

## **University hit with aggravated and punitive damages for actions of third-party plan administrator**

The British Columbia Court of Appeal has upheld an award of \$150,000 in punitive damages and \$35,000 in aggravated damages against the University of British Columbia (UBC). The decision sends a strong message to insurers and raises questions about the relationship between employers and third parties hired to administer benefit plans. *Asselstine v. Manufacturers Life Insurance Co.* (May 25, 2005) concerned a registered nurse who had been employed by UBC for several years. In March 1997, she was diagnosed as suffering from multiple sclerosis. She took six weeks of sick leave and then returned to work, but only to do sedentary tasks. At the beginning of May, due to a lack of funding, she was given notice that her position would be terminated at the end of July. She negotiated paid leave in lieu of working notice and then, some weeks later, took a position as a doctor's receptionist where she worked from mid-August until December, by which time her health had deteriorated to the point that she was unable to work at all.

In March 1998, Asselstine applied for long-term disability benefits from the Manufacturers Life Insurance Company (Manulife), which administered the plan on behalf of UBC, the insurer. To qualify for long-term disability benefits under the plan, an employee had to establish that he or she had become totally disabled while employed by UBC. "Total disability" was defined in the policy as the inability to perform the duties of any occupation for which an employee is fitted by education, training or experience.

Manulife rejected Asselstine's claim at the end of July 1998 on the basis that she had not been totally disabled while employed by UBC. Manulife had before it conflicting medical opinions concerning Asselstine's ability to work. The neurologist treating her until July 1997 maintained that she had been able to work at a reduced level of activity. However, another neurologist who had started to treat her in the fall of 1997 was of the view that she had been incapable of working from the time she had been diagnosed in March.

Asselstine appealed the rejection of her claim twice. She provided a further medical opinion in September 1998 from another neurologist specializing in MS, who also believed that she had been incapable of working since March 1997. Nonetheless, Manulife maintained that Asselstine did not qualify for the benefits.

### **TRIAL JUDGE: INSURERS BREACHED DUTY OF GOOD FAITH**

Asselstine took UBC and Manulife to court, where she won an award of aggravated and punitive damages. The trial judge held that, by rejecting the evidence of the two physicians who believed that Asselstine had been incapable of working, the defendants had not acted in good faith:

"A duty of good faith and fair dealing requires an even-handed evaluation of all evidence before the insurer by the insurer. Just as one cannot cherry-pick the

information to send to an assessor for a rehabilitation opinion, one cannot choose only to accept certain medical evidence in the face of compelling, conflicting evidence."

The judge held that the defendants had applied the wrong test for determining total disability. The judge noted that, while Asselstine had returned to work following her six weeks off, she was unable to function normally and that, at home, she had to get from one place to another in her small apartment by holding on to chairs placed between rooms. Insurance contracts, the judge stated, are intended to protect the insured in times of disaster and crisis and are, accordingly, unlike other commercial contracts. Consequently, the insurer had a duty to act with the utmost good faith. The breach of this duty of good faith was an "actionable wrong" apart from the failure to pay the insured's loss.

Accordingly, this was a case in which both aggravated and punitive damages were available. With respect to aggravated damages, the judge noted that Asselstine had suffered increased anxiety and mental, financial and emotional stress while she was already in a vulnerable state due to her illness. Based on the case law, the judge held that \$35,000 was the appropriate compensation.

The judge also held that punitive damages were necessary to deter the defendants and others from exploiting the vulnerability of insured persons in Asselstine's position. The award of \$150,000 would serve as a reminder that it would not be in the interests of insurers to indulge in similar conduct in the future.

#### **COURT OF APPEAL: AWARD AGAINST UBC SUSTAINED**

The trial judge's award of damages was upheld by a majority of the Court of Appeal. However, the judgment against Manulife was dismissed, as Asselstine's insurance policy specifically provided that no action could be brought against Manulife.

Although the dissenting judge held that, because UBC itself had not been responsible for any egregious or high-handed conduct, the "deterrence" rationale of punitive damages was absent in this case and such damages should not be awarded, the majority of the Court disagreed. Because of the way the defendants had pleaded and conducted their defences, the majority stated, there was no meaningful separation dividing the conduct of Manulife from that of UBC. Manulife had adjudicated the claim for UBC and the defendant parties had treated the actions of one as those of the other. Moreover, Manulife and UBC had filed joint pleadings and engaged the same legal team throughout the action. Accordingly, it would be unfair to Asselstine to permit UBC to shift its ground on appeal in order to dodge responsibility for Manulife's conduct. UBC had accepted that Manulife's actions were its own actions and must now live with that position.

The majority held that the Court should not interfere with the trial judge's determination that the conduct merited punitive damages. While expressing the view that the award of \$150,000 seemed high, it held that it should not second-guess the trial judge, the finder of fact in this case:

"The award is substantial, on the high side of what seems proportionate to the blameworthiness of the defendants' conduct viewed without regard to its effect on the plaintiff, particularly where there is no evidence of any gain to either defendant. But when consideration is given to the vulnerability of the plaintiff and the harm she would have suffered if she had not had recourse to the court for redress of what the trial judge found and we agree is a serious lack of good faith in the assessment of

her application, we cannot say it crosses the line. Just as we would not disturb the finding that punitive damages are appropriate in this case we would not reduce the assessment. So much depends on the trial judge's appreciation of the evidence. Here the judge was concerned that disability insurers understand the law will not countenance bad faith administration of their policies."

In the result, the award of damages against UBC was upheld.

### In Our View

The Court of Appeal noted that the trial judge had not used "highly charged language" to describe the defendants' treatment of Asselstine, yet it was satisfied that she had thought that their treatment of Asselstine's claim was sufficiently reprehensible to warrant the award of punitive damages. This is a reference to the fact that the jurisprudence in this area generally states that a defendant's conduct must be harsh, vindictive and malicious to support awarding punitive damages.

The Court took into account the special character of contracts for disability insurance and the vulnerability of plaintiffs in such cases. Accordingly, employers should be alert to how they or their agents administer those claims, and how they choose to litigate them when something goes wrong.

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