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ERIC'S LTD UPDATE

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Comments: How many of these updates now have I said words to the effect "vaccines are coming, we are nearly out of this pandemic?" So even though vaccines have clearly ramped up, that is all I will say on this topic and maybe that will bring us all good luck.

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(A) LIMITATIONS PERIOD/LATE NOTICE OF CLAIM

(i) *Kumarasamy v. Western Life Assurance Company,* 2021 ONSC 337 (OSCJ)

Summary

Involved a motion for summary judgement by Western Life to dismiss the plaintiff's ("K") action as being statute-barred under the *Limitations Act,* 2002, and alternatively because proper notice of claim was not made in accordance with the terms of the LTD policy.

K was injured in a car accident on August 25, 2014 and the next day retained a law firm ("L) to represent him for his tort and AB claims. K's sister was a legal assistant at L and emailed K's employer for a notice of LTD claim form. Such notice of claim form was sent to K's sister on December 18, 2014.

Under the Policy notice of claim was due by February 26, 2015. Notice of claim was sent by K to Western Life on March 9, 2015. On March 11, 2015 Western Life wrote K requesting that disability application forms be completed. Such letter did not list K's apartment number and K attested that he never received such letter.

Western Life sent 3 follow-up letters to K:

- April 6, 2015 following up on the March 11, 2015 letter.
- April 28, 2015 advising that K's file would be closed if the requested information was not received within 30 days.
- June 2, 2015 advising that K's LTD file had been closed.

K attested that he had only received the June 2, 2015 letter. K formally retained law firm L to represent him for his LTD claim on February 10, 2017 and L corresponded with Western Life and

provided medical documentation throughout June of 2017 which Western Life agreed to review "though by doing so Western Life is not waiving our right to rely on any statutory or Policy provision including any time limitations."

Western Life sent L a copy of the Group LTD Policy in June 2017 and the lawsuit was issued June 28, 2019.

In dealing with Western Life's argument that K's action was statute-barred the Court relied on C*larke v. Sun Life*, 2020 ONCA 11 and the four elements a court must examine cumulatively to determine when a claim was "discovered" pursuant to section 5(1) of the Limitations Act as the earlier of:

a) The day a person first knew:
   (i) That injury or loss had occurred,
   (ii) That injury was caused or contributed to by an act or omission,
   (iii) That the act or omission was that of the person against whom the claim is made,
   (iv) That a proceeding was the appropriate remedy, and

b) The day on which a reasonable person…ought to have known of the matters referred to in clause (a).

The Court rejected Western Life's argument that K ought to have discovered his claim on June 2, 2015 when he received the letter advising that K's file was being closed, or alternatively letters sent to law firm L in November of 2016 and in May of 2017 since the language would lead a reasonable person to believe that the claim had not yet been denied. For example, the May 2017 letter stated in part "before a final determination can be made on your claim."

Rather, the Court found that the first unequivocal denial letter from Western Life was on June 28, 2017 and as the lawsuit was issued June 28, 2019 it was not statute barred.

Commentary

What themes might be constructed from *Kumarasamy* and other case law re late actions and late notice of claim?:

- Successful motions for summary judgement seem challenging for insurers as shown by *Kumarasamy, Nguyen v. SSQ (*see page 151 in Disability Insurance Law in Canada Second Edition "**DILIC**"), and *Clarke v. Sun Life* (motion for summary judgement unsuccessful but Sun Life was successful on appeal).

- Late notice of claim arguments are highly unlikely to succeed where there exists medical evidence from the AB or tort files which the LTD insurer can access and thus there is no prejudice to the LTD insurer (*Kumarasamy* and *Dube v. RBC Life* (page 151 in **DILIC**).

- A plaintiff with limited English skills (such as K) further complicates matters for insurers.

- The sooner a plaintiff receives a copy of the actual group policy the better the chances of an insurer succeeding on a late claim argument (*Kumarasamy* and *St. Laurent v. Sun Life (*page 179 in **DILIC***).* Incredibly to Eric, as recently as 6 years ago, I have heard insurers argue that as the policy is a group policy it "belongs" to the employer and they will not provide a copy directly to an insured even when requested but instead will direct such insured to the employer. The most likely result of taking such a position would seemingly be a possible extracontractual damages award against such insurer.

FINAL COMMENTS:

- *The Kumarasamy* decision is under appeal.

- While in *Kumarasamy* the issue was muddied by Western Life not putting K's apartment number on correspondence and continuing to correspond with K even after law firm L had been officially (K's sister's assistance not counting) retained, it is curious how many letters the Court found that K did not receive. This appears somewhat counter to life insurance case law where there seems more of a presumption that letters sent by an insurer regarding late premiums are received by the insured.

- And since I have crossed over into life insurance law it seems only fair to give the last word to the late David Norwood (author of 3 editions of Life Insurance Law in Canada and co-author with me on the original edition of **DILIC**)

- Commenting on relief from forfeiture (which is inextricably linked to late notice of claim arguments) David Norwood wrote:

  > *Relief from forfeiture has been granted in clearly unjustified situations… and has been refused in circumstances which seem to be very similar to those cases where relief has been allowed.*

- This update will not, however, examine relief from forfeiture in detail. If interested, the reader should refer to *Saskatchewan River Bungalows v. Maritime Life* (1994) 2 S.C.R. 490 and *Williams v. Paul Revere Life* (1997) 34 O.R. (3d) 161 (OCA).

(B) TAXABILITY OF LTD SETTLEMENTS

(i) *Tsiaprailis v. Canada,* (2005) 1 S.C.R. 113 (S.C.C.)

Avoid the taxman…

Forgive me if the introductory comments below states the obvious to experienced LTD counsel. However, this update goes to a large number of counsel with differing levels of experience.

Settling an LTD lawsuit which involves taxable LTD benefits on a lump sum basis for past and future benefits where the portion for future benefits can be deemed non-taxable is of course a huge financial benefit for any plaintiff. (For a full analysis of this issue please refer to Chapter 12 in **DILIC**). Making the settlement portion of future LTD benefits non-taxable also helps the parties settle what (to use the words of Justice Evans in *Siftar v. R*.) "are difficult cases to resolve." Using a T1198 to spread out the LTD arrears over the years representing past benefits also helps reduce the tax hit to plaintiffs.

Recently, I have heard some insurers discuss how, if a taxable LTD lawsuit proceeded to trial and benefits were awarded, the insurer would simply issue a T4A representing all benefit arrears. This would of course result in a large tax hit to the plaintiff in the year of the trial judgement and struck me as being an untenable position. So I decided to try to find an answer.

The background to the taxability of LTD settlements is set out in detail at pages 158 to 161 in **DILIC**. The most important cases are *Siftar v. R. (2003),* 2003 D.T.C. 5243, where a very strong dissent argued that the portion of any settlement representing future benefits should not be considered periodic payments but should be deemed non-taxable in part *to "help settle what are already difficult cases to settle,"* and *Tsiaprailis v. Canada,* (2005) 1 S.C.R. 113, where the Supreme Court of Canada finally resolved the issue in favour of deeming future LTD benefits non-taxable (albeit in a 4-3 decision with a strong dissent).

As a result of *Tsiaprailis,* any mediation involving taxable LTD benefits sees plaintiffs trying to minimize the portion for taxable arrears and maximizing the amount for non-taxable futures. To help achieve a settlement, insurers will usually do what they can to oblige, though only doing what they feel comfortable would survive an audit by CRA.

But if the matter cannot be settled, and the plaintiff succeeds at trial, what happens re tax? What if the insurer issued a T4A representing all taxable benefit arrears from the date of their termination to the date of trial judgement? It seems unfair to tax a plaintiff what could easily be 6 or 7 years of LTD benefit arrears in the year of a trial judgement.

I canvassed over 60 experienced LTD counsel, both plaintiff and defence. Perhaps not surprisingly nobody had ever taken a matter to judgement on the above facts and so I know of no counsel who can state definitively how CRA might deal with this situation if an insurer issued a T4A for the entire LTD benefit arrears amount. I did receive quite a few ideas from counsel, including:

- Have the plaintiff seek a gross-up of damages at trial (and tender expert evidence to quantify such tax hit damages) on the assumption that a T4A being issued would place a heavy tax burden on the plaintiff.

- Have the Statement of Claim seek an order that the insurer be liable for any extra taxes found payable by the plaintiff based on a T4A being issued.

- Ask the trial judge to order that the insurer must issue a T1198 for LTD arrears.

- Ask the trial judge to specify in their judgement the yearly breakdown of arrears which the plaintiff could then present to CRA to obtain tax relief.

I called CRA in an attempt for clarification but after many false leads gave up. The closest I came to an "official" answer comes from a good friend ("C") who is a retired Revenue Canada auditor.

From C's reading of a qualifying retroactive lump-sum payment ("QRLSP"), LTD arrears paid as a result of a trial decision would meet the definition of QRLSP and would require the insurer to issue a T1198.

Two senior and very highly respected in-house counsel told me that if they faced this situation after a trial loss they would inform their claims department that a T1198 had to be issued.

In light of this it would seem unnecessary for plaintiff counsel to seek a gross-up for tax "damages" or to obtain an expert report on what such damages might be.

So sorry no definitive answer for the reader. Only a most likely answer that a T1198 would need to be issued. While I no longer litigate only mediate, if it were me preparing for trial it would certainly seem prudent for opposing counsel to reach agreement on the issuance of a T1198 prior to giving opening statements.

ACKNOWLEDGEMENTS

Eric would like to thank Heather Gastle of Bennett Gastle for sending me the *Kumarasamy* decision, my retired tax auditor friend C, and the countless counsel who provided their comments on the taxability issue.