CHAPTER 12

LITIGATION PROCESS

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Before delving into the intricacies of LTD litigation it should be noted that the LTD litigation battlefield is littered with cases where either counsel for the insured or the insurer was confident of victory but left dumbfounded by the result. Given the vagaries of the insured's credibility, and the strength or the weakness of other witnesses (notably medical witnesses) this should not come as a surprise.

There is need here to cite only one such case,[1] where an insurer had favourable evidence from two physicians coupled with surveillance evidence, however, went down to defeat since the trial judge ruled that the overall cumulative effect of depression and headaches rendered the insured totally disabled.

A. Judge or Jury

Whether a plaintiff insured, or a defendant insurer, is better off having the issue of disability determined by a judge or a jury is a hard to answer question and one which is beyond the scope of this book. Suffice to say that the author has been involved in jury trials on LTD cases acting for the insurer where he has been quite happy with the jury result and conversely been involved in other jury trials where he longed for the trier to have been a judge alone.

What this text will discuss is whether jury trials are available in disability disputes in the common law provinces. In Ontario, a comprehensive decision[2] has settled what had been conflicting case law on the issue of whether jury trials are allowable and determined that they are. The conflict stemmed from a provision of the Ontario *Courts of Justice Act*[3] which provides that juries are not allowed to hear trials involving a claim for declaratory relief. Where a plaintiff insured's pleadings included a claim that the plaintiff obtain a declaration of disability, the issue was whether this ran afoul of the relevant statutory provision.

In *Ramm*,[4] the Court denied a motion by the insurer to strike a jury notice, although it did note the conflicting case law on the issue and urged that the matter be addressed by an appeal court. While the decision of the Court in *Harrison* was a trial decision involving no-fault automobile insurance benefits, the decision provides a comprehensive review of the conflicting law involving jury trials for LTD insurers.[5] After a careful analysis of the

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1 *Wachal v. Crown Life Insurance Co.* (1999), 14 C.C.L.I. (3d) 284, 1999 CarswellMan 378 (Man. Q.B.).

2 *Harrison v. Antonopoulos* (2002), 62 O.R. (3d) 463, 2002 CarswellOnt 4331 (Ont. S.C.J.).

3 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(2).

4 *Ramm v. Sun Life Assurance Co. of Canada*, [1999] I.L.R. I-3664, 1999 CarswellOnt 777 (Ont. Gen. Div.).

5 *MacLennan v. National Life Assurance Co.* (1994), 1994 CarswellOnt 534, [1994] O.J. No. 1242 (Ont. Gen. Div.). *Haskill v. London Life Insurance Co.* (1997), [1998] I.L.R. I-3503, 1997 CarswellOnt 4252 (Ont. Gen. Div.); leave to appeal allowed (1997), 1997 CarswellOnt 5757 (Ont. Gen. Div.).

case law, the Court held that "the essence of the relief requested by the plaintiff is a declaration of fact for the purpose of obtaining executory or coercive relief. In pith and substance, it is "not declaratory relief" as that term is used in s. 108(2) of the *Courts of Justice Act* either in a public or private law context."

In Ontario then, any doubt as to whether jury trials are available in LTD lawsuits where the relief sought includes a declaration of disability has been answered in the affirmative by *Harrison*.

Related to jury trials, an interesting decision[6] discussed when inappropriate statements contained in a plaintiff's opening, including how the LTD insurer's nonpayment was "a betrayal", constituted grounds for a mistrial. Also for interest's sake, a recent decision[7] regarding one Ontario judge who viewed civil juries as simply "seem[ing] to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers"[8] has received a great deal of publicity.

Different rules govern the availability of jury trials in the other common law provinces, with the current state of the law as follows:

In British Columbia case law is divided on the issue. Under B.C.'s *Rules of Court* a trial shall be heard without jury where it relates to the specific performance of a contract or where the sole or principal question at issue is alleged to be one of construction of a written contract.[9]

In the only Court of Appeal decision[10] on point the Court found that Rule 10 applied and struck the jury notice where the principal issue was whether the plaintiff was disabled as defined in the policy.

However, other decisions exist where on similar facts jury notices were not struck.[11]

In Alberta, jury trials are governed by legislation.[12] Section 17(1) allows a claim to be heard by a jury if it falls within the enumerated subsections but s. 17(2) indicates that the justice hearing the application has discretion to prohibit a jury trial if the circumstances indicate that it would be inconvenient for the jury to decide on the matter, or if the documents or investigation are overly lengthy or complex. One case[13] provides guidance to counsel making applications to proceed by way of a jury trial in a disability case.

Saskatchewan also has a *Jury Act*.[14] Whether to allow a jury is canvassed in two decisions.[15]

In Manitoba, there is no right to a civil jury trial and trials by jury are rare. A party must get a judge to order a civil trial by virtue of some unusual and compelling circumstances.[16]

Nova Scotia's legislation[17] provides parties a substantive prima facie right to a trial by jury, although there is no case law on the issue of jury trials in LTD actions.

New Brunswick's legislation[18] permits jury trials only where, on motion by either party, the Court determines that the questions in issue in the action are more fit for trial by jury than by a judge.

Prince Edward Island's legislation[19] suggests that jury trials are likely available in LTD lawsuits although no case law exists on this issue.

It is possible to have a jury trial in LTD matters in Newfoundland and Labrador.[20] However, a request for a jury

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6 *Baillargeon v. Paul Revere Life Insurance Co.*, 2006 CarswellOnt 6550, [2006] O.J. No. 2246 (Ont. S.C.J.).

7 *Mandel v. Fakhim*, 2016 ONSC 6538, 2016 CarswellOnt 16345 (Ont. S.C.J.); additional reasons 2016 CarswellOnt 18674 (Ont. S.C.J.).

8 *Ibid.*, at para. 9.

9 British Columbia *Rules of Court*, Rules 10 and 35.

10 *Edwards v. Mutual Life Assurance Co. of Canada* (1982), 41 B.C.L.R. 269, 1982 CarswellBC 336 (B.C. C.A.). See also *MacDonald v. Maritime Life Assurance Co.*, 2004 BCSC 203, 2004 CarswellBC 334 (B.C. S.C. [In Chambers]) and *Sanders v. Clarica Life Insurance Co.*, 2003 BCSC 403, 2003 CarswellBC 597 (B.C. S.C. [In Chambers]).

11 *Penner v. Great-West Life Assurance Co.*, 2002 BCSC 1131, 2002 CarswellBC 1821 (B.C. S.C.); and *Peters v. Co-operators Life Insurance Co.*, 2007 BCSC 1103, 2007 CarswellBC 1708 (B.C. S.C.).

12 *Jury Act*, R.S.A. 2000, c. J-3.

13 *Shaw v. Standard Life Assurance Co.* (2006), 35 C.C.L.I. (4th) 250, 2006 CarswellAlta 278 (Alta. Q.B.).

14 *Jury Act*, R.S.S. 1998, c J-4.2.

15 *Henderson v. Henderson* (1985), 39 Sask. R. 269, 1985 CarswellSask 423 (Sask. C.A.); leave to appeal refused (1985), 20 D.L.R. (4th) 33n (S.C.C.); and *Tuka v. Mutual Life Assurance Co. of Canada* (1994), 126 Sask. R. 239, 1994 CarswellSask 433 (Sask. Q.B.).

16 See *Martin v. Iliffe* (1984), 7 D.L.R. (4th) 755, 1984 CarswellMan 121 (Man. Q.B.); *Neroda v. Westfair Foods Ltd.* (1990), 63 Man. R. (2d) 311, 1990 CarswellMan 131 (Man. C.A.); and *Rempel (Litigation Guardian of) v. Transcona-Springfield School Division No. 12* (1995), 105 Man. R. (2d) 116, 1995 CarswellMan 608 (Man. Q.B.); affirmed (1996), 1996 CarswellMan 36 (Man. C.A.) refusal to allow a civil jury . . . must show compelling reason why jury better than judge.

17 *Judicative Act*, R.S.N.S. 1989, c. 240.

18 *Jury Act*, S.N.B. 1980 J-3.1, Rule 46.01, N.B. *Rules of Court.*

19 *Jury Act*, R.S. P.E.I. 1988, c J-5.1, Rule 47 P.E.I. *Rules of Civil Procedure*.

20 *Jury Act*, 1991, S.N.L. 1991, c.16, Rule 45 *Rules of Supreme Court*, 1986.

trial must be made through an application and no automatic right to a jury trial exists although at least one case exists allowing a jury to hear an LTD case.[21]

B. Arbitration/Collective Agreement

Where LTD benefits are negotiated pursuant to a collective agreement, the question arises as to whether an insured employee who is unhappy with a denial or termination of their LTD benefits is entitled to bring a lawsuit against their insurer or must instead resort to the arbitration provisions in the collective agreement.

A leading case[22] opined that the employee was entitled to either bring an action against their insurer or had to resort to the grievance arbitration provisions in the collective agreement, and held that because the LTD benefits arose from the collective agreement a suit against the insurer could not proceed.

In another case[23] the union grieved on behalf of a number of employees over their denial of LTD benefits. Long term disability benefits were payable under the insurance policy and not the collective agreement. The Court distinguished the case of *Pilon* and held that LTD benefits were payable under the insurance policy, not the collective agreement, and so the claim had to be made to the insurer.

In *London Life Insurance Co. v. Dubreuil Brothers Employees Assn.*[24] arbitration proceedings regarding claims for entitlement to LTD benefits were instituted. Pursuant to the collective agreement, the employer was obliged to pay the premiums associated with the insurance plan. The arbitrator added the insurer as a party to the proceedings even though the insurer was not a party to the collective agreement, and stated that his decision would be determinative of the dispute between the grievor, the employer, and the insurer, London Life. London Life successfully sought a judicial review of the arbitrator's decision, arguing that the decision was not arbitrable and that the arbitrator lacked jurisdiction because the insurer was not a party to the collective agreement.

In a similar case[25] the insurer denied LTD claims to two employees of the Women's Health Centre. Both employees filed grievances against the Health Centre, and at the outset of the arbitration proceedings the union applied to add the insurer as a party. The Arbitration Board held that they did not have jurisdiction to make an Order adding the insurer as a party defendant, and the union appealed. The B.C. Court of Appeal determined that the insurer was not a party to the collective agreement. The Court of Appeal held that it is well settled law that an arbitration board obtained its jurisdiction over parties either by their consent or as a result of statutory appointment, which did not apply in this case. Referring to the previously decided case of *Pilon*, the Court stated that it did not appear as though the Court in the *Pilon* case had directed its attention to the question before the Court in the case at hand, namely, whether an arbitrator could exercise jurisdiction over a stranger to a collective agreement who did not consent to jurisdiction.

In yet another case[26] an employee brought a claim for disability benefits to a claims review committee, and was found to be entitled to LTD benefits. The insurer continued to deny payment, but the employee was not able to bring a court action for benefits. The claim had to be pursued under the employee's collective agreement, and the Court did not have jurisdiction.

In a similar case[27] a plaintiff seeking LTD benefits had commenced a court action although the claim was governed by a collective agreement. A settlement was reached ending the Court action by allowing the claim to proceed in the proper forum. The Court ordered that the settlement should be enforced, and that the insurer should not be allowed to rely on the defence of the plaintiff's delay caused by the Court action in any subsequent grievance of the benefits claimed.

C. Taxability of LTD Settlements

If a LTD policy's premiums are paid for, in whole or in part, by the insured then benefits are non-taxable. If the premiums are paid by the employer, they are taxable. There is case law suggesting that if an employee can prove

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21 *Clarke v. Manufacturers Life Insurance Co.* (2003), [2003] N.J. No. 73, 2003 CarswellNfld 66 (N.L. T.D.).

22 *Pilon v. International Minerals & Chemical Corp. (Canada)* (1996), 31 O.R. (3d) 210, 1996 CarswellOnt 4334 (Ont. C.A.).

23 *Canada Safeway Ltd. v. U.F.C.W., Local 1518* (1998), 98 C.L.L.C. 220-074, 1998 CarswellBC 3289 (B.C. L.R.B.).

24 *London Life Insurance Co. v. Dubreuil Brothers Employees Assn.* (1998), 98 C.L.L.C. 220-075, 1998 CarswellOnt 3890 (Ont. Gen. Div.); affirmed (2000), 49 O.R. (3d) 766, 2000 CarswellOnt 2419 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 754, 2001 CarswellOnt 755 (S.C.C.).

25 *H.E.U. v. Health Employers Assn. of British Columbia* (2000), 18 C.C.L.I. (3d) 267, 2000 CarswellBC 646 (B.C. C.A.); leave to appeal refused (2000), 2000 CarswellBC 2238, 2000 CarswellBC 2239 (S.C.C.).

26 *Ali v. Manufacturers Life Insurance Co. / Cie d'Assurance-vie Manufacturers*, [2004] I.L.R. I-4312, 2004 CarswellBC 1172 (B.C. S.C.); additional reasons at (2004), 2004 CarswellBC 1324 (B.C. S.C.); affirmed (2005), 2005 CarswellBC 1265 (B.C. C.A.).

27 *Dela Cruz v. Prudential of America General Insurance Co. (Canada)* (2003), [2004] I.L.R. I-4266, 2003 CarswellOnt 5396 (Ont. S.C.J.).

that something of value was given up in the collective agreement bargaining in order that insurance premiums be paid for by the employer, then this situation is akin to premiums being paid by the insured.[28] The issue of whether disability payments which are otherwise taxable should attract tax upon the settlement of a lawsuit has a detailed history. Section 6(1)(a) and (f) of the *Income Tax Act* provides as follows:

> 6. (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable
>
> (a) the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer, or by a person who does not deal at arm's length with the taxpayer, in the year in respect of, in the course of, or by virtue of the taxpayer's office or employment, except any benefit
>
> . . .
>
> (f) the total of all amounts received by the taxpayer in the year that were payable to the taxpayer on a periodic basis in respect of the loss of all or any part of the taxpayer's income from an office or employment, pursuant to. . .
>
> (ii) a disability insurance plan,. . .

The Tax Court of Canada had rejected taxation under s. 6(1)(a) on the basis that a specific provision for the taxation of disability insurance benefits is made in s. 6(1)(f). Regarding s. 6(1)(f) the Tax Court had held, in a number of decisions beginning in 2000, that because lump sum payments are not "periodic payments" they were therefore not taxable.

Throughout this period of time the Minister's position was that lump sum payments were taxable under either clause. There were occasions when the Minister was successful in the Tax Court.[29]

The issue was revisited by the Federal Court of Appeal in the 2003 cases of *Tsiaprailis v. R.*[30] and the *Siftar v. R.*[31]

Tsiaprailis held that:

> The portion of a settlement of a claim under a disability insurance policy attributable to payment in arrears is taxable in the hands of the insured pursuant to paragraph 6(1)(f) of the *Income Tax Act*.

In *Tsiaprailis* the disability insurance claim lawsuit was settled on the basis of payment of the arrears plus the present value of future payments appropriately discounted based upon the facts of the particular case.

However, in *Siftar*, the accidents benefit insurer, the at-fault driver's insurer and the disability insurer each contributed, without consultation with Ms. Siftar's solicitor, to a global settlement. Subsequently, the disability insurer issued a T4A for $44,495.83 and Ms. Siftar was re-assessed by the Minister. There were no detailed calculations as to which portion of the settlement was attributable to past or future benefits, interest, or legal fees, or disbursements.

While Mr. Justice Evans (the dissenting Justice in *Siftar*) felt that these facts point out the inherent difficulty of taxing only a portion of a lump sum settlement, the majority in *Siftar* held:

> Given that the question as to whether a portion of settlement amount is taxable under paragraph 6(1)(*f*) is a question of fact, the failure to establish an allocation cannot be determinative of the issue. Such failure is evidence to be considered in the light of the balance of the evidence, but it cannot, by itself, preclude an inquiry into the makeup of the settlement amount.[32]

Further, the Court held:

> Given that the basis of our tax system if self-assessment, it is for the taxpayer to declare the portion of a settlement which is to be included in his or her income. Given that one is dealing with the calculation of the value to be attributed to the right to receive a certain income stream over a period of time, and that these calculations proceed along predictable lines, there is a certain ability to determine whether declarations are reasonable or not. If the

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[28] *Cooper v. Miller*, 1994 CarswellBC 1235, 1994 CarswellBC 121, *(*sub nom. *Cunningham v. Wheeler)* 113 D.L.R. (4th) 1 (S.C.C.); *Schuett v. Minister of National Revenue*, 1980 CarswellNat 302, [1980] C.T.C. 2185 (T.R.B.); *Dagenais v. R.*, 1995 CarswellNat 389, *(*sub nom. *Dagenais v. Canada)* [1995] 2 C.T.C. 100 (Fed. T.D.); *Pugh v. R.*, 2000 CarswellNat 1867, 2000 CarswellNat 4689, [2000] 4 C.T.C. 2391 (T.C.C. [Informal Procedure]); and *Leonard v. R.*, 1996 CarswellNat 1772, 1996 CarswellNat 3682, [1996] 3 C.T.C. 265 (Fed. T.D.). For further reading on the issue of tax issues affecting LTD settlements, refer to Steven Muller's article, "Income tax considerations in long-term disability cases" (2002) 25 Advoc Q. 463.

[29] *Dumas v. R.* (2000), 2000 D.T.C. 2603, 2000 CarswellNat 2358 (T.C.C. [General Procedure]).

[30] *Tsiaprailis v. R.* (2003), 2003 D.T.C. 5246, 2003 CarswellNat 1069, 2003 CarswellNat 599 (Fed. C.A.); affirmed (2005), 2005 CarswellNat 431, 2005 CarswellNat 432 (S.C.C.).

[31] *Siftar v. R.* (2003), 2003 D.T.C. 5243, 2003 CarswellNat 1068, 2003 CarswellNat 598 (Fed. C.A.).

[32] *Ibid*., at para. 5.

> Agency is not satisfied that the taxpayer's declaration reflects the reality of the transaction, then it can use the tools at its disposal under the Act to reassess the taxpayer. At that point, the taxpayer, who has the greater knowledge of his or her own affairs, bears the burden of establishing the facts in support of his or her position.[33]

Accordingly, following the Federal Court of Appeal decisions in *Tsiaprailis* and *Siftar*, the portion of a lump sum settlement attributable to arrears of benefits is taxable, while a lump sum compromise of future benefits is not. In a 2 to 1 decision in *Tsiaprailis*, the majority held that accumulated arrears fell under s. 6(1)(f) of the *Income Tax Act* as they were "in respect of amounts payable on a periodic basis even though it was paid by way of a lump sum under compulsion of litigation." In *Siftar*, the majority decided that:

> . . . the failure to establish an allocation between past and future payments cannot be determinative of the issue of whether section 6(1)(f) applies. The taxpayer must declare what portion should be included in her income.

Mr. Justice Evans filed a very strong dissent in both cases. He gave the five following reasons why lump sum compromise settlements of future benefits should not be subject to any tax:

> a) including a lump sum settlement as income in the year of the settlement will likely result in a higher marginal rate than if the same amount had been paid on a monthly basis;
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> b) subjecting any part of the settlement to taxation is likely to reduce incentives to settle what are already difficult cases to resolve;
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> c) it is unfair to cases already settled as these litigants would have no idea they had to consider how much of the settlement should be attributable to arrears;
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> d) the Minister has considerable discretion to decide what is a fair amount to include as taxable; and
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> e) the termination of benefits may force an insured into debt and thus the settlement will not leave them in the same situation as someone who had been receiving monthly payments on a regular basis.

The entire issue was put to rest when the Supreme Court of Canada heard an appeal in *Tsiaprailis* in November 2004.[34] The Supreme Court, in a 4-3 decision, dismissed the appeal. The majority ruled the portion of the settlement attributable to benefit arrears was made to replace monies "payable . . . on a periodic basis . . . pursuant to a disability insurance plan" and therefore was taxable under s. 6(1)(f) of the *Income Tax Act*, holding that "it cannot be disputed on the evidence that part of the settlement monies was intended to replace past disability payments . . . and such payments, had they been paid to Ms. Tsiaprailis, would have been taxable." The minority would have held that neither amounts were taxable holding that a bona fide lump sum settlement may result from an insurance policy, which settlement is non-taxable.

With respect to past benefits which are taxable insurers can issue tax form T-1198 to apportion past taxable benefits into the various tax years between the date benefits were terminated and the date of the settlement. Note, however, that pursuant to CRA Guidelines insurers are required to withhold and remit a portion of benefit arrears directly to CRA. Finally, the reader should note that ASO Plans (see Part J to this chapter below) may not be allowed to consider lump sums of future benefits as non-taxable. In order to do so, such plans must be deemed "in the nature of insurance". The author was involved in one such case, and an opinion from a tax lawyer was required.

D. Lump Sum Award for Future Benefits

Courts in several provinces have consistently turned back attempts by plaintiffs seeking lump sum awards for future LTD benefits.[35] The uncertainty as to the permanence of the insured's disability, as well as the right of the insurer to cause the insured to submit to ongoing medical examinations, are just two of the reasons cited by courts on this issue, although they could have added that LTD policies pay benefits monthly in arrears so long as the insured remains disabled (usually to a maximum of age 65) and paying a lump sum award for future benefits ignores the fact that the insured could die tomorrow and thus be disentitled to any future LTD awards. In the *Richardson* case, however, the Court did state that "whereas here there is some uncertainty as to the permanence of the plaintiff's disabilities and the policy allows the insurer to require the plaintiff to submit to ongoing physical examinations as well as for offsets with regard to receipt of other benefits, a lump sum award for future benefits would not be appropriate". Such finding suggests perhaps that if, in theory, a case actually existed where there were:

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[33] *Ibid*., at para. 6.

[34] *Tsiaprailis v. R.*, [2005] 1 S.C.R. 113, 2005 CarswellNat 431, 2005 CarswellNat 432 (S.C.C).

[35] *Andersen v. Great-West Life Assurance Co.*, [1988] I.L.R. I-2317, 1988 CarswellOnt 334 (Ont. H.C.); *Richardson v. Great West Life Assurance Co.*, [1996] I.L.R. I-3376, 1996 CarswellAlta 648 (Alta. Q.B.); *Cram v. Great-West Life Assurance Co.* (1995), 31 C.C.L.I. (2d) 197, 1995 CarswellBC 625 (B.C. S.C.); *Warrington v. Great-West Life Assurance Co.*, [1995] I.L.R. I-3208, 1995 CarswellBC 278 (B.C. S.C.); additional reasons at (1995), 1995 CarswellBC 3033 (B.C. S.C.); reversed in part (1996), 1996 CarswellBC 1952 (B.C. C.A.).

(a) certainty as to the permanence of the plaintiff's disability, (b) no potential for offsets, and (c) no right by the insurer to conduct a medical examination, an insured could at least make an argument for a lump sum award.

It has been suggested to the author that in certain circumstances (such as if a court has previously made a declaration of total disability) an insurer should be required to obtain a court finding of non-disability before benefits can be terminated.

Two cases touch on this issue. In a 1993 decision,[36] the Supreme Court of Canada dismissed the argument that an insurer must prove there is no disability before cessation of the payments. Note also the *Cram* decision,[37] where the Court provided an answer to the plaintiff's argument that failure to lump out a disability claim left the plaintiff:

> at the whim of the Defendant and he that may find himself from time to time having to commence an action to enforce his rights under the contract, there are other remedies. These include special costs or an award for punitive or exemplary damages. I would think given the circumstances of this case the Defendant insurance company would be very cautious about terminating benefits unilaterally once again without the strongest evidence of cessation of disability.[38]

One old Manitoba case[39] does give some support for the requirement of a lump out of future LTD benefits. This is also true of the 2012 Ontario Court of Appeal decision in *Brito v. Canac Kitchens*,[40] where the Ontario Court of Appeal refused to interfere with a trial judge's decision awarding LTD benefits to age 65 since the insured had discharged his evidentiary burden of proving total disability by both *viva voce* and medical evidence. However, a word of caution on *Brito* is warranted. The trial judge was clearly incensed with the employer for going the "bare minimum" route in terms of providing replacement disability coverage to a "loyal, long-service employee"[41] and as part of the damages awarded the present value of the remainder of LTD benefits to age 65 (roughly $48,000). Could this result happen in a non-employment LTD case where the only issue was total disability and whether a lump sum of benefits to age 65 should be awarded? Note also that neither the trial judge nor the Court of Appeal in *Brito* analyzed any of the cases noted above[42] which have held that courts cannot order lump sum payments of future benefits. There is also no discussion in *Brito* on whether the LTD future benefits were given a present value figure or exactly how they were calculated.

E. Mandatory Interlocutory Injunction

Courts have generally rejected any attempt by plaintiffs to seek a mandatory interlocutory injunction for payment of disability benefits,[43] but in doing so they have generally considered three criteria: (a) a preliminary assessment of the case must show that there is a serious question to be tried, (b) the result of the injunction being denied must be such that the moving party will suffer irreparable harm, and (c) the court must determine which of the parties would suffer greater harm if the injunction is refused or granted.

In *Dempster* the plaintiffs (the wife and children of the insured) sought a mandatory injunction against the insurer requiring reinstatement of LTD benefits and arguing that the insured would commit suicide if benefits were not reinstated. Although the Court noted the assessment was difficult where the Court was faced with conflicting medical affidavits untested by cross-examination, the Court did find the plaintiffs had a high degree of success at trial. However, the Court went on to hold that the risk of the insured's suicide was nothing more than speculative, and did not constitute irreparable harm that would arise from the refusal of the injunction.

Similarly, the Ontario Divisional Court has ruled[44] that the fact the plaintiff insured would likely suffer social

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[36] *Caisse populaire de Maniwaki c. Giroux*, 1993 CarswellQue 113, 1993 CarswellQue 152, [1993] 1 S.C.R. 282 (S.C.C.); reconsideration / rehearing refused (March 5, 1993), No. 22608 (S.C.C.).

[37] *Cram*, *supra* note 35.

[38] *Ibid.*, at para. 25.

[39] *Zdan v. Hruden*, 1912 CarswellMan 255, 4 D.L.R. 255 (Man. C.A.).

[40] *Brito v. Canac Kitchens*, 2012 ONCA 61, 2012 CarswellOnt 760 (Ont. C.A.); reversing in part 2011 ONSC 1011, 2011 CarswellOnt 934 (Ont. S.C.J.).

[41] *Ibid.*, at para. 13 (Ont. S.C.J.).

[42] See *supra* note 35.

[43] *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, (*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 176, 1987 CarswellMan 272 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120 (S.C.C.); *Dempster v. Mutual Life of Canada* (1999), [2000] I.L.R. I-3748, 1999 CarswellOnt 3021 (Ont. S.C.J.); *Sawa v. Imperial Life Assurance Co. of Canada* (1994), 118 Sask. R. 194, 1994 CarswellSask 193 (Sask. Q.B.).

[44] *Traynor v. UNUM Life Insurance Co. of America* (2003), 65 O.R. (3d) 7, 2003 CarswellOnt 2144 (Ont. Div. Ct.); reversing [2002] I.L.R. I-4120, 2002 CarswellOnt 2156 (Ont. S.C.J.).

stigma and loss of dignity if unable to meet his financial obligations did not reasonably constitute irreparable harm. A similar result, though for different reasons, was reached by the British Columbia Supreme Court.[45]

In another case,[46] however, the Court determined that the termination of LTD benefits resulting in an insured's family, including a young child, living in poverty, constituted a loss of enjoyment of life which could not be compensated by monetary payment and thus met the test of irreparable harm. At least one Court has allowed an interlocutory mandatory injunction ordering benefits paid for the remainder of the "own occupation" period of disability.[47]

F. Privilege

When a claim is made for extra contractual damages, the question has arisen as to whether the insurer's conduct may be examined to the extent it must make solicitor-client communications available to the claimant. The argument is that this may show that the insurer did not seek legal advice when it should have or, even worse, disregarded legal advice when it denied the claim, but such arguments have been rejected by the courts.

At least one case has overthrown legal privilege on the grounds that the insurer sought the intervention of its lawyer in the decision to deny the claim, so that it waived privilege when it put its "state of mind" at issue.[48] The same court[49] also made a subsequent interlocutory decision that solicitor-client privilege could not be upheld. However, this was because the insurer had inadvertently waived its claim of privilege.

In a case[50] that examined a claims file which included notes from the in-house counsel, the insurer appealed from an order of a trial judge requiring it to produce on discovery its entire claims file arising from a prior action between the parties, including documents authored by its in-house counsel and other employees. In 1998, the insured had commenced action against the insurer for benefits owing under a LTD policy. Benefits were paid for just under two years before being terminated. The insurer ultimately reinstated LTD benefits and the action was settled. However, before settlement of the LTD coverage action was reached, the insured commenced a second action also arising from the termination of LTD benefits, alleging breach of the duty of good faith and fair dealing in the handling of his claim for benefits and claiming, in the second action, special and general damages as well as aggravated and punitive damages based on the insurer's "unwarranted, wilful and high-handed conduct" that was "carried on with conscious disregard" for the insured's rights.

At discovery, the insured's counsel asked for production of the in-house lawyer's file. The insurer refused to produce such file on the ground of privilege. The motions judge concluded that the legal privilege that would normally prevent production of the documents had been impliedly waived. The motions judge referred to waiver and held that the insurer "did allege that all employees acted in good faith and by making that allegation put its state of mind at issue." The motions judge further stated that the general pleading of the insurer that its employees acted in good faith put the "actions of the defendants and counsel at issue, including legal counsel" and it was therefore fair that the entire file be produced. The motions judge accordingly ordered the insurer to produce its entire file including all notes and emails with respect to the first action authored by the in-house counsel. The insurer was further ordered to produce the notes of a company litigation consultant and a memo prepared by an employee to assist the in-house counsel.

On appeal the insurer successfully argued that the motions judge erred in law in ordering the contested material be produced.

The Divisional Court ruled that in their view the motions judge "erred in making a blanket order for production of the entire claims file." The Divisional Court further ruled that the motions judge erred in law in finding that there was a waiver of privilege in this case, but "as there was not sufficient information before this court with respect to the content of the litigation file sought to be produced to determine whether any privilege applies to any specific

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45 *Hedstrom v. Manufacturers Life Insurance Co.* (2002), 2002 CarswellBC 2626, [2002] B.C.J. No. 2463 (B.C. S.C.).

46 *El-Timani v. Canada Life Assurance Co.*, [2001] I.L.R. I-3970, 2001 CarswellOnt 2336 (Ont. S.C.J.). See also *Poersch v. Aetna*, [2000] I.L.R. I-3816, 2000 CarswellOnt 216 (Ont. S.C.J.); leave to appeal refused (2000), 2000 CarswellOnt 1073 (Ont. Div. Ct.); affirmed (2000), 2000 CarswellOnt 5635 (Ont. Div. Ct.).

47 *Ausman v. Equitable Life Insurance Co. of Canada* (2002), [2002] O.J. No. 3067, 2002 CarswellOnt 4112 (Ont. S.C.J.); additional reasons (2002), 2002 CarswellOnt 4113 (Ont. S.C.J.).

48 *Samoila v. Prudential of America General Insurance Co. (Canada)* (2000), 21 C.C.L.I. (3d) 205, 2000 CarswellOnt 2569 (Ont. S.C.J.).

49 *Davies v. American Home Insurance Co.* (2001), [2001] O.J. No. 677, 2001 CarswellOnt 594 (Ont. S.C.J.); additional reasons at [2001] I.L.R. I-3930 at 6791, 2001 CarswellOnt 810 (Ont. S.C.J); reversed (2002), 2002 CarswellOnt 2225 (Ont. Div. Ct.); additional reasons at (2002), 2002 CarswellOnt 3458 (Ont. Div. Ct.). See also *Dexter Estate v. Economical Mutual Insurance Co*., [2007] I.L.R. I-4623, 2007 CarswellNB 178 (N.B. Q.B.) for more analysis of the waiver of privilege issue.

50 *Smith v. London Life Insurance Co.* (2007), 2007 CarswellOnt 269, [2007] O.J. No. 189 (Ont. Div. Ct.).

document contained in the file the matter would be best dealt with by the making of an order directing the insurer to deliver an affidavit of documents in which the documents over which privilege is claimed are individually listed and the grounds for the privilege are articulated and particularized. Once such an affidavit of documents is produced any necessary decision about the privileged nature of documents can be more properly determined." The Divisional Court was of the view that

> . . . a *prima facie* showing of actual misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed requires something more than merely an allegation in the pleading.

A collateral contest has now also arisen as to whether questions surrounding the insurer's conduct and financial worth should be allowed before the court which has found the insurer guilty of bad faith, lest this prejudice a jury. The alternative suggestion is that the trial should be bifurcated so that the merits of the contractual breach dispute are determined first, and that the issues of bad faith be postponed to be heard separately, only if it becomes necessary. Currently, there is mixed law on the issue of severing the trial into separate components.[51]

G. Suing Claims Staff Personally

The 1990s witnessed a trend where life and health insurance company LTD claims staff saw themselves personally named as defendants in court actions over the denial of benefits.

Three cases have touched on this issue.

In *Syrtash v. Provident Life & Accident Insurance Co.*[52] the insured had been covered by a disability policy issued by Provident Life, but had been denied benefits on the basis of his non-disclosure of a pre-existing condition and of a prior insurance application. The insured sued both Provident and several claims department employees of Provident, claiming that they were liable for his loss of coverage, having breached the duty of fiduciary care owed to him.

The action against the employee defendants was dismissed. Absent any allegation of personal fraudulent misrepresentation or voluntary assumption of liability or of a personal special relationship that resulted in a duty of care, there could be no basis for an action against the individual employees in negligence.

In *Spiers v. Zurich Insurance Co.*,[53] the insured brought an action in tort against his insurer and against individual adjusters in tort for payment of statutory accident benefits and punitive damages. The individual adjusters brought an action to have the claims against them dismissed as disclosing no reasonable cause of action. The motion in *Spiers* was denied. The adjusters owed a duty of good faith to the insured and could theoretically be held liable for breach of duty. However, this conclusion has been weakened by the opposite conclusion found in *Burke v. Buss*.[54]

See also *Standard Life Assurance Co. v. Elliott*,[55] where Standard Life brought action against an insured for LTD monies mistakenly overpaid. The insured added numerous employees of Standard Life as third parties. The third parties' application to have the action dismissed as against themselves was allowed with costs awarded on a substantial indemnity scale. Adding such employees as third parties was a tactical ploy only, in part to gain multiple discoveries.

Note a New Brunswick case[56] that allowed individual adjusters to be personally named.

H. Proper Forum

In a case[57] where the insured brought a claim in Small Claims Court for four months' worth of LTD benefits, which was below the monetary jurisdiction of the Court, it was ordered that the case should be moved to the Supreme Court with full examinations for discovery, since it would be an abuse of process to leave the matter in Small Claims Court where there was the potential for 69 separate Small Claims Court actions if the insured remained disabled to age 65.

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[51] *Wonderful Ventures Ltd. v. Maylam* (2001), 31 C.C.L.I. (3d) 298, 2001 CarswellBC 1516 (B.C. S.C. [In Chambers]) upheld bifurcation. *Contra, Sempecos v. State Farm Fire & Casualty Co.* (2001), 2001 CarswellOnt 4384, [2001] O.J. No. 4887 (Ont. S.C.J.); affirmed (2002), 2002 CarswellOnt 3991 (Ont. Div. Ct.); affirmed (2003), 2003 CarswellOnt 2734 (Ont. C.A.). See also Chapter 13, Bifurcation.

[52] *Syrtash v. Provident Life & Accident Insurance Co.* (1996), 1996 CarswellOnt 1845, [1996] O.J. No. 1782 (Ont. Gen. Div.).

[53] *Spiers v. Zurich Insurance Co.* (1999), 14 C.C.L.I. (3d) 21, 1999 CarswellOnt 3189 (Ont. S.C.J.); leave to appeal refused (1999), 1999 CarswellOnt 4172 (Ont. S.C.J.).

[54] *Burke v. Buss* (2002), 2002 CarswellOnt 4381, [2002] O.J. No. 2938 (Ont. S.C.J.).

[55] *Standard Life Assurance Co. v. Elliott*, 2007 CarswellOnt 3236, 50 C.C.L.I. (4th) 288 (Ont. S.C.J.).

[56] *Walsh v. Nicholls*, 2004 CarswellNB 396, 2004 CarswellNB 349, 273 N.B.R. (2d) 203 (N.B. C.A.).

[57] *Paul Revere Life Insurance Co. v. Herbin* (1996), [1997] I.L.R. I-3321, 1996 CarswellNS 101 (N.S. S.C.).

I. Summary Judgment

As evidenced by a 2013 Ontario decision,[58] it would be a rare disability case which allowed a motion for summary judgment when the issue at play was whether total disability existed, a question requiring medical and other witnesses.

J. ASO Plans

ASO (Administrative Services Only) plans involve group "insurance" situations where the STD or LTD plan is funded entirely by the employer and payments flow to disabled employees from the employer. The insurer company's role involves receiving, considering and adjudicating claims presented to it as administrator and making recommendations to the employer regarding the payment of benefits under the plan.

In such situations it has been held that the insurer is not a proper defendant in an action over the denial of insurance benefits.[59] However, it has also been held that an insurer acting as an administrator can be held negligent in the manner in which it adjudicated the claim, which in turn could give rise to a bad faith claim involving punitive and aggravated damages.[60]

Note that the prevalence of ASO plans is likely to lessen in future.

When Nortel filed for bankruptcy in 2009, approximately 400 employees were receiving LTD benefits. Nortel's group benefits were self-insured. As a result of the bankruptcy filing, these employees lost their disability benefits.

As a result of this, the Ontario provincial budget that was introduced after the June 2014 election brought with it a proposal for mandatory LTD insurance. This falls under a proposed piece of legislation, Bill 14, known as the *Building Opportunity and Securing Our Future Act*,[61] Schedule 14 of which would amend the *Insurance Act*. The amendment (not in force at date of publication) would make it so that employers cannot provide group LTD benefits without having them payable under a contract of insurance undertaken by a licensed insurer.

The Bill is similar to legislation from 2012[62] that made it mandatory for federally regulated employers to obtain insurance for any LTD plans they offer employees.

K. Privacy

The *Personal Information Protection and Electronic Documents Act*[63] (PIPEDA) and comparable legislation in Alberta, B.C. and Quebec[64] apply such that in each and every province where insurers carry on business in Canada there are substantially similar rules governing the collection, use, disclosure and retention of personal information in the course of commercial activity, including the activity of carrying on the insurance business. These private sector privacy laws have impacted operationally on insurers. They have also impacted on the litigation process, in two ways in particular.

These private sector privacy laws establish a right in individuals to access the personal information held about them by organizations. This right of access is not absolute. There is an important exception such that access need not be granted to information that is subject to solicitor-client or litigation privilege. However, some of the information that may typically be present in an insurance claims file may not be subject to such a legal privilege. If it is identifiable to the claimant and the claimant asks for the information, access to the information must be granted to the extent that the information is about the claimant. Consequently, prior to commencement of litigation, claimants can now gain access to all or part of the insurer's files outside of the formal discovery process.

In *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*[65] the Supreme Court of Canada held that the Privacy Commissioner of Canada does not have the right to access solicitor-client documents, even for the

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58 *Tropper v. RBC Life Insurance Co.*, 2013 CarswellOnt 6275, 22 C.C.L.I. (5th) 100 (Ont. S.C.J.).

59 *Uy v. Great-West Life Assurance Co.* (2003), [2004] I.L.R. I-4261, 2003 CarswellOnt 5049 (Ont. S.C.J.); *Palk v. Canada Life Assurance Co.* (1994), 157 N.B.R. (2d) 70, 1994 CarswellNB 55 (N.B. Q.B.). See also *Telus Communications Inc. v. T.W.U.* (2008), 176 L.A.C. (4th) 316, 2008 CarswellNat 3987 (Can. Arb. Bd.); affirmed 2010 CarswellBC 1325 (B.C. S.C.); and *Seaward v. Blue Cross Life Insurance Co. of Canada*, 19 C.C.L.I. (5th) 208, 2013 CarswellNfld 92 (N.L. T.D..).

60 *Bagley v. Mutual Life Assurance Co. of Canada* (2000), 2000 CarswellOnt 347, [2000] O.J. No. 390 (Ont. S.C.J.).

61 S.O. 2014, c. 7.

62 *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; see K. Privacy *infra*.

63 S.C. 2000, c. 5.

64 *Personal Information Protection Act*, S.B.C. 2003, c. 63; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; and *An Act respecting the Protection of Personal Information in the Private Sector*, R.S.Q. c. P-39.1.

65 *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, [2008] 2 S.C.R. 574, 2008 CarswellNat 2244, 2008 CarswellNat 2245 (S.C.C.).

limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a statutory official to "pierce" the privilege and PIPEDA does not contain such clear and explicit language. Consequently, in response to a request for access to personal information when access is not granted due to a claim of privilege, the Privacy Commissioner does not have jurisdiction to review an organization's claim of privilege.

Under PIPEDA the collection and use of personal information must be collected for purposes that a reasonable person would consider are appropriate in the circumstances.[66] The capturing of images of identifiable individuals through covert video surveillance is considered to be a collection of personal information. Consequently, in the view of the Privacy Commissioner of Canada, the use of covert surveillance in the private sector is subject to certain limitations and organizations that are contemplating the use of covert video surveillance should be aware of the criteria they must satisfy in order to collect, use and disclose video surveillance images in compliance with PIPEDA.[67]

In *Ferenczy v. MCI Medical Clinics*[68] it was held that in the context of an allegation of medical malpractice, there was implied consent to the collection of personal information about the plaintiff to the extent relevant to defend against the plaintiff's allegations. For this and other reasons, it was concluded that video surveillance evidence of the plaintiff was not collected, recorded, used or disclosed in contravention of the Act. Further, and in any event, it was determined that the video surveillance evidence was relevant and its probative value exceeded its prejudicial effect and therefore the evidence was admissible at trial in any event.

There remains the issue of the constitutional validity of PIPEDA insofar as it does in many respects appear to relate to property and civil rights in the provinces and the administration of justice. Insurers have yet to forcefully challenge the federal privacy statute on constitutional grounds. However, the issue is likely to make its way through the courts. See *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*.[69]

An emerging issue regarding privacy issues concerns whether insurers can compel production of pages from an insured's Facebook account. There are conflicting cases on this issue.[70]

L. Adverse Cost Insurance

A relatively recent phenomenon, this type of insurance policy is purchased by a plaintiff in a lawsuit to provide protection in the event of a judgment for costs against the plaintiff if he or she is unsuccessful at trial. A recent case[71] considered whether the plaintiff's premium for such insurance was a compensable disbursement. The Court did not accept that such a premium should be reimbursed by the defendants, noting that it would not be compensable as a taxable disbursement and that the premium appeared to only be payable if the case was successful. Further, it was noted:

> Existence of the policy may well provide comfort to the plaintiff, it is however an expense that is entirely discretionary, does nothing to advance the litigation, and may in fact even act as a disincentive to thoughtful, well-reasoned resolution of claims. I do not think it fair and reasonable that an insurer be expected to cover the disbursement for this payment of premiums.[72]

Another recent decision[73] considered whether a plaintiff was required to disclose a policy of adverse cost insurance. The defendant sought disclosure of whether such a policy had been taken out for the benefit of the plaintiff; the plaintiff refused to answer whether he had adverse cost insurance or not. Rule 30.02(3) was specifically considered, which states:

> 30.2 (3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,
>
> (a) to satisfy all or part of a judgment in the action; or

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66 PIPEDA, *supra* note 64, s. 5(3).

67 See Guidance on Covert Video Surveillance in the Private Sector (Office of the Privacy Commissioner of Canada).

68 *Ferenczy v. MCI Medical Clinics* (2004), 2004 CarswellOnt 1706 (Ont. S.C.J.).

69 *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*, 2009 NBCA 5, 2009 CarswellNB 16, 2009 CarswellNB 17 (N.B. C.A.).

70 *Leduc v. Roman* (2009), 2009 CarswellOnt 843, [2009] O.J. No. 681 (Ont. S.C.J.), production ordered. *Schuster v. Royal & Sun Alliance Insurance Co. of Canada* (2009), 2009 CarswellOnt 6586, [2009] O.J. No. 4518 (Ont. S.C.J.), production declined. See also Chapter 9 regarding social media.

71 *Markovic v. Richards*, 2015 ONSC 6983, 2015 CarswellOnt 17302 (Ont. S.C.J.).

72 *Ibid.*, at para. 7.

73 *Abu-Hmaid v. Napar*, 2016 ONSC 2894, 2016 CarswellOnt 6769 (Ont. S.C.J.).

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

The Court was of the view that the existence of adverse cost insurance (viewed as "protection") was relevant to the resolution of personal injury disputes and ought to be disclosed at the same stage as disclosure by a defendant as required by Rule 30.02. However, the Court was not convinced that the specifics of the policy or carrier were of any probative value in the case before it, leaving unanswered whether there may be factual situations that may justify the coverage quantum details being disclosed in other cases.

The Court also noted that the difference between a policy that provided "indemnification" and one that "insures" against an adverse cost judgment is "a distinction without a difference",[74] thus the policy providing adverse cost coverage ought to be subject to the disclosure requirements.

M. Expedited Trial

In a 2013 B.C. decision,[75] the insured was employed as an office manager for seven years before having a nervous breakdown and being diagnosed with disabling depression, anxiety and panic attacks. The insured was approved for disability benefits in 2006, but benefits were terminated in 2013. An independent examination psychiatric assessment report stated: "if [the plaintiff] were motivated, I see no reason why she could not return to work in the near future".[76] The insured brought action, and a trial date was set. The insurer alleged that the insured unilaterally set a trial date, and adjournment was required because the insurer did not have expert evidence available to it for that date, specifically evidence of psychiatric and vocational rehabilitation experts. The insurer brought application for an order that trial be adjourned and for an order that fast track litigation cease to apply to the action. Such application was dismissed. Given the size of the claim and the evidence the plaintiff intended to call, there was no reason why the matter could not be concluded in three trial days. If the insurer were not responsible for consequential losses and the insured, by virtue of excessive cost or length of proceedings, were to lose her house, she would have no recourse in damages, which added force to having the matter subject to fast track rules. The insured was impecunious and in precarious financial situation.

N. Prejudice

The issue of whether the insurer has been prejudiced by a negligent or dilatory action (or non-action) by an insured is a common theme in LTD cases. With some exceptions, unless the insurer can establish prejudice courts will generally find for the insured when dealing with technical defences.

For example, in *Dube v. RBC Life Insurance Co.*,[77] the Court found there was no prejudice to the insurer by a seven-month delay in providing notice of claim since extensive medical evidence could be obtained from the accident benefits file. (See Chapter 11 for a fuller analysis of *Dube*.) A statutorily similar result was reached by the court in *Bradley v. Sun Life Assurance Co. of Canada*.[78]

Similarly, in *Toor v. Aetna Life Insurance Co. of Canada*,[79] the insured was in motor vehicle accidents, sued in tort and also brought action against his insurer for LTD benefits. The insured settled his tort claims five years after bringing action against the insurer ("first phase"). The insured's counsel reported himself to the Lawyers' Insurance Fund because he settled the insured's claims on the basis of a misconception. Counsel believed the LTD policy would pay benefits until the insured turned 65, but the original policy, not initially disclosed by the insurer, stated the insured was entitled to only two years of benefits. Some, but not much, activity occurred in next four years ("second phase"). The LTD insurer brought an application to dismiss the insured's claims for want of prosecution. The application was dismissed. The delays were excusable. The LTD insurer acquiesced to delay in the first phase out of self-interest. The insurer felt that settlement of the tort claim could reduce any benefits it had to pay to the insured. In the second phase, matters were moving (albeit slowly), due to involvement of the Fund. The Fund was involved as a direct result of the insurer's late disclosure of the original policy. If delays were not excusable, there was no prejudice arising to the insurer. If there was prejudice to the insurer, the balance of justice weighed in favour of the insured.

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74 *Ibid*., at para. 28.

75 *Briscoe v. SSQ, Life Insurance Co.*, 2013 CarswellBC 3404, 27 C.C.L.I. (5th) 318 (B.C. S.C.).

76 *Ibid.*, at para. 13.

77 *Dube v. RBC Life Insurance Co.*, 2015 ONSC 77, 2015 CarswellOnt 69 (Ont. S.C.J.); affirmed 2015 CarswellOnt 14097 (Ont. C.A.).

78 *Bradley v. Sun Life Assurance Co. of Canada*, 2015 CarswellOnt 556, 44 C.C.L.I. (5th) 13 (Ont. S.C.J.).

79 *Toor v. Aetna Life Insurance Co. of Canada*, 2011 CarswellBC 1300 (B.C. S.C.).

This is not to say that an insurer can never establish prejudice. In *Savundranayagam v. Sun Life Assurance Co. of Canada*,[80] a status hearing was convened in an LTD lawsuit, and the plaintiff had the onus to provide an explanation for the delay in moving the lawsuit forward. The plaintiff was unsuccessful as no explanation was provided as to why no steps had been taken over a 15-month period to pursue the action. Further, there was prejudice to Sun Life as there was no cogent evidence as to the availability of the plaintiff's medical records. The plaintiff had never even completed and submitted an application for LTD prior to the commencement of the action.

[80] *Savundranayagam v. Sun Life Assurance Co. of Canada*, 2007 CarswellOnt 8523 (Ont. S.C.J.); affirmed 2008 CarswellOnt 6255 (Ont. Div. Ct.).