

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
MARILYN FRASER)	
)	David E. Preszler, for the Plaintiff
)	
Plaintiff)	
)	
– and –)	
)	
FENCURCH GENERAL INSURANCE)	
COMPANY)	Jessica L. Kuredjian, Kayla Smith, and
)	Thelson Desamour, for the Defendant
)	
Defendant)	
)	
)	
)	HEARD: May 16-24, 2022

LEIBOVICH J.

Overview

- [1] The plaintiff, Mrs. Fraser, applied for long-term disability from her insurer, the defendant, Fenchurch General Insurance Company [“Fenchurch”] in July 2017. Her application was supported by her treating physician. The defendant ordered an independent medical assessment. The assessor found that the plaintiff suffered no physical impairments but recommended a psychological assessment be done by a practitioner experienced in assessing individuals with chronic pain syndromes. The defendant ignored the recommendation and denied the plaintiff’s claim for long-term disability.

- [2] Mrs. Fraser launched this action. During the course of the litigation the plaintiff obtained a psychiatric assessment which supported her claim that she could not work and sent it to the defendant. The defendant had her assessed with its own expert who agreed. The defendant reversed its decision and allowed her long term disability claim retroactively.

- [3] The plaintiff has continued with the action and seeks extra-contractual damages. The plaintiff seeks aggravating damages in the amount of \$50,000 and punitive damages in the amount of \$1,000,000. The plaintiff claims that the defendant’s denial of the initial request was done in bad faith. The defendant resists the action and submits that there was no bad faith, the initial decision was reasonable and once they were presented with concrete information that plaintiff could not work, they allowed her claim.

[4] This trial raises the following issues:

- 1) Is the defendant liable for extra-contractual damages?
- 2) If the answer is yes, of what kind and in what amount?

Brief Timeline of Events

[5] The following is a brief timeline of the events in this case:

March 22, 2017: Mrs. Fraser stopped working.

At the time of the trial, Mrs. Fraser was 60 years old and had been working full-time as an industrial cleaner at Robinson Solutions for ten years. Her duties required her to use a forklift, climb ladders, and to stand for eight hours. Mrs. Fraser stopped working on March 22, 2017. At that time, she was experiencing severe pain to the point that self-touch was painful. Her sleep habits were such that she often fluctuated from sleeping days at a time, to not at all, which left her exhausted. She became depressed and her weight increased. Mrs. Fraser had been diagnosed with fibromyalgia in 2008, had a heart attack in 2014, and had surgery on her knee in 2016.

July 11, 2017: Mrs. Fraser submitted her application for long-term disability.

July 20, 2017: Mrs. Fraser filled out the claimant's statement.

July 28, 2017: Fenchurch wrote and informed Mrs. Fraser that they needed more information and that her application was pending. Fenchurch was waiting for documentation from Mrs. Fraser's treating physician, Dr. Durrani.

September 5, 2017: Fenchurch advised Mrs. Fraser that they would be sending her for an independent medical examination. Mrs. Fraser was independently assessed by Dr. Oshidari.

October 31, 2017: Dr. Oshidari submitted his report.

November 6, 2017: The defendant denied Mrs. Fraser's claim.

June 27, 2018: Mrs. Fraser applied for Canada Pension Plan disability benefits [CPPD]. Dr. Durrani supported the application.

January 15, 2019: Mrs. Fraser was granted CPPD.

March 19, 2020: Dr. Kirsch prepared a psychiatric assessment on Mrs. Fraser. The report was sent to the defendant.

June 25, 2020: Dr. Jetly prepared, for the defendant, a psychiatric assessment on Mrs. Fraser.

September 24, 2020: The defendant approved Mrs. Fraser's request for long term disability.

The Plaintiff's Claim for Disability from the Defendant

- [6] Scott Knight testified at trial. At the time he was Fenchurch's Chief Operating Officer and director of claims. Mr. Knight made the decision on behalf of Fenchurch to deny Mrs. Fraser's claim for long-term disability. The claim notes, which set out the various steps in the claim process, were filed at trial. Mr. Knight testified that all the notes and all the action taken on the file are found in the claims management system.
- [7] Mr. Knight testified that one does not have to accept the recommendation of the independent medical examiner. However, he testified that Fenchurch had a duty to act in good faith, to expedite communication, collect information and provide an expeditious decision of claims when they come in. He was to provide a fair minded and objective lens.
- [8] Mr. Knight went through Mrs. Fraser's application and claim. He testified that Mrs. Fraser submitted the application on July 11, 2017, but the full application was not received. They sent out the missing forms. Mr. Knight testified that the request for disability was presented as resulting from physical ailments. Dr. Durrani was her supporting physician and he did not list any mental disorders.
- [9] Mrs. Fraser in her application, wrote that she was experiencing the following symptoms:
- Muscle spasm in various parts of my body, heel spurs, fibromyalgia would stop me from doing much, pain in legs, shoulder muscles, to the point I could hardly lift my armors. Continuous pain throughout my body, fatigue, emotionally.
- [10] Under the injuries or illness section, she wrote:
- I couldn't do my job, the walking, sweeping, dust with spine pain, hip pain, feet, lifting. Just makes my pain worse.
- [11] Mrs. Fraser testified that at the time of the application she had not been seeing anyone for any mental health problems. She then added that Dr. Durrani, her family physician, was helping her mental health issues. Dr. Durrani's notes do not contain a diagnosis of her being depressed. However, Mrs. Fraser testified that Dr. Durrani always told her that she suffered from depression. Mrs. Fraser testified in cross-examination that she did not know why she did not include in her application that she suffered from depression. She wrote "emotional" and for her emotional meant depression.
- [12] Dr. Durrani diagnosed Mrs. Fraser with fibromyalgia, osteoarthritis, and spinal degenerative disc disease. He noted a worsening of the plaintiff's pain problems. He opined that she was unable to return to work. He advised that the plaintiff was following his treatment recommendations. He wrote in the primary diagnosis section:

Fibromyalgia

Osteoarthritis

DDD Spine

- [13] Dr. Durrani did not include any DSM-V diagnosis in his physical statement in support of the application. Dr. Durrani testified at trial. He testified that he put on the application the main points.
- [14] Mr. Knight explained that Sarah Lewin was the case manager and her supervisor was Beverly Taylor. Ms. Lewin recommended that they receive an independent medical assessment because they could not ascertain the reasons for the current restrictions. Ms. Lewin wrote in the claim notes:

Recommended Action Plan I Comments: EE is 56 years old and has been off work since March 2017 due to right knee pain. EE had surgery on the left knee in May 2016 and was diagnose with fibromyalgia in 2008 and has had OA in her spine for years. EE is currently on several medications for her conditions and goes for B12 injections infrequently. EE has seen an ortho surgeon twice, after the first visit the surgeon ordered an MRI of the right knee which showed OA and deficiency of the posterior horn and body of the medial meniscus. It doesn't appear that EE will be undergoing any further surgery at this time based on the consult notes from the ortho surgeon. EE has had these conditions for several years now and has been able to work, I recommend continue to pend claim and obtain an Ortho IME now as we don't currently have clear restrictions and limitations that would be causing EE to be disabled from her own occupation as an industrial cleaner.

- [15] Ms. Taylor agreed with the recommendation. Jamie Matthews was the Senior Independent Medical Examiner Coordinator. He made the following comments, as found in the claim notes:

We have reviewed the medical records pertaining to Marilyn Fraser and feel an orthopaedic consult is sufficient for commenting on the right knee issues that this lady has, however the primary diagnosis is fibromyalgia. Very few orthopaedic surgeons can address issues of chronic pain. Dr. Paltich (CV attached) will opine on chronic pain and might address the fibre symptoms. He is booking into November though, so that is not ideal.

Otherwise, physiatrists often address chronic pain, fibromyalgia symptoms and can also address the knee pain. Please let me know how you would like us to proceed.

- [16] Given the time pressures and Dr. Paltich's unavailability it was determined that a physiatrist conduct the assessment.

- [17] Mr. Knight was cross-examined on the decision to seek an independent medical examination and how it meshed with Fenchurch's definition of disability. Fenchurch's policy defined disability as follows:

During the Benefit Waiting Period and during the Own Occupation Period, the Employee is disabled by disease or injury from performing that percentage set out in the Table of Long Term Disability Benefits (or more) of the Employee's Regular Duties and performing that same percentage of the Employee's regular hours of work of the Employee's own occupation for any Employer as determined by the Company and such disease or injury causing the disability occurs for the first time after the Eligibility Waiting Period as set out in the Table of Long Term Disability Benefits.

- [18] Mr. Knight agreed that the above definition of disability does not say anything about long-standing problems. Mr. Knight explained that Mrs. Fraser had been diagnosed since 2009 and he was merely trying to establish what had changed. He hadn't denied her claim, he was merely seeking an independent medical assessment.

- [19] Ms. Lewin told Mrs. Fraser that they needed to conduct the assessment as the current medical information they had did not support a claim for long term disability. Mr. Knight was cross-examined on this comment because Dr. Durrani's physician statement did support the request for disability. Mr. Knight explained that he was seeking medical information to explain what had changed which was now preventing her from working.

- [20] Dr. Oshidari saw Mrs. Fraser on October 16, 2017, and wrote a report on October 31, 2017. Fenchurch received his report on November 1, 2017.

- [21] Dr. Oshidari wrote that Mrs. Fraser complained about daily headaches accompanied by nausea, intermittent pain in spine, pain in her upper and lower extremities, swelling and redness in her ankle area, and swelling in her wrist. Mrs. Fraser complained of general tiredness and fatigue with poor sleep. She stated that when she goes to bed, pain wakes her up after a few hours and she requires sitting in a chair and sleeping in the sitting position.

- [22] Dr. Oshidari concluded that:

Assessment today revealed a cooperative lady. During this assessment I was not able to detect any sign suggestive of inflammatory arthropathy, swelling or redness in any joints in the upper or lower extremities. Assessment today did not reveal any sign suggestive of spinal involvement such as radiculopathy, myelopathy, or plexopathy. Examination today did not reveal any sign suggestive of peripheral nerve entrapment in the upper or lower extremities.

Therefore, from a purely physical point of view, in my opinion, her presentation at this stage does fit with non-specific chronic pain or fibromyalgia. I am not able to make any comment with regard to her psychological condition, which is outside the area of my expertise. However, I would expect that at this stage she does suffer from some type

of pain disorder associated with both psychological factors and general medical conditions, which do present with symptoms suggestive of fibromyalgia.

On one hand the recommendation for people who suffer from fibromyalgia is to keep themselves active as much as possible. There is no documentation that would suggest activities would cause harm or damage in this population. Based on my examination today, from physical point of view there are no neuro musculoskeletal structural or physiological abnormalities. However, if a person suffers from severe fibromyalgia or a chronic pain disorder, they may not be able to continue with their vocational activities. Should Mrs. Fraser be diagnosed with pain disorder associated with both psychological and medical condition, then she will be considered to be disabled. I would recommend a psychological assessment by a practitioner experienced in assessing individuals with chronic pain syndromes.

[23] Dr. Oshidari was asked in his report to answer the following questions:

Does the examinee suffer impairment(s) as a result of your diagnosed conditions? If so, please provide a description of the impairment(s). If there is/are impairment(s) is/are the impairment(s) considered permanent or temporary.

Does the examinee have a medical condition(s) that renders them disabled from performing the essential tasks of their employment? If yes, please comment on the restrictions and/or limitations you have identified. If yes, please identify if the restrictions/limitations are permanent or temporary.

If the examinee is disabled from performing the essential tasks of their employment, please provide treatment recommendation that could assist with returning the examinee to their employment position.

If the examinee is capable of returning to their employment, does the return to work require any modifications to hours worked or duties performed? If so, please provide your recommendations.

Is the examinee currently able to return to work in any capacity?

If the examinee has restrictions and/or limitations preventing a return to work in any capacity, what treatment recommendations do you have and what would be the expected outcome of these treatments?

[24] Dr. Oshidari gave the following same answer to each question:

From physical point of view there are no structural abnormalities. Therefore, there is no physical impairment. Should Mrs. Fraser be diagnosed with pain disorder associated with both psychological and medical condition, then she will be considered to be disabled. I would

recommend a psychological assessment by a practitioner experienced in assessing individuals with chronic pain syndromes.

- [25] Bev Taylor reviewed the report. She believed that the claim should be denied. She wrote to Mr. Knight, as seen in the claim notes:

Scott - my opinion would be decline this claim, However, the IME assessor recommends a psychological assessment by a practitioner experienced In assessing individuals with chronic pain.

I would recommend declining this LTD claim as per no physical impairment which would preclude her from working at her own occupation as an industrial cleaner. EE has had this dx for years and able to work at her own occupation. What was the triggering factor to discontinue work?

- [26] Mr. Knight agreed with Mrs. Taylor's recommendation. He wrote at the time:

Agree with plan to decline - if appealed I would have the psych assessment ready to go

- [27] Mr. Knight testified that he reviewed Dr. Oshidari's opinion. Dr. Oshidari did not find any physical impairments. Mr. Knight therefore declined the claim as the claim was based on physical limitations. Mr. Knight agreed in cross-examination that nowhere in Dr. Oshidari's report did he say that Mrs. Fraser was able to return to work. Mr. Knight inferred that she could because Dr. Oshidari found that she did not suffer from any physical impairments. He testified that he was satisfied that he had complete information when he made the decision to deny her claim.

- [28] A formal "no" letter was sent to Mrs. Fraser on November 6, 2017. The letter advised of the appeal process. Dr. Oshidari's report was sent to Mrs. Fraser on November 6, 2017. Dr. Durrani was sent a copy of the report as well.

- [29] In the November 6, 2017, letter, Fenchurch wrote:

After a careful review of your file in its entirety, including the report from the Psychiatry Independent Medical Evaluation (IME), it is our determination that the medical documentation on file does not support a medical condition of such severity that would cause a functional impairment resulting in your inability to perform your job duties. As such, it is our decision to deny your Long Term Disability claim.

- [30] Mr. Knight testified that a psychiatric/psychological assessment was not done because there was no indication of any mental illness disorder. He testified that psychological assessments can be invasive and are not to be taken lightly. He stated that there was no claim indicating any mental illness disorder. Mr. Knight stated repeatedly that he viewed Dr. Oshidari's recommendation to obtain a psychological assessment as conditional upon evidence that she be diagnosed with a mental illness disorder. Since there was no such diagnosis, he did

not order the assessment. He said that had there been elements of a psychological condition or diagnosis he would have undertaken an assessment to validate those.

- [31] Mr. Knight testified that he was prepared to seek an assessment if Mrs. Fraser appealed but no appeal was ever launched. In the event she disagreed with the denial then the only other path forward was to do a psychological assessment. He said again that they don't do this lightly. In cross-examination he agreed that they were relying on Mrs. Fraser to appeal before ordering the assessment.
- [32] Mr. Knight testified that Dr. Kirsch's report came after mediation during the litigation. Because the report was received during litigation, Fenchurch conducted their own assessment. Dr. Jetly stated that childhood trauma was the source of the problem. Mr. Knight testified that Fenchurch never had any information about childhood trauma. Mr. Knight commented that, "We don't take psychiatric assessments lightly because she was able to function until these issues were raised. She had a work history despite the childhood trauma". Fenchurch viewed the new report received during litigation as akin to filing an appeal, so they treated it as such even though the appeal period had ended. Mrs. Fraser's benefits were received in September 2020.
- [33] Mr. Knight testified about the procedure manual. He approved the manual and assisted in writing it. Mr. Knight agreed that it was important to follow its own procedures and manual but he described the manual as guidance as opposed to hard and fast rules.
- [34] The manual encouraged the assessor to ensure that they have enough information to make a decision. It states that one can ask for a supplementary medical information request from the doctor. The manual states:

Here are some typical questions you might ask a treating doctor in order to obtain more detailed medical information. Depending on the information you have and the medical condition there are many other questions you might ask.

What are the patient's current restrictions and limitations?

What is the current treatment regime?

Based on this treatment, when do you anticipate improvements to the patient's condition?

In your opinion, does this patient have permanent restrictions or limitations?

What are the current medications prescribed and how has the pharmacological treatment changed over the course of the patient's current condition?

Has your patient been referred to a Specialist for further review and if so, who have they been referred to and when will they be seen by that Specialist?

Please submit copies of the patient's test results, lab reports, operative reports, and consultation reports from >>> to current date.

Please submit copies of your clinical notes regarding this patient for the period >>>.

The Doctor should provide enough information for you to understand the restrictions and limitations and together with the job requirements, you should determine eligibility based the definition of disability as outlined in the contract. [emphasis in the original]

[35] Mr. Knight agreed that these were questions that one might ask. He testified that Dr. Durrani's clinical notes were requested. He was unsure if any further questions were asked of Dr. Durrani. A review of the files shows that no further questions were asked.

[36] The manual has a section that address subjective conditions such as fibromyalgia. The manual states in part:

A subjective medical condition is one that does not have objective testing in order to confirm a diagnosis. For example, psychiatric illness, fibromyalgia, chronic pain. These conditions are diagnosed based on the symptoms an employee is experiencing (after ruling out any physiological findings) in light of the absence of a physiological finding using objective diagnostics.

As these conditions are managed through the feedback and impression of the employee only, they are difficult to substantiate and/or treat.

Subjective medical conditions **DO REQUIRE** a more thorough and somewhat aggressive focus in order to determine eligibility and rule out secondary gain or malingering. When you receive a claim for a subjective primary condition such as fibromyalgia you will need to proceed with the following:

- Complete an in-depth phone interview with the employee
- Obtain treating doctor's office notes for the past year

It is important in these claim situations to do your best to build a rapport with the employee so that you can easily ask questions and have the employee comfortable enough to share information with you. You are not trying to 'trap' the employee into saying something or look for something that will allow you to deny benefits. You are connecting with the employee in order to have a full understanding of their situation in order to provide assistance. A function of your role is to help them in their recovery and RTW to the best of your ability. They should be aware from the onset of their claim that our focus is on their RTW. [emphasis in the original]

- [37] Mr. Knight testified that all of Fenchurch's notes on the file are contained in the claim management system. An in-depth interview of Mrs. Fraser is not noted on the system.
- [38] Mr. Knight testified that all the complaints were physical in nature, but he agreed that Mrs. Fraser also used the word emotional in her application. He did not know what she meant by that. Dr. Durrani's notes were reviewed with Mr. Knight. Dr. Durrani made the following notations such as "June 15, 2017 – Mood swings, mood is irritable, anxiety/low mood", "July 10, 2017 – recommendation for counselling" and "August 1, 2017 – chronic fatigue, anxiety and depression." Mr. Knight testified that he was not sure the context of this note.
- [39] Mr. Knight testified that they were not required to investigate the medications taken by Mrs. Fraser. Fenchurch relied on Dr. Durrani to clarify what was the basis for her pain. Mr. Knight testified that Mrs. Fraser had long-standing problems and was taking medications but she was able to work.

After the Claim Denial

- [40] Mrs. Fraser testified that she was very upset by the denial. She was told about the appeal process but decided not to appeal and decided to launch the action instead.
- [41] Mrs. Fraser said that no one from Fenchurch ever called her directly to ask why she cannot do the job.
- [42] Dr. Durrani testified that he read Dr. Oshidari's report and discussed it with Mrs. Fraser. He didn't think he was being asked to refer her to a psychiatrist. Dr. Durrani did not believe it was necessary for Mrs. Fraser to see a specialist. He did not believe she needed a psychiatrist because Dr. Durrani was treating her. If she did, he would have referred to her one irrespective of the recommendation in Dr. Oshidari's report. Mrs. Fraser suffered from depression symptoms but not enough to refer her to a psychiatrist. Dr. Durrani testified that people who suffer from fibromyalgia have physical and psychological issues, but Mrs. Fraser's complaints were physical. Dr. Durrani testified that he treated a number of patients suffering from fibromyalgia and has recommended counselling to others in the past. Dr. Durrani testified that he agreed that there was no structural evidence of pain. He tried his best to treat Mrs. Fraser.
- [43] Mrs. Fraser and her husband Stanley testified about the effects the denial had on them.
- [44] Mrs. Fraser testified that she became depressed after she was initially denied long-term disability. She didn't want to leave the house, she didn't want to do anything. She ate because she was depressed.
- [45] Mrs. Fraser testified that she was subsequently diagnosed with diabetes. She testified that she did not have pre-diabetes before the denial. However, February 20, 2016, lab results show that she did in fact have pre-diabetes. She explained that she was never told this but she was told that her levels were high. She was told to exercise and to keep her blood sugar low. In her Fenchurch application her weight was listed as 270 pounds. In her CPP disability application her weight was listed as 268 pounds.

- [46] Mrs. Fraser testified that the denial placed a financial strain on them. She had earned more than her husband, Stanley. Stanley was a truck driver. They took out a line of credit. Mrs. Fraser testified that Stanley was stressed from the financial strain. They took out a loan. Mrs. Fraser testified that they could not afford to pay the Oshawa property taxes and they needed to downsize. They sold their house and moved to Beaverton, reducing her mortgage and property taxes and house expenses. The Oshawa house had a biweekly mortgage payment of \$564.39 while the Beaverton house's mortgage payment was \$264.33 biweekly. Mrs. Fraser testified that she would have liked to have lived in her Oshawa home forever and would have if her claim had been initially approved. Mr. Fraser testified that the new house in Beaverton was farther away from their grandchildren.
- [47] Mrs. Fraser testified that her financial state when she was working was okay, it was good. They were not struggling. She agreed that they would frequently go into overdraft.
- [48] In addition, Mrs. Fraser testified that her husband, Stanley, suffered a heart attack, and his big toe became infected and had to be amputated.
- [49] Stanley Fraser testified that he was a truck driver who collected employment insurance in the off season. He testified that after the denial they were stressed financially. He ignored his toe because he continued working, cutting grass, doing anything to help. Mr. Fraser testified that he did not think that the stress from the denial was a factor in his toe but it may have been a factor in his heart attack. He agreed in cross-examination that he is a smoker.
- [50] Mr. Fraser testified that before Mrs. Fraser's claim was denied, they were house poor, they struggled to just get by and cover the bills and groceries, but they were doing it. They did not have savings, RRSPs or investments. They were just trying to survive day to day. They stole from Peter to pay Paul. The bank records indicate that prior to the claim being denied they were in financial difficulty.
- [51] Mr. Fraser testified that in September 2018 after crunching the numbers they decided to sell the house and move to Beaverton. He described the move as a no-brainer as their expenses decreased. He testified that now if he worked 4 days a month, he could cover the bills. He testified that now, after receiving the CPP disability and the long-term disability from Fenchurch their financial situation was much easier. He said that when he gets back to work it will be golden. Mrs. Fraser's income covers their bills and Mr. Fraser's minimum amount that he brings in covers insurance and car payments. He testified that they are doing okay, not great.
- [52] Mr. Fraser testified that they may have deferred a payment or two or missed a car payment during the time when they weren't receiving benefits.
- [53] Mr. Fraser also testified that he does not file any tax returns and that the government gets their share through his payroll deductions. Neither Mr. nor Mrs. Fraser have filed their taxes since 2012.

The Application for CPP Disability Benefits

[54] Dr. Durrani supported the application. He wrote that Mrs. Fraser had the following diagnosis:

Fibromyalgia

Coronary artery disease from 2014

Anterior STEM1 March 4, 2014; March 2014

B12 deficiency

Morbid obesity

Asthma

COPD

Osteoarthritis

Gerd Hiatus Hernia from 2002

[55] Mrs. Fraser had assumed that Dr. Durrani would be forwarding her application to CPP but he did not. As a result, initially CPP had the physician statement but did not have Mrs. Fraser's actual application. Mrs. Fraser subsequently filled out the application. With respect to her stated illness or impairments that prevented her from working, Mrs. Fraser wrote:

Fibromyalgia, coronary disease, asthma, COPs, osteoarthritis, gerd hiatus hernia, knees, type 2 diabetes

[56] With respect to how these impairments affected her ability to work, Mrs. Fraser wrote:

I feel pain all through my body all the time, I am exhausted. Depressed, tired and sleep. My arm can only lift so far the pains wont let me go any further. Shortness of breath can be painful.

[57] Mrs. Fraser testified that she was diagnosed with diabetes after she went to Fenchurch. Mrs. Fraser agreed that she did not tell the insurer that she was depressed or that she was out of breath.

[58] Mr. Knight testified that Mrs. Fraser's CCP disability benefits application was only received from plaintiff's counsel on January 25, 2021.¹

Dr. Kirsch's and Dr. Jetly's Reports

[59] Mrs. Fraser testified that Dr. Durrani never sent her for a psychiatric evaluation. However, her lawyers did refer to Dr. Kirsch who conducted an evaluation in March 2020.

[60] During the examination Mrs. Fraser disclosed to Dr. Kirsch her the trauma she experienced as a child. Dr. Kirsch noted the following:

.....this was obviously quite emotionally traumatizing and ever since, she has had symptoms of PTSD from this abuse.

Shedeveloped depression beginning around age 18. She continued to have personal difficulties and believes that she has been depressed recurrently ever since. Individuals with this background are prone to develop other psychiatric conditions, including somatoform disorders.

[61] Dr. Kirsch concluded:

Given this background, it is quite understandable that Mrs. Fraser would have developed a significant somatoform disorder in the form of chronic pain. Eventually, in the context of chronic depression and chronic PTSD, her pain levels became too high and she had to stop working. In my opinion, given her history, this is completely understandable. Individuals often improve when they are in low stress environments; in her case, she should have felt better at home and not doing physically challenging work. While life has been easier out of the workplace, she still has struggled greatly with chronic pain and poor mood and this speaks to how much she has been damaged emotionally.

In my opinion, her condition was never understood properly and she was never given the proper treatment. It is much easier for patients and mental health practitioners to see chronic widespread pain as a physical problem and name it as fibromyalgia when all along, the most appropriate way of understanding this presentation of chronic pain is as a psychiatric somatoform disorder.

[62] In Dr. Kirsch's view, Mrs. Fraser suffered from the following psychiatric disorders:

¹ Counsel for the plaintiff wrote at para. 26 of his factum, "The Defendant was kept apprised of the status of the Plaintiff's application for Canada Pension Plan disability benefits. Notice of submission of the application was given by Plaintiff's counsel by email dated March 22, 2018, and notice of approval was given by Plaintiff's counsel by letter dated February 6, 2019. This was not in evidence before you but is a fact that is undisputed."

Persistent Depressive Disorder (Dysthymia), with Persistent Major Depressive Episode, Moderate

Somatic Symptom Disorder, with Predominant Pain, Persistent, severe

Generalized Anxiety Disorder, moderate to severe

Complex and Chronic Posttraumatic Stress Disorder, moderate

- [63] Dr. Kirsch opined that Mrs. Fraser was impaired because of her psychiatric disorders and substantially disabled as per her contract of insurance:

Yes, it is my considered opinion that Mrs. Fraser is quite impaired because of the psychiatric disorders. Chronic depression leads to poor energy, poor motivation, and difficulty with concentration. Chronic generalized anxiety and PTSD causes her to keep herself isolated and physically tense. All of her psychiatric conditions significantly increase the perception of physical pain through altered brain mechanisms. High levels of chronic pain impair her ability to do many normal tasks in life. All of these conditions together significantly impair her from living a normal life.

- [64] Dr. Jetly's assessment was consistent with Dr. Kirsch's assessment. Dr. Jetly found that Mrs. Fraser could not return to work. Dr. Jetly noted the following:

The discrepancy in this case is the almost complete absence of psychiatric difficulties in the documentation provided but a significant reported history of chronic mood symptoms including history of trauma in childhood. One may question the relatively sudden appearance of significant psychological symptomology in addition to the presentation of pain that is well-documented. She presents in a credible manner and describes brief, not helpful attempted counselling. Avoidance may have overcome a desire to seek help.

- [65] In this regard, Mrs. Fraser said in cross-examination that she blamed herself, she kept things to herself, she did not tell people and she only eventually told Dr. Durrani. Mr. Fraser similarly testified that she never discussed her life before they met. She kept everything to herself. Mr. Fraser testified that until the past three years he did not know anything about Mrs. Fraser's childhood. He said that she was worried he would walk out the door.

- [66] Dr. Kirsch testified at the trial. He said that the often fibromyalgia is treated as a physical illness and the psychiatric issues are ignored. He testified that this was the problem in this case. He testified that fibromyalgia is not really a helpful term. It is given when the body does not show any organic reason for the pain. He testified that the psychological manifestations become more important than the physical ones. Dr. Kirsch testified that now it is much more understood as a matter of mind and body.

- [67] Dr. Kirsch testified that he read Dr. Oshidari's report. He agrees with the report and agrees that with respect to the physical aspect there were no structural abnormalities. Dr. Kirsch

agreed in cross-examination that fibromyalgia is not in the DSM-V. He testified that people could argue both ways, but most would agree that it's a psycho-physical condition with the mind and body involved. Dr. Kirsch testified that in his view, Mrs. Fraser's condition was mishandled by Dr. Durrani. Dr. Durrani should have sent her for counselling earlier on so work could have started on the psychological side. She was never given proper treatment.

Positions of Counsel

[68] The plaintiff submits that Fenchurch mishandled Mrs. Fraser's claim and breached their duty to act in good faith. The plaintiff has four categories of complaints with respect to how the claim was handled. The plaintiff submits that:

1) Fenchurch should have approved the claim upon its receipt of the medical statement and file of Dr. Durrani. There was no need to order an independent medical assessment. Fenchurch wrongly considered that Mrs. Fraser's conditions had been long-standing;

2) Fenchurch improperly ignored the recommendation of the independent medical examiner when he recommended a psychological assessment be done, and wrongly denied the claim based on incomplete information and when there was no medical evidence that she could return to work;

3) Fenchurch wrongly did not reassess the claim when it was made aware that Mrs. Fraser qualified for CPPD; and

4) Fenchurch's conduct at trial in defending the action was inappropriate.

[69] The plaintiff seeks aggravating damages in the amount of \$50,000 and punitive damages in the amount of \$1 million. A high punitive award is proportionate to the high blameworthiness of Fenchurch's conduct and to act as a proper deterrence to Fenchurch and similarly minded other insurance companies.

[70] The defendant submits that they did not breach their duty to act in good faith. They handled the claim in a timely manner. Even though Mrs. Fraser never appealed the refusal of the claim, once Fenchurch was provided with new information, they reassessed the claim and granted the benefits retroactively. Fenchurch was entitled to explore why Mrs. Fraser could not work when she submitted her claim given that the listed conditions on the application were long-standing. The defendant submits that they were not required to adopt the recommendation of the independent medical examiner. If they were wrong in this regard, it was a mistake, not an act of bad faith. The defendant submits that the application for CPPD was different than the one before them, and that they only received the file from counsel after it had already decided, based on the fresh psychiatric evidence, to grant the claim. Finally, with respect to the claim for aggravating damages the evidence reveals that there was no financial loss to the plaintiff and the evidence of mental distress was minor and not worthy of compensation.

Law and Analysis

[71] The plaintiff seeks aggravating and punitive damages for the manner in which the defendant handled Mrs. Fraser's claim for long-term disability.

[72] Aggravating damages do not require the existence of an independent actionable wrong. Rather, they are meant to cover situations where the insured suffers distress arising out of a delay in receiving the requested benefits. However, not all mental distress associated with a breach of contract is compensable. Damages arising from mental distress should in principle be recoverable where they are established by the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. As stated by the Supreme Court of Canada in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 44:

The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. This conclusion follows from the basic principle of compensatory contractual damages: that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.

[73] Punitive damages operate differently than aggravating damages. The awarding of punitive damages against an insurer requires a finding of bad faith in the insurer's handling of the claim at issue. An incorrect decision does not in itself equate with bad faith. An insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate. Punitive damages are not compensatory and are only awarded against an insurer in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency", amounting to acts of bad faith and unfair dealing: *Fidler v. Sun Life Assurance Co. of Canada*, at para. 62. Punitive damages are designed to address the purposes of retribution, deterrence, and denunciation: *Fidler v. Sun Life Assurance Co. of Canada*, at para. 61; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 36 and 94.

[74] With respect to the duty to act in good faith, the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, stated at para. 55:

This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: [citation omitted] The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made

by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy [citation omitted].

[75] In *Fernandes v. Penncorp Life Insurance Co*, 2014 ONCA 615, 122 O.R. (3d) 192, the Ontario Court of Appeal with reference to the Supreme Court of Canada's decisions in *Fiddler* and *Whiten*, summarized the law relating to punitive damages at paras. 74 and 75:

The law relating to punitive damages was canvassed in detail by the Supreme Court in *Whiten* and addressed again more recently in *Fidler*. The key applicable principles may be summarized as follows.

* Punitive damages are designed to address the objectives of retribution, deterrence and denunciation, not to compensate the plaintiff: *Whiten*, at paras. 43 and 94, and *Fidler*, at para 61.

* They are awarded only where compensatory damages are insufficient to accomplish these objectives: *Whiten*, at para. 94.

* They are the exception rather than the rule: *Whiten*, at para. 94.

* The impugned conduct must depart markedly from ordinary standards of decency; it is conduct that is malicious, oppressive or high-handed and that offends the court's sense of decency: *Whiten*, at paras. 36 and 94; and *Fidler*, at para. 62. [footnote omitted].

* In addition to the breach of contract, there must be an independent actionable wrong: *Whiten*, at para. 78, and *Fidler*, at para. 63.

* In a case of breach of an insurance contract for failure to pay insurance benefits, a breach by the insurer of its contractual duty to act in good faith will constitute an independent actionable wrong: *Whiten*, at para. 79, and *Fidler*, at para. 63.

In considering the issue of good faith, it must be emphasized that disputing or refusing a meritorious claim does not, in itself, constitute a breach of a duty to act in good faith: *Fidler*, at para. 63.

1) *Is Fenchurch liable for extra contractual damages?*

[76] An answer to the above question requires an examination of what the defendant knew when they denied the plaintiff's claim on November 6, 2017. There is no dispute that the mental disorders diagnosed by Drs. Kirsch and Jetly, which were based on Mrs. Fraser's subsequent disclosure of childhood trauma and abuse, were not before the defendant when they made their decision in November 2017. Therefore, the analysis must examine what the defendants knew and what steps they took in assessing and investigating Mrs. Fraser's claim in 2017.

[77] As set out above, the plaintiff has four categories of complaints against Fenchurch. Let me deal quickly with the last two categories:

- 1) Failure to reassess the claim once CPP disability benefits were approved; and
- 2) Conduct of Fenchurch at trial.

[78] The plaintiff complains that the defendant did not investigate once they were informed that Mrs. Fraser was approved for CPPD. The plaintiff submits that CPP approved the claim on the same information that Fenchurch rejected. I do not accept these submissions. There was no evidence led at trial regarding when Fenchurch was made aware of CPPD being approved. Counsel for the plaintiff provided such a date in his submissions and said that the date was not a matter of dispute. However, the CPPD application file was only sent, according to the trial evidence to Fenchurch in January 2021, *after* they had granted Mrs. Fraser's claim. Mrs. Fraser was represented by counsel when she applied for CPPD. It would have been an easy matter for her, through counsel, to have sent Fenchurch the CPPD application earlier if they had truly wanted the defendant to reconsider based on that application. Furthermore, I agree with counsel for the defendant that the CPPD application is more fulsome than the application they received, and at the time of the CPPD application Mrs. Fraser had been diagnosed with additional ailments such as diabetes and COPD.

[79] The plaintiff has attacked the manner in which the defendant has defended this action and conducted the trial. Counsel attacked Mr. Scott's trial evidence, the length of his examination and the length of the cross-examination of Mrs. Fraser. He commented that a proper offer to settle was not given. There was nothing wrong with the manner in which the defendant conducted the trial. The trial was short and focused. A joint book of documents was presented. Both parties worked efficiently to ensure that their respective positions were put forward with minimal court time. The plaintiff is certainly entitled to disagree with the defendant's position but the defendant has the right to argue their position.

The request for an independent medical examination

[80] The plaintiff submits that when Fenchurch received Dr. Durrani's physician statement supporting the claim and his medical file on Mrs. Fraser, they should have approved it. There was no need to seek an independent medical assessment. The only medical evidence they had was that she could not work. Fenchurch wrongly imported a requirement that there need to be objective evidence before they approved the claim and wrongly considered that Mrs. Fraser had long been diagnosed with these conditions. The plaintiff notes that the definition of disability in the policy does not have an exclusion clause for pre-existing conditions. The plaintiff further submits that Fenchurch lied to Mrs. Fraser when they explained to her the reason for the independent medical assessment.

[81] I agree with plaintiff's counsel that the definition of disability for the requisite policy does not have an exclusion for a pre-existing condition. I also agree that Dr. Durrani's physician statement supported Mrs. Fraser's claim. However, that does not mean that Fenchurch was not allowed to explore the basis for the request for disability. I accept Mr. Knight's evidence on this issue that Fenchurch was simply collecting information to determine why Mrs. Fraser was unable to work at that time when she was able to work previously with the same ailments. Dr. Durrani's physical statement is quite spartan. He stated that her condition had worsened lately but provided few details. I agree that one approach to ascertain the

information would have been to send a supplementary medical request to Dr. Durrani and to have asked Mrs. Fraser herself some follow up questions. However, that does not make the request to seek an independent medical examination unreasonable or illogical.

- [82] Seeking the independent medical examination clearly caused some delay. Fenchurch was concerned about the delay and chose an assessor that would be ready earlier as opposed to one who was available later. There appears to be no dispute that up until this time Fenchurch had processed the request in a timely manner. Even though Mrs. Fraser stopped working in March 2017, she applied in July 2017 and she only then sent her claimant statement at the end of July 2017. Dr. Durrani then sent the medical notes in at the end of August 2017.
- [83] Counsel for the plaintiff submits that Sarah Lewin, when she spoke to Mrs. Fraser, lied to her about the reasons for the independent medical assessment. Counsel for the plaintiff relies on the following note in the claim file which states:

Spoke with EE and advised that the medical evidence we currently have does not support a disability would preclude her from performing the essential duties of her own occupation. I advised that she has had these conditions for several years now and has been able to work so we require additional medical in order to help us determine what changed. EE advised that she understood and asked if the assessment would be in Oshawa, I advised that she would need to discuss that with IMA/SOMA when they contacted her for an apt but that I requested it urgently. EE thanked me and we disconnected the call.

- [84] The above passage does not support the sinister interpretation that counsel for the plaintiff has placed on it. Technically it is inaccurate in that Dr. Durrani does support the disability claim and Mrs. Lewin stated that she told Mrs. Fraser that “the medical evidence we currently have does not support a disability”. However, it seems clear to me that what Mrs. Lewin was attempting to convey to Mrs. Fraser was that from Fenchurch’s perspective, they did not understand based on the medical information they had why Mrs. Fraser could not currently work when she had been previously able to with her long standing conditions.
- [85] There were a number of different ways that the defendant could have proceeded at this stage, and in my view seeking an independent medical examination was reasonable.

Ignoring the recommendation of Dr. Oshidari and denying the claim

- [86] I agree with the plaintiff that the defendant wrongly denied Mrs. Fraser’s claim after they received Dr. Oshidari’s report. Counsel for the defendant submitted that the insurer is not bound to follow the recommendation of the independent medical examiner. I agree there is no legal requirement to do so. However, the requirement of good faith requires that the insurer fairly investigate the claim and assess the claim in a balanced and reasoned manner. As stated by the Supreme court of Canada in *Fidler v. Sun Life Assurance Co. of Canada* at para. 63:

The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit,

but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), [page27] at para. 29:

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 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. [emphasis added]

[87] As I stated above, seeking an independent medical assessment was a perfectly reasonable decision in this case. However, the reasons for denying the claim after receipt of the assessment and the reasons for not following Dr. Oshidari's recommendation to seek a psychological assessment were not reasonable.

[88] Mr. Knight testified with respect to both these issues. However, his evidence on both these issues makes no sense. Mr. Knight stated repeatedly that he took Dr. Oshidari's recommendation to seek a psychological assessment as a conditional recommendation. In his view Dr. Oshidari was only recommending seeking the assessment if Mrs. Fraser was to be diagnosed with a mental disorder. This, in my view, is a tortured interpretation of what Dr. Oshidari said, which is not supported by the report itself. Again, Dr. Oshidari wrote:

From physical point of view there are no structural abnormalities. Therefore there is no physical impairment. Should Mrs. Fraser be diagnosed with pain disorder associated with both psychological and medical condition, then she will be considered to be disabled. I would recommend a psychological assessment by a practitioner experienced in assessing individuals with chronic pain syndromes.

[89] In my view, Dr. Oshidari's recommendation was a clear unambiguous one. Beverly Taylor clearly viewed it as such because in her email to Mr. Knight she stated, "Scott - my opinion would be decline this claim, *However, the IME assessor recommends a psychological assessment by a practitioner experienced In assessing individuals with chronic pain.* [emphasis added]." I do not accept Mr. Knight's testimony that he believed this was a conditional recommendation.

[90] Mr. Knight also testified that psychological assessments can be invasive and are not to be taken lightly, and in this case, there was no claim indicating any mental illness disorder. Yet he was prepared to have one done if Mrs. Fraser appealed the denial of the claim. Furthermore, I don't see how acting on the recommendation of a physician is being casual or can be viewed as taking such assessments lightly. I do not accept these rationalizations from Mr. Knight. It was evident from his testimony that Mr. Knight was not convinced of the utilities of these assessments. At one point during his examination Mr. Knight was asked about Mrs. Fraser's childhood trauma that was described in Dr. Jetly's 2020 report. Mr. Knight testified that he was not aware of this trauma. There is no dispute that this information only came to light when Mrs. Fraser spoke with Dr. Kirsch. Mr. Knight then commented that these subsequent reports proved his point about why psychiatric assessments shouldn't be ordered. He testified that, "We don't take psychiatric assessments lightly because she was able to function until these issues were raised. She had a work history despite the childhood trauma". In my view it appeared that Mr. Knight seemed to be blaming the psychiatric assessments for creating these mental disorders as opposed to diagnosing the existence of these disorders.

[91] I completely agree with counsel for the defendant's point that the defendant was not required to follow Dr. Oshidari's recommendation, but they must have a reasonable basis to depart from it. None have been provided.

[92] The defendant denied the plaintiff's claim after they received Dr. Oshidari's report. Mr. Knight testified that since Dr. Oshidari found no physical impairments, Mrs. Fraser was able to work. Mr. Knight testified that Dr. Oshidari's report supported the decision to deny the claim. Fenchurch's position as articulated through Mr. Knight's testimony does not make any sense.

[93] Dr. Oshidari did not say that Mrs. Fraser was able to return to work. That question was clearly set out in his report as:

Is the examinee currently able to return to work in any capacity?

[94] Dr. Oshidari's answer was not yes. It was:

From physical point of view there are no structural abnormalities. Therefore there is no physical impairment. Should Mrs. Fraser be diagnosed with pain disorder associated with both psychological and medical condition, then she will be considered to be disabled. I would recommend a psychological assessment by a practitioner experienced in assessing individuals with chronic pain syndromes.

[95] At this juncture the defendant had Dr. Durrani's opinion which supported Mrs. Fraser's request for disability and Dr. Oshidari's report which found no physical impairments but did not say that Mrs. Fraser was able to work. Mr. Knight said he had enough information at this stage to make a determination. He did not, and he certainly did not have any medical evidence that Mrs. Fraser was able to return her job. Yet the defendant denied Mrs. Fraser's claim. They were wrong in doing so.

[96] Counsel for the defendant submits that one cannot conflate denial of a claim with a breach of the duty to act in good faith. I agree the two are not the same. As stated in *Fidler v. Sun Life Assurance Co. of Canada* at para. 71:

But an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate.

Also see *Fernandes v. Penncorp Life Insurance Co.*, at para. 75

[97] Counsel for the defendant submits that Dr. Durrani was sent a copy of Dr. Oshidari's report and he never had Mrs. Fraser assessed by a psychologist or seen by a psychiatrist. This is correct but, in my view, irrelevant. Dr. Durrani's task and Fenchurch's task were fundamentally different. Dr. Durrani was treating Mrs. Fraser. He testified that irrespective of Dr. Oshidari's report, if he thought it would assist Mrs. Fraser's treatment, he would have referred her to a psychiatrist. Rightly or wrongly he did not feel it was necessary to do so. Dr. Durrani did not need further information that she was disabled. Fenchurch was investigating whether Mrs. Fraser met their definition of disabled. They stopped their investigation after receiving half an answer from Dr. Oshidari. They declined to obtain the other half of the answer and made their decision in an information vacuum.

[98] In my view the defendant's denial of the claim was not a mistake based on a misreading of the medical information before them. Rather the decision was high handed, a marked departure from the conduct one would expect in the situation and designed to take advantage of Mrs. Fraser's vulnerable state and to avoid paying the claim. I do not come to this conclusion lightly. I am mindful that up until this point, Fenchurch had reasonably handled Mrs. Fraser's claim. I am also quite aware that when they did receive Dr. Kirsch's report, they properly investigated it, obtained their own psychiatric assessment (Dr. Jetly's report), and changed their decision and awarded benefits in a timely manner.

[99] However, I am compelled to conclude that the denial of Mrs. Fraser's claim was an act of bad faith from the following factors:

- a) No rational or logical explanation has been presented by the defendant for the decision not to follow Dr. Oshidari's recommendation to order a psychological assessment.
- b) That decision is itself contrary to their own procedural manual which states that the assessor should seek out more medical evidence when there are informational gaps.
- c) Fenchurch's attitude, as evidenced by the testimony of Mr. Knight, is that since Mrs. Fraser's basis for her disability claim were physical conditions, they had no responsibility to investigate the psychiatric concerns, despite the recommendation of the independent medical examiner that those issues should be examined. In my view this is the opposite of a fair and balanced assessment of the claim.
- d) There is no logical way to interpret Dr. Oshidari's report as supporting the notion that Mrs. Fraser was able to return to work.

- e) Mr. Knight approved Mrs. Taylor's recommendation to deny the claim. He wrote at the time "Agree with plan to decline - if appealed I would have the psych assessment ready to." In my view this email screams of bad faith. The insurer has a duty to fairly assess the claim. The request for disability should not be seen as a game between an employee and a wily insurer to see who can out-maneuver who. In my view, Mr. Knight knew at the time that the decision to proceed without the psychological assessment was a precarious one but he chanced it anyway figuring that he could always order it later if Mrs. Fraser appealed. If not, the claim would be closed.
- f) Mr. Knight's approach is consistent with the edicts of the procedural manual that Mr. Knight approved and which casts suspicion on subjective conditions such as fibromyalgia. The manual notes that subjective conditions such as fibromyalgia "are difficult to substantiate and/or treat" and "**DO REQUIRE** a more thorough and somewhat aggressive focus in order to determine eligibility and rule out secondary gain or malingering. [Emphasis in the original]." Interestingly, the in-depth interview with the employee that was supposed to allow for a "full understanding of their situation in order to provide assistance" never occurred in this case. In my view, Mr. Knight wrongly believed that Dr. Oshidari's report confirmed Mr. Knight's preconceived view that those diagnosed with fibromyalgia are malingerers.

[100] As I will explain below, given the evidence, the amount awarded for aggravating damages is low. Punitive damages are needed to denounce and deter Fenchurch's behaviour. The aggravating damages award will be insufficient to accomplish these objectives. There would be no incentive for the defendant to change their behaviour in the future if punitive damages were not awarded.

2) What damages should be awarded?

Aggravating damages

[101] The plaintiff seeks aggravating damages in the amount of \$50,000. The defendant submits that no losses beyond incidental frustration have been proven.

[102] Loss for mental distress must be proven. As stated by the Court of Appeal in *Fernandes v. Penncorp Life Insurance Co.* at paras. 89 and 90:

In *Fidler*, the Supreme Court held that damages for mental distress for breach of contract may be awarded: "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": para. 45.

This does not obviate the need to prove the loss. The court stated at para. 47:

The court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2)

that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.

[103] Counsel have referred me to a number of cases. While each case will depend on its own facts, the case provided are helpful in assessing the appropriate range. I have reviewed all of them and some are summarized below:

- a) *Fidler* upheld the lower court's finding that the plaintiff suffered a substantial loss over a five-year period and awarded \$20,000 in aggravated damages. The trial judge found that Mrs. Fidler "genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage." There was medical evidence documenting the stress and anxiety that Mrs. Fidler experienced.
- b) In *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, the trial judge awarded the plaintiff \$10,000 in damages for mental distress. The trial judge concluded that the insurer's actions could reasonably be contemplated to heighten the anxiety of the stress of the plaintiff beyond reasonable norms. However, the trial judge rejected the plaintiff's submissions that the insurer's actions were the effective cause of the plaintiff's hospitalizations, suicidal ideations, or overdoses. The Court of appeal upheld the decision.
- c) In *Asselstine v. Manufacturers Life Insurance Co.* 2005 BCCA 292, 40 B.C.L.R. (4th) 226, the British Columbia Court of Appeal affirmed the trial judge's award of aggravated damages of \$35,000, finding that the plaintiff suffered increased anxiety and mental, emotional, and financial stress as a result of the rejection of her benefits claim and appeals.
- d) In *Godwin v. Desjardins Financial Security Investments Inc.*, 2018 BCSC 99, the trial judge awarded the plaintiff \$30,000 in aggravated damages, finding that as a result of the plaintiff's denial of benefits, the plaintiff and her husband accrued debt, were forced to downsize to a more affordable home, and had to draw on their retirement savings to make ends meet. The court ruled that the plaintiff suffered stress and anxiety over the financial implications of having to depend on her insurance benefits for support.
- e) In *Greig v. Desjardins Financial Security Life Assurance Company*, 2019 BCSC 1758, the trial judge reviewed the history of awards of damages for mental distress and awarded \$50,000 in aggravated damages. She found that the plaintiff's emotional and psychological state deteriorated severely since his termination of benefits.
- f) In *Clarfield v. Crown Life Insurance Co.* (2000), 50 O.R. (3d) 696, The trial judge awarded aggravated damages of \$75,000 and determined that the insurer refused to acknowledge the plaintiff's disability status and cut off the benefits to which he was entitled, resulting in increased anxiety, stress, and financial pressure at a time when the plaintiff was most vulnerable due to his illness. The

court also found that the plaintiff's listing of his house for sale following the termination of his benefit payments was a publicly humiliating step which caused additional suffering.

- g) In *Branco v. American Home Assurance Company*, 2013 SKQB 98, 416 Sask. R. 77, the Court of Appeal reduced the trial judge's award of \$300,000 to \$30,000.
- h) In *Fernandes*, the Ontario Superior Court of Justice awarded the plaintiff \$100,000 in aggravated damages after the insurer had wrongfully terminated the insured's "own occupation" coverage, delayed payment for six years and continued to deny coverage for "any occupation" coverage up to the date of trial. The Court of Appeal reduced the award to \$25,000. The Court of Appeal stated at para. 100:

The award appears inordinately high and entirely disproportionate, where the evidence was that circumstances apart from the appellant's conduct contributed to the respondent's psychological distress. Mental distress damages are to be compensatory, not punitive: *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481.

[104] I would award the plaintiff \$10,000 for mental distress and for the anxiety caused by the delay in receiving the required benefits. Mrs. Fraser had to wait for over three years to receive her long-term disability benefits. There could be no doubt that the loss of the Frasers' primary source of income caused significant anxiety for both of them, and which required them to move an hour away and farther from their grandchildren. Mrs. Fraser told the defendant while she awaited her claim to be processed, and as reflected in the claim notes, that it has "been since July since she has had any income and stated it's easy for us because we have a paycheque coming in." The anxiety caused by a denial was clearly something that would not have been just contemplated by the defendant but actually known by the defendant. In addition, Mrs. Fraser described becoming more depressed when her claim was denied. In awarding \$10,000 I am cognizant of the following:

- a) The plaintiff properly did not allege that Mrs. Fraser subsequent diabetes diagnosis, Mr. Fraser's heart attack or amputated toe are connected to the claim denial.
- b) The Frasers' finances were a mess even when Mrs. Fraser was still working. It seems, based on the banking records filed, that a change was inevitable when Mrs. Fraser could no longer work, even if she had received benefits. The move to Beaverton was a smart one and it allowed the Frasers to reset their finances with a much lower mortgage and property taxes.
- c) Mrs. Fraser clearly described symptoms of depression (being unable to leave the house, only wanting to eat) at the time she was denied. However, at the time she was living with numerous, as of yet, undiagnosed mental illnesses. It is thus naturally difficult to pinpoint the source of Mrs. Fraser's depression.

Punitive Damages

[105] In determining the quantum of punitive damages, the court does not consider the loss suffered by the plaintiff; rather, the focus is on the defendant's conduct. The governing rule for quantum is proportionality. A proper award must be proportional to the blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff and the harm or potential harm directed specifically at the plaintiff. It must also be proportional to the need for deterrence and denunciation, bearing in mind other penalties which have been or are likely to be inflicted on the defendant for the same misconduct: *Whiten v. Pilot Insurance Co.*, *Fernandes v. Penncorp Life Insurance Co.*, *Branco v. American Home Assurance Company*.

[106] Both parties have referred me to a number of cases. Again, each case must be determined on its own facts but the cases provided are helpful in determining what the appropriate quantum should be. I have reviewed all and some are summarized below:

- a) In *Asselstine*, the British Columbia Court of Appeal affirmed the trial judge's award of \$150,000 in punitive damages. The British Columbia Court of Appeal agreed that the insurer had acted in its own interests in assessing the plaintiff's claim by disregarding compelling medical and other information and relying on a flawed report. It noted that the trial judge was moved by the indifference of the insurer to the predicament of the plaintiff.
- b) In *Godwi.*, the court held that the insurer did not conduct a "fair and balanced approach to assessment" in its failure to prioritize the opinion of the plaintiff's treating practitioners over an isolated assessment. The trial judge awarded the plaintiff \$30,000 in punitive damages.
- c) In *Greig*, the trial judge agreed that the defendant's failure to investigate the obvious mental health aspects of the plaintiff's disability was an egregious breach of the duty of good faith. The defendant had, in a prior case, been found to have acted in bad faith. The defendant knew that the victim was vulnerable. The court order punitive damages in the amount of \$200,000.
- d) In *Branco*, the Court ordered punitive damages of \$1.5 million and \$3 million against two insurers, AIG and Zurich, finding that their actions in denying benefits were a clear and blatant attempt to force the plaintiff into accepting an unreasonably low cash settlement. The Saskatchewan Court of Appeal reduced the punitive damages award imposed against AIG to \$175,000 based on a number of erroneous findings of fact by the trial judge. However, the Court concluded that AIG acted improperly in suspending the plaintiff's benefits knowing that he was incapable of working at his original job, that it attempted to push him into accepting an unfairly low settlement of his claim, all constituting a breach of the duty of good faith warranting significant punitive.
- e) In *Clarfield*, the trial judge determined that \$200,000 in punitive damages were appropriate because the insurer had a corporate practice to avoid payment of all policy claims made by its insured who had no earned income during the point at which they

became disabled. The court concluded that the insurer did not act promptly or fairly when dealing with the claim.

- f) In *Fernandes*, the trial judge awarded \$200,000 in punitive damages. The Court of Appeal upheld the award, finding that it was appropriate on the basis that the insurer had not dealt with the plaintiff in a fair and balanced manner, and that the insurer had taken an “adversarial approach” to the plaintiff’s claim.

[107] The plaintiff’s request for \$1 million in punitive damages is not supported by the range set out in the caselaw nor by the facts of this case. I agree that the case that is the most helpful is *Greig*, where \$200,000 in punitive damages was awarded against a defendant who had previously been sanctioned. I have set out above how the defendant acted improperly by ignoring the recommendation of Dr. Oshidari and denying the claim based upon incomplete recommendation and in the absence of any medical evidence that Mrs. Fraser could return to work. I have noted that until that juncture the defendant had acted reasonably and that after they received the new medical information, they acted quickly and appropriately.

[108] In my view, given all the circumstances punitive damages in the amount of \$150,000 is a reasonable and proportionable amount to denounce and deter the defendant’s behaviour.

Disposition

[109] I award the plaintiff \$10,000 in aggravating damages and \$150,000 in punitive damages.

[110] Subject to any offer to settle that may affect costs, as the plaintiff is the successful party she is entitled to costs. If the parties cannot agree on the quantum of costs, the plaintiff shall within 15 days from the date herein serve and file written costs submissions limited to three pages with a bill of costs and cost outline attached together with any offer to settle that affects costs. The defendant shall within 30 days of the date herein serve and file their response, also limited to three pages with a bill of costs and cost outline attached together with any offer to settle that affects costs. If the plaintiff wishes to reply, any reply shall be served and filed within 40 days, limited to one page.



Justice H. Leibovich

CITATION: Fraser v. Fenchurch General Insurance Company, 2022 ONSC 6222
COURT FILE NO.: CV-18-645
DATE: 20221103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MARILYN FRASER

Plaintiff

– and –

FENCURCH GENERAL INSURANCE COMPANY

Defendant

REASONS FOR JUDGMENT

Justice H. Leibovich

Released: November 2, 2022