

The Supreme Court of Canada sets aside the award for punitive damages against an insurer

By Jean Saint-Onge and Catherine Lamarre-Dumas

On June 29, 2006, the Supreme Court of Canada, in a decision written by Judges McLachlin and Abella, reinstated the judgment of the Supreme Court of British Columbia and set aside the \$100,000 award for punitive damages of the Court of Appeal. At the same time, it upheld the judgment rendered by the two lower courts and condemned Sun Life to pay the insured \$20,000 in compensatory damages for mental distress caused by the breach of the disability insurance contract.¹

The Facts

Connie Fidler worked as a receptionist at a Royal Bank of Canada branch in British Columbia and, following a diagnosis of chronic fatigue syndrome and fibromyalgia, she began receiving long-term disability benefits on January 4, 1991. Subsequently, a letter from Sun Life informed her that the payments would be terminated on April 30, 1997 “as a result of a non medical investigation revealing that your activities are incompatible with your alleged disability”. The non-medical investigation consisted of video surveillance conducted by private investigators whose services had been retained by Sun Life. In April 2002, a week before the trial



was scheduled to start, Sun Life offered to reinstate Ms. Fidler’s benefits and to pay all outstanding amounts, along with pre-judgment interest. As a result, the trial dealt only with compensatory and punitive damages for having interrupted the disability payments.

The Judgment of the Supreme Court of British Columbia

The trial judge awarded Ms. Fidler \$20,000 in compensatory damages for mental distress caused by the breach of contract. However, regarding the claim for punitive damages, the Court concluded that while Sun Life’s conduct with respect to Ms. Fidler’s claim was at times “rather zealous”, it had not acted in bad faith. The claim for punitive damages was therefore dismissed.

The Judgment of the Court of Appeal

The Court of Appeal upheld the trial judge’s award for compensatory damages but held that Sun Life’s “arbitrary denial of long-term disability benefits to a vulnerable insured for over five years” required denunciation and deterrence. Applying the criteria set by the Supreme Court in *Whiten v. Pilot Insurance Co.*², the Court was of the view that punitive damages in the amount of \$100,000 was a rational and proportionate response to Sun Life’s conduct.

The Supreme Court of Canada

The Supreme Court of Canada reinstated the judgment of the trial judge.

• Compensatory damages for mental distress

The Supreme Court emphasized that “the fundamental principle on which damages are awarded at common law is that the injured party is to be restored to the position (not merely the financial position) in which the party would have

¹ *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 [hereinafter “Fidler”].

² [2002] 1 S.C.R. 595 [hereinafter “Whiten”].



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been had the actionable wrong not have taken place". Thus, damages for breach of contract should, as far as money can do so, place the plaintiff in the same position as if the contract had been performed. Compensatory damages are independent of any aggravating circumstances and are based completely on the parties' expectations at the time when the contract was entered into. The courts can award damages for mental distress following breaches of contracts that were entered into with a view to pleasure, relaxation or peace of mind, and have included disability insurance contracts in this category because peace of mind constitutes the very essence of the promise.

The Supreme Court stressed that an object of the disability insurance contract in question was to secure a psychological benefit, such that it was within the reasonable contemplation of the parties, at the time the contract was entered into, that a breach would cause mental distress to the insured. Consequently, compensation for mental distress was awarded.

• Punitive damages

While compensatory damages are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered as a result of a defendant's conduct, the Supreme Court reminded us that punitive damages are designed to address the purposes of retribution, deterrence and denunciation³. To attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency - conduct that is so malicious or oppressive that it offends the court's sense of decency.

In breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, the Supreme Court pointed out that it must be independently actionable based on the breach of a contractual obligation. In this instance, that obligation was to act in good faith regarding the insured's claim for disability insurance benefits.

The Court concluded that, although it was troubling that Sun Life had decided to terminate the disability benefits in the absence of any medical evidence indicating that the insured was able to return to work, it did not necessarily breach its obligation to act in good faith by wrongly rejecting the claim. Sun Life did not act maliciously, and consequently the award for punitive damages by the Court of Appeal was set aside.

The Application of the Fidler Decision in Quebec

As in common law, the abusive exercise of a contractual right may constitute a fault in civil law and give rise to non-pecuniary compensatory damages.

However, contrary to the practice in the common law provinces, the awarding of punitive damages in Quebec civil law is permitted only when provided by specific legislative provisions (art. 1621 C.C.Q.). As was noted by the Supreme Court in the *Fidler* decision, punitive damages in common law are intended to signal disapproval of conduct which reveals bad faith or an intent to harm. This concept is alien to traditional civil law in which civil liability has only a restorative function.

Thus, in *Desjardins Sécurité Financière, compagnie d'assurance-vie v. Cour du Québec*⁴, the Superior Court reversed the decision rendered by the Court of Quebec in which the insurer was ordered to pay \$500 in punitive damages to the insured in the absence of a specific provision justifying such an order. Cited by the Superior Court, the following excerpt from the work of authors Baudouin and Deslauriers is interesting:

³ *Whiten*, *supra* note 2.

⁴ J.E. 2006-868 (C.S.). Also see *Kusalic c. Zurich, compagnie d'assurances*, B.E. 2000BE-298 (CA), in which the Court of Appeal ruled that punitive damages cannot be awarded in the absence of a legislative provision authorizing them.

[our translation] «335 - Necessity of a legislative provision- Article 1621 C.C. requires that the courts base the awarding of punitive damages on a specific legislative provision. Two consequences arise from this. On the one hand, it is important that the judges identify clearly the law authorizing them to do so and, in the case of the Quebec Charter, the right which has been infringed upon. On the other hand, in the absence of such an empowering provision, punitive damages must be rejected.

**336 - Illustration: Abusive refusal of insurance coverage - Several first instance decisions, as in common law, have condemned insurers on the basis of their abusive refusal to cover a claim. In our opinion, this approach has no justification in Quebec because it cannot be founded on any legislative provision. On the other hand however, if the insurer infringes certain rights of the insured by its refusal, a remedy could be envisioned under the Quebec Charter.”⁵
(our emphasis; footnotes omitted)**

The Supreme Court’s analysis of punitive damages in *Fidler* will thus have limited scope in Quebec civil law given the different rules governing the awarding of such damages. The abusive refusal of a claim by an insurer does not necessarily result in an award for punitive damages. However, if such a refusal infringes rights recognized by the *Charter of human rights and freedoms*⁶, the situation could be different.

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⁵ J.-L. Baudouin and P. Deslauriers, *La responsabilité civile*, 6^e ed. (Cowansville, Qc : Yvon Blais, 2003).

⁶ R.S.Q. c. C-12.

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