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## ERIC'S LTD UPDATE

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**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 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](https://www.schjerningmediations.com) or simply email Eric at: [eric@schjerningmediations.com](mailto:eric@schjerningmediations.com).

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Eric Schjerning

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#### Comments:

A fair number of new cases to report on as we head deeper into 2024. Note that this LTD Update will be posted on my website at Schjerning Mediations where it will join the previous 4 updates (which contain case law released after the Third Edition of **Disability Insurance Law in Canada** went to print). For case law contained in LTD Updates 1 through 16, these cases are now only found in the Third Edition of my book (published in June 2023). To order a copy of the Third Edition of **Disability Insurance Law in Canada** please click [here](#).

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**(A) Accidental Death: *Allen v. Sun Life Assurance Company of Canada*, 2024 BCSC 306**

Both parties agreed to a summary trial re: whether an accidental death benefit was payable.

The deceased was found in his apartment with a cut on his head and numerous blood stains throughout (which the attending police officer testified appeared to be passive, mainly gravity produced stains and transfer stains), which the police officer suspected were due to the deceased being intoxicated, falling and hitting his head, and then moving about his suite, spreading blood as he died.

Sun Life argued that the fall causing death was due to atherosclerotic cardiovascular disease as set out in the Certificate of the Medical Examiner, which Certificate also listed the manner of death as “natural.”

The Policy required death to be as a direct result of accident, independently of any other cause, and also contained an exclusion if death was directly or indirectly caused by or associated with a physical illness.

Despite an autopsy being ordered, a complete autopsy was never performed.

Plaintiff obtained an expert report from a forensic pathologist who opined that while the assertion of the Medical Examiner was “reasonable, and indeed may be the cause, this conclusion is not necessarily supported by the evidence, and there are certainly other potentially lethal conditions which may well have been operative in this instance....it logically follows that the manner of death has not been determined with any reasonable degree of certainty.”

**Held:** For the plaintiff. After analyzing the Supreme Court of Canada decisions in *Co-Operators Life v. Gibbens* and *Martin v. American International*, the court in *Allen* held that “death was likely caused by a combination of hypothermia and blood loss caused by the laceration to the head and the Court must look at the action that caused the injury and all the circumstances surrounding it in a holistic way and ask whether in ordinary and popular language the event, as it happened, would be described as an accident.”

**(B) Limitation Period: *Hassan v. Sun Life Assurance Company of Canada*, 2023 ONSC 7280**

The plaintiff’s claim for LTD benefits was denied by Sun Life on September 25, 2017 and denied on appeal by Sun Life on December 13, 2017. The Statement of Claim was issued on December 13, 2019 but was not served within 6 months of issuance.

Sun Life brought a motion for Summary Judgment while counsel for the plaintiff (retained by LawPro) brought a motion to extend the time for service of the Statement of Claim.

**Held:** For Sun Life. The plaintiff’s claim was “discovered” on the day the plaintiff received the September 25, 2017 denial letter from Sun Life and not from the date of the appeal denial. Please note that the reader should refer to the full decision in *Hassan* since such decision spends some 25 paragraphs covering case law analysis of a large number of recent cases on this issue including *Kumarasamy v. Western Life*, *Clarke v. Sun Life*, *Pepper v. Sanmina-Sci Systems*, and *Western Life Assurance Company v. Pentilla* (which had held that the limitation period should run from the date of the final denial of the appeal).

The court in *Hassan* noted in part “While the Superior Court is bound by both the Divisional Court and the Ontario Court of Appeal, the Court of Appeal decisions are controlling. *Pentilla* (on which the

plaintiff relied) was decided without the benefit of the Court of Appeal decisions, particularly *Kumarasamy*, where it was held that “there is no authority for the proposition that a clear and unequivocal denial is required.” This is entirely inconsistent with the result in *Pentilla*.

Note: A Notice of Appeal has been filed by LAWPRO.

**(C) Productions: *H.C. v. SSQ Life Insurance Company Inc.*, 2024 ONSC 53**

SSQ brought a motion to compel the plaintiff to produce the redacted and unredacted notes of the plaintiff’s treating psychologist in order to help SSQ assess the plaintiff’s claim for LTD benefits. The plaintiff had produced 114 unredacted pages of the psychologist’s clinical notes and records and had also produced 11 pages of redacted clinical notes and records covering a roughly 5 month period when the plaintiff was dealing with a marital breakdown and divorce.

**Held:** For the plaintiff.

The Court reviewed the 11 pages of redacted notes and records and categorized them as follows:

- discussions about the settlement conferences in the family law case, including comments about the judge.
- discussions with her family law lawyer about the general status of the family law file.
- discussions with the plaintiff’s lawyer in the LTD litigation, including preparations for the discoveries and the post-mortem meetings after discoveries and after mediation.

The court refused to order the unredacted notes and records be produced as “they are irrelevant and there is no good reason to produce them as they do not help resolve the issues in this action and they could potentially embarrass and prejudice the plaintiff.”

**(D) Proper Forum - Collective Agreement: *Banerjee v. The Government of Saskatchewan et al.*, 2024 SKKB 19**

The Government of Saskatchewan, through a statutorily created agency, The Public Employees Benefit Agency (PEBA), denied the plaintiff’s LTD claim. The Disability Income Plan was a self-insured ASO Plan using a third-party administrator but with the final arbiter of LTD claims being a multi-person Council chaired by a Deputy Minister and made up of an equal number of employer and union representatives. The plaintiff brought action against PEBA and the Government of Saskatchewan. At issue in this decision was by which of three potential adjudicative processes the plaintiff’s claim should proceed:

- By Statement of Claim (argued by the plaintiff)
- By arbitration (initial position of the Government of Saskatchewan, which morphed into judicial review due to Crown immunity).

The Government of Saskatchewan argued in the alternative that if judicial review was not appropriate the LTD claim should be resolved by arbitration under the collective bargaining agreement since the provisions of the CBA incorporated the LTD Plan.

The plaintiff, her employer Sasktel, and her union disagreed, arguing that the relevant provisions of the CBA did not incorporate the LTD Plan but only obliged Sasktel to participate in an LTD Plan and pay the premiums.

The Court “after studying the positions of the four parties respecting a multitude of issues including the scope of arbitration under the CBA, public policies favouring judicial review, the provisions of The Insurance Act and The Legislation Act, and the principles of Crown Immunity, found that a Statement of Claim was the proper forum to challenge the LTD denial because, among other things, the plaintiff did exactly what the Disability Income Plan asked her to do, she commenced an action.”

For readers who wish to delve more deeply into the multitude of issues addressed by the Court in *Banerjee*, which includes an analysis of *Weber v. Ontario Hydro*, I would direct the reader to the 30 paragraphs in the decision which address these issues.

#### **ACKNOWLEDGEMENTS:**

As always many thanks to counsel who forwarded me case law for this update.

In no particular order, thank you to Steve Shantz of Sun Life, David Share of Share Lawyers, Tracey Hamilton of Beneva Inc., Alison Gilmour of Burn Tucker Lachaine, and Jeff LeRoy of Smockum Zarnett.

Please keep the case law coming to [eric@schjernermediations.com](mailto:eric@schjernermediations.com) or call me at 416-236-9282.

