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Punitive Damages Now Possible in Alberta in Fatal Accident Actions

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Case commented on: *Steinkrauss v Afridi*, 2013 ABCA 417, as clarified at 2014 ABCA 14

As a result of *Steinkrauss v Afridi* in the Court of Appeal, punitive damages are now possible in Alberta in *fatal accident* actions. This post looks at three things: the background to *Steinkrauss*, what the case means for this and future claimants, and why the Alberta Legislature should fall in line with *Steinkrauss* and change the law regarding *survival* actions.

Background to Fatal Accident Actions and Claims for Punitive Damages

At common law survivors had no right of action whatsoever for their own losses through another's wrongful death, a rule originally established in England in *Baker v Bolton* in 1808, 170 ER 1033 (KB), where a husband failed to recover anything for the death of his wife in a stagecoach accident. Eventually the rule was reformed, by a statute colloquially known after its sponsor as Lord Campbell's Act: *An Act for Compensating the Families of Persons Killed by Accidents, 1846*, 9 & 10 Vict, c 93. This *Act* was immediately imported by the then province of Canada, 10 & 11 Vict, c 6 (1847), and now, in one form or another, all Canadian provinces and territories have similar legislation of their own. [For analysis of this legislation and of fatal accident actions generally, see my chapters in Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (2d edition, Carswell 1996), chapters 10 and 11 (631-49, and 651-720).]

In Alberta, by virtue of the *Fatal Accidents Act*, RSA 2000, c. F-8 (as amended), an action is now possible on behalf of survivors (sometimes called beneficiaries or dependents) where, to quote from section 2, "the death of a person has been caused by a wrongful act, neglect or default". But the right to sue is limited. First, by virtue of other language in section 2, survivors can only sue if the deceased herself could have sued, and sued successfully, were it not for her death; to this extent the survivors' action is derivative. Secondly, only authorized survivors can sue (see in particular sections 3(1) and 8(1)), and thirdly, they can only sue for authorized damages. The basic damages section is section 3(1), which provides that "the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death", though, in addition, section 7 allows recovery of some specified "expenses and fees", while section 8 provides fixed sums for "grief and loss of the guidance, care and companionship of the deceased person".

With respect to punitive damages, sometimes called exemplary damages, they are of course quite different from compensatory damages. Whereas compensatory damages focus on plaintiffs and

their actual and potential losses, punitive damages focus on defendants and their extremely bad behavior. They are tantamount to a civil fine, their goal being to punish, deter and denounce wrongdoers rather than to compensate victims. At common law, in England they go back to 1763 (*Huckle v Money*, 2 Wils KB 205, 95 ER 768 (1763); *Wilkes v Wood*, Lofft 1, 98 ER 489 (KB 1763)), while in Canada the Supreme Court has regularly approved of them, the dominant authority today being *Whiten v Pilot Insurance Co*., 2002 SCC 18.

As for punitive damages in fatal accident actions, in New Brunswick they are expressly recoverable "in appropriate cases", though, if awarded, "they shall be for the benefit of the deceased's estate": *Fatal Accidents Act*, SNB 2012, c 104, s 17. Elsewhere in Canada, *including Alberta*, none of the applicable statutes explicitly mentions them, though they have been decisively rejected by courts in British Columbia, Ontario and Nova Scotia: *Allan Estate (Executors of) v. Co-Operators Life Insurance Co*., 1999 BCCA 35; *Campbell v Read*, 1987 BCCA 2402; *Lord v Downer*, 1999 ONCA 1875; *Latimer v Canadian National Ry. Co*., 2007 ONSC 5689; *Rowe v Brown*, 2008 NSSC 13. On the other hand, two trial judgments in Saskatchewan and Prince Edward Island contain inconclusive *dicta* arguably approving them: *Anderson v Board of Education* (1986), 50 Sask R 4 at 5 (QB), and *Blacquiere's Estate v Canadian Motor Sales Corp.* (1975), 10 Nfld & PEI R 178 at 210 (PEI SC).
This brings us to *Steinkrauss v Afridi*.

Facts and Decisions in *Steinkrauss*

Deirdre Steinkrauss was a cancer patient who sued her doctor for medical malpractice, alleging that he had negligently failed to diagnose her cancer as early as he should have, having omitted to carry out certain genetic and other testing. When Deirdre died shortly after commencing her action, her husband sought to prosecute it in his own name, on behalf of himself and their children, essentially under the *Fatal Accidents Act* (the *FAA*). Among proposed amendments to the original Statement of Claim, he included a prayer for punitive damages, asserting that, sometime after Deirdre's diagnosis but before her death, the defendant tried to shift responsibility from himself to Deirdre by altering her medical charts to indicate that he had suggested the testing to her and that she had declined. A Master in Chambers found for the plaintiff and allowed his amendments. But on appeal a chambers judge (Gates, J.) struck out the prayer for punitive damages, holding that the language of the *FAA* did not permit them: *Steinkrauss v Afridi*, 2013 ABQB 179. The plaintiff then appealed to the Court of Appeal and won. In a Memorandum of Judgment (2013 ABCA 417, written by Berger, Slatter and Veldhuis, JJA), the Court decided that punitive damages are indeed possible under the *FAA* and that in this case, on the facts pled, the plaintiff was duly entitled to pursue his claim at trial.

Comment

The plaintiff in *Steinkrauss* can clearly sue under the *FAA* for compensatory damages, assuming of course he proves that the defendant negligently caused the deceased's death, or perhaps more accurately her premature death. Assuming the defendant's negligence, the deceased herself could have sued for her own losses, had she not died, and so now the plaintiff can sue under the statute for his and his children's losses. That said, the ruling that he could also sue for punitive damages came as something of a surprise, at least to me.

As mentioned, the governing language in the *FAA* is in section 3(1), which authorizes judges to give "those damages that the court considers *appropriate to the injury resulting from the death*" (emphasis mine). While this is evidently poor drafting, I had always taken it to mean that fatal

accident actions were exclusively about compensating dependent loss and not at all about punishing, deterring or denouncing defendant misbehavior; in other words, that the statutory provision as given could never sustain punitive awards. And beyond me, the ruling may well have surprised some personal injury lawyers too. In one case for example, plaintiff counsel felt obliged to concede, even during an interlocutory application, that punitive claims under the *FAA* were simply impossible: *Clapperton Estate v Davey*, 2009 ABQB 63, at para 2. But obviously those of us who thought this way were mistaken all along. For the Court of Appeal in *Steinkrauss* has plainly held that section 3(1) is in fact "open-ended" (2013 ABCA 417 at para 12), that punitive damages are indeed allowable, and that in every case the basic question is whether they are "appropriate to the injury resulting from the death" (para 19). "While it is arguable this test will be difficult to meet," said the Court, "there is no reason to foreclose recovery in every case as a matter of law" (again, para 19).

Leaving aside the dispute over statutory wording and legislative intention, as a matter of policy *Steinkrauss* makes sense. The argument is neither difficult nor new. [See originally Ken Cooper-Stephenson and Iwan Saunders, *Personal Injury Damages in Canada* (Carswell 1981) at 640]. If punitive damages are socially useful in common law actions, as the Supreme Court consistently says they are, as a supplement to the criminal law, *prima facie* they are socially useful in statutory actions too. Given misconduct deserving a penalty, the cause of action *per se* ought not to matter. Thus in the context of *Steinkrauss*, if fines can be levied *inter vivos* for wrongfully injuring people, they should also be levied *via* the statute for wrongfully killing them. This is what the Court of Appeal is presumably saying.

Anyway, granted the reality of punitive claims under the *FAA*, the question for judges now is how best to regulate them. The statute being essentially silent on this, the natural place to get some guidance is the common law, particularly *Whiten v Pilot Insurance* (above) and its extensive progeny. Basically the key starting points at common law are these. First of all defendants are never subject to civil fines simply for committing civil wrongs. Punitive damages are only awarded in exceptional cases, where the defendant's conduct was sufficiently egregious (flagrant or blameworthy) to warrant a fine: see *Whiten*, cited in *Steinkrauss* (2013 ABCA 417 at paras 14 and 20). Furthermore, as Lord Devlin wisely cautioned in the famous case of *Rookes v Barnard*, the plaintiff can only recover punitive damages if he is "the victim of the punishable behavior". Otherwise, "[t]he anomaly inherent in exemplary damages would become an absurdity if the plaintiff totally unaffected by some oppressive conduct … obtained a windfall in consequence": [1964] AC 1129 at 1227 (HL). Or as Lord Diplock put it rather more vividly in a later case, the plaintiff "can only profit from the windfall if the wind was blowing his way": *Cassell & Co. Ltd. v Broome*, [1972] AC 1027 at 1126 (HL). According to the cases, what this latter point means in practice is this. Plaintiffs must show that defendants violated *their* rights, by egregiously committing an actionable wrong against *them*, whether in tort, contract or equity. On the other hand plaintiffs need not show (a) that defendants aimed their conduct *specifically* at them, nor (b) in the case of wrongs actionable *per se*, that they suffered actual loss. So long as there was egregious misconduct in the course of committing a wrong to the plaintiff, punitive damages can follow.

In *Steinkrauss* the Court gave some direction on judging punitive claims under the *FAA* and in doing so drew on the common law, though not always in so many words. The Court explicitly cited *Whiten* (2013 ABCA 417 at paras 14 and 20), particularly on the matter of egregious misconduct, and also, as I read the judgment, implicitly required that plaintiffs be victims of the punishable behaviour. According to the Court, whether claimants can get punitive damages under the *FAA* "depends on the source of the claim", and in that regard "the key question will be

whether [the] egregious conduct was sufficiently connected to the claim of the dependants arising from the death, such that it can be said to be 'appropriate to the injury resulting from the death'" (again, para 14). And then some months later, on an application for clarification of these *dicta*, the Court essentially affirmed what it had originally said: see 2014 ABCA 14 at para 4. As the Court saw it, the plaintiff's position at trial would come down to this: the defendant's conduct in falsifying the records had impeded his ability to prove the defendant's negligence, thus making the conduct sufficiently connected to his own action to justify his claim for an exemplary sum. That position, held the Court, was at least arguable, even if the fraud occurred sometime after the negligence and before the deceased's death, rather than before the negligence or after the death. Even on that version of the facts, the plaintiff was still entitled to his day in court.

If *Steinkrauss* does go to trial and the plaintiff does prove evidence tampering as alleged, this could help him prove some of the facts necessary for negligence. Besides its effect on the defendant's general credibility, the tampering may qualify as spoliation, thus giving rise to a rebuttable presumption of fact that the original medical records would have told against the defendant: on spoliation, see *McDougall v Black & Decker Canada Inc*., 2008 ABCA 353. And if the plaintiff goes on to succeed in his action, by duly establishing negligence, he will presumably ask for solicitor-client costs as an indirect sanction for the tampering. But whether the plaintiff can get punitive damages for that tampering seems questionable, even if the tampering is considered egregious.

The reason seems fundamental, whether the action is at common law or, as here, *via* a statute. Civil fines should only be levied for civil wrongdoing and nothing less, in much the same way that criminal fines can only be levied for criminal wrongdoing and nothing less. However reprehensible the defendant's misconduct, he should only be fined for it in a civil court if it formed part of the actionable wrong on which the litigation is founded. [See for example *Eli Lilly and Company v Apotex Inc*., 2009 FC 991 at paras 657-64, citing *Whiten*.] In *Steinkrauss*, while his wife's death, if wrongful, was also a wrong to the plaintiff, there was no flagrant misconduct surrounding the negligence, so far as we know. As for the evidence tampering, it apparently occurred after the negligence and was quite distinct from it, therefore falling outside the wrong on which this plaintiff necessarily bases his action. Of course, a trial judge under the *FAA* might ignore the common law and give punitive damages anyway, simply on the ground that the tampering was egregious and, to quote from the Court of Appeal, "sufficiently connected to the claim of the dependants arising from the death, such that that it can be said to be 'appropriate to the injury resulting from the death'". But if so, is this what the Court of Appeal really had in mind?

Subject to his pleadings and limitation periods, the plaintiff could alternatively assert the tampering (and punitive damages) in a separate cause of action. But what separate cause of action does he have? The tort of deceit (fraudulent misrepresentation) comes to mind but seems highly unlikely here, since deceit traditionally requires actual plaintiff reliance; a mere attempt to deceive the plaintiff is not enough. One possibility is a new tort of spoliation of evidence. Some American courts have already adopted it and some Canadian courts already seem at least open to it: see for example, *McDougall*, above; *Holland v Marshall*, 2008 BCCA 468; *Spasic Estate v*

Imperial Tobacco Ltd., 2000 CanLII 17170 (ON CA). But so far there is no such tort in Alberta or in any other Canadian jurisdiction for that matter. So the plaintiff in *Steinkrauss* would have to pioneer it. [The British Columbia Law Institute has proposed such a tort: *Report on Spoliation of Evidence* (BCLI Report No. 34, 2004).]

Punitive Damages in Survival Actions

As a result of *Steinkrauss*, there is now an inconsistency between the *FAA* and its relative, the *Survival of Actions Act*, RSA 2000, c S-27 (as amended) (the *SAA*). The solution lies in amending the *SAA*.

By virtue of legislation in all provinces and territories, reversing the common law, civil actions now survive the death of plaintiffs for the benefit of their estates. [For analysis of this legislation and of survival actions generally, see my chapter in Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (2d edition, Carswell 1996), c. 12 (721-46).] And in principle, I suggest, claims for punitive damages should survive too. Once again the argument is familiar. Punitive damages are about the defendant's conduct, not the plaintiff's injury and loss. If the defendant's misconduct while committing the wrong was sufficiently egregious to warrant a fine *inter vivos*, the plaintiff's death should make no difference and the fine should still be imposed. While admittedly punitive damages would be a windfall to the estate, they are something of a windfall to all successful plaintiffs. Nevertheless we allow them because they are socially useful and plaintiffs perform a socially useful service by claiming them: see Binnie J in *Whiten*, above, at para 37.
However in Alberta the law is otherwise. Section 5(2)(a) of the *SAA* explicitly precludes "punitive or exemplary damages" in all circumstances. So in *Steinkrauss*, while the deceased's survivors could claim punitive damages under the *FAA*, the deceased's estate could not have done so under the *SAA*. Thus the defendant relied on section 5(2)(a) of the *SAA* as a reason for prohibiting awards under the *FAA*, an argument rightly rejected by the Court of Appeal.

As I see it, the Alberta Legislature should now amend the *SAA* to allow punitive claims, in actions both *by and against* estates.

[For a Quebec case in the Supreme Court approving punitive damages *against* a deceased wrongdoer's estate, see *de Montigny v Brossard (Succession)*, 2010 SCC 51. And for a comment supporting the decision in *Brossard*, see Nicholas Rafferty and Iwan Saunders, "Developments in Contract and Tort Law: The 2010-11 Term" (2011), 55 Sup Ct L Rev (2d) 163 at 196-202.]