CITATION: McQueen v. Echelon General Insurance Company, 2011 ONCA 649
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COURT OF APPEAL FOR ONTARIO

Gillese, Armstrong and Karakatsanis JJ.A.

BETWEEN

Janey McQueen

Plaintiff (Respondent)

and

Echelon General Insurance Company

Defendant (Appellant)

Jamie R. Pollack and Daniel M. Himelfarb, for the appellant

Jane Poproski, for the respondent

Heard: August 25, 2011

On appeal from the judgment of Justice C. Raymond Harris of the Superior Court of Justice dated September 28, 2009, with reasons reported at [2009] I.L.R. I-4890.

Gillese J.A.:

[1] Janie McQueen (Ms. McQueen or the plaintiff) was injured in a "rollover motor vehicle accident" on January 31, 2004. Her vehicle was destroyed in the accident.

[2] At the time of the accident, Ms. McQueen was 35 years old and unemployed. She had been receiving benefits under the Ontario Disability Support Program for 10 years. She had two children, then aged 14 and 20. She lived with her husband and daughter, Chelsi, the younger of the two children.

[3] Following the accident, Ms. McQueen suffered from a significant number of physical and psychological problems, including chronic pain, difficulty walking and lifting, jaw pain, anxiety related to driving, and memory loss. She saw a number of physicians, in addition to her own family doctor, Dr. Picketts, in the years following the accident.

[4] Ms. McQueen applied for statutory accident benefits from her insurer, Echelon General Insurance Company (Echelon or the appellant). She received very limited benefits from Echelon.

[5] From January 31, 2004, (the date of the accident) to July 30, 2004, Echelon gave Ms. McQueen approximately $43 per week for housekeeping expenses. This amount was for six hours of housekeeping at the rate of $7.15 per hour.

[6] During that same time period, Echelon arranged for Ms. McQueen to have a direct account with a taxi company, which she could use for travel to her various medical appointments.

[7] In May 2004, Echelon received a disability certificate from Dr. Picketts in which he stated that Ms. McQueen suffered from "a complete inability to carry on a normal life" – that is, that Ms. McQueen was substantially disabled from performing her pre-accident housekeeping tasks.

[8] As a result of having received the disability certificate, Echelon hired Ms. Lori Foster, an occupational therapist, to attend at Ms. McQueen's home and conduct an assessment. Ms. Foster conducted the assessment in June 2004 and prepared a report, dated July 14, 2004.[1] Among her findings, Ms. Foster noted that Ms. McQueen had difficulty performing various household tasks. Ms. Foster recommended that Ms. McQueen continue to receive housekeeping assistance for six hours per week.

[9] In her report, Ms. Foster said this in respect of Ms. McQueen's transportation needs:

> Ms. McQueen's home is currently not on a bus route. As such, she would be required to walk to a main street (at least 3 blocks) to access the nearest bus stop. Given the location of Vitality Health Care [where Ms. McQueen's physiotherapist was located], the client would also be required to make a transfer to a different bus to attend her appointments.
>
> Based upon the client's limited tolerance for walking, decreased balance, increased level of fatigue, difficulty with stairs and the opinion of Dr. Lin, it is this therapist's opinion that the client would experience difficulty taking a bus to/from her appointments at Vitality Health Care.

[1] Because the in-home evaluation was conducted on June 28, 2004, the trial judge refers to it by that date.

[10] In July 2004, Echelon retained Dr. Kwok, an orthopaedic surgeon, to examine Ms. McQueen. Echelon did not give Dr. Kwok a copy of Ms. Foster's report.

[11] Dr. Kwok wrote a report dated July 23, 2004, in which he stated that Ms. McQueen was capable of conducting her own housekeeping, was not disabled from driving a motor vehicle and was able to take public transportation.

[12] After receiving Dr. Kwok's report, Echelon immediately stopped paying Ms. McQueen housekeeping and transportation benefits.

[13] Ms. McQueen requested, and Echelon sought, the advice of an independent medical occupational therapist. That therapist advised that Ms. McQueen required assistance with her housekeeping but that an in-home assessment should be performed first. Echelon told Ms. McQueen that the assessment would cost $620.11 but it refused to pay for the assessment because it was not "reasonable and necessary".

[14] Despite Ms. McQueen's repeated entreaties for the SABS benefits, and the provision of additional medical documentation showing that she needed them, Echelon refused to reinstate the benefits. The trial judge found that in a three-year period, Ms. McQueen received 21 denials for 16 separate benefits.

[15] After Echelon refused to give Ms. McQueen transportation benefits, she went to "Operation Lift", a bus service for people that are disabled or in a wheelchair or walkers. She was tested, passed its criteria as being disabled enough to use the service and was

told she could begin using the service immediately. She attempted to use it but without success because the bumpy, rough ride caused her pain.

[16] Ms. McQueen visited a number of medical specialists who requested that she undergo various assessments. Three such assessments are of concern in this appeal: 1) a psychological and neurological assessment by Dr. Gouws at a cost of $2,259.91; 2) a neurological assessment by Dr. McComas at a cost of $1,391.52; and 3) the previously mentioned in-home assessment by Ms. Dyk, an occupational therapist, at a cost of $620.11.

[17] The first two assessments were recommended by a number of physicians.

[18] Echelon refused to pay for any of the assessments.

[19] Ms. McQueen filed two separate Statements of Claim in which she alleged that Echelon had breached various provisions of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996,* O. Reg. 403/96 ("SABS") by refusing to pay her certain SABS benefits. She also alleged that Echelon caused her mental distress and engaged in bad faith conduct, and she sought aggravated, punitive and exemplary damages.

[20] In a lengthy and comprehensive report dated March 23, 2007, Dr. Dinesh Kumbhare, a physiatrist, concluded that Ms. McQueen suffered from chronic pain and that her prognosis for recovery was "guarded".

[21] At trial, Ms. McQueen testified on her own behalf. Ms. Laurie Walker, an independent insurance claims adjuster, testified for Echelon.

[22] Following a seven day trial in May 2009, the trial judge issued a judgment dated September 28, 2009, as amended on November 25, 2009 (the Judgment), in which he awarded Ms. McQueen:

- $7,800 for housekeeping benefits, calculated at $100/week for 78 weeks following the period for which Echelon had already paid;
- $7,500 for transportation benefits;
- $4,271.54 for the three s. 24 assessments;
- $25,000 for mental distress; and
- interest on the first three awards.

[23] Echelon appeals. It challenges all but the interest award.

[24] Echelon raised some fifty grounds of appeal. The essence of the alleged errors in respect of each head of damages is as follows. In ordering housekeeping and transportation benefits, Echelon says the trial judge erred because the plaintiff failed to establish entitlement to, and the quantum of, the benefits awarded. In respect of the s. 24 assessments, Echelon submits that the trial judge erred by failing to properly weigh all of the evidence relating to whether the recommended assessments were reasonable. As for the award for mental distress, apart from alleging numerous errors in findings of fact, Echelon makes a number of submissions as to why the trial judge lacked jurisdiction to make such an award.

[25] For the reasons that follow, I would dismiss the appeal, with the exception of ordering a variation in the amount awarded for transportation benefits.

THE ISSUES

[26] The issues raised in this appeal are whether the trial judge erred in ordering Echelon to pay Ms. McQueen:

(a) housekeeping benefits of $7,800;

(b) transportation benefits of $7,500;

(c) the cost of the three s. 24 assessments of $4,271.54; and

(d) damages for mental distress of $25,000.

ANALYSIS

1. The Housekeeping Benefits

[27] Entitlement to a housekeeping and home maintenance benefit is governed by s. 22 of SABS. The relevant parts of s. 22 read as follows:

> **22.** (1) The insurer shall pay for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains an impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.
>
> (2) The amount payable under this section shall not exceed $100 per week.

[28] The trial judge was fully alive to the requirements in s. 22 and to fact that Ms. McQueen was required to prove both her entitlement to, and the quantum of, SABS benefits on a balance of probabilities.

[29] There was ample evidence in the record that Ms. McQueen was substantially unable to perform the housekeeping and home maintenance services that she had performed prior to her accident. The evidence included her testimony, the disability certificate that Dr. Picketts had prepared, Ms. Foster's in-home assessment and Dr. Kumbhare's report. Indeed, Echelon provided Ms. McQueen with housekeeping benefits until discontinuing the benefit, based on Dr. Kwok's assessment. In discontinuing such benefits, it acted against the recommendations of its own occupational therapist, Ms. Foster, who had attended at Ms. McQueen's home, conducted an assessment and found that Ms. McQueen had difficulty performing housekeeping tasks. The trial judge's finding that Echelon failed to give Dr. Kwok a copy of Ms. Foster's report is worthy of note.

[30] Ms. McQueen testified that after the accident she was bedridden for two months and her husband had to leave his employment to take care of her, their teenaged daughter and the household generally. Prior to the accident, Ms. McQueen did the cooking, house cleaning, shopping and the like. After the accident, she could no longer cook meals, clean bathrooms, change bedding or do any heavy cleaning - her husband and daughter had to do virtually all of the housekeeping.

[31] The trial judge was entitled to accept Ms. McQueen's evidence that she was unable to perform virtually all aspects of the housework that she had performed prior to the accident. He was also entitled to reject Dr. Kwok's report on the matter. It is significant in this regard that the trial judge found as a fact that Dr. Kwok's assessment was made after a 30 minute, "superficial" examination and without reference to the occupational therapy report or the neurological and psychiatric testing that Dr. Kwok himself recommended.

[32] Although Ms. McQueen did not have particularized receipts for the housekeeping services that were provided, in my view, this does not disentitle her to housekeeping benefits. It would be "an absurd result" and unfair to allow only those persons who could pay for services in advance to be allowed to recover for housekeeping services: see *Belair Insurance Co. v. McMichael* (2007), 86 O.R. (3d) 68 (Div. Ct.), at paras. 20 and 23. The evidence that the trial judge accepted, as already noted, satisfied him that housekeeping benefits were necessary. It was for him to decide what amount was reasonable, based on the evidence before him.

[33] I see no basis on which to interfere with the trial judge's finding that $100 per week for an additional 78 weeks was reasonable. Section 22(2) of SABS (set out above in para. 27) limits the amount payable to $100 per week. The trial judge was satisfied that Ms. McQueen was unable to do virtually any of the housekeeping and house maintenance services that she had performed prior to the accident. Given the nature of housekeeping services that needed to be provided, allowing Ms. McQueen two hours per

day of assistance is very reasonable. On that basis, the $100 weekly allowance would provide compensation to her family members at a rate of approximately $7.15 per hour, the same rate at which Echelon had earlier provided the housekeeping benefit.

2. The Transportation Benefits

[34] Echelon knew that pursuant to s. 14 of SABS, it was obliged to pay all "reasonable and necessary" costs of transportation for Ms. McQueen's attendance at medical appointments. In fact, until Dr. Kwok issued his report saying that Ms. McQueen did not need this benefit, Echelon had provided her with this benefit by means of a direct account with a taxi company.

[35] As has been noted, the trial judge found Dr. Kwok's report to be seriously flawed. Even Echelon's own occupational therapist advised that Ms. McQueen needed to be provided with transportation benefits and she was under the mistaken belief that Ms. McQueen had a working vehicle available to her at the material times.

[36] I see no reason to interfere with the trial judge's implicit finding that Ms. McQueen proved entitlement to transportation benefits. A short review of the evidence shows that this finding was fully open to him. This evidence includes: the nature of Ms. McQueen's health problems, her lack of access to a car, the opinion of Echelon's occupational therapist that Ms. McQueen needed such transportation, Ms. McQueen's attempts to use transportation for disabled persons, and the distance from her home to the nearest bus stop.

[37] However, I do accept that the trial judge gave inadequate reasons for how he quantified the amount of transportation benefits to which Ms. McQueen was entitled. Simply put, the trial judge gave no reasons or rationale for arriving at a figure of $7,500 for transportation benefits.

[38] In my view, it would not serve the interests of justice to remit this matter for a second trial. The amount in question is small and the plaintiff is of limited means and fragile health. Thus, it falls to this court to quantify the transportation benefits. Unfortunately, the record provides little help on the matter of transportation costs for medical appointments and otherwise. For example, there is no evidence of the number and cost of the trips to medical appointments that Echelon paid for by means of the direct account with a taxi company in the period January to July 2004.

[39] The little evidence on point comes from a report dated November 24, 2005, following a failed mediation. The report indicates that Ms. McQueen claimed $500 for transportation expenses to and from medical appointments for the period September 1, 2004 to the date of the mediation. September 2004 to November 2005 is a period of approximately 13 months so the claim was for approximately $40 per month. Ms. McQueen testified that the cost of a taxi to a medical appointment was $20 each way. In other words, the claim at mediation appears to be for a single trip each month to a medical appointment. Based on the evidence relating to her medical needs, this claim appears to be very modest and, in my view, reasonable.

[40] Echelon ceased providing Ms. McQueen with transportation benefits at the end of July 2004. There are 57 months in the period from August 2004 to trial (early May 2009). Transportation benefits of $40 per month for 57 months would total $2,280.

[41] Accordingly, I would allow the appeal on this issue and reduce the amount for the transportation benefit from $7,500 to $2,280.

3. The Section 24 Assessments

[42] I would not give effect to this ground of appeal.

[43] Pursuant to s. 24 of SABS, an insurer is required to pay reasonable fees charged for, among other things, the preparation of assessments and reports by members of a health profession.

[44] The trial judge thoroughly canvassed the medical evidence and Ms. McQueen's testimony and made a finding of fact that the neuro/psychological assessments were both reasonable and necessary. There was significant evidence by a number of doctors that such examinations were required. Indeed, Dr. Kwok as the insurance assessor recommended a neurological as well as a psychiatric/psychological assessment of Ms. McQueen.

[45] With respect to the in-home assessment recommended by Ms. Dyk, an occupational therapist and thereby a member of a health profession, the trial judge accepted as a fact that it was reasonable and necessary in the circumstances and that its

denial may have led Echelon to prematurely and incorrectly terminate the plaintiff's housekeeping benefits. The trial judge was entitled to make this finding.

[46] Accordingly, I see no reason to disturb the trial judge's order in relation to the s. 24 assessments.

4. Damages for Mental Distress

a) Some initial comments

[47] I begin by dismissing Echelon's two initial submissions on this issue.

[48] First, Echelon submits that there was procedural unfairness because, in deciding this issue, the trial judge considered conduct that related to matters other than rejected claims for statutory accident benefits.

[49] It is clear from the statements of claim, however, that Ms. McQueen sought to recover damages for more than SABS benefits. She alleged bad faith and mental distress and sought aggravated, punitive and exemplary damages. In particular, she sought the following damages in both of the two statements of claim that were before the trial judge:

- damages in the amount of $100,000 (reduced to $20,000 in the opening address by Ms. McQueen's counsel at trial) for Echelon's wrongful infliction of mental distress by the use of unlawful claims practices;
- damages in the amount of $100,000 (also reduced to $20,000 at trial) for bad faith and unreasonable conduct in the claims process; and
- aggravated, punitive and exemplary damages in the amount of $1,000,000 (reduced to $35,000 at trial).

[50] It should have come as no surprise to Echelon that evidence of the alleged wrongful conduct was adduced at trial. Had Echelon wished to explore the allegations prior to trial, it could have done so through the discovery process.

[51] Second, this recitation of the damages sought also disposes of Echelon's argument that Ms. McQueen reduced her claim for mental distress to $20,000. She reduced her claims to $20,000 per claim for a total of $40,000, in addition to her claim for $35,000 for aggravated, punitive and exemplary damages.

b) More than a simple denial of benefits

[52] Echelon also submits that this is merely a case about the denial of benefits and the simple denial of benefits does not amount to bad faith.

[53] I accept that a lack of good faith is not to be inferred simply because an insurer does not pay a claim. However, based on the findings of the trial judge, it cannot be said that this case was one in which Echelon simply denied benefits.

[54] The reasons of the trial judge must be read as a whole. The specific section of the judgment in which he deals with damages for bad faith and mental distress cannot be separated from the balance of the judgment in which he makes findings in relation to Echelon's conduct. It is evident that those findings lay the foundation for his reasoning on damages.

[55] As early as para. 12 of the reasons, the trial judge refers to *Fidler v. Sun Life Assurance Co. Ltd.*, 2006 SCC 30, [2006] 2 S.C.R. 3 (*Fidler)*, noting that in *Fidler*, the

Supreme Court of Canada held that an insurer owes a common law duty to act in good faith in all its dealings with an insured and has an additional duty not to inflict unnecessary mental distress. He returns to *Fidler* in paras. 51 and 52 of the reasons, stating that in a case of alleged mental distress, 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.

[56] Throughout the reasons, the trial judge repeatedly notes that Echelon refused to provide benefits on the basis that they were not "reasonable and necessary" but Echelon gave no reasons for why they were not reasonable and necessary: see, for example, para. 33.

[57] It is also clear that the trial judge was critical of Echelon for relying on Dr. Kwok's report, which was based on a "superficial examination lasting only 30 minutes" (para. 39), especially as Echelon had not given Dr. Kwok a copy of the report its own occupational therapist, which was favourable to Ms. McQueen (paras. 34 and 36).

[58] In the section of the reasons in which the trial judge concludes that damages for mental distress are warranted, he begins by pointing out a number of claims that Echelon denied, contrary to medical recommendations. He then refers to internal notes from Echelon's files that were in evidence. He finds that the expressions in the notes connote an outmoded attitude that runs against the reasoning in *Whiten v. Pilot Insurance Co*.,

[2002] 1 S.C.R. 595, and *Fidler*. At paras. 58-9 of the reasons, he makes key findings of fact:

> [58] … I find that the Echelon file notes are evidence of an adversarial approach to the Plaintiff *ab initio* and in behaving in this manner, the Defendant has breached its contract of insurance with the Plaintiff.
>
> [59] … Echelon's adversarial position poisoned the process very early on, notwithstanding that it owed the Plaintiff a duty of good faith throughout. Early on there was a negative predisposition toward the Plaintiff by the Defendant and these "notes" were the clarion call to the file going forward.

[59] The trial judge found that one object of the insurance contract was to secure the plaintiff's peace of mind and that it was within the reasonable contemplation of the parties that breach of the peace of mind promise would bring about mental distress.

[60] The trial judge went on to find that Ms. McQueen had suffered and that the suffering was of a degree that warranted compensation. He notes that some indication of Ms. McQueen's mental state in the period following the accident emerges from the clinical records of her treating psychiatrist, Dr. Prayaga. He said there were some two dozen reports in evidence in this regard. Between 2003 and 2007, Dr. Prayaga reported to Dr. Picketts (Ms. McQueen's family doctor) ten times regarding her mental distress over the accident and the difficulties she was encountering with Echelon.

[61] The trial judge went on to canvas the "extensive medical evidence" during the relevant period before concluding that Echelon created an adversarial relationship with Ms. McQueen that was likely to create mental distress and that, in fact, it did cause such

mental distress. He found that her distress was palpable and accepted her evidence that the change in her emotional and psychological conduct was the result of her relationship with Echelon (para. 71).

[62] The trial judge then concluded with a brief summary of instances in which Echelon had terminated or denied her benefits even though the medical evidence demonstrated that those benefits were reasonable and necessary. This included Echelon: terminating housekeeping benefits in the face of medical documentation stating that Ms. McQueen required housekeeping assistance; failing to pay transportation expenses to medical assessments and treatments in the face of clear medical evidence that she needed taxi transportation; and, repeatedly delaying access to medical treatments.

[63] To the extent that Echelon argues that the trial judge was unaware of the differences between a claim for SABS benefits and for damages for mental distress and that he erred in his various factual findings, I reject these arguments. The brief summary of his reasons shows that he was alive to the issues and that his findings were fully available on the record.

c) An award for mental distress was available

[64] In arguing that the trial judge lacked jurisdiction to make an award for mental distress, I understand Echelon's key submission to be as follows. Ms. McQueen was not a party to the insurance contract; it was her husband who was the named insured. Echelon accepts that Ms. McQueen was an insured person for the purposes of claiming

benefits under the insurance policy. However, it contends that because she was not actually a party to the insurance contract, she was not entitled to claim damages for mental distress. In a related argument, Echelon says that *Fidler* is distinguishable from the present case because *Fidler* dealt with a policy for long term disability benefits, not statutory accident benefits. Consequently, Echelon contends, peace of mind cannot have been a term contemplated by the parties when the motor vehicle liability policy was purchased.

[65] In my view, the Supreme Court's decision in *Fidler* supports the conclusion that damages for mental distress may be awarded to a person who is insured under a standard automobile policy, whether that person is the named party to the insurance contract or not. Mental distress to anyone insured under the policy upon breach would have been within the reasonable contemplation of the insurer and the insured and, thus, damages are recoverable pursuant to the basic principle of compensatory damages for breach of contract.

[66] *Fidler* lies at the heart of my conclusion, therefore, I begin with a consideration of that case.

[67] Ms. Fidler was a bank receptionist covered by a group long-term disability (LTD) policy. After a serious kidney infection, she developed chronic fatigue syndrome and fibromyalgia. She received LTD benefits for six years. Video surveillance showed her engaged in activities that the insurer considered to be inconsistent with her inability to

perform light work. There was medical evidence that she was not yet capable of doing any work, but the insurer relied on its own consultants and experts to deny benefits. Shortly before the trial began, the insurer reversed its denial of coverage and paid Ms. Fidler all of the arrears plus interest. The trial and subsequent appeals proceeded on the question of whether an award of aggravated damages for mental distress was appropriate and whether punitive damages were also warranted.

[68] At para. 44 of *Fidler*, McLachlin C.J. and Abella J., writing for the court, held:

> [D]amages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale*. The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken ... 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 at the time the contract was made. [citations omitted]

[69] The court explained, at para. 45, that mental distress of the type that would support a compensatory damages award will not likely be within the expectation of the parties in normal commercial contracts but they will be when the object of the contract is to secure a particular psychological benefit:

> It does not follow, however, that all mental distress associated with a breach of contract is compensable. In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. *The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit.* In such a case, damages arising from such mental distress should in principle be recoverable 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 basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security. [Emphasis added.]

[70] At para. 47, the court stated that in order for the court to award compensatory damages for mental distress, it 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.

[71] The court added, at para. 48, that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable." The promise for peace of mind need not be the dominant or sole object of the contract.

[72] McLachlin C.J. and Abella J. went on, at paras. 52-53, to explain what type of damages properly attract the label of "aggravated damages". They distinguished between damages for mental distress arising out of a breach of contract and "true aggravated

damages." The latter are not awarded for breach of contract but rather rest on an accompanying but separate cause of action – usually in tort – for things like defamation, oppression, or fraud. The award of damages for mental distress in such cases arises from a separate cause of action, rather than out of the contractual breach itself (para. 52).

[73] Having established that damages for mental distress are available in certain breach of contract cases, the court then turned to Ms. Fidler's case and asked, at para. 56: "whether an object of this disability insurance contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made?"

[74] The court explained, at paras. 56-58, that it was an object of the contract:

> The bargain was that in return for the payment of premiums, the insurer would pay the plaintiff benefits in the case of disability. This is not a mere commercial contract. It is rather a contract for benefits that are both tangible, such as payments, and intangible, such as knowledge of income security in the event of disability. If disability occurs and the insurer does not pay when it ought to have done so in accordance with the terms of the policy, the insurer has breached this reasonable expectation of security.
>
> 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.
>
> 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. Ms. Fidler's damages for mental distress flowed from Sun Life's breach of contract. To accept Sun Life's argument that an independent actionable wrong is a precondition would be to sanction the "conceptual incongruity of asking a plaintiff to show *more* than just that mental distress damages were a reasonably foreseeable consequence of breach". [Citations omitted. Emphasis in original.]

[75] In my view, the reasoning in *Fidler* applies to the present case. People purchase motor vehicle liability policies to protect themselves from financial and emotional stress and insecurity. An object of such contracts is to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made (*Fidler*, at para. 56). As an insured person entitled to call on the policy, Ms. McQueen was entitled to that peace of mind and to damages when she suffered mental distress on breach.

DISPOSITION

[76] Accordingly, I would allow the appeal in part and order that para. 1(b) of the Judgment be varied by substituting the amount of $2,280 for the amount of $7,500. I would affirm the Judgment in all other respects.

[77] Given that Ms. McQueen was largely successful, I would award costs of the appeal to her fixed at $6500, inclusive of disbursements and applicable taxes. In light of the very limited success that the appellant enjoyed on appeal, it does not appear to me that any reduction in trial costs is warranted. However, I understand from the parties that trial costs have not been fixed. If they are unable to resolve that matter between themselves, they may raise the result on appeal when they take steps to have the trial costs fixed.

RELEASED: October 18, 2011 ("E.E.G.")

"E.E. Gillese J.A."
"I agree Robert P. Armstrong J.A."
"I agree Karakatsanis J.A."