

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

**SHOULD A CLAIM FOR PUNITIVE DAMAGES  
SURVIVE DEATH?**

**Consultation Memorandum No. 5**

December 1998

## **ALBERTA LAW REFORM INSTITUTE**

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

William H. Hurlburt, Q.C., one of the Institute's counsel, who also prepared our Consultation Memorandum No. 4, *Should a Claim for Loss of a Chance of Future Earnings Survive Death?*, has prepared this concise and clear enunciation of this narrow issue. We are grateful for the speed with which this has been prepared.

## PREFACE AND INVITATION TO COMMENT

Comments on this report should be in the Institute's hands by January 31, 1999. Comments in writing are preferred. Our address is:

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## **A. INTRODUCTION**

The purpose of this Consultation Memorandum is to invite comment as to whether or not a claim for punitive damages should survive the claimant's death.

ALRI has completed a final report on the question whether or not a claim for damages for the loss of future earnings should survive the claimant's death, and the report will be issued shortly. It has been suggested to us that another question of survival should be dealt with at the same time. That is the question of survival of a claim for punitive damages, which, under the *Survival of Actions Act*, cannot be recovered if the claimant dies before obtaining judgment.

The question of survival of a claim for punitive damages is a narrow one, and a report on that subject can best be considered at the same time as our report on future earnings. We therefore request that comments be in our hands by January 31. We will have to commence to prepare a final report immediately after that date.

In this project, ALRI is dealing only with the question of the survival of the claim. This Consultation Memorandum assumes the present law relating to punitive damages and the circumstances under which punitive damages will be awarded and does not raise any issue with respect to those matters.

## **B. NATURE OF PUNITIVE DAMAGES**

Punitive, or exemplary, damages are described by Professor Stephen Waddams as follows:<sup>1</sup>

An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose not of compensating the plaintiff but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated, and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages...

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<sup>1</sup> S.M. Waddams, *The Law of Damages* (3rd. ed. ) 483, paras 11.10, 11.20)

On this view, the essence of punitive or exemplary damages is that they are not intended to compensate a plaintiff who has suffered wrong, but rather to punish a defendant whose conduct has gone beyond mere wrongdoing.

On the other hand, as Dean Klar has pointed out,

despite the emphasis on punishment of wrongdoers, punitive damages also serve the practical purpose of providing extra compensation to victims,

and this aspect of an award is likely to be present to the mind of the court who makes the award. In some cases, an award can be made under the heading of “aggravated” damages, which are characterized as “compensatory,” for conduct similar to that which will attract an award of punitive or exemplary damages: the basis of the award for aggravated damages is that the excessively wrongful conduct of the defendant has aggravated the complainant’s actual injuries.<sup>2</sup>

According to Professor Waddams, the kinds of conduct that have attracted awards of punitive damages have been described as

Malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, callous, disgraceful, wilful, wanton, in contumelious disregard of the plaintiff’s rights, or in disregard of ‘ordinary standards of morality or decent conduct.

Such conduct may be penalized in almost any tort situation, though negligent conduct is not likely to attract punitive damages unless it amounts to recklessness.

### **C. PRESENT ALBERTA LAW AND ITS HISTORY**

The common-law rule that a personal action did not survive the claimant was reversed in Canada, first by Ontario legislation, and later by legislation in the other provinces and territories. The survival legislation provided, in effect, that, except in defamation, the personal representative of a deceased person could sue for any tort or injury to the person or to the estate of the deceased person. No limitation was imposed on the remedies which the

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<sup>2</sup> Klar, Lewis N., *Tort Law*, Carswell 1996.

personal representative might receive,<sup>3</sup> so that there was nothing to prevent an award of punitive or exemplary damages to a claimant's estate.

The present Alberta *Survival of Actions Act*<sup>4</sup> changed this situation. Section 2 provides that all causes of action survive the death of the person in whom they are vested. Section 5, however, limits the remedies available to estates to “those damages that resulted in actual financial loss to the deceased or his estate,” and it specifically precludes estate recovery of “punitive or exemplary damages.”

The *Survival of Actions Act* was enacted following a report by this Institute, then known as the Institute of Law Research and Reform, which recommended the adoption of most of the *Uniform Survival of Actions Act* which was adopted in 1963 by the Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference of Canada). The policy of the Uniform Act, and thus of the *Survival of Actions Act*, was that only damages for actual pecuniary loss (which was changed in drafting to “actual financial loss”) should be recoverable after the death of a claimant. Punitive or exemplary damages have nothing to do with “actual financial loss” and recovery was accordingly excluded.

However, neither the reports on which the Uniform Act was based or the Institute's report focused on punitive or exemplary damages. Perhaps it is appropriate to review the specific question of the survival of claims for punitive or exemplary damages to see whether the policy behind the exclusion from survival of claims for damages for non-pecuniary loss is appropriate for that specific subject-matter.

## **D. POLICY DISCUSSION**

### **1. Reasons for allowing punitive damages**

Although this Consultation Memorandum does not raise any issue with respect to whether and when punitive or exemplary damages should be awarded, the reasoning behind such awards is relevant to the question whether or not a claim for punitive damages should survive the death of the claimant:

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<sup>3</sup> See *Administration of Estates Act* R.S.A. 1970, c.1 s. 51 and its predecessors.

<sup>4</sup> Originally S.A. 1978, c.35, now R.S.A. 1980, c. S-30.

The theoretical justification for an award of exemplary damages has long been debated, for it appears anomalous for a civil court to impose what is in effect a fine for conduct it finds to be worthy of punishment, and then to remit the fine, not to the State Treasury, but to an individual plaintiff who will, by definition, be over-compensated. The arguments in favour of exemplary damages are that deterrence, as well as compensation, is a legitimate aim of the civil law and that conduct worthy of punishment may often not fall within the scope of the criminal law, or may not be thought to justify prosecution, or if prosecuted, may be insufficiently punished. A reason given more commonly in earlier times than recently is that an award of exemplary damages suppresses the likelihood of duelling and private vengeance.<sup>5</sup>

The policy behind awards of punitive or exemplary damages is therefore quite different from the policy behind other forms of damages: its purpose is not compensation or restitution, but punishment. Dean Klar's comment that punitive or exemplary damages, whatever their theoretical foundation, do put money in a plaintiff's pocket, should be borne in mind.

## **2. Whether reasons for non-survivability of damages for non-pecuniary losses in general apply to punitive damages**

The arguments against allowing estates to claim ordinary tort damages for non-pecuniary losses suffered by deceased persons may be summarized as follows:

- (1) Tort damages are in general compensatory, that is, they are intended, insofar as money can do so, to put the injured person in the same position as if the wrong had not been done. They are not intended to punish the wrongdoer but rather to see that the victim is made whole.
- (2) Tort damages paid to an estate are not compensatory because
  - (a) they cannot compensate the dead person, and
  - (b) the estate and those who claim through the estate have not suffered any loss to be compensated for.

These arguments are not determinative of the question whether or not a claim for punitive or exemplary damages should survive. The reason is that, as we have noted, punitive or exemplary damages, whatever their practical effect, are not intended as compensation but as punishment over and above

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<sup>5</sup> *Ibid.*



compensation, so that arguments based on the compensatory nature of tort damages in general do not apply.

### 3. What arguments do apply?

#### ***a. Against survival***

If a wrongdoer is required to pay money into an estate, those who claim through the estate will receive a benefit, whether they be creditors, beneficiaries under a will, or beneficiaries under an intestacy. The argument against survival of claims for punitive or exemplary damages is that there is no valid legal policy in favour of conferring on those creditors or beneficiaries the proceeds of damages for something that was not a loss to them. That is, there is no reason to require a wrongdoer to confer a benefit on creditors or beneficiaries who have not been injured by the wrongdoing. (If surviving family members have suffered either economic loss or grief and loss of guidance, care and companionship, they have direct claims against the wrongdoer under the *Fatal Accidents Act*.)

#### ***b. For survival***

The arguments for survival are:

1. The objective of punitive or exemplary damages is to punish a wrongdoer for high-handed or oppressive conduct and to act as a deterrent to similar conduct.
2. A no-survival rule means that the wrongdoer will not be punished, so that the law's objective is frustrated.
3. Furthermore, the social objective of punishing the wrongdoer is not dependent upon whether or not the plaintiff happens to be alive. Because its purpose is not compensatory, it does not really matter that the award is enjoyed by the estate rather than by the plaintiff personally.

In 1991, the Ontario Law Reform Commission, basing itself on much the same arguments for survival, recommended that in the event of a plaintiff's death, a claim for punitive damages should survive.<sup>6</sup>

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<sup>6</sup> Ontario Law Reform Commission, *Report on Exemplary Damages* 59-60, 105 (1991, (continued...))

#### **4. Whether survival of punitive damages claims would affect the law relating to punitive damages**

Suppose that claims for punitive damages are allowed to survive the death of the claimant. In that state of the law it is likely that cases will arise in which claims for damages for non-pecuniary loss are the principal claims that the injured person have against the wrongdoer, and those claims will be extinguished by the death of the injured person. If punitive damages is the only remedy that survives, will the courts be more likely to give judgment in favour of the claimant's estate for punitive damages? That is, will a legal situation in which punitive damages is upon occasion the only remedy that is not precluded by survival legislation cause the courts to expand the grounds for awards of punitive damages?

We will invite comment on that question.

#### **5. Is the question of survival of claims for punitive damages important enough to legislate about?**

A claim for punitive damages may result from a wrongful act which causes the claimant's death. Or the claimant's death may intervene from other causes. If claims for punitive damages are allowed to survive they will arise whether or not the wrongful act caused the death.

In Alberta, estates have been precluded from bringing claims for punitive damages since the enactment of the *Survival of Actions Act* in 1978. The same rule applies in several other provinces. The absence of claims by estates is fully explained in Alberta and those other provinces while survival legislation of this type has been in force. Even allowing for that, however, our impression is that cases in which an estate would, but for the survival legislation, be entitled to punitive damages are comparatively infrequent.

By way of sample, we have checked all the Canadian cases dealing finally with punitive or exemplary damages disclosed by the Quicklaw DRS database for the period from January 1, 1998, to December 18, 1998, for the purpose of determining how many claims were made in cases in which death ensued or in which severe personal injuries were inflicted which might possibly have resulted in death. The total number of cases was 113, in some

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<sup>6</sup> (...continued)

Ontario Law Reform Commission, Toronto)

41 of which awards were made. Of these, excluding sexual abuse cases (which was the most numerous category), there were 3 assault cases which resulted in serious, though not life-threatening, injuries. There was also one case, in which an award for punitive or exemplary damages was refused, in which it was alleged that a landlord's negligence had led to the murder of a tenant in the parking lot; no other case involved a claimant's estate. Other grounds for awards were such things as defamation, wrongful dismissal, wrongful seizure, trespass to land, and fraud.

The Quicklaw database would not, of course, disclose claims for punitive or exemplary damages which were not made because of survival legislation, and there is nothing to say that the experience of other years would not be different, or that settlements of punitive damages claims have not been made without actions going to judgment.

We will invite comment on the question whether legislative intervention is justified.



## LIST OF QUESTIONS AND ISSUES

We invite comment on the following questions and issues:

1. Are many claims for punitive damages which otherwise be strong enough to pursue not brought because the survival legislation precludes them?
2. Are there many cases in which claimants with valid claims for punitive damages die before they can pursue the claims to judgment?
3. Will a legal situation in which punitive damages is upon occasion the only remedy that is not precluded by survival legislation influence courts to change the requirements for awards of punitive damages?
4. Should claims for punitive or exemplary damages survive the death of the claimant?
5. Should the *Survival of Actions Act* be amended to provide for the survival of claims for punitive or exemplary damages?

*The reader's opinion will be much more useful to the Institute if we understand the reasons for it. We would therefore very much appreciate it if any comments and opinions could be accompanied by reasons. If a comment or opinion is based on the acceptance of any of the arguments set out in this Consultation Memorandum, it would be sufficient to indicate the argument that has been accepted, though such an indication would not preclude the reader for making their own statement of reasons.*