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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:

While COVID-19 seems to be becoming somewhat less of an impact on our lives its immediate legacy may include less case law as I know of only one relevant case for this update. However, to make things more worthwhile I am also including in this update draft Chapter 13 from *Disability Insurance Law in Canada, Third Edition*, which is due to be published in early 2023. For those readers who have the Second Edition of my book you will want to focus on the new parts of this Chapter on Mental Distress Damages, Recent Developments and Where Are We Now?

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- A) Misrepresentation – Materiality –(i) *Estate of Kareem Watson v RBC Life*

- B) *Disability Insurance Law in Canada, Third Edition* –(i) Draft Chapter 13, Extra-Contractual Damages

A) Misrepresentation - Materiality

- (i) *The Estate of Kareem Watson v RBC Life, 2021 ONSC 5305*

A recent Ontario decision highlights the fatal consequences of an insurer failing to prove materiality. In *The Estate of Kareem Watson v RBC Life, 2021 ONSC 5305* the life insured (“W”) answered “no” to the Application question regarding being found guilty of any criminal offences in the past 5 years or had any charges pending. W had in fact been charged with human trafficking and assault 12 months prior to the application date and such charges were outstanding on the date of the application. 8 days following completion of the application W pleaded guilty of assault and received a suspended sentence and probation for 12 months. An Underwriting Manager at RBC Life had opined in a Memorandum (“the Memo”) that “based on the criminal history provided, this policy would not have been issued had the history been fully and accurately declared. Coverage would have been denied.”

The Court ordered the \$250,000 in life insurance paid since while W had a positive obligation to disclose all material facts and had misrepresented his criminal history, RBC Life did not prove materiality:

“In this case to establish materiality, RBC Life relied on an unsworn, unsigned, two-page internal memo...Given the resources available to it to defend this application, I am surprised that RBC Life chose to rely exclusively on the Memo to prove materiality. The Memo reads like it is: a hastily written, bureaucratic missive created for the sole purpose of providing internal justification for denying the claim. It was what lawyers call a “cover-your-butt” memo...The Memo is entirely conclusory in nature and offers no supporting analysis or clear information about how the pending criminal charges were material...There is no information about RBC Life’s eligibility policies, the practices of comparable insurers, or relevant actuarial information. Even counsel for RBC Life admitted that it is unclear whether (the Memo’s author) had properly confined her analysis to risks associated with the pending criminal charges, which the parties agree was the only fact known to W on the date of the application.

The conclusory nature of the Memo distinguishes this case from Fernandes v. RBC Life Insurance Company 2008 CANLII 34279 (ONSC) at paras. 24-25. In that case the RBC Life employee “detailed her work and thought processes”, and referred to “company guidelines, charts and formulae”, and underwriting guidelines and manuals. She clearly articulated the increased risks of morbidity or disability based on the undisclosed fact. Her conclusions were supported by an expert in insurance underwriting...”

B) Disability Insurance Law in Canada, Third Edition

- (i) Draft Chapter 13, Extra-Contractual Damages

As this chapter is too large to recreate in this update, it is attached as a separate attachment to this email.

ACKNOWLEDGEMENTS

Thanks to David Fenicky at Davies Howe LLP for forwarding me the *Estate of Kareem Watson* decision.

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.