QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 98**

Date: **2013 03 21**
Docket: Q.B.G. No. 267 of 2006
Judicial Centre: Saskatoon

BETWEEN:

LUCIANO BRANCO,

PLAINTIFF

- and -

AMERICAN HOME ASSURANCE COMPANY, CAMECO CORPORATION, KUMTOR OPERATING COMPANY and ZURICH LIFE INSURANCE COMPANY LIMITED,

DEFENDANTS

Counsel:

Alex Kotkas, Gulu Punia and Arif Chowdhury	for Luciano Branco
Jerri Cairns and David P. Wedge	for American Home Assurance
Catherine A. Sloan and Paul L. Clemens	for Cameco Corporation and Kumtor Operating Company
Colin D. Clackson	for Zurich Life Insurance

JUDGMENT
March 21, 2013

ACTON J.

FACTS

General

[1] The plaintiff, Luciano Branco ("Branco"), is 62 years of age, and a Canadian citizen who immigrated to Canada from Portugal at the age of 24. He enrolled in a welding class in Halifax, Nova Scotia and after six months obtained his certificate. Branco pursued each and every opportunity to advance his skills and fine tune his expertise. He eventually obtained his red seal having taken numerous additional courses. Branco worked throughout western Canada and the North at various welding jobs. In 1994 his family moved back to Portugal.

[2] Shortly thereafter, Branco took employment in Kyrgyzstan with a Saskatchewan company.

Kumtor Employment and Injury

[3] In 1997, Branco left the Saskatchewan company and entered into an employment contract with Kumtor Operating Company ("Kumtor") in Kyrgyzstan. Kumtor had much better work rotations which involved 28 days in and 28 days out. The mine was at an extremely high altitude in the remote mountains of Kyrgyzstan with the workers living their 28 days at the mine campsite. The mine was an eight hour bus ride from Bishkek where the head office of Kumtor was located and where the workers flew in to and out of to get to the mine.

[4] Branco was an excellent employee with a perfect attendance record and no Workers' Compensation Board ("WCB") claims.

[5] On December 25, 1999 during his 12-hour shift Branco dropped a steel plate on his foot. Although his foot swelled up and he was concerned that he may have chopped his toes off he continued to work. At the end of his shift he washed the

blood off, found that his foot was still intact and packed his foot with snow in an attempt to relieve the pain and take down the swelling.

[6] He continued to work to the end of his 28 days and went home to Portugal to recuperate.

[7] He returned to Kyrgyzstan for his next 28-day shift in February. Two days before the end of his 28-day shift he stepped on a piece of steel and re-injured his foot. As it was only two days before the end of his rotation he finished his rotation on March 15 and returned home to Portugal.

[8] In Portugal he saw his doctor and did not return for his April 15 rotation advising the company that he was ill.

[9] Having not received satisfactory medical assistance to improve this injury he returned to Bishkek for his next rotation in June of 2000. However he did not go to the camp but went directly to the company doctor in Bishkek. It was at this time that his work injury was reported to the company.

[10] Kumtor continued to pay Branco his base salary of $51,920 to the end of his contract, being March 31, 2001. Actually they continued to pay for an additional three months in error, a total of approximately $12,000 for which they did not claim reimbursement. In final argument their position changed to a claim for set-off respecting any liability assessed against Kumtor.

AIG Claim and Subsequent Correspondence

[11] American Home Assurance Company ("AIG") was advised of Branco's work-related injury which triggered the WCB equivalent claim handled under the

AIG policy. AIG provides benefits for work-related injuries based upon WCB benefits payable in the Province of Saskatchewan.

[12] AIG arranged for Branco to attend Dr. Amado in Portugal who recommended surgery. Branco's personal physician, Dr. de Melo, at first agreed with the idea of surgery but on further consideration he advised against it.

[13] Branco was anxious to get back to work. His foot was not improving so he agreed to have the surgery on January 29, 2001. The surgery was not a success. Although Branco took physiotherapy and rehabilitation treatments, Dr. Amado concluded that Branco was permanently disabled and advised AIG accordingly.

[14] Patti Schibler, the adjuster representing AIG, had been communicating with Cameco since October 5, 2000. She confirmed that she had talked with Branco on March 21, 2001. At that time, he was in four weeks of physiotherapy. He indicated he had completed one week and hoped at the end to be able to go back to work. He was to advise her when he went back to work. Patti Schibler advised Branco that he would be receiving $573.04 per week which would be sent out each month until Dr. Amado released him to return to work. She confirmed as well that she would be checking with Dr. Amado and expected that Branco would be able to return to work April 15, 2001.

[15] However on May 8, 2001, Patti Schibler made a memo to the file that she had not heard from Dr. Amado since February 4, 2001. She indicated that her Portuguese office was unable to get information from the doctor's office in spite of the fact that this was the doctor that AIG referred Branco to for medical assistance. She then proceeded to advise Branco that she would pay him for the period April 16,

2001 to May 13, 2001 and will then suspend benefits until she hears from the doctor. On June 27, 2001, Patti Schibler sent a letter to Cameco which stated:

> I have discontinued Mr. Branco's disability benefits effective May 14, 2001 due to insufficient medical documentation. The last report that I received from Dr. Amado was in February 2001. His diagnosis at that time was that Mr. Branco could return to work in or about April/May of 2001. After numerous letters, e-mails and phone calls Dr. Amado has failed to respond to our inquires [*sic*]. In order to continue disability benefits we require current medical reporting. Therefore we suspended disability benefits and this file is presently in a pending status.

[16] On July 30, 2001, Dr. de Melo provided a handwritten report indicating that in his opinion, Branco was permanently unable to perform his occupation.

[17] On the same day, AIG made a cash settlement offer of $22,500 US on the WCB claim.

[18] Patti Schibler then placed a memo on the file on August 3, 2001 stating:

> I called the claimant and he did not accept our offer and said that he was going to get an attorney. I hope he re-considers because he lives in Portugal and he will have to go back to Canada to get an attorney and this whole process is going to take years to settle.
>
> Here we go CANADA!!!!!

[19] AIG requested further examinations by specialists in Saskatchewan. Branco agreed and made the journey to Saskatchewan in September of 2001 at which time he saw one of the specialists. He returned a year later and was examined by two more specialists. The Saskatoon medical examinations confirmed the disability. There were no ongoing payments in spite of the medical reports.

[20] Counsel for AIG demanded that Branco rehabilitate himself without having received benefits. It should be noted that, in Portugal, medical attendances require payment at the time. Branco was being expected to pay for his rehabilitation and medical appointments without obtaining benefits.

[21] AIG persisted. Eventually in April 2, 2003, AIG paid some back benefits and started monthly payments after having cut off benefits twice. The first time was in May of 2001. The second time was in the fall of 2002. Both times were without explanation. The second time was when a payment was issued October 30, 2002. AIG indicated that beginning in the month of November 2002, Branco would receive a benefit cheque on a bi-weekly basis. No further payments were received until April 2003.

[22] Branco did physiotherapy and attended upon numerous specialists to whom he was referred by AIG. None of these specialists provided occupational rehabilitation options. AIG eventually on its own recommendation found a place in Lisbon, Portugal and told Branco he must attend the facility for vocational rehabilitation. This was three hours from Branco's home. However, he and his wife attended and met with the supervisor of the facility. The supervisor indicated that this was not a place for a man like him but for much younger people with less education.

[23] AIG had wanted Branco to be retrained as a gardener which was a very low paying occupation considering his previous earning potential. As well, the occupation of a gardener was inappropriate as Branco was unable to work on uneven ground.

[24] AIG advised on October 8, 2004 that it was going to terminate Branco's workers' compensation benefits if he did not co-operate and take the Lisbon offer or

find other vocational retraining. Since he found the one in Lisbon unacceptable, it was his obligation to find other vocational training that was suitable. Counsel for AIG then advised legal counsel for Branco on March 4, 2005 that "my client has paid Mr. Branco every cent that he was entitled to under its policy up until December 1, 2004 ...". At that time it had discontinued his disability payments because of his continual refusal to co-operate in the rehabilitation program that had been arranged for him in Lisbon. The letter went on further to state:

> As we discussed, it seems to me that Mr. Branco should either agree to enroll in the rehabilitation program or, alternatively, make a recommendation with respect to an alternate rehabilitation program, so that it may be considered by the insurer, so that his disability benefits can be reinstated.

[25] Counsel for AIG were advised by counsel for Branco on November 17, 2005, that they had contacted Dave Hrycyk of the Saskatchewan WCB to discuss what, if any, physical rehabilitation or retraining program would be appropriate for Branco. Mr. Hrycyk advised that he would look at Branco's age, the severity of his injury and his residential location in order to ascertain whether vocational retraining would be a cost effective option for the WCB in this instance. He advised further that because Branco is only 10 years from retirement he would not be considered an appropriate candidate for retraining. This decision is supported by the fact that Branco resides in a small town in Portugal where finding employment at the age of 57 or 58 following retraining would be unlikely. He advised further that the WCB would pay full monthly wage loss benefits until the age of 65 to Mr. Branco and continue to be responsible for all his medical costs after that time.

[26] For WCB to require retraining, the program must be reasonable and must be physically and mentally gainful to the individual. WCB does not require the

claimant to come up with a retraining plan and they never ask claimants to settle for a lump-sum payment.

[27] AIG ignored this and deemed this a refusal by Branco to take rehabilitation. AIG discontinued payment of benefits in 2004. No further payments were received from AIG until August of 2012 (just days before the start of the trial) when funds were paid based on a miscalculation of benefits up to 2004.

[28] AIG also agreed on the eve of the trial that Branco was entitled to and paid him a permanent impairment allowance and independence allowance which were actually due in 2003. However, the permanent impairment allowance was calculated to 2004 and not to current date.

[29] In sum, AIG began making payments to Branco on March 20, 2001, for $1,464.08, being temporary total disability payments for March 19, 2001 to April 15, 2001, followed by a subsequent payment for the period April 16, 2001 to May 13, 2001, in the amount of $1,484.27, which was approved May 8, 2001 and the period May 14, 2001 to September 30, 2001 was not paid until November 13, 2002 without explanation. No further payments were received until October 31, 2002 when AIG paid $19,373.64, which was disability benefits from October 2001 through October 2002, being 52 weeks at $573.04 per week and a per diem allowance from October 5, 2002 to October 28, 2002 at $30.00 a day. In spite of the October 2002 letter indicating that monthly payments would commence in November and be paid regularly, no such regular payments began until May of 2003.

[30] No further payments were made by AIG to Branco until April 23, 2003, when he received the sum of $13,574.33 US, being a payment for 34 weeks and three days of temporary total disability at $573.04 per week Cdn. This was followed by the start of the temporary total disability monthly payments beginning May 1, 2003,

issued May 22, 2003. After this, monthly payments continued up to and including December 2, 2004. Total indemnity to that date was $79,603.44 US. (See Appendix A for list of AIG payments.)

Zurich claim and Subsequent Correspondence

[31] In terms of long term disability, Zurich Life Insurance Company Limited ("Zurich") provides benefits for Kumtor employees in the event of a non-work related disability.

[32] The long term disability policy has a waiting period of 105 days and benefits are payable until either recovery, death or attainment of the age of 65.

[33] It is apparent that Cameco Corporation ("Cameco") / Kumtor did not understand their obligation in the Zurich policy which required the employer to submit the claims and medical reports to Zurich.

[34] The common practice is for employers to distance themselves from this intermediary position which results in individuals like Branco submitting their claims directly to Zurich themselves.

[35] This action was started by Branco in October of 2001, in which Zurich was incorrectly named as Zurich Canada. When Zurich Canada was served, its legal department contacted the legal department for Zurich Life Insurance in Switzerland.

[36] An amended statement of claim was served upon the defendant Zurich on January 28, 2002. Therefore the latest possible date that Zurich could have had knowledge of the claim was January 28, 2002.

[37] Instead of sending claim forms to counsel for Branco to complete so as to be able to process the claim, on June 26, 2002, counsel for Zurich served a notice of motion claiming that the Saskatchewan action should be struck and that the more convenient forum is Switzerland. The application was dismissed with costs to the plaintiff.

[38] It was not until January 2003 that Zurich sent claim forms to counsel for Branco for completion. The forms were returned completed February 17, 2003.

[39] The Zurich policy provided for disability benefits for the first 24 months respecting the claimant's own occupation. After that time coverage was limited to any occupation in the event the individual was not totally disabled.

[40] Although Zurich agreed that the first 24 months coverage did apply it still refused to pay benefits. In fact an offer was made on April 21, 2003 for $62,600 as full settlement with a $9,000 deduction for solicitor-and-client legal costs that Zurich had incurred to date. This offer was made even though this court had ordered that Zurich pay Branco's costs of the application.

[41] Branco had filed his original disability claim with Zurich on February 11, 2003. In a reply to an undertaking, Zurich answered that the original claim was approved in March of 2002 by Zurich upon receipt of medical reports. Branco did not receive any funds from Zurich until May 7, 2009 at which time he received a cheque in the amount of $362,198.00. This payment covered quarterly long term disability payments due to Branco for the period June 26, 2000 to April 30, 2009, in the amount of $321,366.50 plus interest. This was nine years after the first payment was due. Since the date of that payment, Zurich has made all quarterly payments of long term disability as required under the group policy except for the months of August and

September 2010. There is no evidence before the court as to why these payments were not made.

[42] Branco and his family were without funds for many years. They survived on loans from family, in-laws, parents and their daughter. This total lack of income caused severe mental stress upon Branco disabling him even further.

[43] Branco had been a proud, athletic and hard-working individual. He was always trying to improve himself and his skills. He had been happy with his life and had a good marriage.

[44] After suffering his injury he lost his ability to work. He lost his ability to support his family. He even lost the ability to support himself. He had to borrow money from his daughter, his mother, and close family members. He had to re-amortize his mortgage and put the house in his daughter's name. His marriage broke down for a period of 10 months during which time he was forced to live with his mother as he could not afford other accommodation. His daughter had to buy him clothes. When his daughter got married her parents were unable to afford to even provide her with a wedding present. Branco was ashamed that he was unable to support himself and his family which went to the root of his personal self-worth and integrity. His mental distress deepened.

Medical Reports

[45] As described above, the medical report of Dr. de Melo forwarded to Zurich February 11, 2003 indicated that Branco will probably never recover from his current disability.

[46] Branco also attended for examinations in the fall of 2007 in Calgary, Alberta upon Dr. Mothersill and Dr. Clarke as requested by the three defendants and a separate evaluation by Dr. Mandel.

[47] Dr. Mothersill considered that Branco had the capabilities of working as a brazen machine operator and/or setter as well as a bench welder. However Branco was unable to perform low level squatting and crunching. Further, it was recommended that he avoid walking on uneven ground and climbing ladders. He had no difficulty with sitting, hand coordination or seated trunk rotation. Therefore even Dr. Mothersill conceded that his recommendation was inappropriate at the present time.

[48] Some of the specialists, in particular Dr. Mandel, described Branco as earning above average income for a welder. He had 100 percent attendance at work. He was an over-achiever, sincere and genuine with average ability and unlikely to be successful in upgrading his education and obtaining employment. As a result of his injury and the subsequent withholding of benefits he became a demoralized man full of sadness and loss of pleasure. He was formerly a warm, friendly, sensitive person, now an individual full of anxiety and depression.

[49] Although Reflex Sympathetic Dystrophy ("RSD") is very rare, seven out of ten specialists agreed that Branco had RSD also known as complex regional pain syndrome.

[50] There is an extremely poor success rate in rehabilitation for RSD. The vocational assessment report of Dr. Mandel states in part:

> 9.0 Summary and Conclusions

Mr. Luciano Branco is a 58-year-old man who developed reflex sympathetic dystrophy (RSD) in his right foot after two apparently minor injuries while working as a welder for the Kumtor Operating Company (KOC) in Kyrgyzstan in 1999 and 2000. He has not worked since March 2000, and although he has had treatment consisting of medication, physiotherapy, and surgery, there has been no substantive improvement in his condition. He remains with chronic pain and significantly reduced function pertaining to the use of his right leg.

RSD, which is now most commonly referred to as complex regional pain syndrome, type 1, is also known as "algodystrophy" or "neurodystrophy" in Europe. It is a rare condition, with an incidence of 5.46 cases per 100,000 person-years. Median age of onset is 46. According to the Classification of Chronic Pain, published by the International Association for the Study of Pain, RSD is characterized by diffuse pain, swelling, reduced range of motion, and changes in temperature and skin colour of the affected limb. Burning, severe pain in a distal extremity, without nerve damage, is the essential feature. Onset is usually weeks after the injury, and the symptoms are often disproportionate to the inciting event, which is most commonly a fracture. Associated symptoms include sympathetic nervous system hyperactivity, atrophy of skin appendages, and atrophy of deep structures including bone (with advanced cases). Pain is aggravated by use of the body part, and relieved by immobilization. The condition typically persists indefinitely, even if treated, with a small incidence of spontaneous remission. In chronic cases, the condition leads to extreme pain, disability, and inability to work, and causes dramatic changes in the lives of the patients and their families. Depression and inability to perform daily activities is common. Patients with RSD affecting their leg suffer pain and impaired mobility, and their handicaps cause diminished social activity, and problems with work, housekeeping tasks, and recreational activities. The pathogenesis of RSD is only partly understood, and there are no treatments that can guarantee improvement. Indeed, according to one study, "improvement following treatment is rare." A meta-analysis or synthesis of findings of 21 randomized clinical studies investigating treatment of RSD, found no substantive positive effects for the use of sympathetic nerve blocks. While spinal cord stimulation has shown some benefit in reducing the pain associated with RSD, 1/3 of patients did not respond at all to the technique (which is highly invasive), and there was no clinically important improvement in the functional status of the successfully treated (in terms of pain reduction) patients.

While it has been suggested (e.g., Dr. Reilly) that Mr. Branco could benefit from further treatment such as a sympathetic nerve block or implantation of a spinal cord stimulator, the above review confirms

medical opinions by Drs. Amado and Correia that such treatment is unlikely to provide substantive benefit to Mr. Branco.

Prior to developing RSD, Mr. Branco had a solid work history with much above average earnings for his trade. He had worked as a welder since at least 1980, and his average earnings for the two years prior to him becoming disabled were $86,709. He had attained Red Seal certification as a welder and with this, and his accumulated experience, he was highly mobile and his services were in great demand. Academically, in addition to his training as a welder, he attained approximately a grade 11 or grade 12 education in his native Portugal. Other than what he learned as a welder, he has few transferable skills. Mr. Branco married at age 24; however, he and his wife have recently separated, mainly as a consequence of changes in his personality, and due to financial stress. He now lives with his 79-year-old mother in the town where he was born, where the main industry is fishing.

Key results of my assessment of Mr. Branco are as follows. He is a straight-forward and genuine man who showed absolutely no sign of exaggerating the extent of his pain or disability - in fact, he tends to minimize his pain and disability as compared with most other chronic pain patients that I see. He is a man of low average to average intellect, with limited capability for upgrading his education, especially at this stage of his life. He has good comprehension of written English, but his ability to engage in spontaneous, fluid speech in English is more limited. He has average mathematical abilities and I would suspect that he possesses average core academic capabilities in the Portuguese language; however, his abilities within an English language environment are more limited.

There is absolutely no sense that Mr. Branco is a person who tends to exaggerate about physical symptoms. He scored very low on a general symptom reporting measure, and indicated that he was pain free at the time I assessed him (because he had not been standing or walking). His pain reports were consistent with what I would expect for a person with chronic ankle/foot pain, that is, he reported that he experiences moderate pain most of the time, with increases to more severe pain when he has to weight-bear. He is generally able to keep his pain under control by sitting down and/or through the use of analgesic or anti-inflammatory medication. His sleep is regularly disrupted by pain and anxiety, and because of this, he is lacking in energy throughout the day. He is demoralized by his pain, his inability to work, and by the losses (significant decline in his financial status, marital separation) he has experienced as a result of his disability.

I would agree with others who have found that Mr. Branco has been psychologically affected by his pain and disability. Within my

assessment, he showed signs especially of anxiety, but signs of depression were also present. I would conclude that he is suffering from a chronic adjustment disorder with mixed anxiety and depression. This serves to further reduce his quality of life, and can be directly related to his diagnosis of RSD.

At age 58, with limited education and limited transferable skills, there is little that can be anticipated in terms of vocational rehabilitation for Mr. Branco. There is no question that he is now unable to work at his regular job as a welder, and his disability for this type of work is permanent. While it might be suggested that he could work as a welding supervisor or welding instructor, neither of these are sedentary jobs (although they might require less overall physical exertion than work as a welder per se). Welding supervisors typically have to do the same work as those under their charge, but provide instruction, workload management, and quality control. Sitting is not an option. With respect to the position of welding instructor, recent contact with Mr. J. Neilson, senior welding instructor at the Southern Alberta Institute of Technology revealed that there is "no chance" for an individual who is not able to walk or stand for prolonged periods to function in the capacity of a welding instructor or supervisor. Mr. Neilson stated that all welding instructor and supervisor positions require a great deal of walking and standing.

It is perhaps possible that Mr. Branco could work at an entry-level sedentary job such as motel desk clerk, gas station cashier, or at a security desk; however, the unpredictability of his pain would make him an unreliable employee, and he would likely have difficulty getting to and from work, because of the weight-bearing activity required to accomplish this. Further, the rate of pay he could anticipate for such work ($10.00 to $12.00 an hour, or in the range of $20,000 a year, for full-time work, if he could manage it) is much lower than he was earning as a welder, and would only allow him to recoup about 25% of his past wages. His age and his ongoing pain would, I believe, serve as huge barriers to succeeding at even such entry-level jobs, either in Portugal or Alberta.

A study by Kemler & Furnee investigated the impact of RSD on "life in the household", and in particular, on the ability to work. A total of 43 patients with RSD participated in the study. Of the 13 males, 11 had full-time permanent jobs prior to developing RSD, one was employed half-time, and the other was unemployed. Altogether for this sub-group, they were employed at the equivalent of 11.5 full-time positions (11.5 FTE) prior to developing RSD. After the diagnosis of RSD, only one of the male subjects was able to maintain his job (1.0 FTE). None of the other subjects were able to work at all. For the female sub-group, the patients had a combined 14 FTE prior to diagnosis, and this decreased to 2 FTE after the diagnosis of RSD. Altogether, for the patients diagnosed with RSD, there was an 88%

> decrease in work capability. This study provides a very compelling and objective demonstration of the severity of disability associated with RSD, and its impact on the ability to work. From this, it can be seen that the situation that Mr. Branco has found himself in is completely consistent with the norm for this patient group.
>
> In summary, I hold out very little hope for Mr. Branco to be capable of employment at any time in the future, and if he is able to work, there is no way that he will be able to generate earnings that are more than about 25% of those that he was able to generate as a welder.

[51] Dr. Mandel went on to explain that individuals with RSD are very restricted in their daily movement. In fact, Branco was doing better than most. However, their pain is so severe that they tend to withdraw from society which causes demoralization.

[52] Dr. Mothersill included similar comments on page 4 of his vocational assessment report:

> With regard to psychological symptoms, Mr. Branco indicated that he feels down and nervous. He is sad most of the time. He indicated that he also has a diminished interest in all or almost all activities. He has experienced a weight loss of four to five kilograms in the last four years. He has ongoing sleep difficulties. He indicated that he has a diminished ability to think and concentrate. His behavioural repertoire is limited. Mr. Branco also noted that he is quite worried about what will happen in the future. He feels nervous about his medical condition and wonders why he is experiencing his ongoing symptoms. He added that "all I want is my rights and nothing else."
>
> Mr. Branco indicated that the causal factors for his depression include reduced finances, his need to borrow money from his family members and the aftermath of the marital separation. ... Overall, he indicated that his depressive condition onset was due to "all the changes in my life the past seven years." He added that he tends to be isolated much of the time and does not talk with others very often.

[53] Dr. Mothersill concluded on page 21:

> In my opinion, Mr. Branco is presenting with symptoms characteristic of a chronic, mild Major Depressive Disorder. The presence of some exaggeration tendencies was noted in his self report. However, results of this assessment do not indicate that Mr. Branco's depressive symptoms would prevent him from engaging in physically suitable work. It is recommended, however, that Mr. Branco obtain cognitive behavioural therapy with an emphasis on the behavioural activation strategies, increasing his social contact with others and restructuring his beliefs with regard to the perceived hopelessness of his situation and his tendency to be pessimistic. Counselling would also be beneficial in helping him to adjust to his marital separation. Ten to fifteen sessions of counselling on a weekly basis is recommended. In addition, as recommended by Dr. Clarke, if would be helpful for Mr. Branco to have his current medications reviewed by a psychiatrist. ...

[54] Dr. Mothersill also stated that after successful treatment "he may be" able to be a welding supervisor. However, he also concluded that he is not to do bending, lifting or walking extensively. A welding supervisor would only be possible if the original treatment was successful considering the fact that it requires sitting, standing and walking.

[55] As stated by Dr. Clarke in his report on page 15:

> The issue of permanent impairment is difficult to assess. ... The assessment of permanent impairment due to pain is extremely difficult and, in my opinion, virtually impossible. Only in the most recent edition of the AMA Guide to the Evaluation of Permanent Impairment has any attempt been made to address the issues of pain and, in my view, this is far from adequate. Pain is a subjective experience for which no objective measurement is available and thus its assessment by any third party must, of necessity, be highly subjective on their part. I think it would be helpful if Mr. Branco were to undergo a formal Independent Psychiatric Assessment and then be provided with the means to treat his depression. Until that time I do not think it is possible to assess impairment, disability or prognosis.

[56] Dr. Mothersill agreed with Dr. Clarke's report.

[57] Although the medical reports received by Zurich and AIG from the Calgary specialists in 2007 confirmed, in general, the long term disabilities of Branco, Zurich still did not accept and make payment of the claim for disability payments until May 7, 2009.

[58] Zurich did not make payment until nine years after the accident, six years after the claim was filed and one and one-half years after the medical exam which they requested and eventually accepted.

[59] Now, Zurich has approved the quarterly annual payments to Branco up to and including December 31, 2013 after which they have advised they will require further medical evidence to continue until age 65.

[60] AIG had agreed for years that Branco was entitled to an annual permanent functional impairment payment, an annual independence allowance and a lifetime payment of $847.50 per month. However, AIG did not pay these benefits until the day before trial and only for the period ending December 2004. It was confirmed by the plaintiff's expert on worker's compensation benefits that Branco was entitled to wage loss benefits up to and including December 31, 2011, totalling $427,529.33. A similar amount was payable for 2012, as was calculated for the year 2011.

[61] The individuals who testified with knowledge or expertise of the WCB in Saskatchewan indicate the importance of s. 25 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, which states:

> **25**(1) A decision of the board shall be upon the real merits and justice of the case and it is not bound to follow any legal precedent.

> (2) Where the evidence in support of the opposite sides of an issue is approximately equal, the board shall resolve the issue in favour of the worker.

Both individuals agreed that in some situations vocational rehabilitation is not appropriate especially considering age and the possibilities of success in obtaining meaningful employment.

Claim Management by Zurich

[62] Counsel for Zurich agreed with the Zurich claims department representative that when the legal department took over this claim in 2003, "it dropped the ball". The claim had been approved on March 4, 2002, according to an answer given in reply to an undertaking. However, Branco was never advised of this until April of 2009, seven years later. It was apparent from the evidence of the Zurich employee that she had instructions for all communications to go through the legal department instead of having direct communication with Branco (the normal procedure was for the claims department to deal directly). Zurich had refused to pay the full benefits for the first 24 months in spite of its acknowledgement that it was due and owing. This was all because Branco refused to accept the $9,000 deduction for legal fees, an unenforceable and unjustified demand.

[63] The final decision respecting continued total disability benefit payments was made by Zurich after the 2007 assessment by Dr. Clarke in which he indicated that the depression had not been treated and it can take years to recover. Therefore the claims department allowed the claim even though this information was not communicated to Branco or his legal counsel.

[64] The Zurich employee agreed that Zurich did not comply with its philosophy. The deduction of legal fees was totally inappropriate. No evidence was presented to justify the total lack of action by the Zurich legal department to the claim from April 2003 to April 2007.

[65] For ease of reference, the actual philosophy of Zurich referred to as "Achieving Claims Management Excellence Claims Philosophy" states as follows:

> "Quality service, professionally delivered in a timely and cost-effective manner"
>
> At Zurich we aim to provide innovative, comprehensive, practical and integrated solutions to our customers; promptly and properly indemnify policyholders for covered losses they suffer; and pay those claims that are legally owed on behalf of our policyholders. The energetic, timely and appropriate resolution of all reported losses is a benefit to our customers and our other stakeholders.
>
> We also aim to diminish our customers' difficulties by the use of solutions that bring back normality to their lives as soon as possible with the minimum of inconvenience. We believe that we should work with our partners to deliver the best possible solutions in a professional and pragmatic manner to maximise our customers' satisfaction. In conducting all our claims-related activity we are inspired by our Group's core values and basic principles (Zurich Basics). This includes delivering on our contractual legal obligations and serving our customers and claimants in a fair, prompt, honest and friendly manner. At the same time, we must deliver that service and support in the most cost-effective way, so that both our customers and our other stakeholders benefit from the relationship.
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> *The Group Claim Board (formerly named Claim Network Leadership Group) and GHO Claims have developed the Zurich Global Claims Policy for the Group's Claims Departments. This document clearly articulates Zurich's claim approach and acts as a broad template for the effective management of claims.*

[66] The evidence before the court is that the legal department of Zurich in Switzerland was served with the amended statement of claim in January of 2002. After the claims department's original approval of the claim in early 2002 (or 2003),

the claims department was not provided with any further access to the file until at least the fall of 2008. It had received instructions from the legal department that all further communications after the original approval in 2003 were to be through the legal department and not the claims department in spite of the otherwise normal procedure of the claims department dealing directly with a claimant.

[67] The legal department of Zurich received a copy of the November 13, 2002 report of Dr. de Melo which stated in its conclusion: "Because there is not improvement, he should be considered % incapacity ... and be considered incapable of carrying out his normal trade." (P-213, Tab 17)

[68] The legal department of Zurich also received additional medical reports in 2006. One of these reports was from Dr. Paulo Amado, orthopaedic specialist, Master in Sports Medicine, which report was dated February 18, 2006, and a portion of which stated (Tab 21):

> ... As a result of the present medical evaluation we can conclude:
>
> ...
>
> b) The medical situation is settled, therefore we do not recommend further surgery or medical treatment.
>
> c)We do not expect this patient to ever be medically fit to take up his previous professional activity due to the demanding physical conditions required, even with adequate functional rehabilitation.
>
> d) In our opinion no rehabilitation programme will result in adequate recovery to meet the physical requirements of his previous activity, however we accept that he could be readapted to another professional activity, as long as his physical deficiency is taken into account.
>
> e)This patient is also psychologically affected, he is in a reactive depression due to this present situation of conflict, and it will only get worst [*sic*] if this is maintained, knowing that he will never be able to take up his professional activity again.
>
> ...
>
> g) This report was prepared based on my medical experience as a specialist in Orthopaedics and traumatology, with a Masters in Sports Medicine and Responsible for the Sports

> Traumatology Unit of the São Sebastião Hospital, Santa Maria da Feira, and Professor at the Faculty of Health Sciences of University Fernando Pessoa, Porto.

As well, the legal department of Zurich received a copy of the report of Dr. Pinheiro dated April 2, 2006, which is Exhibit P-213, Tab 22, which states:

> Mr. Luciano Branco is psychologically affected with the present state of affairs, and a resolution of this problem may be a great improvement on his health state and quality of life.

[69] Zurich had an independent audit of the Branco file completed which recommended accepting the claim. This report was made in December of 2007 or January of 2008. Even after the separate assessments made by Dr. Clarke and Dr. Mothersill on behalf of the defendants in 2007, this information was not provided to the Zurich claims department for assessment. Nor was it communicated to Branco, even though it is the information on which the 2009 assessment was made, and which resulted in Zurich's decision to acknowledge liability.

[70] Instead, Zurich consulted with the other two defendants and made a joint offer to settle in the amount of $238,000. This was an attempt to settle for a lesser amount in spite of the evidence in their possession. It is also noted that the only witness appearing from Zurich was the claims officer who had received instructions from Mirko Grunder of the legal department, in 2003 that all further communications were to go through the legal department. The evidence was that Mirko Grunder left the employment of Zurich in 2003. There was absolutely no evidence submitted by Zurich as to who had carriage of this claim from 2003 until 2009, other than it was not the claims officer.

[71] Although AIG and Zurich admitted in the examinations for discovery in 2007 that they both owed Branco money and that the lack thereof had caused mental distress, they still refused to pay.

[72] Zurich continued to demand repayment of inappropriate legal fees for five years until 2007.

[73] In 2009 Zurich changed its position and paid long overdue benefits with interest and one-third of the party-and-party costs to that date.

Supplemental Benefits under Zurich Group Policy

[74] Zurich continues to deny any obligation to continue life, accidental death and dismemberment insurance. The Zurich group insurance policy number 8438 being Exhibit P-240, states at article 12, "Cessation of Cover":

> Cover ceases for an insured staff member and/or respective spouse:
>
> 12.1 at the end of the policy period for Group Life during which an insured staff member attains age 65;
>
> 12.2 upon attainment of age 65 for ADD & LTD;
>
> 12.3 after the last day of paid service in case of leaving the Company before age 65;
>
> 12.4 if premiums cease to be paid by the Company;
>
> If a staff member is receiving a LTD benefit and as a consequence is dismissed from employment, an admitted LTD benefit will continue to be paid for as long as the claim is valid, subject to the terms and conditions of the Policy.
>
> Upon cessation of cover for an insured staff member, cover for respective spouse and respective dependant ceases automatically.

> Once cover has ceased, it can only be reinstated upon approval of Zurich Life.
> ...
> **Art. 14 Final Dispositions**
> ...
> Termination of the Policy shall cease all mutual obligations except benefits-in-payment and claims incurred but not yet reported, or premium adjustments due.

Medical, Dental and Vision Benefits

[75] The employment contract from Kumtor addressed to Branco, January 17, 2001 states: "*Medical, dental, vision care* - benefits will expire when you are deemed fit for work or at the termination of the disability benefits." This portion of the insurance was being provided by Cameco/Kumtor. Cameco's human resources department provided services to Kumtor from its Saskatoon head office, including administration of the insurance policies. They had received correspondence from AIG that benefits to Branco were being "suspended" as they had not received a response from their medical expert in Portugal who completed the surgery in January. Cameco/Kumtor thus discontinued their medical, dental and vision coverage in mid-2001 even though AIG benefits had only been suspended at that time and not terminated.

Court Applications

[76] There were also numerous and constant court delays. The first application was by Zurich in June of 2002 to strike the statement of claim for lack of jurisdiction. It was dismissed with costs to the plaintiff.

[77] There was a consent order respecting delivery of undertakings by January 15, 2012 to which AIG requested and was given extensions. However AIG still did not respond. When a contempt application had been filed the answers were received just before it was to be heard.

[78] Then there was the application for security of costs after a 10-year wait, followed by an application by Cameco/Kumtor and Zurich to the Saskatchewan Court of Appeal on a mandamus application which was dismissed with costs. The Zurich, Cameco and Kumtor application for security of costs then continued and was dismissed with costs.

Agreed Statement of Facts at Trial

[79] The agreed statement of facts are as follows:

> 1. Zurich Life Insurance Company is a Swiss corporation and is part of the Zurich Insurance Group, a global insurer.
>
> 2. Zurich Life Insurance Company is not a registered Canadian corporation, although the Zurich Insurance Group includes registered Canadian corporations.
>
> 3. Zurich Life Insurance Company is not licensed to transact insurance in the Province of Saskatchewan, although companies within the Zurich Insurance Group are.
>
> 4. On March 13, 2000 Luciano Branco was employed as welder in a mine site in Kyrgyzstan operated by Kumtor Operating Company.
>
> 5. Kumtor Operating Company is a registered corporation in Kyrgyzstan and a subsidiary of the Defendant Cameco Corporation, a Saskatchewan Company.
>
> 6. Kumtor Operating Company is not a registered Canadian corporation, however it is a subsidiary of the Defendant Cameco Corporation, a Saskatchewan company.
>
> [*sic*]

11. Mr. Branco did not return to work for Kumtor after March 13, 2000.

12. Mr. Branco's base salary on March 13, 2000 was $51,920.00 CDN.

14. Mr. Branco was paid his base salary by Kumtor from March 13, 2000 to June 15, 2001.

15. Mr. Branco was paid workers' compensation benefits by American Home Assurance Company for the period from March 19, 2001 to December 8, 2004 in the total amount of $79,603.44 USD.

16. After his claim arose Mr. Branco asked Kumtor and Cameco for details regarding his insurance benefits but was not provided claim documents. He sued Zurich and AIG on October 19, 2001. Claim documents were not provided to Mr. Branco until January 29, 2003, when they were sent to his counsel. They were completed in February of 2003.

17. Mr. Branco prepared a formal, written application for disability benefits and submitted it to Zurich in February of 2003 with the following additional information;

    (a) Letter of Dr. Dutoit at Kumtor to Prof. Jose Antonio Perreira Da Silva dated June 10, 2000 ... [P-213 Tab 4]

    (b) "Clinical Report" [of Dr. de Melo] dated August 1, 2000 ... [P-213 Tab 5]

    (c) "Clinical Report" [of Dr. de Melo] dated October 30, 2000 ... [P-213 Tab 6]

    (d) "Independent Medical Examination Report" [of Dr. Jeff McKerrell] dated September 28, 2001 ... [P-213 Tab 10]

    (e) "Medical report" [of Dr. Pascoal Pinheiro] dated July 22, 2002 ... [P-213 Tab 13]

    (f) "Insight Medical Imaging Report" [of Dr. R. McEwen] dated October 10, 2002 ... [P-213 Tab 14]

    (g) Letter from J. Reilly, M. B., F.R.C.S. (c) dated October 17, 2002 ... [P-213 Tab 15]

    (h) Letter from J. Reilly, M. B., F.R.C.S. (c) dated October 21, 2002 ... [P-213 Tab 16]

(i) "Medical Report" [of Dr. de Melo] dated November 13, 2002 ... [P-213 Tab 17]

(j) "Medical Report" [of Dr. Paulo Amado] dated November 24, 2002 ... [P-213 Tab 18]

(k) Letter from Jose Correia dated December 18, 2002 ... [Medical Report P-213 Tab 19]

(l) "Additional Questions to Disability Claims" dated February 7, 2003 ... [P-156]

18. On April 21, 2003 Zurich offered to pay the Plaintiff disability benefits for the period March 13, 2000 to June 25, 2002 subject to the 105 day waiting period stipulated in the Zurich policy, in the amount of $62,688.00 CAD, less $9,000 for legal fees incurred by Zurich, in return for a full and final release and discontinuance of the claim against Zurich.

19. On October 27, 2006 Mr. Branco sent additional medical information to Zurich as follows:

(a) "Medical Report" dated February 18, 2006 "signed by Dr. Paulo Amado"

(b) "Medical Report" dated April 2, 2006 "Joao Pascoa Pinheiro"

(c) "Medical Report" dated May 26, 2006 "Jaime M. M. Antunes"

(d) "Medical Report" dated August 23, 2006 "A. Silva Marques"

20. On March 6, 2007 Zurich requested additional information from Mr. Branco as follows:

(a) Historical imaging studies of the injury (reports and original x-ray, bone scan and MRI images)

(b) A complete work history identifying employer (name and location), length of time in employ, positions held, duties related to each position and a complete copy of his employment file with Cameco and/or Kumptor [*sic*],

(c) A complete history of his education, identifying schools or courses attended, periods for each school or course, grade achieved, description of certificates and/or degrees achieved, and

(d) That an independent medical assessment, functional capacity evaluation and vocational assessment be conducted.

21. An independent medical assessment, functional capacity evaluation and vocational assessment of Mr. Branco were required by and undertaken at the expense of the Defendants during late 2007.

22. An independent medical assessment, functional capacity evaluation and vocational assessment of Mr. Branco were all conducted during the week of September 27, 2007 to October 3, 2007.

23. Zurich Life Insurance Company received reports with respect to all assessments by December 13, 2007.

24. On April 4, 2008 the Defendants jointly offered to settle Mr. Branco's claim for amount of $238,000.00 in return for a full and final release and discontinuance of the claim against all the Defendants.

25. On December 9, 2008 Mr. Branco responded by rejecting the offer of settlement.

26. On April 28, 2009 Zurich Life Insurance Company advised the Plaintiff that Zurich accepted Mr. Branco's claim for disability benefits and that Zurich would be paying all disability benefits, interest and party/party costs without deduction for Zurich's legal costs, workers' compensation benefits or salary received during the period of disability.

27. On May 7, 2009 Zurich Life Insurance Company paid the sum of $321,366.50 CDN to Mr. Branco representing disability benefits for the period June 26, 2000 to April 30, 2009.

28. On May 7, 2009 Zurich Life Insurance Company paid the further sum of $40,831.50 CDN to Mr. Branco representing pre-judgment interest from June 26, 2000 to April 30, 2009.

29. On June 18, 2009 Zurich Life Insurance Company paid the sum of $9,863.13 CDN to Mr. Branco, which Zurich represented as being its share of the party/party costs.

30. Mr. Branco has continued to receive disability benefits under the Zurich policy since May 1, 2009. However, Zurich withheld payments for May & June 2010, until counsel for Mr. Branco demanded the resumption of payments.

The Insurance Policies, Agreements and Handbook

[80] The employee handbook which Branco acknowledges receiving a few months after he started employment with Kumtor deals with such issues as long term disability, termination of insurance and workers' compensation. The handbook notes:

> **Disability Benefits**
>
> If your disability is the result of a work-related illness or injury, you may be eligible to receive a monthly income from Worker's Compensation in accordance with Saskatchewan Law.

The handbook also deals with termination of insurance with respect to medical, dental and vision care insurance wherein it states:

> If your Active Service ends due to an Injury or Sickness, your insurance will be continued while you remain totally and continuously disabled as a result of the Injury or Sickness. However, the insurance will not continue past the date your Employer stops paying the premium for you or otherwise cancels the insurance.

[81] With respect to long term disability the handbook states:

> In the event that you become totally disabled as a result of sickness or accident and are unable to perform your occupation after a period of 15 weeks disability, you will receive a disability pension of 70% of annual salary up to a maximum of CAD $8,000 per month until either recovery, death or attainment of retirement age 65.

[82] It is also noted on page 11 of the renewal employment agreement in effect at the time Branco sustained his injuries that para. 12.0 governing law and atonement states in the first paragraph:

> The parties acknowledge that this Employment Agreement shall be performed in its entirety in the Republic of Kyrgyzstan. This Employment Agreement shall be interpreted and construed in accordance with the laws of the Province of Saskatchewan and the laws of Canada applicable therein.
> Notwithstanding the foregoing, no employment standards, human rights or other similar statute of Saskatchewan or Canada shall have any application to the parties.
>
> The parties hereby agree that any dispute with respect to the meaning, application or alleged violation of this Employment Agreement shall be determined by arbitration pursuant to the provisions of *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1. The parties further agree that this Employment Agreement shall not be the subject of civil litigation in any court.

[83] The long term disability contract with Zurich states with respect to:

(a) total disability, in article 5.3:

> Total disability means the complete inability of the insured staff member to perform the principal duties of his/her own occupation and is not following any other occupation. Once benefits have been paid for twenty-four (24) months, total disability shall mean the complete inability of the insured staff member to follow any other gainful occupation for which he/she is reasonably fitted by training, education or experience. The insured staff member must be under the regular care of a physician while disabled but house confinement is not required.

(b) premiums, in article 7:

> Premiums are payable until the day on which the insured staff member dies, the end of the waiting period in case of a disability claim, leaves the services of the Company or attains retirement age.

(c) payment of benefits, in article 9:

> ZURICH LIFE will pay the insured benefit as soon as it has satisfied itself of the validity for claim from the documents required. LTD benefits are payable quarterly in advance.

(d) claims, in article 9.2:

> To substantiate a claim for disability benefits covered by the terms of this Policy the following documents have to be submitted by the Company:
>
> [these include among other things the completed Zurich Life claim form and detailed medical reports from the attending physician.]

(e) article 11 establishes that this is a "Worldwide Policy":

> The insurance is valid worldwide subject to the provisions as set out in Art. 10 above.

(f) the question of applicable law is dealt with, in article 12:

> ZURICH LIFE shall fulfil its obligations in Zurich, Switzerland. Should any differences arise between the contracting parties of the present Group Insurance Policy, the Courts at the domicile of ZURICH LIFE INSURANCE COMPANY LIMITED shall be considered competent and Swiss Law will be applicable.

[84] Group Life Insurance is covered under article 5.1 of the Zurich policy. Branco as a rotational ex-pat would be entitled to four times his annual salary rounded to the next highest thousand. His annual salary without supplemental allowances was $51,920. This translates to life insurance of $208,000.

ISSUES

[85] The evidentiary and choice of law issues are:

(a) adverse inference;

(b) leading evidence contrary to one's reply to undertaking;

(c) appropriate law to be applied to Zurich benefits;

(d) mental, dental and vision coverage;

(e) equitable set-off.

(f) is Kumtor the alter ego of Cameco?

[86] The issues relating to Cameco/Kumtor are:

(1) Is Cameco/Kumtor in breach of the employment agreement?

(2) What damages is Branco entitled to for the breach?

[87] The issues relating to AIG are:

(1) Is AIG in breach of the policy by failing to pay Branco benefits?

(2) Has AIG breached the duty of good faith and fair dealing?

(3) Is Branco entitled to aggravated damages or damages for mental distress from AIG?

[88] The issues relating to Zurich are:

(1) Is Zurich in breach of the policy to continue life and accidental death and dismemberment coverage during disability?

(2) Did Zurich breach the duty of good faith and fair dealing and is Branco entitled to aggravated damages or damages for mental distress from Zurich?

[89] The issues relating to punitive damages:

(1) Should punitive damages be awarded against Kumtor?

(2) Should punitive damages be awarded against AIG?

(3) Should punitive damages be awarded against Zurich?

THE LAW

General principles in interpretation of insurance contracts

[90] In *Wawanesa Mutual Insurance Co. v. Hewson*, 2004 SKCA 112, 254 Sask.R. 203, at paras. 10 to 12, the Saskatchewan Court of Appeal summarized the following general principles:

> **10** The general principles which guide the interpretation of insurance contracts are well known. In *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Company*, [1980] 1 S.C.R. 888, Estey J. said at pp. 901-2:
>
> > Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

> **11** In *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, McLachlin J., as she then was, said:
>
> > In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:
> >
> > (1) the *contra proferentem* rule;
> >
> > (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
> >
> > (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.
>
> **12** The *contra proferentem* rule is defined by Gordon Hilleker in *Liability Insurance in Canada*, at p. 30:
>
> > [*C*]*ontra proferentem*, properly applied, is a rule for resolving a conflict between two reasonable but opposing interpretations of the policy wording. In such cases the interpretation to be adopted is that which favours the insured.

[91] The Supreme Court of Canada also stated in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, 99 D.L.R. (4th) 741, at paras. 38 and 39:

> **38** These ambiguities, interpreted in accordance with the *contra proferentem* rule, militate in favour of adopting an interpretation of the policy that favours the insured rather than the insurer which drafted the policy. The same result is suggested by the rule that coverage provisions should be construed broadly.
>
> **39** I turn to the third relevant principle of construction, the reasonable expectations of the parties. Without pronouncing on the reach of this doctrine, it is settled that where the policy is ambiguous, the courts should consider the reasonable expectations of the parties: *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.), leave to appeal to S.C.C. refused, [1985] 1 S.C.R. v. The insured's reasonable expectation is, at a minimum, that the insurance plan will provide coverage for legitimate claims on an ongoing basis. The presumption must be that the intention of the parties is to provide and obtain coverage for all legitimate claims on an ongoing basis, whether through renewal with the same insurer or through securing new insurance with a different insurer. This presumption is consistent with the discovery principle discussed earlier in these reasons, in that the insurer is able to secure a means of certainty in

> calculating its risk without unfairly creating gaps in coverage. Yet the construction of the policy which the insurer urges upon us may well not achieve that goal.

(a) Adverse Inference

[92] Both AIG and Zurich failed to call witnesses to explain unfavourable claims against them.

[93] In *Murray v. Saskatoon*, [1952] 2 D.L.R. 499, 4 W.W.R. (N.S.) 234 (Sask. C.A.), Martin C.J.S. deals with the issue of parties who fail to call witnesses to explain away unfavourable claims against them. Martin C.J.S. states at paras. 20 and 21:

> **20** The subject is dealt with at length by the learned author in *Wigmore on Evidence*, 3rd ed., vol. II, pp. 162 *et seq*. On p. 162 it is stated in part:–"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."
>
> **21** The party affected by the inference may, of course, explain it away by showing circumstances which prevent the production of the witness; but where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in *Wigmore on Evidence* following the above quotation many authorities are referred to which indicates that in the Courts of the United States the rule is of wide application.

[94] This position is also supported by John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999), at page 297, para. 6.321, under "Failure to Testify or to Call a Material Witness or Other Evidence":

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

In the current situation, AIG failed to call Patti Schibler to explain why she adopted the same strategy which she used in an almost identical case which resulted in punitive damages being awarded against AIG (see *Sarchuk v. Alto Construction Ltd.*, 2003 SKQB 237, [2004] 1 W.W.R. 228). Also Zurich failed to call Mirko Grunder or another member of the legal department of Zurich who had control of the file from at least 2003 to 2009 to explain why no action was taken on this claim. The only witness called from Zurich head office was the claims officer who had no knowledge of the file which was controlled by the legal department for this time period.

[95] Both of these failures lead to adverse inferences against AIG and Zurich.

(b) Leading evidence contrary to one's reply to undertaking?

[96] During trial, the question arose whether or not Zurich could lead evidence to contradict its reply to an undertaking made at its examination for discovery. It was raised that Branco's initial claim to Zurich was not approved on

March 4, 2002 as stated in the reply to undertaking. Counsel attempted to lead evidence at trial that the claim was approved a year later on March 4, 2003.

[97] The Saskatchewan Court of Appeal in *Graham v. Thompson*, [1947] 1 W.W.R. 1131, [1947] S.J. No. 7 (QL), wherein Martin C.J.S., stated in paras. 3 and 4:

> **3** ... I am of the opinion that under the circumstances the plaintiff cannot be permitted to withdraw the admissions made on her examination for discovery. The purposes of an examination for discovery are (1) to enable the examining party to know the case he has to meet, (2) to enable him to procure admissions which will dispense with the proof of his own case at the trial, and (3) to procure admissions which will destroy the opponent's case. As to the first two purposes, *vide Graydon v. Graydon* (1921) 51 OLR 301, Middleton, J., at p. 303. As to the procuring of admissions which will destroy the opponent's case see *Holmested and Langton's Ontario Judicature Act*, 5th ed., pp. 975 and 976, and cases therein cited.
>
> **4** In *Bank of Toronto v. Matheson* [1927] 3 WWR 10, 22 Sask LR 127, Turgeon, J.A., in delivering the judgment of this court, stated, at p. 13, that an examination for discovery "is intended to probe the opposite party's claim, or defence, and to secure admissions binding upon him."

[98] This is also confirmed by the Saskatchewan Court of Appeal in *Perreault v. Board of Kinistino School Unit No. 55* (1957), 8 D.L.R. (2d) 491, 21 W.W.R. 17, where it is stated at para. 46:

> **46** With every deference I think that the defendant should be bound by those admissions and if counsel for the defendants intended to offer evidence contradicting such admissions, he should have informed the plaintiff that he intended to offer such evidence. One of the primary objects of an examination for discovery is to obtain admissions to save costs at the trial and when an admission has been made as clearly as the above, I do not think a party can complain to the Court of Appeal if the trial Judge has accepted such admission. Once this fact has been established, certain necessary consequences flow from it.

[99] Branco went to trial relying on the admissions made by Zurich. Therefore, Zurich should not now be permitted to deny the previously sworn testimony provided in the examination for discovery.

[100] This is reinforced by the fact that there was no suggestion that the date of March 4, 2002 was incorrect until after the plaintiff had closed his case. Zurich had a number of years in which to raise this matter if it was in fact an issue.

[101] Therefore, this court accepts the evidence provided under oath in the examinations for discovery of the proper officer of Zurich. She undertook to contact the claims officer and confirmed the date of the original claim to be March 4, 2002.

(c) Appropriate law to be applied with respect to Zurich benefits

[102] Zurich's insurance policy states that Swiss law will be applicable to any disputes between the parties. Zurich argues that Swiss law should apply to the current dispute. Swiss law does not recognize exemplary or punitive damages.

[103] Swiss law may be applicable in disputes between Zurich and Kumtor, being the contradicting parties. However, the plaintiff is not a party to the contract and therefore is not bound by the choice of law provision.

[104] The Supreme Court of Canada in *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, [2002] 2 S.C.R. 695, at para. 41, states:

> **41** It is trite law, however, to say that the provisions of a contract cannot unilaterally bind a person who is not a party to it. In the absence of privity between the two insurers, there is simply no basis

> for allowing Family to benefit from Lombard's provision on sharing by limits. ...

[105] Similarly, it was stated by the Federal Court of Appeal in *World Fuel Services Corp. v. Nordems*, 2011 FCA 73, [2012] 4 F.C. 183, at paras. 87 and 90:

> **87** Thus, Richard C.J.'s disposition of the issue before him in The Lanner is clearly in accordance with the above principles. However, where, as here, the shipowners are not a party to the supply contract, it cannot be said that they have agreed to the U.S. choice of law provision found in the contract between the appellant and Parkroad. Clearly, they have not.
> ...
>
> **90** The Judge was of the view that because the shipowners were not a party to the contract with the appellant, the choice of law clause had "less significance than otherwise" (paragraph 52 of Judge's Reasons). At paragraph 67 of his Reasons, he expanded on that by saying that "[a]bsent a contract, we must tote up the points of contact". In other words, the proper law is determined not by reference to the choice of law provision, but by an attempt to determine, on the basis of the facts and events of the case, which jurisdiction has the closest and most substantial connection to the transaction. In my view, the Judge made no reviewable error in the way he dealt with the choice of law provision found in the contract between the appellant and Parkroad.

[106] As the Alberta Court of Appeal in *Canada (Attorney General) v. Nalleweg*, 1998 ABCA 282, 223 A.R. 89, stated at paras. 23 and 24:

> [23] In order to properly determine the rights of the Government as against Nalleweg the proper law to look to is the law of British Columbia. The contract between Nalleweg and the Bank created the debt in question and is at the root of this entire matter; therefore, it is proper that any disputes arising out of that contract be governed by the "lex loci contractus". The proper law of the contract is the system of law which has the closest and most real connection to the contract: See *Kenton Natural Resources v. Burkinshaw, Abrams and Exotic Minerals Inc.* (1983), 47 A.R. 321, at p. 329 (Q.B.); *243930 Alberta Ltd. v. Wickham et al.* (1990), 40 O.A.C. 367; 73 D.L.R. (4th) 474 (C.A.), Castel, J.G., *Canadian Conflict of Laws*, 3rd Ed. (Toronto: Butterworths, 1994), at p. 559.

> [24] To determine which jurisdiction is most closely connected with the contract, the place of contracting, place of performance, residence or place of business of the parties, and the subject matter of the contract are all important factors. In this case, the contract was concluded in British Columbia between a student living in British Columbia and a Bank doing business in British Columbia. The subject of the contract was a loan to provide funds so the Nalleweg could attend a University in British Columbia. All of the payments made pursuant to the contract were paid to the Bank in British Columbia. The only discernable reason the action is being brought in Alberta is that Nalleweg is currently residing in Alberta.

[107] In deciding the appropriate law to be applied the British Columbia Supreme Court in *Cansulex Limited v. Reed Stenhouse Limited* (1986), 70 B.C.L.R. 273, [1986] B.C.J. No. 3125 (QL), stated at page 13:

> The important facts in increasing order of importance are: (a) that the policy is deemed to be made here; (b) that Aetna underwrote this risk on an American form; (c) that both parties operate worldwide from their respective countries; (d) that the subject matter of the contract is liability insurance; and (e) that claims might be expected to arise for which coverage might be furnished by the policy in Alberta, British Columbia or worldwide, but not the United States.
>
> ... I do not think it can be said, in the context of this policy, that the law of a country where a claim is unlikely to arise has the closest connection to this policy of liability insurance.

[108] Further, Justice LeBel also highlighted the importance of public policy when determining applicable law in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at paras. 223 and 224:

> **223** ... In my opinion, there is more work for this defence to do. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness. Among these, I would include the idea that civil damages should only be awarded when the defendant is responsible for harm to the plaintiff, and the rule that punitive

> damages are available when the defendant's conduct goes beyond mere negligence and is morally blameworthy in some way. These are basic principles of justice that are reflected in some form in most developed legal systems, although the particular form in which they are expressed may vary.
>
> **224** A law which violates these basic tenets of justice would be fundamentally unfair and worthy of condemnation. ...

[109] In contracts of insurance the appropriate law is determined by the application of the real and substantial connection test. This is the law which must be applied and not the choice of law provision in the contract. There is a real and substantial connection to Saskatchewan. Cameco and Kumtor have head offices here. The contract of employment establishes use of Saskatchewan law and the workers' disability benefits are based upon Saskatchewan Workers Compensation Board benefits.

[110] Canadian courts do not apply foreign laws if the law in question is contrary to public policy. It is a fundamental difference between Canadian and Swiss law that Swiss law does not allow for punitive damages.

[111] The court does not accept that Swiss law should apply in the current situation. Zurich is a company doing business worldwide. For Zurich to argue that they should not be bound by a legal system which accepts punitive damages when it does substantial business in Canada, the United States, Britain and Australia, all of which recognize punitive damages, is unacceptable.

[112] Saskatchewan law is an appropriate law to apply.

(d) Medical, dental and vision coverage

[113] Kumtor maintained coverage for employees for medical, dental and vision care expenses, through Cigna Worldwide Insurance Company ("Cigna").

[114] On July 4, 2001, Kumtor received notification from AIG that the plaintiff's workers' compensation style benefits had ceased. The letter from the AIG adjuster, Patti Schibler, noted that:

> I have discontinued Mr. Branco's disability benefits effective May 14, 2001 due to insufficient medical documentation. The last report that I received from Dr. Amado was in February 2001. His diagnosis at that time was that Mr. Branco could return to work in or about April/May 2001. After numerous letters, e-mails and phone calls Dr. Amado has failed to respond to our inquires [*sic*]. In order to continue disability benefits we require current medical reporting. Therefore we suspended disability benefits and this file is presently in a pending status.
>
> [Emphasis added]

[115] After receiving this notification from AIG, Kumtor then terminated the health, dental and vision care coverage that it carried for the plaintiff pursuant to the Cigna policy.

[116] The payment respecting reimbursement of medical expenses up to 2006 was made on September 7, 2012 and includes all amounts claimed by the plaintiff Branco to 2006. This payment, however, was made by AIG.

[117] The question is whether Kumtor is liable to Branco for these amounts. Kumtor was prompt in providing the initial claim respecting the plaintiff Branco to

AIG. However, Kumtor was completely negligent in failing to comply with the terms of the Zurich policy, which required notification of the claim by Kumtor as it had done with AIG. Further, upon receiving the letter of suspension of benefits from AIG, Kumtor immediately cancelled the medical, dental and vision care benefits through Cigna without any attempt to determine whether or not this was appropriate action in the circumstances.

[118] Based upon the decision of this court that the plaintiff was and continues to be disabled, and continues to be entitled to disability benefits, Kumtor remains responsible for coverage for the medical, dental and vision care expenses on the same terms and conditions as existed under the Cigna policy, which was cancelled. If the plaintiff continues to be disabled to the age of 65, Kumtor shall continue to be responsible for such expenses until the plaintiff attains 65 years of age.

[119] AIG has paid for all medical expenses claimed by Branco up to 2006. These expenses were payable under the workers' compensation benefits payable by AIG.

[120] Kumtor shall be responsible only for the portion of medical expenses which relate to the plaintiff's spouse or such medical, dental or vision care expenses of the plaintiff or his spouse which are not covered by the workers' compensation benefits. Any legitimate medical, dental and vision care expenses submitted by Branco post-2006 respecting his spouse shall be reimbursed by Kumtor as well as any ongoing medical, dental or vision expenses of Branco and his spouse which are not covered by the AIG benefits.

(e) Equitable set-off

[121] Kumtor claims the right to equitable set-off respecting the overpayment of wages in the amount of $12,979.98, being the original wage overpayment.

[122] The law with respect to equitable set-off is set forth by the Ontario Court of Appeal in *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78, 39 C.B.R. (4th) 5. The court does accept this as the law with respect to equitable set-off. However, Kumtor shall not be allowed an equitable set-off as no claim has been made in the pleadings filed by Kumtor for equitable set-off.

(f) Is Kumtor the alter ego of Cameco?

[123] Evidence presented during the trial established that Kumtor is a company incorporated in Kyrgyzstan. Kumtor is the owner and operator of the Kumtor gold mine in Kyrgyzstan. At all relevant times, Kumtor Operating Company was owned by Kumtor Mountain Company. Kumtor Mountain Company was owned by Cameco Gold Inc. Cameco Gold Inc. was owned by Cameco Corporation. Branco alleges that Kumtor is the alter ego of Cameco. He claims that Cameco is liable for the actions of Kumtor.

[124] On this issue the court accepts the law set forth by the Saskatchewan Court of Appeal in *Nedco Ltd. v. Clark*, [1973] 6 W.W.R. 425, 43 D.L.R. (3d) 714, wherein Culliton C.J.S. stated at paras. 19 to 28, inclusive:

> **19** Notwithstanding that since the judgment of the House of Lords in *Salomon v. A. Salomon & Co., Ltd.*, [1897] A.C. 22, the autonomous and independent existence of the corporate entity has generally been accepted as a fundamental feature of both English and Canadian law, there have been occasions when the Courts have found it both possible and necessary to pierce the corporate veil. The Court has done so when one company is in fact the agent of the other; or, where one company is being used as a cloak for the actions of the other; or, for the just and equitable enforcement of a tax law. The Court has also done so when it has concluded that while the corporations are separate in law, one may be under the control of the

other to such an extent that together they constitute one common unit.

20 This latter principle was followed by the English Court of Appeal in *Merchandise Transport Ltd. v. British Transport Com'n et al.*, [1962] 2 Q.B. 173. At p. 202, Devlin, L.J., said:

> But the fact that two persons are separate in law does not mean that one may not be under the control of the other to such an extent that together they constitute one commercial unit. It may be a case of parent and subsidiary; or it may be a case in which one man, though nominally independent, is in truth the instrument of another; or it may be a case in which a man has simply put his vehicles in the name of his wife.

21 In *Smith, Stone and Knight, Ltd. v. Lord Mayor, Aldermen & Citizens of City of Birmingham,* [1939] 4 All E.R. 116, Atkinson, J., held it to be a question of fact in each case whether the subsidiary was carrying on the business as the company's business, or as its own. In this case he went behind the corporate entities and held that the subsidiary in fact was carrying on the company's business, and not its own.

22 Perhaps the strongest statement permitting the Court to depart from the principle laid down in *Salomon v. A. Salomon & Co., Ltd., supra,* is that of Lord Denning, M.R., in *Little-woods Mail Order Stores, Ltd. v. McGregor,* [1969] 3 All E.R. 855, when, at p. 860, he said:

> The doctrine laid down in *Salomon v. Salomon & Co., Ltd.*, [1897] A.C. 22; [1895-99] All E.R. Rep. 33, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork company and see it as it really is - - the wholly-owned subsidiary of the taxpayers. It is the creature, the puppet, of the taxpayers in point of *fact*; and it should be so regarded in point of *law*.

23 The foregoing statement, however, should be contrasted with that of Ormerod, L.J., in *Tunstall v. Steigmann,* [1962] 2 Q.B. 593, when, in effect, he said [headnote]:

> If there has been any departure from a strict observance of the principle of *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22 it has only been made to deal with special circumstances where a limited company might well be a facade concealing the real facts.

24 In a number of Canadian cases involving labour disputes, Courts have looked beyond the corporate veil: see *Lescar Construction Co. Ltd. v. Wigman* (1969), 7 D.L.R. (3d) 210, [1969] 2 O.R. 846, and *Refrigeration Supplies Co. Ltd. v. Ellis et al.* (1970) 14 D.L.R. (3d) 682, [1971] 1 O.R. 190. These cases, however, while recognizing the right to pierce the corporate veil, do not establish any broad principle upon which the right to do so is founded. They do, however, make it clear that each case must be decided in the light of its particular facts.

25 The right to pierce the corporate veil for a specific purpose seems to have been recognized by the Supreme Court of Canada in *Toronto v. Famous Players Canadian Corp.*, [1936] 2 D.L.R. 129, [1936] S.C.R. 141, and *Aluminium Co. of Canada Ltd. v. Toronto*, [1944] 3 D.L.R. 609, [1944] S.C.R. 267, [1944] C.T.C. 159. In the latter case, Rand, J., in delivering the judgment of himself and the Chief Justice, said, at p. 614:

By the decision of this Court in the case of *Toronto v. Famous Players Canadian Corp.*, [1936] 2 D.L.R. 129, [1936] S.C.R. 141 it is now settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate facade of the latter and becomes, itself, the manifesting agency. In such a case it is not accurate to describe the business as being carried on by the puppet for the benefit of the dominant company. The business is in fact that of the latter. *This does not mean, however, that for other purposes the subsidiary may not be the legal entity to be dealt with*.

(The italics are mine.)

26 After reviewing the foregoing, and many other cases, the only conclusion I can reach is this: while the principle laid down in *Salomon v. A. Salomon & Co., Ltd., supra*, is and continues to be a fundamental feature of Canadian law, there are instances in which the Court can and should lift the corporate veil, but whether it does so depends upon the facts in each particular case. Moreover, the fact that the Court does lift the corporate veil for a specific purpose in no way destroys the recognition of the corporation as an independent and autonomous entity for all other purposes.

27 In the present case Nedco Ltd. is a wholly-owned subsidiary of Northern Electric Company Limited. It was organized and incorporated to take over what was formerly a division of Northern Electric Company Limited. As such wholly-owned subsidiary, it is controlled, directed and dominated by Northern Electric Company Limited. Thus, viewing it from a realistic standpoint, rather than its

> legal form, I am of the opinion that it constitutes an integral component of Northern Electric Company Limited in the carrying on of its business. That being so, I can see no grounds upon which lawful picketing of Nedco Ltd., pursuant to a lawful strike against Northern Electric Company Limited, should be restrained.
>
> **28** I want to make it perfectly clear that, in reaching this conclusion, I have not attempted to lay down any general principle. It is only because of the special circumstances prevalent in this case that I have reached the conclusion which I have. While Nedco Ltd. is, for the purposes of this application, an integral component of Northern Electric Company Limited, for all other purposes it remains an autonomous and independent entity.

[125] The law respecting this issue is further updated by the Saskatchewan Court of Appeal in *Tridont Leasing (Canada) Limited v. Saskatoon Market Mall Ltd.*, [1995] 6 W.W.R. 641, 131 Sask.R. 169 (C.A.), wherein the court states at paras. 15-23:

> [15] This submission raises the classic question of when the courts should ignore the separate rights of corporations and treat the individual corporations as one unified entity for the purpose of permitting creditors to attach the property of both corporations. In dealing with such a submission, one must start with the position enunciated in *Salomon v. Salomon & Co.*, [1987] A.C. 22; [1895-9] All E.R. Rep. 33 (H.L.), where the courts recognized that, once a company is legally incorporated, it must be treated like any other independent person with its individual rights and liabilities. Lord Halsbury put it this way:
>
> > "... and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence -- quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the

> motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are." ([1987] A.C. at 30.)

[16] Thus the autonomous and independent existence of the corporate entity is a fundamental feature of Canadian and English law. Notwithstanding that feature, however, the courts have found it possible to pierce the corporate veil when one company is in fact the agent of the other, or where one of the companies is being used to cloak the actions of the other or where it is necessary to permit enforcement of tax laws. The courts have also pierced the corporate veil when one company is so dominated by another that even though they are separate in law, one is so controlled by the other that both corporations constitute one common unit.

[17] Market Mall relies on a decision of this Court, *Nedco Ltd. v. Clark*, [1973] 6 W.W.R. 425, and in particular the statement of Culliton, C.J.S.:

> "After reviewing the foregoing, and many other cases, the only conclusion I can reach is this: while the principle laid down in *Salomon v. Salomon & Co. Ltd., supra,* is and continues to be a fundamental feature of Canadian law, there are instances in which the court can and should lift the corporate veil, but whether it does so depends upon the facts in each particular case. Moreover, the fact that the court does lift the corporate veil for a specific purpose in no way destroys the recognition of the corporation as an independent and autonomous entity for all other purposes.
>
> "In the present case Nedco Ltd. is a wholly-owned subsidiary of Northern Electric Company Limited. It was organized and incorporated to take over what was formerly a division of Northern Electric Company Limited. As such wholly-owned subsidiary, it is controlled, directed and dominated by Northern Electric Company Limited. Thus, viewing it from a realistic standpoint, rather than its legal form, I am of the opinion that it constitutes an integral component of Northern Electric Company Limited in the carrying on of its business." (at 433.)

Culliton, C.J.S., made it perfectly clear that each case is dependent on its own facts and that he had not attempted to lay down any general principle. The special circumstances that existed in that case, a labour dispute, where the subsidiary corporation had been created to take over the distribution functions of the parent company, prompted the court to pierce the corporate veil and deal with two corporations as one economic unit. The subsidiary corporation, Nedco, was treated as an integral component of Northern Electric Company Limited for the purpose of labour relations with the union.

[18] When one examines the corporate relationship and corporate structure in this case, it is clear there are striking differences from those which existed in *Nedco*. Tridont was incorporated in 1981 for the express purpose of providing financial services in the form of leases to franchisees. The financing of franchisee operations was not an integral part of Tridont Health Care's operations. Financing of the clinics had previously been done by third party financial institutions prior to this time. For example the lease of the equipment and leaseholds of the Tridont Dental Centre at Medicine Hat was financed by First City Trust. The franchise holders were not obliged to finance the acquisition of the equipment with Tridont Leasing. Both these companies financed their own operations, kept separate balance sheets, and did not divide profit or loss. When Tridont Health Care went public in 1986 it generated approximately $26,000,000 through the sale of its shares and had assets of approximately $10,000,000. Tridont Health Care is presently in receivership while Tridont Leasing is a viable and profitable operation.

[19] When one examines the cases where the courts have pierced the corporate veil, there must at least be complete domination by the parent over the subsidiary or some note of illegality or improper motive for the creation of the subsidiary company before the courts will treat the companies as one economic entity. In *Merchandise Transport Ltd. v. British Transport Commission; Arnold Transport (Rochester), Ltd. v. British Transport Commission*, [1962] 2 Q.B. 173; [1961] 3 All E.R. 495 (C.A.), the corporate veil was pierced because the two companies were so under the control of one of them that they in fact constituted one economic enterprise. Even in the strongest case relied on by Culliton, C.J.S., in *Nedco, Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners*, [1969] 1 W.L.R. 1241; [1969] 3 All E.R. 855 at 860 (C.A.), Lord Denning M.R. noted that the subsidiary must be "the creature, the puppet of" the controlling shareholders. He stated:

> "The doctrine laid down in *Salomon v. Salomon & Co. Ltd.*, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork company and see it as it really is -- the wholly-owned subsidiary of the taxpayers. It is the creature, the puppet, of the taxpayers in point of *fact*; and it should be so regarded in point of law." (citations omitted)

[20] Sherstobitoff J.A. noted the courts pierce the corporate veil sparingly in *Saskatoon Real Estate Board v. Saskatoon (City)* (1988), 61 Sask.R. 215 (C.A.). He stated:

> "The numerous cases in which the courts have lifted the corporate veil have been subject to criticism some of which may have merit. Welling in *Corporate Law in Canada*, at pp. 127-140 argues that they amount to a practice of invoking or ignoring the principle of corporate entity at the whim of the individual judge whenever he perceives it to be necessary to reach a just and equitable result. He says that the cases have no reasoned principles behind them. He argues that on the basis of the statutory provision and *Salomon*, judges simply do not have the power to ignore the separate existence of a corporation in the name of some unarticulated notion of justice and fair play."

He continued:

> "There is no suggestion that the appellant was created for the purpose of avoiding payment of business tax, nor is there any suggestion of any element of illegality or improper motive in the structure of the appellant. That being so, the appellant must be treated as a separate corporate personality ..." (at pp. 220-221.)

See also *Suncor Inc. Resources Group, Oil Sands Division v. Allarco Group Ltd.*, [1987] 5 W.W.R. 159; 77 A.R. 378 (C.A.) and *Northern Electric Co. Ltd. v. Warkentin (Frank) Electric Ltd.* (1972), 27 D.L.R. (3d) 519 (Man. C.A.).

[21] In the present case, there is no evidence Tridont Leasing was established to defeat the creditors of Tridont Health Care, to avoid the payment of taxes, to shelter the assets of Tridont Health Care, or established for any illegal or immoral purpose. There is no evidence the company was so dominated by the parent corporation so as to form one economic entity, indeed the fact that Tridont Health Care is bankrupt and Tridont Leasing is still a healthy and economically viable company indicates just the opposite. The fact one corporation controls all the shares of another is not an uncommon business practice and not a sufficient reason to depart from the concept of separate corporate identity. As Dickson, J.A. (as he then was), stated in *Northern Electric*:

> "Unless it can be established, on the evidence, that the two corporations are but *alter egos* for Mr. Quiring, or that by reason of mutual covenants, conspiracy, fraud, agency, one of the corporations is liable for the obligations of the other, no legal ground exists for interblending the bodies corporate." (at 530)

> [22] It is contended that Tridont Leasing acted as the agent of Tridont Health Care, but again there is no evidence of that. Professor Welling in *Corporate Law in Canada* (B.L. Welling, *Corporate Law in Canada, the Governing Principles* (2nd Ed.) (Toronto: Butterworths, 1991)) states there are a set of rules that may be applied to determine if there is an agency relationship between the principal shareholder and a corporation. There is either an express agency agreement where the newly incorporated corporation will take over the business of its principal or there is an implied agreement. He points to a set of factors established in *Smith, Stone & Knight Ltd. v. Birmingham Corp.*, [1939] 4 All E.R. 116 (Eng. K.B.), where a parent corporation successfully demanded compensation for the eviction of its subsidiary on the basis that it was the agent of the parent company. The evidence established that the business had been previously run by the parent company and there had never been a formal transfer of assets after the subsidiary's incorporation. Those six factors are:
>
> > (a) whether the profits were "treated" as profits of the parent or of the subsidiary;
> > (b) whether the individuals involved in the day-to-day operations were appointed by the parent;
> > (c) whether the parent corporation was the "brains" behind the day-to-day operation;
> > (d) whether the parent corporation made policy and financial decisions that were merely carried out by the subsidiary;
> > (e) whether the profits were directly traceable to the skill and direction of the parent; and,
> > (f) whether control by the parent was constant, as would be the case in a typical principal-agent situation, or merely periodic and long range, as might occur in a typical corporation-shareholder situation. (Supra, at 130.)
>
> None of the evidence in this case points to the factors outlined above.
>
> [23] The only justification for piercing the corporate veil is the inequity claimed by the landlord, Market Mall, in not being able to attach the property of the wholly owned subsidiary, Tridont Leasing, when the parent company Tridont Health Care is bankrupt. That, in my opinion, is not sufficient reason to depart from established principles. On the facts of this case there is no justification to pierce the corporate veil. This ground of the appeal must therefore fail.

[126] It is apparent from the evidence before the court that there is a type of working relationship being carried on between Kumtor and Cameco. It is noted that

both had employees in Kyrgyzstan working at the mine. It is also noted that Cameco provided human resources and payroll services to Kumtor through its Saskatoon office. Cameco was named as a party to the insurance policy with AIG and negotiated insurance in Saskatchewan for Kumtor. Employees of Cameco were officers of Kumtor and held senior positions in the operation of Kumtor in Kyrgyzstan.

[127] Cameco also maintained an umbrella insurance policy for Kumtor. However, Kumtor was the named insured and the insurance policies being referred to in this action were all held in the name of Kumtor.

[128] As summarized by the Ontario Court of Appeal in *Gregorio v. Intrans-Corp*. (1994), 18 O.R. (3d) 527, 115 D.L.R. (4th) 200, at para. 28:

> **28** ... In my view, these facts do not support the trial judge's finding of liability on a theory of alter ego, which in this case I take to mean treating Paccar as the manufacturer for the purpose of fixing it with liability to the respondent in negligence. Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights. See *Pauley Petroleum Inc. v. Continental Oil Co.*, 239 A.2d 629 (Del. Sup. Ct., 1968), *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (C.A.) and *Aluminum Co. of Canada v. Toronto (City)*, [1944] 3 D.L.R. 609 (S.C.C.).

[129] The evidence establishes that Kumtor had a working relationship with its twice removed parent company. Kumtor maintained its own human resource department in Kyrgyzstan, held its own insurance policies, and operated its own affairs purchasing human resource and payroll services from Cameco.

[130] The court is not satisfied from the evidence before it that Kumtor is the alter ego of Cameco.

[131] The action against Cameco is dismissed.

The Law respecting Aggravated Damages

[132] In comparing aggravated and punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, LeBel J. states at para. 157:

> **157** Aggravated damages served the traditional corrective purpose of the common law: to make the plaintiff whole for injuries to interests that are not properly compensable by ordinary damages. Punitive damages target not loss, but conduct. (See *Vorvis, supra*, at pp. 1098-99; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.) The defendant's wrong must then be considered directly and separately in order to assess its severity and, accordingly, the appropriate degree of punishment. The other forms of damages look to the loss of the plaintiff, but punitive damages refer essentially to the degree of culpability of the defendant's action.

[133] The Supreme Court of Canada considered similar circumstances in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, wherein the court stated:

> **41** The right to obtain damages for mental distress for breach of contracts that promise pleasure, relaxation or peace of mind has found wide acceptance in Canada. Mental distress damages have been awarded not only for breach of vacation contracts, but also for breaches of contracts for wedding services (*Wilson v. Sooter Studios Ltd.* (1988), 33 B.C.L.R. (2d) 241 (C.A.)), and for luxury chattels (*Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.* (2002), 97 B.C.L.R. (3d) 307, 2002 BCCA 78). Some courts have included disability insurance contracts: see *Warrington and Thompson v. Zurich Insurance Co.* (1984), 7 D.L.R. (4th) 664 (Ont. H.C.J.). The Ontario Court of Appeal has endorsed contractual damages for mental distress where peace of mind is the "very essence" of the

promise: see *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, at para. 34.

42 In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, this Court described the line of cases awarding mental distress damages as standing for the proposition that "in some contracts the parties may well have contemplated at the time of the contract that a breach in certain circumstances would cause a plaintiff mental distress" (p. 1102). It is thus clear that an independent actionable wrong has not always been required, contrary to Sun Life's arguments before us.

43 The view taken by this Court in *Vorvis* that damages for mental distress in "peace of mind" contracts should be seen as an expression of the general principle of compensatory damages of *Hadley v. Baxendale*, rather than as an exception to that principle, is shared by others. ...

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*: see *Vorvis*. The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed". The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. ...

...

47 This does not obviate the requirement that a plaintiff prove his or her loss. 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.

[134] In discussing aggravated damages, the court further stated:

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* 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. ... They are not true aggravated damages awards.

...

56 Turning to the case before us, the first question is whether an object of this disability insurance contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made? In our view it was. The bargain was that in return for the payment of premiums, the insurer would pay the plaintiff benefits in the case of disability. This is not a mere commercial contract. It is rather a contract for benefits that are both tangible, such as payments, and intangible, such as knowledge of income security in the event of disability. If disability occurs and the insurer does not pay when it ought to have done so in accordance with the terms of the policy, the insurer has breached this reasonable expectation of security.

57 Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured's anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits. See D. Tartaglio, "The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts" (1983), 56 *S. Cal. L. Rev.* 1345, at pp. 1365-66.

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. To accept Sun Life's argument that an independent actionable wrong is a precondition would be to sanction the "conceptual incongruity of asking a plaintiff to show *more* than just that mental distress damages were a reasonably foreseeable consequence of breach" (O'Byrne, at p. 24 of manuscript (emphasis in original)).
>
> **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. He found as a fact that Ms. Fidler "genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage" (para. 30 (emphasis added)). This finding was amply supported in the evidence, which included extensive medical evidence documenting the stress and anxiety that Ms. Fidler experienced. He concluded that merely paying the arrears and interest did not compensate for the years Ms. Fidler was without her benefits. 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.

[135] In considering the issue of a breach of a duty of good faith which typically goes hand in hand with a denial of benefits or other breach of the express terms of a contract of insurance, Charron J.A. (as she then was) stated in *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.* (2002), 217 D.L.R. (4th) 34, 61 O.R. (3d) 481 (Ont. C.A.), where she wrote:

> [78] A breach of the duty to act fairly and in good faith gives rise to a separate cause of action that is distinct from the cause of action founded on the express terms of the policy and that is not restricted by the limits in the policy. Hence it may result in an award of consequential damages distinct from the proceeds payable under the policy. It is important to note, however, that the duty to pay promptly, as a component of the duty of good faith, must be considered in that context; it is not an absolute obligation giving rise to an automatic claim for consequential damages in the event of any failure to make a timely payment in accordance with the policy. The latter contention was made by the insured in *702535 Ontario Inc.*

> and rejected by this court. O'Connor J.A. stated as follows (at para. 37):
>
> > ... the broader interpretation urged by the appellants could have far-reaching effects for the insurance industry. In some cases, the risk of being found liable for consequential damages resulting from unsuccessfully contesting a claim under a policy would constitute a substantial disincentive for insurers to deny claims, even those which they reasonably and in good faith consider to be either unfounded or inflated. In a general sense, insurers and insureds have a common interest in ensuring that only meritorious claims are paid. Increased payments by insurers lead to increased premiums for insureds. In order to effectively screen claims, insurers must be free to contest those claims which in good faith they have reason to challenge, without running the risk that if they are ultimately found to be wrong, they will be liable to indemnify the insured for losses not underwritten in the policy contracted for by the insured.
>
> [79] In addition, in an exceptional case where the insurer's misconduct is sufficiently malicious, indicative or reprehensible so as to warrant punishment in addition to compensation, a breach of the duty to act fairly and in good faith can also found a claim for punitive damages.

[136] The court accepts that the law set forth by the Supreme Court of Canada in *Fidler, supra,* which establishes that aggravated damages are allowable in "peace of mind" contracts for mental distress.

[137] The court is satisfied that both the workers' compensation coverage provided by AIG and the long term disability insurance provided by Zurich were both peace of mind contracts, an object of which was to secure a psychological benefit. Having said this, mental distress caused by a breach of these contracts is considered within the reasonable expectation of the parties.

[138] As stated in *Fidler,* at para. 57:

> **57** Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay

> the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured's anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits. ...

This quotation explains precisely the current situation.

(1) Is AIG in breach of the policy by failing to pay Branco benefits?

[139] Branco was entitled to expect that his temporary total disability payments would be paid to him monthly in order to replace his lost wages and pay his living expenses. The first payment by AIG to Branco was due March 19, 2001 and was paid March 20, 2001. The next payment was due April 16, 2001 and was paid May 8, 2001.

[140] No further payments were made until October 31, 2002, almost a full year and a half later. The next payment covering the period May 14, 2001 to September 30, 2001, was made on November 13, 2002. Although these payments were to be made monthly in advance, the next payment was not received until April 23, 2003, more than five months later.

(2) Has AIG breached the duty of good faith and fair dealing?

[141] After that date all payments were made on time up to and including December 2, 2004, at which time AIG discontinued payments because Branco refused to attend an inappropriate vocational retraining program chosen by AIG and refused to do the job of AIG and find a more appropriate vocational retraining program. It was

established by the evidence before the court that Branco was still at that point not in any condition to enroll in a vocational retraining program.

[142] AIG discontinued benefit payments for inappropriate reasons. Their chosen medical specialists failed to provide prompt reports. As in the *Sarchuk* case, *supra*, they discontinued payment of benefits in order to create undue hardship on Branco to force him into accepting an extremely low offer of settlement. The attempt failed, but not for a lack of trying.

[143] AIG was also in breach of the duty of good faith in expecting Branco to consider minimum wage employment after being a sought-after, highly-trained member of his welding profession.

[144] As stated by Baynton J. of this court in *Bacon v. Saskatchewan* (1990), 88 Sask.R. 182, [1990] S.J. No. 632 (QL), at para. 46:

> **46** ... An occupation is not a "reasonable" one unless the remuneration it pays is similar (even if not equivalent) to that of the occupation held by the plaintiff before his or her disability. Nor is an occupation reasonable if it is trivial or inconsequential in nature. ...
>
> **47** In summary, the plaintiff will be considered under the plan to be totally disabled if she is unable to substantially perform any occupation that is:
>
> (a) neither inconsequential or trivial; and
> (b) similar in nature and remuneration to her former occupation; or
> (c) similar in remuneration to her former occupation and of such a nature that she can become capable of performing it substantially within a reasonable time and with a reasonable effort and expense.
>
> The determination of what is "similar in nature" and what is a "reasonable time, effort, and expense", is assessed from a consideration of the previous education, training and experience of the plaintiff and her previous occupation.

[145] The AIG policy was a policy to cover the individual workers with monthly disability payments until a worker was able to go back to work or reach the age of 65. The whole purpose was to have monthly benefits available to meet the monthly living expenses of the disabled individual. To fail to make the payments in a prompt and reasonable manner was a breach of duty of good faith and fair dealing on the part of AIG. To fail to pay the disabled individual for months or years on end and then provide a lump-sum payment with interest to date totally defeats the purpose of the policy. Also, for AIG to discontinue payments as of December 2004 because Branco was not prepared to enrol in an inappropriate vocational retraining program in Lisbon is not a justifiable reason to discontinue benefits permanently. Even if the Lisbon program had been an appropriate one, the evidence establishes that even as late as the assessments made of Branco in Calgary, Alberta in the fall of 2007 Branco continued to be neither physically nor mentally able to proceed with any type of vocational retraining.

(3) Is Branco entitled to aggravated damages or damages for mental distress from AIG?

[146] Each of these insurance policies were peace of mind contracts and Branco is entitled to damages for mental distress caused by the failure of AIG to make payments on a regular and timely manner and to continue making such payments until Branco is capable of returning to the work force, a fact which has never to this date been established. Had AIG made the monthly payments on a regular and timely basis as required under the policy there would in all likelihood not have been the significant amount of mental distress which has virtually destroyed Branco's life over the last 13 years.

[147] The only way Branco was able to continue to survive and advance this cause of action was through the support and co-operation of his family and legal counsel. His daughter who is an investment banker in London, England was attempting to provide small amounts of cash to keep her father in clothes and food and to make payments on his legal account. She was so dedicated to helping him with this cause that she was required to leave her large flat in London and obtain much smaller accommodation in order to be able to continue to have sufficient cashflow to assist her father.

[148] Eventually Branco's daughter even failed at this and had to advise legal counsel that she would no longer be able to afford to make payments on her father's legal account on a regular basis. The law firm accepted her position and agreed to postpone further payments until final judgment in this matter.

[149] Without these actions of support by his daughter and his legal counsel Branco would not have been able to withstand the pressure applied by these two major worldwide insurance companies who were determined to apply sufficient pressure to Branco to force him into acceptance of a ridiculously low settlement of this otherwise justifiable claim.

[150] The court has accepted that AIG did eventually make payment of benefits to Branco under the terms of the policy as required to December 2004. However AIG is in breach of the contract in failing to continue payments to age 65 or a date to which Branco is able to return to work which to date has not occurred. AIG is also in breach of its duty to deal in good faith and fair dealing with Branco as evidenced by its numerous lengthy and unexplained delays in payments made to Branco. These acts were malicious and designed to leverage a reduced settlement of the claim.

[151] As established by the Supreme Court of Canada in the *Whiten* decision, Branco is entitled to aggravated damages and damages for the mental distress caused by AIG in its failure to act in good faith and fair dealing.

[152] For these reasons the court does assess aggravated damages against AIG in the amount of $150,000.

[153] In addition, the court orders that the WCB payments which AIG ceased paying as of December 2004 shall continue until Branco attains the age of 65. This shall include the annual permanent functional impairment payments and the annual independence allowance. AIG shall continue to make the lifetime payment to Branco of $847.50 per month and reimburse him for his personal medical expenses for the balance of his lifetime as required by the policy.

ZURICH

(1) Is Zurich in breach of the policy to continue life and accidental death and dismemberment coverage during disability?

[154] In considering the continuation of the life insurance and accidental death and dismemberment insurance coverage which Zurich was providing and which they refused to continue, the statements of the Ontario Court of Appeal in *Gallop v. Co-Operators Insurance Association (Guelph)* (1977), 16 O.R. (2d) 49, 77 D.L.R. (3d) 306 (Ont. C.A.), at para. 4, are relevant:

> It is equally clear, and not argued by the respondent here, nor would it appear to have been argued below, that obligations crystallizing during the existence of the contract could not be terminated by the insurer after the crystallization. It would be ludicrous to interpret the termination sections as entitling the insurer, following the happening of the very event against which the

> insurance is undertaken, to terminate the obligation to pay. Therefore, it follows that the historic distinction in the law of contract between contractual rights under the contract and obligations arising out of the contract has been carried forward into the statutory conditions set forth in the termination section. To interpret it otherwise would bring about a result which would be preposterous.

[155] The long term disability benefits payable under this contract shall continue to age 65 as noted in para. 74 hereof and being para. 12.2 of the policy. It is also noted immediately after para. 12.4 in the policy that "if a staff member is receiving an LTD benefit and as a consequence is dismissed from employment, an admitted LTD benefit will continue to be paid for as long as the claim is valid, subject to the terms and conditions of the policy. The long term disability has crystallized and will therefore continue. Article 14 of the policy goes on to state, also as referred to in para. 74: "Termination of the Policy shall cease all mutual obligations except benefits-in-payment and claims incurred but not yet reported, or premium adjustments due." As this policy was later terminated by Kumtor the life insurance benefits and accidental death and dismemberment coverage were also discontinued at that time. There is no obligation on Zurich to continue the benefits other than the long term disability benefits which were previously approved.

(2) **Did Zurich breach the duty of good faith and fair dealing and is Branco entitled to aggravated damages or damages for mental distress from Zurich?**

[156] With respect to whether or not aggravated damages should be assessed against Zurich, the court has also considered the fact that this is a peace of mind contract. Branco is entitled to expect that the monthly payments will be made in a prompt and regular manner. Zurich has accepted that Branco is totally disabled up to and including December of 2013. However, Zurich failed to commence payments in a timely manner as required under the policy.

[157] Branco was injured the first time in December 1999 and the second time in March of 2000. In spite of the fact that he has never been able to work after that date and in spite of having long term disability insurance with Zurich, he did not receive any payment of any kind from Zurich until the spring of 2009. This is almost a 10-year period without receipt of the benefits to which he was entitled. The fact that interest was paid to the date of payment does not in any way compensate for the mental distress caused by the many years during which Branco was unable to make his mortgage payment, support his family, support himself, and provide for the other necessities of life. Branco has established to the satisfaction of the court that much of his mental distress was caused by the actions of Zurich. The consequences have been a major negative impact upon Branco's life and continues to affect his quality of life.

[158] Similar to the AIG situation, Zurich did eventually pay to Branco the benefits due and owing under the long term disability contract up to and including 2009 with interest to that date and has continued the payments as required except for two monthly payments which have been omitted without explanation.

[159] It is unacceptable for Zurich to claim the benefits have been paid and that it had no responsibility to deal with Branco in a manner involving good faith and fair dealing. It failed to make the payment of long term disability payments except in one large lump-sum in 2009 respecting the accident which occurred in December of 1999 and reoccurred in early 2000. This delay is completely reprehensible. As stated previously, the Supreme Court of Canada in *Whiten*, *supra*, has established that Branco is entitled to aggravated damages and damages for mental distress caused by Zurich in its failure to honour its duty of good faith and fair dealing.

[160] It is abundantly clear from the evidence before the court that much of the mental distress of Branco was caused by this egregious action of Zurich. When an individual is entitled to monthly long term disability payments, for Zurich to wait more than 10 years before making payment is such a gross breach of a peace of mind contract that Branco is entitled to aggravated damages against Zurich which the court does assess in the amount of $300,000.

The Law with respect to Punitive Damages

[161] The law in Canada is accepted as that set out in *Whiten, supra*. Binnie J. stated in para. 4 of his decision:

> **4** ... The appellant was faced with harsh and unreasoning opposition from an insurer whose policy she had purchased for peace of mind and protection in just such an emergency. The jury obviously concluded that people who sell peace of mind should not try to exploit a family in crisis. Pilot, as stated, required the appellant to spend $320,000 in legal costs to collect the $345,000 that was owed to her. The combined total of $665,000 at risk puts the punitive damage awards in perspective. An award of $1 million in punitive damages is certainly at the upper end of a sustainable award on these facts but not beyond it. ...

[162] The court went on further to state at paras. 8 and 9:

> **8** Pilot did not agree that "there is little or no base [*sic*] to deny this claim", although at that stage it had no evidence to support a defence of arson. It refused to accept Francis's recommendations and decided to deny the claim. It did not tell Francis why it would not pay the claim and Francis in turn did not advise the Whitens of what was happening.
>
> **9** Pilot requested the Insurance Crime Prevention Bureau, a body set up by the insurance industry, to review the analysis of Pilot's investigator. By letter dated February 25, 1994, the Bureau reported that "we wouldn't have a leg to stand on as far as declining the claim". Pilot, having asked for the opinion, then apparently decided that the Bureau's evaluator was not in fact qualified to render an opinion. No one from Pilot testified as to why the claims examiner,

> and subsequently Pilot's Branch Manager, Mr. Steven Carter, rejected this advice as well.

Once again very similar to the current situation.

[163] The court goes on further to provide an analysis of punitive damages where it states at paras. 36 to 45:

> **36** Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).
>
> **37** Punishment is a legitimate objective not only of the criminal law but of the civil law as well. Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law. In the present case, for example, no one other than the appellant could rationally be expected to invest legal costs of $320,000 in lengthy proceedings to establish that on this particular file the insurer had behaved abominably. Over-compensation of a plaintiff is given in exchange for this socially useful service.
>
> **38** Nevertheless, the hybrid nature of punitive damages offends some jurists who insist that legal remedies should belong to one jurisprudential field or the other. That is one major aspect of the controversy, often framed in the words of Lord Wilberforce's comments, dissenting, in *Cassell & Co. v. Broome*, [1972] A.C. 1027 (H.L.), at p. 1114:
>
> > It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed

itself to any of these theories: it may have been wiser than it knew.

39 A second major aspect of the controversy surrounding punitive damages is related to the quantum. Substantial awards are occasionally assessed at figures seemingly plucked out of the air. The usual procedural protections for an individual faced with potential punishment in a criminal case are not available. Plaintiffs, it is said, recover punitive awards out of all proportion to just compensation. They are subjected, it is said, to "palm tree justice": *Cassell, supra,* at p. 1087. They are handed a financial windfall serendipitously just because, coincidentally with their claim, the court desires to punish the defendant and deter others from similar outrageous conduct. Defendants on the other hand say they suffer out of all proportion to the actual wrongs they have committed. Because the punishment is tailored to fit not only the "crime" but the financial circumstances of the defendant (i.e., to ensure that it is big enough to "sting"), defendants complain that they are being punished for who they are rather than for what they have done. The critics of punitive awards refer *in terrorem* to the United States experience where, for example, an Alabama jury awarded $4 million in punitive damages against a BMW dealership for failure to disclose a minor paint job to fix a cosmetic blemish on a new vehicle in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In 1994, a jury in New Mexico awarded 81-year-old Stella Liebeck $160,000 in compensatory damages and $2.7 million in punitive damages against McDonald's Restaurants for burns resulting from a spilled cup of coffee, notwithstanding that she tried to open the cup while balancing it on her lap in the passenger seat of a car (*Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309 (D. N.M.)). Critics of punitive damages warn against an "Americanization" of our law that, if adopted, would bring the administration of justice in this country into disrepute.

40 These are serious concerns, but in fact, the punitive damage controversies have little if anything to do with Americanization of our law. Jury awards of punitive damages in civil actions have a long and important history in Anglo-Canadian jurisprudence. They defy modern attempts at neat classification of remedies. The jury is invited to treat a plaintiff as a public interest enforcer as well as a private interest claimant. Almost 240 years ago, government agents broke into the premises of a Whig member of Parliament and pamphleteer, John Wilkes, to seize copies of a publication entitled *The North Briton, No. 45*, which the Secretary of State regarded as libellous. Lord Chief Justice Pratt (later Lord Camden L.C.) on that occasion swept aside the government's defence. "If such a [search] power is truly invested in a Secretary of State", he held, "and he can delegate this power, it certainly may affect the person and property

of every man in this kingdom, and is totally subversive of the liberty of the subject". As to punitive damages, he affirmed that:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.
>
> (*Wilkes v. Wood* (1763), Lofft. 1, 98 E.R. 489 (K.B.), at pp. 498-99)

41 Long before the days of Lord Pratt C.J., the related idea of condemning a defendant to a multiple of what is required for compensation (in the present appeal, as stated, the punitive damages were roughly triple the award of compensatory damages) reached back to the Code of Hammurabi, Babylonian law, Hittite law (1400 B.C.), the Hindu Code of Manu (200 B.C.), ancient Greek codes, the Ptolemaic law in Egypt and the Hebrew Covenant Code of Mosaic law (see *Exodus* 22:1 "If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep"). Roman law also included provisions for multiple damages. Admittedly, in these early systems, criminal law and civil law were not always clearly differentiated. The United States Supreme Court in *BMW, supra*, referred at p. 581 to "65 different enactments [in English statutes] during the period between 1275 and 1753 [that] provided for double, treble, or quadruple damages".

42 Even in terms of quantum, the use of punitive damages in the eighteenth century was aggressive. In *Huckle v. Money* (1763), 2 Wils. K.B. 206, 95 E.R. 768, the journeyman Huckle (who had actually printed the pamphlet *The North Briton, No. 45* at issue in *Wilkes, supra*) won a cause of action for trespass, assault and false imprisonment and received 300 pounds in damages from the jury despite the comfortable and short six-hour duration of his confinement. The government's motion for a new trial on the basis that the award was "outrageous" was denied, even though actual damages totalled only 20 pounds (i.e., a multiplier of 15) (p. 768). The Lord Chief Justice, in introducing the expression "exemplary damages", thought there was no precedent for judges "intermeddling" with damages awarded by juries.

43 The three objectives identified by Lord Chief Justice Pratt, in *Wilkes, supra* -- punishment, deterrence and denunciation ("proof of the detestation") -- are with us still, even though some scholarly critics have argued that these rationales "have very particular and divergent implications" that occasionally wind up undermining each other: B. Chapman and M. Trebilcock, "Punitive Damages: Divergence in Search of a Rationale" (1989), 40 *Ala. L. Rev.* 741, at

p. 744. No doubt, as a matter of language, the word "punishment" includes both retribution and denunciation, and the three objectives should perhaps better be referred to as retribution, deterrence and denunciation.

44 The notion of private enforcers (or "private Attorneys General"), particularly where they act for personal gain, is worrisome unless strictly controlled. Thus, while the availability of punitive damages in Canada was affirmed early on by this Court in *Collette v. Lasnier* (1886), 13 S.C.R. 563, a patent case, they were not widely awarded until the 1970s. Since then the awards have multiplied in number and escalated in amount. A report on punitive damages by the Ontario Law Reform Commission, issued in 1991, which examined research begun in 1989, predicted limited and principled development in the law of punitive damages in Canada: Ontario Law Reform Commission, *Report on Exemplary Damages* (1991), at pp. 93 and 98. By 1998, the report's research director, Dean Bruce Feldthusen, conceded that the law was "certainly developing quite differently in Canada than one would have predicted only a short time ago" and that "many of the doctrinal pillars on which the Report's predictions of limited and principled development in the law governing punitive damages were based have since cracked or collapsed": B. Feldthusen, "Punitive Damages: Hard Choices and High Stakes", [1998] *N.Z. L. Rev.* 741, at p. 742. Contrary to expectations, the awards were much larger, more frequent, appeared to rely more often on the defendant's wealth in support, and included more high profile jury awards. The kinds of causes of action had expanded; punitive damages were the "norm" and had "proliferated" in actions in sexual battery, were now "clearly available" for breach of fiduciary duty, and "persisted" in contract actions. Prior criminal convictions, he concluded, no longer automatically barred punitive awards. He added, "[p]erhaps most significantly, the courts seem to have accepted general deterrence, not retributive punishment, as the dominant purpose behind punitive damage awards in a number of important decisions" (p. 742).

45 This Court more recently affirmed a punitive damage award of $800,000 in *Hill, supra*. On that occasion some guidelines were set out to keep this remedy within reasonable limits. The Court on this occasion has an opportunity to clarify further the rules governing whether an award of punitive damages ought to be made and if so, the assessment of a quantum that is fair to all parties.

[164] The court goes on further at para. 54 wherein it states:

> **54** ... The dissent on this point by Callinan J. is closer to the Canadian position at pp. 50-51:
>
> > The fact of the imposition of punishment and its extent and impact on the defendant will always be relevant factors, probably on most occasions the major and decisive factors. They may not however be conclusive ones for all cases. ... A court would also be entitled to take into account that lesser punishments may have been, or might be imposed as a consequence of the acceptance of a lesser plea, the availability (for what might be sound policy reasons in and for the purposes of the criminal law) of a small penalty only, the desirability of the less condemnatory process by way of civil rather than criminal proceedings, the need to encourage compliance with the law, and the fact that the possibility of any criminal sanction is illusory.

[165] The court after doing a comparative summary of various jurisdictions made the following conclusions at paras. 66 to 74:

> **66** For present purposes, I draw the following assistance from the experience in other common law jurisdictions which I believe is consistent with Canadian practice and precedent.
>
> **67** First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada in *Vorvis, supra*, at pp. 1104-6. The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts, as in *Hill, supra*, or breach of fiduciary duty as in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, but *Vorvis* itself affirmed the availability of punitive damages in the exceptional case in contract. In *Denison v. Fawcett*, [1958] O.R. 312, the Ontario Court of Appeal asserted in *obiter* that on proper facts punitive damages would be available in negligence and nuisance as well. In *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228, the British Columbia Court of Appeal awarded punitive damages in a negligence case on the principle that they ought to be available whenever "the conduct of the defendant [was] such as to merit condemnation by the [c]ourt" (p. 250). This broader approach seems to be in line with most common law jurisdictions apart from England.

68 Second, there is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in *Hill, supra*, at para. 196, they are "the means by which the jury or judge expresses its outrage at the egregious conduct").

69 Third, there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts (*Gray, supra; Daniels* [[1998] 3 N.Z.L.R. 22 (C.A.)]), but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance. (*Buxbaum (Litigation guardian of) v. Buxbaum*, [1997] O.J. No. 5166 (QL) (C.A.); *Glendale v. Drozdzik* (1993), 77 B.C.L.R. (2d) 106 (C.A.); *Pollard v. Gibson* (1986), 1 Y.R. 167 (S.C.); *Joanisse v. Y. (D.)* (1995), 15 B.C.L.R. (3d) 224 (S.C.); *Canada v. Lukasik* (1985), 18 D.L.R. (4th) 245 (Alta. Q.B.); *Wittig v. Wittig* (1986), 53 Sask.R. 138 (Q.B.)) The Ontario Law Reform Commission, *supra*, recommended that the "court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant" (p. 46).

70 Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in *Cassell, supra*, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable.

71 Fifth, all jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and 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.

72 Sixth, it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others.

73 Seventh, none of the common law jurisdictions has adopted (except by statute) a formulaic approach, as advocated by the intervener the Insurance Council of Canada in this appeal, such as a

> fixed cap or fixed ratio between compensatory and punitive damages. The proper focus is not on the plaintiff's loss but on the defendant's misconduct. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award.
>
> **74** Eighth, the governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes*, [[1964] A.C. 1129] and affirmed here in *Hill, supra*.
>
> [Emphasis in original]

[166] The court discusses punitive damages specifically in a breach of contract case wherein it stated at paras. 78 to 83:

> **78** This, as noted, is a breach of contract case. In *Vorvis, supra*, this Court held that punitive damages are recoverable in such cases provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong" (p. 1106). The scope to be given this expression is the threshold question in this case, i.e., is a breach of an insurer's duty to act in good faith an actionable wrong independent of the loss claim under the fire insurance policy? *Vorvis* itself was a case about the employer's breach of an employment contract. This is how McIntyre J. framed the rule at pp. 1105-6:
>
> > When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff. [Emphasis added.]
>
> This view, McIntyre J. said (at p. 1106), "has found approval in the *Restatement on the Law of Contracts 2d* in the United States", which reads as follows:
>
> > Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. [Emphasis added.]

Applying these principles in *Vorvis*, McIntyre J. stated, at p. 1109:

> Each party had the right to terminate the contract without the consent of the other, and where the employment contract was terminated by the employer, the appellant was entitled to reasonable notice of such termination or payment of salary and benefits for the period of reasonable notice. The termination of the contract on this basis by the employer is not a wrong in law and, where the reasonable notice is given or payment in lieu thereof is made, the plaintiff -- subject to a consideration of aggravated damages which have been allowed in some cases but which were denied in this case -- is entitled to no further remedy ... . [Emphasis added.]

Wilson J., with whom L'Heureux-Dubé J. concurred, dissented. She did not agree "that punitive damages can only be awarded when the misconduct is in itself an 'actionable wrong'". She stated, at p. 1130:

> In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

79 In the case at bar, Pilot acknowledges that an insurer is under a duty of good faith and fair dealing. Pilot says that this is a contractual duty. *Vorvis*, it says, requires a tort. However, in my view, a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an "actionable wrong" within the *Vorvis* rule, which does not require an independent tort. I say this for several reasons.

80 First, McIntyre J. chose to use the expression "actionable wrong" instead of "tort" even though he had just reproduced an extract from the *Restatement* which *does* use the word tort. It cannot be an accident that McIntyre J. chose to employ a much broader expression when formulating the Canadian test.

81 Second, in *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, at para. 26, this Court, referring to McIntyre J.'s holding in *Vorvis*, said "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare" (emphasis added). Rare they may be, but the clear message is that such cases do exist. The Court has thus confirmed that punitive damages can be awarded in the absence of an accompanying tort.

82 Third, the requirement of an independent tort would unnecessarily complicate the pleadings, without in most cases adding anything of

substance. *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, held that a common law duty of care sufficient to found an action in tort can arise within a contractual relationship, and in that case proceeded with the analysis in tort instead of contract to deprive an allegedly negligent solicitor of the benefit of a limitation defence. To require a plaintiff to formulate a tort in a case such as the present is pure formalism. An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.

83 I should add that insurance companies have also asserted claims for punitive damages against their insured for breach of the mutual "good faith" obligation in insurance contracts. In *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Q.B.), the court awarded $20,000 in punitive damages against an Aetna policy holder in addition to an order for the repayment of $260,000 in disability payments. The insurance company was not required to identify a separate tort to ground its claim for punitive damages. In that case it was the misconduct of the policy holder, not the insurance company, that was seen as such a marked departure from ordinary standards of decent behaviour as to invite the censure of punitive damages, *per* Murray J. at paras. 84-85:

> This leaves the question of whether or not the plaintiff's conduct was so reprehensible and high-handed that he should be punished for his behaviour. Counsel for the defendant makes the point that the plaintiff embarked on a deliberate course of conduct to misrepresent facts to the defendant in order to continue to collect disability benefits. If the only consequence of this behaviour is forfeiture of his claim then in effect he is no worse off than if he had been truthful in the first place and deterrence which is one of the objects of granting punitive damages is given no effect.
>
> A great deal has been made in the case law, to which this court was referred, of the fact that insurers vis-à-vis their insureds are in a superior bargaining position and one which places the insureds in positions of dependency and vulnerability. Equally, insurers must not be looked upon as fair game. It is a two-way street founded upon the principle of utmost good faith arising from the very nature of the contract. Thus, it is appropriate that punitive damages be awarded and I do so in the sum of $20,000.00.

I refrain from any comment on the correctness of this award, but to those who subscribe to "the sting" approach to punitive damages, I pose the question whether an award of $20,000 against a cheating policy holder in the *Aetna* case has at least as much "sting", or possibly more, than the award of $1 million against Pilot in this case.

[167] The court goes on further to state at para. 92:

> **92** ... punitive damages are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss. As Cory J. observed in *Hill, supra*, at para. 196, "[p]unitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". In any event, there is a good deal of evidence of emotional stress and financial cost over and above the loss that would have been incurred had the claim been settled in good faith within a reasonable time.

[168] Binnie J. went on further to state at paras. 102 to 105:

> **102** The respondent claims that an insurer is entirely within its rights to thoroughly investigate a claim and exercise caution in evaluating the circumstances. It is not required to accept the initial views of its investigators. It is perfectly entitled to pursue further inquiries. I agree with these points. The problem here is that Pilot embarked on a "train of thought" as early as February 25, 1994 (see para. 7 above) that led to the arson trial, with nothing to go on except the fact that its policy holder had money problems.
>
> **103** The "train of thought" mentioned in the letter to Pilot from Derek Francis kept going long after the requirements of due diligence or prudent practice had been exhausted. There is a difference between due diligence and wilful tunnel vision. The jury obviously considered this case to be an outrageous example of the latter. In my view, an award of punitive damages (leaving aside the issue of quantum for the moment) was a rational response on the jury's part to the evidence. It was not an inevitable or unavoidable response, but it was a *rational* response to what the jury had seen and heard. The jury was obviously incensed at the idea that the respondent would get away with paying no more than it ought to have paid after its initial investigation in 1994 (plus costs). It obviously felt that something more was required to demonstrate to Pilot that its bad faith dealing with this loss claim was not a wise or profitable course of action. The award answered a perceived need for retribution, denunciation and deterrence.
>
> **104** The intervener, the Insurance Council of Canada, argues that the award of punitive damages will over-deter insurers from reviewing

> claims with due diligence, thus lead to the payment of unmeritorious claims, and in the end drive up insurance premiums. This would only be true if the respondent's treatment of the appellant is not an isolated case but is widespread in the industry. If, as I prefer to believe, insurers generally take seriously their duty to act in good faith, it will only be rogue insurers or rogue files that will incur such a financial penalty, and the extra economic cost inflicted by punitive damages will either cause the delinquents to mend their ways or, ultimately, move them on to lines of work that do not call for a good faith standard of behaviour.
>
> **105** The Ontario Court of Appeal was unanimous that punitive damages in some amount were justified and I agree with that conclusion. This was an exceptional case that justified an exceptional remedy. The respondent's cross-appeal will therefore be dismissed.
>
> [Emphasis in original]

This court accepts the above quotations as the law in Canada and appropriate in the current circumstances.

[169] This court is cognizant of and guided by the statements of Binnie J. when referring to the issue of quantum wherein he states at paras. 109 to 116:

> **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. Thus a proper award must look at proportionality in several dimensions, including:

(i) Proportionate to the Blameworthiness of the Defendant's Conduct

112 The more reprehensible the conduct, the higher the *rational* limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).

113 The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include:

(1) whether the misconduct was planned and deliberate: *Patenaude v. Roy* (1994), 123 D.L.R. (4th) 78 (Que. C.A.), at p. 91;

(2) the intent and motive of the defendant: *Recovery Production Equipment Ltd. v. McKinney Machine Co.* (1998), 223 A.R. 24 (C.A.), at para. 77;

(3) whether the defendant persisted in the outrageous conduct over a lengthy period of time: *Mustaji v. Tjin* (1996), 30 C.C.L.T. (2d) 53 (B.C.C.A.), *Québec (Curateur public) v. Syndicat national des employés de l'Hôpital St-Ferdinand* (1994), 66 Q.A.C. 1, *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL) (S.C.);

(4) whether the defendant concealed or attempted to cover up its misconduct: *Gerula v. Flores* (1995), 126 D.L.R. (4th) 506 (Ont. C.A.), at p. 525, *Walker v. D'Arcy Moving & Storage Ltd.* (1999), 117 O.A.C. 367 (C.A.), *United Services Funds (Trustees) v. Hennessey*, [1994] O.J. No. 1391 (QL) (Gen. Div.), at para. 58;

(5) the defendant's awareness that what he or she was doing was wrong: *Williams v. Motorola Ltd.* (1998), 38 C.C.E.L. (2d) 76 (Ont. C.A.), and *Procor Ltd. v. U.S.W.A.* (1990), 71 O.R. (2d) 410 (H.C.), at p. 433;

(6) whether the defendant profited from its misconduct: *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.);

(7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g., professional reputation (*Hill, supra*)) or a thing that was irreplaceable (e.g., the mature trees cut down by the real estate developer in *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42 (B.C.S.C.)); see also *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322 (C.A.). Special interests have included the reproductive capacity of the

plaintiff deliberately sterilized by an irreversible surgical procedure while the plaintiff was confined in a provincial mental institution, although no award of punitive damages was made on the facts (*Muir v. Alberta*, [1996] 4 W.W.R. 177 (Alta. Q.B.)); the deliberate publication of an informant's identity *(R. (L.) v. Nyp* (1995), 25 C.C.L.T. (2d) 309 (Ont. Ct. (Gen. Div.)). In *Weinstein v. Bucar*, [1990] 6 W.W.R. 615 (Man. Q.B.), the defendant shot and killed plaintiffs' three companion and breeding German Shepherds who had merely wandered onto the defendant's property from a neighbouring yard. Here the "property" was sentimental, not replaceable, and, unlike the trees, themselves sentient beings.

(ii) Proportionate to the Degree of Vulnerability of the Plaintiff

114 The financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, for example, speaking of a physician who had used his access to drugs to purchase sex from a female patient, McLachlin J. (as she then was) stated, at p. 276:

> Society has an abiding interest in ensuring that the power entrusted to physicians by us, both collectively and individually, not be used in corrupt ways ... .

A similar point was made by Laskin J.A. in the present case (at p. 659):

> [V]indicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes.

115 I add two cautionary notes on the issue of vulnerability. First, this factor militates *against* the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.

116 Second, it must be kept in mind that punitive damages are not compensatory. Thus the appellant's pleading of emotional distress in this case is only relevant insofar as it helps to assess the oppressive character of the respondent's conduct. Aggravated damages are the

> proper vehicle to take into account the additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant. Otherwise there is a danger of "double recovery" for the plaintiff's emotional stress, once under the heading of compensation and secondly under the heading of punishment.
>
> [Emphasis added] [Italics in original]

[170] In dealing with the issue of deterrence the Supreme Court stated at para. 120:

> **120** Deterrence is an important justification for punitive damages. It would play an even greater role in this case if there had been evidence that what happened on this file were typical of Pilot's conduct towards policyholders. There was no such evidence. The deterrence factor is still important, however, because the egregious misconduct of middle management was known at the time to top management, who took no corrective action.

[171] In discussing rationality, Binnie J. stated at paras. 129 to 131:

> **129** The jury followed the "if, but only if" model, i.e., punitive damages should be awarded "if, but only if" the compensatory award is insufficient. The form and order of the questions put to the jury required them first of all to deal with compensation for the loss of the plaintiff's house (replacement or cash value), its contents, and any increase in her living and moving expenses. Only after those matters had been dealt with was the jury instructed to turn their minds to a final question on punitive damages. They were clearly aware that compensatory damages might well be sufficient punishment to avoid a repetition of the offence and a deterrent to others. In this case, the jury obviously concluded that the compensatory damages ($345,000) were not sufficient for those purposes. It was no more than the respondent had contractually obligated itself to pay under the insurance policy. In this case, the power imbalance was highly relevant. Pilot holds itself out to the public as a sure guide to a "safe harbour". In its advertising material it refers to itself as "*Your* Pilot" and makes such statements as:
>
> > At Pilot Insurance Company, guiding people like you into safe harbours has been our mission for nearly 75 years.

> Insurance contracts, as Pilot's self-description shows, are sold by the insurance industry and purchased by members of the public for peace of mind. The more devastating the loss, the more the insured may be at the financial mercy of the insurer, and the more difficult it may be to challenge a wrongful refusal to pay the claim. Deterrence is required. The obligation of good faith dealing means that the appellant's peace of mind should have been Pilot's objective, and her vulnerability ought not to have been aggravated as a negotiating tactic. It is this relationship of reliance and vulnerability that was outrageously exploited by Pilot in this case. The jury, it appears, decided a powerful message of retribution, deterrence and denunciation had to be sent to the respondent and they sent it.
>
> **130** The respondent points out that there is no evidence this case represents a deliberate corporate strategy as opposed to an isolated, mishandled file that ran amok. This is true, but it is also true that Pilot declined to call evidence to explain *why* this file ran amok, and what steps, if any, have been taken to prevent a recurrence.
>
> **131** The respondent also argues that at the end of the day, it did not profit financially from its misbehaviour. This may also be true, but if so, that result was not for want of trying. The respondent clearly hoped to starve the appellant into a cheap settlement. Crabbe's letter of June 9, 1994, quoted earlier, suggests as much. That it failed to do so is due in no small part to appellant's counsel who took a hotly contested claim into an eight-week jury trial on behalf of a client who was effectively without resources of her own; and who obviously *could* have been starved into submission but for his firm's intervention on her behalf.
>
> [Italics in original]

[172] In balancing the issue of the appropriate quantum, Binnie J. stated further at paras. 136 to 139:

> **136** The respondent objects that, prior to this judgment, the highest previous award in an insurer bad faith case was $50,000. However, prior to the $800,000 award of punitive damages upheld in *Hill, supra*, the highest award in punitive damages in a libel case in Canada was $50,000: *Westbank Band of Indians v. Tomat*, [1989] B.C.J. No. 1638 (QL) (S.C.). One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.
>
> **137** Finlayson J.A.'s central point was the need to pay close attention to the "balancing of factors" (p. 667), and in particular, the "reprehensibility of the defendant's conduct" (p. 666). There was

evidence to support the view expressed by Finlayson J.A., but there was also evidence to support the contrary view of Laskin J.A., in dissent (at p. 659):

> ... Pilot acted maliciously and vindictively by maintaining a serious accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental. It abused the obvious power imbalance in its relationship with its insured by refusing to pay a claim that it knew or surely should have known was valid, and even by cutting off rental payments on the Whiten's rented cottage. It took advantage of its dominant financial position to try to force the Whitens to compromise or even abandon their claim. Indeed, throughout the nearly two years that the claim was outstanding, Pilot entirely disregarded the Whitens' rights.

> **138** It seems to me, with respect, that this disagreement among very senior appellate judges turns on precisely the factual issues and inferences that were remitted to the jury for its determination. I would hesitate to characterize the considered opinion of any experienced and learned appellate judge as not only wrong but "irrational".

> **139** Moreover, the trial judge, who sat through the evidence, went out of his way to comment that the award, while high, was reasonable. It was rational. He then added to Pilot's burden an award of over $320,000 in solicitor-client costs.

[173] LeBel J. in her dissent stated at para. 151:

> **151** I agree with Binnie J. on the core principles governing the award of punitive damages. The key considerations remain the rationality and proportionality of the award. ... The main concern of punitive damages remains the preservation of public order, and the assuaging of such harm as may have been done to the public good and to the social peace.

[174] The Supreme Court of Canada considered the issue of punitive damages in *Fidler, supra*, wherein the court stated at para. 63:

> **63** In *Whiten*, this Court set out the principles that govern the 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. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29:
>
> > The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[175] This has been accepted as the law in Saskatchewan as stated by Caldwell J.A. for the Court of Appeal in *Saskatchewan Government Insurance v. Teresa Wilson*, 2012 SKCA 106, 2012 CarswellSask 789 (WL Can), where he states at paras. 42 and 45:

> [42] In *Lauscher v. Berryere* (1999), 172 D.L.R. (4th) 439 (Sask. C.A.), this Court said that a plaintiff must expressly plead a claim for punitive damages:
>
> > [10] Let us turn, first, to the award of punitive damages. The basis upon which a person may become liable for the payment of such damages was succinctly stated by Mr. Justice Cory, in delivering the judgment of the Supreme Court of Canada in *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130 at p.1208:
> >
> > > Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and

> high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.
>
> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much grater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

> [11] In this jurisdiction claims for aggravated and punitive damages must be expressly pleaded, given the requirements of the *Queen's Bench Rules* governing the subject of pleading: *Rieger v. Burgess* (1988), 66 Sask.R. 1 (Sask. C.A.). (See, too, *Atkins Court Forms* (2nd ed.), Vol.32 (1996 issue) at p.29). It is therefore necessary that the statement of claim not only ask for punitive damages but specify the misconduct upon which the cause of action is said to give rise to liability for such damages.

> [45] ... while breach of the duty of good faith is an independently actionable wrong that must underpin an award of punitive damages, it is not axiomatic that conduct which amounts to a breach of that duty necessarily satisfies the higher threshold required for punitive damages; namely, an exceptional case, which may be described as malicious, oppressive or high-handed such that it offends the Court's sense of decency (see: *Whiten*, [2002 SCC 18, [2002] 1 S.C.R. 595] at para. 36; *Fidler* [2006 SCC 30, [2006] 2 S.C.R. 3], at para. 62; and *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130). ...

[176] Justice Milliken in *Sarchuk, supra*, a similar type of case with AIG including the same adjuster, Patti Schibler, and a Saskatchewan worker employed in Kyrgyzstan, stated at para. 94:

> **94** I find that the termination of the weekly loss of income benefits effective June 30, 1997, was made for the purpose of putting undue pressure upon Sarchuk to accept an offer of settlement of his claims under the policy as upon termination of benefits, Sarchuk would have no income upon which to live unless he accepted the offer. I find that AIU had no basis under the Act to terminate payment of the benefits, thus the termination was an unconscientious act.

This decision was rendered May 20, 2003. Punitive damages were awarded against AIG because of the actions of the same Patti Schibler in the amount of $60,000. At the end of July in the same year Patti Schibler applied the same technique to Branco. Obviously the punitive damages award was not sufficient to prevent an immediate reoccurrence of the unacceptable technique.

[177] In reviewing other previous cases where one of the parties had punitive damages awarded against them, the Ontario Court of Appeal stated in *Kagal v. Tessler* (2004) 41 C.L.R. (3d) 1, [2004] O.J. No. 3799 (QL), at para. 29:

> **29** The appellants contend that the trial judge erred by taking account of the fact that Tessler had been the subject of a previous award of punitive damages in an unrelated civil case. I disagree. A central purpose of an award of punitive damages is deterrence. if a previous award of punitive damages does not appear to have changed a person's approach to societal relations and to the conduct of litigation, it is entirely appropriate for a trial judge to include this as a factor in his consideration of whether to award punitive damages in a subsequent case.

[178] It is also noted in *Khazzaka v. Commercial Union Assurance Co. of Canada* (2002), 66 O.R. (3d) 390, [2002] O.J. No. 110 (QL) (Ont. C.A.), Carthy J.A. stated at para. 14, in referring to punitive damages, where as stated in the headnote:

> ... Khazzaka testified that the fire was accidental and police and fire department investigations confirmed his version of events. Commercial Union hired its own investigators, who ignored evidence indicating that the fire was accidental and insisted that it

was arson. The trial judge found that there was an evidentiary basis upon which the jury could have awarded punitive damages. ...

At para. 14:

> **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 teat the insured fairly. It was not unfair to consult the fire department and police and refuse to accept their opinions without independent investigation. It began to be unfair conduct when the insurer persisted in denying the claim when no credible basis for alleging arson arose from that investigation. 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 multiplies as all obstacles to the viability of the defence of arson are turned aside without concern for the insured's rights and well-being. The unfairness is further exaggerated when the defence is pursued through a trial even while the evidence of its supporters, in the trial judge's word, "crumbled" beneath them. 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.

[179] Where he states at paras. 16 and 17:

> **16** I also see a rational purpose for punitive damages in this case as a deterrent. The jury award in *Whiten* was made in 1996, and it can fairly be assumed that the entire insurance industry became aware of the million dollar award shortly thereafter. Yet it had no apparent effect on the appellant's conduct in dealing with this claim, which arose in 1997 and was tried in 1999. I recognize that by the time of trial this court had reduced the damages in *Whiten* to $100,000, but my point stands because the appellant's conduct was consistent throughout.
>
> **17** For these reasons I conclude that an award of punitive damages was fully justified on the evidence.

(1) Should punitive damages be awarded against Kumtor?

[180] It is apparent from the evidence provided to the court that Kumtor did its utmost to treat its employee Branco in a fair and reasonable manner. When Branco initially hurt his foot in December 1999 and aggravated the injury in March 2000 but did not submit a claim until he attended upon the company physician in June 2000, such actions were not questioned by Kumtor. Kumtor's employees immediately filed the appropriate forms with AIG, believing it to be a short term disability. When it became apparent that this was going to be a long term disability, the claim was amended accordingly in a prompt and professional manner. Kumtor did not question whether or not it was a legitimate claim or why the claim was not submitted earlier. Kumtor paid Branco his monthly salary to the end of the contract. When Kumtor overpaid an additional three months' salary, it did not demand reimbursement or harass Branco in any way for reimbursement.

[181] The court accepts that the actions of Kumtor were fair and reasonable in the circumstances. The court accepts that the object of the disability and health benefits provision of the plaintiff's contract with Kumtor was a peace of mind clause to ensure the psychological benefit of security of income in the event of disability. The plaintiff has failed to prove a degree of mental suffering by the limited breach of Kumtor in failing to submit the initial claim to Zurich to warrant aggravated or punitive damages against Kumtor based on the facts as set forth in this decision.

[182] With respect to the issue of punitive damages, the court has set forth in considerable detail the position and criteria set forth by the Supreme Court of Canada respecting punitive damages.

[183] This court is cognizant of the fact that punitive damages are assessed to punish the defendants for their actions. It is not for compensation of the plaintiff. It is

also noted that the award should not be higher than is required to rationally fulfill its purpose of punishing the defendant.

(2) Should punitive damages be awarded against AIG?

[184] The court is aware that punitive damages are for the purposes of retribution, denunciation and deterrence, and that a disproportionate award overshoots its purpose and becomes irrational. However, if the award is too small, it fails to achieve its purpose. As noted previously in this judgment, the courts in Canada have in similar circumstances awarded punitive damages against similar defendants. The *Sarchuk* case in Saskatchewan in 2003 involved an individual employed by a Saskatchewan company working at a mine in Kyrgyzstan who was covered by AIG under a similar workers' compensation benefits policy. The claims adjuster was in fact the same Patti Schibler who took similar actions in discontinuing monthly payments in the hopes of causing the claimants such anxiety, stress and financial hardship that he would accept her extremely low offer of settlement. The court awarded $60,000 in punitive damages. In spite of this award, Patti Schibler and AIG continued to act in a similar manner with Branco in the same time period immediately after the *Sarchuk* decision was rendered.

[185] As stated by the Supreme Court of Canada in *Whiten*, quoted previously herein, "The more reprehensible the conduct, the higher the rational limits of the potential award". The Supreme Court considered conduct which persisted over a lengthy period of time, which, in that situation, was two years without any rational justification. Further, the court considered that the defendant was aware of the hardship it was inflicting. The court considered this to be extremely reprehensible

conduct. In the current circumstances, AIG's actions continued for 18 months, then six months and then eight years. AIG was very aware of the hardship it was inflicting upon Branco. This was further reinforced by the numerous and expensive court applications made by AIG and its co-defendant throughout the many years of litigation.

Factors influencing the level of blameworthiness

[186] The Supreme Court of Canada also established that the level of blameworthiness may be influenced by many factors and proceeded to list seven possible factors. These factors are as follows:

(1) Whether the misconduct was planned and deliberate

[187] The evidence before the court establishes that the actions of Patti Schibler on behalf of AIG in discontinuing benefits for many months at a time and eventually years were not only contrary to the terms of the policy but were a clear and blatant attempt to force Branco into accepting an unreasonably low cash settlement. It was as planned and deliberate as it was determined to be by this court in the *Sarchuk, supra*, decision only more so in that it continued for years.

(2) The intent and motive of the defendant

[188] Once Patti Schibler and her superior became aware of the fact that the claim of Branco was not going to be a quick return to work their intent and motive changed. They immediately made an unreasonably low offer of settlement. When this was not accepted, monthly payments ceased for long periods of time in order to put major pressure upon Branco. The insistence that he attend the vocational re-training

program found in Lisbon was totally inappropriate. The reason for choosing this program in spite of the position taken by Branco and supported by the supervisor of the Lisbon school was solely to provide a justification for alleging that Branco was unco-operative. This would be used as justification for the 2004 discontinuance of benefits completely.

(3) Whether the defendant persisted in the outrageous conduct over a lengthy period of time.

[189] As stated previously, the outrageous conduct of discontinuing monthly benefits without justification lasted for periods of six months and 18 months followed by a subsequent eight years before benefits were even paid for miscalculations made eight years earlier. Monthly benefits were totally discontinued in December of 2004 without justification.

(4) Whether the defendant concealed or attempted to cover up its misconduct

[190] AIG attempted to cover up its misconduct when it used the doctor's failure to provide a prompt medical report as justification for discontinuing monthly benefits. As well, AIG accused Branco of failing to co-operate as justification to discontinue payments in December of 2004.

(5) The defendant's awareness of what he or she was doing was wrong

[191] AIG was to provide monthly benefits to replace loss of income to an injured welder under a workers' compensation peace of mind contract. To discontinue benefits for lengthy periods of time are actions that any rational person would understand would cause stress, anxiety and financial hardship to the individual who

was relying on these monthly payments. AIG was well aware that their actions were wrong.

(6) Whether the defendant profited from its misconduct

[192] AIG have profited from failing to provide monthly benefits since December of 2004. If Branco had been unable to withstand the years of pressure with no payments and continuing court applications, AIG would have profited significantly. Most of the general public would not have the persistence, stamina and fortitude to continue this action for 12 years without finally weakening and giving in to an unjustifiably low offer of settlement. Every time someone gives in to the unjustifiably low offers of settlement, the insurance company profits from its conduct.

[193] The *Whiten* case quoted extensively throughout this decision resulted in punitive damages of $1 million after similar tactics by Pilot Insurance Co. over a two-year period of time. Pilot Insurance Co. pointed out to the court in that decision that there was no evidence to represent a deliberate corporate strategy as opposed to an isolated mishandled file that ran amuck.

[194] In that case as in this one, the defendant insurance company declined to call evidence to explain why the file ran amuck and what steps if any were taken to prevent a recurrence. The current situation involves not two years but from Christmas of 1999 until September of 2012 with only intermittent payments, the longest period being eight years.

(7) Whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable

[195] AIG was well aware of how deeply these actions were affecting the personal well-being of Branco. Patti Schibler had numerous telephone attendances upon Branco in which he expressed his need for the funds to pay for the necessities of life. She would also have been aware of the fact that he became separated from his wife and was required to live with his 79-year-old mother as he had insufficient funds to obtain alternative accommodation and food.

[196] The Supreme Court in *Whiten* stated that the financial or other vulnerability of the plaintiff and the subsequent abuse of power by the defendant is highly relevant where there is a power imbalance. There is no question that there was a major power imbalance between AIG and Branco. The financial vulnerability of the plaintiff was absolutely devastating, so much so that it affected his mental health and psychological well-being for the balance of his life to date.

[197] The goal of punitive damages is deterrence. Insurers must discontinue exploiting the vulnerability of insureds in times of disaster. The court must also consider the fact that previous awards such as $60,000 in *Sarchuk* and $1,000,000 in *Whiten* appear to have done little or nothing to deter insurance companies from their actions.

[198] It should be noted that as well that the $1 million in punitive damages awarded in *Whiten* in 1996 has the equivalent as at trial date in 2012 of $1,368,539.33, based upon the Bank of Canada inflation calculator.

[199] For the reasons set forth and based upon the words of the Supreme Court of Canada quoted in *Whiten* and *Fidler*, which have direct application to the current facts, the court does hereby assess punitive damages against AIG in the amount of $1,500,000.

(3) Should punitive damages be awarded against Zurich?

[200] Applying the factors enunciated by the Supreme Court of Canada in *Whiten*, which were applied to AIG in determining a level of blameworthiness, the court will now proceed to apply these factors to Zurich.

(1) Whether the misconduct was planned and deliberate

[201] The evidence before the court establishes without doubt that the actions of Zurich in refusing to make payments required monthly under the policy even after receipt of numerous medical reports establishing the disability as early as 2002 proves how planned and deliberate the actions were.

(2) The intent and motive of the defendant.

[202] The refusal by Zurich to accept its responsibilities even when presented with the medical evidence of disability and the acceptance by their own claims department of the claim, is sufficient to establish the intent and motive of Zurich. The only actions by Zurich for years were either unjustifiably low offers or expensive and unwarranted court applications.

(3) Whether the defendant persisted in the outrageous conduct over a lengthy period of time.

[203] It is abundantly clear from the evidence that a continuation of the outrageous conduct for more than 10 years is a lengthy period of time. The Supreme Court of Canada in the *Whiten* case even found the outrageous conduct for two years to be sufficient to warrant punitive damages.

(4) Whether the defendant concealed or attempted to cover up its misconduct

[204] Even though Zurich received the reports from the independent assessment indicating that this matter should be settled and the claim accepted and also when receiving the information from the specialists in Calgary indicating that Branco was not even capable of being re-trained at this time, the legal department of Zurich still failed to disclose this information to Branco or its claims department. Instead Zurich and the other defendants coordinated a further low offer of settlement in 2008.

(5) The defendant's awareness of what he or she was doing was wrong.

[205] The evidence before the court by the claim's officer handling the original claim on behalf of Zurich testified that even she was well aware that to make an offer of settlement at the early stage and insist on deducting $9,000 in legal fees was an unjustified act by the legal department of Zurich based upon anyone's standards.

[206] Even when Zurich received the assessment from their specialist who examined Branco in the fall of 2007 they still did not accept the responsibility set forth in the policy to make payments to him. Instead they attempted a further unjustifiably low joint offer of settlement with the other defendants. It was almost two years after Zurich had received the assessment of their expert in Calgary before they made their decision to pay benefits based upon his recommendation.

(6) Whether the defendant profited from its misconduct

[207] Zurich was able to postpone payments due and owing under the policy until 2009 which may have resulted in some small profit or saving by Zurich. However, the numerous court applications and low offers of settlement without ever making a single payment were attempts to make significant profits. Zurich's failure to make significant profits from a settlement based on starving Branco into submission was certainly not for a lack of trying.

[208] The words of Binnie J. quoted previously in the *Whiten* case at para. 131 are most appropriate and a perfect summation of the actions of Zurich wherein he states:

> **131** The respondent also argues that at the end of the day, it did not profit financially from its misbehaviour. This may also be true, but if so, that result was not for want of trying. The respondent clearly hoped to starve the appellant into a cheap settlement. ... That it failed to do so is due in no small part to appellant's counsel who took a hotly contested claim into an eight-week jury trial on behalf of a client who was effectively without resources of her own; and who obviously *could* have been starved into submission but for his firm's intervention on her behalf.

(7) Whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable.

[209] It is totally impossible for Zurich to not have known the misconduct was having a great impact on Branco. A review of the medical reports received in 2003 and 2006 would establish this fact. It was further and strongly supported by the specialist's report in 2007 after Branco had been examined by the three specialists in Calgary. Even then Zurich still did not make payments as required.

[210] It has already been noted that Zurich made absolutely no payments to Branco even after admitting liability for approximately eight years, during which time they made two unconscionably low offers of settlement. It is apparent to the court that

for every individual who could not withstand these types of actions by Zurich in similar situations as Branco, Zurich or other insurance companies would profit by approximately one-half of a million dollars in each case they could settle on an unjustifiably low offer after two or three years of financial and psychological pressure. This is calculated based on the fact that if Branco had been unable to withstand the financial and emotional pressure when Zurich made its first offer of settlement when it was deducting the $9,000 in legal fees, Zurich would have saved more than $500,000 which has been paid on this claim since that date.

[211] The court therefore assesses punitive damages against Zurich in the amount of $3,000,000. Considering that Zurich is doing business worldwide, it would only take six individuals worldwide who accept low offers like the ones made to Branco to save Zurich $500,000 each and recoup the amount of this award.

[212] As stated earlier by the Supreme Court by Binnie J. in *Whiten*, at para. 112:

> **112** The more reprehensible the conduct, the higher the *rational* limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendants' awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).
>
> [Italics in original]

[213] This court cannot imagine more protracted and reprehensible behaviour than that of Zurich in blatantly refusing to pay what had been owed in monthly payments for almost eight years (10 years from the date of the accident). This failure

to pay and continual court applications instigated by Zurich with no reasonable justification were nothing short of torturous on Branco.

[214] The cruel and malicious acts of AIG and Zurich combined with the previously ignored award of punitive damages against AIG is evidence of how calculated and abhorrent the actions of AIG were in dealing with Branco. The actions of AIG and Zurich establish a pattern of abuse of an individual suffering from financial and emotional vulnerability.

[215] Although Canadian court may have believed that the $1 million award in the *Whiten* case would catch the attention of the insurance industry and the court's disapproval of such actions, it is apparent that the $1 million was not sufficient. These decisions were rendered during the same time period that AIG and Zurich were continuing their pattern of aggressive non-activity on the claim of Branco.

[216] The court is cognizant of the fact that a punitive damages award of $3 million may not be particularly significant to the financial bottom line of a successful worldwide insurance company. It is hoped that this award will gain the attention of the insurance industry. The industry must recognize the destruction and devastation that their actions cause in failing to honour their contractual policy commitments to the individuals insured.

[217] Both AIG and Zurich failed to deal with Branco's claim in good faith. Each tried to take advantage of Branco's economic vulnerability to gain leverage in negotiating a settlement. The fact that Branco was able to continue to withstand this pressure for so many years from two different fronts is truly remarkable and almost superhuman, even though his resistence may have resulted in irreparable mental distress which may last for the remainder of his lifetime.

[218] The court has grave concerns as to how often this type of action occurs in dealing with insurance claims. The court is only cognizant of the cases such as *Sarchuk, Whiten* and *Branco* which come before them. If Whiten (in the *Whiten* case) and Branco, in this case, had not been able to withstand the unbelievable pressure to settle on the terms and conditions originally offered these cases would not have received the attention of the courts either. The question remains: how many individuals have been unable to withstand the financial and psychological pressure of these tactics?

[219] The court has earlier quoted extensively from the decision of Binnie J. in the *Whiten* decision. It is noted that the discussion of the *Whiten* circumstances and his eloquent statements show an eerily stark similarity to the current situation but to a much lesser degree and over a shorter period of time than the Branco situation.

[220] The matter of costs has been adjourned to be spoken to after issuance of this decision.

_____ J.
M.D. ACTON

APPENDIX A

Claim Number : S11054367
Claimant: Luciano Branco

Status	Tran Date	Check No.	Total Payment	Payee Name	Line Payment Info	Currency	Account Line
AUTHORIZED	3/20/2001	0000482028	$1,464.08	LUCIANO BRANCO	TEMPORARY TOTAL DISABILITY: 3/19/01 - 4/15/01.	U.S. Dollar	INDEMNITY
AUTHORIZED	5/8/2001	0000486600	$1,484.27	LUCIANO BRANCO	T.T.D.: 4/16/01 - 5/13/01 C$2,292.16 @.647543 = US $1,484.27	U.S. Dollar	INDEMNITY
AUTHORIZED	10/31/2002	0000534336	$19,373.64	LUCIANO BRANCO	PER DIEM 10/5/02 - 10/28/02 @ $30.00 PER DAY, DISABILITY 10/	U.S. Dollar	INDEMNITY
AUTHORIZED	11/13/2002	0000535160	$7,273.42	LUCIANO BRANCO	T.D. BENEFITS 5/14/01-9/30/01 20 WEEKS @C$573.04 PER WEEK EX	U.S. Dollar	INDEMNITY
AUTHORIZED	4/23/2003	0000548176	$13,574.33	LUCIANO BRANCO	TTD, 34 3/7 WEEKS @ C$573.04 PER WEEK C$19,728.94 @.6880 =	U.S. Dollar	INDEMNITY
AUTHORIZED	5/22/2003	0000550874	$1,675.43	LUCIANO BRANCO	TEMPORARY TOTAL DISABILITY: 5/1/03 - 5/28/03	U.S. Dollar	INDEMNITY
AUTHORIZED	6/19/2003	0000553345	$1,706.11	LUCIANO BRANCO	TEMPORARY TOTAL DISABILITY: 5/29/03 - 6/25/03 C$2292.16 @.7	U.S. Dollar	INDEMNITY
AUTHORIZED	7/2/2003	0000554167	$1,700.79	LUCIANO BRANCO	TEMPORARY TOTAL DISABILITY: 6/26/03 - 7/23/03 C$2,292.16 @.	U.S. Dollar	INDEMNITY
AUTHORIZED	8/14/2003	0000557801	$1,652.72	LUCIANO BRANCO	T. T. D. : 7/24/03 - 8/20/03 C$2,292.16 @.7210 = US$1,652.72	U.S. Dollar	INDEMNITY
AUTHORIZED	9/11/2003	0000559910	$1,671.77	LUCIANO BRANCO	T.T.D.: 8/21/03 - 9/17/03 @.7293 C$2292.16	U.S. Dollar	INDEMNITY
AUTHORIZED	10/9/2003	0000562592	$1,709.04	LUCIANO BRANCO	T.T.D.: 9/18/03 - 10/15/03	U.S. Dollar	INDEMNITY
AUTHORIZED	11/6/2003	0000565151	$1,714.66	LUCIANO BRANCO	T.T.D.: 10/16/03 - 11/11/03 C$2,292.16 @.74.81 = US$1,714.6	U.S. Dollar	INDEMNITY
AUTHORIZED	12/4/2003	0000567462	$1,746.54	LUCIANO BRANCO	T.T.D.: 11/13/03 - 12/10/03	U.S. Dollar	INDEMNITY
AUTHORIZED	1/5/2004	0000569685	$1,787.40	LUCIANO BRANCO	T.T.D.: 12/11/03 - 1/17/04	U.S. Dollar	INDEMNITY
AUTHORIZED	1/29/2004	0000572002	$1,719.03	LUCIANO BRANCO	T.T.D.: 1/8/04 - 2/4/04 C$2,292.16 @.7500 = US $1,719.03	U.S. Dollar	INDEMNITY
AUTHORIZED	2/25/2004	0000574636	$1,711.72	LUCIANO BRANCO	T.T.D.: 2/5/04 - 3/3/04 - C$2292.16 @..7468 = US$1,711.72	U.S. Dollar	INDEMNITY
AUTHORIZED	3/25/2004	0000577998	$1,723.95	LUCIANO BRANCO	T.T.D.: 3/4/04 - 3/31/04	U.S. Dollar	INDEMNITY
AUTHORIZED	4/22/2004	0000580452	$1,688.02	LUCIANO BRANCO	T.T.D.: 4/1/04 - 4/28/04	U.S. Dollar	INDEMNITY
AUTHORIZED	5/20/2004	0000582936	$1,672.26	LUCIANO BRANCO	T.T.D.: 4/29/04 - 5/26/04	U.S. Dollar	INDEMNITY
AUTHORIZED	6/17/2004	0000585202	$1,666.90	LUCIANO BRANCO	T.T.D.: 5/27/04 - 6/23/04 C$2,292.16 @.7272 = US$1,666,90	U.S. Dollar	INDEMNITY
AUTHORIZED	7/15/2004	0000587463	$1,734.12	LUCIANO BRANCO	T.T.D.: 6/24/04 - 7/21/04	U.S. Dollar	INDEMNITY
AUTHORIZED	8/12/2004	0000589873	$1,721.98	LUCIANO BRANCO	T. T. D. : 7/22/04 - 8/18/04 C$2,292.16 @ 0.751247	U.S. Dollar	INDEMNITY
AUTHORIZED	9/9/2004	0000592000	$1,779.40	LUCIANO BRANCO	T. T. D. : 8/19/04 - 9/15/04 C$2,292.16 @ 0.776300	U.S. Dollar	INDEMNITY
AUTHORIZED	10/7/2004	0000594474	$1,823.95	LUCIANO BRANCO	T.T.D.: 9/16/04 - 10/13/04 C$2,292.16 @7957	U.S. Dollar	INDEMNITY
AUTHORIZED	11/4/2004	0000596775	$1,902.21	LUCIANO BRANCO	T.T.D.: 10/14/04 - 11/10/04	U.S. Dollar	INDEMNITY
AUTHORIZED	12/2/2004	0000598790	$1,925.70	LUCIANO BRANCO	T.T.D.: 11/11/04 - 12/8/04 C$2292.16 @.8401	U.S. Dollar	INDEMNITY
INDEMNITY TOTAL:			**$79,603.44**				
ACCEPTED	9/18/2000	0000467535	$331.69	LUCIANO BRANCO	MEDICAL TREATMENT PHYSIOTHERAPY TREATMENT. PE 78,031.00 @.00	U.S. Dollar	MEDICAL
ACCEPTED	10/5/2000	0000469569	$43.35	LUCIANO BRANCO	Medical treatment. PTE 10,000.00 @.00433463 = US $43.35.	U.S. Dollar	MEDICAL
ACCEPTED	3/12/2001	0000481379	$570.00	LUCIANO BRANCO	REIMBURSEMENT FOR TRAVEL & MILEAGE.	U.S. Dollar	MEDICAL
ACCEPTED	5/24/2001	0000488686	$387.29	LUCIANO BRANCO	REIMB. FOR TRAVEL & MILEAGE TO PHYSIOTHERAPY	U.S. Dollar	MEDICAL
ACCEPTED	9/10/2001	0000497912	$570.40	LUCIANO BRANCO	REIMBURSEMENT FOR MILEAGE & TRAVEL, 6/4 THRU 6/21/01	U.S. Dollar	MEDICAL
ACCEPTED	11/5/2002	0000534587	$512.00	LUCIANO BRANCO	HOTEL INVOICE 10/20/02 THROUGH 10/27/02 NISHU HOTEL & CONFER	U.S. Dollar	MEDICAL
MEDICAL TOTAL:			**$2,414.73**				