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ERIC'S LTD UPDATE

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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 3 editions of the book **Disability Insurance Law in Canada**.

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

Eric Schjerner

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Comments:

The much-anticipated Ontario Court of Appeal decision in *Baker v. Blue Cross Life Insurance Company* was released just before Christmas. *Baker* of course had, among other things, seen a jury award \$1.5 million in punitive damages against Blue Cross. A complete listing of LTD cases awarding punitive damages is found in the Third Edition of *Disability Insurance Law in Canada*, which was published last June. If you wish to order this text the link is found [here](#).

For details on *Baker* and other recent decisions please see below.

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(A) *Baker v. Blue Cross Life Insurance Company of Canada*, 2023 ONCA 842

Blue Cross appealed a 2022 jury decision (for details please refer to Eric's LTD Update Issue # 17, Winter 2023 found on my website at [SchjernerMediations](#)) which held that LTD benefits be reinstated, awarded \$40,000 in aggravated damages and \$1.5 million in punitive damages, as well as the trial judge's award of nearly \$1.1 million in full indemnity costs (reported at 2023 ONSC 1891). Blue Cross appealed on only the \$1.5 million in punitive damages and the costs award.

In summary the Court of Appeal:

- Upheld the \$1.5 million punitive damages award.
- Upheld the full indemnity costs award of \$850,000 plus HST and disbursements for a total award of \$1,083,953.
- Tore apart the trial judge's ruling that LTD trials automatically warrant special costs awards.

In denying the appeal re punitive damages, the Court of Appeal criticized Blue Cross in part for only electing to call as a witness at trial the last appeals specialist to handle the file (and not any of the 5 claims specialists who at one point had carriage of the file). Note that the entire decision is worth the read and that only portions of the Court's more interesting analysis is reproduced below. Reading the complete decision unveils all of the actions by Blue Cross which the Court of Appeal found justified the jury's award of punitive damages, including: stopping LTD benefits on three separate occasions, delaying in obtaining an IME report and then "distorting" such report in a way that supported the denial of benefits, and "distorting" the findings of a TSA report; and as well lists the Court of Appeal's views on the consequences of Blue Cross insisting that the trial be heard by a jury "*...the choice of a civil jury is a strategy that aims to improve a party's odds of achieving a favourable outcome. In making that choice a party is also taking certain calculated risks.*" Please note that in reproducing certain parts of the judgement below I have placed some quotations out of order. For example, I have tried to place all of the Court of Appeal's analysis of the costs award together even though in the decision itself this is not the case.

At best, the processing of Ms. Baker's file shows reckless indifference [to the duty Blue Cross had] to consider the respondent's claim in good faith and to conduct a good faith investigation, and at worst, a deliberate strategy to wrongfully deny her benefits.

Further, there is nothing about the quantum of the award that warrants judicial interference. It was open to the jury to conclude that Blue Cross engaged in systemic and deliberate misconduct in handling Ms. Baker's claim and that a significant punitive damages award was necessary to deter Blue Cross from conducting themselves in that fashion in the future.

No one is suggesting that an error regarding entitlement to LTD benefits automatically leads to an award of punitive damages. The problem with the submission is its factual premise that all that occurred was a good faith error.

...Blue Cross persisted in distorting their IME neuropsychologist's and TSA assessor's reports even after the Respondent's lawyer wrote to it and pointed out the errors.

Deterrence is impossible unless the punishment is meaningful...A punitive damages award of \$1.5 million is little more than a rounding error for Blue Cross. Indeed, it is difficult to envision how an award of anything less than \$1.5 million would even garner the attention of senior executives, let alone deter future misconduct.

The fact that this appears to be a systemic approach to Blue Cross' claims handling reinforces why a significant award of punitive damages is required.

...Concerning...the costs award...the trial judge erred in finding entitlement to costs on a full indemnity scale on the basis that disability policies as a class should automatically attract such an award. Given this...it falls to this court to determine the issue of costs. In my view, as a result of Blue Cross' misconduct and the existence of the respondent's generous offer to settle, an award of full indemnity costs is warranted.

I agree with the submissions of the appellant and the intervenor [Note that CLHIA intervened on the costs issue only] that the trial judge erred in creating a new class of cases where full indemnity costs will automatically follow. It is unwise for courts to create new classes of cases where full indemnity costs are awarded in all circumstances.

(B) *Tavakoli v. The Canada Life Assurance Company*, Provincial Court of British Columbia C 19092, April 24, 2023

While people digest the ramifications of the *Baker v. Blue Cross Life* decision, I will slow things down with a much less authoritative yet still interesting Provincial Court decision from British Columbia.

The main point of interest from *Tavakoli* is the discussion around what constituted the plaintiff's regular occupation for purposes of entitlement to LTD benefits. Canada Life testified the occupation was electronic service technician despite the employer's form listing regular occupation as commercial technician. The Court accepted Canada Life's contention and assessment of job duties as set out in the Government of Canada's National Occupation Classification ("NOC") and dismissed the lawsuit.

(C) *Mitchell v. Enertech Sheet Metal Inc. v. Sun Life Financial*, 2023 ONSC 6447

The plaintiff alleged wrongful termination from Enertech and further alleged total disability and that Enertech had failed to maintain her benefits including LTD coverage. At no point in her pleadings did the plaintiff state when she had become totally disabled or that she had any claim against the LTD provider Sun Life.

Enertech denied that the plaintiff was either wrongfully terminated or that she had become totally disabled. However, Enertech pled an alternative position in a Third Party claim against Sun Life that if the plaintiff was totally disabled Sun Life was liable for LTD benefits.

Sun Life was successful on their motion to dismiss the Third Party claim.

The plaintiff's claim against Sun Life has not yet crystallized since the plaintiff has not yet alleged that she became totally disabled during the period of coverage and Sun Life is not alleged to have been asked to provide benefits on a claim that she became totally disabled while she had coverage. Accordingly, the Third Party claim is unreasonable.

(D) Canada Disability Benefit

For details on this benefit please refer to Eric's LTD Update Issue # 19 Fall 2023 which can be found on my website at [SchjernerMediations](https://www.schjernermediations.com).

Consultations continue and Regulations are expected out later this year for review. Insurers have represented to the Senate and the federal government that this benefit will be considered a social benefit and not subject to claw back.

ACKNOWLEDGEMENTS:

This LTD update acknowledges a longer than normal list of lawyers since no fewer than 4 counsel forwarded me the *Baker v. Blue Cross Life* decision. This pleased me greatly since it demonstrates that my network of lawyers feeding me case law is alive and well. For this update thank you to Michael Jordan of Jordan Honickman, Stephen Birman of Thomson Rogers, David Fenicky of Davies Howe, Rob Konduros of Hilborn Konduros, Steve Shantz of Sun Life, Steve Muller of Share Lawyers, and Tessa Gilmor of Canada Life.

Please keep the case law coming to eric@schjerningmediations.com or call me at 416-236-9282.

