schjerning
mediations

P.O. Box 15343
Queensway High P.O.
Toronto, ON
M8Y 0B4
eric@schjerningmediations.com
416-236-9282

**ERIC'S LTD UPDATE**

**ISSUE 14- WINTER 2022**

Eric Schjerning is a mediator with 10 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,* with a third edition on the way.

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

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**Eric Schjerning** **Schjerning Mediations Ltd.**

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**WHAT'S NEW AT SCHJERNING MEDIATIONS?**

- In December 2021, Eric was made a member of the **Canadian Academy of Distinguished Neutrals**.
- Eric offers DocuSign if needed by the parties to help paper their settlement.
- As of the end of December 2021 (and following a very good 4th quarter of mediated settlements), Eric's lifetime mediation settlement rate is 95%.
- Work continues on the Third Edition of *Disability Insurance Law in Canada*. If you know of a relevant case which is not in the Second Edition please email Eric.

**INDEX**

**(A) LATE NOTICE OF CLAIM**

*(i) Smith v. Sun Life Assurance Company of Canada*

*(ii) Halladay v. Manufacturers Life Insurance Company*

**(B) LIMITATIONS PERIOD DEFENSE**

*(i) Kumarasamy v. Western Life Insurance Company*

**(C) EXTRA CONTRACTUAL DAMAGES**

*(i) Greig v. Desjardins Financial Security Life Insurance Company*

## (A) LATE NOTICE OF CLAIM

(i) *Smith v. Sun Life Assurance Company of Canada*, 2021 ONSC 7109 (O.S.C.J.)

Sun Life brought a motion for summary judgment alleging failure to submit a formal LTD application constituted non-compliance with the contract and that relief from forfeiture was not available.

The plaintiff went off work in December 2019 and submitted a claim for STD benefits to Sun Life in April 2020. The following key dates then ensued:

- July 22, 2020. Letter from Sun Life denying the STD claim.
- July 28, 2020. Plaintiff's counsel writes Sun Life advising of their being retained "with respect to the plaintiff's disability claim."
- June 12, 2020. The plaintiff's LTD entitlement begins.
- August 13 and September 28, 2020. The plaintiff sends Sun Life additional medical information.
- September 10, 2020. Deadline to submit formal LTD claim.
- September 28, 2020. Plaintiff's APS submitted.
- October 29, 2020. Statement of Claim issued.

The Court held that there had been imperfect compliance with Sun Life's policy. Sun Life was already aware of the nature of the plaintiff's alleged disability, having previously reviewed and adjudicated on a prior STD claim (also for depression) less than a year prior to the claim at issue, and Sun Life's in-house psychiatrist had conducted two file reviews. The Court questioned whether Sun Life would have taken a different position had a formal claim been submitted, and the late notice of claim argument was "*quite technical and crossing over into the world of gotcha litigation*."

Also, and more importantly, the APS submitted by the plaintiff's physician on September 28, 2020 (or 18 days after formal notice of claim was due) was on a pre-printed Sun Life form providing that the claim was for LTD benefits. Accordingly the Court found that the plaintiff's failure to submit a formal LTD proof of claim form was imperfect compliance, that his claim could be subject to relief

from forfeiture, and that the three factors for granting relief from forfeiture (the conduct of the insured; the gravity of the insured's breach; and the disparity between the property forfeited and the damages caused by the insured's breach) had been met, and Sun Life's motion for summary judgment was dismissed.

(ii) *Halladay v. Manufacturers Life Insurance Company*, 2020 ONSC 2802

Manulife brought a motion for summary judgment to dismiss claims for STD and LTD benefits since the Statement of Claim was commenced after the contractual limitation period set out in the insurance policies and since no formal LTD application form had ever been submitted.

The plaintiff suffered from psychiatric issues, submitted a STD claim and was paid one month of STD benefits. The plaintiff dealt with Manulife through 3 appeals of her STD claim, repeatedly provided Manulife additional medical information, and her union (OPSEU) wrote to Manulife asking that Manulife consider the letter as the plaintiff's application for LTD benefits.

In dismissing Manulife's motion the Court wrote:

> "As noted in *Wiles,* circumstances where **no** medical information is provided is distinct from cases where the insurance company has received extensive medical briefs regarding the plaintiff's condition. Moreover, and as was noted *in Dube v. RBC Life Insurance Company,* the defendant's prejudice argument cannot be sustained in circumstances where it has itself failed to take any step to request a medical examination or assessment from the time it received notice of the claim. The defendant cannot create prejudice by its own failure to do something that it reasonably could or ought to have done."

## (B) LIMITATION PERIOD DEFENSE

(i) *Kumarasamy v. Western Life Assurance Company*, 2021 ONCA 849

In a motion decision reported on in Eric's Fall 2021 Update (and available on the website for Schjerning Mediations where readers can find all of the pertinent facts and key dates) the motion judge dismissed Western Life's motion for summary judgement since the judge did not find the plaintiff had known of his possible claim for LTD benefits (even though the plaintiff's sister was a law clerk at the law firm representing the plaintiff in his tort and accident benefits claims).

Writing for the Ontario Court of Appeal, Justice Nordheimer tore apart the reasoning of the motion judge and allowed Western Life's appeal. Since this decision will set the law for Ontario Limitations Act battles in the years to come the most important of Justice Nordheimer's findings are recreated verbatim below:

> [23] As I shall explain, the motion judge erred in her analysis of the central question. Section 5(1) of the *Limitations Act, 2002* requires consideration of when the plaintiff ought to have known four things: (i) that the injury, loss or damage had occurred, (ii) that the injury, loss or damage was caused by 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, and (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

The subsection then requires a determination of the day when a "reasonable person" first ought to have known of these matters. A claim is discovered, within the meaning of the *Limitations Act, 2002*, on the earlier of these two dates.

[24] Of importance as well is section 5(2). It provides a statutory presumption regarding the state of knowledge of a person with respect to the requirements set out in s. 5(1). Specifically, s. 5(2) reads:

A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

The section is a statutory codification of the requirement that an insured person must act with due diligence in pursuing any claim: *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at paras. 42-43.

[25] In this case, the respondent knew of his injuries at the time of the accident. At the same time, he knew that he was covered by his employer's long-term disability insurance provided by the appellant. Indeed, he knew enough, with the help of his sister, to ask for an LTD claim form from the appellant, which the appellant provided. By June 7, 2015, the respondent knew that the appellant had closed its file. The respondent had to know, from that fact alone, that his claim for coverage was in jeopardy. Further, from this time forward, the respondent had lawyers representing him with respect to his injuries and, more specifically, with respect to his accident benefits. He therefore had access to legal advice and assistance if he chose to use it.

[26] Yet, it is almost a year and a half later before the respondent speaks to his lawyers about his LTD claim. Throughout this time, the respondent knows that he is not receiving any LTD payments from the appellant. The respondent's lawyers are told that the file has been closed and they have discussions with the respondent about his claim. Notwithstanding those circumstances, the respondent does not expand his lawyers' retainer to include the LTD claim until February 10, 2017.

[27] Thereafter, the lawyers engaged in discussions with the appellant. Both the lawyers and the respondent had to know that there was an issue about whether the appellant was going to agree to coverage. Indeed, by May 10, 2017, the appellant expressly told the respondent's lawyers that by engaging in a review of the respondent's claim, "we are not waiving our right to rely on any statutory or Policy provision including any time limitations". By this point, the alarm bells ought to have been ringing loudly, and yet the claim is still not commenced until June 2019.

[28] The central errors made by the motion judge are her conclusion regarding when the respondent ought to have known that a loss occurred and her conclusion that the required element of discoverability, found in s. 5(1)(a)(iv), that "a proceeding would be an appropriate means to seek to remedy" the injury, loss or damage, was only satisfied when the appellant clearly and unequivocally denied the respondent's claim. The motion judge does not cite any authority for this conclusion, and it is at odds with other authorities, most notably, this court's decision in *Thompson v. Sun Life Assurance Company of Canada*, 2015 ONCA 162, [2015] I.L.R. I-5721.

[29] In *Thompson*, this court found that there were two reasons why the injured party's claim was barred. One was that the injured party had failed to meet the qualifying conditions of the policy: at paras. 11-12. The other was that the two-year limitation period had expired because the injured party knew of her total disability in August 2008 but did not commence her action until September 17, 2010: at paras. 13-14. The latter conclusion applies equally to this case. The respondent knew of the significance of his injuries by the end of August 2014. However, because of the terms of the Policy, the respondent was not entitled to receive LTD disability payments

until February 26, 2015. Applying the *Thompson* approach, the limitation period would have commenced on February 26, 2015, which was the first day benefits would have been payable had the respondent submitted a timely application and met the Policy's definition of Total Disability. By that time, the respondent knew that he was injured, he believed that he was entitled to long-term disability payments, and he knew that the appellant was not making those payments.

[30] The motion judge attempted to avoid the consequences of *Thompson*, and other cases in the Superior Court of Justice subsequently decided along the same lines, on the basis of s. 5(1)(a)(iv), that is, that litigation was not an appropriate remedy until the appellant categorically denied the respondent's claim. While the motion judge said, "I agree with Western Life that a clear and unequivocal denial is not necessarily required to start the limitations clock" (at para. 62), it is evident from the balance of her reasons and her conclusion that that is, in fact, what she required.

[31] There is no authority for the proposition that a clear and unequivocal denial is required. It may be that there will be some cases where an insurer may, by its conduct, lead an insured person to believe that their claim has not been denied (and thus litigation is not required). Those cases will likely be rare, and, in any event, this case is not one of them. The appellant did not do anything to lead the respondent into the belief that his claim was still alive and well. In fact, the appellant did the opposite. First, the appellant had told the respondent that his file had been closed. Second, when the issue was raised again, almost two years later, the appellant expressly told the respondent's lawyers that, in undertaking its re-examination of the claim, the appellant was not waiving any applicable time limits.

[32] To accede to the motion judge's conclusion is to do that which this court cautioned against in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, where Sharpe J.A. discussed the appropriate means requirement in s. 5(1)(a)(iv) and said, at para. 34:

To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.

[33] I would add another reason for rejecting any suggestion that a limitation period does not commence until an insurer has made a "clear and unequivocal" denial of a claim. To adopt such an approach would only serve to encourage insurers to make such denials at their earliest opportunity to ensure that the "limitations clock" starts to run. It would thus discourage insurers from undertaking a fair evaluation of the claim before making a decision. It might also lead to the commencement of more premature or needless proceedings, which is contrary to the intent of the subsection: *Markel*, at para. 34; *407 ETR Concession Co. v. Day*, 2016 ONCA 709, 133 O.R. (3d) 762, leave to appeal refused, [2016] S.C.C.A. No. 509, at para. 48.

[34] The motion judge's conclusion in this case is at odds with the jurisprudence from this court regarding the proper interpretation of s. 5(1)(a)(iv), that is, when litigation is an appropriate remedy. It is contrary to the decision in *Thompson*, as I have already explained. It is also contrary to this court's decision in *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, 142 O.R. (3d) 561, where Brown J.A. undertook an analysis of the existing authorities on the proper interpretation of s. 5(1)(a)(iv). In doing so, Brown J.A. noted that there are certain circumstances where the conduct of an insurer may, essentially, toll the limitation period. He referred to the decision in *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321, where Pardu J.A. had identified two such circumstances: (i) where the plaintiff

relied on the superior knowledge and expertise of the defendant, especially where the defendant undertook efforts to ameliorate the loss; and (ii) if an alternative dispute resolution process offers an adequate alternative remedy and that process has not fully run its course. Like the situation in *Nasr*, neither of those circumstances arise in this case.

[35] Indeed, in this case, there is little to which the respondent can point in the conduct of the appellant that could give rise to a situation akin to promissory estoppel that is often used in insurance cases to avoid the effect of a limitation period: see the discussion in *Nasr* at paras. 53-56. Any such suggestion becomes more problematic, in the circumstances of this case, since the respondent had access to lawyers throughout the five years before this action was commenced.

[36] In the end result, there are three potential start dates for the limitation period that arise in this case and that would be consistent with the existing jurisprudence. One is February 26, 2015, when the elimination period required by the Policy expired and the respondent should have started to receive LTD payments, if he was entitled to them. Another is June 7, 2015, when the respondent would have received the appellant's notification that his claim file had been closed. At that point, the respondent knew that, not only was the appellant not making payments to him, but the appellant was also not going to make payments to him in the future. Yet another is November 8, 2016, when his lawyers received copies of the same correspondence.

[37] I do not need to decide which of these three dates is the actual start date because the two-year limitation period passed with respect to all of them before this proceeding was commenced on June 28, 2019. The respondent's claim for LTD benefits under the Policy is therefore statute-barred.

[38] Before concluding, I should note that the motion judge did not expressly address s. 5(2) of the *Limitations Act, 2002* when conducting her appropriate means analysis. In fairness, it is not clear that the parties raised it. Nevertheless, it was a matter that was required by the terms of the *Limitations Act, 2002* to be taken into account. However, it is obvious that the motion judge took the view that the respondent had displaced the presumption that the date of the injury (extended to February 26, 2015 because of the terms of the Policy) was the day he ought to have known that a proceeding was an appropriate means to remedy his loss, because the appellant had not made an unequivocal denial of his claim. I have already explained why the motion judge erred in adopting that approach.

## (C) EXTRA CONTRACTUAL DAMAGES

### (i) *Greig v. Desjardins Financial Security Life Assurance Company*, 2021 BCCA 455

Desjardins appealed from a trial decision awarding $200,000 in punitive damages and $50,000 in aggravated damages, arguing that the B.C. Supreme Court had no jurisdiction to award such damages (since LTD benefits were provided pursuant to a Collective Agreement - the parties had agreed prior to trial that the trial judge could not adjudicate on the issue of entitlement to LTD benefits) - and that even if the trial judge had inherent jurisdiction to award extra contractual damages she erred in the quantums awarded. In an interesting wrinkle, Desjardins had satisfied the

trial judgment and undertook to the Court of Appeal that it would not seek to recover the amounts paid out regardless of the outcome of the appeal.

However, the B.C. Court of Appeal dismissed the appeal as there was no present controversy between the parties (plaintiff counsel had no instructions to make any submissions to the Court of Appeal) and the "lack of any effective reply to the appellant's arguments was an insurmountable obstacle to an appropriate consideration of the legal questions in dispute."

What we are left with then is the B.C. Supreme Court decision awarding $200,000 in punitive damages (based on, according to the trial judge, improperly requiring objective medical evidence; for failure to properly adjudicate medical evidence received during litigation; and for relying on an unsupported allegation of lack of motivation by the plaintiff during rehabilitation) and $50,000 in aggravated damages (the plaintiff was forced to live in a minivan for 6 months). Interestingly, these amounts are strikingly similar to the amounts awarded by the Ontario Court of Appeal in *Fernandes v. PennCorp* ($200,000 in punitive damages and $25,000 in aggravated damages), and fairly close to the amounts awarded by the Nova Scotia Court of Appeal in *Industrial Alliance v. Brine* ($60,000 in punitive damages and $90,000 in aggravated/mental distress damages). See Chapter 13 in *Disability Insurance Law in Canada, Second Edition.*

## ERIC'S COMMENTS

The **Smith, Halladay**, and **Kumarasamy** decisions (Note that the motion judge in **Kumarasamy** had rejected Western Life's late notice of claim argument – Western Life however chose to appeal only on their Limitations Act defence) and most importantly the Ontario Court of Appeal decision in **Dube v. RBC Life,** make it very clear that unless many years have passed and clear prejudice has been suffered by the insurer by not being able to compile medical evidence, denying a claim solely for late notice of claim is a doomed denial. Indeed the case law is so overwhelming that it would not be surprising if going forward such denials attracted awards of extra contractual damages.

Late lawsuits and the Ontario Limitations Act are an entirely different kettle of fish and all Ontario counsel should commit to memory the findings of the Ontario Court of Appeal in **Kumarasamy.**

## ACKNOWLEDGEMENTS

Eric's LTD Updates are possible thanks to case law sent to me by countless LTD counsel.

This issue thankfully continues this trend. For this issue many thanks to both Steve Muller and Alison Gilmour of Share Lawyers, to Rob Konduros of Hilborn & Konduros, and to Heather Gastle of Bennett Gastle.

So please keep the emails coming to eric@schjerningmediations.com.