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## ERIC'S LTD UPDATE

### ISSUE 18 – SPRING 2023

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**Eric Schjerner** 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 next two months).

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

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**Eric Schjerner**

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#### Comments:

The Third Edition of **Disability Insurance Law in Canada** is set to be published in the next two months. It is considerably longer than the Second Edition with over 100 new cases and with 3 new Chapters, mediation tips, evidence in LTD trials, and LTD claims from a plaintiff's perspective by Matt Lalande. Note that none of the cases or commentary contained in this LTD Update are in the Third Edition as the editorial cut-off date was September 2022. A separate email will be sent when the book is actually published including details on how to order.

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## A) LUMP SUM AWARD OF FUTURE BENEFITS

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

In my Winter 2023 LTD Update (posted on my website) I referenced this recent Saskatchewan decision, which awarded a lump out of future LTD benefits “discounted” to \$886,000 up to the plaintiff’s 65<sup>th</sup> birthday. While *Pasap* was a wrongful dismissal case, the lump out of future benefits goes against most case law. I accordingly spoke with plaintiff’s counsel, and can advise as follows:

- *Pasap* is under appeal.
- The “discounted” future LTD benefits was made pursuant to Saskatchewan Rule 912 which sets out the discount rate for future damages (2.5%).
- There was no discount given for possible mortality risk (Mr. Pasap suffered from diabetes and heart disease) or for CPP disability benefits.
- While the Ontario decision of *Brito v Canac Kitchens*, 2011 ONSC 1011 (in *Brito* 24 months of future LTD benefits were awarded in a lump sum) was argued during the *Pasap* trial, none of the 5 Canadian decisions (see below) rejecting a lump out of future LTD benefits were raised at trial.
- While *Pasap* involved (like *Brito*) a case for wrongful dismissal, unlike *Brito* where LTD was self-insured by the employer, in *Pasap* there was a life insurer issued LTD policy. However, for some reason no witness testified from such LTD insurer, even though disability was in dispute.

These last two bullet points seem to me to be problematic for plaintiff counsel seeking to rely on *Pasap* to argue for a lump out of future LTD benefits. *Pasap* would be much more authoritative had the 5 decisions rejecting a lump out of future LTD benefits been analyzed by the court and reasons given as to why they were not being followed, even though of course the Saskatchewan Court of Queen’s Bench is not bound by cases from British Columbia, Alberta, or Ontario.

Given the number of recent cases on the issue of LTD lump outs the following summary of case law province-by-province may be of use:

**British Columbia:** 3 B.C.S.C. decisions: *Cram v Great West Life Assurance Co*, 1995 CanLII 1014, *Warrington v Great West Life Assurance Co*, 1995 CanLII 16126 and *Gascoigne v Desjardins Financial Security Life Assurance Company*, 2019 BCSC 1241 as well as the B.C. Court of Appeal in *Gascoigne* (2020 BCCA 316) have all held that a court is not empowered to lump out future LTD benefits.

**Alberta:** The Alberta Court of Queen’s Bench came to the same conclusion in the 1996 case of *Richardson v Great West Life Assurance Co*, 1996 CanLII 10422.

**Saskatchewan:** *Pasap v Saskatchewan Gaming Authority*, 2022 SKQB 200 ordering \$886,000 in future LTD benefits. The case is expected to be heard by the Saskatchewan Court of Appeal in late 2023 or early 2024.

**Manitoba:** *Zdan v Hruden*, 1912 CanLII 799. Here the Manitoba Court of Appeal arguably gives some support to the possibility of lumping out future LTD benefits. Sometimes case law over 100 years old can be quite authoritative. But perhaps not in situations where such case has not been considered by any other court since it was decided. I have not seen that *Zdan* has been raised in any other case since it was decided.

**Ontario:** *Anderson v. Great-West Life Assurance Co.* (1988) I.L.R. 1-2317 rejected plaintiff’s request to lump out future LTD benefits.

*Brito v Canac Kitchens*, 2011 ONSC 1011 ordered a lump out of 2 years of future LTD benefits, albeit in a wrongful dismissal case where LTD benefits were self-insured.

**Maritime Provinces:** No case law to date in any of these 4 provinces addresses this issue.

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## **B) COSTS AWARD**

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- (i) *Murray v TD Life Insurance Company*, 2021 ONSC 7187

My Spring 2022 LTD Update (found on my website) contains a synopsis of this creditor life insurance case, which held that fraudulent misrepresentation had not been proven by TD Life and which also awarded punitive damages against TD Life for filing a counterclaim against the plaintiff widow for allegedly withholding key medical records contained in her late husband’s family doctor’s file. In this costs endorsement, it was held that the receipt of an award of punitive damages is not a bar to an award of substantial indemnity costs, and \$260,000 in such costs were awarded to the plaintiff.

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## **C) MEDIATION TIPS**

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The Third Edition of *Disability Insurance Law in Canada* contains a new Chapter listing what I consider to be a number of mediation do’s and don’ts from both plaintiff and insurer perspectives.

When writing this Chapter over a year ago I wondered whether under plaintiff don’ts I needed to comment on “do not attend mediation where your only offer is a reinstatement plus costs.” Also be prepared with a lump sum offer.

I decided not to comment on this point in this chapter of the Third Edition since it seems to me so obvious a point and since it so rarely happens. Of course, no sooner was this chapter finalized that I experienced a rash of mediations where plaintiff counsel’s only offer was a reinstatement plus costs. Such mediations almost always fail quite quickly. When such plaintiff counsel seem surprised by this I always ask them, “How would you feel if the insurer’s only offer was zero dollars plus you pay their legal fees?” “Ridiculous, that is not a real offer” is invariably the response.

But just as an insurer's best day at trial is zero in benefits plus recoverable legal costs, a plaintiff's best day at trial is a reinstatement plus costs. And why would either side agree to the other side's best day at trial? While it is true that plaintiff counsel can say, "We are waiving extracontractual damages", and while it is also true that such damages awards have certainly been increasing since I wrote the first edition of my book in 2010, only in a clearly terribly handled file with a grave risk of punitive damages will an insurer be tempted by a reinstatement plus costs. In other cases, where presented with no offer but a reinstatement plus costs, the insurer is likely to simply end the mediation and take on the trial risk of extracontractual damages.

So as plaintiff counsel I feel it is always prudent to prepare your client to explore a lump sum settlement at mediation. This is not to suggest that reinstatements plus costs never happen at mediation. But lump sum settlements are far more common.

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## ACKNOWLEDGEMENTS

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Thanks to Michael Jordan, of Jordan Honickman Barristers in Toronto, and to Titli Datta, of Miller Thomson in Regina, for forwarding me case law found in this update. Please send any relevant case law you are aware of to [eric@schjerningmediations.com](mailto:eric@schjerningmediations.com).

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](mailto:eric@schjerningmediations.com) or call 416-236-9282.

