IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rose v. British Columbia Life & Casualty Company,* 2012 BCSC 1296

Date: 20120904
Docket: S098365
Registry: Vancouver

Between:

Lana Rose

Plaintiff

And

British Columbia Life & Casualty Company

Defendant

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	Faith E. Hayman
Counsel for the Defendant:	Jo Ann Carmichael, Q.C.
Place and Date of Hearing:	Vancouver, B.C. June 7, 2012
Place and Date of Judgment:	Vancouver, B.C. September 4, 2012

[1] The defendant, British Columbia Life and Casualty Company, has applied under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* to strike out portions of paras. 19 and 21 of the plaintiff's amended notice of civil claim on the basis that they "disclose no reasonable claim".

The Background and Legal Framework for this Application

[2] The parties agree on the legal framework that governs applications brought under Rule 9-5(1)(a). That provision states:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence, as the case may be,
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> ...

[3] The recent and leading case of *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, confirmed the following propositions in relation to the former Rule 19(24)(a):

> (i) A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action (at para. 17);
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> (ii) The power to strike claims that have no reasonable prospect of success promotes efficiency in the conduct of the litigation and contributes to more effective and fair litigation (at para. 19); and
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> (iii)The motion to strike is a tool that must be used with care, as the law is not static and actions previously were deemed hopeless may in the future succeed. Therefore, it is not determinative that the law has not yet recognized the particular claim. In its analysis the court must be generous and err on the side of permitting a novel but arguable claim to proceed to trial (at para. 21).

[4] The foregoing propositions are consistent with the conclusions and statements found in cases such as *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980, *Odhavi Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15, and *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 40 and 41.

[5] The defendant did not suggest that a different analytical framework governed the present Rule 9-5(1)(a).

[6] The plaintiff, in her amended notice of civil claim, advances a claim based on the following allegations and facts:

(a) the plaintiff, while employed with the Sunshine Coast Regional District, was insured under a policy of long term disability insurance (the "Policy"). The Defendant was the insurer under the Policy;

(b) in the spring of 2008, the plaintiff began to experience significant health problems which precluded her from being able to work;

(c) the plaintiff applied for long-term disability benefits. Though she received such benefits for a brief time, her claim was thereafter denied. Over the ensuing year, the plaintiff unsuccessfully appealed that determination on three separate occasions; and

(d) the plaintiff thereafter brought a claim under the Policy. Paragraph 20 of the amended notice of civil claim asserts that on the eve of the plaintiff's summary judgment application the defendant approved the plaintiff's disability claim. Paragraph 20 also asserts that the plaintiff's summary judgment materials are based on "essentially the same information" as had been provided to the defendant by the plaintiff during her various earlier appeals.

[7] Paragraphs 19 and 21 of the amended notice of civil claim provide:

> 19. The defendant was and remains under a duty to adjudicate the plaintiff's claim fairly and in good faith. The duty of good faith includes a fair and timely investigation and adjudication of the plaintiff's claim and timely payment of benefits when due and owing. The defendant breached its duty of good faith by offering to reconsider its decision and failing to do so in a careful and responsible manner. In its adjudication of long-term disability claims, the defendant has a practice of offering to reconsider a denial of long-term disability benefits and declining the vast majority of appeals knowing that while the offer to reconsider its decision provides an appearance of fairness, the reality is that successive unsuccessful appeals have the effect of

> wearing out and discouraging claimants and exposing them to missed limitation periods.
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> ...
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> 21. Since benefits were reinstated, the plaintiff has continued to experience severe negative after-effects of her struggles with BC Life in 2009. In the summer of 2010, the defendant attempted to put the plaintiff in a rehabilitation program which would have been inappropriate for her. The plaintiff continues to fear that the defendant will force her into an inappropriate rehabilitation program or wrongly deny disability benefits.
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> [underlining added]

[8] The defendant seeks, on this application, to strike the underlined portions of paras. 19 and 21.

[9] It is significant that the plaintiff's present claim is not for disability benefits under the Policy. Rather, the plaintiff alleges a failure on the part of the defendant to adjudicate the plaintiff's initial claim fairly and in good faith and she relies, *inter alia*, on *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 395, in support of this claim.

The Paragraph 19 Issue

[10] The defendant argues that only the defendant's conduct in relation to the plaintiff is relevant and that the plea of systemic wrongdoing on its part forms no part of any cause of action, nor is it relevant to any claim for punitive damages. The decision of *Curry v. Advocate General Insurance Company of Canada* (1986), 9 C.P.C. (2d) 247 (Ont. H.C.J. Master), is central to the defendant's application.

[11] In *Curry*, the defendant applied to strike out a portion of the statement of claim which alleged:

> (10) The plaintiff says that the defendant, Advocate General Insurance Company of Canada, indulges in a regular practice of wrongfully denying the claims of persons insured under policies of insurance which it has issued, thereby gaining for itself an unjust profit or gain.

[12] That allegation is substantially the same as the portion of para. 19 that the defendant now seeks to strike. The Court allowed the application and, at 251-252, said:

> In my opinion, punitive damages must be based upon the conduct of the defendant which affects the plaintiff without taking into account conduct to the world at large.
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> I have come to this conclusion based on principle as well as authority.
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> I consider first the practical effect of the proposition contended for by the plaintiff. If it is correct, it will be open, and in fact necessary for the plaintiff and the defendant to review all of the defendant's files, where it has rejected claims by its insureds. Each one of these will have to be reviewed by the plaintiff to determine if the defendant has been guilty of the same sort of conduct towards each of the other insureds as it has allegedly visited upon the plaintiff... In effect the trial Judge would have to inquire in to a substantial number of other claims and determine whether they were wrongfully rejected by the defendant as well as dealt with in a high-handed manner. The discovery process including exchange of documents and the trial itself would assume monstrous proportions.
>
> Secondly, it must be borne in mind, that this is an action between two persons, the object of which is to do justice between them. The plaintiff is a private individual suing only on his own behalf. He is not a public officer nor is this a class action... He has no status to seek to vindicate a public right. It is worth mentioning although it would not be a factor in all cases, that the defendant here is an insurance company subject to regulation by government. If it makes a practice of contravening the regulations laid down for the protection of the public, it is for the governmental authorities to take appropriate steps.

[13] The *Curry* decision has been referred to and relied on by several decisions of this Court. Importantly, all such decisions arose in the context of applications for the production of further discovery. Thus, in *Kelly v. Unum Life Insurance Co. of America*, 2000 BCCA 667, a decision that predates *Whiten*, Newbury J.A. dismissed an appeal from a chambers judge's decision not to permit the plaintiff to ask questions relating to various policies and records of the defendant insurer. After referring to *Curry*, she said, at para. 5:

> [5] ... Unless the plaintiff were suing in some representative capacity, the conduct of Unum *vis-a-vis* other insureds is irrelevant to Dr. Kelly's claim including that for punitive damages. The motion he makes amounts not to a fishing expedition in a lake or stream but an entire ocean. This simply is not permitted without some basic relevance being shown. If and when Dr. Kelly obtains damages, they will reflect his own situation and not that of others. I see no possibility Dr. Kelly would succeed in this Court on this point, which is

> not a matter of public importance, but rather an application of a clear principle to the facts of this case. I would therefore not grant leave.

[14] In *Astels v. Canada Life Assurance Co*., 2006 BCSC 941, Arnold-Bailey J. considered an application for extensive discovery of documents pertaining to the defendant insurer's past and present claims adjudication processes, including the total number of claims received, the number of claims accepted and the number denied in the past five years, the number and disposition of complaints with adjudications, and the number of lawsuits commenced, on the basis of a pleading of systemic bad faith in the adjudication process aimed at increasing profits.

[15] At para. 34, Arnold-Bailey J. held that *Kelly* was not contrary to the conclusions reached in *Whiten*. She then said, at para. 35:

> [35] ...without the specific facts of the case giving rise to allegations of bad faith or failure to act in the utmost good faith, the plaintiff is simply fishing in the wide ocean of all insurance decisions taken by the defendants in the hopes of turning up systemic conduct that were found in claims for bad faith, from which they could then impute the same conduct in the case at bar.

[16] In *Logan v. RBC Life Insurance Co*. (1 August 2007), Vancouver S052099 (S.C.), Kelleher J. dealt with both an application by the plaintiff to amend her pleadings to add an allegation that the defendant's misconduct represented "a widespread practice", as well as an application for further production. It is significant that the plaintiff had not, in its initial pleading, advanced any assertion of widespread wrongdoing. Thus, the production application was brought on the basis of a narrow claim of wrongdoing by the defendant against Ms. Logan.

[17] As it relates to the production application, and after referring to each of *Kelly* and *Astels*, Kelleher J. said:

> [48] Therefore, I agree with the conclusion reached by Arnold-Bailey J. in *Astels*. *Kelly* is still the law in British Columbia, and even in relation to punitive damages, the information sought by the plaintiff must have an appreciable use in the context of the action that extends beyond merely advancing a bald assertion in the statement of claim (*Astels* at para. 27: see also *Kelly* at para. 5).

[18] As it related to the amendment application, however, Kelleher J. concluded that it was premature to determine that there was no evidence to support the allegation and said:

> [35] The relevance of a wide-spread practice or the absence of it was noted in *Whiten v. Pilot Insurance Co*., [2002] 1 SCR 595, 2002 SCC 18. In that case the court pointed out that a breach of insurer's duty of good faith is an independent actionable wrong which gives rise to punitive damages (paras.78-9).

[19] It is also significant that there has been development and change in the Ontario decisions which post-date both *Curry* and *Whiten*, and which are brought in the context of an application to strike the parts of a claim which allege a systemic breach of an insurer's obligations to its insureds. None of *Kelly*, *Astels* or *Logan* make any reference to these further decisions.

[20] Thus, in *Covelli v. Sears Canada Inc*., 2011 ONSC 6984, Dambrot J. said:

> [3] It is true that there is a line of cases that supports the position of the defendant, albeit a short one. It consists of a 1986 decision of Master Peppiatt in *Curry v. Advocate General Insurance Co. of Canada* (1986), Carswell Ont. 617 and a 2009 decision of Pearce J. that followed *Curry* in *Howells v. Manufacturers Life Insurance Co*., [2005] O.J. No. 4816. But that line of cases has been overtaken by the *obiter* on this issue in the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co*, [2002] 1 S.C.R. 595 at para. 120 and subsequent decisions of the Ontario Court of Appeal and of the Divisional Court as well as other courts that have explicitly or implicitly followed *Pilot*.

[21] The decisions of *Craig-Smith v. John Doe*, [2009] O.J. No. 4041 (S.C.J.), and *Hodson v. CIBC*, [2001] O.J. No. 4378 (Div. Ct.), are to like affect. In each of these cases the court was dealing with a pleading that advanced a claim of systemic wrongdoing. In each, after referring to *Whiten*, the court declined to strike the portion of the pleading in issue.

[22] In this case, the application of the defendant, as it relates to para. 19, is flawed in several respects. The object of Rule 9-5(1)(a) is to enable a party to strike "any part of the pleading" that fails to disclose "a claim or defence". The defendant in its focus on the plaintiff's plea of a "practice" of wrongdoing has confused: (i) a claim

or cause of action with a material fact; and (ii) the need to plead material facts with pleading evidence.

[23] Rule 3-1(2)(a) requires that a notice of civil claim "set out a concise statement of the material facts giving rise to the claim". "Claim" and "cause of action" have been interpreted to mean the same thing in this context: *Masse v. N. Hoolsema & Sons Ltd.* (1977), 2 B.C.L.R. 345 (S.C.).

[24] Whether the evidence substantiates the pleaded facts at the time of the motion, or might at some future date as the case progresses and additional evidence becomes available, is irrelevant to the motion to strike. This was confirmed by McLachlin C.J., writing for the court, in *Imperial Tobacco* where she stated:

> [23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[25] There is no definition in the current Rules or in the old Rules of "material fact". Recently, in *Jones v. Donaghey*, 2011 BCCA 6 at para. 18, Mr. Justice K. Smith stated that: "a material fact is the ultimate fact, sometimes called the 'ultimate issue', to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put 'in issue' by the pleadings."

[26] Facts relating to "matters in aggravation of damages" or "matters in mitigation of damages" are treated as material facts: *Petersen v. Bannon* (1993), 37 B.C.A.C. 26, 84 B.C.L.R. (2d) 350 at para. 21.

[27] In assessing whether a cause of action has been adequately pleaded, the basic function of pleadings should be kept in mind. This was summarized by K. Smith J., as he then was, in *Homalco Indian Band v. British Columbia* (1998), 25

C.P.C. (4th) 107 at para. 5, as "clearly defin[ing] the issues of fact and law to be determined by the court". He went on to provide a useful guide to the elements of a cause of action that the material facts will ordinarily cover:

> [6] A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, *Handbook of Common Law Pleading*, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:
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> > Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.
>
> If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars should follow and should be identified as such: *Gittings v. Caneco Audio-Publishers Inc.* (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

[28] I do not understand the plaintiff's allegation regarding the systemic nature of the defendant's conduct as being intended to ground a distinct cause of action based on systemic bad faith, separate from her individual bad faith claim. Rather, I understand her only to be arguing that it is an aggravating factor in her claim for punitive damages. In short, I consider it to be a material fact relating to her claim, rather than a claim or cause of action in its own right.

[29] This interpretation is supported by the plaintiff's reference in her written submissions to *Whiten*, where Binnie J. states:

> [120] Deterrence is an important justification for punitive damages. It would play an even greater role in this case if there had been evidence that what happened on this file were typical of Pilot's conduct towards policyholders. There was no such evidence. The deterrence factor is still important, however, because the egregious misconduct of middle management was known at the time to top management, who took no corrective action.

[30] It is also supported by the fact that the plaintiff's Notice of Civil Claim seeks, *inter alia*, "damages, including punitive and/or exemplary damages, for breach of the Defendant's duty of good faith toward the Plaintiff". There is no mention of a separate claim based solely on the defendant's systemic conduct or acts towards others.

[31] Thus, properly analyzed, the assertion of a "practice" or pattern of wrongdoing is a basis upon which, in this case, the claim for punitive damages is advanced.

[32] The defendant, in its written submission, further argues "that allegations of 'widespread practices' have no relevance to the issue of whether the adjudication of the plaintiff's claim attracts punitive damages".

[33] This is not correct. In *Whiten*, Binnie J. said:

> [84] The respondent says that even if a separate claim arising under the insurance contract *could* provide the basis for punitive damages, none was pleaded in this case.
>
> [85] In other words, while "punitive and exemplary damages" are explicitly requested in para. 13 of the statement of claim, the material facts necessary for the grant of such an award are not spelled out in the body of the pleading. Further, the respondent in its cross-appeal says that even if the plaintiff has established an "independent actionable wrong", she failed to prove any separate and distinct damage flowing from it. The appellant thus failed, Pilot says, to meet the *Vorvis* requirements and her claim for punitive damages ought to have been dismissed.
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> ...
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> [87] One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as harsh, vindictive, reprehensible and malicious" (*per* McIntyre J. in *Vorvis*, *supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.

[34] I emphasize para. 120 of *Whiten*, found at para. 29 of these reasons, which expressly deals with the relevance of conduct that is "typical" of a defendant. The reference, in para. 120 of *Whiten* to "evidence" of conduct is, however, for a different stage of the proceedings. At this point, the plaintiff has simply identified to the

defendant the fact that it is advancing a claim for punitive damages and has set out a material fact that that claim is based on - namely, a practice or pattern of wrongdoing.

[35] To the extent that the defendant argues that in some cases, *Hodson* being an example, there was some evidence to support the claim of systemic wrongdoing being advanced, the defendant has confused the difference between pleading material facts and pleading evidence and has further ignored the prohibition on pleading evidence contained in Rule 3-7(1); *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc*., 2005 BCSC 371 at para. 9. Again, the assertion that the defendant has engaged in a pattern of wrongdoing simply constitutes a material fact that underlies the plaintiff‘s claim for punitive damages. A pleading which addressed, by way of example, the defendant's earlier treatment of Messrs. Jones, Smith, Black, and White would constitute an impermissible pleading of evidence.

[36] I accept that the interaction between Rule 9-5(1)(a) and an application for document production may give rise to something of a conceptual disconnect. An application brought on the basis of Rule 9-5(1)(a) is based on the claim or defense as pleaded and is limited to those material facts necessary to make out the claim or cause of action. An application for further discovery of documents, whether brought under Rule 7-1(1) or Rule 7-1(11), is, in turn, based on the pleadings.

[37] This would engage the very concern raised in each of *Kelly*, *Logan* and *Astels* about "defendant's fishing in the wide ocean of all insurance decisions taken by the defendants". This issue was not, however, argued before me. It requires an analysis of those cases which pertain to applications brought under the Rules that are relevant to document disclosure and would also have to engage the overarching consideration of proportionality. These issues are for another day.

[38] The onus on the applicant is to establish that it is “plain and obvious” that the pleading offends Rule 9-5(1)(a). Given: (1) that the reference to a “pattern” of conduct in para. 19 of the amended notice of civil claim is relevant to the plaintiff’s

claim for punitive damages; (2) the conflicting lines of authority in Ontario; (3) the Supreme Court of Canada's remarks in *Whiten*, at para. 120; (4) the fact that all of the British Columbia cases referred to by the defendant dealt with applications concerning the extent of discovery, rather than motions to strike pleadings; and, (5) the fact that Kelleher J., in *Logan*, allowed an amendment to the statement of claim in that case to include an allegation that the misconduct in question reflected a widespread practice, I do not consider that the defendant has satisfied the onus that rests with it. Specifically, I do not consider that it is plain and obvious that the allegation in question in para. 19 of the amended notice of civil claim should be struck.

The Paragraph 21 Application

[39] The defendant also seeks to strike from the amended notice of civil claim the sentence that reads, "[t]he plaintiff continues to fear the defendant will force her into an inappropriate rehabilitation program or wrongly deny disability benefits", again on the ground that it does not disclose a reasonable claim, pursuant to Rule 9-5(1)(a).

[40] The defendant's submissions in this regard focus exclusively on the relevance of the assertion to the plaintiff's claim for punitive damages as a result of the defendant's alleged breach of its duty of good faith. The defendant appears to conceptualize the plaintiff's claim for punitive damages as relevant to a speculative future breach of that duty. Paragraph 35 of the defendant's written submissions reads:

> The Defendant respectfully submits that it is only the Defendant's past conduct which could give rise to a claim of breach of duty of good faith. The Plaintiff is now receiving LTD benefits. The Defendant is not in breach of any duty owed under the Policy. It is only when the Defendant is found guilty of a breach of contract that a claim to damages for bad faith arises.

[41] Similarly, para. 39 reads, in part:

> Here, the Plaintiff alleges that, although the defendant is not now in breach of its contractual duty, having accepted the Plaintiff's claim to benefits, she is still entitled to damages for an **anticipated** future breach of the insurer's duty of good faith.
>
> [emphasis in original]

[42] Within this narrow conception of the plaintiff's claim, the defendant would be correct. As it argues, though a bad faith claim is an independent actionable wrong, it does not crystallize without a finding that the plaintiff was owed benefits under the relevant policy: *Forestex Management Corp. v. Lloyd's Underwriters*, 2004 FC 1303 at para. 24; see also, *Andreychuk v. RBC Life Insurance Company*, 2008 BCSC 286 at paras. 63-64, aff'd 2008 BCCA 492.

[43] Further, punitive damages are not compensatory; the objectives of an award of punitive damages are retribution, deterrence and denunciation: *Whiten* at paras. 112, 116, 120 and 123.

[44] A claim for punitive damages for bad faith founded on the plaintiff's fear of a speculative future breach would therefore indeed not disclose a reasonable claim.

[45] However, I do not understand this to be a claim the plaintiff is making. Instead, I again understand the plaintiff to intend the allegation in question to be a material fact, supporting a cause or causes of action, rather than a cause of action in its own right. This is clear from her amended application response, where she asserts that her continuing fears are relevant to both her claim for damages for mental distress and her claim for punitive damages.

[46] The relevance of the assertion to the plaintiff's claim for damages for mental distress is not addressed by the defendant. My understanding of the plaintiff's claim for punitive damages is that it is based on the defendant's past conduct, rather than on any prospective breach.

[47] There is no question that damages for mental distress are recoverable in a disability insurance context, even when benefits have been restored before trial. In *Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, which involved just such a fact pattern, McLachlin C.J. and Abella J., writing for the Court, stated:

> [57] 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.
>
> [58] 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 stressful. ...

[48] In that same decision, McLachlin C.J. and Abella J. also confirmed that such damages are not an exception to the rule in *Hadley v. Baxendale*, but are rather the result of the application of the foreseeability principle that applies generally to determine the availability of damages for breach of contract: *Fidler*, at paras. 49 and 53-54.

[49] That the plaintiff continues to suffer mental distress is clearly material to any assessment of the damages she has suffered as a result of the defendant's conduct under this head.

[50] The plaintiff's continuing fears are also material to the claim for punitive damages based on the defendant's alleged past breach of its duty of good faith. As Binnie J. confirmed in *Whiten*, at para. 116, the emotional distress of the plaintiff is relevant in such cases "insofar as it helps to assess the oppressive character of the respondent's conduct", though courts must be careful not to allow double recovery for such damages.

[51] The allegation in question is therefore relevant to at least two well-founded causes of action, and should therefore not be struck from the amended notice of civil claim.

[52] Accordingly, the defendant's application is dismissed. Costs of the application are to be in the cause.

"Voith J."