

## The Supreme Court on Aggravated and Punitive Damages: A Commentary on *Fidler v. Sun Life*

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The Supreme Court of Canada, in *Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30, had an opportunity to consider the issue of aggravated and punitive damages in the context of a wrongful denial of disability benefits pursuant to a group LTD policy.

The plaintiff suffered from chronic fatigue and fibromyalgia. The insurer denied her benefits at the stage when the insured was required to meet the "any occupation test". The insurer relied upon surveillance evidence and internal medical consultations in reaching its decision to terminate.

One week before trial, the insurer reinstated the insured and paid back benefits, together with pre-judgment interest. The trial went forward only on the issues of aggravated and punitive damages.

The trial judge awarded \$20,000 in aggravated damages but dismissed the punitive damage claim. The British Columbia Court of Appeal upheld the aggravated damage claim, overturned the trial judge's decision on punitive damages, and awarded \$100,000 punitive damages.

The Supreme Court of Canada upheld the aggravated damages claim, overturned the Court of Appeal's decision on punitive damages, and restored the trial judge's decision to dismiss the punitive claim.

In so doing, the Supreme Court of Canada endorsed modern judicial trends in both aggravated and punitive damage cases.

### **Aggravated Damages**

With respect to aggravated damages, the Court distinguished two different types of aggravated damage cases. The first is "true aggravated damages" which arises out of aggravating circumstances. This type of aggravated damages requires a plaintiff to

establish mental distress as a result of the breach of an independent cause of action in order to recover. The award of damages in these types of cases arises from the separate cause of action. It does not arise out of the contractual breach itself.

The second type of damages is mental distress damages which do arise out of the contractual breach itself. They exist independent of any aggravating circumstances and are based completely on the parties' expectations at the time of contract formation.

The Supreme Court indicated that disability policies give rise to the potential for mental distress damages as part and parcel of "peace of mind" insurance contracts. The Court stated that peace of mind cases are an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

Disability insurance contracts contemplate a bargain wherein in return for a premium, an insured is to be paid benefits in the case of disability, but also is to be afforded the security of knowing that there is income stability in the event of disability.

The Supreme Court held that in these cases, the Court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.

In this case, the Court concluded that both elements were met and upheld the trial judge's award of \$20,000 for aggravated damages. The Court felt the damage award was reasonable, given the fact that the plaintiff suffered a substantial loss over a five year period and that she sustained significant additional distress and discomfort arising out of the loss of the disability coverage.

The Supreme Court noted that the trial judge was provided with ample evidence, including extensive medical evidence documenting the stress and anxiety that the plaintiff experienced.

## **Punitive Damages**

The Supreme Court notes that while aggravated damages are compensatory in nature, punitive damages are designed to address the purposes of retribution, deterrence and denunciation. To attract punitive damages, the impugned conduct must depart markedly

from ordinary standards of decency - the exceptional case that can be described as malicious, oppressive or high-handed, and that offends the Court's sense of decency.

The Supreme Court notes that it is important that punitive damages be resorted to only in exceptional cases, and with restraint.

The legal foundation for punitive damages in insurance contract cases is a breach of the implied contractual duty of good faith. The Court notes that an insurer has a contractual obligation to pay long term disability benefits that are due and owing, but also has an independent contractual obligation to deal with an insured's claim in good faith.

The Supreme Court afforded particular deference to the trial judge on the issue of punitive damages. Given what the Supreme Court referred to as the "subjective element of the duty of good faith" the trial judge's assessment of the insured's credibility was considered to be of particular significance in determining whether the insurer acted with an improper purpose in denying the insured's claim.

The surveillance evidence, together with the nature of the claimant's condition, suggested that the insurer had a real, albeit incorrect, doubt as to whether the insured was capable of performing "any" work as required under the terms of the policy.

The Supreme Court quoted the trial judge's characterization of the insured's condition, stating:

"Given the fact that the nature of Ms. Fidler's illness is of a type that is not demonstrated by indicators such as an x-ray or MRI, I do not think that Sun Life's conduct should be characterized as an act of bad faith. I say this even though Sun Life carried out what would appear to be at times a rather zealous approach to refuting Ms. Fidler's entitlement to the long term disability benefits despite strong medical evidence that she continued to be disabled."

The Supreme Court upheld the trial judge's finding that the insurer was not necessarily, and was not in this case, in breach of its duty of good faith by incorrectly denying a claim that is eventually conceded or judicially determined to be legitimate. The Supreme Court noted that the question to be asked is whether the denial was the result of the overwhelmingly inadequate handling of the claim, or the introduction of improper considerations into the claims process.

The Court found the duty of good faith was not breached despite the fact that the insurer relied on surveillance evidence which was not inconsistent with the insured's self-reporting; despite the production of an internal memoranda exaggerating the nature of the insured's activities and a claims administrator's written memorandum contemplating the successful denial of the insured's claim in the event of litigation; and despite the fact that the insurer's medical consultant was plainly wrong and factually inaccurate when it indicated that there was no medical or non-medical evidence that the insured could not perform light work. Despite these observations, the trial judge, as affirmed by the Supreme Court of Canada, concluded that there was not the kind of harsh, oppressive, vindictive, reprehensible conduct required to give rise to an award of punitive damages.

On balance, this decision is probably a welcome one from the perspective of disability insurers (including accident benefit carriers) in Canada. Although the door has perhaps been opened wider with respect to the potential for mental distress claims flowing from the breach of peace of mind insurance, the damage awards in that regard appear tempered (as non-pecuniary assessments for increased stress or anxiety) and only available upon proof of the damage being incurred and the distress sustained.

Further, the Supreme Court's articulation of the availability of punitive damages in the context of disability insurance cases reveals that despite *Whiten* (and perhaps as a result of the proliferation of allegations of bad faith in its aftermath), such damages are to be "resorted to only in exceptional cases, and with restraint."