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Fidler v. Sun Life an "Aggravating Decision"

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AN AGGRAVATING DECISION

by Eric Schjerning

The Supreme Court of Canada recently released its decision in *Fidler vs. Sun Life*. This case was eagerly awaited by writers of disability insurance but has proven to be something of a disappointment to insurers as it has lowered the bar for awarding aggravated damages in Canada, particularly in Ontario.

Facts of the Case

Ms. Fidler was a bank receptionist who, at the age of 36, became ill and was eventually diagnosed with chronic fatigue syndrome and fibromyalgia. She began receiving LTD benefits from Sun Life in 1991. The benefits were terminated in 1998, based to a large extent on video surveillance which Sun Life felt detailed activities inconsistent with her claim that she was incapable of performing light or sedentary work. Several weeks prior to the action going to trial, Sun Life re-instated benefits with interest. The only issue at trial was Ms. Fidler's entitlement to punitive and aggravated damages. The trial judge awarded Ms. Fidler $20,000.00 in aggravated damages for mental distress but dismissed her claim for punitive damages.

The British Columbia Court of Appeal unanimously upheld the $20,000.00 award for mental distress damages, and, in a surprising move, two of the three judges on the panel allowed Ms. Fidler's cross appeal and awarded her $100,000.00 in punitive damages. The two appeal judges held that the trial judge had made a palpable and overriding error in denying Ms. Fidler's claim for

punitive damages. The Court of Appeal relied on three aspects of the trial record in allowing the claim for punitive damages:

(a) The absence of medical evidence justifying a denial of Ms. Fidler's claim;

(b) Sun Life's internal memoranda exaggerating the surveillance evidence; and

(c) Sun Life's failure to disclose to Ms. Fidler the surveillance video on which it relied in denying her claim.

Sun Life sought leave to appeal which was granted by the Supreme Court of Canada.

The Supreme Court of Canada allowed Sun Life's appeal on the issue of punitive damages and threw out the Court of Appeal's $100,000 award in punitive damages. The Supreme Court felt that Sun Life's conduct was troubling, but not sufficiently so as to interfere with the trial judge's conclusion that there was no bad faith. The trial judge's reasons disclosed no error of law, and his eventual conclusion that Sun Life did not act in bad faith was inextricable from his findings of fact and his consideration of the evidence.

The Implications

The Supreme Court's reversal of the award of punitive damages is good news. But the insurance industry was more anxious to see how the Supreme Court's decision would treat aggravated damages. In this respect insurers should be disappointed.

Aggravated damages can be awarded to compensate a disabled plaintiff for the mental stress arising out of an improperly denied claim. Their purpose is to compensate an insured plaintiff for their

suffering as opposed to punitive damages which are meant to punish an insurer for its improper action.

It is difficult for insurers to resist claims for aggravated damages. It seems relatively easy for an insured who has been improperly denied LTD benefits to claim they have suffered distress and anxiety as a result. Accordingly, insurers have been rightfully more concerned about awards of aggravated damages in Canada than punitive damages. There have to date been many more cases awarding aggravated damages against insurers in Canada (12) than punitive damages (5).

Prior to the *Fidler* decision, aggravated damages awards in Canada had usually only been granted where there was an objective basis for the mental distress: for example, where the insured was forced to sell their house, resort to social assistance, or cash in RRSP's in order to live. The *Fidler* case is troubling because Ms. Fidler did not lead evidence of any financial stressors. Notwithstanding this, the trial judge had allowed Ms. Fidler's claim for aggravated damages. This lack of any real evidence of stress or anxiety or a basis for such stress or anxiety was why Sun Life appealed the trial judge's award of aggravated damages to the B.C. Court of Appeal.

Insurers had hoped the Supreme Court of Canada would curtail awards of aggravated damages, especially by courts in British Columbia where there have been 7 such awards to date against disability insurers. Unfortunately, in *Fidler* the Supreme Court of Canada has lowered the bar for awarding aggravated damages across Canada.

The traditional rule of law was that damages for mental suffering could not be awarded in a contract dispute. However, in the 1970s the English courts began to acknowledge that damages for mental suffering could be awarded in certain types of contractual disputes. The most well known example of these are the so-called holiday cases. In such cases the plaintiff had a contract

for a vacation, was provided a terrible holiday, and was able to recover damages not only for the cost of the ruined vacation, but also for the mental distress of the ruined holiday. Courts began to apply a "peace of mind exception" so that damages for mental suffering could be awarded in contract cases "where the very object of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation".

Applying these English cases, courts in Canada began awarding damages for mental distress in breach of contract cases. The "peace of mind exception" was used not only for vacation contracts but also for breaches of contracts for wedding services and the purchase of luxury automobiles. A number of courts, mainly in British Columbia, have also applied this exception to LTD contracts. This has permitted the courts in British Columbia to award aggravated damages in cases involving breach of LTD contracts.

The hope of Canadian disability insurers was that the Supreme Court of Canada would decide that mental distress damages for breaches of LTD contracts require an independent actionable wrong by the insurer. Courts in British Columbia have been awarding aggravated damages simply because the LTD contract was a "peace of mind" contract and did not require there to be an independent actionable wrong on the part of the insurer. In this respect, British Columbia courts had differed from those in Ontario.

In Ontario there have, to date, been only 3 cases awarding aggravated damages against disability insurers: *LeBlanc vs. London Life* ($10,000), *Clarfield vs. Crown Life* ($75,000) and *Cross vs. Canada Life* ($29,000). In *Cross*, the trial judge held that an independent actionable wrong is required before aggravated damages can be awarded. The court further held that an unreasonable delay in paying an LTD claim constitutes such a wrong.

The reasoning of the trial judges in *LeBlanc* and *Clarfield* is somewhat murky as to whether they required an independent actionable wrong before awarding aggravated damages. However, those two cases at least referred to an Ontario Court of Appeal case which had held that a separate independent actionable wrong was required on the part of the insurer before aggravated damages could be awarded. The presence of an independent actionable wrong sets a higher standard for an award of aggravated damages. An independent actionable wrong requires really bad conduct by an insurer, which conduct in and of itself could justify a monetary damage claim against the insurer. This is considerably more difficult to prove than the mere fact that the policy in question is a "peace of mind" contract.

There are only two cases outside of B.C. or Ontario awarding aggravated damages in the disability insurance context. In *Fowler v. Maritime Life* (Newfoundland $75,000) the judge followed the B.C. line of cases in saying LTD policies are peace of mind contracts. In *Gerber v. Telus* (Alberta $20,000), the judge also followed the B.C. approach and specifically stated that no separate actionable wrong was required to award aggravated damages.

Insurers had hoped the Supreme Court of Canada would follow the Ontario line of cases and opine that to award aggravated damages in Canada, an independent actionable wrong is required. Unfortunately, the Supreme Court of Canada did exactly the opposite.

The Supreme Court of Canada, after a lengthy analysis of the history of damages for mental distress in contract situations, opined that in Canada an independent actionable wrong has not always been required to award mental distress damages in breach of contract cases. When the parties enter into a contract, one object of which is to secure a particular psychological benefit, damages arising from mental distress should be recoverable where they are established on the

evidence and shown to have been in the reasonable contemplation of the parties at the time the contract was made.

The Supreme Court held that in Ms. Fidler's case, one object of her disability insurance contract was to secure the psychological benefit of income protection in the event of disability. This brought the prospect of mental distress upon breach of contract within the reasonable contemplation of both parties at the time the contract was made. Accordingly, the Supreme Court affirmed the approach the British Columbia Courts have adopted in dealing with aggravated damage awards against disability insurers. The Supreme Court held that LTD contracts are not mere commercial contracts, but rather are contracts with benefits that are both tangible as far as monthly payments are concerned and intangible, such as the comfort of knowledge that it will provide income security in the event of disability.

As a result of the *Fidler* decision, aggravated damages awards against insurers will likely become fairly routine in cases where LTD benefits are determined by the trial judge to have been improperly denied. The resistance to aggravated damages awards offered by Ontario Courts using the independent actionable wrong standard has been swept aside.