Date: 20201110
Docket: CI13-01-84668
(Winnipeg Centre)
Indexed as: Martens v. The Manitoba Public Insurance Corporation
Cited as: 2020 MBQB 158

# COURT OF QUEEN'S BENCH OF MANITOBA

**B E T W E E N:**

| | | |
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| EVELYN MARTENS, | ) | Counsel: |
| | ) | |
| plaintiff, | ) | WILLIAM S. GANGE and |
| | ) | THOMAS K. REIMER |
| - and - | ) | for the plaintiff |
| | ) | |
| THE MANITOBA PUBLIC INSURANCE CORPORATION, | ) | GORDON A. McKINNON and |
| | ) | ANDREW D.F. SAIN |
| | ) | for the defendant |
| defendant. | ) | |
| | ) | JUDGMENT DELIVERED: |
| | ) | NOVEMBER 10, 2020 |

## LANCHBERY J.

## INTRODUCTION

[1] The automobile is a well-used prop in popular culture. The crash of a motor vehicle is memorialized in songs such as "Dead Man's Curve" (Jan and Dean), "Leader of the Pack" (The Shangri-Las), "Last Kiss" (J. Frank Wilson/Pearl Jam), "Brought Up That Way" (Taylor Swift), and "I Hope They Get To Me in Time" (Darius Rucker). These are but a few of hundreds of artists who found inspiration from a motor vehicle accident ("MVA"). Television and movies are replete with MVAs as an underlying theme.

[2] For the plaintiff, Evelyn Martens ("Evelyn"), her experience will never be memorialized or act as a source of inspiration.

[3] On December 4, 1998, Evelyn was seated in the front passenger seat when the vehicle was struck by another vehicle at a major intersection. This type of MVA is commonly referred to as being "t-boned". The major cause of the MVA was poor visibility due to a raging blizzard. One is left to wonder why so many Manitobans venture out in poor weather conditions. This MVA is too familiar to Manitobans, other than in this case no one lost their life.

[4] MVAs result in human damage. Evelyn's road back from December 4, 1998 is still ongoing. Over 20 years of twists and turns a fiction writer's imagination would be hard pressed to create.

[5] A representative of the defendant, The Manitoba Public Insurance Corporation ("MPI"), described MPI's actions, which one can only believe was a reference to Winston Churchill, "as not our finest hour". The court heard evidence confirming this description.

[6] It is important to remember this trial was not about liability. Those issues were resolved in 2012 when Evelyn's claim was fully paid.

## DEEP ISSUE – WHETHER MPI, BY ITS ACTION OR FAILURE TO ACT, ACTED IN BAD FAITH

[7] This trial was about whether MPI's dealings with Evelyn amounted to bad faith. Section 199(1) of ***The Manitoba Public Insurance Corporation Act***, C.C.S.M. c. P215 (the "***Act***"), protects MPI from liability, and reads as follows:

> **Immunity from action**
> 199(1) No action or proceeding may be brought against the commission, a commissioner, the corporation, or an employee or agent of the commission or the corporation for any act done in good faith in the performance or intended performance of a duty or in the exercise or intended exercise of a power under this Part, or for any neglect or default in the performance or exercise in good faith of the duty or power.

[8] The deep issue is whether the acts or omissions of MPI, its employees and/or agents, in the performance of its obligation under the ***Act*** in settling Evelyn's claim amount to bad faith.

[9] In ***Fidler v. Sun Life Assurance Co. of Canada***, 2006 SCC 30 (CanLII), at paragraph 63, the Supreme Court of Canada adopted the following paragraph from ***702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters***, 2000 CanLII 5684 (ONCA), as follows:

> 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.

[10] In the final paragraph of Brenda Hollingsworth's paper, "Behaving Badly: Bad Faith in Insurance", 2019 CanLIIDocs 3835 (quoted by Mainella J.A. in ***3746292 Manitoba Ltd. et al. v. Intact Insurance Company et al.***, 2018 MBCA 59 (CanLII)), she concluded:

> It may seem as if we are back where we started. While some cases have provided specific instances and indicators of bad faith, they do not provide a hard and fast rule or a blueprint to mounting a bad faith claim. The best wisdom may be found back in *Fidler*, where the Supreme Court of Canada made the following observation about bad faith claims:
>
> > Ultimately, each case revolves around its own facts. As O'Connor J.A. stated in *702535 Ontario*:
> >
> > What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim. [para. 30]
>
> In other words, lawyers will continue to be challenged to predict the outcome in a case where bad faith and/or fraud is in play with very little assistance from the recent case law.

[11] Whether Evelyn's claim of bad faith is successful requires an examination of MPI's actions.

[12] For Evelyn, the evidence is clear she suffered economically and psychologically as a result of the MVA. The evidence is prior to the MVA Evelyn's life was difficult. Through hard work and dedication she persevered against all challenges. Following the MVA her perseverance continued notwithstanding a lengthy recovery and complications in her personal life.

## **COVERAGE**

[13] Part 2 of the ***Act*** came into effect on March 1, 1994. The coverage provided by MPI is commonly referred to as no-fault insurance.

[14] Prior to March 1, 1994 the insurance offered by MPI was governed by tort law. After 1994 the following governs automobile accident insurance:

> **No tort actions**
> 72 Notwithstanding the provisions of any other Act, compensation under this Part stands in lieu of all rights and remedies arising out of bodily injuries to which this Part applies and no action in that respect may be admitted before any court.
>
> **No-fault system**
> 73 Subject to this Part, compensation is payable under this Part by the corporation, regardless of who is responsible for the accident.
>
> **Victim resident in Manitoba entitled to compensation**
> 74(1) Subject to this Part, a victim who is resident in Manitoba at the time of the accident, and any dependant of the victim, is entitled to compensation under this Part if the accident occurs in Canada or the United States.
>
> **Owner, driver, passenger are deemed residents**
> 74(2) Where an automobile that is registered in Manitoba is involved in an accident in Manitoba, the owner, the driver and any passenger in the automobile are deemed to be resident in Manitoba.

[15] The definition section in Part 2 is distinct from the definition section in Part 1 of the ***Act***. A "claimant" in Part 2 is defined as follows:

> "**claimant**" means a person who applies for compensation under this Part;

[16] MPI argues the court should treat MPI's no-fault insurance as claims under The Workers Compensation Board of Manitoba ("WCB"). This will be explored in the analysis section.

## REFERENCES

[17] The following are used throughout the decision for ease of reference:

- AICAC – Automobile Injury Compensation Appeal Commission
- PIPP – Personal Injury Protection Program
- IRI – Income Replacement Indemnity
- IRO – Internal Review Officer
- FAC – Fraud Advisory Committee

## THE *ACT*

[18] The following are the sections in the ***Act*** relevant to this action:

> **Events that end entitlement to I.R.I.**
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident;
>
> (b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);
>
> (c) the victim is able to hold an employment determined for the victim under section 106;
>
> (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;
>
> (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;
>
> (f) the victim is entitled to a retirement income under section 103;
>
> (g) the victim dies.
>
> . . .
>
> **Claimant to advise of change in situation**
> 149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.
>
> . . .
>
> **Corporation may refuse or terminate compensation**
> 160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person
>
> (a) knowingly provides false or inaccurate information to the corporation;

(b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;

(c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;

(d) without valid reason, neglects or refuses to undergo a medical examination, or interferes with a medical examination, requested by the corporation;

(e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;

(f) without valid reason, prevents or delays recovery by his or her activities;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

(h) prevents or obstructs the corporation from exercising its right of subrogation or recovery under this Act.

. . .

**Corporation may reconsider new information**
171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

**Claims corporation may reconsider before application for review or appeal**
171(2) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

(a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or

(b) the decision contains an error in writing or calculation, or any other clerical error.

. . .

> **No reimbursement of amount paid before reconsideration**
> 191 If a decision is reconsidered and changed by the corporation under subsection 171(1) or clause 171(2)(a), the corporation is not entitled to reimbursement of any amount paid to a person as a result of the decision unless the amount was obtained by fraud.
>
> . . .
>
> **Immunity from action**
> 199(1) No action or proceeding may be brought against the commission, a commissioner, the corporation, or an employee or agent of the commission or the corporation for any act done in good faith in the performance or intended performance of a duty or in the exercise or intended exercise of a power under this Part, or for any neglect or default in the performance or exercise in good faith of the duty or power.

[19] The agreed book of documents ("Exhibit 1") and other exhibits in this case total over 1,800 pages.

## CHRONOLOGY

### December 4, 1998 to May 2003

[20] In order to appreciate the deep issue a lengthy recitation of MPI's actions is required. Between December 4, 1998 and April 28, 2003, the parties are *ad idem* MPI's dealing with Evelyn comprised a typical claim. Sue MacCutcheon ("MacCutcheon"), senior injury specialist, Casualty & Rehabilitation Claim Centre ("CRCC"), was MPI's initial claims adjuster. The evidence is MacCutcheon went to great lengths to assist Evelyn with her claim. MacCutcheon approved an increase in Evelyn's weekly benefit based upon a promised job, which resulted in an increased IRI. At the time of the MVA Evelyn was in the initial stages of opening a care home for four troubled teenagers. The record shows this was only a dream at that point, but MacCutcheon went out of her way to support Evelyn.

[21] Pages 79-118 of Exhibit 1 set out serious mental health concerns experienced by Evelyn after the MVA.

[22] On page 118 of Exhibit 1, MacCutcheon's memorandum to file dated March 15, 1999 states:

> Evelyn is quite angry with the HSC staff and me for not identifying that she had PTSD prior to being discharged from the hospital. She stated that I should have seen her crashing and should have been able to prevent her 2nd hospitalization.
>
> I will refer this file to Claudette Dupont, Psych Nurse, to case manage.

The evidence is Claudette Dupont ("Dupont"), rehabilitation consultant, D.B. Hanson and Associates Inc., assumed this responsibility on July 26, 1999.

[23] The decision to refer Evelyn's file to an outside person to manage her claim occurred when MPI believed the trust relationship between MPI and Evelyn was irrevocably broken. In this case, Evelyn blamed MacCutcheon for not recognising she was experiencing a serious breakdown in her mental health before ultimately being admitted to hospital. The communication between Dupont and MPI will be outlined herein.

[24] After Dupont's appointment as the external claims manager on July 26, 1999 and until April 2003, Evelyn suffered a number of medical difficulties, as follows (reference to the page numbers are as set out in Exhibit 1):

- pages 186-87 – August 9, 1999 – Dr. Alan Slusky ("Dr. Slusky"), clinical psychologist and neuropsychologist, Wellness Institute at Seven Oaks General Hospital, expressed concern with respect to a relapse in Evelyn's mental health;

- pages 206-7 – August 23, 1999 – Liz Adamkowicz, physiotherapist, Wellness Institute at Seven Oaks General Hospital, indicated "steady

deterioration in gait was observed" and "that active rehabilitation be put on hold";

- pages 221-25 – September 9, 1999 – Dupont summarized Evelyn's physical and mental health issues and requested MacCutcheon to provide further instructions;

- pages 240-41 – October 27, 1999 – Dr. Slusky expressed concerns about Evelyn's mood;

- pages 244-45 – November 4, 1999 – Dupont wrote to Dr. Ian Sutton, pain specialist, Health Sciences Centre, and advised of Evelyn's upcoming surgery for hip replacement and inquired if Dr. Sutton would be able to attend to Evelyn's pain management needs;

- page 248 – November 19, 1999 – Dupont wrote to Evelyn's family physician, Dr. Garth Campbell ("Dr. Campbell"), North Eastman Medical Associates, and advised him there was improvement in Evelyn's physical condition in that she was ambulatory for short distances and her mood was improving;

- pages 251-53 – December 2, 1999 – in her letter to MacCutcheon, Dupont noted that Evelyn "although experiencing many physical and psychological difficulties, appears to be genuinely motivated to return to work and become independent". One of the treatment plans recommended was to "[i]nitiate volunteer work activities with Child and Family Services when medically authorized." It was also recommended that "[t]he writer to maintain regular contact with the client to maintain a positive relationship which is critical in this particular situation";

- pages 255-57– December 23, 1999 – Dupont reported to MacCutcheon:

> As you are aware, the writer has significant concerns regarding Ms. Martens' pre-existing psychological and social issues. To date, the writer's concerns have been largely a result of intuition and assumptions based on significant contradictions that the writer has noted in conversations with Ms. Martens. Recently the writer had a very extensive conversation with a family friend in trying to gather further information regarding a possible psychiatric referral. The family friend was very open with me during this conversation and informed me of significant and long-term family and personal problems. I certainly have concerns about how these issues will impact rehabilitation. At this point, my recommendation would be that we try to secure appropriate psychiatric help for Ms. Martens to avoid the transition from psychotherapy with a psychologist

> funded by Manitoba Public Insurance and the long-term assistance that Ms. [Martens] actually requires. Although it is reasonable to expect Manitoba Public Insurance to cover the initial psychotherapy required to deal with the post traumatic stress disorder, to assume that Manitoba Public Insurance will continue to cover the long-term care that the writer believes that this individual requires is not realistic. As a result of this the writer will be researching options for the appropriate psychiatric care for this individual and will update you as new information comes in.

- pages 262-63 – February 7, 2000 – Dr. Slusky wrote to MacCutcheon and confirmed PTSD symptomology will be the focus of Evelyn's treatment;

- pages 268-69 – March 6, 2000 – Dupont wrote to Dr. Kenneth Zimmer, Psych-Health Centre, and advised of Evelyn's ongoing medical matter and concluded the letter with "[t]hank you very much for your support in this rather complex situation";

- page 298-99 – May 8, 2000 – Dupont opined in an Individualized Written Rehabilitation Plan where she described the barriers to rehabilitation, as follows:

> Ms. Martens has had many complications to deal with which resulted in additional periods of hospitalization and emergency surgery. These experiences were very traumatizing for Ms. Martens and will require time and treatment to resolve. The gradual weaning of analgesic and anti-anxiety medication may slow the rehabilitation process. Ms. Martens' need to be in charge or in control of the rehabilitation process has to be addressed as it is a significant concern for her. This may slow the process somewhat as this involves reviewing draft plans prior to full implementation. However, this delay should be minimal when viewing the overall rehabilitation process.

- page 380 – October 16, 2000 – Dr. Campbell wrote to Dupont and advised Evelyn's withdrawal from narcotic use was successful;

- pages 382-85 – November 2, 2000 – in the Home Site Assessment report directed to Debbie Dunstone ("Dunstone"), senior injury specialist, casualty and rehabilitation claims centre (new MPI case manager), Joanne Vanderhorst ("Ms. Vanderhorst"), occupational therapist, New Century Health, advised Evelyn was currently living in the main floor suite of the duplex and her daughter and son occupied the upper level of the duplex;

- page 393 – December 12, 2000 – letter to Evelyn from Herman Adrian, supervisor, child resource unit, Winnipeg Child and Family Services, wherein he confirmed approval of a place of safety for one child "from November 30, 2000 to December 14, 2000 or until the end of the placement in your home, whichever is shorter. At the end of this time, the special rate may be extended or amended based on further evaluation of the progress of the child by you and the child's social worker";

- pages 407-8 – February 28, 2001 – Dr. Roger Graham ("Dr. Graham"), psychiatrist, responded to Dupont's queries in her letter to him of February 22, 2001 (page 405), and noted:

> The questions you have asked are all related to employability. I feel this patient is prepared and has already initiated the process of returning to the work place. ... I feel this woman is psychiatrically capable of working with children with physical and mental health concerns. I also feel that her present plan of running a home with an assistant is also viable. ...

- pages 417-18 – March 12, 2001 – Dr. Campbell wrote to Dupont and opined Evelyn was able to return to work depending on the type of employment. He stated:

> ... Employment requiring extensive walking, stairs, climbing [et cetera] would not be realistic at this time, and it certainly appears that nerve damage in her leg may very well be permanent. ...
>
> Ms. Martens and I have talked recently about her previous plans to open a treatment group home and the realistic possibilities of it occurring at this time. Her and I both agree that because of her ongoing physical disabilities, as well as her dependence in the not [too] distant past on various medications, it is not realistic to plan for this group home being opened in the immediate future. ...

  Dr. Campbell noted Evelyn still considered the group home as her aspirational goal;

- pages 428-30 – May 16, 2001 – Rehabilitation Assessment Progress Report wherein Dupont indicated to Dunstone there had been some setbacks in Evelyn's care and recommended a job demands analysis be completed on the operation of a treatment group home;

- pages 464-78 – Occupational Therapy Functional Capacity Evaluation from Vanderhorst to Dunstone wherein she indicated after reviewing all of the tests performed by her, she recommended:

> Overall it appears that Ms. Martens appears suited for the position of Facilitator/Manager, as described by Child and Family Services position of Shelter/Support Worker II, if the following are considerations
>
> - The opportunity to sit intermittently and frequently throughout the work shift
> - The client would not be required to physically lift, carry or restrain children (older children may be the most appropriate clientele)
> - Activities such as bending, squatting, kneeling and stair climbing do not exceed an occasional level of frequency

*[NOTE: There does not appear to be a date referenced in the report itself, although the index in Exhibit 1 notes the date to be October 5, 2001.]*

- pages 480-81 – October 26, 2001 – memo from Dupont to Dunstone wherein Dupont noted a number of unresolved medical issues. She indicated Dr. Todd Sekundiak, in the presence of herself and Evelyn, informed Evelyn:

> ... that he would sign a medical approval of any job she felt capable of doing. He stated the only physical restrictions are that of moderation. She can walk, bicycle, cross-country skiing, ride horses, etc., in moderation. The only concern he had in regards to Ms. Martens working in a treatment group home was that of restraining a large child. He agreed with Ms Martens that she should be able to meet all the other sedentary demands of that position and leave the physically demanding activities to the other staff.
>
> [Emphasis in original.];

- pages 488-89 – July 23, 2002 – Esther Penner, rehabilitation consultant, New Century Health, wrote a letter to Bryan Wiebe ("Wiebe") (new MPI case worker) and noted Evelyn was willing to return to the workplace. It was noted she needed to upgrade her computer skills and provide MPI with a required Transferrable Skills Analysis;

- pages 491-96 – September 23, 2002 – Jack Spence, employment specialist, Occupational Rehabilitation Group of Canada, prepared the Transferable Skills Analysis. Spence discussed several counselling occupations but noted (page 495):

> ... these could require many years to remunerate Ms. Martens at 100% of her net income. Thus they may not be an option.

He also opined (page 495):

> ... an individual's employability is greatly enhanced by factors such as the person's motivations and interest to try out alternate occupations. Based on research gathered for this report, it would seem reasonable to conclude Ms. Martens is capable of alternate employment.

- pages 501-04 – November 5, 2002 – Wiebe, senior case manager, CRCC, sent an inter-departmental memorandum to Gord Lapointe, case management supervisor, CRCC, regarding a request for approval of a two-year determination of Evelyn and mentioned counselling as an ideal area for the one-year job search requirement;

- pages 531-33 – May 2, 2003 – Dr. Graham wrote to Wiebe and noted Evelyn continued to present with PTSD;

- pages 549-50 – May 21, 2003 – an internal investigation memo noted Evelyn was living with a known sex offender. It also noted Evelyn had been working since the year 2000.

**June 16, 2003 to March 26, 2005 – the fraud allegation**

[25] MPI received a confidential tip that Evelyn was working and failing to report the income she received. MPI conducted an internal investigation and it was determined Evelyn failed to report she was working. On June 16, 2003, pursuant to the provisions of the ***Criminal Code***, the Crown charged Evelyn with fraud.

[26] In oral reasons (Exhibit 1, pages 694-96), Mykle J. believed Evelyn's evidence that she reported her employment during the years in question to Dupont and Dr. Graham. He also noted:

> Mrs. Dupont -- again my impression is that she sees the world in her own absolute terms ...

Mykle J. attributed the differences between Evelyn and Dupont to be "misunderstood communication".

[27] In a memorandum dated March 29, 2005 (Exhibit 1, pages 701-3 ), Michael Mahon ("Mahon"), senior Crown prosecutor for Manitoba Justice, noted:

> ... the court acquitted the accused but there is little doubt she did not make much of an effort to tell MPI what she was earning. This is another case which highlights the clear need for claimants to have to sign a document on a regular basis that their financial and employment circumstances have not changed.

[28] Mahon also suggested the problems with this type of case could be resolved if claimants were required to file a monthly or quarterly written acknowledgement of whether or not there was a change in a claimant's circumstances.

**March 27, 2005 to May 2012 – post Mykle J's. decision**

[29] Evelyn believed Mykle J.'s decision would result in an immediate reinstatement of her benefits. Her personal beliefs were quickly dashed by MPI. In a letter dated April 28, 2005 (Exhibit 1, pages 706-9), Wiebe informed Evelyn that her benefits were now being terminated pursuant to sections 110(1)(a) and (e) of the ***Act***.

[30] Following this decision Evelyn retained Murray Trachtenberg ("Trachtenberg") as her legal counsel. Thomas R. Strutt ("Strutt"), senior solicitor of MPI, acted as IRO. Strutt advised Trachtenberg that Evelyn could request a review of the decision, which was tentatively scheduled for May 31, 2005. Trachtenberg advised Strutt the matter would not be ready to proceed on May 31 and requested an adjournment. Strutt agreed to the adjournment.

[31] Trachtenberg, in a letter to Strutt dated June 21, 2005 (Exhibit 1, pages 716-18), advised him of the following grounds of appeal:

1. Wiebe's fresh decision of April 26, 2005 was ill-founded as there was no new information.

2. Medical information available to MPI throughout demonstrated that Evelyn "has not been able to work continuously since December 1, 2000".

3. Since May 2, 2003, MPI "has taken no steps since that time to obtain any medical information on my client but instead, given the criminal prosecution, maintained throughout a position that my client's entitlement had come to an end and that no ongoing medical information was necessary."

4. The restrictions noted in Vanderhorst's Occupational Therapy Functional Capacity Evaluation to Dunstone effectively rendered Evelyn incapable of performing such duties. *[Note: In his letter Trachtenberg referenced the date of this report as October 1, 2001, the Index in the Exhibit 1 references the date as October 5, 2001, and the report itself references no date.]*

5. Dr. Graham's report of May 2, 2003 clearly established Evelyn's ongoing disability.

6. Trachtenberg argued the actions of MPI amount to bad faith in light of Dr. Graham's opinion as to Evelyn's ongoing mental health issues.

7. Trachtenberg questioned MPI's failure to follow up with Dr. Graham in the last two years as being unusual considering it made a fresh decision without this information.

[32] Strutt, in a letter to Trachtenberg dated June 23, 2005 (Exhibit 1, page 721), characterized Evelyn's condition as "a relapse", which is distinguishable from a review, and would require a new decision by the case manager.

[33] Strutt, in an email to Trachtenberg dated June 29, 2005 at 10:06 a.m. (pages 726-28 of Exhibit 1), commented:

> ... Although I am unfamiliar with the file at this point, I take it that the decision is based on the fact that Ms. Martens was actually working at that time. ... If you want a decision on the relapse issue, you must consult the case manager. You have a right to a decision on the issue, but I am not going to take over case management of the claim and make a decision which is up to the case manager.
>
> Clearly it would be preferable to have all the issues resolved by case managers' decisions before proceeding in the Review Office so that we could do one Review instead of a series. ...

[34] Dwayne McFaddin ("McFaddin"), senior case manager, CRCC (new MPI case manager) (Exhibit 1, pages 743-44), wrote to Evelyn on July 22, 2005 and advised her a complete psychiatric examination was necessary based on Dr. Graham's conclusions. He also stated:

> Once all of the information has been gathered, I will confirm the April 28, 2005 decision letter if appropriate and then you can proceed with your Internal Review hearing. However, should information come to light that would alter this decision, I would substitute the proper decision for it. ...

[35] Further, McFaddin advised Evelyn her benefits would be reinstated as of July 1, 2005 pending the review. McFaddin confirmed:

> We will process your IRI payments for this finite period with no expectation of recovering those funds. That is, should our final decision be that you are capable of work and therefore ineligible for further benefits, or that you are incapable of working due to PTSD that is unrelated to the motor vehicle accident, etc., we will not be seeking recovery of these monies.

[36] Dr. Mark Etkin ("Dr. Etkin"), Associate Professor Department of Psychiatry, University of Manitoba (Exhibit 1, pages 766-83), performed an independent psychiatric evaluation for MPI. Dr. Etkin reviewed Evelyn's medical history and opined that Evelyn's ongoing mental health issues were unrelated to the MVA. The psychometric results in the report are as follows (page 773):

1. Beck Depression Inventory – moderate to moderately severe level of depressive symptoms.

2. Beck Anxiety Inventory – very severe anxiety symptoms.

3. Fear Questionnaire – 7 on a scale from 0 to 8, with 6 being markedly disturbing and disabling and 8 being very severely disturbing and disabling.

4. Depression Anxiety Symptom Scale – very high score, being 42 out of a possible 63.

5. Hamilton Depression Scale and Hamilton Anxiety Rating Scale – Dr. Etkin reported "[t]he completion of the observer-rated Hamilton Scales was difficult because of Ms. Martens' vagueness and inability in regard to describing her symptoms."

[37] Dr. Graham, in a letter to McFaddin on October 14, 2005 (Exhibit 1, pages 795-96), opined the criminal charges interfered with Evelyn's recovery "and unfortunately may have delayed her recovery". Dr. Graham noted stressors in her daily life that contributed to delaying her recovery. He also noted Evelyn was not "presently employable".

[38] Holly Arabsky ("Arabsky"), senior case manager, CRCC (new MPI case manager), in a letter to Evelyn dated December 20, 2005 and signed on December 21, 2005 (Exhibit 1, pages 850-52), advised her that based on the new medical information gathered Evelyn's current condition is not related to the MVA. Arabsky also advised further steps would be taken **to recover any benefits paid to date** and Evelyn could now seek a review of this decision.

[39] Trachtenberg wrote to McFaddin on December 21, 2005 (Exhibit 1, pages 853-55) and complained he was not privy to the reports relied upon by MPI and requested an internal review of the decision.

[40] Strutt, in a letter to Trachtenberg dated December 22, 2005 (Exhibit 1, page 858), noted:

> This review file was opened to review the July 23, 2003 decision. As I understand it, that decision has never been set aside and so it is still subject to review. ...

[41] In a letter dated January 9, 2006 (Exhibit 1, pages 864-65), Trachtenberg, responding to Strutt's letter of December 22, 2005, agreed on the question of internal review, but added:

> If, however, the original decision of July 23, 2003 is available for review, what is the status of the April 28, 2005 decision? If that decision has any legitimacy, when is that decision to be effective? April 28, 2005 or as the Corporation's letter indicated, back to July 23, 2003?

Trachtenberg noted Evelyn "does dispute all of the decisions going back to July 23, 2003 and including April 28, 2005 and December 21, 2005."

[42] Arabsky, in an inter-departmental memorandum dated January 9, 2006 to Dr. Jones, Dr. Shrom and Dr. Mazurat at Health Care Services (Exhibit 1, pages 866-67), sought further medical information for Evelyn to verify all compensation steps taken to date.

[43] In a letter dated March 14, 2006 (Exhibit 1, page 871), Strutt wrote to Evelyn and confirmed the internal review hearing had been conducted by telephone on February 1, 2006. Strutt noted "it appears that some of the

documentation used to support the decision under Review cannot be located." Strutt commented that without the missing documentation a review could not be completed.

[44] In a letter dated May 24, 2006 (Exhibit 1, pages 876-82), Strutt advised Evelyn her request for review was denied and set out her right of appeal to the AICAC. By notification of appeal dated June 21, 2006, the AICAC acknowledged Evelyn's appeal (Exhibit 1, pages 884-86).

[45] In a letter dated December 20, 2007 (pages 893-94 of Exhibit 1), Dr. David Hedden ("Dr. Hedden"), orthopaedic surgeon, St. Boniface Surgical Associates, wrote to McFaddin (once again MPI's case manager) and referenced Evelyn's 1998 MVA. Dr. Hedden noted the acetabular fracture "had been complicated by a sciatic nerve injury and this had resulted in a persistent peroneal nerve deficit". In the concluding paragraph of his letter, Dr. Hedden opined:

> In view of the fact that this lady does have some ongoing deficits in relation to the neurological function of her right leg, it would be appropriate to either change her job description to avoid some of the physical demands that is currently necessary to perform in her previous capacity or to change her job completely, which may require retraining.

[46] Dean Scaletta ("Scaletta"), senior solicitor of MPI, in a letter dated February 1, 2008 (Exhibit 1, page 898), wrote to Paulette Laurin, director of appeals at the AICAC, enclosing Dr. Hedden's letter of December 20, 2007 and advised the report does not change MPI's position as expressed by the IRO.

[47] The AICAC appointed Nicole Napoleone ("Napoleone") as Evelyn's claimant advisor. In a letter to Scaletta dated October 28, 2008 (Exhibit 1, page 905),

Napoleone suggested that an AICAC pre-hearing meeting be held to discuss settlement. In a letter dated October 31, 2008 (Exhibit 1, pages 906-7), Scaletta responded to Napoleone's letter and advised that the only way settlement discussions could occur would be for Evelyn to withdraw her appeal.

[48] Dr. Mallory D. Fast ("Dr. Fast"), in a letter to Napoleone dated November 20, 2008 (Exhibit 1, pages 912-13), opined:

> In conclusion, there is objective physical evidence that she has suffered damage to the right sciatic nerve with resulting right foot drop. This would make it difficult for her to perform her previous occupation if that involved having to rely on her leg for sudden movements and frequent walking, especially up and down stairs. I note the functional capacity evaluation recommended any employment she undertake give her 'the opportunity to sit intermittently and frequently throughout the work shift' and 'not be required to physically lift, carry or restrain children.' ...

[49] Dr. Graham, in a letter dated January 15, 2009 to Napoleone (Exhibit 1, pages 924-27), clarified that Evelyn's psychiatric issues are resolved but her physical limitations prevent her from working at her pre-MVA vocation.

[50] Napoleone, in a letter dated February 12, 2009 (Exhibit 1, page 929), requested that the AICAC set Evelyn's hearing date.

[51] Terry B. Kumka ("Kumka") is noted to be acting as MPI's solicitor for the appeal. Kumka, in a letter dated March 16, 2009 (Exhibit 1, page 936), requested the AICAC to assist in obtaining Dr. Graham's file notes.

[52] In an inter-departmental memorandum dated July 29, 2009, Dr. D. Andrew Jones ("Dr. Jones"), consulting clinical psychologist to MPI, Health Care Services (pages 939-42 of Exhibit 1), wrote to Kumka. Dr. Jones indicated he had reviewed of all the information available to him, and opined (page 942):

> ... it is now the writer's opinion, based on this information, that the claimant, on the balance of probabilities, did suffer a relapse of her PTSD symptomatology in April, 2003 as indicated by Dr. Graham. ...

Dr. Jones further opined he could not tell when the PTSD may have resolved.

[53] Kumka, in letters to Napoleone dated December 4, 2009 (Exhibit 1, page 963) and December 10, 2009 (Exhibit 1, pages 964-65), offered to resolve Evelyn's claim for $10,645.63. In a letter dated December 15, 2009 (Exhibit 1, pages 969-70), Napoleone rejected the suggested settlement and requested a hearing before the AICAC.

[54] Kumka, in a letter to the AICAC dated December 18, 2009 (Exhibit 1, pages 972-73), opined that with the new information in the file this matter should be referred back to the MPI case manager for decision.

[55] The AICAC, in a letter to Kumka dated January 21, 2010 with a copy to Evelyn (Exhibit 1, page 983), agreed this matter should be referred back to the case manager. As a result, Evelyn filed a new application for review of the injury claim decision, dated May 27, 2010, restating her objections to the decision made by MPI (Exhibit 1, pages 984-86).

[56] Lynne Nixon ("Nixon"), IRO, MPI's legal department, in an email chain with Dawn Sladek ("Sladek") (one and the same person as Dawn Green), senior case manager with MPI (Exhibit 1, pages 989-93), requested Evelyn's MPI file. It is noted the information, such as the April 28, 2003 decision letter, appears to be missing.

[57] In the decision letter to Evelyn dated September 30, 2010 (Exhibit 1, pages 995-1001), Nixon denies Evelyn's request for review. Once again, Evelyn's appeal rights are outlined. In an email dated December 3, 2010 to Candace Ransome ("Ransome"), appeals officer with the AICAC, Napoleone requested the AICAC to schedule Evelyn's appeal for all decisions back to the December 1, 2000 letter (Exhibit 1, page 1006).

[58] The AICAC, in a notification of appeal from Ransome dated November 10, 2010 (Exhibit 1, page 1009), requested MPI's legal department (Kumka) to provide Evelyn's complete file in preparation for the appeal. The file was provided to the AICAC on November 18, 2010.

[59] There are a series of letters (Exhibit 1, pages 1056-75) written to and from MPI to Evelyn's physicians in Alberta that requested updated medical information in preparation of the AICAC appeal.

[60] The AICAC's notice of hearing dated February 2, 2012 (Exhibit 1, page 1159) confirmed hearing dates of June 4 to 7, 2012.

[61] Evelyn retained William S. Gange ("Gange") prior to the AICAC hearing. In a letter dated May 2, 2012 (Exhibit 1, pages 1177-78), Gange reiterated the April 28, 2005 decision cannot stand as no new information was available to MPI that permitted it to make a new decision.

[62] Settlement discussions followed and on May 29, 2012 these discussions were sufficiently completed that the AICAC hearing was postponed. The parties agreed Evelyn was not capable of returning to pre-MVA employment as of

December 1, 2000, MPI could not deduct any monies it had paid to her after December 1, 2000, and Evelyn's IRI benefits were incorrectly calculated and would be re-done.

[63] The terms of the final settlement included payment of all outstanding IRI benefits from 2003 to the date of the agreement. MPI did not offset any monies Evelyn received from employment between 2000 and 2002. Evelyn remained entitled to any other benefits she was entitled to under the ***Act***.

## POSITION OF MPI

[64] MPI submitted "bad faith" is not a cause of action. The Supreme Court of Canada in ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24 (CanLII) ("***Elder Advocates***"), stated:

> [78] The law does not recognise a stand-alone action for bad faith. As the certification judge noted, at para. 408, the bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable.

[65] MPI cited a number of Ontario Workplace Safety & Insurance Board cases (the Ontario equivalent to WCB cases) to support its position: ***Taylor v. Workplace Safety & Insurance Board***, 2018 ONCA 108; ***Castrillo v. Workplace Safety and Insurance Board***, 2017 ONCA 121. MPI's position is the coverage offered by MPI is similar to the coverage outlined by WCB and bad faith claims were found not to exist in WCB cases. Therefore, the court does not have authority to grant punitive damages in this case.

[66] MPI cited ***Britton v. Manitoba***, 2011 MBCA 77 (CanLII), when the court found that an allegation of bad faith "cannot sustain an action on their own" (paragraph 45).

[67] MPI submitted the appropriate legal framework for claims such as Evelyn's is the intentional tort of misfeasance in public office. Citing the Supreme Court of Canada in ***Odhavji Estate v. Woodhouse***, 2003 SCC 69 (CanLII), the court stated:

> 32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[68] MPI noted the Supreme Court of Canada refused leave to appeal in ***Rain Coast Water Corp. v. British Columbia***, 2019 BCCA 201. In ***Odhavji***, the court noted a failure to discharge a statutory obligation is not actionable. In ***Rain Coast Water Corp.*** the court found the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious conduct.

[69] MPI suggested that the claim for "bad faith" in the administration of a claim for Part 2 benefits in ***Watts v. Manitoba Public Insurance Corp.***, 2008 MBQB 20, should be disregarded as it was decided prior to ***Elder Advocates***, ***Taylor*** or ***Castrillo***. In the alternative, MPI submitted ***Watts*** set out a useful analysis of

the types of actions by MPI case managers that are not bad faith. The court also equated bad faith with actual malice.

[70] MPI submitted that insurance bad faith allegations have no application to Evelyn's case as there is an absence of a related contractual duty of good faith. See ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18, ***Fidler*** and ***3746292 Manitoba***. The PIPP benefits have elements of or in relation to insurance. The PIPP is not a contract. It applies to every Manitoban regardless of whether they have purchased any kind of insurance product or whether they have ever owned, driven or licenced a vehicle. It applies regardless of fault.

## POSITION OF EVELYN

[71] Evelyn's submission is based on the following arguments:

a) Did MPI owe Evelyn a duty of good faith when it administered her claim?

b) Did an examination of MPI's conduct demonstrate that it breached the duty of good faith?

c) If breached, what are Evelyn's damages?

## EVELYN'S POSITION ON MPI'S ACTIONS

[72] The vulnerability of an insured claimant is among the reasons insurance contracts are of the utmost good faith, which extends to whether an insured is receiving or administering a claim. An insured's vulnerability *vis-a-vis* an insurance company is well understood.

[73] When the Legislature amended the compensation regime in the ***Act*** from a tort system to a no-fault system it did not change the nature of the insurance relationship but introduced a "simplified insurance scheme". The intent was to reform the automobile insurance market but not do away with concepts of insurance.

[74] The court should focus on substance over form and consider whether:

- the insurance scheme administered by MPI is analogous to an insurance contract;
- the benefits provided to claims are akin to those available under an insurance contract; and
- the existence of the insurance plan creates an expectation of benefits and "peace of mind" akin to an insurance contract.

[75] Turning to the question of bad faith, Gange argued that the law is clear on this question of what constitutes bad faith. As to the specifics, Gange submitted the following examples of decisions made in bad faith:

- Wiebe acknowledged that decision letters are very important and there needs to be a thorough review of a file, but he only read part of Evelyn's file before making his decision;
- when Wiebe issued the 2003 decision he received an email from the FAC directing him to do so and who was the decision-maker, Wiebe or the FAC;
- when Wiebe made the 2003 decision he was unaware that Evelyn denied the allegation and did not ask what her position was on the allegations;
- Wiebe and Strutt acknowledged that section 160 of the ***Act*** requires a positive statement from Evelyn that was either false or inaccurate;

- Wiebe did not seek clarification from Dr. Graham about his statement "initiated the process of returning to the workplace", although nothing prevented him from seeking clarification;

- Dupont did not follow up when Evelyn reported to her that she was seeking a licence from CFS to foster an adolescent boy;

- Evelyn was in extreme pain and medicated when the application was signed and intended to follow up in the days following the MVA but never did;

- at the time of the 2003 decision Wiebe was aware that Evelyn suffered a PTSD relapse that rendered her disabled from working;

- Wiebe and Strutt, under cross-examination, acknowledged the 2003 decision was incorrect, but Kumka in 2012 advanced to the AICAC that Evelyn was "guilty of fraudulent behaviour".

[76] Gange submitted the ***Palmer*** test (***R. v. Palmer***, 1979 CanLII 8 (SCC)) regards new information was accepted by the AICAC as applicable to section 171 decisions (see AICAC File No.: AC-04-24, at pages 13-15).

[77] The Wiebe decision of July 28, 2005 was contrary to this principle. Wiebe also lacked jurisdiction to make this decision because the ***Act*** does not permit a case manager to review his own decision. This is effectively what Wiebe was doing.

[78] Mykle J.'s decision accepted Evelyn's statements she did report she was working, but MPI did not believe the conclusion.

[79] Shortly after Mykle J.'s decision, Strutt emailed Wiebe on April 12, 2005 commenting:

- "I think we have trouble.";

- "We did, after all, insist that the criminal proceeding go first, and we are the complainants in that proceeding.";
- "... let me know if you think there is any 'wiggle room'."

[80] Strutt testified his final correspondence to Evelyn dated May 9, 2006 was an abject failure that was "extremely wrong" and about which he was embarrassed. Strutt also admitted under cross-examination that he attempted to assemble the information he felt was needed to support Arabsky's decision. The IRO's responsibility is to review the decision. The IRO should not assemble information to support a case manager's decision.

[81] Evelyn asserted the attempts to settle her claim for less than was eventually agreed are examples of bad faith efforts (see ***Zurich Life Insurance Co. v. Branco***, 2015 SKCA 71).

[82] MPI submitted its Part 2 benefits have been determined to be an insurance contract and subject to a claim of bad faith. See ***Automobile Injury Compensation Appeal Commission v. Constantin et al.***, 2010 MBCA 76 ("***Constantin***"), ***McMillan v. Thompson (Rural Municipality)***, 1997 CanLII 1152 (MB CA), and ***Watts***.

## DID MPI BREACH ITS DUTY OF GOOD FAITH?

[83] What constitutes bad faith depends on the circumstances in each case throughout the claims process (see ***702535 Ontario***).

[84] An insurer discharges the duty of good faith if it:

- deals with, investigates and assesses a claim in a fair and reasonable manner;
- pays claims in a timely manner when there is no reasonable basis to deny coverage (see ***702535 Ontario***, at paragraph 28);
- does not delay payments or deny coverage in order to obtain leverage in settlement negotiations

[85] Gange submitted that subsequent payment of monies owing does not cure the bad faith of the insurer (see ***J.I.L.M. Enterprises & Investments Limited v. INTACT Insurance***, 2017 ONSC 357, at paragraphs 87-94).

[86] A finding of bad faith does not require subjective intent on the part of the bad faith actor, but rather encompasses actions of serious carelessness or recklessness (see ***Finney v. Barreau du Québec***, 2004 SCC 36).

[87] Gange submitted that when considering the cumulative actions and effects of MPI, the only conclusion this court can draw is that MPI's conduct was so "markedly inconsistent with the relevant legislative context" of the ***Act*** and that MPI is liable to pay punitive damages as a result.

## ANALYSIS

[88] MPI's position is the no-fault insurance offered to Manitobans is not insurance at all but an indemnity scheme equivalent to the WCB. The evidence in this case included references to employees of MPI administering damage claims to vehicles as well as the Part 2 benefits.

[89] The court takes judicial notice that in purchasing automobile insurance at any of the authorized MPI locations one purchases insurance coverage such as

damage, third party liability, loss of use, excess valuation and other forms of extended coverage.

[90] The latest online annual report of MPI (2018/19) includes Dr. Mike Sullivan's (chairperson) comments on PIPP:

> There are many excellent examples I could offer to demonstrate how we deliver on our mission, but to choose just one, I point to our protection for Manitobans injured in automobile collisions. Through the Personal Injury Protection Plan, we ensure all Manitobans injured in a collision anywhere in Canada or the U.S. are compensated for their specific economic losses and comprehensively supported in their recovery. Supporting Manitobans – whether they are recovering from injuries, learning to adapt to new realities physically or emotionally, or coping with the loss of a loved one – is one of the most important and essential services we provide.
>
> [https://www.mpi.mb.ca/Documents/2018-Annual-Report-pdf]

[91] The same annual report includes the financial statement for MPI listing the sources of revenue. The only active source of revenue is the premiums charged to those who purchase insurance or driver's licences. MPI receives other sources of income such as interest and investment income, or monies carried over from a previous year.

[92] MPI's argument is PIPP covers all Manitobans injured in MVAs and therefore the contractual element is absent. The reason this coverage exists is because the Province of Manitoba, effective March 1, 1994, substituted the tort system for the no-fault insurance scheme. Prior to March 1, 1994 if you were injured in a MVA the victim under tort law could sue those whom the victim believed were responsible. After March 1, 1994 this right of a victim to pursue those responsible in tort was abolished.

[93] The language of the legislation makes it clear anyone who sued in tort for damages suffered in a MVA prior to March 1, 1994 now is indemnified under a statutory scheme.

[94] MPI benefits are a contract created by statute. MPI's injury benefits under the no-fault insurance scheme include:

- catastrophic injury;
- caregiver expenses;
- medical and personal expense;
- income replacement indemnity (IRI);
- injury rehabilitation;
- personal care assistance.

[95] An examination of the benefits offered by MPI are identical to those found in a special damages award in tort law. Although the insurance offered is described as no-fault, the legislative changes effective March 1, 1994 are best described as a victim of a MVA is prohibited from suing the persons he/she believed were responsible for the loss suffered.

[96] Workers compensation commentary often refers to the "historic compromise" made with workers to ensure benefits would be received (see https://www.wcb.mb.ca/sites/default/files/2016%20backgrounder.pdf). It is also referred to as the "grand bargain". In the event an injured employee received an award of compensation in tort beyond the employer's ability to pay, the employer may chose bankruptcy as the only reasonable course of action. If the employer filed for bankruptcy protection, the injured employee may receive little or no compensation. The bankruptcy could also result in an otherwise successful business being shuttered, putting others out of work.

[97] The "historic compromise" or "grand bargain" required employers to pay all the premiums into a central fund and the injured employee would receive a guarantee, notwithstanding the financial health of the employer, the defined benefits would be paid. This program has existed in Canada for over 100 years.

[98] Contrast this with the implementation of Manitoba's public automobile insurance program. Prior to November 1, 1971 drivers, passengers and motor vehicle owners participated in private insurance. Whatever the benefits or limitations of the program, the public was served by private insurance. Drivers, passengers and motor vehicle owners never bargained for the public program, it was imposed on them by legislative authority. This is not a criticism of the legislative choice, it is only a summary of what occurred.

[99] Although the change was a political decision by one political party, the public automobile insurance program remained in effect notwithstanding several changes in the governing party that formed government. One of the oft stated reasons for public satisfaction were the low premiums charged for the insurance.

[100] Between 1969 and March 1994, the public automobile insurance program was administered in a manner consistent with other automobile insurers. The program was based in tort.

[101] In 1993, the Legislature changed the program from a tort system to a defined benefits system. The so-called "historic compromise" or "grand bargain" at the heart of WCB legislation is absent.

[102] As acknowledged during the course of this trial, the 1993 legislative change had one stated purpose, to keep the cost of the public automobile insurance premiums low by limiting the benefits received by claimants under the policy of insurance. Nothing more, nothing less.

[103] The way the Legislature chose to do so was to set upper limits for income replacement (currently $80,000 annually) and to eliminate the need for claimants to retain legal counsel to assist in the claims process.

[104] The 1993 enactment of the Part 2 benefits regime remains at its core insurance.

[105] In ***Constantin***, the Manitoba Court of Appeal found:

> 36 There is no doubt that the general scheme of the *Act* is to establish a no-fault regime whereby compensation is payable for bodily injury caused by an automobile in respect of an accident, regardless of responsibility for the accident. Thus, whenever a Manitoba resident has suffered bodily injury caused by an automobile in respect of an accident, the claim advanced under Part 2 of the *Act* will, of necessity, and in the broadest sense, be a claim for compensation, the question of fault having been statutorily excluded.
>
> 37 But the scheme is still one of insurance. Thus, though fault is no longer a factor, the injuries giving rise to compensation must be the result of an unintended act or omission, not an act or omission intended to cause the injuries or death for which the compensation is claimed.

## BAD FAITH AS A STAND ALONE CLAIM

[106] The question is whether an allegation of bad faith, in the context of an insurance contract, may proceed as a stand-alone claim. The leading authority in bad faith claims is ***Elder Advocates***. The context of the claim is described as:

> [2] The class has filed a statement of claim in which it alleges that the government's conduct constitutes a breach of fiduciary duty, negligence,

> bad faith in the exercise of discretion and/or unjust enrichment. The class seeks the return of monies or damages equivalent to the amount of any overpayment of the permitted accommodation charges. It is on the basis of these allegations that the action was certified. The class also brings an equality claim under s. 15 of the *Canadian Charter of Rights and Freedoms*, which Alberta does not seek to have struck but argues should not proceed by way of class action.
>
> [3] At certification, the Province of Alberta challenged the claims of fiduciary duty, negligence, and bad faith in the exercise of discretion. The certification judge struck out the plea of breach of fiduciary duty and partially limited the duty of care alleged in negligence (2008 ABQB 490, 94 Alta. L.R. (4th) 10). The Court of Appeal upheld the entitlement of the plaintiff class to pursue all three causes of action (2009 ABCA 403, 16 Alta. L.R. (5th) 1). The Crown in Right of Alberta now appeals to this Court, contending that all the claims should be struck out and the action decertified.
>
> [4] This is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law. The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out.

[107] MPI cited paragraph 78 of ***Elder Advocates*** in its submission. Paragraph 79 provides much needed context:

> [79] At the hearing, counsel for the plaintiffs sought to argue that we should read the plea of bad faith as disclosing the tort of misfeasance in public office: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. Notwithstanding the difficulty of raising this interpretation of the pleadings for the first time in response during oral hearing, I do not see how this claim is sustainable at law: The facts necessary to support such an allegation cannot be extricated from the pleas of negligence and fiduciary duty, and a court is not obliged to divine causes of action apart from those deliberately pleaded and argued by a party. Misfeasance in a public office was not raised before the courts below, and I would not now accede to this submission.

[108] The underlying facts of ***Odhavji*** involve a claim brought by the estate of the shooting victim. The plaintiff argued the defendant officers' and the chief of

police's refusal to cooperate with a special investigation unit was actionable as misfeasance in public office.

[109] The underlying facts of ***Castrillo*** involved whether portions of a proposed class action statement of claim for tortious conduct in a global perspective should be struck. The substance of the allegations was set out by the court, as follows:

> [6] The appellant later learned there were a number of injured workers whose NEL awards were similarly reduced by the WSIB on the basis of so-called pre-existing conditions that were not true impairments, many of which were also reversed on appeal. The appellant discovered the reductions were the result of the implementation of an internal WSIB document, which he calls a "secret policy". Through it, the WSIB adopted a broader interpretation of the term, "pre-existing impairment", to include asymptomatic pre-existing conditions, which had previously been excluded. The appellant asserts this change in interpretation was illegally made in order to save WSIB money by reducing NEL awards.

[110] In ***Castrillo***, the claim's foundation was in the tort of misfeasance by a public officer. The court also determined "a bad faith claim in the context of an insurance contract" (paragraph 72) had no application to the facts in this case. ***Castrillo*** goes on to state:

> [74] I agree with the WSIB's submission that bad faith is not, in itself, a free standing cause of action: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 78. There, the Supreme Court said that bad faith, in tort, "is an element of misfeasance in public office". The elements of bad faith are therefore properly pleaded as incidental to the claim in misfeasance in public office, but the free standing claim for relief set out at paras. 51-57 of the amended statement of claim should be struck. I would grant leave to amend, but only for the appellant to better tie the bad faith allegation to the claim of misfeasance in public office, if so advised.

[111] In ***Castrillo***, the court did not eliminate a claim for bad faith, but, as noted above, indicated the appellant must "better tie the bad faith allegation to the claim of misfeasance in public office".

[112] However, earlier in the decision the court stated:

> [72] The appellant proffers two authorities for the proposition that there is a free standing cause of action for breach of a duty of good faith. The first is *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. That case concerned the availability of a bad faith claim in the context of an insurance contract, and in my view has no application here.

[113] In ***Castrillo***, the court rightly identifies that the Ontario workers compensation legislation does not permit bad faith claims to advance but claims may advance in the context of an insurance contract, citing ***Whiten***.

[114] In ***Castrillo***, the plaintiff alleged the existence of a workers compensation board "secret policy". Policy decisions by a board are distinguishable from insurance claims management.

[115] A careful examination of the cases cited by MPI are distinguishable on the facts. The court distinguished the action of misfeasance in public office and cases where the dispute before the court is based in the claims management performed under an insurance contract.

[116] Billingsley's position is an insurance contract (Canadian) may be created by statute or the terms of the contract (see ***3746292 Manitoba***, at paragraph 21). After Saskatchewan, Manitoba was the second jurisdiction to enact public automobile insurance. It has since been joined by British Columbia and Québec. Insurance contracts in these four provinces are creatures of statute.

[117] One of the contractual terms of the Manitoba public insurance contract is a positive obligation on MPI, as outlined in section 150 of the ***Act*** (repeated for emphasis), and states:

> **Corporation to advise and assist claimants**
> 150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

[118] This Legislature created an obligation to settle claims fairly, as contemplated in ***Whiten***. The Legislature imposed this obligation in the insurance contract created by statue to "endeavor to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part" (referring to Part 2).

[119] Section 150 must be read in conjunction with section 199(1) of the ***Act***. The use of "shall" in section 150 creates a mandatory obligation on MPI to "endeavor to ensure".

[120] Section 199(1) protects MPI from claims if it discharged its duties in good faith. The plain reading of section 199(1) is that any actions other than those performed in good faith remain actionable.

[121] Section 188 of the ***Act*** states:

> Except as provided in this Part, a decision of the corporation or the commission is final and binding and not subject to appeal or review by a court.

[122] This is known as a privative clause. Decisions of MPI are final and binding, "**except as provided in this Part**". The plain reading of the word "except"

contemplates not every action is subject to the privative clause. Section 199(1) must be read as one of the exceptions contemplated in section 188. Any other interpretation would result in section 199(1) having no effect.

[123] The placement of section 199(1) in Division 13, "MISCELLANEOUS PROVISIONS AND REGULATIONS" is significant. The question of bad faith conduct, including bad faith conduct by MPI remains alive and well.

[124] To suggest that a review of bad faith allegations would be the sole responsibility of MPI is nonsensical. To suggest that the AICAC could review claims alleging bad faith is equally so. The plain reading of section 199(1) is when MPI acts in bad faith it remains liable for its actions. A court must make this determination, being the exception to section 199(1) as it is outside the privative clause in section 188(1).

[125] The court considered ***Britton*** on the question of actionable wrongs. Britton sued the Province of Manitoba when Manitoba amended its group insurance disability program resulting in Britton losing her existing benefits. The court noted:

> 41 Having said that, the amendments are an allegation of an "actionable wrong," which is required to found a claim for punitive damages, as explained originally in *Vorvis v. Insurance Corporation of British Columbia*, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085, and subsequently in *Whiten*, and *Fidler*. In *Whiten*, Binnie J. wrote (at paras. 78-79):
>
> > ... 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 in ***Whiten***.]
>
> . . .
>
> 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. ...

42 t is true that Binnie J. later used the phrase "independent actionable wrong" several times, including in the context of his explanation that an independent tort is not required when claiming punitive damages (at para. 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 CanLII 29 (SCC), [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.
>
> [emphasis added]

43 In *Fidler*, McLachlin C.J.C. and Abella J., in explaining the principles governing the award of punitive damages in breach of contract cases, wrote that a claim for punitive damages must be "independently actionable" (at para. 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. ….
>
> [emphasis added]
>
> 44 I do not view the references to "independent actionable wrong" in *Whiten* and "independently actionable" in *Fidler* to mean that a new cause of action is required, or for that matter is necessarily created, when punitive damages are sought. What is required when claiming punitive damages is an actionable wrong; that is, conduct that is deserving of punishment by punitive damages, as explained in *Whiten* and *Fidler*. Certainly, an actionable wrong can be an independent cause of action, but it need not be. It will depend on whether the actionable wrong can sustain an action on its own.

Hamilton J.A. went on to state:

> 45 Here the amendments, as stated earlier, elaborate on the manner in which Manitoba is alleged to have terminated the plaintiff's disability benefits. While they allege a breach of the independent contractual obligation of good faith and fair dealing, they cannot sustain an action on their own. If the plaintiff is unsuccessful in establishing that Manitoba wrongfully terminated her disability benefits because she was not totally disabled, that will be the end of the plaintiff's claim. Thus, the manner of the termination of benefits, as set out in the amendments, will be a non-issue. …

[126] What distinguishes ***Britton*** from the case at bar is the allegation that the claims handling process was performed in bad faith and not whether a single decision resulted in termination of benefits. Contrary to what was argued by MPI, ***Britton*** does not stand for the proposition that a stand-alone claim can never go

forward, it depends on the circumstances of each case. These are the directions found in ***Whiten*** and ***Fidler***.

[127] The court also considered section 199(2) of the ***Act*** in reaching its decision. The section states:

> **Compellability of witness**
> 199(2) A director of the corporation, commissioner, or employee or agent of the corporation or commission shall not be required to testify in a civil action or proceeding about information or to produce documents or things obtained under this Part, except for the purpose of carrying out the person's duties under this Part.

[128] Although not raised by MPI, it is clear from its actions that MPI produced documents and called its own employees in support of its defence to a claim that it acted in bad faith. The court would have expected MPI to:

(a) bring a motion for summary judgment; or

(b) to bring a motion to strike the pleading;

[129] The issue is whether there is an actionable wrong such as to support a claim for punitive damages. In some occasions the actionable wrong will be a claim in tort or misfeasance in public office. In others it will be a claim in contract for improper claims handling process. For emphasis, as Binnie J. noted in ***Whiten***:

> 82 ... To require a plaintiff to formulate a tort in a case such as the present is pure formalism. ...

[130] This court agrees. What is alleged in this case is MPI failed in its contractual duty to act in good faith during the claims process. The facts of this case are

limited to MPI's claims process. This is what distinguishes this case from MPI's cases where other factors were at issue.

[131] The court notes this is an incremental change to ***Whiten***, unique to the public automobile insurance contract created by the Legislature. It places claimants under the ***Act*** on equal footing with claimants under all other automobile insurance programs, whether private or public.

[132] One of the arguments advanced when changes are made, even incremental ones, is the proverbial "flood gates" will open. In the case of a public insurer there may be an increase in premiums to cover claims for bad faith in the claims handling process. Since ***Whiten*** and ***Fidler*** there has not been a flood of cases. Punitive damages based in bad faith handling of insurance claims will rarely succeed. As noted in ***702535 Ontario***:

> [30] What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim.

[133] The rarity of punitive damages in the context of insurance litigation over the previous 20 years confirms the directions in ***Whiten*** failed to open the flood gates.

## DOES THIS BAD FAITH AS ALLEGED RISE TO AN ACTIONABLE WRONG?

[134] The court turns to a review of the actions of MPI in this case. Mainella J.A.'s comments in ***3746292 Manitoba*** set out what is good faith:

[21] At different stages of the life of an insurance contract, one of the parties may be vulnerable to the other (e.g., information advantage of an insured in negotiating the contract and the economic and technical advantage of an insurer in the claims-handling process) (see Barbara Billingsley, *General Principles of Canadian Insurance Law*, 1st ed (Markham: LexisNexis, 2008) at 48). Accordingly, beyond the obligations on the parties to an insurance contract created by statute or the terms of the contract, the common law imposes a reciprocal duty of good faith. The objective of the reciprocal duty of good faith is to place the parties on an "equal footing" (*Greenhill v Federal Insurance Co* (1926), [1927] 1 KB 65 at 76 (CA (Eng)).

[Emphasis added.]

[22] In *Bhasin v Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognised good faith as the general organising principle of the common law of contract and that the duty of honest performance of a contract was a manifestation of the general organising principle. Before *Bhasin*, the courts had accepted that there was an obligation of good faith placed on an insurer to dispose of insurance claims openly, honestly and without unreasonable delay (see *702535 Ontario Inc v Lloyd's London, Non-Marine Underwriters* (2000), 2000 CanLII 5684 (ON CA), 184 DLR (4th) 687 at para 27 (Ont CA), leave to appeal to SCC refused, 2000 CarswellOnt 4335).

[23] This duty of an insurer applies to both "the manner in which it investigates and assesses the claim and to the decision whether or not to pay it" (*Bhasin* at para 55). While an insurer does not have to treat the insured's interests as paramount in the same way as a fiduciary must, an insurer is obligated in the claims-handling process to be even-handed by giving equal consideration to the interests of the insured as to its own interests (see *Usanovic v Penncorp Life Insurance Company (La Capitale Financial Security Insurance Company)*, 2017 ONCA 395 at para 27). Practically, for an insurer, even-handedness in the claims-handling process means that an insured is not an adversary; the insured is entitled to correct information, a fair interpretation of the policy, a timely and balanced assessment of the claim based on its objective merits, and prompt and full payment of a valid claim.

[24] In *702535 Ontario Inc*, O'Connor JA (as he then was) discussed an insurer's duty to promptly and fairly administer a claim in the following way (at paras 28-29):

> The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges

> the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment.
>
> 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.
>
> [25] Given the complexities that often arise in assessing an insurance claim, an insurer is permitted to fairly debate the claim, and its amount, provided it acts reasonably (see Roderick Winsor, *Good Faith in Canadian Insurance Law* (Toronto: Thomson Reuters, 2017) at 5-17 to 5-19; and Gordon G Hilliker, *Insurance Bad Faith*, 2nd ed (LexisNexis, 2009) at 68). In order to establish a breach of an insurer's duty of good faith, more must be shown than simply that errors occurred in the claims-handling process. Also, just because an insurer is ultimately wrong does not mean that it acted in bad faith. A successful action requires proof that there was no reasonable basis in law or fact to deny benefits and that the defendant knew or ought to have known that to be the case. Tell-tale signs of bad faith by an insurer are when the handling of the claim was "overwhelmingly inadequate" or there was an "introduction of improper considerations into the claims process" (*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 71; and *Industrial Alliance Insurance and Financial Services Inc v Brine*, 2015 NSCA 104 at para 69, leave to appeal to SCC refused, 36809 (12 May 2016)).
>
> [Emphasis added.]

[135] The court will review MPI's claim process to determine if it was "overwhelmingly inadequate" or there was an "introduction of improper considerations into the claims process".

[136] The chronology of this claim is clear. Prior to May 2003, Evelyn's claim proceeded as expected. IRI benefits were paid to her based upon a promised job. Although from time to time Evelyn and her MPI claims manager did not see eye-to-eye, these were amicably resolved.

[137] Once MPI received information from its tip line that Evelyn failed to report her employment earnings the lens by which MPI viewed her file changed. MPI considered that Evelyn fraudulently obtained benefits and all her benefits should be terminated, not just her IRI.

[138] First, MPI could have denied Evelyn benefits relying on section 149 for failing to report a change in circumstances, but chose section 160, fraud, as its basis of denial. If fraud was proven, Evelyn's claim would be terminated in full.

[139] Second, without any new information being received by MPI between July 23, 2003 and April 26, 2005, MPI relied on section 110, claiming receipt of new information. These steps were taken without speaking with Evelyn to obtain her version of the complained event. MPI failed to obtain updated medical information from Dr. Graham, but instead MPI relied primarily on a tip from a "snitch" line as its evidence.

[140] Mykle J.'s findings in the fraud trial were that Evelyn disclosed to Dupont she was working and he found Dupont's file notes confirmed Evelyn advised her she was attempting to return to work.

[141] Mykle J. also found that Evelyn disclosed to Dr. Graham she did respite work, group home work and fostered a child. Mykle J.'s findings included a note

prepared by Dupont that stated Evelyn reported she was working. Mykle J. believed Evelyn's testimony on this point. As Dupont's notes indicated this to be the case that conclusion is easily supported.

[142] Mahon reported to MPI in a memorandum dated March 29, 2005, and commented on Mykle J.'s ruling, as follows (Exhibit 1, page 702):

> Dr. Graham would not release information to Dale Lofto [MPI's investigator] or this office prior to the trial which was unfortunate as the matter might have been dealt with differently. The fact she did disclose to him was difficult to harmonize with the fraud when the accused had signed a release about all the information. ...

Mahon does not specify how the case would end in a different result if Dr. Graham's notes were disclosed. It is important to remember Dr. Graham's opinion from 2003, before criminal charges were laid, formed the foundation for the reason MPI eventually settled. I am left to wonder why MPI would proceed with charging Evelyn without considering the evidence from her treating psychiatrist.

[143] Mahon further noted (Exhibit 1, page 702):

> In the end the court acquitted the accused but there is little doubt she did not make much of an effort to tell MPI what she was earning. This is another case which highlights the clear need for claimants to have to sign a document on a regular basis that their financial and employment circumstances have not changed.

He goes on to comment (Exhibit 1, page 702):

> ... From June 28th, 2000 to March 5th, 2001 there were no formal reports from Ms. Dupont to MPI. Ms. Dupont and the MPI case managers believed she was not worked when, in fact, she started in August of 2000. This is too common in these long term fraud cases. There are longs periods of time that are often not covered by any documentation. This whole problem could be rectified by monthly or quarterly written acknowledgements by

> the claimants that their financial or employment situations have or have not changed.

[144] Mahon also stated such a reporting system would protect the case managers from being cross-examined about a failure to document the file.

[145] Mahon's memorandum is critical for these reasons:

a) it identified specific problems in how Evelyn's claim was initially signed;

b) it identified the deficiency in MPI's reporting requirements;

c) it acknowledged Mykle J.'s finding, albeit in a limited way, that Evelyn reported to Dupont she was working with the words "she did not make much of an effort", and;

d) Dupont's failure to document her interaction with Evelyn at the critical time.

[146] Mahon's memorandum noted the deficiencies of MPI's overall reporting requirements and the failure of its independent claims manager to document critical interactions with Evelyn. This memorandum identified significant issues that should have been addressed by MPI.

[147] In the days following the receipt of Mahon's memorandum, Strutt (IRO) and Wiebe (case manager) considered the next steps. Based on Mykle J.'s decision, Strutt's evidence was that Evelyn's claim should be reinstated, thus ending the matter. Strutt's evidence was that he forwarded an email to Wiebe on April 12, 2005 (Exhibit 13) raising concerns regarding Mykle J.'s decision, such as:

- it is not a negative judgment, which might leave room to maintain the decision with a lower standard of proof;
- positive findings were made;

- Mykle J. believed Evelyn's evidence;
- Mykle J. rejected Dupont's evidence and was fairly critical of Dupont in the process;
- Mykle J. found that Evelyn reported to Dupont about the jobs she had and that Dupont did not follow up;
- MPI may be "issue estopped";
- if Wiebe thought there was any "wiggle room" to let him know; and
- Strutt did not see any point in holding a hearing on any of this.

[148] This email was disclosed at trial after Strutt testified to the existence of the email. Wiebe did not mention the email in his testimony. There appears to be no internal discussion by MPI after the significant issues identified by Mahon, other than Wiebe making a new decision based upon what he described as "new information" (see letter from Wiebe to Evelyn dated April 28, 2005 – Exhibit 1, pages 706-7).

[149] This saga is best described by the words of Robert Haithwaite ("Haithwaite"), executive director of bodily injury claims for MPI (2009-2006), during his cross-examination. The first exchange between Gange and Haithwaite is as follows:

> Q Well, Mr. Wiebe acknowledged that at no time did Evelyn Martens say to him, because he never asked the question, as to whether or not she was earning money? You heard that evidence, sir?
> A Yeah, it's her --
> Q So with respect to Mr. Wiebe, there was -- he had no information, he personally, the decision-maker had no information because he had never asked the question with respect to earning income, correct, sir?
> A Yes, and he wasn't party to the SIU investigation.

Q And -- and at no time did SIU have information from anyone that they had asked Evelyn Martens whether she was working; would you agree with that, sir?
A Sorry, you have to -- to repeat it, please?
Q At no time did SIU have information that anyone else asked Evelyn Martens whether she was working and earning money, correct, sir?
A They investigated, right?
Q That's not my question.
A And asked -- whether they asked -- whether anyone asked Evelyn Martens?
Q Yes.
A I'm sorry, I've got to have you ask me once more. I'm trying to recall.
Q I have suggested to you --
A Yeah.
Q -- that at no time did SIU have information from anyone that they had asked Evelyn Martens whether she was earning money?
A Okay. I think there was letters. Maybe not have asked her about earning money, there would have been documentation letters asking her that she -- or giving her obligation that she had to report income.

[Transcript, January 27, 2020, page T76, lines 10-41; page T77, line 1]

[150] Haithwaite disagreed with Gange's assertion that Evelyn needed to make a statement about her earning income before either of these sections could be relied upon by MPI.

[151] Haithwaite's cross-examination continued as follows:

Q Right. Okay, so -- so thank you. So -- so the first formal decision letter is the decision letter that -- that the IRI payments will be made based upon the promised job, correct, sir?
A Correct.
Q And then -- and then Wiebe number 1 comes along and terminates those benefits?
A Terminates the entire claim.
Q Terminates the claim?
A Yes.
Q And you heard Mr. Strutt saying that it was his intention to set aside Wiebe number 1, correct, sir?
A Yes.
Q And I used the words "pre-empt", that Mr. Wiebe, in issuing Wiebe number 2, pre-empted Mr. Strutt; would you agree with that?
A Yes.

Q And I put to Mr. Strutt, and you mentioned it this morning with my learned friend, Mr. Sain, that I had suggested to Mr. Strutt that if Wiebe number 1 was set aside, the only decision on the file, would be MacCutcheon -- the MacCutcheon decision on the promised job, correct, sir? That would be the only thing that would be on the file?

A No, all -- well, all the entitlements would be open again now, right? Because there wasn't a -- as an example -- or there wasn't -- hasn't been a permanent impairment entitlement dealt with yet.

Q Right.

A And so many -- many other entitlements would have opened up again.

Q Right. But the -- the decision with respect to IRI, would have been MacCutcheon's decision, correct, sir?

A The decision with regard to -- that's what would have been -- that decision would -- is what her IRI was -- Evelyn Martens IRI was based on that decision.

Q Right.

A Right.

Q So you set aside Wiebe number 1?

A M-hm.

Q It's gone --

A M-hm.

Q -- no longer exists? And the file, then, goes back to the -- to the status of MacCutcheon with respect to IRI and -- and the promised job, IRI compensation, correct, sir?

A Well, no, I think I explained that this morning. Because what if the -- I'll use the same example. Sorry, I'm long-winded sometime myself too. So use the same example that somebody went back to work and continued to be at work for forever. We thought they hadn't told us. We -- we do the same thing and charge them and then they -- and it gets overturned or changed.

Now, you -- the file comes back to you, would they -- would -- I can't ask you a question, so I'm telling -- they would not be entitled to IRI. Their -- their IRI entitlement would be based on the Sue MacCutcheon letter, but the fact they went to work and continued working, they wouldn't have an entitlement. They would be allegeable, but they wouldn't have an entitlement.

That's what we -- that's the step that was kind of missing. When the -- 160 gets set aside, all the entitlements are opened up for PIPP, which are, again, the 64 cover codes I talked about. Then you got to determine what is he or she entitled to --

Q Right.

A -- based on that setting aside.

Q Right. Okay.

A Okay.

Q So now let's go back there.

A Okay.
Q And -- and we're in the hypothetical of -- of what should have happened, because you'd agree with me, Strutt should have set aside Wiebe number 1, correct, sir?
A Should have? Yeah, Wiebe set aside when it -- Tom was -- it should have come from the IRO.
Q Yeah, and so then it -- it goes back to entitlement and Ms. Martens is not working at that point in 2005, correct?
A 2005? Correct.
Q She hasn't worked since 2001 from -- from your information in the SIU file, correct, sir?
A Correct. But at one period of time, we've got to remember that, it was determined that she was not working. Now, the belief of the corporation -- because it wasn't accident related either at one point and time, 2002 I believe. Was now because of -- she stopped working with CFS for reasons other than the motor vehicle accident injuries.
Q But that comes way later. That -- that -- that's a decision that you make way later; isn't it, sir?

[Transcript, January 27, 2020, page T82, lines 18-41; page T83, lines 1-41; page T84, lines 1-30]

Q MR. GANGE: Mr. Haithwaite, it's fair to say that -- that back in 2003 to 2005, you didn't have any active involvement in this file?
A Correct.
Q And the issue of the -- of -- of whether or not the question of -- of Ms. Martens', then, husband, Mr. McCabe, and the question of pedophilia, you certainly didn't have any information or -- when you -- when would you have first learned about the issue? From your review of the file; is that right?
A Probably only -- I think that issue only when we started to prepare for trial.
Q So not even in the review of the file?
A No.
Q That's something that you would have just -- when -- when you were being assisted by Mr. McKinnon and Mr. Sain in to -- to prepare for the trial?
A Yes.

. . .

Q MR. GANGE: And when you were reviewing the file, did you also look at Wiebe number 2?
A Yeah, Wiebe number 2 is I think the one I mistook this morning. That's really the one that I made my decision mostly on.
Q That you were focusing on?
A Yes.

. . .

Q And the point that you were making this morning was that, from your review of Wiebe number 2 -- so Wiebe -- Wiebe number 2 relies upon Section 110, correct, sir?
A Yes.
Q And my notes indicate that you had concerns because you didn't think that this was a valid basis to terminate her entitlement?
A I thought -- I thought it would be. I think -- hopefully I used the language. I know I went on a long time, but I thought it was going to be a close call.
Q And -- and you mentioned that -- that you knew that this was coming up and that it's coming up in front of AICAC, correct?
A Yes. Yes.
Q And you made reference to Mr. Myers?
A Yes.
Q And you knew that Mr. Myers from your -- from your previous experience with Mr. Myers, I -- I -- how would I say this? He could be a stickler for details; is -- is that -- is that a fair assessment?
A I think -- well, I think all of AICAC had a -- had an expectation that -- that certain evidence would be there and we would do certain things, yes.
Q And -- and --
A Not -- not just Mr. Myers.
Q No, not just Mr. Myers --
A Yeah.
Q -- but -- but -- and that's -- that's fair enough.
A Yeah.
Q AICAC was, from -- from your experience, not a body that was expected to rubberstamp decisions coming from MPI, correct, sir?
A Correct.

[Transcript, January 27, 2020, page T88, lines 13-28 and lines 34-41; page T89, lines 8-41; page T90, line 1]

Q And I think from my notes of -- of Mr. Sain's direct examination of you, I believe that 1157 is the last statement of issues before AICAC?
A I believe so.
Q Yeah, that's -- that's your recollection as well?
A Yes.
Q So the -- the two issues at -- at -- that are set out in 1157, sir, were whether Ms. Martens would be capable of returning to her pre-accident employment as of December 1st, 2000, correct?
A Yes.

Q And is MPI entitled to seek reimbursement of the IRI benefits paid to Ms. Martens between December 1st, 2000 and April 6th, 2003, correct, sir?
A Yes.
Q And the instructions that you ultimately gave to Mr. Kumka were to settle the claim in its entirety, correct?
A Yes.
Q And do I take it that -- that the instructions that you gave actually went further than what was before AICAC as set out in page 1157?
A As far as beyond the -- when we talked about going beyond the November 7th, 2007 date?
Q No, in terms of the -- the ultimate decision -- or, pardon me, the ultimate settlement was $346,000, which included a component for interest --
A Interest, yeah.
Q -- correct?
A Yes.
Q So I -- and I think, and I'm -- I'm just going off memory, which I -- but I think it was $316,000 for -- or -- and that's plus or minus some dollars?
A Yeah.
Q But about $316,000 for payments that had not been made -- that had been held back from Ms. Martens during that nine-year period, 2003 to 2012, correct, sir?
A Well, it was -- it was payments -- it was to make payments from the last -- last time she was paying -- oh, 2000 right through to 2012, yes.

[Transcript, January 27, 2020, page T93, lines 1-41]

Q And -- and so the -- the ultimate decision -- the ultimate settlement was that she would be payed [sic] for all of the -- all of the IRI benefits with some clawing back just to -- to a certain degree. But everything that she would have been paid from the time of Mr. Wiebe's termination of benefits in 2003 up until the date that -- that the cheque came in 2012?
A Right. The --
Q Correct, sir?
A So the direction from me would -- to the area in the claim's folks would be that I considered her to be still disabled --
Q Yes.
A -- as of -- from 2000 on. So do the reconciliation from that point until 2012, taking into account the usual stuff you would take out, periods that she worked, periods that I believe McFaddin had paid her for about six months of partial IRI and that.
Q Right.

A And then clearly -- that's why I mentioned this morning, they -- they missed the other period of time that she was -- had earned the 22,000 that should have also been a part of that reconciliation.
Q Right. And so there was no reimbursement of the IRI benefits from December 1st, 2000 to April 6th, 2003 in your decision, correct, sir?
A Oh, a number 2 part you mean there?
Q Yes.
A No, because she was disabled.

[Transcript, January 27, 2020, page T94, lines 24-41; page T95, lines 1-10]

Q -- your call was consistent with the demand that I had made to Mr. Kumka, correct? That payments should be made on -- on a continuous basis?
A My -- my decision was that she was disabled past November of 2007 and it should go back to case management for a further case management. What happens after that is just, like, after any relapse or other situations, start to case manage. If she could work today, then it would be up to the case manager to -- to bring in 110 or whatever part of the *Act* they could again.
Q Right.
A But I said, I considered her to be still disabled and send it back to case management for their further direction, further handling.
Q Sir, you're aware that Mr. Kumka was trying to resolve this claim upon payment of $30,000 (sic), correct, in 2009?
A Not -- not until I was reviewing it. Not any information about that until I was reviewing the case for now.

[Transcript, January 27, 2020, page T95, lines 30-41; page T96, lines 1-4]

MR. GANGE: Thank -- thank you, Mr. McKinnon. You're right, it is $10,000.

. . .

Q I was referring -- when -- when I said "30,000" --
A You meant ten?
Q -- it was 10,000.
A Yeah.

. . .

Q And at page 963 in the middle paragraph, Mr. Kumka had said: (as read)

> Therefore, in accordance with the enclosure, I will proceed to requisition the sum of $10,645.63, which would be

> forwarded to you in exchange for a final release, which I will prepare in a consent order of the Commission.
>
> What would that final release have dealt with?
> A Oh, just -- just with the issue that was at AICAC on regard to the relapse?
> Q The relapse?
> A Yes.
>
> [Transcript, January 27, 2020, page T97, lines 9 and 10, lines 15-19, lines 32-41; page T98, lines 1 and 2]

[152] In May 2012, the evidence is Haithwaite's review of Evelyn's claim occurred in short order. MPI's previous investigation failed to obtain a statement from Evelyn on her actions at the centre of the fraud charge. MPI did not include statements from those people living with her at the time. If it had, MPI would have learned that Evelyn was not capable of working. Her family members' assistance allowed Evelyn to care for one child. Without that assistance she was incapable of doing so. MPI would also have learned that Evelyn was caring for one child not four children as her promised job was based upon.

[153] Mahon alerted MPI to internal problems, which were ignored in MPI's relentless pursuit of Evelyn. On June 28, 2005, Trachtenberg alerted Wiebe to the absence of so-called "new information", which prohibited MPI from relying on section 110. The court finds Trachtenberg's position was confirmed during Haithwaite's testimony.

[154] Strutt, the person responsible for deciding Evelyn's request for review of Wiebe's July 2003 decision, allowed Wiebe, his subordinate, to control the decision-making process even when his own decision was to recommence benefits.

It is true that Strutt's preempted decision was one of the two possible outcomes. However, an IRO reviewing Wiebe's July 23, 2003 decision should not have failed to identify that Wiebe had no authority to review his own decision.

[155] At this point there was clearly a conflict of views. Strutt's evidence was he did not confront Wiebe but instead let the letter go to Evelyn without further comment. It was Strutt's superiors who made the decision to proceed with a termination of benefits under section 160. Strutt's superiors directed Wiebe to write to Evelyn on July 23, 2003 that her benefits were terminated. Strutt's superiors were the ones who received Mahon's report of what occurred at the fraud trial, but the record does not disclose any action taken by those same superiors. Did the superiors wash their hands of this file once Mykle J.'s decision was issued? The court finds this absence of decision-making very troubling.

[156] It is also troubling that Strutt, in his letter of June 25, 2005, advised Trachtenberg he was unfamiliar with the file. Strutt's own testimony, plus the troubling email from Strutt to Wiebe, indicated he was very familiar with Evelyn's file. Why the subterfuge?

[157] Haithwaite's cross-examination confirmed the lack of oversight for Evelyn's claim. McFaddin offered Evelyn a "without prejudice" resumption of benefits. Yet future decisions ignored McFaddin's offer that MPI would not attempt to recapture any benefits paid during this time frame. Evelyn brought this oversight to the attention of MPI. Notwithstanding McFaddin confirmed MPI would not recover these funds were advanced to Evelyn, it ignored its own position in the original

payment approval. Further, MPI ignored section 191 preventing it from reclaiming the benefits authorized by McFaddin.

[158] MPI made decisions about Evelyn's entitlement to IRI in the absence of updated medical information from Evelyn's physicians. Those very decisions were made knowing that certain records were missing from the file and only went looking for them after decisions were made.

[159] MPI also ignored the opinions expressed by her physicians. The medical information from the file confirmed Evelyn was unable to work due to physical demands, but MPI focussed on Evelyn's mental health and whether there was a relapse.

[160] Mahon mentioned in his internal memorandum that Dr. Graham would not provide the 2003 opinion prior to trial, but no steps were taken by MPI to contact Dr. Graham until 2007. MPI ignored the reason for Dr. Graham's refusal to provide an opinion was his concern the patient-physician trust relationship would be lost.

[161] It is understandable that Dr. Graham and Evelyn expressed those concerns about the potential breakdown in the patient-physician trust relationship when MPI had already accused her of fraud. However, MPI's failure to take steps to obtain Dr. Graham's opinion prior to causing fraud charges to be laid against Evelyn is puzzling.

[162] MPI is entitled to review a claimant's medical condition when determining eligibility. Yet MPI decided to proceed under section 160 alleging fraud in the

absence of critical information, being Evelyn's response to the allegation made on the tip line or seeking current medical information.

[163] MPI's rehabilitation assessments noted Evelyn experienced difficulties with prolonged sitting or standing. A suggestion that Evelyn could be a dental hygienist, given those restrictions, would be contraindicated. MPI mistook Evelyn's willingness to attempt any occupation as confirmation she possessed the ability to perform those functions. How such a conclusion could be reached is troubling.

[164] Those same assessments clearly identified that Evelyn would have difficulty restraining children in her care. Her promised job was to run a four-child group home. How could she perform such a job if she could not restrain children? How would Evelyn caring for one child equate to the demands of caring for four children? How could she perform that job when it was only with her children's assistance she could care for one child? How could she perform that job when she could not sit or stand for prolonged periods of time?

[165] Evelyn's willingness to retrain was connected to her desire to get back to work. The evidence indicated she was a hard worker prior to the MVA. She was willing to take courses to improve herself, such as working in the corrections field. Evelyn was willing to take what would be years of educational upgrading to be a dental hygienist even when her physical limitations prevented her from sitting or standing for any length of time. All of this information was available to MPI but it chose to ignore it.

[166] This conclusion is drawn from Mykle J.'s decision, where he stated (Exhibit 1, page 695):

> I accept the fact that Mrs. Dupont and Mrs. Martens, in fact, had the same overall ultimate objective and that is to have Mrs. Martens working full-time. ...

He further stated (Exhibit 1, page 696):

> ... [T]his could, in fact, be a case of misunderstood communication or miscommunication ...

[167] If MPI acted in good faith, Mykle J.'s reasons for judgment together with Mahon's review of the trial forwarded to MPI plus Strutt's email of April 12, 2005 should have prompted a larger review. Based on these circumstances, the court infers that the decisions made by MPI following Strutt's email to Wiebe (Exhibit 13) were the "wiggle room" to deny Evelyn benefits.

[168] If MPI was acting in good faith after Mahon identified deficiencies in MPI's internal processes, it would have considered Mykle J.'s finding of fact and Strutt's email of April 12, 2005 far sooner than in 2012 on the eve of the AICAC hearing.

[169] Strutt's failure to intervene when Wiebe preempted his intended course of action resulted in sending Evelyn on a seven-year journey to obtain the benefits she was entitled to and MPI was obligated to pay her.

[170] Trachtenberg's letter to Strutt of June 21, 2005 (Exhibit 1, pages 716-18) objecting to the absence of any new information when none existed should have been given greater importance than the short shift it received. Trachtenberg's

jurisdictional argument could not be ignored. Yet MPI rejected it without comment and over time made more so-called new decisions on the same fact circumstances.

[171] As stated in ***Fidler***, MPI was entitled to be wrong in its decision-making investigating a claim. What occurred between 2003 and 2005 is understandable.

[172] However, Mykle J. released his reasons on March 26, 2005 and Mahon identified in the memorandum to MPI its current reporting requirements were deficient. At least as far as Evelyn is concerned, MPI took no action to address the reporting deficiencies. Until Haithwaite's action to resolve Evelyn's claim in the face of the upcoming AICAC hearing and Gange's retainer, it was as if Mahon's opinion was left to gather dust.

[173] The very senior MPI officials involved in the original FAC recommendation failed to speak out after Mykle J.'s decision. An email dated July 9, 2003 and marked "privileged and confidential" (Exhibit 1, page 595A) is critical. The members of the FAC made the following decision:

> Ms Martens has unjustly enriched herself to the tune of AT LEAST $20,000-$25,000, and the Crown will be proceeding with charges and will be [seeking] restitution of all amounts paid since July 2000. The essence of her offence is that she represented herself as unable to work after July 1, 2000, while she was in fact able to work and in fact did so, concealing her earnings from us. All of her benefits are to be terminated, based on s. 149 and the relevant parts of section 160.

[174] Mykle J. accepted Evelyn disclosed to MPI she was working, and his reasons found Dupont's evidence that Evelyn had never spoken with her to be contraindicated by Dupont's own file notes.

[175] The justification for the FAC's recommendation to terminate Evelyn's benefits were her representation that she was unable to work. Mykle J.'s key finding in his reasons made the FAC's justification moot, including the application of section 160 and/or section 149 irrelevant. Evelyn's claim could not be terminated under section 160 nor section 149.

## SECTION 110 AND SECTION 171 OF THE *ACT*

[176] On April 28, 2005, Wiebe, in his decision, relied on sections 110(1)(a) and (e) of the ***Act*** to deny Evelyn her benefits. Haithwaite, during his cross-examination, admitted this was at least a close call as to whether Evelyn returned to her former employment.

[177] In addition to Haithwaite's admission, the record is clear Evelyn never returned to her former employment. She clearly was unable to do her promised job as she only cared for one disabled child. It is true Evelyn worked temporary shifts in an attempt to return to the workplace. However, even if one accepted her income between 2000 and 2002, the total compensation received by Evelyn was, by MPI's estimation, $25,000.

[178] In determining whether section 110 applied, the court reviewed the record of Evelyn's income earning. The initial compensation was approved based upon an estimate of $500 per week. On the strength of that estimate, $1,500 was advanced to Evelyn on December 30, 1998 (Exhibit 1, page 20).

[179] MacCutcheon initially established her annual earnings, resulting in IRI payments of $584 bi-weekly, effective February 8, 1999 (Exhibit 1, page 57), based on current gross yearly earnings of $19,701.76 (Exhibit 1, page 32).

[180] MacCutcheon, in a letter to Evelyn dated July 16, 1999 (Exhibit 1, page 180A), recommended that Evelyn's IRI be calculated commensurate with her promised job. Evelyn's bi-weekly IRI was increased to $1,263.46 based on earnings of $36,500 per year. Further, a retroactive payment from February 1, 1999 in the amount of $8,153.52 was authorized.

[181] Section 110(1)(a) of the ***Act*** states:

> **Events that end entitlement to I.R.I.**
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident;
>
> . . .

[182] MPI conducted its investigation without speaking with Evelyn. If MPI had done so, it would have discovered not only was Evelyn unable to perform her promised job, but the work she was doing was as a result of the efforts of her children living with her. MPI would have discovered that Evelyn was not able to hold the employment of her promised job. All of the medical information in MPI's possession when it made the decision in 2003 and again in April of 2005 indicated Evelyn could not hold the employment she held at the time of the MVA.

[183] The ***Act*** goes on to state in section 110(1)(e):

> (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;

[184] FAC suggested Evelyn enriched herself of income from between $20,000 to $25,000 for the period from 2000 to 2002. The reading of section 110(1)(e) does not speak of pre-MVA earnings. It only speaks of "gross income on which the victim's income replacement indemnity is determined". Assuming Evelyn's earnings were for parts of 2000, 2001 and 2002, the only conclusion is she never earned more than $36,500 in a single year.

[185] Wiebe's calculation of Evelyn's earnings was that if she earned $22,500 over a 193-day period her prorated earnings for a year would be over $42,000 ($22,500 times 365 divided by 193). This is the only evidence before this court that Evelyn earned more than $36,500 in a single year.

[186] It is unreasonable to expect Evelyn's prorated earnings were equivalent to working 365 days straight without time off. Part of Evelyn's earnings were working respite for other group home operators, which is reasonable under the circumstances. To suggest Evelyn's earnings over 193 days be prorated when MPI's evidence was Evelyn could not sit or stand for prolonged periods, can only be described as wishful thinking.

[187] If Wiebe considered the medical evidence available to him he should have known Evelyn could not return to her pre-MVA employment and section 110(a) or (e) could not be relied upon due to the circumstances Evelyn was able to work. On cross-examination Haithwaite's evidence confirmed this. The court finds

section 110 was never helpful to the positions MPI took after Strutt looked for "wiggle room" or a "plausible plan".

[188] Wiebe testified that he agreed with Mykle J.'s decision. This agreement occurred only after an exceptionally long pause, a long pause which to the court appeared to be searching for the correct answer. I find this interesting as his opinion about Mykle J.'s decision is irrelevant. Nothing hinges on his agreeing with the decision or not. I find his searching for an answer related more to the subject matter of the trial to minimize his conduct.

[189] Turning to the chronology, as Evelyn's AICAC appeal moved to hearing, MPI would consider updated medical information as a reason to refer the matter to a case manager for a new decision.

[190] MPI knew or ought to have known that part of the AICAC's appeal process requires current medical information be provided. In order to assist Evelyn in preparation of the AICAC hearings, Napoleone was obligated to request Evelyn's updated information. She did on multiple occasions.

[191] The only actions taken by MPI when these requests were made by Evelyn, or Napoleone on her behalf, were to send Evelyn back to a claims manager for a new decision.

[192] By January 2012, there were four MPI decisions scheduled to be reviewed by the AICAC. MPI, by repeatedly referring Evelyn's claim to a claims manager for a new decision, delayed Evelyn's ability to appear before the AICAC. The AICAC

hearing would not guarantee Evelyn success, but she would receive the final answer she deserved and was entitled to by legislation.

[193] MPI's reliance on section 171 of the ***Act*** directly contributed to its own statement that the handling of Evelyn's claim was "not our finest hour".

[194] By 2012, MPI's position on the issues under appeal to the AICAC were (Exhibit 1, page 1155A):

a) entitlement to IRI benefits beyond December 1, 2000;
b) entitlement to medication expenses (it was noted that Evelyn may withdraw this ground of appeal);
c) whether IRI benefits were correctly calculated for the relapse period April 7, 2003 up to and including November 7, 2007; and
d) whether MPI was entitled to deduct monies paid after December 1, 2000 from the IRI payable (for the relapse period).

[195] Kumka, in a letter to the AICAC dated January 25, 2012 (Exhibit 1, pages 1157-58), acknowledged the only two issues were whether Evelyn was capable to returning to her pre-MVA employment as of December 1, 2000 and whether MPI could seek reimbursement for monies paid to Evelyn between December 1, 2000 and April 6, 2003.

[196] It is noteworthy the four identified issues appealed to the AICAC are related to the very issues identified in Wiebe's letter of July 23, 2003 (Exhibit 1, pages 613-15) terminating Evelyn's benefits. The same issues arose over and over again. The actions of MPI in constantly referring Evelyn's claim to case managers in the years following Mykle J.'s decision caused a seven-year delay in her receiving benefits. Haithwaite's admissions during cross-examination on this point are damning.

[197] When the AICAC was ready to hear Evelyn's appeal in 2012, Haithwaite intervened. Haithwaite's evidence is clear that MPI's denials turned into the proverbial house of cards. Haithwaite confirmed MPI knew the AICAC was truly independent and MPI risked the AICAC's disagreement. The court is left to wonder why MPI took so long for this to come to its attention.

[198] What is interesting is the eventual settlement ignored MPI was entitled to set-off from any settlement the monies Evelyn received while working from 2000 to 2002. The court is left to ponder why MPI would not want to recover monies from Evelyn it was properly owed. In a perverse way this also appears to be a rush to settlement at all costs, even to its own detriment, so it could close this file once and for all.

[199] MPI's actions must be considered in light of MPI's responsibilities set out in section 150 of the ***Act***.

[200] MPI's actions, after MacCutcheon was no longer acting as claims manager up to the time Haithwaite's involvement in settlement, cannot be described as advising or assisting Evelyn. The actions by act or omission only hindered Evelyn receiving the benefits she was entitled. Once the tip was received she was working it was as if "all bets were off" and Evelyn's benefits should be terminated, even in the face of Mykle J.'s findings. If MPI spoke with Evelyn prior to going to trial it would have found:

- Evelyn informed Dupont she was working and Dupont's notes confirmed this conversation as found by Mykle J.;

- Evelyn's performance of any work undertaken by her was not up to the standards expected by a person caring for children;
- Evelyn's ability to care for one child was mostly attributed to her family performing the work, and not to anything Evelyn was able to do.

[201] What occurred in this case is extraordinary. MPI's counsel asked its witnesses if any of them held any animosity or ill will towards Evelyn. All of them denied the suggestion put to them. The court is not surprised by the answer. I find the answers are not self-serving, but for the most part honest answers of good people trying to do their best with varying degrees of success.

[202] MPI's claims process failed to assist Evelyn so she could receive all the benefits to which she was entitled as mandated by section 150 of the ***Act***. With respect to Strutt's reference to "wiggle room" in the email forwarded to Wiebe on April 12, 2005, one could easily conclude that Wiebe's new information letter of April 28, 2005 was the "wiggle room" suggested by Strutt that became Wiebe's decision. If Wiebe's decision was made without considering Strutt's "wiggle room" the result is the same. Denying Evelyn IRI in these circumstances can never be considered as providing all the benefits Evelyn was entitled under section 150 when MPI searched for "wiggle room".

[203] I am also troubled by Strutt's email of October 18, 2005 (Exhibit 14) where he wrote:

> ... My question has to do with whether the review ought to be open at all, in its present form at least, given that you have prospectively reinstated IRI etc. There probably are some issues that need to be reviewed, but they are not the ones set out in the July 23, 2003 decision (the one I am supposed to be reviewing).

> Do you have any suggestions about getting rid of this old file. One thought would be a review decision setting aside the July 23, 2003 decision, while reserving a specific issue to be returned to you for a fresh decision. If you think that is a promising approach, you could be of assistance in defining the issue.
>
> Please advise. I don't want this review file to sit idle much longer without at least a plausible plan for eventually retiring it.

[204] Six months after looking for "wiggle room" Strutt is now looking for a "plausible plan". The court finds this in not in keeping with the statutory obligation outlined in section 150.

[205] MPI argued that since Evelyn's counsel never questioned MPI's witnesses on good faith during cross-examination, the rule in ***Browne v. Dunn***, 1893 CanLII 65 (FOREP), (1893), 6 R. 67 (H.L.), is applicable.

[206] In weighing the evidence of MPI's witnesses what is more important is the effect the decisions taken by those witnesses had on discharging MPI's obligations under section 150 and if improper considerations entered the claims process. The court finds MPI's witnesses knew Evelyn's claim was atypical. The plain meaning of a search for "plausible plan" is also an actionable wrong considering MPI's obligation under section 150.

[207] The conundrum MPI finds itself in is that although the problem was well known internally it made no efforts to move the file to an AICAC hearing. The constant referral back of Evelyn's claim so more decisions could be made and those decisions could then be reviewed is the problem. Evelyn must have considered herself the star in a version of the movie "Groundhog Day", waking up to her 6:00 a.m. alarm only to relive her nightmarish experience day after day.

[208] It does not matter what MPI's witnesses testified to about their conduct during the trial. What matters is the cumulative effect of those decisions in examining the claims process.

[209] ***Fidler*** makes it clear that an insurer has a right to investigate. An insurer's investigation actions should be considered that perfection is not the standard. When criminal charges were laid, MPI's actions were understandable even with mistakes made in the investigation itself.

[210] After 2005, MPI's collective decision-making by its employees denied Evelyn the benefits she was entitled. A person who was severely injured on December 4, 1998 waited until May 2012 to receive the years of benefits properly owed cannot be considered as timely decision-making.

[211] The decision to lay criminal charges may have been reasonable at the time, but the evidence available to MPI following Mykle J.'s decision was clear, Evelyn reported her earnings. It was the alleged failure to report these earnings that was the focus of MPI's concerns. Once those concerns were eliminated by an ordinary reading of MPI's own records together with Mykle J.'s findings MPI should have resolved the claim.

[212] MPI's actions need to be considered in light of what is commonly referred to as institutional memory. Sladek's evidence was, generally speaking, a person who has not fully recovered within four years from the MVA date rarely improves. By 2003, Evelyn was four years into her recovery. The evidence before this court, which is now accepted by MPI, is Evelyn never recovered from her injuries. The

totality of the evidence confirms that Evelyn was unable to perform her promised job. The court is left to wonder why MPI did not apply its institutional memory to Evelyn's fact circumstances.

[213] Every MPI claims decision after 2005 failed in its statutory mandate set out in section 150. In this case, it is important to put in context the poor decisions and errors made by MPI after 2005, as follows:

- Evelyn's requested internal review of Wiebe's decision of July 23, 2003 was held in abeyance pending Mykle J.'s decision, but Wiebe issued his April 28, 2005 decision without conducting the requested review;
- Strutt in his capacity as IRO determined Evelyn's benefits were to be reinstated absent any "wiggle room" and shared his decision with Wiebe;
- Wiebe, contrary to Strutt's pending decision, communicated a new decision on April 28, 2005, effectively preempting his superior's decision;
- Strutt acquiesced to Wiebe;
- Wiebe's decision of April 28, 2005 alleged that section 110 applied when the ordinary reading of subsections 110(1)(a) and (e) could not support such a decision;
- Trachtenberg's letter of June 21, 2005 questioned whether there was any new information for MPI to rely upon;
- the October 18, 2005 email looking for a "plausible plan" to retire the file which for more than six years was to deny Evelyn benefits;
- the constant referral of Evelyn's file back to case managers when she wanted and needed an AICAC hearing;
- MPI's knowledge that the AICAC's backlog was three years in the spring of 2006, but continued to refer her file for reconsideration by either a case manager or an IRO, further delaying her appeal;

- MPI made settlement offers that undervalued Evelyn's claim contrary to its duty to provide Evelyn with assistance throughout and ensure that she received all benefits she was entitled to;

- Scaletta's suggestion that settlement discussions could only occur if Evelyn withdrew her appeal knowing this would delay her appeal for two more years;

- the record demonstrates that no matter what new information came to MPI's attention it never truly reconsidered Evelyn's case;

- an unusual case languished until moments before Evelyn's appeal was scheduled and then in a matter of days MPI settled the claim without any evidence being called (see Haithwaite's cross-examination).

[214] MPI's coverage is extended to Evelyn because her right to sue for her losses was removed by the ***Act***, even though she was not a MPI policyholder. It can be argued Evelyn is, in fact, more vulnerable to the decisions of MPI, especially when MPI is mandated to assist her so she can receive benefits. The court's review of all the documentation demonstrates that MPI failed to advise or assist Evelyn as mandated by section 150.

[215] MPI, by continuing to ignore Evelyn's physical and mental health limitations and the actions it took, departed markedly from the approach Manitobans expect from MPI's no-fault insurance contract as mandated by section 150.

[216] ***702535 Ontario***, as noted in ***Fidler*** at paragraph 63, sets out consideration for the court. I find, based on the above, MPI did not assess the merits of Evelyn's claim fairly when it relied on an anonymous tip without seeking Evelyn's input into what occurred. MPI's denial of coverage, knowing Evelyn's

physical and mental limitations prevented her from doing her former job, should have caused a full investigation into the file following Mykle J.'s decision.

[217] Strutt emailing McFaddin on October 18, 2005 that there needed to be a "plausible plan" is the introduction of an improper purpose into the claims handling process. The ***Act*** should always be the only approach MPI needs to follow. It is interesting Strutt knew the review file could not sit idle much longer without at least a plausible plan to eventually retire it. The court finds that searching for a plausible plan when section 150 sets out that MPI needed to ensure Evelyn received all the benefits she was entitled to is introducing an improper consideration in the claims handling process.

[218] It is not fair to allow Evelyn's appeal to languish after 2005 by constantly referring her file back to case manager. The delay caused by these new decisions, when the evidence demonstrated that MPI was searching for evidence to support its denial of Evelyn's claim. Worse yet, Haithwaite determined in short order MPI's position would not be favourably considered by the AICAC. The reason for constant referral of the file to a new case manager is only known to MPI. The court finds the introduction of "wiggle room" and a "plausible plan" in 2005 explains MPI's actions in the years that followed.

[219] An insurer must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability. The evidence is clear that once Evelyn's benefits were terminated her life spiraled downward. The offer to settle

her claim for $10,000 is most egregious. This is a direct result in maintaining "wiggle room" and a "plausible plan".

[220] The evidence demonstrated Evelyn did all that was expected of her as a claimant; she participated in any medical examinations requested of her, she participated in retraining initiatives offered to her and she readily agreed to anything suggested by MPI as necessary. The evidence also demonstrated that Evelyn continued to press MPI representatives for answers to her problems. Given Evelyn's medical condition this is not surprising. The court finds the offers made to Evelyn prior to final settlement being reached are one of the ***Whiten*** factors demonstrating bad faith.

[221] MPI set in motion Evelyn's mistreatment when it caused Mahon to eventually lay the criminal fraud charge. To reiterate, the court takes no issue with this decision. At the conclusion of the fraud trial MPI had all the information it required to comply with the section 150 positive contractual obligations.

[222] It is not lost on the court that when Gange became involved in 2012, Evelyn's case quickly resolved. The totalities of the actions that caused the delay cannot be considered good faith dealings, but, more importantly, the totality of MPI's actions demonstrate it denied the benefits Evelyn was entitled to and also what the Legislature intended.

[223] Returning to ***Fidler***, what constitutes bad faith:

> 72 Ultimately, each case revolves around its own facts. As O'Connor J.A. stated in *702535 Ontario*:
>
> > What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will

> look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim. [para. 30]

These are very truly unusual circumstances, including MPI's self-described conduct as "not our finest hour".

[224] Considering all the circumstances on the balance of probabilities, the actions of MPI amount to bad faith. The search for "wiggle room" and a "plausible plan" are not good faith, but so egregious to be the marked departure from what is required in claims handling.

[225] Haithwaite described Evelyn's case as a "close call". In applying section 150 of the ***Act***, a close call means a claimant receives the benefits they are entitled to. Haithwaite quickly determined Evelyn should be paid. Haithwaite did not agonize over the decision. This was never a close call nor on a balance of probabilities a close call. Providing a claimant with benefits they are entitled should never involve "wiggle room" or a "plausible plan". The only actions MPI needed to get rid of this file was to pay Evelyn the benefits she was entitled.

[226] MPI's introduction of improper considerations into the claims process confirm its actions were "overwhelmingly inadequate". The decisions taken during the seven-year delay that were reversed by Haithwaite support this conclusion. The introduction of improper considerations by Strutt's use of "wiggle room" and a search for a "plausible plan" within seven months of Mykle J.'s decision are the nexus for what followed for six and one-half years.

[227] The court reminds itself of the language from ***Whiten*** that an actionable wrong must never be the strong feelings the judge may have about the actions of the insurer. The actionable wrong in this case was the search for "wiggle room" and a "plausible plan" to deny Evelyn the benefits she was entitled following Mykle J.'s decision.

[228] The court finds the claims process rises to the level of egregiousness. MPI's quick resolution of Evelyn's claim once Haithwaite became involved together with the use of the words "not our finest hour" confirms for the court MPI was aware as early as May 2012 that its claims management decisions were overwhelmingly inadequate.

[229] The court finds the totality of MPI's actions in looking for "wiggle room" and a "plausible plan" is squarely within the bad faith definition set out in ***Whiten*** as well as section 150, such that punitive damages are warranted.

## DAMAGES

[230] Evelyn seeks special damages, damages for mental distress and punitive damages.

### Special Damages

[231] MPI's position on special damages is that it was Evelyn's choice to retain Gange on a contingency fee contract. Napoleone acted for Evelyn in her capacity as an AICAC appointed claims advisor as set out in the ***Act***. Evelyn's testimony was that she was satisfied with Napoleone's efforts on her behalf. Therefore, the

decision to retain Gange was Evelyn's decision alone and this is properly dealt with in any order of costs.

[232] Kumka, in a letter to the AICAC dated January 17, 2012 (Exhibit 1, pages 1154-55C) setting out MPI's position on the pending appeal, stated (Exhibit 1, page 1155B):

> As indicated above, the claimant was prosecuted criminally for defrauding MPIC and she was acquitted in an Oral Judgment dated March 24, 2005 (Tab 143)

It is MPI's position that the acquittal is not determinative of the issues before the AICAC. In ***R. v. Wilks***, 2005 MBCA 99, the Manitoba Court of Appeal, in directing that there should be an acquittal due to issues relating to the case manager's notes, stated:

> 36 The notes taken may have been quite satisfactory for case management purposes, but they fell short of a standard suitable for criminal prosecution purposes. ...

And:

> 38 But the frailties of Unger's note-taking process, described above, lead us to conclude that we cannot be satisfied that he recorded his discussions with the accused sufficiently reliably so that his notes can be the basis of a criminal conviction for fraud.

In other words, notwithstanding the acquittal, it will be still open for the AICAC to conclude that, based upon the evidence, Evelyn continued to accept and receive IRI when she was knowingly capable of returning to her employment. This entitled MPI to "set off" the overpayment from further monies payable for the relapse period.

[233] Napoleone was copied on the letter and the court can assume that she forwarded a copy to Evelyn. Napoleone acted for Evelyn so this assumption is reasonable under the circumstances. Is it surprising that Evelyn retained Gange knowing Kumka was still advancing her actions as fraudulent?

[234] It is true that Evelyn was entitled to "free representation" as suggested by MPI. Haithwaite testified that the intent of the ***Act*** is for a claimant to be able to navigate the claims process without the assistance of a solicitor.

[235] The circumstances of this case require the court to consider whether MPI's actions are such that the special damages are warranted in this case. I find special damages are appropriate, due to MPI looking for "wiggle room" and a "plausible plan" to deny Evelyn benefits instead of assisting her to obtain all the compensation she was entitled as required by section 150.

[236] Is there any doubt that by the early winter of 2012, when her nine-year ordeal was coming to an end, MPI continued to maintain she acted fraudulently? The court acknowledges fraud may be criminal or civil in nature, but the underlying circumstances in MPI's argument relate to a failure to report Evelyn was working. Mykle J. specifically rejected that argument in its entirety, as the records reflected Evelyn reported to Dupont and her physician she was attempting to return to work. Seven years after being acquitted by Mykle J. Evelyn's retaining counsel is what a reasonably prudent person would do in these circumstances.

[237] Kumka's letter goes to the very reason Gange was retained. Evelyn's relationship with MPI was irrevocably broken at this time. Kumka's letter meant

that MPI still relied on section 160 in its denial. At the time Kumka wrote this letter he was aware that Evelyn was self-represented. The court is left to ponder whether Evelyn being self-represented may have been MPI's motivation.

[238] In order for the court to award special damages there must be a claim for special damages set out in the pleadings (Rule 25.06(13)). Evelyn failed to advance a claim for special damages and therefore the court is not in a position to grant them.

[239] I concur with MPI the claim for legal fees, disbursements and taxes are more appropriately addressed during argument on costs.

**Mental Distress**

[240] MPI argued that Evelyn's evidence, together with the evidence of her daughter Maureen Friesen, does not rise to the level of compensable damages as outlined in ***Odhavji*** and ***Saadati v. Moorhead***, 2017 SCC 28.

[241] Evelyn submitted MPI breached the "peace of mind" that is foundational in insurance contracts. See ***Fidler***, ***McQueen v. Echelon General Insurance Company***, 2011 ONCA 649; ***Lumsden v. Manitoba***, 2009 MBCA 18; ***McCallum v. Government of Manitoba***, 2006 MBQB 114; and ***Zurich***. Counsel suggested damages of $50,000 to $80,000.

[242] I concur with MPI that the *viva voce* evidence in this case of mental distress is limited. However, Exhibit 1 provides the evidentiary foundation of the mental health struggles Evelyn experienced from the doctors who examined her. The difficulty is how does the court separate the mental distress experienced as a result

of the MVA from the mental distress experienced during the claims settlement process? Dr. Etkin noted Evelyn experienced stressors raised by the conflict with her insurer (see Diagnosis, Axis IV, Exhibit 1, page 781). Referring to Dr. Graham's letter dated October 14, 2005, Gange in his written submission (file document #24, page 58, paragraph 132) stated: "MPIC's conduct with respect to the legal process related to the criminal trial interfered with the progression of [Ms Martens'] recovery and may have delayed it." Two physicians, one performing an independent examination for MPI and one acting for Evelyn, both identified MPI's responsibility in Evelyn's ongoing mental distress.

[243] MPI knew, or should have known, as early as 2005 that its own actions were contributing to Evelyn's mental distress. MPI's own independent examiner report confirmed this fact. It was only when Haithwaite became involved in 2012 that MPI paid Evelyn $348,248.22 to settle the claim (Exhibit 17).

[244] I also note that Evelyn's decision to move to Alberta in 2007 improved her mental health. MPI's characterization that Evelyn moving away from the stressors in her life may have led to positive mental health outcomes must be considered that one of those stressors was MPI's own actions in dealing with her. Although Evelyn had many mental health stressors in her life, MPI's pursuit of Evelyn for fraud is an important stressor in this court's decision.

[245] The court finds that Evelyn attempted to return to work after 2007 but was unable to do so. Evelyn's ability to work is at the heart of her mental distress

claim. The medical evidence of her limitations in returning to any job prior to 2007 were proven true when she did attempt to return to work.

[246] In ***Lumsden***, Scott C.J.M. reviewed the evolution of damages for mental distress. Although 11 years have elapsed since his decision, I accept the practical, sensible and realistic approach forms the basis of any award.

[247] I find it difficult to precisely determine the percentage of Evelyn's mental distress solely attributed to MPI's dealings given the entirety of the psychological stressors in her life. As directed by the Manitoba Court of Appeal in ***Vickar v. MJ Roofing & Supply Ltd.***, 2016 MBCA 77 (CanLII), in cases where difficult assessments of damages are required, the court stated:

> [54] In the circumstances, the best that can be done is an arbitrary determination. ...

[248] In ***Lumsden***, the court awarded $25,000 for mental distress. Adjusting for inflationary consideration between 2009 and 2020 the court arbitrarily adjusts this amount to $30,000 in 2020 dollars.

[249] There were unique psychological stressors in Evelyn's life prior to the MVA and during her recovery unrelated to MPI's actions or her decision to move to Alberta. Due to those stressors, this court arbitrarily reduces Evelyn's entitlement by 50% to account for those stressors unrelated to MPI's actions. Therefore, this court awards the sum of $15,000 for mental distress.

**Punitive Damages**

[250] In ***Whiten***, the Supreme Court of Canada discussed seven factors for blameworthiness to be considered where punitive damages was awarded in bad faith cases:

> 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).
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> 113 The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include:
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> (1) whether the misconduct was planned and deliberate: *Patenaude v. Roy* (1994), 1994 CanLII 6107 (QC CA), 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), 1998 ABCA 239 (CanLII), 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), 1996 CanLII 1907 (BC CA), 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), 1994 CanLII 6112 (QC CA), 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), 1995 CanLII 1096 (ON CA), 126 D.L.R. (4th) 506 (Ont. C.A.), at p. 525, *Walker v. D'Arcy Moving & Storage Ltd.* (1999), 1999 CanLII 2808 (ON CA), 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), 1998 CanLII 5023 (ON CA), 38 C.C.E.L. (2d) 76 (Ont. C.A.), and *Procor Ltd. v. U.S.W.A.* (1990), 1990 CanLII 6637 (ON SC), 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), 1989 CanLII 183 (ON CA), 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), 1990 CanLII 8047 (BC SC), 66 D.L.R. (4th) 42 (B.C.S.C.)); see also *Kates v. Hall* (1991), 1991 CanLII 1127 (BC CA), 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 CanLII 7287 (AB QB), [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 CanLII 11072 (MB QB), [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.

1) Planned and deliberate

[251] When Mykle J. ruled in Evelyn's favour in finding that she had reported to Dupont she was working, as required to do, MPI was required to do more than what appears to be washing its hands in the years that followed. MPI never offered an explanation for what occurred after 2005. Kumka's letter of January 18, 2005 maintaining fraud as its central argument permits this court to find the actions of MPI were planned and deliberate.

2) Intent or motive

[252] MPI failed to consider the effect of Wiebe's July 23, 2003 letter to Evelyn (Exhibit 1, pages 613-15) in light of Mykle J.'s findings. Mahon in his memorandum

alerted MPI to the problems with this specific case but also noted the system of monitoring claims was deficient. Strutt should have alerted his superiors instead of looking for "wiggle room" or a "plausible plan" as suggested by Strutt, which demonstrated bad faith intent or motive.

3) Length of time of the bad faith conduct

[253] MPI described its actions using the Churchillian reference "not our finest hour". It is self-evident that MPI's actions are truly not its finest seven years.

4) Whether the bad faith conduct was covered up or concealed

[254] The AICAC was the only body that could resolve Evelyn's claim. As outlined herein, MPI delayed Evelyn from having the AICAC hear her appeal. Only a very minor factor but a factor nonetheless.

5) MPI's awareness that what occurred was wrong

[255] MPI's investigation placed it in a far superior position to Evelyn. Its investigation confirmed her financial situation. Any settlement offers made by MPI as outlined above can only be considered to obtain an advantage over the weaker party in this contract. MPI's decision to attempt to recover the benefits, as authorized by McFaddin, without recourse pending a new decision is especially egregious and even more egregious when the court considers section 150 of the ***Act***.

[256] Paragraph 35 of this decision demonstrates MPI failed to live up to its July 1, 2005 representation not to recover any of Evelyn's other interim reinstatement

benefits. Evelyn's protestations about MPI's decision in light of what was promised to her fell on deaf ears. Any goodwill MPI may have accrued for recommencing IRI benefits is all the more egregious by its failure to follow through with its unconditional offer.

[257] The same can be said for MPI's position expressed by Scaletta, a member of its legal department (Exhibit 1, page 906-7), that it would only negotiate with Evelyn if she abandoned her appeal to the AICAC.

[258] Settlement negotiations occur every day in insurance claims. What is true is claimants agree to abandon any claims they are entitled **after** a settlement is reached between the insurer and the insured. When Scaletta insisted Evelyn, an unrepresented person, abandon her appeal prior to conducting negotiations this was extremely egregious considering there was a three-year backlog at the AICAC. An unrepresented person relinquishing her rights to a statutory mandated appeal as a precondition is concerning to the court. A lawyer would not agree to this condition. Why would Scaletta even suggest such a precondition? The court finds that MPI knew precisely what it was doing when Scaletta offered this as a precondition.

[259] Days after Mykle J.'s decision at Evelyn's fraud trial, Strutt testified it was his position that MPI should have paid her claim, and he emailed Wiebe of this fact, "unless wiggle room could be created to support a denial of the claim". The court accepts that individual employees may disagree on the fact circumstances of

any decision. However, Strutt acted on his decision. He sent an email to Wiebe on April 12, 2005 looking for "wiggle room".

[260] Until Strutt testified about sending an email to Wiebe, Evelyn or her counsel were unaware of this communication. This communication was crucial to the finding of bad faith as it demonstrated that after MPI completed its investigation into Evelyn's claim it was motivated to find "wiggle room" and a "plausible plan". These words speak volumes.

[261] During the trial, the detail of Strutt's April 13, 2005 email to Wiebe only came to light during Strutt's testimony. The content of the email is plain and obvious to anyone who reads it; 18 days after Mykle J.'s decision MPI was preparing to provide itself with "wiggle room". If this email never surfaced during this trial this court's decision on bad faith may have been very different. The content of the email became the nexus for the finding of bad faith.

[262] The court finds MPI's late disclosure of this email is sufficient for the court to find that MPI was aware of the potential significance of the email, and the inferences that could be drawn by the court.

6) Profit from the misconduct

[263] MPI maintained internal reserves for Evelyn's claim throughout. The reserves were initially in the amount of $1,256,792.70. Dale Lofto, fraud investigator for MPI, characterized the reserve as "savings amount" (Exhibit 9). MPI's actions in setting aside a reserve when managing a claim are those of a reasonable insurer.

[264] A public insurance corporation does not profit in the traditional sense of a private insurer. MPI's reserves are not paid to the citizens of Manitoba if its position is successful. In the event a claim is not paid, MPI's financial position is enhanced.

[265] In this instance Lofto identified the financial savings to MPI if it could be established that Evelyn acted fraudulently. Financial savings mentioned in Exhibit 9 does not allow this court to conclude this was MPI's sole motivation. However, MPI maintaining that Evelyn fraudulently obtained benefits as late as January 19, 2012 is one of the factors outlined in ***Whiten***. Strutt testified that a finding of fraud would disentitle Evelyn to all benefits, not just her IRI. It was MPI's continued focus that Evelyn committed fraud after Mykle J.'s clear findings on this issue is relevant to the ***Whiten*** analysis.

7) Whether the interest violated by the misconduct of MPI was known to be deeply personal to Evelyn

[266] Whether the interest violated by the misconduct of MPI was known to be deeply personal to Evelyn is not evident at first blush. In ***Whiten***, examples of the conduct to be considered by a court do not appear to be present.

[267] However, in 2005, Dr. Graham, in his letter to McFaddin dated October 14, 2005 (Exhibit 1, pages 795-96), opined that MPI's conduct in pursuing Evelyn for fraud contributed to her psychiatric symptomology. MPI, notwithstanding concerns about the direct linkage between its conduct and Evelyn's mental health, continued to deny Evelyn her benefits. The continued contribution to Evelyn's

psychiatric symptomology for seven years is certainly "deeply personal", as suggested in ***Whiten***.

[268] The seven factors outlined in ***Fidler*** are found in MPI's conduct although some are less important than others. The most egregious factor is Kumka's letter alleging fraud as late as 2012.

[269] In ***Whiten***, the court stated:

> 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" ...

[270] I find, based upon the analysis herein, MPI's conduct can only be described as malicious, oppressive and high-handed for the reasons outlined herein.

[271] MPI reminded the court that in ***Whiten*** the court was instructed to consider the following factors in its award of punitive damages:

(i) proportionate to the blameworthiness of a defendant's conduct;
(ii) proportionate to the degree of vulnerability of a plaintiff;
(iii) proportionate to the harm or potential harm directed specifically at a plaintiff;
(iv) proportionate to the need for deterrence;
(v) proportionate, even after taking into account other penalties that may have been inflicted, including compensatory damages that "[i]n many cases they will be all the 'punishment' required"; and
(vi) proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[272] MPI's position is the cases where the larger awards of punitive damages were made are distinguishable where a finding that the conduct amounted to malicious prosecution. In this case, the allegation of malicious prosecution was removed from the amended statement of claim.

[273] MPI submitted punitive damages should not be awarded, but if the court was so inclined, damages should be less than $100,000. See ***Industrial Alliance Insurance and Financial Services Inc. v. Brine***, 2015 NSCA 104; ***Sarchuk v. Alto Construction Ltd.***, 2003 SKQB 237; ***Kings Mutual Insurance Company v. Ackermann***, 2010 NSCA 39; ***Godwin v. Desjardins Financial Security Investments Inc.***, 2018 BCSC 99; and ***Adams v. Confederation Life Insurance Co.***, 1994 CanLII 9244 (AB QB).

[274] Evelyn's position is the conduct in this case is so egregious that a range of $250,000 to $500,000 be considered.

[275] Evelyn was exceptionally vulnerable throughout this entire time. MPI's actions created four decisions that were before the AICAC in early 2012, all caused by MPI's unwillingness to accept Mykle J.'s findings that Evelyn reported her income to representatives of MPI as required. The medical evidence was clear Evelyn could not return to work.

[276] It was only when the AICAC appeal was finally scheduled did MPI's senior executives become involved. It is especially troubling that senior management appeared to be totally disinterested in Evelyn's file after fraud charges were dismissed in 2005. Mykle J.'s decision and Mahon's memorandum brought attention to deficiencies in MPI's approach. The actions after 2005 are clearly not in keeping with what MPI should have done considering Mykle J.'s decision and Mahon's memorandum.

[277] After Mykle J. found Evelyn was truthful, MPI soldiered on without considering a new approach for seven years, denying benefits to a person who could not work as a result of the MVA that occurred on December 4, 1998.

[278] In light of MPI's statute-mandated obligations set out in section 150 of the ***Act***, damages must be sufficient to deter future conduct. MPI's own admission of "not our finest hour" recognised its own responsibility. Placing the Churchillian reference in context, the Second World War was won in less time than MPI took to pay Evelyn her IRI benefits.

[279] Evelyn was injured in a MVA on December 4, 1998. Over 20 years have elapsed. I find her testimony demonstrates her nightmare remains.

[280] In ***Whiten***, punitive damages were set at $1,000,000. The facts underpinning that decision were:

- deliberate action by the insurer over a two-year period to deny the claim when it knew the claim should be paid;
- low-ball offers presented to induce settlement; and
- the claimant's legal expenses to obtain the rightfully owed amount approached the total entitlement of the claim.

[281] The circumstances of this case do not rise to the level of ***Whiten***. The circumstances are more egregious than those assessed at $100,000. The court is mindful of the fact many cases are overturned on appeal where the trial judge award is not tied to the circumstances of the case.

[282] The cases cited by counsel are specific to those fact circumstances. I find none of those cases provide sufficient instruction to be relied on as to quantum of

damages. In ***Industrial Alliance***, the court conducted a thorough review of punitive damages, as follows:

> [202] The only punitive damage awards higher than the $500,000 to Mr. Brine are the in *Whiten* ($1,000,000), and *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 ($750,000 to each of four parties). In *National Bank*, this Court found that the Bank's deliberate misconduct over many years in concealing a critical settlement agreement from not only the opposing parties, but from the courts, amounted to an abuse of process. There is no abuse of process in Mr. Brine's case.
>
> [203] The next highest punitive damages awards are those of $500,000 and $450,000, awarded in *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 and *Pate Estate* respectively. Both are employment law cases where the employer persisted with criminal allegations it knew to be false or incomplete for over a decade.
>
> [204] In *Plester*, a jury awarded punitive damages of $350,000 and $100,000 respectively against the insurer which had performed an incomplete investigation and breached its duty of good faith to the insureds whose business premises were destroyed by fire. At ¶ 103, R.P. Armstrong J.A., writing for the Ontario Court of Appeal, described these damages as "fairly high". While he would not have awarded the amount the jury assessed, he could not conclude that it was "so exorbitant or so grossly out of proportion ... as to shock the court's conscience and sense of justice" (¶ 101).
>
> [205] In each of *Khazzaka* and *Fernandes*, the Ontario Court of Appeal upheld awards of $200,000 in punitive damages. In *Khazzaka*, the insurer had rejected the opinions of the fire department and police, and pursued an arson defense for years. The same insurer had been involved in *Whiten*. Carthy J.A., writing for the Court of Appeal, saw deterrence as a rational purpose for punitive damages, and concluded that the jury award of punitive damages was fully justified and proportionate.
>
> [206] In *Fernandes*, the insurer started payment of total disability benefits but, after viewing surveillance video, discontinued payments. It did so for five years, though the surveillance footage did not reasonably support the decision to terminate, and in the absence of any medical evidence indicating that the insured was other than totally disabled. The insurer gave no notice of termination and maintained its refusal to pay after receipt of medical reports, including medical reports from its own expert.
>
> [207] In *Asselstine*, the rejection of an employee's claim for long-term disability insurance benefits ultimately led to the employee bringing an action against her employer and the insurance administrator. The majority of the British Columbia Court of Appeal upheld the trial judge's award of

> $150,000 in punitive damages against both. *Kogan v. Chubb Insurance Co. of Canada*, [2001] O.J. No. 1697 (S.C.J.), involved unsubstantiated arson allegations. The judge found the conduct of the insurer and its adjuster to be "reprehensible, callous and highhanded because of the prejudging" of the fire insurance claim. He awarded $100,000 in punitive damages.
>
> [208] In summary, insurance cases where punitive damages of $100,000 or more were imposed are limited to *Whiten* ($1,000,000), the case under appeal ($500,000), *Branco* (CA) ($500,000 and $175,000), *Plester* ($350,000 and $100,000), *Khazzaka* ($200,000), *Fernandes* ($200,000), *Asselstine* ($150,000) and *Kogan* ($100,000).

[283] The court must balance the ***Whiten*** factors to reach its decision.

[284] The primary consideration for this court is deterrence. The statutory-mandated obligation under section 150 of the ***Act*** states MPI was to assist Evelyn in obtaining the benefits she was entitled. No Manitoban should be placed in the situation Evelyn found herself in to receive insurance benefits entitled by statute.

[285] The cases cited in ***Industrial Alliance*** bear a number of similarities to the case at bar. These include continuing to investigate a claim where allegations of fraud were originally made (***McNeil v. Brewers Retail Inc.***, 2008 ONCA 408), conducting an incomplete investigation and breaching its duty to conduct a good faith investigation (***Plester v. Wawanesa Mutual Insurance Co.***, 2006 CanLII 17918 (ON CA)), and commencing disability benefits but changing its opinion when video surveillance came to light and then maintaining the denial for five years (***Fernandez v. Penncorp Life Insurance Co.***, 2014 ONCA 615).

[286] The court notes the awards in these cases were made by a civil jury. The comments on the jury awards suggested many were amounts at the high end of

the range but not so high to be exorbitant or grossly out of proportion to shock the court's conscience or sense of justice.

[287] Considering all of the above, the court finds the circumstances of this case are similar to those found in ***Plester*** and ***Fernandez***. The court finds MPI's actions in denying the claim for seven years after the investigation was complete, and the internal decisions reflected in the two emails forwarded by Strutt to Wiebe (April 12, 2005) and Strutt to McFaddin (October 18, 2005) after Mykle J.'s decision in March of 2005, causes this court to find the actions are closely aligned to the actions in ***Plester***. Therefore, this court finds an award in the amount of $350,000 is appropriate and is not so high as to be exorbitant or grossly out of proportion to shock the court's conscience or sense of justice.

[288] This court finds the sufficiency of this amounts to be high enough to deter MPI from future claims management decisions that result in statements such as "not our finest hour".

[289] Any lower amount would make a mockery of section 150. MPI, a public insurer instructed by the Legislature to ensure claimants are assisted throughout the claim process and receive the benefits claimants are entitled, acted contrary to its obligations. MPI's actions frustrated not only Evelyn's claim but the very statute-mandated process created to protect Manitobans under section 150 of the ***Act***.

[290] Prior to settling the questions of damages, the damages assessment shall be proportionate to the circumstances. Evelyn's entire Part 2 claim was settled for $348,248.22.

[291] The court must assess whether an award of damages that doubles the value of Evelyn's settlement is proportionate to these circumstances. As stated in ***Whiten***, this is the rare case that requires punitive damages. MPI is a public insurer with a statutory mandate to assist claimants and ensure a claimant receives the benefits to which they are entitled. The court has considered MPI's actions in light of Mainella J.A.'s comments on the action of an insurer set out in ***3746292 Manitoba***:

> [23] ... Practically, for an insurer, even-handedness in the claims-handling process means that an insured is not an adversary; the insured is entitled to correct information, a fair interpretation of the policy, a timely and balanced assessment of the claim based on its objective merits, and prompt and full payment of a valid claim.

[292] After reviewing the award of damages to ensure it is proportional in all circumstances, the total damages, whether punitive or for mental distress totalling $365,000, shall be reduced to $348,248.22, equal to the amount MPI agreed to pay Evelyn after her seven-year battle.

[293] When the Legislature enacted no-fault insurance, it required MPI to deal with claimants with fairness, required the adversarial approach of tort-based insurance systems be ended, claimants should not require the assistance of counsel, but most importantly directed MPI to endeavour to assist claimants in obtaining all the benefits they are entitled. This amount is the only manner the

court has to deter MPI from treating another claimant in the manner it treated Evelyn for not living up to its legislative mandate.

## CONCLUSION

[294] Punitive and mental distress damages are set at $348,248.22 plus pre- and post-judgment interest.

[295] Costs are awarded to Evelyn. The parties shall request an appointment in front of me if they are unable to agree.

_____ J.