

INSURANCE LAW BULLETIN

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DAMAGES FOR MENTAL DISTRESS

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On September 28, 2009, the Ontario Superior Court of Justice released its decision in *McQueen v. Echelon General Insurance Co.*, [2009] O.J. No. 3965. The Court made a substantial award of mental distress damages against the insurer, Echelon, for denial of benefits in the amount of \$25,000.00.

BACKGROUND

This case arose from a claim for statutory accident benefits and damages for breach of the insurer's duty to act in good faith. The plaintiff sustained injuries in a rollover motor vehicle accident. At the time of the accident, she was unemployed and received benefits under the Ontario Disability Support Program, primarily due to manic depression.

Following the accident, the insurer denied payment of housekeeping benefits and transportation expenses. In addition, the insurer limited the plaintiff's access to medical assessments. While the insurer initially paid 26 weeks of housekeeping benefits, this benefit was subsequently terminated after receipt of a section 42 assessment. The insurer refused to fund an assessment for housekeeping benefits stating that it was not "reasonable and necessary", however, Echelon failed to provide reasons for its decision.

The plaintiff contended that the insurer's refusal of benefits and limitation on her access to medical assessments caused her mental distress. She sought redress for bad faith, mental distress, aggravated damages and punitive damages. Of the four remedies, the Court was of the view that mental distress was the most sensitive to the facts herein and had the evidentiary support to bring about the appropriate redress.

In a breach of contract case involving a contract for peace of mind, no independent actionable wrong is required for damages for mental distress to be awarded. Instead, the Court must be satisfied that: (a) 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 (b) the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. While mental distress as a consequence of the breach must reasonably be contemplated by the parties to attract

damages, it need not be the dominant aspect or the “very essence” of the bargain.

The Court in *McQueen* was satisfied that an object of contract between the parties was to secure psychological benefits to the plaintiff in the form of peace of mind. The nature of the contract was such that its breach would bring about mental distress and this was within reasonable contemplation of the parties. The Court found that it was reasonably foreseeable that intangible injuries and mental distress may flow from the insurer’s wrongful refusal to pay benefits even where the insured suffers no immediate financial hardship. Further, the plaintiff entered into her relationship with the insurer in a vulnerable state, having been diagnosed with bipolar disorder and having complaints of upper back pain.

The Court found that the insurer took an adversarial approach to handling the claim, as evidenced by some internal notes prepared by Echelon. These notes contained the following expressions: “the claimant is expecting great things from her claim”, “she has retained a lawyer”, and “the lawyer is not the easiest to deal with”. By behaving in this manner, the Court held that Echelon breached its contract of insurance with the plaintiff, and the mental distress suffered as a result of the breach was found to be of a sufficient degree to warrant compensation. Accordingly, damages were awarded for mental distress in the amount of \$25,000.00.

COMMENTARY

Damages for mental distress in breach of contract cases are intended to provide the wronged party with the peace of mind that they would have had if the contract had been performed. Unlike punitive damages which are intended to punish egregious conduct by the defendant, damages for mental distress in breach of contract cases are compensatory in nature. They arise out of the contractual breach itself and do not require an independent cause of action. They exist independent of any aggravating circumstances and are based completely on the parties’ expectations at the time of contract formation.

The law regarding damages for mental distress was clarified by the Supreme Court of Canada in the 2006 case, *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3. This case found that damages for mental distress for breach of contract may be recovered 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. The court must be satisfied that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.

The decision in *McQueen* appears to go a step further, however, and establishes that even where no immediate financial hardship is suffered by the plaintiff it is reasonably foreseeable that mental distress may flow from the insurer’s wrongful refusal to pay benefits. Insurers should be aware that taking an adversarial approach towards the handling of a claim may amount to a breach of the contract of insurance with the plaintiff, and subsequently lead to an award of damages for mental distress. This case also establishes that adjuster’s notes are producible and can be used as evidence to show an adversarial approach taken by the insurer in the handling of the claim.

This decision is being appealed by Echelon.