The Relationship Between Long-Term Disability Benefits and The Duty to Accommodate: The Plaintiff's Perspective

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1. Introduction

In the late 1970s and early 1980s, legislators across Canada amended their human rights legislation to include protection for persons with disabilities. Since employment was an activity that was expressly covered, the amendments meant that employer actions based on an employee or prospective employee's disability were for the first time subject to legal scrutiny.

While our human rights legislation was based on American models, Canadian jurisprudence has differed markedly from that south of the border by minimizing the threshold a person must cross in order to demonstrate an employer's action is based on disability. Rarely, if ever, is a disability found to be too severe or not severe enough. Moreover, employer action based on the person having a history of disability or being perceived as having a disability regardless of its current existence is reviewable.[1]

Discrimination can take many forms. Not only negative employer action, such as a termination, based on hatred, fear or stereotyping is prohibited. Not long after disability was added as a protected ground, the Supreme Court of Canada decided that a failure to act, even when the failure is based on inadvertence or neglect, can be discriminatory.[2] In a decision that proved to have particular relevance for employees with disabilities, the Court held that our society, including places of employment, should be structured to be inclusive. Those that were not, resulting in adverse effects based on disability, were found to be discriminating unless they could demonstrate the restructuring required would cause the employer "undue hardship." As the Court stated in a subsequent case, "… discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups [ie. those enjoying legal protection against discrimination] benefit equally…."[3] The obligation to take positive steps is what is meant by "the duty to accommodate."

Before exploring the obligations the duty imposes on employers, employees with disabilities, and potentially long-term disability insurers, it bears remembering that human rights law is quasi-constitutional and is paramount over legislation which does not specifically state to the contrary. It also takes precedence over contracts; meaning in the context of this paper that contracts of insurance do not exclude human rights safeguards, and may well run afoul of them.

2. The Duty to Accommodate

Stated briefly in the initial step giving rise to a duty to accommodate is prima facie discrimination. It is not just the employer who can be a party to employment discrimination. It could also be a party to an agreement with an employer, which results in prima facie discrimination: a trade union being a prime example.[4] It could also be an employee of a contracted rehabilitation firm,[5] or of a long-term disability insurer,[6] who

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[1] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City),* 2000 S.C.C. 27 [*"Mercier"*].
[2] *Ontario Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 [*"O'Malley"*].
[3] *Eldridge v. British Columbia (Attorney General)*, [19997] 3 S.C. R. 624 at para.78 [*Eldridge*].
[4] *Central Okanagan School District No.23 v. Renaud*, [1992] 2 S.C.R. 970 [*Renaud*].
[5] *Alexander v. Zellers*, 2009 HRTO 2167 (CanLII) [*Alexander*].
[6] *Boldy v. Manufacturers Life Insurance*, 2010 HRTO 1512 (CanLII) [*Boldy*].

acts in a de facto role as accommodation gatekeeper for the employer. In either case the employer of the rehabilitation worker dealing with the employee with a disability would be vicariously liable for the worker's discriminatory actions, jointly and severally with the disabled employee's employer on behalf of whom the rehabilitation worker was acting.

Prima facie discrimination can be thought of as overreacting or underreacting to a person's disability. Differential treatment is often an indication that discrimination is occurring, but differentiation may actually represent the "true essence of equality"[7] in circumstances where a failure to differentiate would be discriminatory. Justice Sopinka stated it well:

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. … by not allowing for the condition of the disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s.15(1) [of the *Charter* and equally true of human rights legislation] in relation to disability.[8]

Differential impact giving rise to prima facie discrimination is usually established by comparing the results of the action/failure to act upon persons without disabilities to the impact on the person with a disability. Sometimes, however, the selection of the comparator group may be more complex. For example when considering eligibility for salary or benefits when on disability leave, the comparator group has been held to be with other employees on leaves of absence.[9] Another case of an unusual comparator involved an underinclusive long-term disability policy which imposed more draconian restrictions on persons with an emotional disability than on persons with other disabilities.[10]

Once a case of prima facie discrimination has been established the onus shifts to the employer to establish a defence. According to the leading authority on point:

> An employer may justify the impugned standard [ie. its prima facie discriminatory action or inaction] by establishing on a balance of probabilities"
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

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[7] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p.169.
[8] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para.67.
[9] *O.N.A. v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489 (O.C.A.) (leave to appeal to the S.C.C. refused [1999] S.C.C.A. No.118.).
[10] *Gibbs v. Battlefords and District Co-operative Ltd.* (1996), 27 C.H.R.R. D187 (S.C.C.).

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
(3) that the standard is reasonably necessary to the accomplishment of that work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[11]

The use of the term "impossible" has been interpreted by the Supreme Court of Canada to mean "without undue hardship." In the context of an employee who would be totally unfit to return to work at any point in the foreseeable future, even with accommodation and "the proper operation of the business is hampered excessively," the Court incorporated contract notions of frustration to say the "undue hardship" or "impossibility" test had been met by the employer.[12]

Where a disability arose during employment and the employment is terminated due to the hardship reinstatement would cause the employer prior to the commencement of long-term disability benefits, the former employee retains eligibility for the benefits.

3. Accommodations Required and Undue Hardship

Apart from the complete frustration of the contract of employment, the extent of the accommodation duty should not be underestimated.

The principle of accommodation is based upon requiring an individualized response to the particular circumstances of the employee with a disability. The barriers that exclude the return to work can be physical, attitudinal and systemic. In each case the law requires that the barrier be removed subject to the removal imposing undue hardship on the employer.

The responsibility for making the accommodation rests on the employer. Denial of employment or a long-term disability benefit based on the assumption that the employee is responsible for making his or her own accommodation violates the human rights of the employee and the right to long-term disability benefits of the insured.

Typical accommodations can include the provision of a device such as a computer equipped with voice activated software and training in its use for a person who is blind, removal of an obstacle barring access to a person in a wheelchair such as replacing stairs with a ramp or elevator, or the provision of a service such as sign interpretation for a person who is deaf.

Accommodations may involve temporary or permanent modifications to employer policies, including collective agreements, and affect the working conditions of other

[11] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [2008] S.C.J. No.44 at paras.16-19 [*"Meiorin"*].
[12] *Hydro-Quebec v. Syndicat des employe-e-s detechiques profesionelles,* [2008] S.C.J. No.44 at paras.16-19 [*Hydro-Quebec*].

employees. Examples include provisions of lightened duties for an employee with a back injury or a variable work schedule for a person with diabetes or an emotional disability.[13]

Accommodation is to be made in a manner which is as inclusive as possible.[14] The issue arises in the context of employment where the employee is entitled to be reinstated in their pre-disability job. While reference in the *Ontario Human Rights Code* to performance of "the essential duties of the job" gave rise to some initial doubts, it is now clear that accommodation in alternate employment, sometimes referred to as "transfers" are also recognized as appropriate employment where return to the pre-disability job is not possible.[15] Under the *Canadian Human Rights Act*,[16] the right of reinstatement upon a finding of discrimination is limited where it would require "the removal of an individual from a position if that individual accepted employment in that position in good faith." In such cases reinstatement is to be made "on the first reasonable occasion" that it does not involve the displacement of such an individual. In practice this can mean an employee may be medically cleared for a return to work but be "unable to work" and therefore entitled to remain on long-term disability benefits until such time as the first available occasion arises.[17]

Generally, the duty to accommodate should be recognized as being of mutual benefit to the employee with a disability, the employer and the insurer by reducing unnecessary insurance costs and allowing the employee to return to work at full salary as seamlessly and quickly as possible. The exception to this win-win proposition is the fact that accommodation can impose hardship, normally costs,[18] on an employer.

Generally the Courts have hesitated to define what is meant by undue hardship in definitive terms. They have emphasized the importance of giving a large and liberal application to provisions that enhance equality and a narrow or strict interpretation to defences, such as undue hardship, which restrict it. They have emphasized the importance of not under-valuing equality by setting the undue hardship threshold too low, however, the Supreme Court of Canada has stated that "bearing the net cost would threaten the survival of the enterprise or alter its essential character" would constitute undue hardship.[19] In do doing the Court expressed approval of an Ontario Board of Inquiry decision which in turn adopted the accommodation guidelines issued by the Ontario Human Rights Commission on this issue. The Commission's updated "Policy and guidelines on disability and the duty to accommodate"[20] remains the most current

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[13] *Ibid.* at para.17.
[14] *British Columbia (Superintendant of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para.22 [*"Grismer"*]; *Meiorin*, *supra* note 11 at para.41; *Quesnel v. London Educational Health Centre*, (1995) 28 C.H.R.R. D1474 at para.16 (Ont. Bd. of Inquiry) approved by the S.C.C. in *C.C.D. v. Via Rail*, 2007 SCC 15 at paras.132 and 182-3 [*Via Rail*].
[15] *Hamilton Civic Hospitals and CUPE, Local 794,* (1994) 44 L.A.C. (4th) 31 (Ont. Arb. Award); *Hydro-Quebec*, *supra* note 12 at para.17.
[16] *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 at sections 53(2)(b) and 54(2) [*CHRA*].
[17] See *Duliunas v. York-Med Systems*, 2010 HRTO 1404 (CanLII) at paras.66-79.
[18] For a discussion of the factors which may or may not be considered when assessing undue hardship see *Ontario Human Rights Commission*, Policy and Guidelines on Disability and the Duty to Accommodate, November 23, 2000, updated to December 2009; http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf at p.21-23 [*OHRC Policy*].
[19] *Via Rail*, *supra* note 14 at para.132.
[20] *OHRC Policy, supra* note 18.

and comprehensive single source document when attempting to determine whether making an accommodation would impose undue hardship on an employer.

4. The Process of Accommodation

While the responsibility for making accommodations for employees with disabilities rests on the employer, it is not only the employer who has obligations to participate in the process of accommodation. The process is a shared responsibility of the employee, employer and often third parties, including unions, professional associations and disability insurance providers.

The Ontario Human Rights Commission outlines the respective responsibilities of the different parties to the accommodation process as follows:

The *person with a disability* is required to:

- advise the accommodation provider of the aspects of the disability requiring accommodation (although the accommodation provider does not generally have the right to know other aspects of disability such as diagnosis or prognosis)
- make her or his needs known to the best of his or her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation
- answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed
- participate in discussions regarding possible accommodation solutions
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability
- meet agreed-upon performance and job standards once accommodation is provided
- work with the accommodation provider on an ongoing basis to manage the accommodation process
- discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

The *employer* is required to:

- accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- obtain expert opinion or advice where needed
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate
- keep a record of the accommodation request and action taken
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request
- grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language

- bear the cost of any required medical information or documentation. For example, doctors' notes and letters setting out accommodation needs, should be paid for by the employer.

Unions and professional associations **are required to:**

- take an active role as partners in the accommodation process
- share joint responsibility with the employer to facilitate accommodation
- support accommodation measures irrespective of collective agreements, unless to do so would create undue hardship.[21]

The employee and the employer have responsibilities in the initiation of the process of accommodation. The employee may be required to make his or her disability-related needs known to the employer in order to trigger the duty to accommodate. The employer, however, is required to take initiative in pursuing accommodation where an employee is suspected or perceived to have a disability, even if such needs have not been explicitly communicated by the employee. This recognizes the fact that employees may not be willing or able to disclose their disabilities to employers. Particularly in cases of mental illness, one may choose not to inform an employer about a disability because of fear of stigmatization or may be unable to identify and communicate disability-related needs. Thus employers may be obliged to offer assistance and accommodation to employees suspected of having disabilities, particularly in cases where such disabilities may be the underlying cause of inappropriate behaviour or poor work performance. These efforts should be made by employers before pursuing sanctions or termination.[22]

Confidentiality is an important consideration in the process of accommodation. An employee is not necessarily required to disclose confidential information, such as the exact nature of his or her disability, in order to receive accommodation. What must be disclosed are only those details that pertain to the employee's restrictions or limitations in the performance of the duties of the job. Additional information requested by the employer must be provided only insofar as it is reasonably required for accommodations to be provided. The information provided in support of the need for accommodation is to be shared among individuals and departments of the employer organization only as necessary to the accommodation process.[23] This suggests the need for the employer to maintain confidentiality as well in their dealings with third parties to the process, including disability insurers.

Both the employee and the employer also have responsibilities in the process of devising appropriate accommodations. Employees are required to participate in discussions regarding potential accommodations and cooperate with the other parties involved. The Supreme Court of Canada has referred to this as a "duty to facilitate the search" for accommodation; however, this does not constitute a duty to originate a solution.[24] Employers bear the ultimate responsibility in the process of proposing and developing accommodations for employees with disabilities. This is in recognition of the fact that "the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's

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[21] *OHRC Policy, supra* note 18at p.19.
[22] *Ibid* at p.20-21; See also *Niagara Catholic District School Board v. Canadian Union Of Public Employees, Local 1317*, 2010 CanLII 35849 (ON L.A.) at paras.73-74.
[23] See *ibid*. at p.21.
[24] *Renaud, supra* note 4 at para.44.

business."[25] Employees cannot cause the accommodation process to fail, however, by holding out for a "perfect solution"; they are obligated to accept and implement reasonable accommodations proposed by the employer.[26]

If the employer fails in discharging its responsibilities in the process of accommodating an employee with a disability, its actions may be found to constitute discrimination. In contrast, if the employee fails to participate in the accommodation process as required, his or her complaint of discrimination against the employer may be dismissed.

The actions of the employer and the employee in the accommodation process may also be relevant to long-term disability insurance claims. The failure of the employer to provide accommodation will directly affect the opportunities available for an employee to return to work. An employee may be deemed fit for a resumption of work with modified duties by the insurer, for example; however, their actual ability to return may be hindered by the lack of accommodation offered by the employer. Where eligibility for disability benefits is defined in terms of an inability to perform job duties as a result of illness or injury, this could leave employees with disabilities to fall through the cracks without benefits or the ability to resume employment. It is incumbent on insurers not to rely on or take advantage of an employer's discriminatory conduct in failing to provide accommodation when assessing the eligibility of an employee for long-term disability benefits.[27]

The shirking of responsibilities by the employee in the process of accommodation may also be significant to disability insurance claims. Where an employee has not demonstrated sufficient commitment to a potential return to work, they may have more difficulty in establishing their eligibility for long-term disability benefits.[28] However, it is important for insurers and other parties involved in accommodation to consider the challenges that an employee may encounter in the process. For example, particularly where the employee has mental health or emotional disabilities, he or she may face difficultly participating in the accommodation process because it may cause significant stress and exacerbate psychological conditions. Individuals may also be forced to struggle against stereotypical assumptions about their abilities and limitations. It is important for employers and insurers to acknowledge and attempt to address these potential barriers for employees in order to ensure that discrimination is not embedded within the accommodation process itself.

In addition to employers and employees, third parties are also often involved in the accommodation process. This can be seen in the Ontario Human Rights Commission policy laid out above that mentions the role of unions and professional associations.

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[25] *Ibid*.
[26] *Ibid*. at para.43-44; See also *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161 at para.22.
[27] See for example *Gonneau v. Denninger,* 2010 HRTO 425 where the Tribunal found both the employer and the employee failed in their procedural duties in the accommodation process. The Tribunal awarded damages to the employee. An insurer, relying on the erroneous decision of the employer that the employee could be terminated because the employee had failed in her duties, would end up being both liable on the policy and a party to the employer's discrimination. An independent assessment is advised.
[28] See *Conte v. The Canada Life Assurance Co.*, 2005 CanLII 28545 (ON S.C.) at paras.59-70 [*Conte*].

Discrimination claims have also been made against other independent third parties contracted by employers to provide assistance in managing employee disability issues.[29] Disability insurance providers may fall into this category as they frequently act as agents of the employer in facilitating the accommodation process. Where insurers are directly involved in this way, they are appropriately required to refrain from discriminatory conduct or reliance upon such conduct by other parties in the process. For example, insurers ought to facilitate collaboration between the multiple stakeholders and the resolution of disputes between professionals providing opinions on the accommodation options available. They should also be expected not to take advantage of the vulnerability of employees with disabilities by avoiding punishing them for acting or failing to act on medical advice. In these ways disability insurance providers are required to consider their own human rights obligations in accordance with the duty to accommodate in the context of their role as agents of employers in the process of accommodation.

5. Human Rights in Civil Litigation

The actions of disability insurers with respect to accommodation may also be relevant to civil claims where the denial of long-term disability benefits can be connected to the insurer's role in discriminatory actions of employers who have failed to comply with their duty to accommodate. With an amendment to the *Ontario Human Rights Code* that came into force in June 2008, the *Code* now provides for civil remedies to be ordered by courts for the infringement of human rights:

> 46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:
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> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
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> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.[30]

This provision of the *Code* allows a plaintiff to advance an infringement of his or her human rights as a cause of action in connection with a civil claim, such as a breach of contract for long-term disability insurance. It therefore provides an avenue by which insurers may be held accountable for their reliance on or complicity in the discriminatory actions of employers in failing to accommodate employees with disabilities.

This inroad to civil remedies for human rights infringements exists notwithstanding the Supreme Court of Canada decision in *Honda Canada Inc. v. Keays*[31] in which it was held that a breach of the *Human Rights Code* cannot constitute an independent

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[29] See *Alexander, supra* note 5 at para.6.
[30] *Ontario Human Rights Code*, 2006, c. 30, s. 8. at s.46.1(1) [*Ontario Human Rights Code*].
[31] *Honda Canada Inc. v. Keays,* 2008 SCC 39, [2008] 2 S.C.R. 362 [*Honda*].

actionable wrong for the purposes of an award of punitive damages.[32] *Honda* clearly states that, "a person who alleges a breach of the provisions of the *Code* must seek a remedy within the statutory scheme set out in the *Code* itself."[33] The enactment of s.46.1 of the *Code* embeds civil remedies within the human rights legislation in accordance with this requirement. The Ontario Court of Appeal has recognized the new substantive jurisdiction created by the civil remedy section of the *Code*,[34] and the Ontario Superior Court has grappled with its application, including in the context of a civil action for wrongful dismissal and associated allegations of the failure of the employer to accommodate the employee's disability.[35]

The scope of s.46.1(1) of the *Code* in the civil context does not extend into the realm of punitive damages; however, it allows for broad-based compensatory awards based on tangible as well as intangible injuries, including explicitly those affecting dignity, feelings and self-respect. In the Ontario context, the recent amendments mean that there is no longer a separate assessment and a capped value for "mental distress" damages and, as such, there is no longer a requirement of willful or reckless conduct on the part of the party found guilty of rights infringements in order for there to be an award of non-pecuniary damages. The developing jurisprudence of the Human Rights Tribunal of Ontario has suggested that the focus instead in calculating the quantum of damages is the impact of the discrimination on the individual affected.[36]

In cases involving employment and the failure to accommodate employees with disabilities, the Tribunal has considered both subjective and objective circumstances related to the effects of the discrimination on the employee.[37] Damage awards for non-pecuniary losses in such contexts have ranged from $5,000 to $20,000. Factors correlated with higher damage awards appear to include repeated acts of discrimination rather than isolated incidents,[38] the vulnerability of the individual at the time of the discrimination, such as suffering from an illness or disability,[39] and the significance of the impact of the human rights violation and associated wrong, such as discriminatory conduct coupled with a termination of employment.[40]

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[32] *Ibid*. at para.63-64; See also *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181.
[33] *Honda*, supra not 31 at para.63.
[34] *Dobreff v. Davenport*, 2009 ONCA 8 (CanLII) at para.2 ("We are also satisfied that s. 46.1 of the *Human Rights Code* creates a new substantive jurisdiction and that it should be read prospectively only").
[35] *Stokes-and-St. Clair College*, 2010 ONSC 2133 (CanLII) at paras.2, 15, 23-24; See also *Mackie v. Toronto (City) and Toronto Community Housing Corporation*, 2010 ONSC 3801 (CanLII) at paras.56-63.
[36] *Clennon v. Toronto East General Hospital*, 2010 HRTO 506 (CanLII) at para.33.
[37] *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII) at paras.15-16; See also *Judd v. 718710 ON*, 2009 HRTO 1735 (CanLII) at paras.21-22 [*Judd*]; See also *Chen v. Ingenierie Electro-Optique Exfo*, 2009 HRTO 1641 (CanLII) at paras.50, 53-55; See also *Vetricek v. 642518 Canada*, 2010 HRTO 757 (CanLII) at paras.76-78 [*Vetricek*]; See also *McLean v. DY 4 Systems*, 2010 HRTO 1107 (CanLII) at paras.103, 105 [*McLean*].
[38] *Vetricek*, *ibid*. at paras.77-78 (Damage award of $15,000 as compensation for intangible harm caused by rights infringement).
[39] See *McLean*, *supra* note 37 at paras.105-106 (Damage award of $20,000 as compensation for intangible harm caused by rights infringement).
[40] *Judd*, *supra* note 37 at para.23 (Damage award of $10,000 as compensation for the effects of the rights violation based on a statement that "in cases where a *Code* violation is found to be a

While no longer the necessary factor or primary focus of determinations regarding non-pecuniary damages, the presence of willful or reckless discriminatory conduct continues to be relevant. This relates to the basis for damage awards specifically legislated federally in the *Canadian Human Rights Act*,[41] as well as in human rights legislation in a number of other provinces and territories.[42] The terms "willful" and "reckless" have been defined in federal jurisprudence; "willful" conduct has been described as deliberate or intentional,[43] and "reckless" acts have been interpreted as those demonstrating thoughtless practice or indifference to consequences.[44] It was further clarified that the requirement of "malicious or outrageous conduct" for the awarding of punitive damages is not necessary for an award of special compensation on the basis of willfulness or recklessness.[45]

In the federal jurisdiction willfulness and recklessness have formed the basis for damages in the employment context where employers have failed to comply with their duty to accommodate employees with disabilities or health-related issues. As examples, one employer was found to have acted recklessly by offhandedly mischaracterizing and refusing an employee's request for accommodation without further assessment of her situation,[46] while another employer was found to have exhibited willful or reckless behaviour because they knew or ought to have known that they had not properly accommodated their employee's disability.[47] A further employer was found to have engaged in willful discriminatory conduct because its representatives had breached a confidentiality agreement and had misrepresented information concerning an employee, and they were further held to have been reckless because they had terminated the employee based on misleading information and without consideration of the conditions imposed by law or the consequences on the employee.[48]

Based on the inclusion of civil remedies under the *Ontario Human Rights Code*, disability insurance providers may find themselves subject to liability not only for the breach of insurance contracts for inappropriate denial of disability benefits, but also may face damage awards for their participation or complicity in discrimination against employees with disabilities. The nature of such awards will be compensatory; however, they may extend to cover intangible injuries as a result of rights infringement. The quantum of such damages will depend on the subjective and objective circumstances surrounding the discrimination, including consideration of both the effects on the party discriminated against as well as the conduct of those responsible for the discrimination.

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factor in a decision to terminate the employment of a person, a significant award of damages will often be justified").

[41] *Canadian Human Rights Act*, *supra* note 16 s.53(3).

[42] See human rights legislation of Manitoba, Saskatchewan, Nunavut, and the Yukon and Northwest Territories.

[43] *Montreuil v. Canada (Canadian Forces)*, C.H.R.D. No.52, 2007 CHRT 53 at paras.84, 87.

[44] *Ibid*. at para.85 (From *Blacks Law Dictionary*).

[45] *Pepper v. Deputy Head (Department of National Defence)* [2008] C.P.S.L.R.B. No.71, 2008 PSLRB 71 at para.40 (Case decided by the Canada Public Service Labour Relations Board) [*Peppper*].

[46] *Cole v. Bell Canada* [2007] C.H.R.D. No.7 at paras.99-100 (Damage award of $2,000).

[47] *Willoughby v. Canada Post Corp.* [2007] C.H.R.D. No.44, 2007 CHRT 45 (Damage award of $10,000).

[48] *Pepper*, *supra* note 45 at paras.41, 43 (Damage award of $8,000).

In addition to damages directly flowing from an infringement under the *Human Rights Code*, the role of disability insurance providers in the process of accommodation of employees with disabilities may also affect more traditional damage awards made in the civil context. The Supreme Court of Canada has clarified in *Fidler v. Sunlife Assurance Co. of Canada*[49] the heads of damages available upon the breach of insurance contracts.

Compensatory damages include damages for mental distress in the event of a breach of contract where an object of the contract is to secure a psychological benefit and mental distress upon breach was within the reasonable contemplation of the parties at the time the contract was made.[50] Disability insurance contracts were recognized in *Fidler* as a type of contract offering not only monetary benefits, but also intangible benefits such as peace of mind in the knowledge that one has income security in the event of disability.[51] On the facts of *Fidler*, it was held that substantial loss was experienced by the plaintiff who had suffered from distress and discomfort as well as stress and anxiety as a result of the contract breach,[52] and thus significant damages were awarded in the amount of $20,000 for mental distress.[53] Cases to follow *Fidler* involving breaches of disability insurance contracts have applied the principles it expounded and also awarded damages for mental distress against insurers.[54]

The possibility for punitive damages to be awarded against disability insurance providers was also discussed in *Fidler*. While the Supreme Court recognized that such awards are to be exceptional, it was held that punitive damages may be warranted where there has been in independent actionable wrong in addition to the contract breach; it was suggested that this independent actionable wrong could take the form of a breach of the insurance provider's duty to act in good faith.[55] This duty is said to be breached and punitive damages warranted where the actions of the offending party reach the level of malicious, oppressive or high-handed misconduct, and offend the court's sense of dignity.[56]

Punitive damages were not awarded on the facts of *Fidler*; however, the case of *Asselstine v. The Manufacturers Life Insurance Co.*,[57] pre-dating *Fidler*, provides some guidance regarding circumstances in the context of disability insurance contracts that may warrant punitive damage awards. For example, punitive damages were awarded in *Asselstine* based on a holding that the insurer had not settled the insured's claim in good faith and in a reasonable time due to their inappropriate conduct in the course of investigating, determining and litigating the claim.[58] In addition, the court identified the

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[49] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 [*Fidler*].
[50] *Ibid*. at para.47; See also *Piresferreira v. Ayotte,* 2010 ONCA 384 (Can LII); See also *Honda, supra* note 31.
[51] *Fidler, supra* note 49 at para.56-57.
[52] *Ibid*. at para.59.
[53] *Ibid*. at para.76.
[54] *Lumsden v. Manitoba*, 2009 MBCA 18 (CanLII) at paras.68-71, 75 (Damage award of $25,000 for mental distress); *Saunders v. RBC Life Insurance Co.*, 2007 N.L.T.D. 104 (CanLII) at paras.165-166 (Damage award of $25,000 for mental distress).
[55] *Fidler*, *supra* note 49 at para.63.
[56] *Ibid.* at para.62.
[57] *Asselstine v. The Manufacturers Life Insurance Co.*, 2003 BCSC 1119 (CanLII).
[58] *Ibid*. at para.212.

need to deter insurance providers from exploiting the vulnerability of their insureds.[59] As a result, $150,000 was awarded against the insurer as punitive damages.[60] In the 2010 Labour Arbitration case of *Greater Toronto Airports Authority v. Public Service Alliance Canada, Local 0004*, punitive damages were also awarded against the employer because it failed to deal with the grieved employee in a reasonable manner and in so doing "stripped the collective agreement of any meaning."[61] Punitive damages were said to be necessary to serve as a deterrent to any future misconduct by the employer,[62] and were awarded in the amount of $50,000.[63]

Mental distress and punitive damages in civil actions, like damages for intangible injuries in the human rights context, provide an opportunity for the role of disability insurance providers in the accommodation of employees with disabilities to be scrutinized. The insurers' participation or complicity in discriminatory conduct in the failure to provide appropriate accommodation may be considered an aggravating factor in the denial of not only monetary benefits but also peace of mind in accordance with disability insurance contracts, and it may further constitute an independent breach of their duty of good faith. As such, discrimination may contribute to a determination of eligibility for or the quantum of mental distress or punitive damage awards against insurers in civil litigation for breach of contract. This suggests that while the insurer may not directly have a duty to accommodate employees with disabilities because this responsibility is to be borne by the employer, they risk exacerbating damage awards made against them in the event of civil action for breach of contract by taking part in a discriminatory accommodation processes.

6. Conclusion

The interaction between long-term disability and the duty to accommodate is an emerging area of the law that straddles human rights and civil law systems. The paramountcy of human rights law goes a long way in ensuring that the duty to accommodate people with disabilities in the employment context cannot be disregarded by disability insurance providers.

This is particularly true when insurers participate directly in the accommodation process; a role that is often explicitly incorporated into disability insurance contracts and policies. Even where such direct involvement of the insurer is not mandated, it arguably remains in their interests to prime the accommodation pump through the provision of rehabilitation benefits. These often include wage supplements for part-time work or work-hardening programs and may act to facilitate transitions off of disability benefits. Where such outside sources of funding are being provided to support accommodation, employers cannot disregard such options in alleging compliance with their duty to accommodate to the point of undue hardship.[64]

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[59] *Ibid.* at para.211.
[60] *Ibid*. at para.213.
[61] *Greater Toronto Airports Authority v. Public Service Alliance, Local 0004*, [2010] C.L.A.D. No. 127 at para.267
[62] *Ibid*. at para.268.
[63] *Ibid*. at para.269.
[64] *Ontario Human Rights Code, supra* note 30 at s.11(2) and 17(2).

Thus, insurers may play a truly catalytic role in the accommodation process. This may not only shield them from possible claims of discrimination and associated awards of damages against them in legal proceedings, but it is also in their interests in terms of facilitating the return to work of disability benefit recipients. This reinforces the mutual interests of insurers and employers in working collaboratively to provide accommodations for employees with disabilities in accordance with their human rights obligations.