ESCAPE IN THEIR PJS - GOT SEVERE FROSTBITE - LOST ALL PERSONAL BELONGINGS AND THEIR CAT

FIRE MARSHALL'S REPORT, 2 INDEPENDENT ADJUSTERS, INSURANCE CRIME INVESTIGATION UNIT (INDUSTRY BODY), ENGINEER HIRED BY INSURER ALL SAID "ACCIDENTAL"

INSURER KEPT SHOPPING AROUND FOR A REPORT IT LIKED. PRESSURED THE ENGINEER INTO CHANGING HIS CONCLUSION

INSURER STOPPED PAYING RENT FOR TEMPORARY ACCOMMODATION WITHOUT NOTICE

HELD: (ALL THE WAY TO THE SCC)

THIS WAS MANIFESTLY UNFAIR TREATMENT

NO “GENUINE ISSUE” OF FACT – IN FACT MANIPULATION OF EVIDENCE BY THE INSURER

JURY AWARDED $1M IN PUNITIVE DAMAGES

CA: $100,000

THE UPDATE TO THE 2001 STORY IS THAT THE SCC: RESTORED $1M

I ALSO TOLD YOU ABOUT AN ONTARIO DECSION *CLARFIELD V. CROWN LIFE INS. CO.* (2000), 23 CCLI (3d) 266 (OSCJ) AS AN EXAMPLE OF A DISABILITY CLAIM

DEPRESSION

HIGH EARNING CLAIMANT

INSURER’S POLICY OF ROUTINELY REFUSING SUCH CLAIMS

USED MEDICAL EVIDENCE SELECTIVELY, UNREASONABLE DELAYS.

COURT AWARDED $200,000. (NOTE: PRE SCC DECISION IN *WHITEN*). ALSO $75,000 AGGRAVATED DAMAGES – MORE ON THAT LATER.

BAD FAITH IS A SEPARATE WRONG

WHEN I SPOKE IN 2001, THE ONTARIO CA IN *WHITEN* HAD SAID THAT BAD FAITH WAS A WRONG SEPARATE FROM THE BREACH OF CONTRACT, “PROBABLY” A TORT.

SCC SAID NOT A TORT BUT A *SUI GENERIS* WRONG STANDING ALONE

THE REASON IT IS CAST AS A SEPARATE WRONG IS THAT, IN CANADA, THAT IS REQUIRED FOR PUNITIVE DAMAGES IN BREACH OF CONTRACT CASES

THIS BEGS AN INTERESTING QUESTION: IF BAD FAITH IS A SEPARATE WRONG, CAN IT EXIST – AND GIVE RISE TO DAMAGES - WITHOUT AN ASSOCIATED BREACH OF CONTRACT. I.E. WHERE THE INSURANCE CLAIM IS ULTIMATELY UNSUCCESSFUL?

LAW IS UNCLEAR ON THIS.

ON THE ONE HAND COURTS CONSISTENTLY SAY, THE DUTY ARISES FROM THE MOMENT THE CLAIM IS MADE. *MASCHKE ESTATE* 1986 OCA; *ALGUIRE V. MANULIFE* 2016 ONSC.

BUT: *BARKER V. ZURICH* 2001: NO COVER THEREFORE NO PUNITIVE DAMAGES

IN THEORY, MAY BE A CASE WHERE BAD FAITH CAUSES HARM EVEN THOUGH NO BREACH OF CONTRACT – MIGHT GIVE RISE TO COMPENSATORY AS WELL AS PUNITIVE DAMAGES.

THERE MAY ALSO BE A DIFFERENT LIMITATION PERIOD BUT THIS DEPENDS ON LIMITATIONS LEGISLATION

SEPARATE WRONG OF BAD FAITH NOT REQUIRED FOR AGGRAVATED DAMAGES

PRIOR TO 2006, CASES LIKE CLARFIELD WERE APPARENTLY BASED ON THE ASSUMPTION THAT **BOTH** PUNITIVE DAMAGES **AND** AGGRAVATED DAMAGES REQUIRED BAD FAITH.

BUT IT HAS NOW BEEN HELD BY THE SCC THAT A SEPARATE WRONG OF BAD FAITH IS NOT NECESSARY FOR AN AWARD OF AGGRAVATED DAMAGES.

IN *FIDLER V. SUN LIFE INS. CO.* 2006 SCC 30 HELD THAT A **"WRONGFUL**" DENIAL OF A CLAIM (EVEN WITHOUT BAD FAITH OR PROOF OF FINANCIAL LOSS) BREACHES THE INSURER'S **CONTRACTUAL** OBLIGATION TO PROVIDE **"PEACE OF MIND".**

THIS IS BASED ON THE PRINCIPLE IN *HADLEY V. BAXENDALE*.

I.E. AT THYE TIME OF CONTRACTING IT IS FORESEEABLE THAT, SHOULD THE INSURER BREACH THE CONTRACT, ONE OF THE CONSEQUENCES COULD BE LOSS OF PEACE OF MIND

THIS RAISES AN INTERSTING QUESTION:

WHAT IS THE DIFFERENCE BETWEEN “WRONGFUL” DENIAL OF A CLAIM AND BAD FAITH?

IF WRONGFUL SIMPLY MEANS THAT THE CLAIM IS ULTIMATELY SUCCESSFUL, **ANY** DENIAL OF SUCH A CLAIM COULD ATTRACT AGGRAVATED DAMAGES IF THERE IS PROOF OF SOME MENTAL DISTRESS. SURELY IT IS FORESEEABLE FROM THE INSURER’S STANDPOINT THAT **DENIAL OF ANY CLAIM** MAY CAUSE SOME LOSS OF PEACE OF MIND.

BUT THE CASES THAT HAVE EMERGED SINCE *FIDLER* SUGGEST THAT IN THIS CONTEXT “WRONGFUL” DOES EQUATE TO SOMETHING APPROACHING BAD FAITH. THE RELATIVELY FEW REPORTED CASES ALL INVOLVE WHAT THE COURT IN EACH CASE REGARDED AS **UNREASONABLE DELAY** – TYPICALLY ABOUT 5 YEARS – IN RESOLVING ULTIMATELY SUCCESSFUL CLAIMS. WHETHER OR NOT THEY ARE CALLED “BAD FAITH” THEY SEEM TO ME TO PASS THE TEST FOR THAT CATEGORY.

MEASURE OF DAMAGES

A. PUNITIVE DAMAGES

IN *WHITEN* THE SCC SET OUT THE PRINCIPLES THAT GUIDE THE AWARDING AND MEASUREMENT OF PUNITIVE DAMAGES.

1ST. PUNITIVE DAMAGES ARE THE **EXCEPTION** RATHER THAN THE RULE

I.E. RESERVED FOR THOSE CASES WHERE THERE IS MALICIOUS, HIGH-HANDED, OR ARBITRARY BEHAVIOUR.

[PUNITIVE DAMAGES ARE ROUTINELY SOUGHT BY PLAINTIFFS WHOSE CLAIMS HAVE BEEN DENIED. MOST OF THESE EFFORTS ARE UNSUCCESSFUL, EITHER BECAUSE THE COURT FINDS THERE IS NO BAD FAITH OR, IN SEVERAL CASES, THE COURT HAS FOUND BAD FAITH BUT NOT BAD ENOUGH TO JUSTIFY PUNITIVE DAMAGES.]

IF PUNITIVE DAMAGES ARE JUSTIFIED, COURTS ARE INSTRUCTED TO APPLY THE PRINCIPLE OF "PROPORTIONALITY"

THAT IS: THE AMOUNT OF THE AWARD SHOULD BE PROPORTIONATE TO THE DEGREE OF BLAME

DEGREE OF BLAME TAKES INTO ACCOUNT:

- INTENT
- MOTIVE
- DURATION OF CONDUCT
- WHETHER THERE WAS A COVER-UP
- AWARENESS OF THE IMPACT OF THE CONDUCT ON THE PLAINTIFF
- VULNERABILITY OF THE PLAINTIFF

THE COURT IS ALSO SUPPOSED TO CONSIDER: -

- THE NEED FOR DETERRENCE (MORE THAN A SLAP ON THE WRIST WHICH THE INSURER SIMPLY TREATS AS A COST OF DOING BUSINESS)
- OTHER CRIMINAL OR ADMINISTRATIVE PENALTIES (E.G. *BULLOCK* - $40,000 FINE UNDER THE INSURANCE ACT
- ANY BENEFIT OBTAINED BY THE INSURER NEEDING TO BE NULLIFIED

MOST AWARDS ARE NOWHERE NEAR THE $1M AWARDED IN *WHITEN.* IN THAT CASE, THE SCC SAID THE INSURER NEEDED A "LARGE WHACK". BUT IN MOST CASES, THE COURTS IMPOSE A "SHARP JAB RATHER

THAN A CONCUSSIVE BLOW”. (*INDUSTRIAL ALLIANCE INS. & FINANCIAL SERVICES V. BRINE* 2015 NSCA 104).

IN *BRINE* THE NSCA SURVEYED THE CASES REPORTED SINCE *WHITEN* (2002) AND FOUND **ONLY 6** WHERE THE PUNITIVE DAMAGES WERE IN EXCESS OF $100,000.

ALTHOUGH MANY UNDER THAT AMOUNT.

B. AGGRAVATED DAMAGES

NB. THESE ARE OFTEN CONFLATED WITH DAMAGES FOR MENTAL DISTRESS OR LOSS OF PEACE OF MIND

BUT THE TWO CATEGORIES ARE NOT NECESSARILY THE SAME AS AGGRAVATED DAMAGES MAY ENCOMPASS MORE THAN MENTAL DISTRESS

REGARDLESS, WE ARE DISCUSSING HERE A CATEGORY OF **COMPENSATORY** DAMAGES, MEANING THAT **PROOF OF LOSS** IS REQUIRED.

E.G. *702535 ONTARIO INC. V. LLOYDS* 2000 OCA

UNREASONABLE DELAY IN HANDLING THE CLAIM BUT NO EVIDENCE OF A CHANGE IN PROPERTY VALUE DURING THAT TIME – NO AGGRAVATED DAMAGES. (BUT N.B. THIS WAS PRE *FIDLER* AND MENTAL DISTRESS NOT CONSIDERED)

IN SOME CASES THE MEASUREMENT MAY BE A SIMPLE ARITHMETICAL CALCULATION

E.G. IN *CLARFIELD* THE INSURED WAS UNREASONABLY DENIED DISABILITY BENEFITS. HE HAD TO SELL HIS HOUSE. WHEN THE INSURANCE MONEY WAS ULTIMATELY FORTHCOMING, HE BOUGHT IT BACK. HE WAS COMPENSATED FOR THE TRANSACTION COSTS INVOLVED AND THE INCREASED PRICE.

AND, IF THERE ARE MEDICAL EXPENSES ASSOCIATED WITH MENTAL DISTRESS, THOSE ARE EASILY CALCULATED TOO

BUT MOSTLY DAMAGES ARE MEASURED "AT LARGE" TO COMPENSATE THE INSURED'S LOSS OF PEACE OF MIND. ALTHOUGH MENTAL DISTRESS STILL MUST BE PROVEN.

THIS IS NECESSARILY ARBITRARY BUT THE COURTS TRY TO ACHIEVE A REASONABLE DEGREE OF CONSISTENCY BY ADHERING TO "CONVENTIONAL" AMOUNTS.

A RECENT DECISION OF THE COURT OF APPEAL OF SASKATCHEWAN (*ZURICH LIFE INS. CO. V. BRANCO* 2015 SKCA 71) SURVEYED THE CANADIAN CASES REPORTED SINCE *FIDLER* AND FOUND THE RANGE OF DAMAGES AWARDED TO BE IN THE RANGE OF $15,000 TO $35,000

THE AWARD IN *CLARFIELD* , WHICH PREDATES *FIDLER*, WAS $75,000 BUT, AS MENTIONED, THAT INVOLVED FINANCIAL AS WELL AS NON-FINANCIAL LOSS.

CONCLUSION

I UNDERSTAND THE NZ COURTS ARE AS YET NON-COMMITTAL ON THE QUESTION OF BAD FAITH AND PUNITIVE DAMAGES. (*CEDENCO FOODS V. STATE INS.* 1998 NZCA).

HOWEVER, PRESUMABLY NZ COURTS ARE FREE TO AWARD DAMAGES FOR MENTAL DISTRESS OR LOSS OF PEACE OF MIND UNDER THE *HADLEY V. BAXENDALE* PRINCIPLE.

I.E. IT WOULD BE CONSISTENT WITH RECOGNISED COMMON LAW PRINCIPLES TO ACKNOWLEDGE LOSS OF PEACE OF MIND AS A FORESEEABLE CONSEQUENCE OF BREACH OF AN INSURANCE CONTRACT BY THE INSURER.

BUT, RE BAD FAITH/PUNITIVE DAMAGES, SHOULD NZ FOLLOW CANADA'S LEAD?

IN MY TALK IN 2001 AND IN THE ARTICLE IN 2002 IN THE NZ LAW REVIEW I WAS POSITIVE ABOUT WHAT WAS THEN A RELATIVELY NEW DEVELOPMENT IN CANADIAN LAW.

MY REASON FOR OPTIMISM WAS THAT I FORESAW A **BALANCED** APPROACH

ON THE ONE HAND, I THOUGHT A DETERRENT MECHANISM WAS NEEDED FOR TRULY BAD CONDUCT

ADMINISTRATIVE FINES OF $40,000 OR SO FALL INTO THE CATEGORY OF THE COST OF DOING BUSINESS AND PROVIDE LIMITED INCENTIVE FOR A DISAFFECTED INSURED TO INITIATE PROCEEDINGS – COMPARED TO THE PROSPECT OF PERHAPS $100,000 OR MORE WHICH THE INSURED GETS TO KEEP

ON THE OTHER HAND, THERE WAS REASON TO BELIEVE CANADIAN COURTS WOULD ACT WITH RESTRAINT.

COMPARE:

- RELIEF FROM FORFEITURE POWER
- S. 155 OF THE ONTARIO INSURANCE ACT – POWER TO STRIKE DOWN UNREASONABLE POLICY TERMS
- REASONABLE EXPECTATIONS IN POLICY INTERPRETATION

AS FAR AS I CAN TELL, MY OPTIMISM SEEMS TO HAVE BEEN JUSTIFIED

ANECDOTAL EVIDENCE IS THAT IT HAS GIVEN MOST INSURERS PAUSE IN THE WAY THEY HANDLE CLAIMS

AND, BASED ON REPORTED CASES, IT IS APPARENT THAT COURTS TAKE A BALANCED APPROACH. AT LEAST AS MANY CLAIMS FOR PUNITIVE DAMAGES ARE DENIED AS ARE GRANTED.

MOST SUCCESSFUL CLAIMS YIELD LESS THAN $100K IN PUNITIVE DAMAGES

CLAIMS FOR AGGRAVATED DAMAGES REQUIRE PROOF OF LOSS AND AWARDS ARE, FOR THE MOST PART, MODEST.

A RELATED QUESTION THAT HAS OCCURRED TO ME IS; WOULD EXPOSURE TO LIABILITY FOR PUNITIVE OR AGGRAVATED DAMAGES LEAD TO HIGHER PREMIUMS?

TO COVER THIS ADDITIONAL POTENTIAL LIABILITY
BECAUSE INSURERS WOULD PAY MORE MARGINAL CLAIMS

I.E. WOULD IT MAKE IT HARDER FOR INSURERS TO RESIST CLAIMS?

IT'S DIFFICULT TO KNOW FOR SURE BECAUSE PREMIUM SETTING IS A COMPLICATED BUSINESS.

AGAIN THE EVIDENCE IS ONLY ANECDOTAL, BUT THERE DOES NOT SEEM TO HAVE BEEN THIS EFFECT.

CERTAINLY IT'S NOT SOMETHING INSURER'S COMPLAIN ABOUT

AND, AS I MENTIONED, THE COURTS HAVE TAKEN A BALANCED APPROACH:

- PUNITIVE DAMAGES ARE "EXCEPTIONAL" (HUGE AWARDS EVEN MORE SO)
- ONLY CLEARLY INAPPROPRIATE CONDUCT IS PUNISHED OR ATTRACTS AGGRAVATED DAMAGES
- MANY CLAIMS ARE DENIED
-
- AND BAD FAITH BY THE **INSURED** IS TAKEN INTO ACCOUNT AND MAY BE SUBJECT TO PUNITIVE DAMAGES

IN OTHER WORDS, THE WAY CANADIAN COURTS HAVE APPROACHED THE SUBJECT REFLECTS WHAT I CONSIDER TO BE THE ESSENTIAL PURPOSE OF INSURANCE LAW – TO STRIKE THE RIGHT **BALANCE** BETWEEN THE LEGITIMATE INTERESTS OF BOTH INSUREDS AND INSURERS.