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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:

My last LTD update concerning the requirement of medical treatment when so many Canadians are without a family doctor generated a great deal of email traffic, with lawyers pointing out numerous scenarios where it would seem difficult to enforce a Policy's requirement of medical treatment provision.

This update contains two rather juicy decisions going to the heart of some key issues in LTD litigation: the scope and relevance of various examination for discovery questions; and surveillance and with it a plaintiff's credibility at trial.

The cases in this update will of course not appear in my most recent book though this update will be posted on my Schjerner Mediations website. To access the 850 odd cases contained in the Third Edition of **Disability Insurance Law in Canada** you may order this text [here](#).

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(A) Relevant Examination for Discovery Questions: *Heathcote v. RBC Life Insurance Company*, 2024 ONSC 1539

Concerned a motion over a number of interesting refusals given at the examination for discovery of RBC Life Insurance Company with some key wins by each party. Because I found the refusals and the Motion Judge's Findings ("M.J.F.") of great interest, large portions of the Motion Decision will be reproduced below.

Q. To provide contact information for any RBC witnesses that may have left the employment of RBC.

M.J.F.: I find that a party is required to provide contact information for any person who may have relevant information or who may be a witness at trial. In this case, if a person ceases to be an employee of RBC, the defendants are required to provide any available contact information... This requirement is not conditional upon compliance with RBC's policy or upon obtaining the consent of the former employee.

Q. For production of a training document used by the RBC Life adjuster (such adjuster was also named personally) when she had been employed by Royal Bank, prior to her employment at RBC Life Insurance Company.

M.J.F.: Defence counsel submits that the RBC Life employee's training to deal with complaints about the Bank is irrelevant to her training to do her job as an adjuster at RBC Life.

It is important to recognize that the plaintiff's claim is a bad faith claim in which the plaintiff alleges that RBC protocols and procedures were not followed and that the RBC Life adjuster was not properly trained to handle these types of claims.

Thus, in my view, the adjuster's background and training are very relevant considerations in this case. In my opinion, this would include her training to do her current job, as well as her prior training, education, and experience... and this training document shall be produced.

Q. For production of RBC Life's entire Claims Manual, as opposed to the 5 out of 67 headings in such manual which defence counsel deemed relevant.

M.J.F.: In my view, it is not sufficient for defence counsel alone to vet a document and then decide to produce only what defence counsel feels is relevant... Opposing counsel should have some input into the decision as to which documents are relevant.

Moreover, relevance is an issue that will be more closely scrutinized at trial. At this stage, the issue is not about admissibility, but discoverability.

I accept that certain headings of the Claims Manual are clearly irrelevant... However, other headings are ambiguous and may or may not be relevant. I am not convinced that defence counsel is correct that there are only five headings that are possibly relevant.

As this is a fairly short document as compared to other insurance documents I will order that the entire Claims Manual be produced to plaintiff's counsel. Plaintiff's counsel can then review the document as a whole. Ultimately, the issue of which headings are relevant will be decided by the trial judge.

Q. To provide information concerning all files over a 3-year period in which the RBC Life adjuster had requested urine, blood and hair samples (for drug testing).

M.J.F.: In my view, the information requested by the plaintiff has some relevance. The plaintiff is attempting to prove that RBC systematically ordered drug testing for no practical reason... to support his argument... for bad faith.

The difficulty with the question posed at the examination for discovery is that it will take a great deal of time and work to answer. Each file must be identified, and then carefully reviewed to determine if drug testing was ordered, how often it was ordered, and on what dates it was ordered.

The Rules of Civil Procedure provide that discovery is not unlimited, discovery is governed by the principles of proportionality as set out in Rule 29.2.03. In this case, I find that the amount of time to answer the question is a factor that supports the defence position.

Moreover, the answer to this question will have limited relevance as each RBC Life Insurance claim will be unique... Therefore, I will not order that the defendants answer this question.

Q. To provide the amount of profit made by RBC from 2019 to present and to confirm that RBC's profit exceeded \$15 billion in 2022.

M.J.F.: It is the position of the plaintiff that if RBC is systematically acting in bad faith, the triers of fact must consider the profitability of RBC in determining the quantum of damages. In response, defence counsel submits that the amount of RBC's profit is irrelevant to the plaintiff's claim for bad faith, that the profitability of a corporate defendant is a confidential and sensitive topic, and that profitability will only become relevant if and when the plaintiff establishes that the defendants acted in bad faith.

*There are two competing principles with respect to this request, both of which were dealt with by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.*

*The first principle is set out at para. 72 of the *Whiten* decision. That principle is that it is proper to consider the profitability of a corporate defendant in a claim for punitive damages because "it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others."*

Therefore, I accept that the profitability of a defendant insurance company that has systematically acted in bad faith is a relevant factor for consideration in determining the quantum of damages.

The second principle is set out at para. 121 of the Whiten decision. That principle is that financial information for a corporate defendant should not be disclosed to the trier of fact before liability is established. As set out in para. 121, “disclosure of detailed financial information before liability is established may wrongly influence the jury to find liability where none exists.”

I find that these two principles conflict with one another. That conflict raises a question as to the proper procedure for conducting a jury trial on a bad faith claim where the jury will be asked to determine both liability and damages; that is, based on the current state of the law, the jury will be told that the profitability of the corporate defendant is one factor for their consideration in assessing the quantum of damages, but the jury will not be told the particulars of the profitability of the corporate defendant until the jury has established that there is liability.

... I question why RBC should be ordered to produce information as to its profitability if the law is clear that this information cannot be introduced at trial unless and until liability has been established.

In my view, it may be necessary to bifurcate this trial...

...defence counsel has already answered other questions posed by the plaintiff by acknowledging that RBC is in fact a profitable corporation. I find that the defendants need not provide any further information on this topic at this stage.

(B) Surveillance Evidence at Trial: *Hassan Dek v. The Manufacturers Life Insurance Company*, 2024 ONSC 2071

The plaintiff sought a declaration of entitlement to LTD benefits despite not having made an application to Manulife, arguing for such declaration on the basis of relief from forfeiture for imperfect compliance with the Policy provisions.

Manulife countered that failure to deliver an application form for LTD benefits constituted non-compliance, rather than imperfect compliance with the Policy provisions, and that in any event the plaintiff was not totally disabled.

The plaintiff (aged 32) suffered a back injury while working at his assembly line job. The plaintiff refused two offers of modified work by his Employer and ultimately claimed total disability due to chronic back pain and depression.

Manulife tendered surveillance evidence showing, in the words of the trial judge: “the plaintiff was able to walk at an apparently normal speed and gait without any evidence of pain or favouring his left leg. It also shows him bending, reaching above his shoulders, and sitting for long periods of time. In addition, it shows the plaintiff’s ability to get into and out of a vehicle without issue.”

Manulife also produced evidence at trial that the plaintiff had obtained work at an alternate employer doing work similar to the plaintiff’s own occupation, whereupon plaintiff’s counsel abandoned the claim for ongoing benefits and limited the claim to benefits to the date of this other employment.

Held: The Court granted relief from forfeiture as failure to deliver proof of claim to Manulife prior to issuing a Statement of Claim was imperfect compliance rather than non-compliance and thus assessed the lawsuit on its merits.

Regarding the merits, the Judge was greatly troubled by the surveillance evidence and the plaintiff's attempt to explain his videotaped actions during cross-examination and found in part: "The evidence of the plaintiff's G.P. and chiropractor are based for the most part...on the difficulties experienced by the plaintiff as reported by him.....no where in the clinical notes and records of any of the plaintiff's treating physicians is there mention of the plaintiff's physical abilities as documented in the surveillance videotapes...the only reasonable explanation of the absence of this critical information is that the plaintiff was less than truthful with his doctors."

The plaintiff's claim for LTD benefits, general damages and extra-contractual damages were all dismissed with costs.

ACKNOWLEDGEMENTS:

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For this issue thanks to Brendan Sullivan of Sullivan Injury Law and to Gord Jermane of Manulife.

If you have a case to share or a question to ask about LTD law please either email Eric at eric@schjernermediations.com or call 416-236-9282.

