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Lex Punit Mendacium: punitive damages and Bhasin v Hrynew

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Abstract
Punitive damages are a controversial remedy in Canadian and non-Canadian law. Some scholars have gone so far as to argue that punitive damages are entirely inconsistent with the goals and principles of private law and ought to be abolished. Notwithstanding these criticisms, the Supreme Court of Canada has treated punitive damages as a relatively uncontroversial private law remedy. However, the circumstances under which a court will consider awarding punitive damages have evolved with recent Supreme Court decisions. One example is the introduction of the independent actionable wrong requirement in *Vorvis v Insurance Corporation of British Columbia*. The independent actionable wrong requirement has been criticized as an incoherent and ineffective check on the availability of punitive damages. Moreover, the duty of honest contractual performance introduced by the Supreme Court of Canada in *Bhasin v Hrynew* has added a new and readily available source of an independent actionable wrong.

This paper addresses two main issues. First, it discusses and rebuts various theoretical objections to the availability of punitive damages in private law. It then provides a cogent theoretical justification for the availability of the remedy. Second, the paper discusses the impact that the duty recognized in *Bhasin* may have on the availability of punitive damages. Ultimately, this paper argues that the duty recognized in *Bhasin* has crystallized the practical and theoretical irrelevance of the independent actionable wrong requirement and, consequently, that the requirement should be eliminated.

Keywords
punitive damages, independent actionable wrong, dignitary injury, corrective justice, duty of honest performance, bhasin v hrynew, good faith, contract law, breach of contract, remedies, punishment, retribution, deterrence, denunciation, Whiten, Fidler, Vorvis

LEX PUNIT MENDACIUM: PUNITIVE DAMAGES AND *BHASIN V HRYNEW*

ERIC ANDREWS*

INTRODUCTION

Over the past few decades, punitive damages have become an important topic in Canada, much like they have in the United States. Canadian media coverage of high-profile punitive damage awards both domestically and abroad reflects the topic's notoriety. The string of Supreme Court of Canada (SCC) cases dealing with this topic in recent decades, along with the voluminous academic literature these cases have inspired, further underscores its importance. The availability of punitive damages has been strongly criticized in the private law context. For example, Professor Lewis Klar argued that "punitive damages should not be awarded in any tort case," while Professor Angela Swan and Jakub Adamski claimed that punitive damages "should not be awarded in any case of breach of contract."[1] This contemporary antipathy is not a recent development. In 1872, Justice Foster remarked in *Fay v Parker*:

> Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.[2]

Despite these criticisms, punitive damages remain a well-established feature of Canadian private law.[3] For example, in 2004 John Swan argued that it is now "common for Canadian courts to award punitive damages for breach of contract."[4]

The SCC's decision in *Bhasin v Hrynew* has breathed life into another important topic in Canadian law.[5] In *Bhasin*, the Court declared that good faith contractual performance is a general organizing principle of the common law of contract in Canada and recognized a common law

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[1] Lewis Klar, "Punitive Damages in Canada: Smith v. MegaFood" (1995) 17:4 Loy LA Intl & Comp LJ 809 at 811 [emphasis in original]; Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd ed (Markham ON: LexisNexis, 2012) at 553.

[2] 53 New Hampshire Reports 342 at 382 (1872) [*Fay*].

[3] *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 67 [*Whiten*]; Swan & Adamski, *supra* note 1 at 553.

[4] John Swan, "Punitive Damages for Breach of Contract: A Remedy in Search of a Justification" (2004) 29:2 Queen's LJ 596 at 597.

[5] 2014 SCC 71 [*Bhasin*].

duty to act honestly in the performance of contractual obligations.[6] In recognizing this duty, the SCC gave effect to the Latin maxim *lex punit mendacium*: the law punishes falsehood.[7] Given that the duty recognized in *Bhasin* is somewhat undefined in scope, the decision could significantly affect how punitive damages are awarded in breach of contract cases. In *Vorvis v Insurance Corporation of British Columbia*, the SCC held that in order to award punitive damages for breach of contract, a plaintiff must establish an actionable wrong independent of the alleged principal breach.[8] This decision gives rise to two important questions: Will a breach of the duty of honest performance suffice to meet the independent actionable wrong requirement?[9] In what circumstances will a breach of the duty warrant an award of punitive damages?

This paper explores these questions in the context of punitive damages for breach of contract. Part I discusses the prevailing theoretical critiques of punitive damages and outlines a potential justification for the role of punitive damages in private law. Part II examines the origins and meaning of the independent actionable wrong requirement and includes a discussion of the principal theoretical justifications and criticisms of the requirement. Finally, Part III explores the potential impact of the new duty of honest contractual performance on the availability of punitive damages.

This paper makes two main claims. First, that punitive damages can be justified under the theory of corrective justice as a "hybrid" remedy. Second, that the duty of honest contractual performance will magnify the irrelevance of the independent actionable wrong requirement when awarding punitive damages for breach of contract. Consequently, the independent actionable wrong requirement should be eliminated to make the law of punitive damages more conceptually coherent and, therefore, more justifiable within the sphere of private law.

I. A THEORETICAL JUSTIFICATION FOR PUNITIVE DAMAGES

Rebutting Arguments Against Punitive Damages

Swan and Adamski argue that the recent[10] availability of punitive damages in contract law has come about "quite suddenly and without any attempt by the courts to consider precisely what role punitive damages should have within the context of the whole law of contract remedies."[11] They further contend that "[t]he topic of punitive damages is among the least

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[6] *Ibid* at para 33.
[7] SS Peloubet, "Collection of Legal Maxims in Law and Equity, with English Translations" (Littleton, Colo: Fred B Rothman Publications, 1999) at 152.
[8] [1989] 1 SCR 1085 at para 25 [*Vorvis*].
[9] A similar (and prescient) question was recently raised in *Proulx v Canadian Cove Inc*, 2014 ONSC 3493 at paras 101–02. The judgment was rendered just 10 days before the decision in *Bhasin*.
[10] The SCC first confirmed the availability of punitive damages for breach of contract in *Vorvis*, *supra* note 8 at 1096. The Court subsequently reiterated their availability in: *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 79 [*Wallace*]; *Whiten*, *supra* note 3 at para 141; *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at paras 62–63 [*Fidler*]; *Honda Canada Inc v Keays*, 2008 SCC 39 at para 62 [*Honda*].
[11] Swan & Adamski, *supra* note 1 at 553.

satisfactorily analyzed in the whole law of contracts"[12] and that there are no justifications for punitive damages in contract law.[13] In light of these claims and others,[14] it is necessary to address the primary criticisms of punitive damages as a private law remedy.

An often-cited criticism against punitive damages is that punishment is only a valid objective for criminal law and, thus, is inappropriate in the private law context.[15] This argument fails to consider that the scope of liability in private law is different from the scope of liability in public law. Private law is centered on the enforcement of private rights, whereas criminal law is concerned with offences against society as a whole.[16] Conduct that merits an award of punitive damages may not merit criminal liability, and vice versa. Punitive damages respond to conduct that may not be considered an offence against society. As Justice Binnie wrote for the majority in *Whiten v Pilot Insurance Co*, "Punishment is a legitimate objective not only of the criminal law but of the civil law as well."[17] Thus, even though punitive damages and criminal law both punish wrongdoing, they are complementary, rather than duplicative, tools.

A related argument is that punishment should be restricted to criminal law because private law defendants lack the robust procedural protections that are provided in criminal proceedings.[18] However, the need for robust procedural protections in private proceedings is arguably not as strong because the social stigma associated with civil liability is far less significant.[19] Moreover, an award of punitive damages does not involve a threat to liberty and therefore does not entail the threat of physical coercion that is associated with criminal liability.[20] Thus, the procedural safeguard argument is not convincing.

Some have argued that punitive damages should be available in tort law but not in contract.[21] The basis of this argument is that contracting parties voluntarily assume and define their contractual obligations, whereas tort obligations are imposed.[22] Therefore, it is argued that *imposing* punishment (through punitive damages) is appropriate in tort actions, but not in actions

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[12] *Ibid*.
[13] *Ibid*.
[14] See Ernest J Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78:1 Chicago-Kent L Rev 55 at 86 [Weinrib, "Punishment and Disgorgement"]; Ralph Cunnington, "Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases?" (2006) 26:3 LS 369 at 380.
[15] *Ibid*.
[16] Cunnington, *supra* note 14 at 381.
[17] *Whiten*, *supra* note 3 at para 37.
[18] Pey-Woan Lee, "Contract Damages, Corrective Justice and Punishment" (2007) 70:6 Mod L Rev 887 at 888.
[19] Marc Galanter & David Luban, "Poetic Justice: Punitive Damages and Legal Pluralism" (1992-1993) 42:4 Am U L Rev 1393 at 1458.
[20] *Ibid* at 1460. An exception would be where a defendant who has been ordered to pay punitive damages fails to do so and is imprisoned following proceedings for contempt. However, the SCC has held that contempt is an enforcement power of last resort and imprisonment is uncommon where a defendant simply does not comply with an order to pay. Moreover, in contempt proceedings, the defendant's contempt must be proven to the criminal standard of proof. See *Carey v Laikin*, 2015 SCC 17 at paras 32, 36; *Vidéotron Ltée v Industries Microlec Produits Électroniques Inc*, [1992] 2 SCR 1065 at paras 18-20.
[21] Cunnington, *supra* note 14 at 375; *Thyssen Inc v SS Fortune Star*, 777 F2d 57 at 63 (2nd Cir, 1985).
[22] England and Wales, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Commission No 247) (London: The Stationary Office, 1997) at 118.

for breach of contract. The counter-argument, however, is that tort law duties are also voluntarily assumed to some extent. For example, as Patrick Atiyah helpfully explains, "[a] person who negligently injures another while driving his car is voluntarily on the road, voluntarily driving his car, and may be said to submit himself to the requirement of the law with as much or as little truth as the seller of goods."[23] To the extent that Atiyah is correct, this criticism loses some of its force. Even if we reject Atiyah's explanation, most contracts say nothing about the remedial consequences of a breach, particularly regarding the availability of punitive damages.[24] As Justice Pennell of the Ontario High Court wrote succinctly in *Thompson v Zurich Insurance Co*, "to allow the imposition of punitive damages in tort actions and to deny them without exception for breach of contract … is a mechanical classification without sound and legitimate basis."[25]

Another recurrent argument is that punitive damages awards discourage efficient breach of contract.[26] This argument is attractive since the SCC has supported the idea that courts should avoid discouraging efficient breach of contract.[27] Regardless, the SCC does not appear to be concerned that punitive damages will discourage efficient breach of contract. Indeed, the Court made no mention of efficient breach in its prominent decisions on breach of contract in *Vorvis*, *Whiten*, *Wallace v United Grain Growers Co*, *Fidler v Sun Life Assurance Co of Canada*, or *Honda Canada Inc v Keayes*. Moreover, this argument would equally denounce the remedy of specific performance and the tort of inducing breach of contract. In any case, defendants typically must have acted maliciously for punitive damages to be awarded.[28] As the Ontario Law Reform Commission correctly argued, "it is difficult to support gratuitous malice on efficiency grounds."[29] Thus, the theory of efficient breach does not support a convincing argument against punitive damages for breach of contract.

A final criticism of punitive damages is that the civil law already possesses tools for punishing defendants in the form of awards of full or substantial indemnity costs.[30] That the SCC has remarked that such tools are used "only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties" lends weight to this criticism.[31] This comment has led some to argue that punitive damages and indemnity costs are duplicative, since the conduct that will merit an award of full or substantial indemnity costs is similar to the

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[23] Patrick Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) at 41, quoted in Cunnington, *supra* note 14 at 376.

[24] Cunnington, *supra* note 14 ("contracts very rarely make provision for the remedial consequence of breach … Indeed, in all but the most sophisticated commercial contracts, the quantum of damages is left for the court to determine in accordance with criteria external to the contract itself" at 376).

[25] (1984), 7 DLR (4th) 664 at 673 (Ont H Ct J).

[26] See Ontario Law Reform Commission, *Report on Exemplary Damages* (Toronto: Ontario Law Reform Commission, 1991) at 93; Swan, *supra* note 4 at 629, 640; England and Wales Law Commission, *supra* note 22 at 118.

[27] See *Bank of America Canada v Mutual Trust Co*, [2002] 2 SCR 601 at paras 30–31.

[28] *Whiten*, *supra* note 3 at para 36; *Fidler*, *supra* note 10 at para 62; *Honda*, *supra* note 10 at para 62.

[29] Ontario Law Reform Commission, *supra* note 26 at 96.

[30] Swan, *supra* note 4 at 608; Swan & Adamski, *supra* note 1 at 571–72.

[31] *Young v Young*, [1993] 4 SCR 3 at para 251.

conduct that will merit an award of punitive damages.[32] Despite this criticism, punitive damages should not be eliminated. From a practical perspective, cost awards may not be a sufficient means of exacting retribution in many cases because the quantum of costs is often unknown at the time of the award, and the quantum that is eventually determined may not be large enough to truly achieve retribution. Furthermore, awards of full or substantial indemnity costs often serve a different purpose than punitive damages: they are typically awarded "to mark the court's disapproval of the conduct of a party *during* the litigation."[33] According to Wakeling JA in *Pillar Resource Services Inc v PrimeWest Energy Inc*, punitive damages "have nothing to do with the amount of the successful party's legal obligations to its counsel" and it would be wrong to equate punitive damages with an indemnity costs order.[34] Ultimately, punitive damages may be the only effective means of achieving retribution in many cases.

Corrective Justice in the Context of Contract Law

According to the theory of corrective justice, the aim of a legal remedy is to correct injustice inflicted by one person upon another.[35] Injustice occurs when one party realizes a normative gain and the other a corresponding normative loss.[36] The remedy responds to the injustice and, to the extent possible, endeavours to undo it by restoring the notional equality with which the parties entered the transaction.[37] The injustice is undone when the defendant is ordered to restore what is rightfully the plaintiff's, either specifically or with something of equivalent value.[38] It is the nature of the plaintiff's right and the defendant's correlative duty that determines the remedy that the plaintiff should be granted.[39]

The main advantages of the corrective justice approach to contract law are three-fold. First, the correlative structure of contracts fits well with the core feature of the theory of corrective justice.[40] Second, the protections that contract law provides to plaintiffs reflect the corrective justice requirement that the contracting parties stand in equal relation to each other.[41] Finally, corrective justice can provide a compelling explanation[42] for why the default remedy in contract law is and should be expectation damages.[43]

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[32] See e.g. *Plester v Wawanesa Mutual Insurance Co*, [2006] 269 DLR (4th) 624 at para 109 (Ont CA); Mark Orkin, *The Law of Costs* (Aurora ON: Canada Law Book, 1987) (looseleaf 2005), s 219.1.2.
[33] *Prinzo v Baycrest Centre for Geriatric Care*, [2002] 60 OR (3d) 474 at para 76 (CA) [emphasis added].
[34] 2017 ABCA 19 at para 127.
[35] Ernest J Weinrib, "Corrective Justice in a Nutshell" (2002) 52:4 UTLJ 349 at 349 [Weinrib, "Corrective Justice"].
[36] *Ibid*.
[37] *Ibid* at 349–50.
[38] Weinrib, "Punishment and Disgorgement", *supra* note 15 at 60.
[39] *Ibid* at 57; Curtis Bridgeman, "Corrective Justice in Contract Law: Is There a Case for Punitive Damages?" (2003) 56:1 Vand L Rev 237 at 254.
[40] The core feature being correlativity. Bridgeman, *supra* note 39 at 252.
[41] *Ibid* at 253.
[42] See Ernest J Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) at 136, n 2. A contract entitles each party to the other's performance. Bridgeman, *ibid* at 256–57, explains that this entitlement to performance is best understood as a normative entitlement: when the promisor fails to perform the contract the

The focus of a corrective justice analysis is on the relationship between the wrongdoer and the victim.[44] Defendants and plaintiffs are said to be "correlatively situated" when they are the respective doer and sufferer of injustice.[45] Thus, a remedy must be the correlatively structured response to a correlatively structured injustice.[46] It is not clear that these requirements are met under the traditional conception of punitive damages. Professor Ernest Weinrib, a leading proponent of corrective justice, criticizes punitive damages because they seem to focus unilaterally on the defendant as the doer of injustice and fail to consider the correlative situation of the plaintiff.[47] However, as the next section demonstrates, it is in fact possible to conceive of punitive damages as a correlatively structured response to a correlatively structured injustice.

Correcting Dignitary Injuries

According to Professor Jean Hampton, some wrongful actions constitute an affront to the victim's value or dignity, which she characterizes as "moral injuries."[48] In order to avoid the inherent vagueness in the term "moral injury," this paper refers to such affronts as "dignitary injuries" instead. The idea of a dignitary injury is premised on the liberal notion that every human being has equal and objective intrinsic worth.[49] This notion of equality underlies many doctrines of contract law. For example, the doctrine of consideration ensures that the parties to a contract are treated as equals by requiring that they become bound only in respect of something for which they bargain.[50] Thus, the parties to a contract participate equally in the creation of the contract itself.[51] Additionally, the doctrine of unconscionability ensures a minimum degree of equity between contractual parties.[52] By protecting parties against abuse and exploitation, these doctrines demonstrate that contract law treats contracting parties as equals.

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promisee suffers a normative loss. Expectation damages reflect the amount of normative loss suffered by the promisee. Thus, expectation damages are compensatory and serve to correct injustice.

[43] See *Wertheim v Chicoutimi Pulp Co*, [1911] AC 301 (PC) ("in giving damages for breach of contract, the party complaining should so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. … That is a ruling principle. It is a just principle." at para 7). Some theories imply that expectation damages should not be the default remedy for breach of contract. Since this is not the actual position of contract law in Canada, those arguments are outside the scope of this paper. See e.g. Bridgeman, *supra* note 39 at 239.

[44] Bridgeman, *supra* note 39 at 241.

[45] Weinrib, "Punishment and Disgorgement", *supra* note 15 at 59.

[46] *Ibid*.

[47] *Ibid* at 86.

[48] Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution" (1991-1992) 39 UCLA L Rev 1659 at 1666-8. Hampton's use of "moral injury" is derived from Kant's definition of human worth as equal for all as dignified, rational, and autonomous beings. This is not to be confused with Kant's definition of "moral worth," which renders human worth unequal based on how "good" someone is. To avoid confusing these two uses of "moral," this paper instead uses the term "dignitary injury."

[49] *Ibid* at 1667.

[50] Weinrib, *The Idea of Private Law*, *supra* note 42 at 138; Peter Benson, "The Unity of Contract Law" in Peter Benson, ed, *The Theory of Contract Law* (Cambridge, UK: Cambridge University Press, 2001) 118 at 156-7.

[51] Weinrib, *The Idea of Private Law*, *supra* note 42 at 138.

[52] Benson, *supra* note 50 at 185-6.

The concept of dignitary injury is objective: each person's intrinsic value generates certain entitlements.[53] A defendant causes a dignitary injury through wrongful conduct that violates or rejects these entitlements by flouting a plaintiff's value and thereby representing the plaintiff as less than her actual worth.[54] This affront causes a dignitary injury by violating the plaintiff's right to dignitary equality.[55] Correlatively structured injustice occurs because, relative to his or her baseline normative equality, the defendant has realized a gain and the plaintiff a corresponding loss.[56]

To establish a dignitary injury, there must be evidence that the breaching party acted in a manner that degraded the plaintiff's dignity.[57] For example, deception can be viewed as evidence of a defendant's utter disrespect for a plaintiff's equal status.[58] A defendant's failure to take the plaintiff into account suggests a conscious disdain for the plaintiff, especially when there is a power imbalance between the parties.[59] Dishonest conduct may communicate contempt and a lack of respect if it implies that the plaintiff does not deserve to be treated with honesty.[60] However, not all dishonest conduct will cause dignitary injury. Some acts may be offensive but will cause only negligible damage to a plaintiff's dignitary value.[61] It is only extreme or egregious dishonest conduct that will cause a dignitary injury. This condition is a check against frivolous claims and conforms to the requirements for awarding punitive damages.[62]

The next requirement to establish a dignitary injury is that the conduct must be intentional. While some may argue that unintentional or negligent acts may cause dignitary injuries, this is incorrect. The difference between an intentional wrong and a merely unintentional or negligent wrong is demonstrated by Oliver Wendell-Holmes' aphorism that even a dog knows the difference between being stumbled over and being kicked.[63] An unintentional or negligent act simply does not entail the same disrespect and disregard of the plaintiff's intrinsic equality. The defendant's blameworthy state of mind is an essential component. Without it, the defendant does not represent the plaintiff as worth less than her actual value, and the defendant does not accord himself a value that he does not really have.

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[53] Hampton, *supra* note 48 at 1674.
[54] *Ibid* at 1672.
[55] Anthony J Sebok, "Punitive Damages: From Myth to Theory" (2007) 92 Iowa L Rev 957 at 1008.
[56] Weinrib, "Corrective Justice", *supra* note 35 at 349.
[57] Lee, *supra* note 18 at 904.
[58] *Ibid* at 905.
[59] Sebok, *supra* note 55 at 1014.
[60] *Ibid*.
[61] Hampton, *supra* note 48 at 1679.
[62] *McIntyre v Grigg* (2006), 83 OR (3d) 161 at para 60 (CA): "An award of punitive damages therefore requires the defendant to have engaged in extreme misconduct. The type of conduct required to attract punitive damages has been described in many ways, such as: malicious, oppressive, arbitrary and high-handed that offends the court's sense of decency ... a marked departure from ordinary standards of decent behaviour ... harsh, vindictive, reprehensible and malicious ... offends the ordinary standards of morality and decency ... arrogant and callous ... egregious ... high-handed and callous ... arrogant, callous of the plaintiff's rights and deliberate ... outrageous or extreme ... highly unethical conduct which disregards the plaintiff's rights ... and recklessly exposing a vulnerable plaintiff to substantial risk of harm without any justification ..." [citations omitted].
[63] Robert Stevens, *Torts and Rights* (Oxford, UK: Oxford University Press, 2007) at 86.

Punitive damages respond to the injustice of dignitary injuries and vindicate the truth about the parties' equal status.[64] They repudiate the defendant's message of superiority over the plaintiff in a way that confirms them as equals.[65] The plaintiff's worth is re-established through a loss suffered by the defendant, which proves that the plaintiff and defendant are equal in value.[66] Therefore, punitive damages are best understood as a form of substitutive damages.[67] A punitive damage award substitutes for the plaintiff's right to dignitary equality, which has been infringed.[68] As Professor Rob Stevens has explained, substitutive damages are awarded even if the plaintiff has suffered no consequential losses.[69] This is true of punitive damages since a dignitary injury does not necessitate any physical or psychological harm.[70] Critically, this conception of punitive damages still permits a consideration of the egregiousness of the defendant's conduct. More extreme and malicious conduct will result in a greater infringement of a right and will therefore necessitate a greater substitutive award.[71] This is precisely how punitive damages are quantified.[72]

Recognizing this substitutive purpose also addresses any criticisms that punitive awards provide unjustifiable windfalls to plaintiffs. The awards substitute for the infringement of plaintiffs' rights. This improves the law's internal coherence and provides a normative justification for punitive damages that is separate from the purely retributive role played by awards of full or substantial indemnity costs. As a form of substitutive damages under the theory of corrective justice, punitive damages become a more intelligible and defensible remedy.[73]

Punitive Damages as a Matter of Corrective Justice: A Hybrid Conception

At this point, one might object to the notion that punitive damages are substitutive. Historically, courts have not relied upon that rationale. For example, more than 250 years ago, Lord Chief Justice Pratt held that punitive "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[74] Drawing on prior jurisprudence, Justice Binnie in *Whiten* held that "the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and

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[64] Lee, *supra* note 18 at 897.
[65] Hampton, *supra* note 48 at 1686; see also Stevens, *supra* note 63 ("[p]unitive damages operate as an 'emphatic vindication of the claimant's rights'." at 86). This conception is similar to Hampton's and Lee's in that punitive damages serve a vindicatory purpose as opposed to a merely vindictive one.
[66] Hampton, *supra* note 48 at 1686-87. Only the defendant's publicly visible defeat by the plaintiff can establish the plaintiff's true value. See also Galanter & Luban, *supra* note 19 at 1432 (only the defendant's publicly visible defeat by the plaintiff can establish the plaintiff's true value).
[67] Stevens, *supra* note 63 at 60.
[68] *Ibid* at 85.
[69] *Ibid* at 60.
[70] Hampton, *supra* note 48 at 1672.
[71] Stevens, *supra* note 63 at 85.
[72] *Whiten*, *supra* note 3 at paras 74, 94.
[73] Lee, *supra* note 18 at 890.
[74] *Wilkes v Wood* (1763), Lofft 1, 98 ER 489 at 498–99 (KB) [*Wilkes*].

denunciation."[75] As I will demonstrate, punitive damages can achieve these objectives *and* correct for dignitary injuries because, as Justice Binnie noted in *Whiten*, punitive damages are a "hybrid" remedy.[76]

It should be noted that in the above-quoted passage, Lord Chief Justice Pratt stated first and foremost that punitive damages are designed "as a satisfaction to the injured person."[77] The concept of dignitary injuries gives substance to this notion of "satisfaction to the injured person." The "satisfaction" is the vindication of the plaintiff's worth and the reassertion of the parties' intrinsic equality. This substitutive role is consistent with Justice Binnie's statement that punitive damages are not meant to compensate victims.[78] That being said, punitive damage awards can serve multiple objectives.

Punitive damage awards can simultaneously achieve the objectives of retribution, deterrence, and denunciation while correcting the injustice of dignitary injuries. Justice Binnie defined retribution as giving "a defendant his or her just desert."[79] Under this paper's hybrid conception of punitive damages, a defendant's "just desert" is an award of punitive damages that is proportionate to her wrongdoing. Proportionality is essential because the liberal conception of equality entails that no one is superior to any wrongdoer.[80] Thus, a punitive award should only do what is rationally required to vindicate the truth of the parties' equality and should not portray the plaintiff as superior to the defendant. In *Whiten*, Justice Binnie repeatedly stressed the need for proportionality in awarding punitive damages and held that punitive damages "are given in an amount that is no greater than necessary to rationally accomplish their purpose."[81] Even if disproportionate awards do occur, the SCC has affirmed, "punitive damages are not 'at large' and appellate courts have 'much greater scope and discretion on appeal' than they do in the case of general damages. If the court considers the award or its quantum to be irrational, it has a duty to interfere."[82] Thus, there are effective controls in place to prevent sensational punitive damage awards like those seen in the US.[83] Under this hybrid conception, punitive damage awards can simultaneously substitute for dignitary injury and serve the objective of retribution.

Deterrence ought to be considered a merely ancillary benefit of punitive damage awards. The threat of punitive damages undoubtedly has some effect on the conduct of contractual parties, even if punitive damages awards tend to be "unreliable, erratic, and unpredictable."[84] Punitive damages awards also serve the objective of denunciation. By vindicating the

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[75] *Whiten*, *supra* note 3 at para 68.
[76] *Ibid* at para 38.
[77] *Wilkes*, *supra* note 74 at 498.
[78] *Whiten*, *supra* note 3 at para 36.
[79] *Ibid* at para 94.
[80] Hampton, *supra* note 48 at 1668.
[81] *Whiten*, *supra* note 3 ("the governing rule for quantum is proportionality" at para 74; "[punitive damages] are given in an amount that is no greater than necessary to rationally accomplish their purpose" at para 94).
[82] *Whiten*, *supra* note 3 at para 133 [citations omitted].
[83] See e.g. *Pacific Mutual Life Insurance Company v Haslip*, 499 US 1 at 50–51, 64–65 (USSC 1991) cited in Sebok, *supra* note 59 at 969.
[84] Sebok, *supra* note 59 at 984.

fundamental truth of the parties' equality, a court simultaneously communicates its disapproval of the defendant's conduct. That said, the substitutive and retributive purposes of punitive damages ought to remain paramount. Like deterrence, denunciation should be considered merely an ancillary benefit. This is because correcting the injustice of dignitary injuries provides the best theoretical justification for punitive damages in contract law.

Overall, this analysis demonstrates that punitive damages can be theoretically justified in actions for breach of contract. Punitive damages fit within the theory of corrective justice because they are a correlatively structured remedy for a correlatively structured injustice: dignitary injury. The next part of this paper will examine the independent actionable wrong requirement in light of this theoretical justification.

II. THE INDEPENDENT ACTIONABLE WRONG REQUIREMENT

Origin and Meaning

In an action for breach of contract in Canada, malicious and egregious conduct alone is not sufficient to merit an award of punitive damages despite the infliction of a dignitary injury. In *Vorvis*,[85] the Court held that the "only basis for the imposition of … punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff."[86] Subsequent cases interpreted this statement to mean that the actionable wrong must be separate and independent of the principal breach of contract alleged by the plaintiff.[87] In *Whiten*, the SCC confirmed that in order to award punitive damages, "[a]n independent actionable wrong is required."[88] This requirement has been affirmed repeatedly since then.[89]

Prior to *Whiten*, judges and legal scholars interpreted *Vorvis* to mean that in addition to the breach of contract, the defendant's conduct must have been tortious in order to fulfill the actionable wrong requirement.[90] In part, this is because the Court in *Vorvis* held that *Robitaille v Vancouver Hockey Club Ltd*[91] and *HL Weiss Forwarding Ltd v Omnus*[92] were examples of the application of the requirement. In *Robitaille*, the British Columbia Court of Appeal (BCCA)

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[85] Arnie Herschorn, "Awards of Punitive Damages for Breach of Contract" (2013) 41 Adv Q 464 at 465; Yehuda Adar, "Whiten v. Pilot Insurance Co.: The Unofficial Death of the Independent Action Wrong Requirement and Official Birth of Punitive Damages in Contract" (2005) 41 Can Bus LJ 247 at 251.

[86] *Vorvis*, *supra* note 8 at 1105-6.

[87] John D McCamus, "Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada" (2004) 41:4 San Diego L Rev 1491 at 1499 [McCamus, "Prometheus"]; see also *Marshall v Watson Wyatt & Co* (2002), 57 OR (3d) 813 at para 44 (CA).

[88] *Whiten*, *supra* note 3 at para 82.

[89] See *Fidler*, *supra* note 10 at para 63; *Honda*, *supra* note 10 at para 62; *Barber v Vrozos*, 2010 ONCA 570 at para 152; *Fernandes v Penncorp Life Insurance Co*, 2014 ONCA 615 at para 74.

[90] Adar, *supra* note 85 at 254. See also Stephane Beaulac, "A Comparative Look at Punitive Damages in Canada" (2002) 17 SCLR (2d) 351 at 366; Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000) at 277; *Taylor v Pilot Insurance Co*, [1990] 75 DLR (4th) 370 at para 6 (Ont Ct J (Gen Div)).

[91] (1981), 124 DLR (3d) 228 (BCCA) [*Robitaille*] cited in *Vorvis*, *supra* note 8 at para 1105-6.

[92] [1976] 1 SCR 776 [*HL Weiss*] cited in *Vorvis*, *supra* note 8 at para 1105-6.

awarded punitive damages based on the defendant's negligence.[93] Likewise, in *HL Weiss*, the award of punitive damages was based on a finding of the tort of conspiracy in addition to the breach of the employment contract.[94] Therefore, a separate tort seemed to be required. Further, the above-quoted passage from *Vorvis* seemed to require that the actionable wrong must have caused actual loss to the plaintiff.[95] The SCC clarified its position in *Whiten*: an independent actionable wrong can be found in the breach of a separate and distinct contractual provision, either express or implied, irrespective of whether the second breach caused loss to the plaintiff.[96]

Justifications for the Independent Actionable Wrong Requirement

Some scholars have asserted that the independent actionable wrong requirement is simply a misreading of the majority judgment in *Vorvis*. According to this theory, Justice MacIntyre did not think that the defendant's conduct breached the contractual term requiring the defendant employer to provide reasonable notice of termination.[97] He did not think there was *any* wrong that could justify an award of damages. Therefore, Justice MacIntyre was merely stating that, like all damages, punitive damages can only be awarded where there has been some kind of breach of duty.[98] He did not mean that the actionable wrong needed to be independent of or in addition to another breach.[99] Despite this potential misinterpretation, several attempts have been made to justify the requirement that the actionable wrong be separate and independent of the original breach of contract.

Professor Weinrib has argued that the SCC in *Whiten* was concerned that exclusive reliance on a "whole gamut of dyslogistic judicial epithets" would render the punitive damage analysis far too subjective.[100] Boyd McGill has expressed similar concern that without the requirement, judges and juries will impose punitive damages based solely on their widely varying levels of subjective outrage.[101] Accordingly, punitive damages require a legally objective form of justification (i.e., an independent actionable wrong). The requirement sets a minimum threshold for when such awards can be made and therefore can be seen as an attempt to restrict the availability of punitive damages. This purpose conforms to the SCC's repeated assertions that awards of punitive damages for breach of contract are meant to be unusual,[102] rare,[103] and

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[93] *Robitaille*, *supra* note 91 at paras 77–78.
[94] *HL Weiss*, *supra* note 92 at paras 1, 5.
[95] Adar, *supra* note 85 at 257.
[96] *Whiten*, *supra* note 3 at para 82.
[97] McCamus, "Prometheus", *supra* note 87 at 1497–98, 1517.
[98] *Ibid* at 1498.
[99] Shannon Kathleen O'Byrne & Evaristus Oshionebo, "Punitive Damages and the Requirement for an Independent Actionable Wrong: Whiten v Pilot Insurance Co", Case Comment, (2001-2002) 25 Adv Q 496 at 503.
[100] *Cassell v Broome*, [1972] AC 1027 at 1129 (HL) quoted in Weinrib, "Punishment and Disgorgement", *supra* note 15 at 96.
[101] Boyd McGill, "Pine Tree Justice: Punitive Damage Reform in Canada" (2012) 36 Man LJ 287 at 301.
[102] *Vorvis*, *supra* note 8 at 1107.
[103] *Ibid*; *Whiten*, *supra* note 3 at para 81.

exceptional.[104] *Brown v Waterloo Regional Board of Commissioners of Police*[105] and *Vorvis*[106] demonstrate the utility of an independent actionable wrong requirement since punitive damages were denied in each case due to a failure to satisfy the requirement.[107] As will be shown in the next section, however, other cases reveal that it is ambiguous whether the requirement effectively achieves its purpose.

A second potential justification can be gleaned from the SCC's discussion of damages for mental distress in *Fidler*. The Court held that an independent actionable wrong is *not* required for mental distress damages in actions for breach of contract because the plaintiff's loss arises from the breach itself.[108] Appropriate damages are therefore determined exclusively by what was in the reasonable contemplation of the parties at the time of contract formation.[109] An independent cause of action is required, however, where the damages "are of a different sort entirely."[110] Arguably, punitive damages are not based on any loss that arises from the breach of contract itself. They have nothing to do with what was in the reasonable contemplation of the parties. Therefore, they are "of a different sort entirely" and require an independent actionable wrong.

Criticizing the Independent Actionable Wrong Requirement

The trouble with this line of reasoning is obvious: In an action for breach of contract, the contract must have been breached in order to justify any award of damages, punitive or otherwise. Punitive damages cannot be awarded for malicious or reprehensible conduct if no breach has occurred because the plaintiff's underlying breach of contract claim will fail. An affront to a person's dignity alone does not afford a cause of action. As outlined above, a defendant causes a dignitary injury through wrongful conduct that represents the plaintiff as worth less than her actual value. An affront to a person's dignity which is non-tortious and which does not constitute a breach of contract or any other duty is not legally wrongful and therefore cannot be redressed by a legal remedy. In the context of an action for breach of contract, a dignitary injury can only be caused by the manner of the breach. This makes the breach a necessary element of the dignitary injury. Thus, according to the SCC in *Fidler*, punitive damages should not require any independent actionable wrong.

Many scholars have criticized the notion that the independent actionable wrong requirement functions as a check on subjectivity. For example, Professor Bruce Feldthusen has asserted that the requirement is not an effective restriction.[111] Professor Swan has similarly

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[104] *Whiten*, *supra* note 3 at para 36.
[105] (1982), 136 DLR (3d) 49 at 51 (Ont HC), rev'd in part on other grounds 43 OR (2d) 113 (CA) [*Brown*].
[106] *Vorvis*, *supra* note 8 at 1103.
[107] Herschorn, *supra* note 85 at 471. See *Vorvis*, *supra* note 8 at 1109-10; *Ibid* at para 62.
[108] *Fidler*, *supra* note 10 at para 55.
[109] *Ibid*.
[110] *Ibid*.
[111] Bruce Feldthusen, "Punitive Damages: Hard Choices and High Stakes" [1998] NZLR 741 ("there seems to be a substantial number [of cases] in which the courts have either disregarded *Vorvis* or have found ways to circumvent it" at 765).

argued that the requirement utterly fails to impose any restriction on awards of punitive damages.[112] The premise of these arguments is that judges can easily circumvent the requirement. Professor Swan argues that many courts have simply added (or refused to add) extra obligations to the defendant's basic contractual obligations in order to find (or deny) a basis for an award.[113] Moreover, the defendant's contractual obligations can simply be divided into many separate duties in order to find an additional breach.[114]

One example, arguably, is *Whiten* itself. The majority in *Whiten* held that the breach of the insurer's duty of good faith was independent of the breach of the insurer's duty to pay the insured's loss.[115] Instead, the majority could have held, as the defendant argued, that there was only a single breach: the breach of the contract of insurance by failing to deal with the plaintiff's claim in good faith.[116] This argument is appealing since Justice Binnie did not explain why the insurer's duties were separated. There have been many additional cases where the application of the requirement has been questionable.[117] For example, the BCCA in *Deildal v Tod Mountain Development Ltd* held that "[n]othing in *Vorvis* suggested that the impugned conduct must be anything more than *potentially* independently actionable."[118] Under this approach, a plaintiff would not have to even specify the alleged independent actionable wrong in their pleadings.

There have also been a number of cases where courts have not even bothered to classify the conduct as an independent actionable wrong when awarding punitive damages.[119] Overall, it appears that many courts award punitive damages when a defendant's conduct is sufficiently reprehensible and, out of respect for precedent, simply couch their decisions in the language of the independent actionable wrong. Thus, in practice, the requirement is a largely irrelevant and ineffective check on the availability of punitive damages. That said, some judges undoubtedly rely upon the requirement in order to refrain from awarding punitive damages. *Fidler* is one such example.[120]

The requirement has also been criticized as incoherent and unjustifiable on other grounds.[121] Many authors have questioned why one single breach of duty is sufficient for

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[112] Swan, *supra* note 4 at 600; Swan & Adamski, *supra* note 1 at 565.
[113] Swan, *supra* note 4 at 600.
[114] *Ibid* at 616.
[115] *Whiten*, *supra* note 3 at para 79.
[116] O'Byrne & Oshionebo, *supra* note 99 at 501.
[117] Conrad v Household Financial Corp (1992), 118 NSR (2d) 56 (CA); Tannous v Donaghue (1995), 16 CCEL (2d) 75 (Ont Ct (Gen Div)); Ribeiro v Canadian Imperial Bank of Commerce (1989), 67 OR (2d) 385 (H Ct J); Francis v Canadian Imperial Bank of Commerce (1994), 21 OR (3d) 75 (CA); Williams v Motorolla Ltd (1996), 18 CCEL (2d) 74 (Ont Ct (Gen Div)); Hughes v Gemini Food Corp (1997), 97 OAC 147 (CA); Anderson v Peel Memorial Hospital Assn (1992), 40 CCEL 203 (Ont Ct (Gen Div)) all cited in Feldthusen, *supra* note 111 at 766, n 148.
[118] [1997] 6 WWR 239 at para 101 (BCCA) [emphasis added].
[119] See Ward v Manufacturers Life Insurance Co, 2007 ONCA 881; Ferme Gérald Laplante & Fils Ltée v Grenville Patron Mutual Fire Insurance Co (2002), 61 OR (3d) 481 (CA), leave to appeal to SCC refused, 225 DLR (4th) vi; Millar v General Motors of Canada Ltd (2002), 27 BLR (3d) 300 (Ont Sup Ct J); IT/NET Ottawa Inc v Berthiaume (2002), 29 BLR (3d) 261 (Ont Sup Ct J), rev'd on other grounds [2006] 13 BLR (4th) 15 (CA).
[120] *Fidler*, *supra* note 10 at para 76.
[121] John D McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law Inc, 2012) at 956.

punitive damages in tort law, but two breaches are required in an action for breach of contract.[122] It does not seem logical to require an additional breach of duty to justify an award. Under the hybrid conception, a dignitary injury only requires a single breach of duty so long as the manner of the breach is egregious and represents the plaintiff as worth less than her actual value. Since no additional breach is required to cause a dignitary injury, no additional breach should be required to justify an award of punitive damages. To deny an award when there has been a dignitary injury simply because there is no independent actionable wrong would also undermine the objectives of punishment, deterrence, and denunciation that punitive damages are meant to serve.

A further criticism of the requirement is that an independent actionable wrong should simply result in another award of ordinary compensatory damages.[123] If the initial breach is remedied in this way, then why should the second actionable wrong not be remedied in this way too? Why award punitive damages instead of awarding increased expectation or reliance damages? This logical inconsistency is difficult to justify under the prevailing conceptions of punitive damages. From the perspective of the hybrid theory, the whole requirement is unnecessary to begin with. As outlined above, the manner of breach must be reprehensible and egregious in order to cause a dignitary injury, but only one breach is necessary. When deciding whether an award should be made, it is irrelevant whether the dignitary injury was caused by a single breach or by multiple breaches.

As a result of these strong criticisms, many scholars have predicted that the SCC will eventually eliminate the independent actionable wrong requirement.[124] Several developments support this prediction. First, New Brunswick statutorily eliminated the independent actionable wrong requirement more than twenty years ago.[125] Second, while the decision in *Wallace* indicated that an independent actionable wrong is required to recover damages for mental distress,[126] the SCC eliminated the requirement in *Fidler*.[127] Nevertheless, despite being "an inelegant source of continuing analytical difficulty," the independent actionable wrong requirement remains the current law of Canada for punitive damages for breach of contract.[128] The next part of this paper discusses the new duty recognized in *Bhasin* and how it may affect awards of punitive damages for breach of contract.

III. THE DUTY OF HONEST CONTRACTUAL PERFORMANCE

Origin and Meaning

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[122] See *Ibid*; O'Byrne & Oshionebo, *supra* note 99 at 504; Adar, *supra* note 85 at 263.
[123] Swan, *supra* note 4 at 616; Swan & Adamski, *supra* note 1 at 569; Weinrib, "Punishment and Disgorgement", *supra* note 15 at 97.
[124] Adar, *supra* note 85 at 277; McCamus, "Prometheus", *supra* note 87 at 1504.
[125] *Law Reform Act*, RSNB 1993, c L-1.2, s 3(1).
[126] *Wallace*, *supra* note 10 at para 73.
[127] *Fidler*, *supra* note 10 at para 55.
[128] McCamus, "Prometheus", *supra* note 87 at 1504.

The doctrine of good faith has been described as "the most important contractual issue of our time."[129] Despite its apparent importance, most common law jurisdictions have not recognized good faith as a general and independent doctrine of contract law.[130] Canadian law has traditionally shared this view.[131] For example, the ONCA in *Transamerica Life Canada Inc v ING Canada Inc* held that there is no stand-alone duty of good faith that is independent of the express contractual terms.[132] More recently, the Alberta Court of Appeal reached the same conclusion in *Benfield Corporate Risk Canada Ltd v Beaufort International Insurance Inc*.[133] However, courts have not always been so opposed to good faith as a general doctrine of contract law. In 1766, Lord Mansfield held that good faith is a "governing principle … applicable to all contracts and dealings."[134] Similarly, in 1792, Lord Kenyon held that "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith."[135] Clearly, the view of good faith as an independent doctrine of contract law has deep roots in the common law notwithstanding the ambivalence of modern courts.

In 2014, the SCC unanimously declared for the first time in Canada that good faith contractual performance is a governing principle of the common law of contract.[136] The Court held that as a governing principle, good faith underpins and informs the various rules by which the common law recognizes obligations of good faith in various contractual situations.[137] The Court further held that one manifestation of the principle of good faith is in the form of a general duty of honesty in contractual performance.[138] This duty requires that the parties to a contract must not lie or deceive each other about matters directly linked to the performance of their contractual obligations; however, this duty does not rise to the level of a fiduciary duty.[139] It is a simple requirement: do not lie or behave dishonestly either by act or omission. Critically, the

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[129] Sir Thomas Bingham, "Foreward" in Reziya Harrison, *Good Faith in Sales* (London: Sweet & Maxwell, 1997) at vi cited in Woo Pei Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001) 1 OUCLJ 195 at 195.

[130] Chris DL Hunt, "Good Faith Performance in Canadian Contract Law" (2015) 74:1 Cambridge LJ 4 at 6. See also *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, [1989] 1 QB 433 at 439 (CA); *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*, [2013] EWCA Civ 200 at para 105; *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, [2002] HCA 5 at para 87; *CGU Workers Compensation (NSW) Ltd v Garcia*, [2007] NSWCA 193 at para 132; *Archibald Barr Motor Company Ltd v ATECO Automotive New Zealand Ltd*, [2007] NZHC 1142 at para 79.

[131] Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ontario Law Reform Commission, 1987) Book 130 at 165.

[132] [2003] 68 OR (3d) 457 at para 53 (CA).

[133] 2013 ABCA 200 at para 120.

[134] *Carter v Boehm* (1766), 3 Burr 1905, 97 ER 1162 at 1164 (KB).

[135] *Mellish v Motteux* (1792) Peake 156, 170 ER 113 at 157 (KB).

[136] *Bhasin*, *supra* note 5 at para 33.

[137] *Ibid*.

[138] *Ibid* at para 73.

[139] *Ibid*; Marco P Falco, "'Promise Not to Lie': The Duty of Honest Contractual Performance in Contract" [2014] Bus L Today 1 at 2.

Court explained that the duty should not be seen as an implied term; it is a non-excludable contractual duty that operates irrespective of the intentions of the parties.[140]

Bhasin has been described as a "revolutionary" decision because it represents a rejection of a significant amount of modern common law jurisprudence, both in Canada and abroad.[141] However, as outlined above, the foundation for the SCC's decision was established hundreds of years ago and the decision in *Bhasin* represents a return to an earlier interpretation of the role of good faith in contract law. This is not a radical step: many important concepts in contract law already reflect the principle of good faith, and hundreds of federal and provincial statutes already incorporate good faith language.[142] As the SCC recognized in *Bhasin*, in most cases commercial parties reasonably expect that they will be treated with a basic level of honesty in their contractual dealings.[143] This duty also does not create a significant restriction on parties' freedom of contract. After all, parties to a contract were not free to lie and knowingly deceive one another before *Bhasin*. Liability for misrepresentation, fraud, and unconscionability are examples of legal tools that courts have typically used to limit this sort of conduct in the past.

The duty of honest contractual performance simply adds to this judicial toolbox and provides another way for courts to enforce the expectations of contractual parties and to curtail deceitful conduct. However, the likely effect of the duty in relation to punitive damages requires careful consideration. This analysis is important because the decision in *Bhasin* has made it clear that a breach of the duty of honest contractual performance will be regarded as a breach of contract even though the duty is not an implied term.[144] Thus, the SCC created a new potential source of an independent actionable wrong that could form the basis of an award of punitive damages. This possibility raises several important questions: Will this increase the availability of punitive damages? Will *Bhasin* thereby lead to an increase in awards? What other effects might it have? These questions are addressed in the next two sections.

Bhasin and the Independent Actionable Wrong Requirement

The SCC's decision in *Bhasin* will likely increase the practical irrelevance of the independent actionable wrong requirement. Currently, many courts dubiously adhere to the requirement while others simply disregard it.[145] For the most part, the requirement does not present much of a restriction on awards of punitive damages. Thus, the requirement is already well on its way to irrelevance. The duty of honest contractual performance should be the proverbial final nail in the coffin for the independent actionable wrong requirement. As outlined above, the duty may be breached through lying or deceitful acts or even omissions. If misleading

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[140] *Bhasin*, *supra* note 5 at paras 74–75.
[141] Hunt, *supra* note 130 at 6.
[142] Ontario Law Reform Commission, *supra* note 131 at 166. The Commission found 47 federal statutes, 96 British Columbia statutes, 55 New Brunswick statutes, and 156 Ontario statutes with good faith provisions.
[143] *Bhasin*, *supra* note 5 at para 60.
[144] Falco, *supra* note 139 at 2.
[145] See e.g. *supra* note 117; *supra* note 119.

conduct is all that is required to constitute a breach of the duty, judges and jurists will likely have little difficulty in finding actionable wrongs. In theory, the duty should provide an easy source of an independent actionable wrong in many breach of contract cases where the defendant's conduct is sufficiently egregious to warrant punitive damages.

Klaus v Taylhardat is a good example of a case where the duty of honest contractual performance could have been used to satisfy the independent actionable wrong requirement.[146] The defendant photographer contracted with the plaintiffs to take pictures of their wedding. He attended the wedding and took many pictures, including aerial shots from a helicopter that the plaintiffs had hired for that purpose. The defendant promised to deliver the pictures within six weeks but failed to follow through. For more than a year the defendant repeatedly promised the plaintiffs that he would deliver the pictures until he finally informed them that the pictures had been destroyed. Although the trial judge did not mention *Whiten* or the independent actionable wrong requirement, he awarded punitive damages "because of the dishonest and insensitive manner in which [the plaintiffs] were treated."[147] Clearly, if this case were decided today, the defendant's conduct would constitute a breach of the duty of honest contractual performance since the defendant unabashedly lied about his intent and ability to perform the contract. The substantive requirements for punitive damages would be met and an award would be justified.

The Ontario Superior Court case of *Gordon v Altus Group Ltd* shows that this analysis is more than merely hypothetical.[148] In *Gordon*, the plaintiff's company sold its assets to the defendant (Altus) and the plaintiff was hired to work for Altus for a period of three years. Towards the end of the second year, a dispute arose regarding the amount of money that the plaintiff's company would receive under the previous sale of assets. The plaintiff indicated his intent to seek arbitration. Shortly thereafter, Altus claimed that the plaintiff was no longer working effectively and that "he swore considerably to the point that it made working with him unbearable."[149] Altus then fired the plaintiff, who subsequently brought an action for wrongful dismissal. Justice Glass awarded the plaintiff damages for wrongful dismissal and $100,000 in punitive damages. In doing so, he held that there had been an independent actionable wrong since Altus failed to honestly perform the employment contract.[150]

The independent actionable wrong requirement will continue to fail as a restriction on punitive damage awards for breach of contract and, in most cases, it will become little more than an empty phrase used by judges and jurists out of respect for precedent. Eliminating the requirement would make punitive damage awards align more closely to the hybrid theory and would be consistent with the idea of *lex punit mendacium*. Without the requirement, only one breach of duty will be needed to justify an award. Since punitive damages correct the injustice of dignitary injuries, the law of punitive damages would become more coherent and therefore

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[146] 2007 BCPC 21.
[147] *Ibid* at para 10.
[148] 2015 ONSC 5663 [*Gordon*].
[149] *Ibid* at para 5.
[150] *Ibid* at para 41.

justifiable without the requirement. Many scholars and judges would no doubt applaud its abolition.

CONCLUSION

Punitive damages are a controversial remedy in private law generally and in contract law specifically. They have been described as absurd, ridiculous, out of place, irregular, anomalous, unjustifiable, and unscientific.[151] Despite these criticisms, punitive damages are justifiable under the theory of corrective justice. Egregiously deceitful conduct causes dignitary injury to the plaintiff by implicitly conveying the plaintiff's inferiority to the defendant. Punitive damages serve an important purpose: correcting the injustice of dignitary injuries. This correlatively structured remedy is more than just a form of substitutive damages. As a hybrid remedy, awards of punitive damages can simultaneously achieve retribution, deterrence, and denunciation. From this perspective, the independent actionable wrong requirement is unnecessary and incoherent, and it may lead to unjust results if the requirement prevents the correction of a plaintiff's dignitary injury. The new duty of honest contractual performance will further erode the practical relevance of the requirement by providing an easily found independent actionable wrong. While the new source of an independent actionable wrong will likely embolden plaintiffs to seek punitive damages more often, there is no reason that deceitful conduct should not merit an award of punitive damages so long as it is sufficiently egregious to have caused a dignitary injury. It is likely, and preferable, that the requirement will be eliminated in a future case due to this practical irrelevance. In any event, a new conception of punitive damages should not stoke fears of the floodgates opening. The quantum of punitive damages awards will be restrained by the principle of proportionality, and the number of awards made will be limited because outrageous affronts to dignity are exceptional. Punitive damages are here to stay, so it is important that they serve, and be seen to serve, an important and coherent purpose.

[151] See *Fay*, *supra* note 2 at 382.