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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** or simply email Eric at: **eric@schjerningmediations.com.**

Eric Schjerning **Schjerning Mediations Ltd.**

Comments:

While I do have some recent case law for you, I decided to put these cases in my Fall Update. The LTD Updates which contain new case law will then find a home on my website. The 850 odd LTD cases in existence prior to June of 2023 can be found in the Third Edition of **Disability Insurance Law in Canada**. You may order this text here.

I decided on the subject matter for this summer update after having three recent mediations where a main reason for denying LTD benefits was the plaintiff not receiving regular treatment from a physician. Meanwhile news media is awash in stories of millions of Canadians without access to a family physician. How would these two issues intersect in the world of LTD?

Many (if not most) LTD policies contain exclusionary clauses that LTD benefits will not be paid if the insured is not under the regular care of a physician. Though exact policy wording varies, a typical policy might state that benefits will not be payable during any period of time that the Employee is not under the continuing care of a physician or surgeon legally licensed to practice medicine.

Other policy wordings exclude benefits if the Employee is not receiving "appropriate treatment" for their medical condition.

But how would courts apply this wording when nearly 1 in 10 Canadians do not have a family physician?

Consider the following recent news articles:

- 'Sounding the alarm': 1 in 4 Ontarians could be without family doctor by 2026, group says. Global News, January 29, 2024.
- Canada's family doctor shortage: 10 million will soon lack access to primary care. National Post, February 16, 2024.
- Half a million people in Toronto don't have a family doctor, college says. CBC News, March 5, 2024.

I will not attempt to address in this Update the perplexing (at least to me) questions of why, with so many young Canadians eager to apply to medical schools, there is such a shortage of physicians in Canada, or why Canadians have not made this more of a political issue for our politicians. Rather, I will only address my thoughts on how courts might deal with this issue where insureds, through no fault of their own, cannot access a physician.

My three recent mediations on point involved:

- A plaintiff seeing a nurse practitioner for colitis.
- A plaintiff seeing a social worker psychotherapist who was under the supervision of a psychologist.
- A plaintiff with severe emotional issues, alcohol abuse and past trauma who had no G.P. but had seen an Emergency Room Physician, been referred to a psychiatrist, did not see such psychiatrist, then moved provinces and started attending a walk-in-clinic in her new province.

None of these three plaintiffs were being continuously treated by a licensed physician and LTD benefits were declined in large part for this reason.

There is some limited case law touching on this issue.

In ***Rodrigues v. Purtill*, 2019 ONCA 740**, one of the issues was whether a psychologist is a "physician" for purposes of proving that the plaintiff meets the statutory threshold in m.v.a. claims. The Court of Appeal stated that arguably what is important is not whether the expert is labelled a "doctor", a "physician", a "psychiatrist", or a "psychologist". Rather it is important to examine whether the expert has the requisite training and experience to assess the impairment to apply the established guidelines and standards of the profession, and to give expert evidence on the application of the criteria set out in the Regulation. The Court of Appeal indicated that the purpose of the legislation may well support an interpretation of "physician" that would include a "psychologist" and went on to list 4 cases where evidence of psychologists had been accepted without objection.

In ***Kirkness Estate v. Imperial Life Assurance Co. of Canada*, 1993 CanLII 8522 (ON CA),** the insured suffered from schizophrenia, and had LTD benefits denied because he was not "under the regular care and personal attendance of a psychiatrist", as provided by the policy. A psychiatrist testified that the degree of denial of illness on the insured's part was so great that it prevented any form of treatment. The psychiatrist testified that this was a well-known symptom of schizophrenia, and, in effect, the insured was untreatable.

The plaintiff was successful on an Application for a declaration of entitlement to LTD benefits and Imperial Life appealed.

The Ontario Court of Appeal dismissed such appeal, holding in part that:

> "There has been a difference of judicial opinion on the interpretation of "regular care" clauses in disability insurance contracts. While relatively few Canadian decisions deal with this problem, it has been canvassed in numerous American cases. The United States decisions have been referred to in some Canadian cases and, in my opinion, are entitled to the highest consideration because of their full discussion of the issues involved.
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> ….In my opinion, the tenor of the American decisions is against strict construction of clauses requiring "regular care" and in favour of their liberal construction. These decisions establish that "regular care" clauses will not bar recovery where, as is the case here, permanent disability is established and no useful purpose would be served by regular attendance on a physician. Numerous examples of this method of construction of disability policies are given in Couch….
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> A succinct example of liberal construction is provided in ***Massachusetts Bonding & Insurance Co. v. Springston*****, 283 P. 2nd 819 (1955, Okla. Sup. Ct.)** where the insured was found to be totally and permanently disabled by Parkinson's disease. In affirming the lower court decision, the Supreme Court of Oklahoma adopted the liberal approach recognizing that the insured's condition of total disability could not be improved by treatment. Justice Corn stated at p. 823:
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>> The majority rule is that, in instances where the insured's disability is established, such a policy provision is evidentiary only. The principle appears to be well settled that such a requirement has no application in cases of permanent disability. Two reasons are given for such holdings. First, it is said that the law does not require performance of futile acts and, although fulfillment of this requirement attests the serious nature of the illness, to give a literal meaning to such provision would be to exalt the letter of the law while submerging the spirit of the contract. Second, it is recognized that the primary purpose of such a provision is to establish the good faith of the insured's claim and to guard against fraud. Thus, where it is manifest fraud could not exist, the purpose of the contract would be violated by giving such provision a literal and narrow construction…."

If *Kirkness Estate* provides some clarity in instances where medical treatment would not alter the insured's total disability, there is no real judicial guidance in instances where regular medical treatment could, or would, improve (or even cure) the insured's illness but where the insured is simply unable to access a physician.

Three other Canadian decisions nibble around the edges of the regular treatment issue: ***Continental Casualty Co. v. Roberge*****, (1955) S.C.R. 676 (SCC);** ***Froelich v. Continental Casualty Co*****., (1956) 4 D.L.R. (2d) 62**; and ***Rose v. Paul Revere Life Insurance Co.*****, (1991) 62 B.C.L.R. (2d) 48 (BC CA).**

So there you have it. An express contractual term will argue insurers. However, a term which is essentially impossible to comply with will argue plaintiff counsel.

I do not know which argument a trier of fact would accept but I would guess that a plaintiff's chances of success would be much improved if they had at least been seen by a walk-in clinic or Emergency Room Physician, been given a diagnosis and perhaps been prescribed medication, and where regular visits to a physician had only a very modest chance of curing the insured's medical condition.

What I do know is that when (not if) a case addresses this issue, it will be featured in a future LTD update.

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If you have a case you wish to share or if you would like to be removed or added to my LTD mailing list, please email me at eric@schjerningmediations.com or call me at 416-236-9282.