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ERIC'S LTD UPDATE

ISSUE 17 – WINTER 2023

Eric Schjerning is a mediator with 11 years of mediating LTD and other insurance disputes, a former litigator with over 3 decades of LTD trial work, and the author of 2 editions of the book **Disability Insurance Law in Canada** (with the Third Edition scheduled to be released in the Spring of 2023).

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:

I hope everyone had a nice holiday season. Might as well jump right back into the fray with an Ontario punitive damages decision as well as a Saskatchewan decision lumping out future LTD benefits. Note that neither the *Fraser* nor *Pasap* decisions listed below will be referenced in the Third Edition of Disability Insurance Law in Canada (“DILIC”) as they came to my attention after my manuscript had been sent off to my Editor.

Note also that *Fraser* marks the third consecutive edition of Eric’s LTD Updates which contains a punitive damages award in excess of \$100,000. There have now been 7 such decisions across Canada since 2000. A complete listing of such decisions (minus *Fraser*) is contained in the Third Edition of DILIC.

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A) PUNITIVE DAMAGES

- (i) *Fraser v Fenchurch General Insurance Company*, 2022 ONSC 6222

The plaintiff was denied LTD benefits based on a defence IME by a physical medicine and rehabilitation specialist who found no physical impairments but who recommended a psychological assessment be completed by a practitioner experienced in assessing individuals with chronic pain syndrome. No such assessment was obtained by the insurer prior to the LTD claim being denied.

During litigation the plaintiff obtained a psychiatric assessment which supported her claim that she could not work. Upon receipt of such report the insurer conducted its own psychiatric IME which concurred with the plaintiff's medical assessment.

The insurer then reversed its decision and allowed the LTD claim retroactively and so the trial proceeded on the issue of extracontractual damages only. The insurer argued that at worst the denial was a mistake, not an act of bad faith.

The trial judge awarded \$10,000 for what he variously termed mental distress and "aggravating" damages though clearly he meant aggravated damages. More important was the award of \$150,000 in punitive damages due to the *insurer acting improperly by ignoring the recommendation of their IME psychiatrist in obtaining a psychiatric assessment*.

- (ii) *Baker v Blue Cross Life Insurance Company*, (2022 Ont. S.C.J. jury decision)

A 2022 Ontario jury decision awarding 1.5 million in punitive damages (and which is covered in Issue 16 of Eric's LTD Updates). Please note that a Notice of Appeal has been filed by Blue Cross.

B) LUMP OUT OF FUTURE LTD BENEFITS

- (i) *Pasap v Saskatchewan Indian Gaming Authority and Bear Claw Casino*, 2022 SKQB 200

A wrongful dismissal case dealing with whether the employee ("P") resigned or was fired. However, one of the main issues at trial involved damages for loss of LTD benefits. Four months into his notice period (during which time it was argued P had LTD coverage) P suffered congestive heart failure, spent 25 days in hospital, and had various surgeries, including a dual coronary bypass operation.

There was extensive medical evidence at trial regarding P's neurocognitive issues, diabetes, and tendency to underestimate his medical difficulties.

P claimed:

LTD own occ benefits.....	\$88,528
LTD arrears of any occ benefits.....	\$308,695
"Discounted" LTD benefits to age 65.....	\$886,090
Total LTD benefits.....	\$1,283,313
Less part time income earned.....	\$66,549
Total LTD damages.....	\$1,216,764

The Court awarded this \$1,216,764 in LTD benefits as well as moral damages (as an employment law case) of \$25,000 and punitive damages of \$25,000.

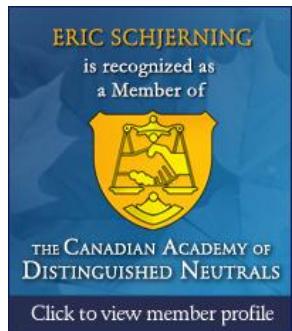
ERIC's COMMENTS: Similar to the case of *Brito v Canac Kitchens* referenced in DILIC there is no analysis in *Pasap* of an appropriate present value discount rate re future LTD benefits to age 65, no discussion of any discount for mortality risk (note that among other things P had a dual coronary bypass and as well suffered from diabetes), and no analysis of any of the 5 court decisions (3 in B.C., 1 in Alberta, 1 in Ontario) referenced in DILIC all holding that a court is not empowered to award future LTD benefits. Accordingly, *Pasap* offers no clue of how the trial judge arrived at a "discounted" \$886,000 in future LTD benefits. I traded voicemails with counsel in *Pasap* and it was agreed that I would put a boatload of questions regarding the discounted future LTD benefits award in an email to counsel. I did so but received no reply and so can only conclude that somehow none of the critical issues (and none of the problematic case law) facing a judge granting a lump out of future benefits was even debated in *Pasap*.

So while the large lump out award in *Pasap*, coupled with the modest lump out award in *Brito*, can certainly be raised by plaintiff counsel seeking a lump out of future LTD benefits, there still seem many unresolved hurdles in achieving such an award. On top of the proper discount rate, mortality risk, and case law to the contrary issues which are noted above, both *Pasap* and *Brito* are employment law cases where the disability benefits at issue were self-insured by the employer. (Please note that *Brito* involved self-insured benefits. There is no mention in *Pasap* of an insurance company but my email to counsel asking that they confirm that LTD benefits were self-insured was not answered by counsel and so I cannot state this with certainty).

ACKNOWLEDGEMENTS

Eric's LTD Updates are possible through case law sent to me by LTD counsel. For this issue many thanks to Stephen Birman of Thomson Rogers and to Steve Muller of Share Lawyers.

For any questions on these or 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.



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