Assurances

Assurances

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Mark D. Lerner

Volume 54, Number 2, 1986

URI: https://id.erudit.org/iderudit/1104496ar
DOI: https://doi.org/10.7202/1104496ar

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Publisher(s)

HEC Montréal

ISSN

0004-6027 (print)
2817-3465 (digital)

Explore this journal

Cite this document

Lerner, M. (1986). Bad Faith and Punitive Damages. *Assurances*, *54*(2), 225–238. https://doi.org/10.7202/1104496ar

Article abstract

Dans l'ensemble au Canada, les tribunaux sont réticents à accorder ce que l'on appelle des *punitive damages*, c'est-à-dire une indemnité reconnaissant l'aspect malicieux de dommages causés aux tiers. Comme question de fait, dans la province de Québec, les cas sont rares, dans le cours ordinaire des choses. S'ils sont plus fréquents dans la province d'Ontario, l'auteur de l'article souligne bien le caractère punitif que l'on veut donner à une indemnisation de ce genre. Et c'est par là que son article est intéressant. L'article de Me Lerner est suivi d'une note de Me Rémi Moreau, qui traite des dommages à titre punitif comme on les conçoit dans la province de Québec.

Bad Faith and Punitive Damages

by

Mark D. Lerner[1]

Dans l'ensemble au Canada, les tribunaux sont réticents à accorder ce que l'on appelle des punitive damages, *c'est-à-dire une indemnité reconnaissant l'aspect malicieux de dommages causés aux tiers. Comme question de fait, dans la province de Québec, les cas sont rares, dans le cours ordinaire des choses. S'ils sont plus fréquents dans la province d'Ontario, l'auteur de l'article souligne bien le caractère punitif que l'on veut donner à une indemnisation de ce genre. Et c'est par là que son article est intéressant.*

L'article de Me Lerner est suivi d'une note de Me Rémi Moreau, qui traite des dommages à titre punitif, comme on les conçoit dans la province de Québec.

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I – We're still in the midst of a controversy about punitive damages. There is pressure on both sides. In England, the Courts have tried to limit the cases where punitive damages could be awarded, whereas in Canada it seems that Courts have tried to open new areas for awards of punitive damages, although as we shall see, this tendency is not uniform.

What will be discussed here is how and when Ontario insurers might be faced with a claim in punitive damages and what are the prospects for the future. Bad faith claims are the perfect example where punitive damages can be awarded and we shall use bad faith claims as a case study for our discussion about punitive damages. However, we shall also examine whether punitive damages can be awarded in the context of first party claims such as no-fault benefits.

Before starting the discussion there is a question of vocabulary that has to be clarified. Various expressions are used to describe

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[1] Of the law firm *Lerner & Associates*, London, Ontario.

damages as punitive, vindictive, exemplary, aggravated, mental distress, and others. It is essential to understand the difference between punitive or vindictive or exemplary damages as opposed to aggravated or damages for mental distress.

Punitive damages aim at punishment and the deterence of either a particular litigant or any person in the same position. Punitive damages are given regardless of the loss to the plaintiff. They express the Court's abhorrence toward the conduct of a litigant. Punitive damages are in effect an effort by the civil courts to police the
 practices of members of society.

Aggravated damages on the other hand, aim at compensation. They compensate the plaintiff for his or her damages which were aggravated by the conduct of the defendant. Aggravated damages express the contempt of the Court for the behaviour of the defendant, but the plaintiff has to prove his or her loss as either mental distress, depression, loss of reputation, or loss of pride.

Since both damages express to a certain degree the tribunal's outrage at the defendant's conduct, it is sometimes difficult to distinguish between the two, but the distinction is important. The arguments for granting aggravated damages do not always offer a good rationale for awarding punitive damages. Aggravated damages can be seen as an extension of the compensation principle expressed in *Hadley* v. *Baxendale*. Aggravated damages can also be seen as merely an expression of the tort principle that all foreseeable losses have to be compensated by the wrongdoer.

Punitive damages, however, are of a different kind. They are rooted in punishment and deterrence, not compensation. It appears to be an anomaly for Canadian civil courts to have the power to make such an award. It somewhat usurps a function devoted usually to our criminal courts. It is this quasi-criminal power to award punitive damages that is causing controversy.

The argument which has known a certain success in England is as follows.

It is unfair for the defendant to be required to pay punitive damages because our system distinguishes between civil trials and criminal trials. Our system is built to consider that civil trials should aim at compensation of the victim and criminal trials should aim at

the punishment of the wrongdoer. As such, the burdens of proof are different and certain rules of evidence, like the right to remain silent, are different. All these guarantees are denied a defendant who is faced with a punitive damage award in a civil trial, even though there is no reason for such a difference since the purpose of deterrence and punishment is the same.

An award of punitive damages brings a windfall to the plaintiff without proof of his or her loss. There is no reason why a particular plaintiff should profit from the desire of society to deter and protect itself from illegal activities.

To these arguments it is always answered with some success that there is no reason why the civil courts should be deprived of a power to react to outrageous actions by litigants that the criminal law cannot police. It is said that this remedy is particularly inadequate when the mere compensation of the plaintiff's injuries does not deter the defendant from adopting the wrongful conduct because the compensation merely acts as a licence or fee to continue to break the law or otherwise offend society. It is the actions of insurers which may fall into the latter category.

These arguments in favour of punitive damages and the binding effect of old precedents forced the House of Lords to back down on its ban of punitive damages. The Court arrived at three categories where punitive damages could still be awarded in England, (*Rookes* v. *Barnard*, [1964] 1 All E.R. 367) :

1. oppressive, arbitrary or unconstitutional actions by the servants of the government ;

2. the defendant's conduct had been calculated to make a profit which was superior to the compensation which would be payable to the plaintiff ;

3. punitive or exemplary damages were expressly authorized by statute.

The judgment in *Rookes* v. *Barnard* and its three magic categories has been strongly criticized in England for the irrationality of the categories : why, for example, are only public employees liable for punitive damages for oppressive, arbitrary or unconstitutional

actions ? The actions of employees in the private sector may be as oppressive or arbitrary.

Canadian courts have not been convinced by the rationality of the three categories and have more or less ignored *Rookes*. For example, in 1975, 11 years after *Rookes* v. *Barnard*, in *Weiss Forwarding* v. *Omnus*, Chief Justice Laskin of the Supreme Court of Canada awarded $10,000.00 in punitive damages for inducing breach of contract. The case could have very well fallen into the second category of *Rookes*, the category which allows punitive damages when the defendant's conduct brings a profit that is superior to the compensation payable to the plaintiff. However, the judgment of *Rookes* was not even mentioned.

The failure to follow *Rookes* by the Canadian courts does not mean that punitive damages are awarded without problem in Canada. The debate in Canada has centred on a different distinction, namely, a difference between the regime of liability in contract and in torts.

Traditionally, torts have been seen as the area of law where punitive damages could be awarded. An outrageously negligent conduct or a vindictive trespass or malicious conversion, brutal assault or wanton defamation, etc. would justify a court to impose a civil fine so that the tortfeasor would not continue the wrongful conduct. The Ontario Court of Appeal in *Dennison* v. *Fawcett* made clear that punitive damages could be awarded in actions of tort "such as assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment".

On the other hand, remedies for breach of contract could not include punitive damages. Lord Atkinson in 1909 in *Addis* v. *Gramophone*, described the start of the law in the following way : "I have always understood that damages for breach of contract were in the nature of compensation, not punishment."

For the longest time everybody understood the law the same way Lord Atkinson did. However, the distinction between tort law and contract law is difficult to sustain, particularly when the plaintiff has a right of action, both in tort and in contract, or when there is an

element of tortious actions in the breach of contract. Statements in recent cases criticize this distinction between tort and contract law.

In *Brown v. Waterloo*, 37 O.R. 277, Linden, J., said in obiter :

> Punitive damage awards should be part of the judicial arsenal in contract cases in the same way as they are in tort cases. I can see no sound reason to differentiate between them. Canadian Courts, unlike English Courts, have retained their broad power to award punitive damages in tort cases. Thus, if a high handed breach of contract also happens to amount to tortious conduct, punitive damages would be awardable pursuant to the theory.

> It is said that if this conduct is purely a breach of contract and not tortious, then no punitive damages can be awarded despite the callousness of the conduct. That makes no sense. It is wrong to treat one contract breach different from another merely because one violates tort principles while the other does not. In recent years principles of damages in tort and contract are becoming more consistent. That is good and should be encouraged. By allowing punitive damages for contract breach that laudable trend would be advanced. Moreover, hopefully those who plan to breach contracts in a callous fashion will think twice.

Similar criticism can be seen in *Thompson* v. *Zurich Insurance*, a judgment of the High Court of Justice in 1984, where Pennell, J., awarded aggravated damages against an insurer. In obiter, Pennell, J., went on to say :

> That punitive damages have a proper place in actions of tort and as punishment of and deterrent to various forms of wrongful behaviour has long been recognized in Canada. It seems to me (I hope with becoming deference and diffidence) that to allow the imposition of punitive damages in tort actions and to deny them without exception for breach of contracts standing alone is a mechanical classification without sound and legitimate basis."

We shall have more to say about *Thompson* in a few minutes.

Some Judges think that punitive damages for breach of contract are only possible in cases of wrongful dismissal. A judgment of Osler, J. in the High Court of Justice in *Attorney General of Ontario* v. *Tiberius Productions Inc. et al* (1984), 46 O.R. (2d) 152 is to that effect, and to the effect that punitive damages could not be awarded in an ordinary action for breach of a commercial contract.

As of yet there is no clear judgment of the Court of Appeal on this question. In *Cardinal Construction Limited* v. *The Queen* (1982), 38 O.R. (2d) 161, the Court of Appeal reviewed a decision of Madam Justice Boland, dismissing an application to amend a Statement of Claim in a commercial contract case so as to add a claim for punitive damages. The Court of Appeal did not disagree with the conclusion of Madam Justice Boland and avoided discussing whether punitive damages could be awarded for breach of contract.

Therefore, it is still doubtful whether punitive damages can be
 awarded for breach of contract other than for wrongful dismissal cases.

The statement by Lord Atkinson as to his understanding of contract law and damages will still constitute the major hurdle to be overcome by an insured suing his own insurer for punitive damages.

We shall now examine how a case for punitive damages can be made for different actions against an insurer.

Generally, an action for breach of an insurer's statutory obligation to provide accident benefits pursuant to the standard policy of automobile insurance within the terms of the Insurance Act, or for breach of a contract of insurance for first party coverage, or for a breach of a contract of indemnity for third party liability, sounds in contract. In the case of no-fault benefits, the liability to pay is part statutory obligation and part contractual and for this reason has received special treatment from the courts on the subject of punitive damages.

Let's deal with the common experience of accident benefits. For the non-payment or delay in payment of no-fault benefits, there is some authority that such benefits do not arise out of contract but out of statutory obligation or liability on the part of the insurer. The case of *Jennett* v. *Federal Insurance Co.* (1976), 13 O.R. (2d) 617, allowed an insured to file a statement of claim containing a claim for punitive damages for failure to pay no-fault benefits. The case of *Thompson* v. *Zurich Insurance Co.* (1984), 45 O.R. (2d) 744 (H.C.J.) Pennell, J., reaches the same conclusion that punitive damages could be awarded for a wilful non-payment of no-fault benefits. However, Pennell, J., concluded that there was no evidence in that case that amounted to malice directly or inferentially. Pennell, J., only

awarded aggravated damages of $750 for mental distress for delay in paying the no-fault benefits.

The facts are interesting : Daniel Thompson, 16 years-old, had just commenced a Summer job at the time of a car accident in which he became permanently disabled. He was intending to return to school the following Fall. The terms of the policy stipulated that the insurer was to pay for the loss of income from employment for the period of disability provided that the person was employed at the time of the accident.

The insurer was arguing that it was bound to pay only the actual loss of income, that is the loss of income between June and September. The plaintiff argued that according to the policy he was deemed to be employed and therefore was entitled to receive benefits for the whole period of his disability.

After accepting the plaintiff's position on the policy, the Judge went on to discuss whether punitive damages should be awarded. The plaintiff was complaining that in handling the claim the defendant, Zurich Insurance, had been delaying payment unreasonably. The initial claim for payment of the disability benefits was given to the insurer around June 18, 1980, 11 days after the accident. The claim was inaccurate in that it showed as his part-time employer, Mac's Milk store, and did not show the other Summer employment he was engaged in at the time of the accident. The part-time employment at Mac's Milk was substantially less lucrative than his Summer employment.

Shortly afterwards the insurer started paying disability payments of $22.80 per week calculated on the basis of 80% of the income at Mac's Milk store. On August 15, 1980 a revised claim was filed with the insurer with the proof of employment for the Summer job. To this revised claim the defendant did not answer.

The plaintiff, through his solicitor, wrote back to the insurance company on August 27 requesting the increased disability benefits. In September the solicitor for the plaintiff spoke with the senior claims examiner for the Defendant. Zurich expressed some doubt as to the truthfulness of the Summer employment. The solicitor offered to allow Zurich Insurance to interview the employer. Zurich refused

this offer. The company went on making disability payments on the basis of part-time employment.

After the Examinations for Discovery where the plaintiff explained that his Summer employment had commenced the day of the accident the disability benefits were terminated.

In addition, there were also problems in handling the rehabilitation claims which the plaintiff alleged were not handled in a timely fashion.

232 The Judge found that :

> The handling of the claims under this policy was attended by no excess of competence. However, I am not persuaded that the insurance company's conduct was so utterly unreasonable and indefensible its position so free from the possibility of bona fide contest and debate as to be the equivalent of malice.

The test followed by the Judge is certainly a stringent one. He effectively denied any punitive damages in this case but awarded aggravated damages for the mental distress that the delay caused to the plaintiff. Only the mental distress caused to Daniel by his feeling "the pinch of impecuniosity" was compensated by aggravated damages. The fact that the plaintiff's father had to remortgage his house and suffered various other misfortunes because of the delay in payment was considered not to be recoverable.

The *Thompson* case could have serious repercussions. It is an important case first because it recognizes that punitive damages could be awarded against an insurer for delay in payment or failure to pay accident benefits. It is important, especially in light of the controversy as to whether breaches of contract entitle plaintiffs to claim punitive damages.

It is also significant because of the test that has been applied by the Courts to decide whether malice was present. The test appears to be rather severe and is certainly going to be difficult to meet. This test of malice will be applied also in bad faith claims against insurers. We have to examine how these claims are going to be resolved after *Thompson*.

There are two types of bad faith claims. First, a failure to pay or a delay in paying the amount according to the policy, the first party

claim. Secondly, an attack can be made by reason of a Judgment against an insured where the insurer failed to settle within the policy limits when it had the opportunity to do so.

We suggest that a failure to pay or a delay in payment of the amount owed under the policy can expose the insurer to aggravated damages and punitive damages. Aggravated damages would be compensation for the mental distress occasioned to the insured by the delay in receiving the money from the insurer. The first problem the plaintiff to a first party claim against an insurance company must overcome is the traditional idea that punitive damages cannot be awarded for breach of contract.

Before the *Thompson* case and the other cases which opened the door to such damages, plaintiffs attempted to obtain punitive damages by formulating their action also in tort. Such an action is very popular in the United States and is often called the tort of outrage.

In Canada, in one case punitive damages were claimed for failure to pay an amount due under a marine insurance contract : *Riverside Landmark Corporation* v. *Northumberland General Insurance* (1984) 8 C.C.L.I. 118, per Anderson, J.

In that case the plaintiff was demanding punitive damages because of the conduct of the insurer after the loss, particularly the denial of the claim, even before any formal claim was filed.

The insurer had several letters prior to the formal submission of the claim under the policy, acknowledged "without prejudice" that the loss was going to be investigated and eventually that the claim was rejected.

Anderson, J. concluded that this action did not amount to conduct which should be punished by an award of punitive damages. The Judge adopted as a test the statement of Linden, J., In *Brown* v. *Waterloo* that punitive damages should be awarded "where a contract has been breached in a highhanded, shocking and arrogant fashion so as to demand condemnation by the Court as a deterrent." Here again the test is a very severe one which will not be easily met.

What about third party claim cases in which the plaintiff is suing the insurer for bad faith in the conduct of settlement negotia-

tions ? The typical case is the case where the insurer refuses to settle for an amount equal or less than the policy limits on the basis that there might be a good defence and that eventually the case is decided against the insured for an amount in excess of the policy.

There is only one reported Canadian case, *Pelkey v. Hudson Bay Insurance Co. et al* where an excess claim has been prosecuted. Punitive damages were not discussed and no other Canadian cases have yet considered such damages in that context. The plaintiff had offered to settle the case for $50,000, which was the policy limits.

This offer was refused and eventually judgment was rendered awarding approximately $150,000 to the plaintiff plus costs. The court, faced with the bad faith claim of the insured considered that there were no Canadian cases on the subject, and referred to the American authorities. The test established in *Crisci* v. *Security Insurance Company of New Haven, Connecticut* was referred to, to the effect that there is an implied obligation of good faith and fair dealing requiring the insurer to settle in appropriate cases, although the express terms of the policy do not impose such a duty. Futhermore, in determining whether to settle, the insurer must give the interest of the insured at least as much consideration as it gives to its own interests ; and that when there is a great risk of recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interests requires the insurer to settle the claim.

Catzman, J., did not use the test elaborated in *Crisci*, since he took a different view of the case before him. He concluded that counsel representing the insurer had failed to communicate the offer of settlement and that the insurer was liable for the failure of its counsel to submit the settlement offer for consideration. However, Catzman, J. confirmed that in view of the lack of authority in Canadian and British law it was appropriate to refer to American authorities.

If the *Pelkey* decision opened the door to third party bad faith claims it did not solve the problem of punitive damages since no punitive damages were claimed in *Pelkey*. Although this case is authority on the bad faith issue and the duty of a solicitor to an insurer, it offers no guidance as to whether punitive damages, in addition to the compensatory aspect of such action, will be awarded. However, it can be argued that American authorities could be relied

upon to justify the award of punitive damages for bad faith third party claims.

It seems that if the door has been opened to punitive damage awards against insurers it has not been opened very widely. *The test used by the courts are very stringent and unless an insurer acts in an extremely malicious way, the Canadian Courts up to now have refrained from awarding punitive damages.* It is worth mentioning that the Courts are becoming more sensitive to arguments that the insurance industry has an interest in not paying claims in a timely fashion and waiting for the insured to sue them, since insurers benefit to a certain degree on the statistical certainty that a significant number of claimants will be persuaded to give up or compromise their claims, particularly if they are impecunious.

This argument is justifying the American courts to be much more aggressive in their assessment of punitive damages against insurers and our courts may lean that way in the future. Up to now the requirement that their conduct be characterized as highhanded, insolent, vindictive, malicious, showing a contempt of the plaintiff's rights, disregarding every principle which actuates the conduct of gentlemen, shockingly contentious, a callous and highhanded trampling of the plaintiff's rights, wantonly and oppressively without ground for belief that one had the right to do as one did, a bullying fashion, flagrant disregard and careless indifference to the plaintiff's rights, glaring abuse of power, inexcusable, disgraceful and outrageous, cruel and heartless standard of morality and reprehensible and offensive to ordinary standards of community or decent conduct renders very unlikely that Canadian insurers will be ordered to pay punitive damages.

However, there is no doubt that inventive plaintiffs' counsel will try and that claims for punitive damages will be more common in Statements of Claim.

These claims will be found in actions 1) where the insured or others entitled attempt to enforce their right to no-fault benefits; and 2) in an insured's action arising out of awards in excess of their liability limits because of the insurer's bad faith refusal to settle within the policy limits.

In Ontario, given the power of the Court to award prejudgment interest at market rates, the interest advantage gained by the insurer is not a concern when the plaintiff's damages do not approach the defendant insured's policy limits. Where damages are obviously in excess of the policy limits, an insurer in Ontario, not obligated to pay interest in excess of the policy limits, stands to benefit by delaying the payment of the policy limits, at the expense of the insured who will become liable for the balance of the judgment. In the case of no-fault benefits, disability payments and other first party claims, though interest is payable a court can draw an inference from the
236 evidence that the real reason for the failure to pay was based on the expectation that an impecunious plaintiff could not bother suing for small amounts. This is particularly so when one considers the inevitable financial hardship that ensues from a failure to pay no-fault benefits. In these cases it is suggested reprehensible conduct of that kind warrants sanction by a Court.

In the result, the foregoing review of the current law of punitive damages evidences a serious intention by our courts to accept the role of punitive damages as a part of the civil law function to control and regulate the conduct of members of society. These damages are, and can be, substantial. Their effect will be far-reaching to the extent where their stated intended purpose of regulating society's conduct will be accomplished. Such effect will be enhanced if the courts accept the notion these awards should be made under separate heads each justified and rationalized separately. The development of this body of law represents a challenge for the future to the judiciary counsel and the insurance industry.

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II – Voilà une excellente étude sur les tendances actuelles des tribunaux à accorder ou à rejeter une indemnisation basée strictement sur des dommages punitifs. L'auteur signale toutefois une réticence des tribunaux canadiens à cet égard :

> "The failure to follow *Rookes* by the Canadian courts does not mean that punitive damages are awarded without problem in Canada. The debate in Canada has centred on a different distinction, namely a difference between the regime of liability in contract and in torts.

> Traditionally, torts have been seen as the area of law where punitive damages could be awarded. An outrageously negligent conduct or a vindictive trespass or malicious conversion, brutal assault or wanton defamation, etc. would justify a court to impose a civil fine so that the tortfeasor would not continue to wrongful conduct. The Ontario Court of Appeal in Dennison v. Fawcett made clear that punitive damages could be awarded in actions of tort "such as assault, prespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment.
>
> On the other hand, remedies for breach of contract could not include punitive damages. Lord Atkinson in 1909 in Addis v. Gramophone described the start of the law in the following way : "I have always understood that damages for breach of contract were in the nature of compensation, not punishment". 237

Au Québec, le principe de compensation origine d'abord du Code civil. Il est basé sur des dommages effectivement subis par une victime et de la stricte réparation pécuniaire d'un préjudice. Selon les articles 1073 et s., les dommages sont limités au montant de la perte encourue et du gain perdu. Dans des cas restreints, certaines décisions peuvent allouer des montants pour des pertes non pécuniaires (ex. : perte de soutien de moral) ou encore des sommes maximales, notamment en matière de diffamation. En droit statutaire, cependant, quelques législations québécoises permettent au tribunal d'accorder des dommages punitifs (exemples : Loi sur la protection du consommateur, Charte des droits et libertés de la personne).

Il n'en reste pas moins que cette étude demeure fort pertinente et extrêmement intéressante, en ce qui concerne les provinces du Common Law.

En conclusion, l'auteur signale, après examen de la jurisprudence, la position actuelle de nos tribunaux :

> "In the result, the foregoing review of the current law of punitive damages evidences a serious intention by our courts to accept the role of punitive damages as a part of the civil law function to control and regulate the conduct of members of society. These damages are, and can be, substantial. Their effect will be far-reaching to the extent where their stated intended purpose of regulating society's conduct will be accomplished. Such effect will be enhanced if the courts accept the notion these awards should be made under separate heads each justified and rationalized separately. The de-

velopment of this body of law represents a challenge for the future to the judiciary counsel and the insurance industry".

R.M.

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Voici à ce sujet une note intéressante que nous extrayons du bulletin de *L'Argus International* de janvier 1986 : « Les *punitive damages* originellement prévus pour le comportement hautement imprudent, voire même *criminel*, d'un entrepreneur sont de plus en

plus souvent exigés par les avocats, sur la base d'une responsabilité *causale* ». Si *L'Argus* est d'accord avec l'auteur, en ce qui a trait aux États-Unis, ses conclusions ne s'appliquent absolument pas à la province de Québec, jusqu'ici tout au moins.

Une compagnie peut être tenue criminellement responsable.
Extraits d'une opinion de Me Graham Nesbitt, de l'étude Clarkson, Tétrault, avocats

« Une compagnie peut être tenue criminellement responsable des activités illégales de ses hauts dirigeants :

La Reine c. Canadian Dredge & Dock Co.
(Cour suprême du Canada).

En étudiant les précédents sur la responsabilité criminelle des compagnies, la Cour suprême a noté qu'il était rare qu'une compagnie puisse être coupable d'une infraction criminelle, étant donné que, n'étant pas une personne physique, elle n'avait pas l'intention coupable (*mens rea*). Cette doctrine a évolué, si bien qu'aujourd'hui, une compagnie peut être trouvée coupable criminellement, selon la *théorie d'identification.*

L'essence de cette théorie est que la conduite criminelle d'un employé de la compagnie est attribuée à cette dernière, si cet employé occupe un poste de décision et constitue son *âme dirigeante.* »

Me Graham Nesbitt
Clarkson, Tétrault
Bulletin 1885-1985
Automne/hiver 1985