

# **PUNITIVE AND AGGRAVATED DAMAGE AWARDS IN DISABILITY CLAIMS**

by Alf Kwinter<sup>1</sup>

## **Introduction**

Little did Connie Fidler know as she went off to trial self represented seeking only punitive and aggravated damages against Sun Life, that her case would change the law with respect to disability claims across the country.<sup>2</sup> The insurer had cut off all her benefits five years earlier but paid up all arrears plus interest just a week before the trial started. The trial judge of the British Columbia Supreme Court awarded Ms. Fidler \$20,000 in aggravated damages but dismissed her claim for punitive damages. By the time the Supreme Court of Canada had completed its work, Ms. Fidler had seen her \$20,000 aggravated damage award upheld by the British Columbia Court of Appeal, her dismissed punitive damage award increased to \$100,000 by the Appeal Court and then watched as the Supreme Court of Canada wiped out the punitive damage award and renamed her aggravated damage award under a new head, now to be known as “damages for mental distress”. Was the final decision a victory or a defeat for Ms. Fidler? Was it a win or loss for the Plaintiff bar? What is the state of the law with respect to the right to claim punitive and aggravated damages in disability claims? These are some of the issues I will explore in this paper.

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<sup>2</sup> My informed sources tell me that she was unrepresented, at least at the commencement of trial.

## **Aggravated and Punitive Damages - What's The Difference?**

A brief comment is perhaps warranted to explain the difference between aggravated and punitive damages, when such damages may be awarded and for what purpose as there is often confusion between these two heads of damages.

Firstly, aggravated damages are compensatory. As the Supreme Court of Canada stated in *Fidler v. Sun Life*<sup>3</sup>, as quoted from *Waddams (The Law of Damages)* (2nd Ed. 1983) at pp. 562-63 noting that aggravated damages

“describe an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant’s insulting behaviour.” (par. 51)

Punitive damages on the other hand are not compensatory but are intended to punish the defendant for its conduct. The Supreme Court of Canada in *Hill v. Church of Scientology*<sup>4</sup> states:

“Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant.” (par. 196)

Again, to quote the Supreme Court of Canada in *Fidler* at par. 61:

“...punitive damages are designed to address the purpose of retribution, deterrence and denunciation: *Whiten v. Pilot Ins.*

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<sup>3</sup> [2006] S.C.J. No. 30, 2006 SCC 30

<sup>4</sup> [1995] 2 S.C.R. 1130 [1995] S.C.J. No. 64

Co., [2002] 1 S.C.R. 595, 2002 SCC 18 at par. 43.”

### **Aggravated Damage Awards**

There have been a number of landmark decisions where appeal courts and the Supreme Court of Canada have dealt with awards of aggravated damages. In *Hill v. Church of Scientology*, (supra), the Supreme Court notes:

“Aggravated damages may be awarded in circumstances where the defendants’ conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff’s humiliation and anxiety arising from the libellous statement.”  
(par. 188)

And at par. 189:

“These damages take into account the additional harm caused to the plaintiff’s feelings by the defendant’s outrageous and malicious conduct.”

While *Hill* is a case of libel, aggravated damages have also been awarded in cases involving battery and, in particular, in sexual assault cases. In *Norberg v. Wynrib*<sup>5</sup>, the Plaintiff had been sexually assaulted by her family doctor. She had become addicted to drugs which the doctor had provided to her in exchange for sexual favours. In discussing aggravated damages, the Court states:

“Aggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances.

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<sup>5</sup> [1992] 2 S.C.R. 226, [1992] S.C.J. No. 60

...These must be distinguished from punitive or exemplary damages. The latter are awarded to punish the defendant and to make an example of him or her in order to deter others from committing the same tort;" (par. 53)

### **Aggravated Damages In Disability Claims**

Our courts have long recognized that aggravated damages and mental distress can flow from an insurer's breach of contract to pay disability benefits. In *Thompson v. Zurich Insurance Co.*<sup>6</sup>, Pennell, J. noted:

"It was for a long time the rule that no damages could be received in contract for injury to the feelings. The rigidity of the rule has yielded, however, to the spirit of the times. The parties' contemplation and the scope of the contract has now become the basic criterion:" (par. 57)

In *Warrington v. Great-West Life Assurance Co.*<sup>7</sup>, the British Columbia Appeal Court quoted with approval the above excerpt from *Thompson v. Zurich* and then went on to state:

"In summary, I conclude that a disability insurance policy is

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<sup>6</sup> (1984) 7 D.L.R. (4<sup>th</sup>) 664 (Ont. H.C.)

<sup>7</sup> (1996) 139 D.L.R. (4<sup>th</sup>) 18 (B.C.C.A.)

one of the few contracts in which damages for mental distress are recoverable when they are proven to result from the breach of contract. The trial judge here dealt with these damages in another way. Perhaps considering McIntyre, J.'s comment, at p. 1103 of Vorvis, that he was not saying aggravated damages could never be awarded in a case of wrongful dismissal 'particularly where the acts complained of were also independently actionable,' the trial judge apparently felt constrained to find an independent 'actionable wrong', a breach of a duty of good faith apart from the breach of contract." (par. 22)

The Court found that no bad faith or motive (or breach of duty of good faith) was required to prove damages for mental distress but only breach of contract. Whereas the trial judge had awarded damages for mental distress arising from the "breach of duty of good faith", the appeal court set aside his award noting:

"Subject to the issue of quantum, then, I would set aside the trial judge's award of damages for mental distress arising from an independent wrong known as 'breach of the duty of good faith' and substitute an award of damages for mental distress, or aggravated damages, for breach of contract."  
(par. 23)<sup>8</sup>

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<sup>8</sup> The B.C.C.A. was clearly ahead of its time as this decision reflects the thinking of the Supreme Court of Canada in setting aside Ms. Fidler's aggravated damage award and substituting instead the award for mental

What I believe to be the “high water mark” in aggravated damage awards for disability claims in Ontario is the decision of Mr. Justice Juriansz (as he then was) in *Clarfield v. Crown Life Ins. Co.*<sup>9</sup>. In what can only be described as a scathing judgment against the defendant insurer, the Court awarded both aggravated and punitive damages noting:

“I find that Crown Life totally failed to assess Mr. Clarfield’s claim in a balanced and reasonable manner and failed to act fairly in dealing with it.” (par. 73)

In dealing with the issue of aggravated damages, Juriansz, J. states:

“I conclude that this is an appropriate case for an award of aggravated damages. Mr. Clarfield suffered increased anxiety, stress and financial pressure both from the rejection of his claim and from the delay in dealing with it. These came at a time when he was particularly vulnerable to stress because of the nature of his illness. The manner in which the extra-contractual benefits were made in this case increased the anxiety and financial pressure felt by the insured. Mr. Clarfield, while in dire need of the money, was afraid to cash the cheques because he would not be able to afford to pay the money back if reimbursement were demanded. The January 8, 1998 letter confused him, and he suffered great anxiety about whether he should sign it.

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distress.

<sup>9</sup> [2000] O.J. No. 4074

Yet he needed the money. He did not cash the payments until his insurance broker assured him that Crown Life would not seek reimbursement. (The evidence was that the broker assured Crown Life that he would pay the money back personally should that be necessary.)” (par. 75)

Commenting on the manner in which the payments were made, the Judge notes:

“Before me the company argued that it had paid the plaintiff the full amount of total disability benefits to which he was entitled. That may be so, but the manner in which they were paid negated the purpose of disability payments to provide solace and security to the insured, and in fact exacerbated his feelings of anxiety and uncertainty about the future.”

(par. 76)

The Court found that the Plaintiff was forced to sell his house due to the Defendant’s actions in refusing his benefits.

“Mr. Clarfield testified that he was publicly humiliated by having to sell the house.” (par. 78)

“ ... the sale of the home was directly related to the manner in which Mr. Clarfield’s claim was processed and that the sale of the home caused him additional suffering.” (par. 83)

The Court then states:

“In addition, Mr. Clarfield subjectively felt a public humiliation and the whole family suffered the disruption of two moves of the household, as the Clarfields first moved into rental housing and bought a smaller house a year later.” (par. 84)

The Plaintiff was awarded aggravated damages of \$75,000.<sup>10</sup>

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<sup>10</sup> There was no appeal as the case resolved after trial.

An aggravated damage award of \$35,000 (in addition to punitive damages of \$150,000 described below) was upheld by the British Columbia Court of Appeal in *Asselstine v. Manufacturers Life Insurance Co.*<sup>11</sup> In commenting on the trial judge's award, Lowry, J.A. notes:

"It is accepted that awards of aggravated damages are now commonplace whenever claims for benefits on what are characterized as 'peace of mind' contracts', like long term disability insurance policies, are wrongly denied. The award provides compensation for mental distress which will usually be a consequence of a breach of contracts of that kind, but it is said that the award in this case is 75% greater than any award in the courts of this province in cases like this. Awards for mental distress have generally been between \$10,000 and \$20,000" (par. 18)

The Court then states:

"The award should not be seen as an upward trend in such damages justifying increased awards. But that said, I do not consider the amount of \$15,000 beyond what appears to be the upper end of awards of aggravated damages in cases of this kind to be so great that this Court should interfere with what the judge who tried the case found to be appropriate compensation for Ms. Asselstine." (par. 20)

The case was decided while the Supreme Court of Canada's decision was pending in *Fidler*. Interestingly, the Court appears to struggle as to whether an aggravated damage award of \$35,000 is appropriate yet there is no reference to the *Clarfield* decision which had been decided five years earlier and which awarded more than

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<sup>11</sup> [2005] I.L.R. I-4410

double that amount for aggravated damages.

In the recently released decision of *Monks v. ING Insurance Company of Canada*<sup>12</sup>, the Ontario Court of Appeal dealt with an appeal from a trial judgment where aggravated damages of \$50,000 were awarded by the trial judge to the Plaintiff in an action by the Plaintiff against her own auto insurer for various accident benefits. The Court of Appeal upheld the trial judge's award of aggravated damages. There are significant similarities between disability policies and the Accident Benefit provisions of an automobile policy, particularly the provisions covering income replacement benefits. The comments of the Court of Appeal in upholding the award are I believe applicable to disability claims:

“There was ample evidentiary support for the award of aggravated damages in this case. In the course of his damage assessment, the trial judge made the following findings: (i) ING did not look after Ms. Monks' needs properly from August to December, 2000, even when her cognitive powers were diminished and she was in a depressive state; (ii) some care recommendations made for Ms. Monks were not carried forward by ING; (iii) in other instances, ING's delay in implementing care measures, i.e. home improvements, caused Ms. Monks' physical and emotional damage; (iv) ING's sudden termination of Ms. Monks'

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<sup>12</sup> Released April 14, 2008

benefits after the Zurich Settlement and its demand for reimbursement of approximately \$52,600 on account of benefits already paid caused stress and damage to Ms. Monks and exacted a high toll on her physical and mental health; (vi) at about the same time, ING reduced Ms. Monks' monthly income replacement benefits by 20% to offset the alleged overpayments made to Ms. Monks; and (vii) the funds paid to Ms. Monks in respect of needed expenditures prior to May, 2002, when benefits were cut-off, were the 'bare minimum'. These findings, which were open to the trial judge on the evidence, are sufficient to support his award of aggravated damages." (par. 116)

### **Punitive Damages In Disability Claims**

As noted above, punitive damages are intended to punish the Defendant and should have no bearing on the damages suffered by the Plaintiff. The Supreme Court of Canada decision in *Whiten v. Pilot Insurance Co.*<sup>13</sup> now stands as the leading authority as to what factors the Court is to consider in determining if there should be a punitive damage award. The points set out by Justice Binnie are:

1. Punitive damages are very much the exception rather than the rule.
2. They are to be imposed only if there has been high-handed, malicious, arbitrary or highly

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<sup>13</sup> [2002] S.C.J. No. 19 2002 SCC 18

reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour.

3. They should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant.
4. There should be regard to any other fines or penalties suffered by the defendant for the misconduct in question.
5. They are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.
6. Their purpose is not to compensate the plaintiff.
7. Their purpose is to give a defendant his or her just desserts (retribution), to deter the defendant and others from similar misconduct in the future (deterrence) and to mark the community's collective condemnation (denunciation) of what has happened.
8. They are to be awarded only where compensatory damages are insufficient to accomplish these objectives.
9. They are to be given in an amount that is no greater than necessary to rationally accomplish their purpose.
10. While ordinarily the state would be the recipient of any fine or penalty for misconduct, the plaintiff keeps punitive damages as a "windfall" in addition to the compensatory damages.
11. Moderate awards of punitive damages, which inevitably carry a stigma in the broader

community, are generally sufficient. (para. 94)

In *Whiten*, the Supreme Court of Canada restored the jury's award of 1 million dollars which the Ontario Court of Appeal, in a 2 - 1 decision, had reduced to \$100,000. Prior to *Whiten*, it was difficult to obtain any kind of significant award for punitive damages against an insurer. As noted by the Supreme Court of Canada in *Whiten*, none of the previous damage awards against an insurance company for bad faith had ever exceeded \$50,000. (par. 136) Yet there have been significant punitive damage awards against insurers. In *Clarfield v. Crown Life Ins. Co.* (supra), the trial judge noted:

“My impression from the testimony of Crown Life's witnesses was that these matters were not rare. However, in these circumstances, I propose to assess the quantum of punitive damages based solely on the fact that the insurer's deleterious conduct in this case was as a result of its staff's established practices, and that a disincentive to the continuation of those practices is necessary. In addition to all the factors discussed above I have considered that precedents in Canadian jurisprudence are sparse. I have concluded that an award of \$200,000 in punitive damages is appropriate.” (par. 115)

At the time of the *Clarfield* decision, the Court of Appeal had reduced the *Whiten* award to \$100,000 and the Supreme Court of Canada had not yet released its decision. Justice Juriansz in effect found the conduct of the insurer in *Clarfield* worth double the Court of Appeal's award in *Whiten*. We can only speculate what amount he would have awarded if the Supreme Court of

Canada decision restoring the jury's 1 million dollar award had already been released.

### **So What Is Bad Faith?**

The Supreme Court of Canada has held that punitive damages are recoverable in a breach of contract case provided the Defendant's conduct giving rise to the claim is itself an actionable wrong (*Whiten* par. 78).

“A breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an ‘actionable wrong’ within the Vorvis rule, which does not require an independent tort. I say this for several reasons”  
  
(*Whiten* par. 79)

The manner in which an insurer is required to handle a claim is succinctly set out by O'Connor, J.A. in *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*<sup>14</sup>, as quoted in par. 63 of *Fidler*:

“The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim

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<sup>14</sup> [2000] O.J. No. 866 184 D.L.R. (4th) 687, para. 29

and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith."

Based on this judgment, the duty of good faith which an insurance company owes to its insured commences the moment the claim arrives at the insurer's office.

When dealing with a disability claim, it is sometimes difficult to determine what type of conduct by an insurer will attract punitive damages. In *Gerber v. Telus Corp.*, [2003] A.J. No. 849 2003 ABQB 453, Rowbotham, J. found that the insurer had used a false affidavit, had inappropriately used its ombudsman as a witness against the Plaintiff and relied upon the report of a doctor whose report neglected to include highly relevant facts. Yet while the Court described the Defendant's conduct as "inappropriate" and "disturbing", it decided that its conduct did not

warrant a punitive damage award attributing its conduct to “poor judgment.” While the Court refused to award punitive damages, it did award the Plaintiff aggravated damages of \$20,000.

Where an insurer has obtained valid medical information on which it chooses to rely, it is unlikely punitive damages would be awarded. As the Court noted in *McIsaac v. Sun Life Assurance of Canada (c.o.b. Sun Life of Canada)*<sup>15</sup>:

“Given these circumstances, the fact that Sun Life chose to rely on the opinions of their own medical consultants rather than Dr. Kothari, Dr. Troffe, and Ms. Anderson does not render their conduct harsh, vindictive, reprehensible, malicious, high-handed, or as showing a wanton and reckless disregard of the Plaintiff’s rights. Moreover, the evidence did not show that Sun Life had embarked on this course to deliberately starve the Plaintiff into submission.” (par. 91)

The manner in which an insurance company dealt with the insured did come under severe criticism by the Newfoundland and Labrador Supreme Court in *Fowler v. Maritime Life Assurance Co.*<sup>16</sup> The Court found that the insurer had taken “...an unnecessarily adversarial approach towards Mr. Fowler...” At par. 101, the Judge states:

“The Company could (and in my view should) have entered into a

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<sup>15</sup> [1997] B.C.J. No. 2164

<sup>16</sup> [2002] N.J. No. 217.

reasoned, intelligent discussion with Mr. Fowler's lawyer and attempted to resolve the impasse in a less stressful and damaging way, particularly having regard to the nature of Mr. Fowler's illness. Instead, it forced Mr. Fowler to commence a legal action to assert his rights in the face of clear medical evidence that he was disabled. The Company rejected the explanation of Mr. Fowler's counsel for his refusal to provide the income tax returns without attempting to provide its own explanation for requiring them. Ms. McQueen said that even to-day the company would withhold payments for a failure of a doctor appointed by the company to provide his report, even if there was no fault on the part of the insured and this was reiterated by counsel for the defendant in his summation."

After referring to numerous authorities, the Court awarded Mr. Fowler aggravated damages of \$75,000. The Court then went on to review the law of punitive damages and set out in detail the criteria set out by Binnie, J. in *Whiten* as noted above. The Court found that the insurer had in fact "acted in a harsh and outrageous manner towards Mr. Fowler which is worthy of denunciation" but then goes on to state:

"Having made what I acknowledge to be a large (although obviously, in my view, appropriate) award of aggravated damages, I find that this will adequately serve the additional purpose of retribution, deterrence and denunciation that might be

accomplished by a further award of punitive damages. Therefore, the application for punitive damages is denied.” (par. 122)

### **A Few Words About Pre-Judgment Interest**

Aggravated damages, being compensatory, will attract pre-judgment interest. Punitive damages do not. Both aggravated and punitive damages, however, will earn post-judgment interest. If you have a substantial punitive damage award, it is therefore important that your judgment bear the date of the judgment or verdict, i.e. the earliest possible date to allow post-judgment interest to run. I learned this lesson in one of my fire loss cases where defence counsel dated the judgment not as of the date of the jury’s verdict but as of the date (approximately one year later) when the trial judge delivered his lengthy reasons dealing with costs. Only when I commenced calculating the amount of interest owing did I realize that defence counsel had (inadvertently I am sure?) attempted to do my client out of one year’s post-judgment interest on the punitive damage award. I was in the process of bringing a motion to amend the judgment when the issue was resolved.

### **Fidler v. Sun Life and Beyond**

Connie Fidler received disability benefits from January, 1991 until April, 1997 when her benefits were terminated. She was suffering from chronic fatigue syndrome and fibromyalgia. Sun Life discontinued her benefits not based on any medical evidence but based on surveillance evidence only. The video surveillance report prepared for the insurer was misleading. In fact, the surveillance evidence was consistent with the “Lifestyle Questionnaire” Ms. Fidler had

completed for her insurer.

In January, 1998, Ms. Fidler's doctor confirmed her disability. The IME conducted at Sun Life's request recommended she "embark on a graduated training program." The insurer did not follow this recommendation.

Having cut off her benefits and forcing her to bring an action, one week before the trial in April, 2002, all benefits including interest were paid, no doubt because Sun Life realized that it would have little chance of success at trial. Ms. Fidler had been left without benefits for five years.

There was evidence of her severe distress arising from her loss of benefits. When one looks at the factors which Binnie, J. in *Whiten* held would justify an award of punitive damages, Connie Fidler's case would appear to be the classic case. The conduct of the insurer was certainly high-handed, arbitrary and highly reprehensible. It certainly departed to a marked degree from ordinary standards of decent behaviour given the Plaintiff was left without any means of support for five years. There is no issue as to the vulnerability of the Plaintiff. Not paying the benefits would reap a profit for the Defendant. There were no other fines or penalties the Defendant was facing. Was this not the type of conduct that called for retribution, deterrence and denunciation?

Paying up just prior to trial the monies Sun Life owed Ms. Fidler could not be considered sufficient compensatory damages to accomplish these objectives. The money was owing. Yet, at the end of the trial, no award was made for punitive damages. In effect, the company had met virtually all of Mr. Justice Binnie's points yet escaped unscathed save and except for a \$20,000 award for aggravated damages. The British Columbia Court of Appeal took a very different

view of the insurer's conduct. In a 2 - 1 decision, it held that Sun Life's conduct justified an award for punitive damages and awarded \$100,000 in addition to upholding the \$20,000 aggravated damage award. But when the case reached the Supreme Court of Canada, the Court of Appeal's punitive damage award was set aside as was the aggravated damage award and in its place, the Supreme Court substituted an award of \$20,000 for damages for "mental distress".

The *Fidler* case demonstrates how differently courts can view an insurer's conduct towards its insured. The Supreme Court of Canada found Sun Life's conduct "extremely troubling", but clearly not troubling enough to warrant a punitive award. The five-year denial of benefits without medical support was not seen as high-handed, malicious, arbitrary or highly reprehensible but as "inappropriate."

I choose to see the Supreme Court of Canada's elimination of the punitive damage award more as an example of its respect for trial judgments rather than an endorsement of Sun Life's conduct.

As noted by the Court:

"The trial judge's conclusion that Sun Life did not act in bad faith was the product of a thorough review of the relevant evidence, and depended heavily on his appreciation of the basis on which Sun Life denied Ms. Fidler's claim. He considered every salient aspect of how Sun Life handled Ms. Fidler's claim, including those features that might be relied upon to suggest that Sun Life approached the claim obstructively or dismissively, but made no such finding." (par. 73)

"Sun Life's conduct was troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. The trial judge's reasons disclose no error of law, and

his eventual conclusion that Sun Life did not act in bad faith is inextricable from his findings of fact and his consideration of the evidence.” (par. 75)

What the Plaintiff bar did gain from the *Fidler* decision was a new cause of action, or to be more accurate, a new head of damages - mental distress. The award of damages for mental distress was not entirely new.<sup>17</sup> What *Fidler* did, however, was to segregate that head of damages from aggravated damages which had, until *Fidler*, been the head under which damages for mental distress had been awarded.

The damages for mental distress awarded to Ms. Fidler, were not “aggravated damages” but were damages that were

“...within the reasonable contemplation of the parties at the time the contract was made.” (par. 45)

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<sup>17</sup> See *Warrington v. Great-West Life*, (supra)

This award of damages for mental distress by the Court is based on the rule in *Hadley v. Baxendale*<sup>18</sup>, which as all law students learn very early, states that damages must be

“such as may fairly and reasonably be considered either arising naturally ... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.” (*Fidler* par. 27)

The Court held that with certain “peace of mind” contracts such as the one covering Ms. Fidler,

“... damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made.” (par. 45)

According to the Court, these damages have nothing to do with awards for what the court refers to as “true aggravated damages”

“The first are true aggravated damages, which arise out of aggravating circumstances. They are not awarded under the general principle of *Hadley v. Baxendale*, but rest on a separate cause of action – usually in tort – like defamation, oppression or fraud.” (par. 52)

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<sup>18</sup> (1954) 9 Ex. 341 156 E.R. 145

Thanks to Connie Fidler, we now have damages for mental distress, a new and separate head of damages which can be claimed in addition to aggravated damages.

No doubt, once *Fidler* was released, all counsel practicing in the area of disability claims have begun to include a claim for mental distress in the prayer for relief. While the quantum awarded to Ms. Fidler appears inadequate given her years of suffering, Plaintiff counsel can I believe take heart from the Supreme Court of Canada's words that damages for mental distress are recoverable where they are established "on the evidence."

This will require counsel to monitor the client's health while benefits are being pursued and to ensure that all the appropriate medical evidence is obtained to support what may, depending on the evidence, be a significant claim.

Receiving \$20,000 after years of litigation cannot have been much of a victory for Connie Fidler. Perhaps if her claim had been tried by a jury, the result might well have been different. A jury would, I believe, likely have considered Sun Life's conduct to be more than just "inappropriate". Unlike the trial judge, a jury would, I believe, have been more likely to have found conduct warranting a punitive damage award. Based on my experience, any case involving allegations of bad faith against an insurer should whenever possible be heard by a jury. As occurred in *Whiten*, given the right set of facts with a Plaintiff whose medical condition is properly documented, I believe significant awards by juries for mental distress will be forthcoming and that such awards will be, to use the words of Justice Binnie in *Whiten*:

“ ... in touch with evolving realities, including financial realities.”

(par. 136)

### **Mental Distress - The New Frontier?**

Finally, I also believe that the Supreme Court of Canada may, in *Fidler*, have laid the foundation for mental distress awards in other types of insurance claims. Why are only disability insurance policies entitled to be termed “peace of mind” contracts? Is not every type of contract of insurance designed to bring us “peace of mind” whether the insurance is on our health, our home or our life? When I address a jury on a bad faith claim, I always remind the jury that we all sleep a little better at night because we have (or at least believe we have) insurance. I refer to the policy which my client has purchased as his or her lifeboat or lifeline. The companies themselves use this type of image to sell their policies. “You’re in good hands”. “Guiding people like you into safe harbours”. “Own a piece of the rock”. What are these companies selling if not “peace of mind”?

Justice Binnie stated in *Whiten* that prior to the \$800,000 punitive damage award upheld in *Hill v. Church of Scientology* (supra), the highest award for punitive damages in a libel case in Canada was \$50,000. Referring to punitive awards against insurance companies, he noted:

“Pilot’s concern may have been easy to allay when the expected exposure to punitive damages was only \$15,000.” (par. 135)

I say therefore that the \$20,000 award for mental distress to Connie Fidler should be seen by

creative counsel as a win and perhaps a new beginning.