

DISABILITY LAW UPDATE

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Fidler v. Sun Life

Astels v. Great West Life

I Denial of Insurance Coverage

Two recent cases have once again changed in significant ways both the analysis of and strategic approach counsel take to litigating claims arising from a denial of insurance coverage. Interestingly, in each case, both the individual plaintiffs and corporate defendants were represented by BC counsel.

In *Fidler v. Sun Life*, 2006 SCC 30, [2006] S.C.J. No 30, 271 D.L.R. (4th) 1, 350 N.R. 40 the Supreme Court of Canada has given the latest word on both punitive damages and damages for mental distress. In *Astels v. The Great West Life Assurance Company*, SCBC, New Westminster Registry No. S87491, September 21, 2006 a New Westminster jury, for the first time in British Columbian (and possibly Canadian) judicial history handed down a civil verdict awarding punitive damages and damages for mental distress against a private disability insurer. A comparison of these two different judicial resolutions of relatively similar claims squarely raises for counsel not only whether a particular fact pattern reveals a claim for punitive and/or mental distress damages but perhaps, as importantly, whether or not a jury notice should be issued.

The Supreme Court of Canada decision in *Fidler v. Sun Life*, supra, is pivotal to an analysis of potential causes of action in a claim involving denial of insurance coverage. The history of the *Fidler* litigation was unique for a number of reasons. The Plaintiff was initially unrepresented and only retained counsel after trial proceedings had commenced. At trial Ms. Fidler was awarded damages of \$20,000.00 for mental distress. Her benefits had been reinstated by the insurer just prior to trial. The claim for punitive damages was dismissed. The Defendant Sun Life appealed the damage award for mental distress. Ms. Fidler cross appealed on the issue of punitive damages. In a two third majority ruling (Ryan JA dissenting) Justice Finch (Prowse JA concurring) upheld the award for mental distress and reversed the trial judge's dismissal of the claim for punitive damages, awarding Ms. Fidler \$100,000.00. This was a remarkable outcome given that Sun Life's legal research was unable to find a single case in the Commonwealth in which a Court of Appeal had reversed a trial judge's dismissal of a punitive damage claim. This appears to be based on the analysis that a finding of bad faith is to some degree analogous to a determination of credibility and is therefore generally unappealable. Sun Life sought and was granted leave to appeal to the Supreme Court of Canada. At issue were both the award for mental distress and the successful cross-appeal for punitive damages. In a unanimous decision, the Supreme Court of Canada upheld and clarified the award for mental distress, but restored the trial judge's dismissal of the punitive damage claim.

II "Mental Distress" Defined

Dealing first with its analysis of damages for mental distress the court held at para 54 - 59:

“It follows there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in Hadley v. Baxendale. The Hadley test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see Wallace v. United Grain Growers Ltd., [1997] 3 S.C.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. They are not true aggravated damages awards.

The recognition that Hadley v. Baxendale is the single and controlling test for compensatory damages in cases of breach of contract therefore refutes any argument that an “independent actionable wrong” is a prerequisite for the recovery of mental distress damages. Where losses arise from the breach of contract itself, damages will be determined according to what was in the reasonable contemplation of the parties at the time of contract formation. An independent cause of action will only need to be proved where damages are of a different sort entirely: where they are being sought on the basis of aggravating circumstances that extend [page24] beyond what the parties expected when they concluded the contract.

Turning to the case before us, the first question is whether an object of this disability insurance contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made? In our view it was. The bargain was that in return for the payment of premiums, the insurer would pay the plaintiff benefits in the case of disability. If disability occurs and the insurer does not pay when it ought to have done so in accordance with the terms of the policy, the insurer has breached this reasonable expectation of security.

Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person’s disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured’s anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits. See D. Tartaglio, “The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts” (1983), 56 S. Cal. L. Rev. 1345, at pp. 1365-66.

People enter into disability insurance contracts to protect themselves from this very financial and emotional stress and insecurity. An unwarranted delay in receiving this protection can be extremely [page25] stressful. Ms. Fidler's damages for mental distress flowed from Sun Life's breach of contract. To accept Sun Life's argument that an independent actionable wrong is a precondition would be to sanction the "conceptual incongruity of asking a plaintiff to show more than just that mental distress damages were a reasonable foreseeable consequence of breach" (O'Byrne, at p. 334 (emphasis in original)).

The second question is whether the mental distress here at issue was of a degree sufficient to warrant compensation. Again, we conclude that the answer is yes. The trial judge found that Sun Life's breach caused Ms. Fidler a substantial loss which she suffered over a five-year period. He found as a fact that Ms. Fidler "genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage" (para. 30 (emphasis added)). This finding was amply supported in the evidence, which included extensive medical evidence documenting the stress and anxiety that Ms. Fidler experienced. He concluded that merely paying the arrears and interest did not compensate for the years Ms. Fidler was without her benefits. His award of \$20,000.00 seeks to compensate her for the psychological consequences of Sun Life's breach, consequences which are reasonably in the contemplation of parties to a contract for personal services and benefits such as this one. We agree with the Court of Appeal's decision not to disturb it."

III Prosecuting a Claim for Mental Distress

To prosecute a successful pleading of damages for mental distress the Plaintiff must satisfy what is in effect a two part test:

- 1) is the contract one which has an implied term of psychological wellbeing or security;
- 2) has the wrongful breach of this implied term cause a significant (i.e. not trifling) negative effect.

In the disability insurance field it is difficult to imagine an individual or group policy which would not have as a material, if unwritten object the provision of some measure of psychological comfort. These policies are rainy day contracts which accept usually monthly premiums in exchange for a promise to provide some level of income replacement in the event of disabling injury.

In these circumstances the insurer is either deemed to, or as a practical matter can, in fact foresee, that the wrongful denial of benefits could cause the claimant mental distress. The level or duration of that distress is of course a case by case determination; however damages to date have been conservative, the high water mark in BC being \$35,000.00, a case in which the insurer's wrongful denial of coverage caused the insured anxiety,

mental, emotional and financial stress: *Asselstine v. Manufacturer's Life Insurance Co.*, 2005 BCCA 465, [2005] B.C.J. No. 2024, 216 B.C.A.C. 288, 50 B.C.L.R. (4th) 11

IV Wrongful Breach of Contract Not Necessarily Bad Faith

By restoring the trial judge's dismissal of the punitive damages award *Fidler* reasserts the bad faith threshold defined in *Whiten v. Pilot Insurance Co*, 2002 SCC 18, [2002] 1 S.C.R. 595. It is important to note that from the insurance industry's perspective, the BCCA decision in *Fidler* had significantly lowered the bar as to what type of claims adjusting and corporate behaviour constitutes bad faith. The SCC decision emphasizes that a wrongful breach of a disability insurance contract does not necessarily create a claim in bad faith. In fact, the Court provided the following caution at para. 62:

"By their nature, contract breaches will sometimes give rise to censure. But 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: Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 196; Whiten, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in Whiten, at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint."

The narrow view of the application of *Fidler* is that the Court simply reaffirmed that it was at the discretion of the trial judge to assess evidence, including issues of motive and credibility and barring palpable or unreasonable error, such findings are unappealable. The broader view is that *Fidler* endorses a conservative, even restrictive analysis of the circumstances which will lead to a finding of bad faith. The middle ground is that the Court refers back to the criteria set out in *Whiten*.

Before a New Westminster jury, the plaintiff in *Astels v. Great West Life Assurance Company*, supra, argued that she was totally disabled under the terms of her disability policy and that her denial of benefits gave rise to actionable wrongs for which punitive and aggravated damages should be awarded. The Plaintiff's treating doctors all gave opinions that she was totally disabled while an in-house insurance specialist disagreed. The claims handling process criticized by plaintiff's counsel had primarily to do with the insurer's continuing requests for additional medical information, putting the onus on the impecunious insured to provide this information before the claim could properly be assessed.

Joseph Prodor, counsel for Ms. Astel, kindly provided a copy of the trial judge's charge on both aggravated and punitive damages.

With respect to aggravated damages, the charge reads:

“The plaintiff says that the defendants’ wrongful termination of her benefits and the on-going failure to reinstate her benefits, was in breach of their contract, and caused or contributed to in a material way, which means in a way that was something more than trivial, to her mental distress. She wants the defendants to pay her aggravated damages to compensate her for that mental distress.

The general principle in contract law – and the Policy is a contract – is that damages will not be awarded for mental distress which results from a breach of contract. As a general rule aggravated damages are not awarded for injury that results from the breach of a contract. There is, however, an exception to that general rule in respect of “peace of mind” contract whose very purpose is to secure the peace of mind of the person who is insured. The Policy in this case is a “peace of mind” contract because it creates an expectation of benefits and freedom from financial distress in the event that the plaintiff experienced a disability. Therefore, if the plaintiff establishes that the defendant’s breach of the Policy by discontinuing the payment of benefits caused her mental distress, she may be entitled to an award of aggravated damages.

Aggravated damages are intended to compensate for psychological consequences of the defendants’ breach of the insurance contract in cases where it is determined that merely paying the arrears of disability payments and any applicable interest does not adequately compensate the plaintiff for the years she was without her benefits. They are designed to compensate a plaintiff for emotional distress like anguish, anxiety, humiliation, grief, damaged self-esteem and similar kinds of psychological or mental distress. There must be actual evidence that the plaintiff experienced aggravation and mental distress and the degree of the plaintiff’s mental suffering must be sufficient to warrant monetary compensation. It is not necessary for the plaintiff to have endured financial hardship resulting from the breach in order to justify an award of aggravated damages; the plaintiff’s mental distress flowing from the defendants’ breach alone is sufficient.

It is important to understand that the defendants’ conduct, other than the fact of breach of contract itself, is not material to an assessment of aggravated damages because the nature of aggravated damages is compensatory, that is to compensate, rather than punitive, that is to punish.”

On the question of punitive damages the judge charged as follows:

“Punitive damages may be awarded if the wrongful acts of the defendant towards the plaintiff were outrageous or reprehensible and offensive to ordinary standards of decent conduct in the community. It is within this context that the defendants’ conduct throughout the course of the handling plaintiff’s claim takes on significance.

An insurance company such as the defendants' have an obligation under the contract to deal with the persons whom they insure, such as the plaintiff, in good faith. That obligation to act in good faith is separate and distinct from the insurance company's other contractual obligations such as to pay on a valid claim. Accordingly, a breach of the contractual duty of good faith is independent of and in addition to any breach of the contract to pay the claim if valid. In this case, the plaintiff alleges that the defendants breached the duty to act in good faith and that their conduct was reprehensible or outrageous and offensive to ordinary standards of decent conduct in the community. She is seeking punitive damages in respect of this alleged misconduct.

In considering an award of punitive damages you must keep the following in mind:

- (1) an award of punitive damages is very much the exception rather than the rule;*
- (2) punitive damages are only awarded if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;*
- (3) the purpose of punitive damages is not to compensate the plaintiff but to give a party responsible for the conduct described above, its just desserts (known as "retribution"), to deter such a party and others from similar misconduct in the future (known as "deterrence"), and to mark the community's collective condemnation of what has happened (known as "denunciation");*
- (4) punitive damages are generally given only when the misconduct would otherwise be unpunished or when other penalties suffered by the defendant are unlikely to adequately achieve the objectives of retribution, deterrence, and denunciation.*

Therefore, punitive damages are awarded if and only if compensatory damages, such as any aggravated damages, are insufficient to accomplish the above objectives "

The jury ultimately awarded Ms. Astel's \$35,000.00 for aggravated damages and assessed punitive damages of \$150,000.00 against Great West Life.

The charge contained no prohibition against jurors researching matters on their own time via internet or otherwise and one can't help but notice that the award under both these heads of damage is identical to the reported decision of *Asselstine v. Manufacturers Life Insurance Company*, supra. One is left to wonder the degree to which this jury assessed these awards without reference to judge made law.

V Conclusion

The dismissal of the punitive award in *Fidler*, particularly if one takes a broader view of its applicability, when compared to the verdict in *Astels* leads to the question of whether or not there is a potential divergence between what juries might consider bad faith behaviour and how a judge alone might interpret the decision in *Fidler*. Whether the *Fidler* decision would significantly change the content of the judge's charge in *Astels* is open to debate.

In summary, these two cases provide counsel with an opportunity to seriously consider whether a particular case warrants a jury notice or whether it should proceed to trial by judge alone.