NOVA SCOTIA COURT OF APPEAL

Citation: ***Industrial Alliance Insurance and Financial Services Inc. v. Brine***, 2015 NSCA 104

Date: 20151117
Docket: CA 431538
Registry: Halifax

Between:

Industrial Alliance Insurance and Financial Services Inc.

Appellant
Respondent by Cross-Appeal

v.

Bruce Brine

Respondent
Appellant by Cross-Appeal

Judges:	Fichaud, Oland and Scanlan, JJ.A.
Appeal Heard:	April 16, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed in part and cross-appeal dismissed with costs, per reasons for judgment of the Court
Counsel:	Michelle C. Awad, Q.C., and Danielle Kershaw for the appellant Barry Mason, Q.C., and Glenn Jones for the respondent

Reasons for judgment of the Court:

[1] Disability insurance is a peace of mind contract. It shields from stress at a time of vulnerability. Mr. Brine's total disability left him vulnerable, psychologically and financially. His insurer paid the disability benefits to which he was entitled. In fact, Mr. Brine's recoveries from other sources meant the insurer overpaid him. Yet Mr. Brine and his insurer were at odds constantly over sixteen years. Their differences stemmed partly from the insurer's attempts to recoup the overpayments and partly from what Mr. Brine considered as the insurer's inveterate obstinacy. Hence this litigation.

[2] Justice Cindy A. Bourgeois, then of the Supreme Court of Nova Scotia, found that the insurer had breached its contractual obligations and duty of good faith (2014 NSSC 219). She awarded Mr. Brine substantial contractual damages, $150,000 aggravated damages and $500,000 punitive damages. She held that the insurer was subrogated to a settlement Mr. Brine had received.

[3] The insurer appeals and Mr. Brine cross-appeals, each on many grounds. We would allow the appeal in part, and dismiss the cross-appeal.

Background

[4] Mr. Bruce Brine was born March 17, 1949. He is married with three children. His career in police work led to his appointment in 1993 as Director of Ports Canada Police in Halifax, at the rank of Superintendent. He achieved favourable performance reviews throughout his career and, in 1994, received the Governor General's award for exemplary service in policing.

[5] Mr. Brine was covered for long-term disability ("LTD") under Policy G68-1400 ("Policy") between the National Life Assurance Company of Canada, now Industrial Alliance Insurance and Financial Services Inc. ("National Life"), and the Board of Trustees of the Public Service Management Insurance Plan.

[6] In March 1995, Ports Canada Police terminated Mr. Brine's employment. Shortly after, Mr. Brine was diagnosed with depression. He applied for LTD benefits under the Policy. On August 1, 1995, National Life approved his application.

[7] The disagreements between Mr. Brine and National Life over the following years concerned rehabilitation services, the tax treatment of the benefits paid to him, and National Life's reduction of benefits for third party payments to Mr. Brine. National Life started the litigation in 2001. But, at trial in 2013, what remained was Mr. Brine's amended Counterclaim alleging that National Life had breached specific terms of the Policy and its duty of good faith. National Life argued that it had handled the claim appropriately, and it was entitled to a settlement that Mr. Brine had received.

[8] Mr. Brine testified. Dr. Edwin Rosenberg, who diagnosed Mr. Brine's depression and was his treating psychiatrist, testified on his behalf. National Life's witnesses were: Alan Stern, Q.C., who had represented Mr. Brine's employer respecting Mr. Brine, particularly the settlement of Mr. Brine's complaint to the Canadian Human Rights Commission against Ports Canada Police; Anna Antonini, Supervisor of National Life's LTD department from 1997 to 2005; and Julie Jako, Director of the LTD department in the 1990s.

[9] The judge accepted Dr. Rosenberg's diagnosis of Mr. Brine's depressive illness, his symptoms, mental state and abilities at various times. National Life acknowledged that, at all material times, Mr. Brine was totally disabled as defined in the Policy. Except when it withheld benefits due to an overpayment, it paid him disability benefits under the terms of the Policy. The judge agreed that Mr. Brine was totally disabled and entitled to benefits. She found that, other than some modest and temporary improvement in 1990 and 2004, Mr. Brine's mental health functioned at a significantly impaired level. She also determined that National Life knew of his condition and limitations.

[10] The judge held that National Life was entitled to claim reimbursement for overpayments of $99,506.64 from Mr. Brine's receipt of retroactive lump sums under the Canada Pension Plan ("CPP") and Public Service Superannuation Act ("PSSA"). However, in her view, the Policy's provision regarding the timing of reimbursement for lump sum payments did not entitle National Life to completely stop his monthly disability payments until the overpayment was repaid, as National Life had done. Rather, the reimbursement should have been pro-rated monthly. She held that the $62,036.81 balance of Mr. Brine's claim for the overpayment was extinguished by Mr. Brine's discharge from bankruptcy, and Mr. Brine should recover $62,036.81 as damages for National Life's breach of contract.

[11] The judge next considered Mr. Brine's claim that National Life had breached its duty of good faith. She found that National Life had breached that duty on the bases that: (i) it discontinued rehabilitation counselling services; (ii) it did not provide him with a report dated April 15, 2003 by Dr. Mark Rubens ("Rubens Report") until the week before trial, some ten years later; and, (iii) it continued to issue T4 slips that classified his disability benefits as taxable after National Life had received a Tax Court ruling that they were not taxable.

[12] The judge awarded Mr. Brine $150,000 aggravated damages and $30,000 for mental distress.

[13] The judge concluded that punitive damages were justified on four bases – the three elements of National Life's breach of its duty of good faith, and the evidence of National Life's Ms. Antonini whom the judge described as having a "wanton disregard for the accuracy of her testimony". She awarded Mr. Brine $500,000 in punitive damages.

[14] The judge turned to National Life's claim of subrogation. In 2004, Mr. Brine settled his human rights complaint against Ports Canada Police and the Halifax Port Authority for $300,000. The judge held that the subrogation provision in the Policy obliged Mr. Brine to advise the insurer of the settlement, which he had not done. She determined that the larger component of his claim was for his loss of past and future income. The judge deducted certain amounts from the settlement and ruled that Mr. Brine owed National Life the balance of $210,000.

[15] The foregoing briefly summarizes the decision that contained 333 paragraphs. We will set out the evidence and Justice Bourgeois' analysis more fully as we consider the issues raised on appeal.

Issues

[16] The Notices of Appeal and Cross-Appeal set out various grounds. We reframe the grounds that are not withdrawn, and indicate their source, as follows:

1. On reimbursement for the overpayments:

    (a) The trial judge erred in her interpretation of the Policy's provisions, namely the *Pro Rata* and Temporary Reductions clauses, that govern the insurer's reduction of benefits to recover an overpayment. *(National Life's appeal).*

(b) She erred in the application of the Policy's provisions to the circumstances of Mr. Brine's bankruptcy, and by awarding $62,036.81 damages to Mr. Brine *(National Life's appeal)*.

(c) If the *Pro Rata* clause does apply, the judge erred in calculating the amount of any set off that National Life could apply against ongoing benefits, and erred in quantifying the loss *(National Life's appeal)*.

2. On the insurer's duty of good faith:

(a) The judge erred in her formulation of the test that governs breach of an insurer's duty of good faith. *(National Life's appeal)*.

(b) She erred by ruling that National Life's allegations of Mr. Brine's fraud and misrepresentation did not breach its duty of good faith. *(Mr. Brine's cross-appeal)*.

(c) She erred by ruling that National Life's misinterpretation of the *Pro Rata* clause did not breach its duty of good faith *(Mr. Brine's cross-appeal)*.

(d) The judge erred in finding that any of the following breached National Life's duty of good faith owed to Mr. Brine:

(i) the discontinuance of rehabilitation services in July 1998;

(ii) the failure to produce the Rubens Report earlier, given that Mr. Brine did not plead the late production as a particular of bad faith;

(iii) the issuance of T4 slips treating Mr. Brine's benefits as taxable after receipt of a 2006 Tax Court of Canada decision that they were not taxable.

(National Life's appeal).

3. On damages for lost opportunity - the judge erred in determining that Mr. Brine was not entitled to damages for lost opportunity to return to the workforce resulting from National Life's discontinuation of rehabilitation services *(Mr. Brine's cross-appeal)*.

4. We will concurrently discuss contractual damages for mental distress and aggravated damages:

   (a) National Life says there are no contractual damages because there is no breach of contract, as discussed under issues # 1 and 2.

   (b) On aggravated damages:

      (i) The judge erred by awarding duplicative damages *(National Life's appeal)*.

      (ii) The appeal and cross-appeal each raise the question - Should damages for mental distress be assessed as "aggravated" damages or under *Hadley v. Baxendale*?

      (iii) The judge erred by awarding amounts that were too high *(National Life's appeal)* or too low *(Mr. Brine's cross-appeal)*.

5. On punitive damages:

   (a) The judge erred in finding that any of the following should attract a punitive award:

      (i) National Life's discontinuance of rehabilitation services;

      (ii) National Life's failure to make timely production of the Rubens Report;

      (iii) National Life's issuance of T4 slips classifying the disability payments as taxable after its receipt of a 2006 Tax Court of Canada decision that they were not taxable; and

      (iv) the judge's finding that the testimony of one of National Life's witnesses was misleading.

      (National Life's appeal);

   (b) The judge erred by quantifying an amount that was too high *(National Life's appeal)* or too low *(Mr. Brine's cross-appeal)*.

6. On subrogation, the judge erred in her interpretation of the Policy. *(Mr. Brine's cross-appeal)*.

[17] We will consider these six issues in the order set out above. Under each we will discuss concurrently the points raised by the appeal and cross-appeal.

Standard of Review

[18] Except where these reasons indicate otherwise, the normal appellate standard of review to a trial judge's decision will apply: correctness as to issues of law, and palpable and overriding error to issues of both fact and mixed fact and law with no extricable legal issue: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at ¶ 25-26, and ¶ 36.

1. Reimbursement for Overpayment

[19] This issue deals with Mr. Brine's receipt of CPP and PSSA benefits.

[20] First, the background.

[21] The Policy provided that, during the beneficiary's total disability to age 65, the LTD gross benefit would be 70% of the beneficiary's salary, plus cost of living increases. Mr. Brine's annual salary had been $73,000. Accordingly, in 1995 his gross monthly disability benefit from National Life started at $4,258.33. His net benefit would be the gross benefit less reductions for Mr. Brine's other income according to the protocol in the Policy. The Policy and its explanatory material said that these reductions would include CPP and PSSA benefits and income replacement from third party damages. From August 1995 through September 1998, Mr. Brine's gross disability benefits from National Life totalled $166,270.13.

[22] This was a last payor policy. National Life's letter of August 14, 1995, approving disability benefits, pointed out that CPP and PSSA benefits were deductible from its disability payments under the Policy.

[23] Mr. Brine received $12,341.76 (retroactive CPP benefits) and $87,164.88 (retroactive PSSA medical retirement benefits), totalling $99,506.64. By July 1998, National Life knew that Mr. Brine had received these amounts. To recover the overpayments by set-off, beginning October 1, 1998 National Life stopped paying Mr. Brine any disability benefits. Mr. Brine said the termination of benefits took him by surprise, and he reacted with despair, confusion and panic. He said the news was "totally crippling".

[24] On July 30, 1999, Mr. Brine made an assignment in bankruptcy. He had cashed in his RRSP savings, sold his home and incurred significant legal fees in his efforts to establish that he had been wrongfully dismissed and to clear his name. The two debts Mr. Brine identified as prompting his bankruptcy were a liability of about $67,000 owing to National Life, being the balance of the CPP and PSSA overpayment, and $30,000 owing to the Canada Revenue Agency for income tax arrears from a reassessment. The tax reassessment followed National Life's refusal to accept that the disability benefits were not taxable income. He also owed $120,000 to CIBC.

[25] In its Proof of Claim to the trustee, National Life said that the outstanding debt for the overpayments was $62,036.81. During the bankruptcy, National Life continued to fully set off Mr. Brine's debt for the overpayments against his ongoing disability benefits.

[26] On May 1, 2000, Mr. Brine was discharged from bankruptcy.

[27] After Mr. Brine's discharge, National Life continued to fully reduce his monthly disability benefits by the balance of the overpayments. National Life took the view that Mr. Brine's debt survived his bankruptcy discharge because the debt had been incurred by fraud.

[28] On June 8, 2000, the Nova Scotia Supreme Court in Bankruptcy issued an Order, to which Mr. Brine's counsel consented, that said "National Life may commence an action against Brine to claim repayment of benefits it alleges are due from Brine". On September 20, 2001, National Life filed an Originating Notice and Statement of Claim. This is the Originating Notice that led ultimately to the trial before Justice Bourgeois. The Statement of Claim alleged that Mr. Brine had received overpayments of $99,506.64 of CPP and Public Service Superannuation, and his failure to notify National Life was "a fraudulent misrepresentation and a misappropriation of funds." National Life's claim was based on s. 178(1)(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3:

> 178(1) An order of discharge does not release the bankrupt from
>
> …
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others.

National Life's Statement of Claim, dated September 20, 2001, calculated the quantum of National Life's net claim:

> 12. Since October 1, 1998, National Life ceased paying to Brine any benefits under the Policy so as to set off against the overpayment referred to herein. In total, National Life has set off the sum of $58,541.05 leaving the amount owing to it of $40,965.59.

[29] By August 2003, National Life's set-offs had recovered the full amount of the overpayments. Then National Life resumed payment of disability benefits until Mr. Brine reached age 65 in March 2014.

[30] On November 13, 2013, in closing argument to Justice Bourgeois, counsel for National Life withdrew its allegations under s. 178(1)(d). Counsel cited an Alberta case, then said:

> One final comment My Lady on that front. And that is on the question of the fraud allegation in our initial Statement of Claim in this matter. …
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> And on page 3 they [the Alberta Court] set out the law as it was at that time, fraud must be proven on a civil standard of probabilities. …
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> We're not seeking such a determination in this case against Mr. Brine. My point simply is when the action started in 2001 based on the information that was available at that time it was not unreasonable to make such an allegation when National Life knew clearly that Mr. Brine received those funds.

[31] We turn to the grounds of appeal respecting National Life's reimbursement for the overpayments.

(a) Interpretation of Policy

[32] National Life submits that the judge misinterpreted the Policy's provisions that govern the timing for reimbursement of overpayments.

[33] The judge ruled that National Life should have pro-rated the deductions from Mr. Brine's disability benefits to recover the overpayment over time. She relied on the *Pro Rata* clause in the Policy. That clause reads:

> If an employee should receive a lump sum settlement in lieu of, or as an accumulation of periodic benefits from any of the sources described above, other than as described under clauses (4) and (5), the amount of the lump sum received shall be apportioned equally over the period from the date of payment of such lump sum to the date of the employee's 65th birthday, and the amount apportioned to each month or partial month in the period shall be deemed a benefit payable for such month or partial month.

[34] The judge set out National Life's argument on the *Pro Rata* clause:

> [256] National Life submits, supported by the evidence of its witnesses, that retroactive lump sum payments had never been pro-rated over the remaining balance of a policy in any situation that they could recall. They explained the provision permitting a pro-rating is solely intended to apply to those circumstances where a lump sum settlement constitutes a payment of future income losses. Mr. Saunders argued, quite capably, that such an approach makes complete financial sense. In fact, to pro-rate retro-active payments would be contrary to any reasonable interpretation of the policy, as an insured would have recovered their past losses, plus disability benefits for the same period, resulting in double recovery. Mr. Saunders further directed the Court's attention to the fact that the policy provision in question was subsequently amended, and is now entirely reflective of the interpretation advanced by National Life. He suggests the amendment served to "clarify" the intent of the original provision.

[35] The judge rejected that submission. She wrote:

> [258] In my view, the provision in question is not as "clear cut" as National Life asks the Court to accept. Further, although I agree that there are good financial reasons why National Life would want the provision interpreted to exclude lump sum payments of retroactive awards, there are also financial reasons why a claimant may say such should be included. A claimant may fully anticipate National Life being willing to structure a pro-rated repayment given that in many instances of a retroactive payment, a claimant has not regularly received that particular source of income, and the disability benefits themselves do not constitute a full indemnity of their pre-disability income. A claimant having been placed in financial circumstances more challenging than normal, may very well anticipate such a provision being negotiated by the policyholder as a means of alleviating financial hardship which may have arisen due to the disability and resulting drop in income. I cannot reject the interpretation advanced by Mr. Brine as not being within the reasonable contemplation of the parties to the policy.

> [259] The provision is open to alternate interpretation. I base that conclusion on several observations. The clause does not clearly differentiate between lump sum payments covering retroactive versus future income payments. Further the use of the phrase "or as an accumulation of periodic benefits from any of the sources described above" gives rise to a question as to its meaning and purpose of inclusion. Mr. Saunders submits this references a situation where a party received a final lump sum settlement which encompasses an accumulation of future benefits and should be read in conjunction with the phrase that immediately precedes it. Typically, or at least sometimes however, "accumulation" is used to describe some event which has already occurred. The "or" is significant and in my view its use creates two alternative scenarios in which a pro-rated payment will arise. Mr. Brine's situation would fall within the second category - he received an accumulation of periodic benefits. In light of the above, Mr. Brine's interpretation should prevail. National Life was not entitled to undertake a complete claw back of his monthly disability payments. The overpayment should have been pro-rated on a monthly basis until Mr. Brine's 65th birthday.

[36] National Life acknowledges that the judge (¶ 186) correctly set out the principles for interpretation of an insurance contract, from *Ruffolo v. Sun Life Assurance Co. of Canada*, [2007] O.J. No. 4541 at ¶ 82 and ¶ 83, aff'd 2009 ONCA 274, leave to appeal denied [2009] S.C.C.A.no. 222:

> **82** It is accepted that some special rules apply to the interpretation of insurance contracts. However, it is also accepted that the normal rules of contract interpretation apply to insurance contracts and that the normal rules are the starting place for interpreting insurance contracts…
>
> **83** The normal rules for the interpretation of contracts direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement…In searching for the intent of the parties, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms…

[37] On the appeal, National Life makes two arguments: (1) the judge did not consider the "factual matrix" as directed by *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R 633, released by the Supreme Court after Justice Bourgeois' decision; and (2) she should have focused on the Policy's Temporary Reductions provision instead of the *Pro Rata* clause.

[38] **The *Sattva* Argument:** In *Sattva*, two corporations had agreed to arbitration of matters pertaining to a finder's fee. The appeals were from the commercial arbitration decision. Justice Rothstein, for the Court, observed that historically, the

determination of the rights and obligations from a written contract was considered a question of law. He continued:

> [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
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> ...
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> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
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> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. ...

[39] From these passages, National Life's factum submits:

> 48. What is the factual matrix in this case? Quite simply: The Policy provided indemnity for disability-related income loss. The Reductions and Temporary Reductions provisions ... clearly show that the Appellant (as administrator of the benefit ultimately paid by the Policyholder) was the 'last payor' when there was income loss and therefore income or replacement income from other sources were direct deductions from the Monthly Income Benefit provided under the Policy.

[40] *Sattva* is the leading authority on the standard of review for the interpretation of a contract. Nonetheless, some authorities indicate the standard of review for the interpretation of a discrete provision in a standard form insurance contract remains correctness: *Fontaine v. Canada (Attorney General)*, 2015 ABCA 132 (Q.L.) at ¶ 17 and ¶ 18, *Ledcor Construction Ltd. v. Northbridge*

Indemnity Insurance Co., 2015 ABCA 121 (Q.L.) at ¶ 14, ¶ 17 to ¶ 18, and *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277 at ¶ 28. On the other hand, in *Thorburn Wharf Fisheries Ltd. v. ING Insurance Company*, 2010 NSCA 96, Justice Saunders expressed a view that presaged Justice Rothstein's later comments in *Sattva*:

> [10] As to the appropriate standard of review on appeal, we agree with the respondent. While it is true that the judge was discerning the meaning of certain words within an insurance contract and in that sense was required to employ correct legal principles of interpretation, in doing so he was applying those principles to a particular set of facts. The exercise was really a question of mixed fact and law to which deference is owed. Absent palpable and overriding error, this court will not intervene. …

[41] We will apply *Sattva*. But the use of *Sattva*'s standard of review does not overturn the judge's conclusion.

[42] In *Sattva*, Justice Rothstein (¶ 50) characterized the interpretation of a contract as an issue of mixed fact and law "in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". He continued (¶ 51) – "one central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute".

[43] In Mr. Brine's case, Justice Bourgeois considered the factual matrix. She (¶ 256) noted National Life's perspective of the circumstantial background. But (¶ 258) she found that the insured's perspective better assisted her interpretation.

[44] In our view, the *Pro Rata* clause's wording reasonably may be understood as encompassing retroactive lump sum payments. Further, the judge's appreciation of the insured's perspective was well supported by Mr. Brine's evidence. *Sattva* directs appellate deference, *i.e.*, a standard of palpable and overriding error, to the judge's assessment of the factual matrix. The judge's ruling involved neither an error of law nor a palpable and overriding error on a factual or mixed issue.

[45] **Temporary Reductions clause:** National Life's second argument is that the judge erred by focusing on the *Pro Rata* clause. National Life says that the relevant provision of the Policy was the Temporary Reductions clause, which says:

Temporary Reductions

The Insurer reserves the right to reduce immediately the amount of an employee's Monthly Income Benefit according to the Insurer's estimate of the amount of periodic disability benefits to which the employee would be entitled, if approved, under the Canada Pension Plan, Quebec Pension Plan or any workers' compensation law, where such benefits

(a) have not yet been approved or disallowed, or
(b) have been disallowed and such disallowance is being appealed.

However, the Insurer will not make an immediate reduction of the estimated amount of disability benefits provided the employee

(a) with respect to the Canada Pension Plan:

    (i) applies for a disability benefit under the Canada Pension Plan, and completes and signs the Consent To Deduction From Canada Pension Plan In Payment To The Administrator (Insurer) Of The Disability Income Program form, or

    (ii) signs an undertaking stating that he or she will pursue a claim for disability benefits under the Canada Pension Plan, and agrees that he or she will repay the Insurer any overpayment of Monthly Income Benefit by the Insurer as a result of the disability benefit received under such Plan. If the employee should receive a disability benefit under the Canada Pension Plan and he or she should fail to make repayment of any overpayment to the Insurer in a timely manner, the Insurer may charge interest, at a rate set by the Insurer, on the amount of the overpayment.

(b) with respect to the Quebec Pension Plan or any workers' compensation law:

    (i) signs an undertaking stating that he or she will pursue a claim for disability benefit under such Plan or law, and agrees that he or she will repay the Insurer any overpayment of Monthly Income Benefit by the Insurer as a result of the disability benefit received under such Plan or law. If the employee should receive a disability benefit under the Quebec Pension Plan or any workers' compensation law and he or she should fail to make repayment of any overpayment to the Insurer in a timely manner, the Insurer may charge interest, at a rate set by the Insurer, on the amount of the overpayment.

[46] National Life notes the Temporary Reductions clause contemplates anticipatory deductions for the types of outside payments that Mr. Brine received. National Life says the Temporary Reductions clause sensibly must be read as requiring immediate repayment of the CPP and PSSA overpayments.

[47] We do not accept National Life's submission. The Temporary Reductions clause allows reduction of benefits in *anticipation of a future* overpayment. But, unlike the *Pro Rata* clause, it does not cite a protocol for recovery of a *lump sum retroactive* overpayment, if anticipatory reductions have not been made. Here there were no anticipatory reductions. The Temporary Reductions provision does not undermine the judge's view that literally, and purposefully from the insured's perspective of the factual matrix, the *Pro Rata* clause governed National Life's recovery of the retroactive lump sums paid to Mr. Brine.

(b) Effect of the Bankruptcy

[48] National Life submits that, even if the judge correctly interpreted the *Pro Rata* clause, she erred in its application given Mr. Brine's bankruptcy.

[49] As described earlier, to recover the overpayment, National Life refused to pay Mr. Brine any disability benefits from October 1998 onward, during his bankruptcy and after his discharge from bankruptcy. In the bankruptcy proceedings, National Life filed a Proof of Claim for the outstanding amount of $62,036.81.

[50] After the judge determined that National Life had contravened the *Pro Rata* clause, the judge addressed the effects of the bankruptcy and discharge. She found that Mr. Brine was neither fraudulent nor acting in a fiduciary capacity towards National Life, within s. 178(1)(d), nor did he possess the discretionary power to alter the insurer's legal or practical interests in the overpayment. The judge's findings included:

> [228] …I find that Mr. Brine's misinterpretation was just that, a misinterpretation, as opposed to a deliberate attempt to circumvent National Life from receiving funds it claims it is owed. …
>
> [263] …He had no intent to give the type of undertaking required to give rise to an ad hoc fiduciary duty. …
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> …
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> [265] Based on the foregoing, the balance of the overpayment claimed by National Life, being the sum of $62,036.81 was extinguished by the bankruptcy.

[51] The judge turned to quantification of Mr. Brine's damages for breach of contract, *i.e.*, breach of the *Pro Rata* clause. She said (¶ 300) that National Life's claw backs "undoubtedly created a considerable financial strain" which "in turn, increased his mental distress". She continued:

> [301] …To award Mr. Brine the total of the sums inappropriately withheld would not be proper in my view, as it would not reflect the reality that had the policy provision been properly implemented, Mr. Brine would have continued to have a deduction of $342.00 applied every month, until the policy terminated on his 65th birthday. In effect, if not for its own policy breach, National Life would have recouped the entire $99,506.64 over the life of the policy. Such a pro-rated deduction would not have been impacted by Mr. Brine's bankruptcy.
>
> [302] It is not reasonable however, that National Life should benefit from its own breach of the policy, while Mr. Brine clearly suffered an unwarranted financial detriment for nearly 5 years. National Life chose to seek an upfront claw back of the overpayment, a significant balance being outstanding at the time of Mr. Brine's bankruptcy. National Life chose to file a Notice of Claim characterizing the balance of the overpayment as an outstanding debt and it an unsecured creditor. It subsequently withdrew from the bankruptcy proceeding and claimed the protection afforded by s. 178(1)(d) of the *Bankruptcy and Insolvency Act*. The Court has previously found that National Life was not entitled to that protection. As such, and in the normal course, the unsecured debt would be extinguished by the bankruptcy.
>
> [303] In my view, given National Life's breach, and given the path it forced upon Mr. Brine, namely a unilateral upfront claw back of his benefits, an appropriate measure of damages is $62,036.81, being the balance of the overpayment purported to be outstanding at the date of the bankruptcy. This debt, as characterized by National Life, was not extinguished by the bankruptcy. As National Life continued to inappropriately withhold benefits from Mr. Brine until that sum was paid down, that amount is properly returnable to him.

[52] Mr. Brine's obligation to reimburse National Life for the overpayment was a pre-bankruptcy debt provable in bankruptcy. Unless that debt survived according to a provision of the *Bankruptcy and Insolvency Act*, National Life's claim for the balance of that debt ended with his discharge on May 1, 2000. Sections 178(1)(d) and 97(3) pertain to whether the debt might have survived.

[53] In September 2001, National Life pleaded that Mr. Brine incurred the debt by fraud or misappropriation while he was a fiduciary for Industrial Alliance, so the debt would have survived the discharge by s. 178(1)(d). As noted earlier, in closing argument to Justice Bourgeois, National Life abandoned its claim under s. 178(1)(d). The judge found that Mr. Brine had not acted fraudulently and held that he was not a fiduciary. National Life's Notice of Appeal does not include a ground that the Court of Appeal should overturn these findings. Given National Life's abandonment of the issue in the trial court, no such ground could be tenable.

[54] Section 178(1)(d) is a dead issue. The Supreme Court's Order of June 8, 2000, that permitted National Life to commence its action under s. 178(1)(d), is spent.

[55] Section 97(3) of the *Bankruptcy and Insolvency Act* governs set-offs:

> 97(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting fraud or fraudulent preferences.

Section 97(3) relates to debts and receivables during a bankruptcy. Mr. Brine's entitlement to post-bankruptcy benefits was contingent on his continuing disability after the bankruptcy. His post-discharge disability benefits were not ascertained or unconditional at the time of his bankruptcy. So his entitlement to post-discharge disability benefits was not a receivable of his trustee. Section 97(3) does not entitle National Life to reduce disability benefits that are payable after Mr. Brine's discharge from bankruptcy.

[56] Simply put, National Life's claim for Mr. Brine's pre-bankruptcy debt for the overpayments was extinguished by Mr. Brine's discharge from bankruptcy. After his discharge, National Life could no longer reduce Mr. Brine's ongoing post-bankruptcy disability benefits with what remained of that pre-bankruptcy debt. By improperly reducing Mr. Brine's post-bankruptcy benefits, National Life breached the contract by underpaying the benefits due under the Policy.

[57] The judge (¶ 301-3) quantified contractual damages at $62,036.81. Our comments on quantum are these.

[58] The $62,036.81 came from National Life's proof of claim to the trustee in bankruptcy. The proof of claim said that Mr. Brine owed $62,036.81 as of July 30, 1999. National Life's Ms. Jako attached to the Proof of Claim an affidavit dated August 19, 1999, stating:

> 9. Based on the information contained in Brine's Income and Expense Statement, National Life calculates the amount of the overpayment is $88,274.00, based on payments received over 38 months at $2,323.00 per month.

> 10. Since October 1, 1998, National Life has not paid benefits in the amount of $26,237.19, resulting in a net overpayment as of today's date in the amount of $62,036.81.

[59] National Life's factum to this Court points out an arithmetic error by the judge:

> 61. In this case, the breach by the Appellant was the discontinuance of all benefit payments on October 1, 1998. Application of Her Ladyship's interpretation would have resulted in a reduction of the Monthly Income Benefit paid from October 1, 1998 until the Respondent reached age 65, (which is 186 months and not 292 months as Justice Bourgeois calculated at para. 297 of the Decision: AB vol. 1, p. 157). The amount of the reduction would have been $534.98 per month (and not $342.00 per month as Her Ladyship suggested at para. 297 of the Decision, *supra*).

National Life submits that, as the full $62,036.81 would have been set off eventually, at $534.98 monthly, Mr. Brine has suffered no loss. We agree that the set off should have been $534.98 monthly before Mr. Brine's discharge from bankruptcy. But we disagree that the quantum of damages is excessive.

[60] From October 1, 1998 through Mr. Brine's bankruptcy discharge on May 1, 2000, the total set off (using the *Pro Rata* clause as the judge directed) should have been 19 (months) x $534.98 = $10,164.62. Had that amount been set off, against the baseline $88,274.00 in Ms. Jako's affidavit, the outstanding debt owed by Mr. Brine at the date of his discharge from bankruptcy would have been $88,274.00 less $10,164.62 = $78,109.38. After the discharge, National Life was not entitled to set off this $78,109.38 against ongoing disability benefits. By August 2003, National Life had set off the full amount. So Mr. Brine lost $78,109.38. We prefer this approach to the judge's more diffuse analysis that led to the quantum of $62,036.81 (¶ 301-3).

[61] There is no cross-appeal to request this Court to raise the judge's award from $62,036.81 on this head of damages. The Court of Appeal may not determine an un-appealed ground of appeal: *R. v. Mian*, [2014] 2 S.C.R. 689. Accordingly, we dismiss National Life's ground of appeal on this point, and the award remains at $62,036.81.

2. Duty of Good Faith

[62] First we will address National Life's argument that the judge applied the wrong test. Next we discuss Mr. Brine's cross-appeal that two additional items breached the duty of good faith. Last will be National Life's submissions that the judge erred in her identified bases for finding that National Life breached the duty.

(a) The Test

[63] National Life cites the following passage from *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3:

> 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. In this respect, we respectfully part company with Finch, C.J.B.C. who, in awarding punitive damages, characterized Sun Life's concession that Ms. Fidler was entitled to benefits as "the civil equivalent of [a] 'guilty plea'" (para. 78). *The question instead is whether the denial was the result of the overwhelming inadequate handling of the claim, or the introduction of improper considerations into the claims process.* [Emphasis added]
>
> 72 Ultimately, each case revolves around its own facts. As O'Connor J.A. stated in *702535 Ontario*:
>
> > What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim. [para. 30]

[64] National Life says Justice Bourgeois did not specifically address whether its handling of Mr. Brine's case was "overwhelmingly inadequate" or whether there was an "introduction of improper considerations into the claims process".

[65] In our view, Justice Bourgeois did not mistake the test.

[66] The judge (¶ 189-192) reviewed the authorities. Later she began her analysis by agreeing with National Life's caution:

> [266] As a starting point, I acknowledge and agree with the position advanced by National Life that not every breach of a "peace of mind" contract of insurance,

> or every mis-step shown to have occurred will constitute a breach of the duty of utmost good faith. The Court must be cautious to not peer through the critical glasses which hindsight may tempt one to wear. In assessing National Life's conduct, the Court must be concerned with why a decision was made or a position advanced, and the information upon which such was based at the time. It is further important to articulate that the duty of utmost good faith extends over the duration of the life of a policy. Although considerations such as privilege may arise once litigation is commenced, the fact that a legal claim has been filed does not serve to remove or lessen the duty to act in good faith.

[67] In *Fidler*, ¶ 63, the Chief Justice and Justice Abella for the Court said that "the legal standard to which Sun Life and other insurers are held is correctly described" by Justice O'Connor in *702535 Ontario Inc. v. Lloyd's London Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at ¶ 29-30, which read:

> 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.
>
> 30 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.

Justice Bourgeois (¶ 189) described as "particularly helpful" Justice O'Connor's description of the duty in ¶ 27-32 of *702535 Ontario Inc.*

[68] Justice Bourgeois (¶ 192) referred to the summary of the law in *Kings Mutual Insurance Co. v. Ackerman*, 2010 NSCA 39, ¶ 37, which stated:

> ...one thing that can lead to a breach of the duty of good faith and an award of punitive damages is the denial of a claim which resulted from the overwhelmingly inadequate handling of a claim; *Fidler, supra*, para. 71.

[69] Importantly, the judge's reasons show that, in her view, National Life clearly did not act fairly in handling several aspects of Mr. Brine's claim. She carefully recounted the evidence and identified what gave her great difficulty. She cited the "reasonable standard", mentioned by Justice O'Connor, to dismiss aspects of Mr. Brine's submission that National Life had acted in bad faith. As we will discuss,

the judge held the view that National Life introduced improper considerations into the management of Mr. Brine's claim. That responded to a component of the test in *Fidler*, ¶ 71. The judge did not consider her conclusion – that National Life breached its duty - was a close call. Though she did not use the words "overwhelmingly inadequate", essentially she found that National Life's handling of the claim over a span of years failed that standard.

[70] The judge did not err in formulating the test.

[71] We turn to the judge's application of the test. First are Mr. Brine's grounds of cross-appeal that the judge should have identified two additional breaches of National Life's duty of good faith.

(b) National Life's Allegation of Fraud

[72] In the bankruptcy, National Life claimed that Mr. Brine's debt for the overpayment was excluded under s. 178(1)(d) because Mr. Brine was a fiduciary and the debt arose from "fraud, embezzlement, misappropriation or defalcation."

[73] After Mr. Brine's discharge from bankruptcy, National Life filed its 2001 lawsuit that led ultimately to the decision under appeal. National Life's pleadings tracked the language of s. 178(1)(d). National Life withdrew its allegations of fraud and misappropriation only during closing arguments before Justice Bourgeois.

[74] At the trial before Justice Bourgeois, Mr. Brine contended that National Life's allegations of fraud and misappropriation constituted bad faith.

[75] The judge disagreed:

> [290] National Life has made allegations of wrongdoing against Mr. Brine, which argue a breach of the duty of utmost good faith. These allegations are contained both in the pleadings and in documentation in support of National Life's application to bring an action notwithstanding his bankruptcy. Notwithstanding that the Court has found that Mr. Brine did not act in a fraudulent manner, the evidence available to National Life was such that making such allegations was not outside the reasonable range of positions available to an insurer. The Court has concerns that during that time period the insurer preferred to believe Mr. Brine, despite his known mental capacity, purposefully withheld information based upon its file review. I cannot conclude such amounts to bad faith. …

[76] On this appeal, Mr. Brine submits that the judge erred. He says that National Life's allegations of fraud and misappropriation did not have a reasonable basis in fact and the insurer did not conduct any investigation on the matter.

[77] The judge found that making the allegations in its 2001 Statement of Claim "was not outside the reasonable range of positions" available to National Life. There is evidential support for the judge's finding. In the circumstances, when it issued its Statement of Claim, National Life had a reasonable basis for its belief that Mr. Brine had withheld information from it concerning his receipt of CPP and PSSA benefits.

[78] This is a factual matter. The judge made no palpable and overriding error. We dismiss this ground of Mr. Brine's cross-appeal.

(c) National Life's Interpretation of the Pro Rata Clause

[79] Mr. Brine's cross-appeal asserts that the judge erred by not characterizing National Life's interpretation of the *Pro Rata* clause, respecting the timing for recovery of the overpayments, as a breach of its duty of good faith. The judge (¶ 268) said the insurer's position was "not unreasonable or arbitrary in light of the policy provision in question. It was reflective of a possible interpretation of the policy."

[80] According to Mr. Brine, the test is not whether the interpretation was "possible", but whether it was "fair and reasonable": *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, at ¶ 55, ¶ 59-71, *Fidler*, at ¶ 63 and *702535 Ontario Inc*. He says the judge applied the wrong test.

[81] The judge repeatedly cited the principle from the authorities that the insurer must act "reasonably". Her reasons said National Life's interpretation of the *Pro Rata* and Temporary Reductions provisions was "not unreasonable". She did not misapply the test. We dismiss this ground of Mr. Brine's cross-appeal.

[82] Next are the judge's three bases for ruling that National Life breached its duty of good faith, all challenged by National Life.

(d) Discontinuance of Rehabilitation Services

[83] The judge cited National Life's discontinuance of rehabilitation services.

[84] First, a factual summary.

[85] The Policy did not oblige the insurer to make rehabilitation services available to its insured. However, National Life decided to involve a rehabilitation counselor because of Mr. Brine's young age and the possibility that he may be able to return to work. In a December 1, 1995 letter to Mr. Brine, National Life advised that such services would be provided to assist him with his "efforts to return to the workforce, where practical".

[86] Dr. Rosenberg, Mr. Brine's treating psychiatrist, was not consulted by National Life about the commencement of rehabilitation services for his patient. In his first report in relation to Mr. Brine to National Life, which was dated October 6, 1995, Dr. Rosenberg stated:

> ...His sleep is non-restorative, his energy and ambition are dissipated; his concentration is constantly preoccupied with matters relating to his dismissal from work. He cries on a daily basis, has had vague thoughts of suicide, and markedly increasing irritability. He views his future as being bleak. ... His estimate is that he is functioning at a level of 40% of his normal, with which I would concur. ...

[87] Dr. Rosenberg's November 27, 1995 report said that "[t]he prognosis for most depressive illness is good to excellent". His May 28, 1996 report said:

> The prognosis for Mr. Brine's major depressive episode is still good to excellent, although I am unable to provide a time frame regarding improvement to a point where he will be able to return to the workplace. Currently, Mr. Brine has a GAF (Global Assessment of Functioning) of 55-60, with moderate symptomatology of depression and moderate difficulty in social and occupational functioning. When Mr. Brine's GAF is improved to a level of at least 70-80, it would be appropriate to consider rehabilitation efforts and a possible return to the workplace. However, at this time, it is felt that Mr. Brine's symptomatology still is sufficient enough to prevent a return to the workplace.
>
> [Emphasis added]

[88] In her report to the insurer dated January 22, 1996, rehabilitation counsellor Suzanne Azzie recounted her meeting with Mr. Brine and his wife, and repeated Dr. Rosenberg's view at that time that Mr. Brine was functioning at only 30% of capacity and unable to undertake any kind of employment. She indicated that she would maintain a weekly follow-up with Mr. Brine, which she did by telephone. She also met with him in May 1997 when he was in Ontario for the hearing before

the Human Rights Commission. Mr. Brine testified that he was buoyed by the involvement of this well-respected rehabilitation specialist.

[89] Ms. Azzie sent periodic updates to National Life. Her last report dated July 11, 1997 said that Dr. Rosenberg had recently advised her that Mr. Brine's condition was not getting better. Dr. Rosenberg's Attending Physician's Initial Long-Term Disability Benefits Statement dated July 29, 1997, which National Life received in December 1997, noted that Mr. Brine then had a GAF score of 60-65. He never advised National Life that Mr. Brine had reached a GAF of 70-80.

[90] In June 1998, thirty months after rehabilitation had begun, National Life suspended Ms. Azzie's rehabilitation services to Mr. Brine. Ms. Jako testified that she had reviewed his entire file, including medical reports, and suspended those services until she had more information on his condition. National Life required Mr. Brine to attend an independent medical examination with Dr. Allan D. Peterkin in Ottawa. His August 11, 1998 report gave Mr. Brine's GAF as 60 to 65, and concluded with this summary:

> From a strictly psychiatric point of view, Mr. Brine's symptoms do not prevent him from working at this time. He is rageful but not severely depressed or suicidal and there is no history of psychosis or severe anxiety disorder. The absence of any work or re-training challenge may indeed worsen Mr. Brine's chronic rage symptoms as he finds himself ruminating about the workplace on a daily basis. Ongoing counselling with a maximizing of his medical treatment and decreasing of his alcohol intake may assist him in working through his anger in such a way that would sustain a return to the workplace.

[91] After receiving the Peterkin Report, National Life terminated the rehabilitation services.

[92] Justice Bourgeois found that National Life had breached its duty of good faith. The following passages encapsulate the judge's reasoning:

> [274] In my view, National Life cannot escape its obligation to manage in good faith the provision of this benefit, just because it was not obligated to provide it in the first instance. National Life chose to provide rehabilitation services. It chose to provide such services contrary to the recommendation of Dr. Rosenberg. The duty of utmost good faith attaches to its management of this benefit. Ms. Jako made the decision to suspend Mr. Brine's rehabilitation services, and further decided not to subsequently re-instate them. As referenced earlier, the Court has concern with respect to her evidence regarding her rationale for these decisions.

[275] …If Mr. Brine had no reasonable chance of returning to work, she [Ms. Jako] testified the continuation of rehabilitation services would be unwarranted. …

[276] …What elicits concern however is the "last" Rosenberg report Ms. Jako repeatedly pointed to as justification for suspending rehabilitation services and her view that Mr. Brine was not improving sufficiently to participate in rehabilitation services. That report was dated July 30, 1997, nearly 11 months prior to suspending Ms. Azzie's services. There was no current medical information on file as to Mr. Brine's actual condition in June of 1998. None was sought from Dr. Rosenberg prior to suspending services, nor was Ms. Azzie consulted. Instead, the Peterkin IME was requested.

[277] Dr. Peterkin did not opine that Mr. Brine was incapable of returning to work. To the contrary, he was of the view that his present condition did not prevent him from working. That was the very issue on which Ms. Jako testified she wanted an objective independent opinion, in order to decide whether to continue with rehabilitation services. Despite the opinion saying Mr. Brine was capable of returning to work, Ms. Jako did not re-instate rehabilitation services.

[278] Challenged in cross-examination, Ms. Jako provided two explanations for not acting on the very opinion she had sought to obtain. Firstly, the list of treatment recommendations made by Dr. Peterkin was so onerous; she did not feel it was "fair" to expect Mr. Brine to attempt a return to work while implementing such treatment. Secondly, she testified she became aware shortly thereafter that Mr. Brine had qualified for CPP, and in such circumstances claimants never return to work. …

…

[282] With respect to Ms. Jako's explanation that rehabilitation was not re-instated due to Mr. Brine's receipt of CPP benefits, I cannot accept such as a valid rationale for concluding Mr. Brine was incapable of returning to work, and thus rehabilitation was not warranted. Firstly, Ms. Jako did not have access to the medical information which supported the successful CPP application. Secondly, such a finding was contrary to the very recent opinion of Dr. Peterkin. Finally, National Life made no attempt to discuss with Mr. Brine whether he would want to participate in rehabilitation notwithstanding his receipt of CPP benefits.

[283] …Ms. Jako acted on obviously outdated medical information from Dr. Rosenberg and made no attempt to collect current information as to Mr. Brine's status or the advisability of stopping rehabilitation once it had been started. Upon receipt of the Peterkin report, Ms. Jako ignored the very opinion for which she had suspended rehabilitation in order to obtain. Again, she forged ahead with her own view, without seeking clarification or important input from those more suited to offer insight. Ms. Jako's handling of the above constituted a breach of National Life's duty of utmost good faith to their insured.

[93] Under the heading "Long-Term Disability Benefit", the Policy's "Rehabilitation" provision spoke of a rehabilitation program to be "approved in advance by the Insurer". But the provision did not specify how or when National Life may terminate such an approved rehabilitation service. National Life says it was under no obligation to approve rehabilitation in the first place. So how, asks National Life, may its discontinuance of the service be in bad faith?

[94] In *Bhasin*, the Supreme Court of Canada expanded the implied duty of good faith from insurance, and similar implied contractual duties from other particular contexts, into a general contractual duty. Justice Cromwell for the Court said:

> [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: [citing *Fidler* and *702535 Ontario Inc.*]. …
>
> …
>
> [65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. …
>
> …
>
> [93] A summary of the principles is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual relations.

[95] *Bhasin*'s ruling involved an implied contractual duty of honest dealing. At issue here is the insurer's implied contractual duty of good faith. *Bhasin* makes it clear that these sibling duties stem from the same root – what Justice Cromwell termed "the organizing principle of good faith that underlies and manifests itself in

various more specific doctrines governing contractual performance" (¶ 63 and also ¶ 55 and 93). From that common perspective, *Bhasin* helps us to understand the scope of the insurer's implied duty.

[96] In *Bhasin*, the contract literally gave Can-Am unfettered discretion to terminate the contract by notice. Article 3.3 said that the contract would renew

> unless [either party] *notifies the other in writing* at least six months prior to the expiry of the Initial Term or any renewal Term that the notifying party desires expiry of the Agreement, *in which event the Agreement shall expire* at the end of such Initial Term or Renewal Term, as applicable. [quoted in *Bhasin*, ¶ 95]
>
> [emphasis added]

Can-Am submitted that Article 3.3 unambiguously allowed no scope to imply any restriction on Can-Am's authority to terminate by notice (see ¶ 31).

[97] Similarly, National Life says that the Policy did not restrict its unfettered discretion whether to provide, and therefore terminate, Mr. Brine's rehabilitation services.

[98] In *Bhasin*, the trial judge, to whom the Supreme Court deferred for the facts, found that Can-Am had acted dishonestly in the exercise of its contractual discretion to terminate by notice. From this, the Supreme Court of Canada held that Can-Am breached its implied duty, and owed damages. Justice Cromwell said:

> [103] … I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

[99] As with any implied contractual term, there may be an issue whether an express term excludes the implication. *Bhasin*'s outcome is helpful on that point. *Bhasin*'s contract was more explicitly directive than National Life's Policy. Article 3.3 expressly permitted Can-Am to send a notice of termination and said that, after the notice, "the Agreement shall expire". If Can-Am's literally unfettered power to terminate had been a complete defence, Mr. Bhasin's claim would have failed. Yet Can-Am breached its implied duty. The contract's explicit acknowledgement of the discretion and its directed consequence did not exclude the implied standard that must accompany the exercise of the discretion.

[100] Similarly National Life's bad faith - if we uphold the judge's findings in that regard - pertains to whether it breached its implied contractual duty of good faith to Mr. Brine.

[101] *Bhasin*'s broad organizing principle and its outgrowth duties do not just tack an extra sanction onto the breach of an explicit contractual term. Neither are the duties of honest dealing in *Bhasin*, or good faith in the insurance context, just executive summaries of the contract's written terms. They are independent implied contractual obligations that derive from the existence of the contract. Whether National Life breached its duty of good faith is not predicated on the condition precedent that National Life breached an explicit provision of the Policy.

[102] This view is supported by the Ontario Court of Appeal's ruling, on an interlocutory appeal, in *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118. The insured sued the insurer for breach of the duty of good faith in the administration of the policy. The judge of first instance struck the insured's claim because "it cannot be a breach of good faith and fair dealing to administer insurance policies in accordance with their terms" (see ¶ 12 of the OCA's decision). The Court of Appeal reversed the ruling, noting:

> 34 As for the first breach – that Sun Life failed to administer the policies in accordance with MetLife's misrepresentations – neither the motion judge nor the respondents produced a Canadian authority for the proposition that an insurer who has complied with the express terms of the contract cannot have breached its duty of good faith and fair dealing. The plaintiffs, however, point to *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, a case involving a franchisor-franchisee relationship, in which this court held, at para. 71, that "the fact that contractual terms are ultimately complied with, does not mean that there has been no breach of the duty of good faith". As this proposition may apply in the insurance context, and as its scope has yet to be determined, this first branch of the plaintiffs' duty of good faith claim could possibly succeed.

[103] We turn to Justice Bourgeois' application of the test. *Fidler*, ¶ 63, 71-72, and its adopted passage from *702535 Ontario Inc.*, pose the questions: Did National Life deal with Mr. Brine's claim "fairly?" Was its handling of rehabilitation "overwhelmingly inadequate?" Did National Life introduce "improper considerations". The insurer's duty to act fairly applies to "the manner in which it investigates and assesses the claim and to the decision whether or not to pay it" (*Bhasin*, ¶ 55, *Fidler*, ¶ 63).

[104] Justice Bourgeois found that National Life's assessment of Mr. Brine's rehabilitation potential was influenced by improper considerations. She found that Ms. Jako disregarded the medical evidence that rehabilitation could assist Mr. Brine to return to work despite that National Life earlier had identified that medical evidence as pivotal. Without asking Mr. Brine, Ms. Jako assumed that, because

Mr. Brine qualified for CPP, he would never return to work and rehabilitation was pointless. The judge said "I cannot accept such as a valid rationale". Essentially the judge found that Ms. Jako applied an improper consideration.

[105] There is no palpable and overriding error in the judge's findings. Given these facts, in our view the judge was entitled to conclude that improper considerations generated National Life's decision to terminate rehabilitation. The provision of rehabilitation, though not mandated by the Policy, was an element of National Life's assessment of Mr. Brine's claim to which the duty of good faith attaches.

[106] We dismiss this ground of National Life's appeal.

(e) Late Production of Rubens Report

[107] In 2002, National Life asked Mr. Brine to attend a psychiatric assessment by Dr. Mark Rubens. Dr. Rubens' report included:

> 9. The patient's occupational future, of course, also remains uncertain. Potentially, again, some changes might be made in this area (providing the patient with rehabilitation counselling, for example, and directing him into other possible areas of work). However, the availability of such counselling, and the patient's willingness to participate in such a process in an open-minded and co-operative way has to be considered somewhat doubtful. Again, there is potential for improvement, but the actual circumstances at present are not favourable.
>
> 11. I believe the impairments I have summarized here would also be relevant to any occupation I could imagine a person of Mr. Brine's experience and maturity being able to realistically work at. As I shall discuss presently, however, I think that this patient can and should at this point begin to expand his activities in various ways, and that such activities can at this point begin to include activities relevant to possible future occupational involvements. To define these matters more specifically, however, a transferable skills analysis would be required, as well as the involvement, perhaps for a somewhat prolonged period of time, of a rehabilitation counsellor or specialist.

Dr. Rubens' Summary included:

> ... The identification of possible alternative occupations for this patient by means of a formal transferable skills analysis, and involvement with a rehabilitation specialist over a relatively prolonged period of time would be helpful, but may not

> occur in practical terms. This patient is suffering from a psychiatric illness of moderate to severe intensity. This affects his capacity to participate effectively in rehabilitation and occupational activities. The prognosis, both clinically and occupationally, remains uncertain as there are as yet many unpredictable elements in this patient's ongoing illness and future course.

[108] National Life did not contact Dr. Rubens to clarify his recommendations and reservations. Neither did it contact Mr. Brine to assess his willingness to participate in rehabilitation services.

[109] National Life did not provide a copy of the Rubens Report to Mr. Brine for ten years – *i.e.*, until the week before trial. In this regard, the judge wrote:

> [285] Closely related to the decisions surrounding rehabilitation services is National Life's request for and response to the Rubens report. … that report, received by National Life in April of 2003, was not disclosed to Mr. Brine until the week prior to trial. The Court heard no evidence as to why that report was requested, nor was the letter of request to Dr. Rubens provided which may have shed some light on that point. The report does provide some assistance in that Dr. Rubens notes he was asked by the referral source to comment on "the severity of Mr. Brine's depression and whether the effect of it, or any other condition, prevents him from performing his own or any other occupation" as well as whether Mr. Brine could benefit from "anger management".
>
> [286] …the Rubens report contains statements relevant to whether or not rehabilitation services could have been of assistance to Mr. Brine. ... On the surface, the comments do appear to be generally supportive of rehabilitative efforts being implemented, subject to Mr. Brine's openness to participating in such efforts. The problem is that the Court did not have the opportunity to hear from Dr. Rubens directly on that issue, and cannot reach a conclusion one way or another, as to what, if anything, he was recommending.
>
> [287] The late disclosure of the Rubens report had several consequences. Mr. Brine's counsel was deprived of the opportunity to inquire further as to Dr. Rubens' opinion, and to have Dr. Rosenberg subsequently comment on same in a more meaningful way than was afforded to him. Mr. Brine was deprived of the opportunity to have Dr. Rubens' comprehensive recommendations considered in a timely fashion by his own treating physician. Mr. Brine was deprived of the opportunity to utilize Dr. Rubens' views as support for his request to re-initiate rehabilitation services.
>
> [288] Mr. Brine was entitled to be provided with a copy of the Rubens report. It is a certainty that if his counsel had sought an order compelling disclosure, it would have been granted. Counsel's failure to "push the envelope" in that regard

> did not however, derogate from National Life's obligation of timely disclosure. Holding the report in excess of a decade prior to disclosing same is, on its face, inconceivable. No explanation for this omission was offered. None. Not that it got lost. Not that there was a mistaken belief it had been disclosed. Not that there was a view held until the eve of trial that it was subject to a claim of privilege. None.

[110] The judge held that National Life's failure to produce the Report breached its duty of good faith:

> [289] At this juncture, the Court could stop and simply find that the failure to disclose the Rubens report in a timely fashion constituted a breach of National Life's duty of utmost good faith. More in my view is required. Why did National Life fail to disclose the Rubens report? Based on the evidence of National Life's approach to this matter, and the lack of any form of reasonable explanation, I conclude that the report was purposefully withheld as it, at a minimum, would have triggered renewed requests for rehabilitation, and at worst, provided evidence supportive of Mr. Brine's claim to provide such services. National Life did not want to face the consequences which would have arisen from a timely disclosure in April of 2003. Instead, it chose the latest possible opportunity to disclose, days before trial, effectively preventing Mr. Brine from exploring the possible ramifications of the report.

[111] National Life argues that Mr. Brine did not plead its failure to produce the Rubens Report, so it should not have been considered as a particular of bad faith. National Life submits that parties may not raise un-pleaded issues.

[112] Mr. Brine pleaded that National Life breached its duty of good faith. He did not plead the late production of the Rubens report as a particular. However, the significance of the Rubens Report only became apparent when National Life produced it just days before the trial, and after the parties had agreed to final amendments to the pleadings. Even then, National Life counsel or witnesses might have given a reasonable explanation for the delay during the trial. Only when its representatives were cross-examined did Mr. Brine and his counsel realize that no explanation was offered.

[113] In these circumstances, it is our view that the judge did not err by considering, as a factor in her good faith analysis, National Life's unexplained failure to disclose the Rubens Report on a timely basis.

[114] As to the substance of the breach, we repeat the judge's strong findings:

> [289] …the report was purposefully withheld as it, at a minimum, would have triggered renewed requests for rehabilitation, and at worst, provided evidence supportive of Mr. Brine's claim to provide such services. National Life did not want to face the consequences which would have arisen from a timely disclosure in April of 2003. Instead, it chose the latest possible opportunity to disclose, days before trial, effectively preventing Mr. Brine from exploring the possible ramifications of the report.

[115] There is no basis to say that these findings are palpably wrong. Given the findings, this is not just neglectful tardiness. It is a deliberate attempt by the insurer to handicap its insured. The judge's findings on the Rubens Report and the termination of rehabilitation services mutually reinforce the judge's findings that National Life introduced improper considerations into the handling of Mr. Brine's rehabilitation.

[116] We dismiss National Life's ground of appeal on the Rubens Report.

[117] We note that National Life's appeal counsel were not involved during the trial.

(f) T4 Slips for Disability Benefits

[118] National Life and Mr. Brine differed diametrically on the tax treatment of his disability benefits. The insurer classified them as taxable and issued T4 slips showing them as such, except during the claw-back period which ended in 2003. Based on legal and accounting advice, Mr. Brine considered them non-taxable and did not claim them as income. This led to reassessments by the Canada Revenue Agency.

[119] The judge summarized the events:

> [292] In 2006, Mr. Brine successfully appealed a ruling of the Minister of National Revenue, the substance of which asserted that the income received as disability benefits from National Life in the 2003 tax year, should have been claimed as taxable income. Mr. Brine disagreed, arguing the benefits were non-taxable and the Tax Court agreed with him. Ms. Antonini testified National Life was aware of that decision. Notwithstanding my concerns regarding the overall reliability of her evidence, I accept that National Life knew, or ought to have known about the Tax Court ruling in 2006. It continued to issue Mr. Brine T4 slips showing the benefits as being taxable income which prompted continued disputes for Mr. Brine with Revenue Canada. Based on the ruling, he did not claim the income, but because a T4 slip was issued, Revenue Canada made repeated contacts with him inquiring as to his failure to claim, and again re-

> assessed his income in the 2009 taxation year to include the income issued by National Life. This prompted yet another appeal to the Tax Court in 2010 on the identical basis as the 2006 matter. Mr. Brine was again successful. National Life continued to issue T4 slips showing the disability benefits as taxable.

[120] Justice Bourgeois found that National Life's treatment of the issue breached its duty of good faith. She reasoned:

> [293] National Life submits it did not alter its approach to the taxability of Mr. Brine's benefits post-2006 because he had never asked it to do so, and it took the view, according to the evidence of Ms. Antonini, that based on information from the Treasury Board, that the 2006 ruling of the Tax Court was incorrect. At this point, given Mr. Brine's prior communications, National Life was well aware of Mr. Brine's views regarding the taxability of his benefits, as well as the fact that he found dealing with that issue an added stressor. …
>
> [294] The Court was presented with no evidence of substance as to National Life's attempts to seek clarification from the Treasury Board, or from any other appropriate source, with respect to any direction it may offer regarding what response, if any, to the Tax Court decision was warranted. There is no evidence as to what information, if any, may have been received. No such evidence was contained in the National Life file materials relating to Mr. Brine's claim. What is certain is that National Life had in 2006 an unappealed decision of the Tax Court of Canada which found the disability payments it was paying to Mr. Brine to be not taxable. What is certain is National Life knew Mr. Brine had earlier taken issue with National Life issuing T4 slips classifying the disability benefits as taxable. What is certain is that National Life knew its insured was disabled due to depressive illness and he had advised that this matter added to his mental stress.
>
> [295] I agree entirely with the submissions of National Life's counsel that it is not responsible for making a determination as to the taxability of benefits paid under the policy. In my view, however, in light of the circumstances known to it in 2006, National Life had an obligation to pro-actively ascertain whether it should alter its previous approach to classifying the benefits as taxable. It was, as part of its obligation to manage Mr. Brine's claim fairly, required to either implement the Tax Court's decision, or present a very good reason why it did not. Ms. Antonini's evidence that contact was made with the Treasury Board, is questionable in terms of its reliability, and even if believed, falls far short of justifying why National Life ignored a court decision directly related to the benefits it was issuing. In my view, National Life breached its duty of utmost good faith by failing to meaningfully address and consider whether it should continue to classify Mr. Brine's disability benefits as taxable income following the 2006 Tax Court decision.

[121] In the Court of Appeal, National Life points out that Mr. Brine first raised the issue of taxability in 1998, that in 1999 National Life contacted the Treasury

Board, and the Treasury Board then advised that the benefits were taxable. According to National Life, nothing changed before it received the 2006 Tax Court decision. National Life alleges that then, as in 1999, it consulted the Treasury Board.

[122] The judge found otherwise. She said there was no substantive evidence that National Life consulted or received advice from the Treasury Board after the 2006 Tax Court Decision.

[123] National Life also submits that it was not responsible for determining the taxability of benefits paid under its policies. This, it maintains, means that the judge erred by stating (¶ 295) that its obligation to manage Mr. Brine's claim fairly required it to "pro-actively ascertain whether it should alter its previous approach to classifying the benefits as taxable" and to "implement the Tax Court decision".

[124] The submission misses the judge's point. Nobody suggested that National Life should have made a tax ruling. That was the Tax Court's job. If there had been evidence, for example, that after the 2006 Tax Court ruling, the Treasury Board had instructed that ruling was under appeal and National Life should continue as before until final resolution in the courts, then the judge would not have found a breach of the duty of good faith. But there was no such evidence. From the evidential void, the judge inferred that National Life succumbed to inertia.

[125] National Life cites the judge's use of the word "proactively", and suggests that its duty does not require affirmative action. We disagree that the issue turns on such a distinction. This is not mere nonfeasance. National Life issued tax slips that described Mr. Brine's disability benefits as taxable. Effectively, National Life disagreed with the Tax Court. Ms. Antonini testified that she knew the Tax Court decision was not appealed, and that National Life's taxable treatment of the benefits stressed Mr. Brine. In the judge's view, the insurer's conduct was not "fair" management of a peace of mind contract.

[126] There is no palpable and overriding error in the judge's assessment of the evidence or inferences, or in her finding that National Life's actions in relation to the 2006 Tax Court decision amounted to a breach of its duty of good faith.

(g) Conclusion – Breach of Duty of Good Faith

[127] The judge found that National Life's breach of the duty of good faith included the discontinuance of rehabilitation services, ten-year delay in the provision of the Rubens Report, and treatment of taxability. We dismiss National Life's appeal against those findings.

[128] In addition, the judge said:

> [290] …Ms. Antonini's wanton disregard for the accuracy of her testimony, the goal of which was to paint Mr. Brine in a negative light, constituted bad faith.

[129] National Life's grounds of appeal do not challenge the judge's finding respecting Ms. Antonini in the context of the duty of good faith. National Life does challenge the judge's use of the credibility finding to support the punitive damages award. Later, we discuss Ms. Antonini's evidence in the context of punitive damages.

3. Damages for Lost Opportunity

[130] Mr. Brine submits that the judge erred by not awarding damages for his lost opportunity to return to the work force as a result of National Life's refusal to continue rehabilitation services.

[131] The judge's reasoning was:

> [304] Mr. Brine claims a host of other "calculable" damages, including loss of pension income, wage losses from 1999 forward and damages relating to the loss of his RRSP savings. The amount of the claims is significant. Both the pension and wage losses are based upon the premise that had Mr. Brine been provided with rehabilitation services by National Life, he would have successfully returned to work, and as a result accrued more pensionable service and a resulting greater pension income. No independent evidence was presented to the Court to support the pension calculations offered by Mr. Brine, nor the quantum of wages he asserts he would have earned upon a return to work. The calculations further appear to be based on an assumption that Mr. Brine could have returned to full time work with the federal government.
>
> [305] I have already concluded that National Life breached its duty of utmost good faith by arbitrarily discontinuing rehabilitation services and failing to properly assess whether re-initiating the service was warranted. To award the damages being sought by Mr. Brine however, the Court would need to conclude that if rehabilitation services were re-initiated in 1998, Mr. Brine would have

> returned to the workforce in a full-time capacity. I cannot reach that conclusion based upon the evidence before me. Because of the outstanding stressors in his life including his dispute with his former employer, Mr. Brine continued to suffer the disabling consequences of depressive illness. According to Dr. Rosenberg, this only lessened somewhat in 2004 which would have been the optimal time for rehabilitation services. His opinion was that if implemented then, Mr. Brine likely could have returned to the workforce in some capacity, but in Dr. Rosenberg's words "we will never know if he would have, because he was not given that opportunity".
>
> [306] I can readily conclude that if offered, Mr. Brine would have in 2004, and even earlier, willingly participated in rehabilitation efforts. He was not given that opportunity, despite his requests made to National Life. He was not given that opportunity despite both Ms. Jako and Ms. Antonini testifying that re-initiating rehabilitation would have been considered should new medical information become available. Given his skill set, and motivation, Mr. Brine would have, on a balance of probabilities, returned to work if rehabilitation services were offered to him in 2004. However, given his longstanding illness, including his "learned helplessness" it is not at all certain what degree of success Mr. Brine would have achieved. The Court cannot conclude he would have obtained full-time employment, or that it would have, as claimed by Mr. Brine, resulted in an annual income of $125,000. What Mr. Brine was deprived of was an opportunity which likely would have resulted in a return to the workforce in some capacity. The duration and nature of that employment is not ascertainable based on the evidence before the Court. The Court declines to make awards reflecting a loss of wages and pension benefits accordingly.

[132] Mr. Brine points out that the judge found that, had services been provided in 2004, he likely would have returned to work. He submits that the judge was then required to quantify the loss as best she could, even if ascertainment was difficult: *All-Up Consulting Enterprises Inc. v. Dalrymple*, 2013 NSSC 46 at ¶ 197 quoting from *Wood v. Grand Valley Rway. Co.* (1915), 51 S.C.R. 283 at 289, and *Wilson et al. v. Rowswell*, [1970] S.C.R. 865 at pp. 872-873. Based on his salary when his employment was terminated, his age (55) in 2004, etc., he estimates that his loss would have been over $20,000 per year for at least ten years.

[133] This argument overlooks the judge's statements (¶ 306), that follow those upon which Mr. Brine relies. The judge determined that the nature or duration of any employment Mr. Brine might have obtained was unascertainable from the evidence. Mr. Brine's disability benefits were 70% of his terminal salary of $73,000. To recover for his lost opportunity to return to the workforce, Mr. Brine had to provide evidence that his earnings would have surpassed his disability

benefits. Absent that evidence, there is no proven loss to quantify under this heading.

[134] Mr. Brine relies on *All-Up Consulting*, a commercial case with business losses after a helicopter was damaged, and *Wilson*, involving a lawyer's negligence in a real estate transaction. These are distinguishable. In both, there were firm findings that a loss had occurred.

[135] Causation of loss is a factual inquiry that is reviewed for palpable and overriding error: *Ediger v. Johnston*, [2013] 2 S.C.R 98, at ¶ 29. In *Kern v. Steele*, 2003 NSCA 147, at ¶ 56-58, this Court reviewed how a court is to assess damages for future loss and reiterated that the evidence must be "cogent evidence and not evidence which is speculative".

[136] The judge's findings are supported by the record, and bear no palpable and overriding error.

[137] We dismiss this ground of Mr. Brine's cross-appeal.

4. Contractual and Aggravated Damages for Mental Distress

[138] The judge concluded that Mr. Brine was entitled to $30,000 contractual damages for mental distress. She said:

> [308] …the law recognizes the availability of an award of general damages for mental distress arising for a contractual breach, as well as an award of aggravated damages where a plaintiff can establish mental distress as a result of an independent cause of action (see *Fidler, supra*). Mr. Brine is entitled to recovery on both grounds.
>
> [309] National Life breached the policy by not pro-rating the overpayment as required. The direct financial result of this breach was significant, and lasted nearly 5 years. This caused considerable financial strain and added stress to an individual already battling the effects of disabling depression. It most certainly had an impact on his deteriorating financial situation. I award general damages for mental distress arising from this breach in the amount of $30,000.00.

[139] The judge also awarded $150,000 aggravated damages for the following reasons:

> [310] I turn now to consider Mr. Brine's claim for aggravated damages. The Court has found that National Life has in several respects breached its duty of

> utmost good faith owed to Mr. Brine. He has suffered distress, anger and had his depression prolonged and worsened due to these failings. He has suffered intangible losses which although not calculable, are no less real. The impacts of National Life's bad faith have extended from the arbitrary suspension of rehabilitation benefits in June of 1998 to the week before trial, when it finally disclosed the Rubens report.
>
> [311] An insurer is not obligated to insulate their insured from harm at all cost. Often decisions are made which cause upset to those who believe they are entitled to benefits either denied or cancelled. Such acts, if taken reasonably and based upon a fair assessment of the materials in support of a claim, should not be subject to criticism. This is not such a case. National Life's decision to commence rehabilitation services, contrary to the opinion of his treating physician, followed by its arbitrary termination had a significant and long lasting deleterious impact on their insured. I accept Dr. Rosenberg's opinion that the termination of rehabilitation without explanation to Mr. Brine, gave rise to a "learned helplessness" on his part, which served to worsen and sustain his depression. Although Mr. Brine testified Dr. Rubens had advised him that his depression was legitimate and a source of disability in their meeting, he was deprived of fully being apprised of the opinion contained in his report. This impacted not only on the potential of implementing the treatment recommendations contained in the report, but also deprived Mr. Brine of exploring and re-initiating his requests for rehabilitation.
>
> [312] The Court has found that National Life's response to the 2006 Tax Court of Canada decision was a breach of its duty of good faith. I accept Mr. Brine's evidence that the continued receipt of T4 slips showing his benefits as taxable in the face of a court decision to the contrary was extremely upsetting and frustrating to him. This was only enhanced by the continued disputes with Revenue Canada as to why he was not claiming this income, and the required appearance in the Tax Court in 2010. For a mentally fit person, the hoops Mr. Brine found himself jumping through with Revenue Canada as a result of the classification of benefits not being changed by National Life post 2006 would be daunting. For a person suffering from disabling depression, the impact was significantly enhanced.
>
> [313] By virtue of National Life's bad faith conduct, Mr. Brine suffered significant distress and added loss. Given the extended time frame over which Mr. Brine suffered the consequences of National Life's wrongful conduct, and the severity of the consequences both emotionally and financially, I award aggravated damages in the amount of $150,000.

[140] To overturn a damages award, the appeal court must find that the trial judge applied a wrong principle of law, or the award was so inordinately high or low that it is a wholly erroneous estimate of loss: *Nance v. British Columbia Electric*

Railway Co. Ld., [1951] A.C. 601, as cited in *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, pp. 435-6.

[141] National Life and Mr. Brine each challenge the judge's award of $150,000 aggravated damages. National Life submits that, even if it breached its duty of good faith, the judge's awards of $30,000 and $150,000 were duplicative and, if aggravated damages were appropriate, the judge's quantum was excessive. Mr. Brine says that, given the serious and multiple acts of bad faith, the quantum is too low.

(a) Duplication

[142] We begin with National Life's submission. Its factum says:

> 111. …The aggravated damages were said to be appropriate because the Respondent's "suffered distress, anger and had his depression prolonged and worsened" … The consequences leading to the mental distress damages are described as "considerable financial strain" and "added stress" … One can certainly see overlap between the consequences leading to mental distress damages and the harm which is meant to be compensated by the aggravated damages award. Duplicative recovery must be avoided and it does not appear that the Learned Trial Judge adverted to that legal principle.

[143] National Life cites *Andrews v. Keybase Financial Group Inc.*, 2014 NSSC 31 where Wright J. awarded mental distress damages for breach of investment product contracts. He found that aggravated damages could be considered because there was a breach of fiduciary duty. But (¶ 210) he concluded that aggravated damages would be duplicative because "[I]t is the same injury for which compensation should only be awarded once."

[144] In Mr. Brine's case, both the mental distress and aggravated damages awards aimed principally to compensate Mr. Brine for the exacerbation of his diagnosed depression. But the judge carefully explained that the separate compensable breaches affected Mr. Brine's health differently. She held (¶ 309) that National Life's contractual breach, of not pro-rating its recovery of the overpayment, had a significant financial impact on Mr. Brine that lasted nearly five years. That in turn caused "considerable financial strain and added stress to an individual already battling the effects of disabling depression." In contrast, the aggravated damages aimed to compensate Mr. Brine for the distress, anger and exacerbation of his depression arising from National Life's approach to the T4 slips, termination of rehabilitation benefits and related withholding of the Rubens

Report with its comments on rehabilitation. According to the judge, the taxability issue had a separate financial impact on Mr. Brine that endured until benefits ceased in 2014 and resulted in persistent and prolonged conflict with Revenue Canada. Termination of his rehabilitation, she found, mired Mr. Brine in hopelessness.

[145] The judge parsed and quantified the separate contributions to Mr. Brine's mental suffering. These are factual findings for which there is no palpable error. Consequently, *Andrews* is distinguishable. There was no duplicative compensation to Mr. Brine.

(b) Contractual and Aggravated Damages

[146] Before discussing the submissions on quantum, we comment on the terminology used by the judge and the parties for the heads of damages that relate to Mr. Brine's mental distress.

[147] In *Fidler*, the Chief Justice and Justice Abella for the Court explained the relationship between contractual damages for mental distress and aggravated damages:

> 44 We conclude that damages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale* [(1854), 156 E.R. 145, [1843-60] All E.R. Rep. 461 (Eng. Ex. Div.)]: see *Vorvis* (*Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085]. The court should ask "what did the contract promise?" and provide compensation for those promises. … There is no reason why this should not include damages for mental distress, where such damages were in reasonable contemplation of the parties at the time the contract was made. …
>
> …
>
> 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. These questions require sensitivity to the particular facts of each case.
>
> 48 While the mental distress as a consequence of breach must reasonably be contemplated by the parties to attract damages, we see no basis for requiring it to be the dominant aspect or the "very essence" of the bargain. … Principle suggests 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. This is to state neither more nor less than the rule in *Hadley v. Baxendale*.

…

51 It may be useful to clarify the use of the term "aggravated damages" in the context of damages for mental distress arising from breach of contract. "Aggravated damages", as defined by Waddams (*The Law of Damages* (1983), at pp. 562-63), and adopted in *Vorvis*, at p. 1099,

> describ[e] an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.

As many writers have observed, the term is used ambiguously. The cases speak of two different types of "aggravated" damages.

52 The first are true aggravated damages, which arise out of aggravating circumstances. They are not awarded under the general principle of *Hadley v. Baxendale*, but rest on a separate cause of action — usually in tort — like defamation, oppression or fraud. The idea that damages for mental distress for breach of contract may be awarded where an object of a contract was to secure a particular psychological benefit has no effect on the availability of such damages. If a plaintiff can establish mental distress as a result of the breach of an independent cause of action, then he or she may be able to recover accordingly. The award of damages in such a case arises from the separate cause of action. It does not arise out of the contractual breach itself, and it has nothing to do with contractual damages under the rule in *Hadley v. Baxendale*.

53 The second are mental distress damages which do arise out of the contractual breach itself. These are awarded under the principles of *Hadley v. Baxendale*, as discussed above. They exist independent of any aggravating circumstances and are based completely on the parties' expectations at the time of contract formation. With respect to this category of damages, the term "aggravated damages" becomes unnecessary and, indeed, a source of possible confusion.

54 It follows that there is only one rule by which compensatory damages *for breach of contract* [emphasis in original] should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. They are not true aggravated damages awards.

> 55 The recognition that *Hadley v. Baxendale* is the single and controlling test for compensatory damages in cases of breach of contract therefore refutes any argument that an "independent actionable wrong" is a prerequisite for the recovery of mental distress damages. Where losses arise from the breach of contract itself, damages will be determined according to *what* was in the reasonable contemplation of the parties at the time of contract formation. An independent cause of action will only need to be proved where damages are of a different sort entirely: where they are being sought on the basis of aggravating circumstances that extend beyond what the parties expected when they concluded the contract. [Emphasis added]
>
> …
>
> 58 People enter into disability insurance contracts to protect themselves from this very financial and emotional stress and insecurity. An unwarranted delay in receiving this protection can be extremely stressful. Ms. Fidler's damages for mental distress flowed from Sun Life's breach of contract. …
>
> 59 The second question is whether the mental distress here at issue was of a degree sufficient to warrant compensation. Again, we conclude that the answer is yes. The trial judge found that Sun Life's breach caused Ms. Fidler a substantial loss which she suffered over a five year period. … His award of $20,000 seeks to compensate her for the psychological consequences of Sun Life's breach, consequences which are reasonably in the contemplation of parties to a contract for personal services and benefits such as this one. We agree with the Court of Appeal's decision not to disturb it.

[148] In *Fidler*, the trial judge had termed the $20,000 award for mental distress to be "aggravated damages": 2002 BCSC 1336, ¶ 22, 31. The Supreme Court of Canada affirmed the award but re-classified the $20,000 as contractual damages under *Hadley v. Baxendale*, not aggravated damages. *Fidler* emphasizes that all damages flowing from a contractual breach engage *Hadley v Baxendale*. As the insurer's duty of good faith is an implied term of the contract of insurance, damages for its breach follow *Hadley v. Baxendale*. Aggravated damages, according to *Fidler*, derive from a "separate cause of action – usually in tort". Damages for mental distress from an insurer's breach of its duty of good faith are not "true aggravated damages" as discussed in *Fidler*, ¶ 57.

[149] *Zurich Life Insurance Company Limited v. Branco*, 2015 SKCA 71 ["*Branco* – (CA)"], ¶ 134-142, 207-12 , partially allowing the appeal from *Branco v. American Home Assurance Co.*, 2013 SKQB 98 ["*Branco* – (QB)"] exemplifies the proper approach. The Saskatchewan Court of Appeal discussed contractual damages for mental distress. It did not discuss aggravated damages, despite that both insurers breached their duties of good faith.

[150] In *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, a wrongful dismissal case, Justice Bastarache for the majority reiterated the point:

> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. …

[151] *Fidler*, ¶ 63, says that punitive damages for breach of contract should stem from conduct that is "independently actionable", and that breach of the insurer's duty of good faith "will meet this requirement". This comment involved punitive damages. The comment did not alter *Fidler*'s earlier direction that compensatory damages for mental distress follow *Hadley v. Baxendale*'s test for compensatory damages. The comment in ¶ 63 does not denote the "separate cause of action" needed for aggravated damages.

[152] In Mr. Brine's case, the judge and counsel appear to have misunderstood *Fidler*'s statement in ¶ 63 to be a ruling that a breach of the duty of good faith is a "separate cause of action" for aggravated damages. That misconception continued during the submissions on the appeal.

[153] In *Fidler*, the Supreme Court was faced with a similar terminological error by the trial judge, who categorized the $20,000 award as "aggravated damages". The Chief Justice and Justice Abella simply corrected the terminology, then considered the merits of the submissions. We will do the same.

[154] To summarize, there is no separate – *i.e.*, non-contractual – cause of action against National Life. National Life's breaches of duty of good faith are impliedly contractual. So there can be no aggravated damages. Here the judge awarded $30,000 for mental distress and $150,000 for what she termed "aggravated" damages related to Mr. Brine's mental distress. We will treat these as one award of $180,000, and consider whether that quantum is too high or too low under the principles of *Hadley v. Baxendale*.

(c) Quantum

[155] National Life argues that the judge did not analyze the authorities before fixing the quantum for breach of the duty of good faith. It emphasizes that $150,000 is Nova Scotia's highest reported damages award for mental distress.

[156] It is worth noting that, at trial, the parties presented the judge with little guidance on quantum. National Life rested on its submission that it had not breached its duty of good faith. Its oral and written submissions did not address the quantum of damages.

[157] At the trial Mr. Brine requested "significant aggravated damages for mental distress". He relied heavily on *Branco* (QB). An injured welder sued Zurich Life Insurance Company Limited and American Home Assurance Company ("AIG") for benefits under two group insurance policies. Zurich's failure to pay monthly benefits for ten years was held to be a flagrant breach of good faith that resulted in significant distress. In the case of AIG, Mr. Branco suffered financial hardship and resulting stress as a result of malicious delays in payment "designed to leverage a reduced settlement of the claim." The trial judge ordered Zurich and AIG, respectively, to pay $300,000 and $150,000 for mental distress arising from their failure to pay disability benefits. Mr. Brine characterized his case as worse than in *Branco* and sought $500,000 in aggravated damages.

[158] After Mr. Brine's appeal was heard, *Branco* (QB) was significantly altered on appeal by *Branco* (CA). The Saskatchewan Court of Appeal found that the judge had made factual and legal errors, and substantially reduced awards for mental distress – from $300,000 to $30,000 against Zurich and from $150,000 to $15,000 in against AIG. Chief Justice Richards (¶ 139) observed that the trial judge's global award of $450,000 far exceeded the "much more modest awards which have been made to other insureds who have suffered extended periods of financial insecurity with similar-type consequences to those experienced by Mr. Branco: …".

[159] National Life points out several cases where the awards were much lower than in the decision under appeal. In *Blackwater v. Plint*, [2005] 3 S.C.R. 3, the Supreme Court of Canada upheld a $20,000 aggravated damages award to a victim of sexual abuse in a residential school. In *Tomah v. Sylliboy*, 2010 NSSC 439, the court awarded $30,000 in aggravated damages to a woman who had been deliberately set on fire. In *Merrick v. Guilbeault*, 2009 NSSC 60, the court added $7,000 in aggravated damages to a $45,000 award for non-pecuniary damages, to the victim of a vicious physical assault. *Blackwater*, *Tomah* and *Merrick* involved intentional torts rather than contracts or insurance. In our view, they are not particularly helpful.

[160] National Life also refers to *Fernandes v. Penncorp Life Insurance Co.*, 2014 ONCA 615 and *Fowler v. Maritime Life Assurance Co.*, [2002] N.J. No. 217.

[161] In *Fernandes*, 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 trial judge awarded $100,000 aggravated damages for failure to pay benefits. The Ontario Court of Appeal reduced it to $25,000. There was no evidence or explanation to justify a fourfold increase from the amount that the plaintiff had requested, and there was evidence that many other factors had contributed to the plaintiff's distress.

[162] In *Fowler*, the insurer discontinued disability benefits to an insured who suffered hypertension and anxiety disorder, for eight months in the year after accepting his claim, and then for over four years. The judge determined that the insurer had misinterpreted the policy and had breached its duty of good faith by withholding his disability benefits in a "misguided, unnecessarily harsh and arbitrary" manner, in the face of clear evidence of disability. Its actions caused the insured emotional and financial stress when he was particularly vulnerable because of his illness and reduced income. He was awarded $75,000 aggravated damages.

[163] In his submission to the Court of Appeal, Mr. Brine relied on *Branco* (QB) and cited an employment law case, *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419. There the jury found that the employee had been constructively dismissed and awarded $200,000 aggravated damages against the employer for the manner of the dismissal. The Ontario Court of Appeal upheld the award.

[164] Mr. Brine also mentioned two cases with some similarities to his situation, namely, the sale of his home and cashing of his RRSPs. In *Clarfield v. Crown Life Insurance Co.*, [2000] O.J. No. 4074 (S.C.J.), the insurer had taken an unbalanced view of the disability claim, rejected and delayed dealing with it. As a result, the vulnerable insured suffered increased anxiety, stress and financial pressure. The court awarded $75,000 for mental distress. In *Cross v. Canada Life Assurance Co.*, [2002] O.J. No. 293 (S.C.J.), the insurer failed to process the LTD claim on a timely basis, but never denied the claim. This caused the claimant substantial anxiety forced her to collapse part of her RRSP for living expenses. The court awarded $18,000 in aggravated damages.

[165] Lastly, we have *Plester v. Wawanesa Mutual Insurance Co.*, [2006] O.J. No. 2139 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 315, and *Monks v. ING Insurance Co. of Canada*, 2008 ONCA 269. In *Plester*, despite the absence of credible evidence, the insurer denied the claim on the ground that the insureds had set fire to their business premises. The Ontario Court of Appeal found that the jury award of $175,000 was "grossly excessive" and reduced it to $50,000. In *Monks*, the automobile insurer terminated benefits after three and a half years, claiming that the insured was not "catastrophically impaired". The Ontario Court of Appeal upheld the trial judge's award of $50,000 in aggravated damages.

[166] With the major reductions in the awards made in *Branco* (CA), the highest awards for mental distress in the insurance context are $75,000 in *Fowler* and *Clarfield*. Most awards in disability insurance cases fall between $10,000 and $35,000. These include: *Asselstine v. Manufacturers Life Insurance Co.*, 2005 BCCA 292 – $35,000; *Branco* (CA) – $30,000 and $15,000; *Rowe v. Unum Life Insurance Co. of America*, [2006] O.J. No. 4937 (S.C.J) – $30,000; *Saunders v. RBC Life Insurance Co.*, 2007 NLTD 104 – $25,000; *Lumsden v. Manitoba*, 2009 MBCA 18 - $25,000; *Fernandes* – $25,000; *McQueen v. Echelon General Insurance Co.*, 2011 ONCA 649 – $25,000; *Fidler* - $20,000; *Gerber v. Telus Corp*., 2004 ABCA 118 – $20,000; *Evans v. Crown Life Insurance Co.*, [1996] B.C.J. No. 1347 (S.C.) – $20,000; *McCallum v. Manitoba*, 2006 MBQB 114 – $15,000; *D.E. v. Unum Life Insurance Co. of America*, 1999 BCCA 507 – 15,000; and *Warrington v. Great-West Life Assurance Co.*, [1996] 10 W.W.R. 691 (B.C.C.A.) – $10,000.

[167] We observe that in *Saunders*, the insured suffered mental distress from a five-year delay in payment of benefits, and had been forced to spend his savings and withdraw his RRSPs, could not purchase the foods for his medical conditions and was under long-term psychological care. In *Lumsden*, the insured was denied disability benefits for five years, was placed in debt and losing his home, and had to litigate to recover. The Manitoba Court of Appeal noted that, since *Fidler*, courts no longer need to be guided by caution in awarding damages for mental distress. Nevertheless, it held that the $45,000 award at trial was excessive and reduced it to $25,000.

[168] In summary, the judge assessed an award of $180,000 for Mr. Brine's mental distress without many relevant cases being presented to her, and before *Branco* (CA) substantially reduced the awards in *Branco* (QB). In the insurance law context, the highest awards are the $75,000 in *Fowler* and *Clarfield*. Of course,

these are not legal caps, and each award turns on the circumstances. Here we have strong findings, with no palpable and overriding error, that Mr. Brine suffered substantial and protracted mental distress at least partially caused by National Life's breaches of contract and duty of good faith.

[169] Placing the judge's strong findings, for which there is no palpable error, into the jurisprudential context on quantum, in our view the award for mental distress damages was so inordinately high as to be a wholly erroneous estimate of the damage. We would reduce the quantum from $180,000 to $90,000 damages for mental distress under *Hadley v. Baxendale*.

5. Punitive Damages

[170] National Life submits that the judge erred by finding that any of the following should attract punitive damages: (1) the judge's concerns about Ms. Antonini's testimony, (2) National Life's discontinuance of rehabilitation services, (3) National Life's failure to produce the Rubens Report earlier, and (4) National Life's issuance of T4 slips, treating the disability income as taxable, after National Life received the 2006 Tax Court of Canada decision. National Life submits that, if punitive damages were warranted, the judge's quantum is excessive. Mr. Brine's cross-appeal counters that the quantum was too low.

(a) Entitlement to Punitive Damages

[171] Justice Bourgeois referred to *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595. Justice Binnie for the majority (¶ 43) identified retribution, deterrence and denunciation as the justification for such an award. He said the award should be reasonably proportionate to the blameworthiness of the defendant, the plaintiff's vulnerability, the harm or potential harm directed specifically at the plaintiff and the need for deterrence. The judge should take into account other sanctions to which the defendant is subject, and the advantages gained by the defendant's misconduct. The judge observed that *Whiten* had identified the factors to be assessed in Mr. Brine's case.

[172] The judge reminded herself:

> [314] …such an award arises in only exceptional cases - where conduct is so malicious, oppressive and high-handed that if (*sic*) "offends the court's sense of decency". Such awards are not to compensate a plaintiff but rather "address the

> purposes of retribution, deterrence and denunciation". They are to be resorted to with restraint. (See *Whiten, supra* and *Fidler, supra*)

[173] Justice Bourgeois explained why, in her view, an award of punitive damages was warranted:

> [315] There are several aspects of National Life's conduct which in the Court's view go beyond the ordinary misconduct associated with a breach of policy provisions, and are deserving of censure by the Court. These are National Life's gross mishandling of their duty to fairly consider and assess the provision of rehabilitation services; the failure to disclose the Rubens report; the failure to implement the findings of the Tax Court of Canada; and the breach of the duty of utmost good faith by Ms. Antonini's wanton disregard for the accuracy of her trial testimony in the face of documents possessed by National Life which conflicted directly with her evidence.

[174] The judge reviewed the jurisprudence setting out the factors to be considered and the circumstances of this case. Later we will examine her reasons for quantification.

[175] **Ms. Antonini's evidence:** National Life submits that problematic testimony is the exclusive province of costs, not punitive damages.

[176] Justice Bourgeois (¶ 237-249) strongly criticized Ms. Antonini's testimony. She pointed out Ms. Antonini's incorrect assumptions and direct contradictions with National Life's file materials before the Court. The judge stated:

> [248] ...Given the importance of the issues, it is difficult to accept that Ms. Antonini was mistaken or "missed" the references in her file materials. Rather, I find it more probable that her evidence was a purposeful attempt to paint Mr. Brine in as negative a light as possible in order to reinforce National Life's position that he breached the duty of honesty by not being forthright about matters impacting upon the claims before the Court.
>
> [249] The Court is left with serious reservations about the reliability of Ms. Antonini's testimony, and I conclude that in many respects her evidence was given to support National Life's position, without regard to accuracy. …

[177] Later the judge (¶ 315) cited "Ms. Antonini's wanton disregard for the accuracy of her trial testimony in the face of documents possessed by National Life which conflicted directly with her evidence", and added:

> [316] …Ms. Antonini's clear misstatement of facts which a cursory review of National Life's own file material quickly highlights as inaccurate is highly

> blameworthy. This was a purposeful attempt to, contrary to the clear information available to her, to malign Mr. Brine and attempt to have the Court draw negative conclusions as to his credibility and honesty.

In the next paragraph, the judge connected the misconduct to Mr. Brine's vulnerability, a factor that weighs in punitive damages:

> [317] The vulnerability of the plaintiff is a factor the Court must consider in reaching an appropriate quantum. Not only was Mr. Brine a vulnerable insured due to his mental illness, National Life was well aware of his status and limited functioning. In many respects, National Life simply turned a blind eye to the very probable amplified impact of their misconduct given Mr. Brine's precarious mental health.

[178] National Life says that the judge's criticism involved Ms. Antonini's trial testimony, not her handling of the claim. It submits that litigation misconduct may generate costs penalties, but is out of bounds for punitive damages. National Life cites *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29:

> [69] The judge conflated the analysis of punitive damages and costs. Punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach. Costs reflect the results and conduct of parties leading to and in the course of litigation. They are not a remedy for breach of contract.

[179] On the other hand are cases where evidence at trial was considered in the punitive damages analysis: *Khazzaka (c.o.b. E.S.M. Auto Body) v. Commercial Union Assurance Co. of Canada*, [2002] O.J. No. 3110 (C.A.) at ¶ 14; *Sigrist v. McLean*, 2011 ONSC 7114 (Q.L.) at ¶ 135; and *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 at ¶ 128. In *Khazzaaka*, Justice Carthy for the Ontario Court of Appeal said:

> 14 In my view the evidence that the jury may have accepted and the reasonable inferences therefrom clearly establish a rational purpose for an award of punitive damages. As the trial judge pointed out, the critical facts in *Whiten* were more extreme and overt and largely occurred prior to trial. Here, the roots extend back to the early investigation, surface at trial and are supplemented by the nature of the testimony. The appellant had a duty to treat the insured fairly. … It was clearly unfair to concoct evidence of the presence of gasoline to support a defence, which may have been the jury's finding. … Unfairness compounded over and over again amounts to conduct that merits the condemnation of the court when visited by an insurer that owes a duty of good faith to its insured.

[180] In our view, Justice Carthy's approach conforms to the purposive directive in *Whiten* and *Fidler*. A series of high-handed actions that began before the trial may extend into the trial to compound what happened before. Ms. Antonini had participated in the management of Mr. Brine's claim from the outset. The judge's findings of bad faith involved events thereafter. Justice Bourgeois considered Ms. Antonini's testimonial misconduct as culminating a continuum that delivered a *coup de grâce* to Mr. Brine's fragile state.

[181] Saying this does not exclude enhanced costs for litigation misconduct if, for example, the judge holds the view that the misconduct unduly burdened the other party with litigation expense. Punitive damages and enhanced costs each serve their own purpose. The judge must not doubly compensate or punish. Here the parties agreed to the quantum of trial costs after Justice Bourgeois issued her decision with punitive damages. So duplication is not an issue.

[182] We reject National Life's argument that conduct in the course of litigation cannot affect punitive damages. The judge did not err in law.

[183] **Other Particulars of National Life's Bad Faith:** National Life submits that the judge erred by finding that its discontinuance of rehabilitation services, late disclosure of the Rubens Report, and treatment of taxability following receipt of the 2006 Tax Court decision, should attract a punitive damages award.

[184] Punitive damages are "designed to address the purposes of retribution, deterrence and denunciation": *Whiten* at ¶ 43, as quoted in *Fidler* at ¶ 61. In breach of contract cases, "the impugned conduct must depart markedly from ordinary standards of decency – the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency": *Fidler* at ¶ 62; *Whiten*, ¶ 36; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at ¶ 196. The misconduct must exceed "the usual opprobrium that surrounds breaking a contract" and must "straddle the frontier between civil law (compensation) and criminal law (punishment)": *Fidler*, ¶ 62; *Whiten*, ¶ 36.

[185] In *Fidler*, the Chief Justice and Justice Abella for the Court spoke of the connection between an insurer's bad faith and punitive damages:

> 63 In *Whiten*, this Court set out the principles that govern an award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary

> standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. 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. …
>
> …
>
> 75 Sun Life's conduct was troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. … The award of punitive damages, of course, does not depend exclusively on the existence of an actionable wrong. In *Whiten*, the Court clearly established the relevant factors to consider in determining whether or not an award of punitive damages is warranted. Absent bad faith in this case, however, there is no need to go further.
>
> 76 Ms. Fidler is entitled to $20,000 for mental distress, but her claim for punitive damages is dismissed.

[186] In *Bhasin*, ¶ 55, Justice Cromwell for the Court cited the insurer's duty of good faith and said : "The breach of this duty may support an award of punitive damages."

[187] The judge (¶ 206) quoted 61-63 from *Fidler* and later (¶ 315) re-summarized the comments. This immediately preceded her description of National Life's conduct as "beyond the ordinary misconduct associated with a breach of policy provisions" and thus "deserving of censure". She referred to the insurer's "gross mishandling" of rehabilitation services and the "deliberate" withholding of the Rubens Report for over a decade. The judge stated that National Life certainly knew before and after the 2006 Tax Court decision that Mr. Brine, who was disabled by depressive illness, wanted his benefits reclassified and this continuing dispute added to his mental stress, yet the insurer did not act after receiving that decision.

[188] In *Fidler*, the trial judge found that the insurer's conduct did not warrant punitive damages. The Court of Appeal disagreed, and awarded punitive damages. The Supreme Court of Canada restored the trial judge's denial of punitive damages. The Chief Justice and Justice Abella (¶ 72-75) said that "each case revolves around its own facts" and agreed with the dissenting appellate justice that "it was for him [the trial judge] to assess the evidence and to determine its weight and effect".

[189] Mr. Brine's case is the converse of *Fidler*. The trial judge assessed the evidence and found that National Life's conduct was in bad faith, and sufficiently egregious to warrant a punitive award. The judge drew the connection between bad faith and a punitive award that was posited by *Fidler*. The misconduct was in National Life's management of a "peace of mind" contract meant to ease the insured's stress at a moment of crisis and vulnerability. Mr. Brine was in crisis and particularly vulnerable, emotionally and financially. National Life knew his susceptibilities.

[190] The judge cited and applied the correct principles of law. As *Fidler*, ¶ 75, reminds us, it was for the judge to assess the evidence and to determine its weight and effect. Justice Bourgeois made no palpable and overriding error. We dismiss National Life's ground that the punitive damages award should be overturned in its entirety.

[191] In our view, some of National Life's submissions are better directed at the quantum of the punitive award. We turn to that topic.

(b) The Trial Judge's Quantum

[192] At trial, the judge was not provided with much assistance on quantum. National Life maintained that there had been no breach of the duty of good faith, and its conduct did not warrant any punitive damages. It presented no case law on quantum. Mr. Brine emphasized *Whiten* and *Branco* (QB). He argued that National Life's misconduct was more reprehensible than in either of these cases, and called for punitive damages between $5,000,000 and $7,500,000.

[193] The judge awarded Mr. Brine $500,000 in punitive damages. She reasoned:

> [316] Assessing an appropriate quantum of punitive damages is a more difficult task but the Court is guided by the considerations outlined by the Supreme Court in *Whiten, supra*. Proportionality is key to reaching an appropriate quantum, and commences with a consideration of the blameworthiness of the defendant's conduct. In the present circumstances, the level of blameworthiness is high. Here the withholding of the Rubens report was deliberate, extended over a decade and was intended to preclude Mr. Brine from utilizing the potentially helpful information it contained. Ms. Antonini's clear misstatement of facts which a cursory review of National Life's own file material quickly highlights as inaccurate is highly blameworthy. This was a purposeful attempt to, contrary to the clear information available to her, to malign Mr. Brine and attempt to have the Court draw negative conclusions as to his credibility and honesty.

[317] The vulnerability of the plaintiff is a factor the Court must consider in reaching an appropriate quantum. Not only was Mr. Brine a vulnerable insured due to his mental illness, National Life was well aware of his status and limited functioning. In many respects, National Life simply turned a blind eye to the very probable amplified impact of their misconduct given Mr. Brine's precarious mental health.

[318] An award of punitive damages must be proportionate to National Life's need for deterrence. Here, there is an unquestionable need for deterrence as the misconduct attracting censure insinuated the bad faith into the very integrity of the litigation process. National Life must be deterred from undertaking a strategy in future of withholding relevant evidence from claimants for the gain of tactical advantage. Further, National Life and its individual representatives must be deterred from engaging in the eliciting of misleading evidence, particularly that which intends to paint their insured in a negative light. Mr. Brine argues that the need for deterrence is heightened given National Life has already been subject to an award of punitive damages in relation to the bad faith handling of a claim by Ms. Jako, and that the modest award there of $7,500, did not serve to bring home to National Life the importance of striving to meet its duty of utmost good faith to its insured. I agree. (see *Ferguson v. National Life Assurance Co. of* Canada, 1996 CarswellOnt. 1513). (Emphasis added]

[319] An award of punitive damages must be proportionate even after considering other penalties, both civil and criminal which the defendant's misconduct has attracted. Other than the compensatory damages ordered herein, the court is unaware of any further penalties associated with National Life's misconduct as it relates to this matter. The compensatory damages awarded herein are far from adequate to meet the goal of punishment given the extent of the misconduct found by the Court.

[320] Mr. Brine submits that an appropriate award of punitive damages in this matter is between $5 and $7.5 million dollars. He relies upon the decisions in *Whiten, supra* and *Branco v. American Home Assurance Company* (2013), 20 C.C.L.I (5th) 22, a decision of the Saskatchewan Court of Queen's Bench. It is well known that in *Whiten,* the Supreme Court upheld a jury's punitive damages award of $1 million dollars. It is important to note however, that the court opined that such was near the top of the reasonable range for such awards and should not therefore, be displaced. Justice Binnie for the court noted that he would not have awarded such an amount.

[321] In *Branco, supra*, two defendant insurers had been found to have acted in bad faith towards their mutual insured. One of the defendants, the LTD insurer, had never paid benefits at all over an extended period, despite having medical opinion in its file supporting a disability finding. Punitive damages of $1.5 million and $3 million dollars respectively were awarded by the trial judge.

[322] Although the quantum of awards in other cases are informative, the Court must be guided by the particular circumstances before it and the factors outlined

> above. Considering the compensatory damages awarded herein, as well as the blameworthiness of the misconduct and the need for deterrence in particular, I find an award of punitive damages in the amount of $500,000 is appropriate in the circumstances.

[194] On appeal, National Life cites various authorities that escaped its submission to the trial judge, then submits the judge erred by failing to analyze these awards.

[195] On his cross-appeal, as at trial, Mr. Brine relied extensively on *Whiten* and *Branco* (QB). He submitted that the National Life's misconduct was more severe than it was in either of those decisions and that, given the multiple incidents of serious misconduct, the fact that National Life is a repeat offender and the nature of the four separate acts of bad faith, the judge erred in making her award. Mr. Brine says that, considering the nature and degree of National Life's conduct, $500,000 was simply too low to achieve the objectives of retribution, deterrence and denunciation.

[196] In *Whiten*, Binnie J. for the majority summarized why the jury had awarded punitive damages:

> 1 ...The jury was clearly outraged by the high-handed tactics employed by the respondent, Pilot Insurance Company, following its unjustified refusal to pay the appellant's claim under a fire insurance policy (ultimately quantified at approximately $345,000). Pilot forced an eight-week trial on an allegation of arson that the jury obviously considered trumped up. It forced her to put at risk her only remaining asset (the insurance claim) plus approximately $320,000 in legal costs that she did not have. The denial of the claim was designed to force her to make an unfair settlement for less than she was entitled to. The conduct was planned and deliberate and continued for over two years, while the financial situation of the appellant grew increasingly desperate. Evidently concluding that the arson defence from the outset was unsustainable and made in bad faith, the jury added an award of punitive damages of $1 million, in effect providing the appellant with a "windfall" that added something less than treble damages to her actual out-of-pocket loss. ...

[197] Justice Binnie (¶ 105) described *Whiten* as "an exceptional case that justified an exceptional remedy." He restored the jury award of $1,000,000 in punitive damages against the insurer, which the Ontario Court of Appeal had reduced to $100,000. He stated (¶ 128) that he would not have awarded that amount. However, in his view, "…the award is within the rational limits within which a jury must be allowed to operate. The award was not so disproportionate as to exceed the bounds of rationality. ..."

[198] In *Branco* (QB), the trial judge awarded punitive damages of $3,000,000 against Zurich, the long-term disability insurer, for trying to exploit Mr. Branco's economic vulnerability and not administering his claim in good faith. He awarded punitive damages of $1,500,000 against AIG, the workers' compensation benefits insurer, for improperly discontinuing benefits and attempting to force Mr. Branco to accept a low settlement offer. When Justice Bourgeois issued her decision, the punitive damage awards in *Branco* (QB) were the highest in Canadian insurance jurisprudence.

[199] An award of punitive damages attracts a more focused standard of review than other damage awards. In *Whiten*, ¶ 108, Justice Binnie said the court of appeal has "more interventionist" supervisory powers and explained that an award of punitive damages may be set aside if, when added to compensatory damages, it exceeds what is rationally required to punish the defendant:

> 107 …the test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct.
>
> 108 This test provides an appellate court with supervisory powers over punitive damages that are more interventionist than in the case of other jury awards of general damages, where the courts may only intervene if the award is "so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice" (*Hill, supra*, at para. 159; *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.)). In the case of punitive damages, the emphasis is on the appellate court's obligation to ensure that the award is the product of reason and rationality. The focus is on whether the court's sense of reason is offended rather than on whether its conscience is shocked.
>
> 109 If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it will be reduced or set aside on appeal.
>
> 110 An award that is higher than required to fulfil its purpose is, by definition, irrational. The more difficult task is to determine what is "inordinate". Here, I think, the Court must come to grips with the issue of proportionality.
>
> 111 I earlier referred to proportionality as the key to the permissible quantum of punitive damages. Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose. …

[200] As noted earlier, after the hearing of this appeal, the Saskatchewan Court of Appeal released its decision in *Branco*. The Court of Appeal sharply reduced the awards of punitive damages made in the Queen's Bench. The punitive damages award against Zurich shrank from $3,000,000 to $500,000 and, against AIG, from $1,500,000 to $175,000.

[201] At this point, it would be helpful to briefly survey the landscape of punitive damages. Only a few exceed $100,000.

[202] The only punitive damage awards higher than the $500,000 to Mr. Brine are the in *Whiten* ($1,000,000), and *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 ($750,000 to each of four parties). In *National Bank*, this Court found that the Bank's deliberate misconduct over many years in concealing a critical settlement agreement from not only the opposing parties, but from the courts, amounted to an abuse of process. There is no abuse of process in Mr. Brine's case.

[203] The next highest punitive damages awards are those of $500,000 and $450,000, awarded in *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 and *Pate Estate* respectively. Both are employment law cases where the employer persisted with criminal allegations it knew to be false or incomplete for over a decade.

[204] In *Plester*, a jury awarded punitive damages of $350,000 and $100,000 respectively against the insurer which had performed an incomplete investigation and breached its duty of good faith to the insureds whose business premises were destroyed by fire. At ¶ 103, R.P. Armstrong J.A., writing for the Ontario Court of Appeal, described these damages as "fairly high". While he would not have awarded the amount the jury assessed, he could not conclude that it was "so exorbitant or so grossly out of proportion ... as to shock the court's conscience and sense of justice" (¶ 101).

[205] In each of *Khazzaka* and *Fernandes*, the Ontario Court of Appeal upheld awards of $200,000 in punitive damages. In *Khazzaka*, the insurer had rejected the opinions of the fire department and police, and pursued an arson defense for years. The same insurer had been involved in *Whiten*. Carthy J.A., writing for the Court of Appeal, saw deterrence as a rational purpose for punitive damages, and concluded that the jury award of punitive damages was fully justified and proportionate.

[206] In *Fernandes*, the insurer started payment of total disability benefits but, after viewing surveillance video, discontinued payments. It did so for five years, though the surveillance footage did not reasonably support the decision to terminate, and in the absence of any medical evidence indicating that the insured was other than totally disabled. The insurer gave no notice of termination and maintained its refusal to pay after receipt of medical reports, including medical reports from its own expert.

[207] In *Asselstine*, the rejection of an employee's claim for long-term disability insurance benefits ultimately led to the employee bringing an action against her employer and the insurance administrator. The majority of the British Columbia Court of Appeal upheld the trial judge's award of $150,000 in punitive damages against both. *Kogan v. Chubb Insurance Co. of Canada*, [2001] O.J. No. 1697 (S.C.J.), involved unsubstantiated arson allegations. The judge found the conduct of the insurer and its adjuster to be "reprehensible, callous and highhanded because of the prejudging" of the fire insurance claim. He awarded $100,000 in punitive damages.

[208] In summary, insurance cases where punitive damages of $100,000 or more were imposed are limited to *Whiten* ($1,000,000), the case under appeal ($500,000), *Branco* (CA) ($500,000 and $175,000), *Plester* ($350,000 and $100,000), *Khazzaka* ($200,000), *Fernandes* ($200,000), *Asselstine* ($150,000) and *Kogan* ($100,000).

[209] Many cases have awarded punitive damages under $100,000.

[210] In *Whiten*, Justice Binnie said that a court should relate the facts of the particular case to the purposes of punitive damages, namely retribution or punishment, deterrence of the wrongdoer and others, and denunciation. He added (¶ 71) that the court should "ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, *i.e.*, because any higher award would be irrational." (Justice Binnie's emphasis).

[211] Here, the judge clearly demonstrated an awareness of the principles underlying punitive awards. Her reasons (¶ 208-210) quoted *Whiten*'s passage on the need for proportionality, and (¶ 316-321) cited some of the relevant factors and tied them to the facts.

[212] However, the judge did not address the factor of wrongfully acquired profit discussed in *Whiten* (¶ 124-126).

[213] Unlike the insurers in cases where benefits were denied, such as *Whiten* and *Branco*, National Life did not deny coverage. The judge did not find that National Life was trying to profit from Mr. Brine's vulnerability or to use that vulnerability as a negotiating tactic, for example by offering an unfair settlement. National Life was callous in its approach to Mr. Brine's mental state and the impact of its actions. However, it was in National Life's financial interest to see Mr. Brine rehabilitated early rather than to continue payment of benefits until the age of 65. Similarly, National Life's obstinacy on the T4 slips stemmed from apathy not avarice.

[214] Further, in our view the judge did not sufficiently consider *Whiten*'s direction (¶ 109) to consider whether the total of compensatory and punitive damages is inordinate. Mr. Brine's vulnerability weighed heavily in the judge's punitive award. But Mr. Brine's vulnerability also generated s significant award for mental distress and aggravated damages.

[215] In *Cinar Corporation v. Robinson*, 2013 SCC 73, the Supreme Court of Canada succinctly reiterated *Whiten*'s standard of review:

> [134] In *Richard* [*Richard v. Time Inc.*, 2012 SCC 8] this Court held that an appellate court may only interfere with a trial judge's assessment of punitive damages (1) if there is an error of law; or (2) if the amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation (see para. 190).

The ultimate question is that in ¶ 107 of *Whiten*: whether, in this Court's view, "a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct."

[216] Here, the award of $500,000 is inordinate, given the case law not cited and the factors not considered. In our view, the award exceeds the amount needed to rationally serve the purposes of prevention, deterrence and denunciation.

(c) What Should the Quantum Be?

[217] The quantification of punitive damages is not a linear exercise. It is a contextual balance of the criteria that were discussed in *Whiten*. The quantum should stem from a principled analysis. The questions are: How would the award promote the objectives of punitive damages? What is the lowest award that would serve those objectives, because any higher award would be irrational? (*Whiten*, ¶ 70-71).

[218] The "governing rule for quantum is proportionality" (*Whiten*, ¶ 74). To frame a proportionate analysis, it is helpful to arrange the critical circumstances into categories representing the two perspectives.

[219] First is Mr. Brine's perspective. He was particularly vulnerable, financially and psychologically. The blows he suffered over time cascaded to cripple his capacity to resume a gainful life. Some of these blows were delivered by his employer, not National Life. But National Life's professional function was to manage a peace of mind policy for Mr. Brine. In *Whiten*, ¶ 129, Justice Binnie said "the appellant's peace of mind should have been Pilot's objective". National Life knew or should reasonably have anticipated the consequences of its conduct. Yet, its approach, on the items of conduct found offensive by the judge, ranged from cavalier to deliberately obstinate.

[220] There is a tempering factor. Mr. Brine's susceptibilities generated components of his compensatory damages. *Whiten* directs that we should be mindful of other components in the overall award.

[221] On the other hand is National Life's perspective. What did it do that must be punished? It did not deny benefits. To the contrary, it overpaid the benefits, as it turned out. Much of the litigation involved the mechanics of repayment due to National Life. Mr. Brine may have been shocked by National Life's insistence on recovery of the overpayments. But his surprise was not National Life's fault. From the outset, National Life informed Mr. Brine of the Policy's protocol respecting gross and net benefits. Before the bankruptcy, National Life fully clawed back, when it should have pro-rated. After the bankruptcy discharge, it continued the claw back to repay an extinguished claim. Though these practices breached the contract, the judge did not cite them as a breach of good faith or to support punitive

damages. Generally, on the substantive financial issues, National Life either succeeded or advanced an arguable, though unsuccessful position.

[222] This case does not involve *Whiten*'s level of crass opportunism or the quest for a windfall that is seen in some of the authorities. Clearly this affects the quantification of what is supposed to be a denunciative award. The high-end punitive awards discussed earlier censure defendants' misconduct that was more blameworthy than we see here.

[223] There is an exacerbating factor. This is not National Life's first transgression. In *Ferguson v. National Life Assurance Co. of Canada*, [1996] O.J. No. 1329, 1996 CarswellOnt 1513 (Ct. of J. Gen. Div.) at ¶ 136-45, another LTD claim for total disability based on mental impairment, Justice Bell found that National Life had breached its duty of good faith and awarded punitive damages of $7,500. Deterrence involves a meaningful gradient between successive transgressions.

[224] In *Whiten* (¶ 118), Justice Binnie spoke of the "large whack" needed to jolt an obdurate professional litigant. Needed here is a sharp jab, not a concussive blow. In our view, after balancing everything, a punitive award of $60,000 would be proportionate to the required degree of retribution, denunciation and deterrence.

6. Subrogation of Human Rights Settlement

[225] The judge awarded National Life $210,000 on its counterclaim, being the amount of Mr. Brine's settlement of his complaint to the Canadian Human Rights Commission less certain amounts. In his cross-appeal, Mr. Brine submits that, in interpreting the Policy provisions regarding subrogation and in making this award, the judge erred in law. In particular, he says the judge (1) failed to properly characterize the settlement funds as general damages, (2) misinterpreted the Policy to entitle National Life to claim subrogation against the settlement paid by his employer and, (3) in determining the amount of which any claim could attach, failed to consider the legal fees and disbursements he incurred and the amount of the settlement actually received.

[226] For the reasons which follow, we would reject all those submissions.

[227] The judge (¶ 328-329) found that National Life was aware of the complaint Mr. Brine filed with the Commission against his former employer, Ports Canada,

as well as the Halifax Ports Authority, and that the subrogation provisions in the Policy clearly required Mr. Brine to advise the insurer of the settlement, which he did not do. In her view, there was no legal or equitable reason to deprive National Life of subrogation.

[228] The subrogation provision in the Policy read in part:

> If the third party damage claim is settled prior to trial of the action, the Insurer shall be reimbursed in an amount that reasonably reflects the benefits that would otherwise by payable under this Benefit, on account of past, present, and future income without regard to the terms of settlement that may have been agreed to by the employee and the third party.

The Minutes of Settlement between Mr. Brine, the Commission, and Halifax Port Authority and Transport Canada described the payment as general damages:

> 1. The Respondents shall pay the sum of Three Hundred Thousand Dollars ($300,000.00) to the Complainant, Bruce Brine, for general damages for intentional infliction of mental suffering, defamation and injury to his reputation.

The Minutes also required the Port Authority to provide Mr. Brine with letters of apology and reference.

[229] At trial, National Life pointed out that, when Mr. Brine's complaint was filed, the legislation provided a maximum general damages award of $20,000. So National Life claimed $280,000 of the $300,000 settlement as attributable to income replacement. The insurer's argument that, though the settlement was characterized as "general damages", most of it was for lost income, succeeded. The judge (¶ 324) relied on *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally*, 1999 NSCA 129, for her view that Mr. Brine was obliged to establish that the settlement funds were not for lost income. She found he had not met this burden:

> [327] …I cannot accept that the settlement was intended to only compensate Mr. Brine for general damages. The evidence of Mr. Stern, which I accept without reservation, was that throughout the complaint process, the largest component of Mr. Brine's claim was for alleged loss of income, both past and future.

Mr. Stern had represented the Port Authority in the settlement negotiations.

[230] Mr. Brine argues that the judge erred in ignoring the explicit terms of the Minutes of Settlement that the funds paid in settlement were paid as general

damages. However, the documents relating to Mr. Brine's claim to the Commission, Mr. Brine's own testimony, and that of Mr. Stern all support the judge's conclusion that throughout the complaint process, the "largest component of Mr. Brine's claim was for alleged loss of income, both past and future." The judge was entitled to allocate the amount recovered on settlement, taking into account settlement negotiations and pre-settlement documents. See *Inglis v. Nova Scotia (Attorney General)*, 2007 NSSC 314 and *Inglis v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2009 NSSC 254.

[231] Alternatively, Mr. Brine submits that his claim was against his former employer which is a party to the Policy, so it did not involve a "third party" as required by the subrogation provision in the Policy. He maintains that the judge erred by writing:

> [326] …The parties to the policy are National Life and "The Board of Trustees of the Public Service Management Insurance Plan and their successors". The only evidence elicited with respect to the composition of the Board of Trustees, was that it was comprised of federal employees. This is inadequate in my view for the Court to reach a conclusion that the "Board of Trustees" is one in the same as Mr. Brine's employer. Further, there is no evidence to establish that the settlement funds actually came from Ports Canada, Mr. Brine's employer.

[232] The judge correctly identified the Board of Trustees as the named insured in the Policy. The only evidence as to the identity or composition of that Board was that of Mr. Brine who testified that they were "senior government officials, … from various different government branches." Nothing else in the evidence links Ports Canada, his former employer, to the Board of Trustees. Nor was there definitive evidence whether the payor of the settlement funds was the Halifax Port Authority or Transport Canada.

[233] In any event, we agree with National Life that settlement funds did not need to come from a "third party" for subrogation rights to be triggered. The first paragraph of the subrogation provision reads:

> Where a Monthly Income Benefit becomes payable with respect to an employee who has a right to recover damages from any individual or organization, the Insurer will be subrogated to the rights to recovery of the employee against such individual or organization to the extent of the benefits paid or payable.

Subrogation arises when an employee has "a right to recover damages from any individual or organization". Recovery is not limited to funds from "third parties".

[234] Finally, Mr. Brine argues that the judge erred as to the amount to which National Life was entitled. The judge reasoned:

> [330] To award National Life the full $280,000 sought would create the result of having Mr. Brine pay the entirety of the legal costs associated with pursuing these funds ultimately for the insurer's gain. There is nothing in the subrogation provision which dictates an insured should carry this expense. Based on the legal account submitted into evidence, Mr. Brine paid legal fees included of HST of $70,181.76, plus numerous disbursements which I am satisfied are properly related to the proceedings. Mr. Brine did receive benefit from the settlement other than the monetary award. He testified his most significant concern was obtaining a letter of apology and reference, both of which served to some degree as vindication in terms of his dismissal and allegations of wrongdoing. In the circumstances, Mr. Brine should be afforded a credit in relation to the legal fees paid to advance in complaint in the amount of $70,000, leaving a balance of $210,000 owing to National Life.

[235] At trial, Mr. Brine established that he received $202,992.48 from the settlement. He argues that the judge should have awarded the insurer the amount he actually received, not $210,000.

[236] The evidence shows a settlement of $300,000 and legal fees, disbursements and HST totalling $75,000 even. According to Mr. Brine, the judge erred by reducing his legal fees some $5,000. However, the judge (¶ 330) explained why she did not reduce the settlement by the full amount of the legal fees, HST and disbursements. The figure she allowed for deduction was what she estimated was "properly related to the proceedings." She identified other benefits, namely the letter of apology and reference, that were not part of his monetary claim.

[237] Mr. Brine also points to the evidence regarding payments to a company for loans he had incurred "to keep finances going for my legal battles at the time and keep myself afloat." He says the judge should have taken those into account in her calculations. We respectfully disagree. What Mr. Brine did with the funds after he received them does not affect National Life's right to subrogation.

[238] We dismiss the cross-appeal regarding subrogation.

7. Conclusion

[239] We revise the damages as follows:

(1) The awards of $30,000 (mental distress) and $150,000 (aggravated damages) are replaced with one award of $90,000 as compensatory damages for mental distress caused by breach of contract, including the breaches of the contractual duty of good faith.

(2) The punitive damages of $500,000 are reduced to $60,000.

[240] In all other respects we dismiss the appeal and cross-appeal.

[241] We order Mr. Brine to pay National Life costs of $10,000, including disbursements, for the appeal.

[242] The judge awarded pre-judgment interest and costs. The amounts were agreed by the parties after the judge's award on liability and damages. The judge is no longer available to reconsider those matters. If, as a result of the Court of Appeal's decision, issues arise concerning pre-judgment interest and trial costs, and the parties are unable to agree, they may make submissions to this Court. Unless counsel arrange another schedule, each party should file and serve its submission two weeks from the date of this Court's order, and a reply one week thereafter.

Fichaud, J.A.

Oland, J.A.

Scanlan, J.A.