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ERIC'S LTD UPDATE

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Eric Schjerning is a mediator with 10 years of mediating LTD and other insurance disputes, a former litigator with over 3 decades of LTD trial work, and the author of 3 editions of the book **Disability Insurance Law in Canada**.

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:

Of course no sooner than the Third Edition of *Disability Insurance Law in Canada* was published in June 2023 that a deluge of new cases were released together with new Federal legislation creating the Canada Disability Benefit. Read on for details on these.

As for the Third Edition of *Disability Insurance Law in Canada*, if you wish to order this text, please click the link to purchase [here](#) or call Thomson Reuters Sales at 1-800-387-5164. The Third Edition is 520 pages long compared to the Second Edition's 319 pages and contains over 850 case citations (compared to the Second Edition's 700).

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(A) AMENDING LTD PLEADINGS: *Schwaluk v HSBC Bank of Canada and Sun Life Assurance Company of Canada*, 2023 ONCA 538

The plaintiff (“S”) commenced an action against her employer HSBC (which provided STD benefits administered by Sun Life) and Sun Life (regular LTD policy) in 2016. S settled all claims versus HSBC in 2017 and claimed she had never received a copy of the LTD policy and was unaware of the time limits for submitting LTD claims. In 2022, S moved to amend her Statement of Claim versus Sun Life to claim relief from forfeiture. The motions judge denied S’s request since the proposed amendments sought to: (i) withdraw an admission S had made in her Reply that she had not filed an application for LTD benefits within the time required under the policy and (ii) add a request for relief from forfeiture that was statute-barred.

Held: The Appeal was allowed. The proposed amendments did not withdraw the factual admission made in S’s Reply. In addition, the request for relief from forfeiture did not, in the circumstances, constitute the introduction of a new claim that was barred by the expiry of a limitation period.

(B) CANADA DISABILITY BENEFIT

The Federal Government’s Bill C-22 creating the Canada Disability Benefit (“CDB”) received Royal Assent on June 22, 2023. This Legislation is meant to provide a monthly benefit to low-income working-age Canadians with disabilities. The intent of the Federal Government is not to allow LTD insurers to offset LTD benefits by the CDB given that CDB is a social program. This issue is still to be finalized, together with the eligibility criteria to receive CDB as well as the monthly benefit amount. It is not expected that Regulations dealing with these points will be finalized until the end of 2024.

(C) CERB OFFSET: *Yates v Langley Motor Sport Centre*, 2022 BCCA 398

Yates appealed from a trial judge's decision to deduct CERB payments from her damages award for wrongful dismissal. The appeal was allowed with respect to the deductibility of CERB payments with the Court noting in part "Broader policy considerations and the purpose of the CERB program support the conclusion that these payments should not be deducted from damages awards. CERB was an emergency aid program designed to support Canadian workers who lost all or a significant portion of their income due to the COVID pandemic. It is a matter between the individual and the appropriate authority and should not be a windfall for the employer." (Eric's comment: Query how a Court would treat CERB as an offset from LTD benefits. I am aware of no case law on this issue to date).

(D) CONSOLIDATION OF LTD ACTION: *Wright v Sun Life Assurance Company of Canada*, 2023 NSSC 13

Sun Life and the tort defendant were successful in a motion to consolidate their actions despite plaintiff's opposing such motion since there was already a trial date in the LTD action and consolidating the actions could delay the LTD trial by up to two years.

(E) COSTS ENDORSEMENT: *Baker v Blue Cross Life Insurance Company of Canada*, 2023 ONSC 1891

After a 22-day trial in 2022, the jury found the plaintiff entitled to ongoing LTD benefits plus awarded \$221,000 in retroactive LTD benefits, \$40,000 in aggravated damages and 1.5 million in punitive damages. In this costs endorsement the judge analyzed numerous decisions, including *Tanious v The Empire Life Insurance Company*, 2017 BCSC 85, aff'd 2019 BCCA 329, for a detailed analysis of the "...unique character of long-term disability policies, justifying, in British Columbia, an award of full indemnity, which I find persuasive". The Court in Baker exercised its discretion under s. 131 of the Courts of Justice Act to award full indemnity costs. "I find that the wrongful denial of LTD benefits by an insurer, given the unique character of long-term disability policies, constitutes special circumstances justifying this elevated award." The court awarded \$850,000 in full indemnity costs as well as \$123,000 in disbursements.

(F) DEFENCE MEDICAL LOCATION: *James v State Farm Insurance*, 2023 ONSC 203

A tort case of interest. The plaintiff resided in Markham and was content to be examined by the IME assessor there. State Farm wanted the IME to be held at the assessor's location in Mississauga and relied on surveillance showing that the plaintiff was able to drive. The Court considered the relevant principles as stated in the 2020 case of *McGowan v Green*, noted that all of the plaintiff's driving captured on State Farm's surveillance was on city streets in Markham with no highway driving, relied on the plaintiff's psychiatric diagnosis of PTSD with driving anxiety, and held that absent any evidence as to why the IME assessor could not travel from Mississauga to Markham the assessment should take place in Markham.

(G) ELIGIBILITY FOR LTD BENEFIT COVERAGE: *Soave v Stahle Construction Inc*, 2023 ONCA 265

A construction company (Stahle) appealed a trial decision ordering that it pay damages for improperly terminating LTD benefits coverage to a construction site supervisor (“S”). S had completed work at a construction site but had then decided to have hernia surgery and turned down an offer from Stahle to work at another site. The ROE indicated S was on temporary leave due to medical illness.

Before such hernia surgery was scheduled, S was involved in a serious motor vehicle accident. S applied for LTD benefits and Stahle told its LTD insurer (GWL) that S was no longer employed and not entitled to LTD. S’s claim was denied as he was no longer working at the time of the m.v.a.

The trial judge found that S was an employee at the time of his m.v.a. and would have qualified for LTD benefits and awarded 246K in general damages.

On appeal, Stahle did not challenge the trial judge’s finding that S remained an employee, but argued that S was not entitled to receive LTD benefits since the trial judge erred in: (i) denying Stahle’s request to introduce the GWL insurance policy at trial; (ii) failing to give any weight to the GWL denial letter; and (iii) incorrectly interpreting the benefit booklet which S had relied on at trial.

The Court of Appeal rejected appeal ground (i) in part because the Policy had never been produced by Stahle in their AOD and because in their Statement of Defence, Stahle stated that the booklet provided an accurate description of the applicable provisions for entitlement to LTD benefits. The Court of Appeal rejected appeal ground (ii) since it is not the role of an appellate court to reweigh the trial evidence and since Stahle had not even called any GWL witness at trial. However, the Court of Appeal found that the trial judge made a palpable error in finding that S was entitled to LTD benefits without considering if S was disabled on the date he stopped working or if he became totally disabled during his leave of absence and that Stahle was required to pay for benefit coverage during that period “as required by legislation, regulation or case law” (the wording contained in the booklet).

Held: As there were no trial submissions on point (iii) the Court of Appeal remitted the matter back for a trial on this issue.

(H) LATE FILED JURY NOTICE: *Milne v RBC Life Insurance Company*, 2022 ONSC 666

RBC Life was successful on a motion to file a late jury notice after examinations for discovery, mediation, and the passing of the trial record had all taken place.

The court examined the two key factors to be considered in determining whether to permit service of a jury notice after the close of pleadings: (1) the circumstances of the delay; and (2) whether there is prejudice to the other side (*Proper v Nikore*, 2010 ONSC 2307).

In granting RBC Life’s motion, the court concluded that the filing of the jury notice would not cause any prejudice to the plaintiff, and that the delay was not unconscionable and could be explained by successive instances of inadvertence on the part of counsel.

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Legal and to Stephen Birman of Thomson Rogers. And many thanks to Tracey Hamilton of Beneva (formerly La Capitale +SSQ Life Insurance), and to Rob Konduros of Hilborn & Konduros, both of whom sent me two cases for this issue. Please send any relevant case law you are aware of to eric@schjerningmediations.com.

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.

