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ERIC'S LTD UPDATE

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Eric Schjerner is a mediator with 9 years of mediating LTD and other insurance disputes, a former litigator with 3 decades of LTD trial work, and the author of 2 editions of the book Disability Insurance Law in Canada.

To look for available mediation dates or to book a mediation with Eric, visit <https://schjernermediations.com> or simply email Eric at: eric@schjernermediations.com.

Eric Schjerner

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Comments:

Welcome to the 10th issue of Eric's LTD Update, the 3rd published during COVID-19 (who would have predicted this?), and the first issue by Schjerner Mediations Ltd.

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A) Costs Award

(i) *Kardaras v Sun Life*, CV-16-560974 Costs Endorsement

In a somewhat Pyrrhic win for the plaintiff (“K”) commented on in Eric’s Fall 2020 LTD Update, Sun Life was ordered to pay the remaining own occ LTD benefits of \$12,037 as well as \$10,000 in mental distress damages, but any occ benefits were denied.

Regarding her costs, K argued that she was successful in the action (even if any occ benefits as well as aggravated damages were denied) thus entitling her to costs and that such costs should be at a higher level than partial indemnity in recognition of the fact that Sun Life acted in bad faith. K submitted a Bill of Costs of \$340,000 on a partial indemnity scale and \$380,000 on a substantial indemnity scale.

Sun Life countered that K should not receive costs since any occ benefits were denied, the ultimate award was within the monetary jurisdiction of the Small Claims Court, and that according to Rule 57.05 (1) the court could make an order that the plaintiff shall not recover any costs.

Justice O’Brien held that it was reasonable for K to have commenced her action under the ordinary procedure and that she should not be denied her costs on the basis of Rules 56.05 or 76.13. However, Justice O’Brien noted that the costs award should take into account the fact that K’s recovery was less than \$25,000 and further noted:

“In my view, K’s partial success, considerations of proportionality, Sun Life’s Offer to Settle, and to a lesser degree, K’s conduct at trial that lengthened the proceeding (Eric’s note: this included unmeritorious objections to the admissibility of evidence and over allowing one witness to testify via video conference) should have a significant impact in reducing the costs awarded to her. K had the opportunity over several months to reach a settlement that would have exceeded the ultimate result and obviated the need for a 13-day trial that ultimately resulted in a low damages award. In addition, although I considered her to be successful overall, she was ultimately not successful on a significant issue, which was her entitlement to benefits during the “any occupation” period. Once the trial commenced K’s counsel did not proceed in a manner that allowed for an efficient trial.... Given all of these factors, I conclude that costs in the amount of \$70,000 inclusive is appropriate.”

B) Jury Trials

(i) *Louis v Poitras*, 2020 ONSC 6907 (Div. Ct.)

Involved an appeal to Divisional Court from two decisions striking jury notices in personal injury cases on the basis of delays caused by the COVID-19 pandemic. (Eric’s note: see Belton v. Spence in Eric’s Fall 2020 Update where one such jury notice was struck since the delay to the plaintiff outweighed the defendant’s right to a trial by jury).

In *Louis v. Poitras*, however the Divisional Court ruled that the motions judge struck the juries solely due to the presence of delay without any evidence that explained the anticipated length of the delay, whether such delay might be extended, or its impact on the administration of justice.

Held: The recognition of the presence of delay is not enough. In determining a motion to strike a jury notice the primary factor is providing justice to the parties. Appeal granted but without prejudice to further motions to strike the jury notices with evidence that would address the key factors missing in the decisions of the motions judge.

C) LUMP SUM AWARD OF FUTURE BENEFITS, PUNITIVE DAMAGES

(i) *Gascoigne v Desjardins*, 2020 BCCA 316, on appeal from 2019 BCSC 1241

The plaintiff appellant appealed the trial judge's decision not to award her a lump sum payment of future LTD benefits or of an award of punitive damages after finding that the respondent insurer had breached its duty of good faith. The appellant asserted that the insurer's denial of LTD benefits constituted a fundamental breach of the insurance contract, and as such entitled her to a lump sum payment representing the present value of all future LTD benefits to which she would be entitled. The appellant also argued that, having found that the respondent insurer acted in bad faith, the trial judge was obliged to make an award of punitive damages.

Held: Appeal dismissed. *"Because a non-contracting beneficiary of a group policy is not entitled to terminate the policy, the appellant is precluded from claiming fundamental breach of contract. Further, because not every breach of good faith merits an award of punitive damages, the trial judge properly considered whether the respondent's conduct was sufficiently egregious to warrant such an award. The trial judge did not err in conducting that assessment."* (the following line added by Eric for the reader... in concluding that such conduct "was not sufficiently high-handed, malicious, arbitrary or highly reprehensible" to warrant such an award).

(Eric's comments: The trial judge had followed *Warrington v. Great West Life* in holding that a group person insured is entitled to enforce a payment of LTD benefits but is NOT entitled to bring the group policy to an end between such insured and the insurer by forcing a lump out. Note that the trial judge in *Gascoigne* did not find that the plaintiff had reached maximum medical improvement. Might a lump out be ordered in the case of a plaintiff suing under an individual policy who had reached maximum medical improvement? Of course, the issue of mortality risk (which would obviate any basis for a future lump out), not to mention what discount rate should be used and why would also need to be fought out in any such future case dealing with a lump out of future benefits. As of today, there are now 5 cases across Canada (3 in B.C., 1 in Alberta and 1 in Ontario (see page 161 in *Disability Insurance Law in Canada Second Edition*) where requests for a lump out of future LTD benefits have been denied).

ACKNOWLEDGEMENTS

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For any questions on these or on other LTD cases, or if you have a case you wish to share, please email Eric at eric@schjerningmediations.com, or call 416-236-9282.