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ERIC'S LTD UPDATE

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To look for available mediation dates or to book a mediation with Eric, visit [**Schjerning Mediations**](#) or simply email Eric at: eric@schjerningmediations.com.

Eric Schjerning

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Comments:

When working on the Third Edition of *Disability Insurance Law in Canada* this past Winter, I came across case law concerning relevant examination for discovery questions by plaintiff counsel in LTD claims seeking punitive damages. While the cases on this topic listed below are not decisions released in the past few months, they are interesting and are included below.

Also included below are two interesting fraudulent misrepresentation cases.

If any reader knows of a case which should be included in the Third Edition of my book, please email me in the next few months.

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A) Relevant Examination for Discovery Questions in Lawsuits Seeking Punitive Damages

Attempting to cover what is and what is not a relevant examination for discovery question to a defendant LTD insurer in lawsuits seeking punitive damages is too detailed to fully cover in this newsletter. I will only scratch the surface here in listing a few cases of interest.

- (i) *Bowerman v Sun Life Assurance Company*, [\[2003\] BCSC 1975 \(CanLII\)](#)

In *Bowerman v Sun Life Assurance Company of Canada*, the Court allowed the plaintiff's request requiring Sun Life to answer by interrogatories the number of LTD independent medical examinations conducted by a Dr. K. for Sun Life over a seven year period, on the basis that if the answers were that Dr. K. derived a substantial income from numerous Sun Life referrals and had never opined that a claimant qualified for benefits, they might provide a basis for an inference of bias.

In *Stoneman v Desjardins*, [\[2004\] BCTC 57 \(CanLII\)](#) the Court referred to *Bowerman* and confirmed that potential bias of an expert is a relevant issue, but that the time and place to explore it is at trial.

- (ii) *Ellingsen v Desjardins Financial Security Life Assurance Company*, [\[2017\] BCSC 1208 \(CanLII\)](#)

In *Ellingsen v Desjardins*, the plaintiff sought details of how much Desjardins paid internal medical consultant Dr. R. over the preceding three years and the number of consultations that he performed annually for Desjardins.

The Court refused the plaintiff's request, holding:

The difficulty with the plaintiff's request is that Dr. R has not provided a medical legal report and as such his credibility is not going to be in issue at the trial. This factor is sufficient to distinguish the case from Bowerman where Dr. K.'s credibility as an expert was an issue at trial. Unless Dr. R. is to be proffered by the defendant as an independent expert with confirmation on his part acknowledging a duty on his part to assist the court and not to be an advocate for one of the parties, I am not satisfied that the possibility of bias on the part of Dr. R. will be a consideration for the trial judge. At this stage, how much the defendant pays Dr. R. is no more relevant than is how much the defendant pays any of its claims examiners or adjusters who have handled the plaintiff's file.

(iii) *Kelly v Unum Life Insurance Company of America*, [2000 BCCA 667 \(CanLII\)](#)

Lastly, in *Kelly v Unum Life Insurance Company of America*, the B.C. Court of Appeal heard leave to appeal a motion to compel Unum to provide a vast array of documents and to answer related questions relating to various policies, incentive plans, claims registers and indices kept by Unum, past speeches by Unum personnel given in training disability adjusters etc.

In refusing to grant leave to appeal the Court of Appeal commented:

The motion he makes amounts not to a fishing expedition in a lake or stream but an entire ocean. This simply is not permitted without some basic relevance being shown.

B. Fraudulent Misrepresentation

(i) *Costanza v Desjardins Financial Security Life Assurance Company*, [2022 ONSC 432 \(CanLII\)](#)

A life insurance case where the life insured ("C") answered "no" to the application question concerning having been convicted of or pleaded guilty to any criminal offence in the last three years.

C was allegedly involved in the drug trade and was found dead in his car with several bullet holes in his body. Desjardins rescinded the policy for fraudulent misrepresentation since C was "convicted" of assault causing bodily harm and sentenced to 90 days imprisonment 2 years 9 months and 29 days prior to completing the application. The Costanza decision provides a good summary of the law on fraudulent misrepresentation, including the *Gregory v. Jolley* and the *Mohammed v. The Manufacturers Life Insurance Company* decisions before concluding that Desjardins did not prove fraudulent misrepresentation since the criminal background check document ("CPIC"):

... produced by Desjardins is not a court record, but a police record. The date of entry is, or may typically be, the date of the disposition of the matter, rather than the date of conviction. The way to verify the date of a conviction is by reference to the official court record entry contained in an Information or Indictment or a court transcript....In this case, there is no evidence to permit me to say that the date of the entry that appears in the CPIC is the date of the conviction, rather than the date of the disposition...

One final point of interest from *Costanza*. The paramedical report obtained by Desjardins as part of C's application stated that C *may have used illegal drugs in the past 5 years not sure state no to the question; Dr. L is family doctor. However, physician will find something wrong and prescribe*

medication, stated is big drug dealer. The Court found that this passage referred to the family physician (not C) being *a big drug dealer- a physician who easily prescribed medications.*

(ii) *Murray v TD Life Insurance Company et al. 2021 ONSC 4748*

A married couple applied for creditor mortgage life insurance on two properties, property B in 2006 and property C in 2007. Husband "R" died of cirrhosis of the liver. TD Life approved the claim for property B but denied the claim on property C.

During the litigation, TD Life amended their pleadings to seek recovery of the \$131,000 death benefit paid under property B on the basis that R had committed fraudulent misrepresentation when applying for insurance in 2006. TD Life also contested payment re property C based on fraudulent misrepresentation.

R had answered on the health questionnaire that he drank 26 ounces of rye per week. R's G.P. testified that R was *a functioning alcoholic*, and that he had told R that some tests were normal, some were elevated, and that further blood tests were needed *to see what was going on with R's liver.*

The G.P. subsequently told R *that the tests that had been repeated were better than they were last time, but further investigation was required* and he recommended an ultrasound.

During the claim process for property B, TD Life became concerned whether R had been treated for alcoholism during the relevant period. R's wife (the plaintiff) offered to pick up the clinical notes and records on R from the G.P. (who was also the plaintiff's G.P.). Some of the blood tests and lab reports were missing from such file sent to TD Life. TD Life was aware of this but made the decision to pay the claim on property B in their absence. TD Life subsequently counterclaimed alleging a breach of the duty of good faith on the part of the plaintiff wife in passing incomplete clinical notes and records to TD Life.

The claim for property B was paid, though TD Life again referred the file to underwriting re property C. TD Life Underwriting concluded that R should have disclosed his elevated liver function tests as well as fatty liver noted on his ultrasound, which would have led to a decline of coverage.

The court found as follows:

With respect to property B (2006 application) there was no reference in the clinical notes to R's liver or alcohol use and no further blood work done and neither R nor his G.P. had a pressing concern about the condition of R's liver.

With respect to property C (2007 application) R knew he had an abnormal test result but R did not know it arose from liver function tests.

The court differentiated *Mohammed v. The Manufacturers Life Insurance Company* (a duty to disclose all material facts even in the absence of specific questions from the insurer) since in *Murray* the application form contained only a "yes" or "no" response with no place to provide additional details.

The court found that TD Life had not proven fraud, nor even misrepresentation, when it came to property B...*and could have decided to explore R's drinking at the time they were underwriting the policy in 2006, to obtain further information from R's G.P., or to have R complete a supplementary alcohol questionnaire. They chose to do none of these things, found that R was an acceptable risk,*

and accepted premium payments for over seven years....these are circumstances of a calculated business decision, to which the doctrine of mistake has no application.

The court not only ordered that the life insurance benefits for both properties be paid but also awarded punitive and mental distress damages.

C) Punitive and Mental Distress Damages

- (i) *Murray v TD Life Insurance Company et al., 2021 ONSC 4748*

Murray v. TD Life is the first creditor insurance or life insurance case of which Eric is aware to award punitive and mental distress damages in either a creditor insurance or a life insurance context. *Murray* involved what knowledge the life insured had of abnormal test results concerning his liver. *Murray* also involved the life insured's wife (who had the same family physician as the life insured) offering to send to TD Life the clinical records on her husband. TD Life alleged that the wife left out of such records some important blood work and lab reports and amended their pleading to counterclaim for breach of her duty of good faith on the part of the wife.

With respect to the missing records, the court found:

As it turns out, documents from (the G.P.'s) chart, specifically blood work and other test requisitions, as well as lab reports, were not included in the records provided to TD Life. Two reasons for this present themselves from the evidence. As previously stated, during the last few years of his practice The College of Physicians and Surgeons raised concerns about (the G.P.'s) medical record-keeping. Accordingly, it may be that those parts of his chart were misplaced, lost and/or not scanned when his office moved to electronic record-keeping. The evidence also shows that the G.P.'s office assistant expressed opposition to providing the records to TD Life. This could also account for why parts of the chart are missing.

With respect to punitive damages, the court found:

That the driving force behind the defendants' unreasonable position was solely litigation gamesmanship is underscored by the unproven allegation found in paragraph 28 of their counterclaim. There was not a shred of evidence that Susan breached a duty of utmost good faith in relation to the medical records. But faced with such an allegation, one puts oneself in the position of the plaintiff – how could it not add to her turmoil and distress to be so unfairly accused of such wrongdoing? The defendants put that false allegation in the pleading even though they had the evidence in their hands, for years, that showed otherwise.

I find that the defendants breached their duty of good faith.

The purpose of punitive damages in this case is to express the court's condemnation of these actions by an insurer toward a person to whom they owe a duty of good faith and as a deterrent against similar conduct in the future. I find that the misconduct of the defendant is so outrageous that punitive damages are rationally required for these purposes. The compensatory damage awards in this case are insufficient to accomplish these purposes – Susan is only going to receive what she contracted for, plus a relatively small award to recognize her mental distress damages.

The Court indicated in Whiten, at para.71, that in determining the amount of an award, a court should relate the facts of the particular case to the underlying purposes of punitive damages and "ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award

would be irrational.” For insurance companies like these defendants, the award has to be high enough to create deterrence in order to be meaningful. I fix punitive damages in the amount of \$150,000.

Regarding mental distress damages, the court found:

While the claim seeks an award of “aggravated damages”, paragraph 16 of the amended statement of claim pleads that “the plaintiff has suffered substantial mental distress, for which she claims aggravated damages.” As explained in Fidler, at paras. 43, 44, 48-54, damages for mental distress arising out of the breach of a peace-of-mind contract are perhaps misleadingly referred to as aggravated damages, but the principle is this: as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable.

A policy of credit protection insurance, whether life or critical illness, is, at its essence, a peace-of-mind contract. Customers obtain it so they do not face the situation of being unable to pay their mortgage or secured line of credit – or their surviving family members being unable to do so in the event of their death – placing their home in jeopardy when the lender enforces the debt. Susan testified that being left with such debt was a great fear.

Unquestionably, this type of insurance has as its primary object to secure a psychological benefit and sense of security to those who have bargained to pay the premiums in exchange for such financial security. It would have been within the contemplation of the parties that if the death benefit was unjustly denied, the surviving spouse may be faced with financial security and resulting emotional distress at the same time that they are grieving a major loss, such as the loss of a spouse. Accordingly, I conclude that it will have been within the reasonable contemplation of TD Life and the Murrays that mental distress could ensue upon breach of contract.

Damages for mental distress will be awarded. The award will be reduced from what I would otherwise award because putting Susan back into the position that she would have been but for the breach requires that the court take into account her other sources of mental distress that do not flow from TD Life’s breach – the debt caused by Robert’s gambling, having to sell and move from her home, and her prior health condition.

I fix damages for mental distress in the amount of \$10,000.

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.

