Blaney McMurtry LLP

PUBLICATION

LTD Case Law Update - Spring 2018

Date: Spring 2018

In an attempt to keep LTD counsel apprised of any significant LTD case law, Eric Schjerning will send this update whenever warranted by new case law. It may be 4 times per year or only once.

PUNITIVE/AGGRAVATED DAMAGES

Godwin v. Desjardins Financial Security (2018) BSCS 99 (B.C.S.C.)

The plaintiff (a paralegal) claimed disability due to anxiety and depression. Both the plaintiff's G.P. and stress counsellor/therapist stated the plaintiff would return to work, but could not give an exact timeframe, though the G.P. felt a return to work was possible in 6 months.

The insurer's in-house psychiatric consultant opined that the plaintiff's symptoms **might include** more occupational (issues with her former employer) and motivational factors than a severe and limiting psychiatric impairment.

The claims adjuster's denial letter stated as fact that the plaintiff's situation was dominated by occupational and motivational factors rather than by a severe and limiting psychiatric impairment that would prevent the plaintiff from working.

The trial judge found the initial denial of own occupation benefits "severely flawed" and that "the impression of the denial letter was of a claims examiner looking for reasons to deny coverage".

Desjardins had also denied any occupation benefits despite the plaintiff's having by this point seen a treating psychiatrist who strongly supported the inability to return to any type of work for at least 6 months. The insurer's in-house psychiatric consultant reviewed the treating psychiatrist's opinion and opined that the effect of occupational/motivational issues remained unclear.

Following a further letter of support from the plaintiff's psychiatrist, and a further referral to the in-house psychiatrist consultant, LTD benefits were approved retroactively for own occupation benefits.

Regarding any occupation benefits, an independent psychiatric medical examination was arranged. The IME psychiatrist ("IME") took issue with "significant discrepancies between the

plaintiff's activities of daily living and the treating psychiatrist's assessment of symptoms as moderate to serious". The IME also dismissed the views of the counsellor/therapist as being "overly sympathetic and insufficiently objective".

The in-house psychiatric consultant found the IME psychiatrist's analysis "convincing", but did not opine as to why it should be preferred over the opinions of the treating psychiatrist and therapist.

The trial judge noted:

In the present case, a fair and balanced approach to assessment of this claim would have led the claims examiner questioning whether the stark contrast between the opinions of the IME - who saw the plaintiff only on a single occasion - and those of her treating practitioners, was possibly the result of the IME having an incomplete understanding of the plaintiff's history and symptoms.

The trial judge further held that the claims examiner had:

a duty to resolve the inconsistencies in the medical evidence and that had she done so, she would have seen that the IME had "cherry-picked" passages from the treating psychiatrist's reports.

Six days before trial, and after several settlement offers back and forth between counsel, Desjardins paid retroactive LTD benefits and reinstated the plaintiff's monthly benefits. The trial proceeded for punitive and aggravated damages.

The judge wrote:

As noted in *Fidler*,

…an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate.

The present case, however, represents much more than an insurer simply having made an incorrect decision. I have detailed above how Desjardins failed to assess both Own Occupation and Any Occupation claims in a fair and balanced manner. These failures went beyond mere errors of judgment or misunderstandings. Desjardins' responsible claims examiner repeatedly failed to analyze and to weigh the evidence placed before her, imported or applied tests for disability beyond those set out in the Policy, and made findings not supported, or not adequately supported, by the evidence. These failings, - some of them individually, and certainly all of them taken in context - amounted to a breach of Desjardins' duty of good faith.

On the balance of probabilities, these deficiencies in the claims handling materially delayed the acceptance of the Own Occupation claim by approximately 10 months.

I find that Desjardins' breach of its duty of good faith delayed the acceptance of the Any Occupation claim for a period of between approximately 34 to 40 months.

In respect of Desjardins' conduct of the litigation, the plaintiff contends that Desjardins compounded its breach of the duty of good faith by continuing to rely on the IME when it ought to have known that his opinion was unreliable, and then by attempting to suppress his evidence, and further, by not reinstating benefits earlier than on the eve of trial, and by attempting to extort from the plaintiff, through its settlement offers, a waiver of her claims for aggravated and punitive damages.

The trial judge awarded general damages for mental distress of $30,000 as well as punitive damages of $30,000.

KEY LEARNINGS FROM *GODWIN:*

This case reinforces what should be known by experienced LTD counsel as generally accepted "rules" for trial:

- The opinions of in-house medical consultants are usually given little weight by trial judges
- The opinion of one-time defence IME psychiatrists are often viewed with a jaundiced eye
- Insurers must have an easy to follow and justifiable basis for their claims denial to present to the trial judge

RELIEF FROM FORFEITURE/LATE CLAIM

Wiles v. Sun Life 2018 A.C.W.S. (3d) 754 (O.S.C.J.)

The employee claimed disability from depression from October 2015. She was terminated for cause in November 2015. In December 2015 and January 2016, Sun Life requested the plaintiff submit a completed APS. A Statement of Claim versus Sun Life was issued in January 2017.

Completed APS forms were sent to Sun Life July 2017. LTD forms were required to be submitted to Sun Life by July 31, 2016. At the time of service of the Statement of Claim, claim forms had only been submitted to the employer for the short term Salary Continuance Benefits, for which Sun Life was only the administrator.

The motions judge wrote:

I am satisfied that the plaintiff failed to submit to Sun Life the appropriate forms for LTD benefits within the time specified in the policy of insurance. I reject the plaintiff's assertion that she only became aware that different forms were required to assert a claim for Salary Continuance Services and a claim for LTD benefits when the present Notice of Motion was served.

Sun Life's LTD Policy provides that any legal action must be commenced within one year after the end of the time period in which the initial submission of proof of claim was required.

The outcome of this motion therefore turns on the issue of whether the plaintiff is entitled to relief from forfeiture for failure to submit her claim for LTD benefits within the requisite time period and for failure to initiate legal action within one year as required by the policy. The options available on the present motion include a finding that a trial is required to determine the issue of whether the plaintiff is entitled to relief from forfeiture or a finding that the plaintiff is entitled to relief from forfeiture.

Relief from forfeiture is available to the plaintiff pursuant to either section 129 of the *Insurance Act* or section 98 of the *Courts of Justice Act*. However, under either section, relief from forfeiture is only available for imperfect compliance with a term of the insurance policy but is not available for non-compliance with a term of the policy.

On the basis of this distinction, the plaintiff's failure to give timely notice to Sun Life of her claim for LTD benefits could be the subject of relief from forfeiture. However, the plaintiff's failure to commence the action against Sun Life to claim disability benefits until more than one year after the end of the time period in which the initial submission of proof of claim was required would be non-compliance with the contract and would not be subject to relief from forfeiture. Accordingly, the plaintiff's claim against Sun Life must be dismissed.

OFFSET BY INCOME REPLACEMENT BENEFITS

Two not hot off the press cases, but cases not widely known and which perhaps should be.

(i) Ng v. Cole et al, 2013 ONSC 6588, (O.S.C.J.)

The plaintiff sued Manulife for LTD and Dominion (his own insurer) for SABS and IRBS. Dominion pleaded that all IRBS and medical rehab benefits were paid and that IRBs were paid during the time the plaintiff received severance.

Dominion cross-claimed against Manulife for the amount of IRBs paid by Dominion during the time Dominion claimed Manulife was obligated to pay LTD.

Dominion claimed Manulife was unjustly enriched by Dominion's payment of IRBs and that these benefits would not have been paid if the plaintiff had received LTD benefits.

In short, (the judge wrote) Dominion claims:

1. that Manulife had primary responsibility to pay LTD benefits to the plaintiff;
2. that the obligation of Dominion to pay income replacement benefits should have been reduced by LTD payments made to the plaintiff by Manulife;
3. that Manulife has been unjustly enriched by its refusal to pay disability benefits to the plaintiff; and
4. that Manulife is obligated to pay to Dominion the LTD benefits it ought to have paid to the plaintiff.

Pursuant to s. 7 of *SABS*, Dominion is entitled to deduct Manulife LTD payments from IRBs otherwise payable by it only if:

(a) Mr. Ng has been paid LTD, or

(b) he failed to apply for LTD.

It is not disputed that Manulife has not paid LTD benefits to the insured and that Mr. Ng has applied for such benefits. Manulife denies that the insured is entitled to receive any disability benefits pursuant to the LTD policy of insurance made available to the insured through his employment. Unpaid LTD benefits cannot be characterized as payments for loss of income received by the insured under an income continuation plan. Pursuant to the plain reading of the Regulation, Dominion is not entitled to deduct from payments to Mr. Ng the value of unpaid LTD payments applied for and denied.

Based on *Vanderkop*, Dominion cannot set off against income replacement benefits payable to Mr. Ng any hypothetical LTD benefits applied for but refused by Manulife and Dominion has not done so in this case. Rather, Dominion has paid the income replacement benefits to Mr. Ng and has elected to claim reimbursement of such hypothetical benefits directly from Manulife on the basis of unjust enrichment. There are several problems with this approach.

The unjust enrichment claim made by Dominion is inconsistent with the decision of the Court of Appeal in *Vanderkop*. It is also inconsistent with the statutory and regulatory scheme providing no-fault benefits.

The result sought by Dominion is also inconsistent with section 7 (1) 1 (i) and (ii) of SABS which makes it clear that Dominion is entitled to deduct Manulife LTD payments from IRBs otherwise payable by it only if: (a) Mr. Ng has been paid LTD, or (b) he failed to apply for LTD.

The *Insurance Act* and the *SABS Regulation* clearly recognize that the obligation of the no-fault benefit provider to pay income replacement benefits to an eligible employee is not affected by the denial of benefits by the LTD insurer.

(ii) Hamblin v. The Standard Life Assurance Company 2016 ONCA 854 (O.C.A.)

The application judge held Manulife was entitled to reduce the LTD payments it was making to the appellant, under its Group Insurance Plan as a result of the appellant's first accident, by the amount of the Non-Earner Benefit (NEB) she was receiving from her own insurer under *SABS*, as a result of her second accident.

The appellant was not working at the time of her second accident. She elected to receive the NEB under s. 12 (1) of the *SABS*. In order to qualify, she was required to establish that she suffered "complete inability to carry on a normal life as a result of and within 104 weeks after the accident" and that she did not qualify for an income replacement benefit.

Under s. 12 (2) of the *SABS*, the appellant's automobile accident insurer was entitled to deduct the LTD payments from the amount of the NEB payable but, for reasons that were not explained, it did not do so.

The judge continued on:

However, under the terms of its Group Insurance Plan, the respondent was entitled to reduce the monthly LTD payments by "any disability or retirement benefit…payable…under…a provincial auto insurance law." After being notified by the appellant that she was receiving the NEB, the respondent began to deduct the amount of the NEB from its LTD payments. It takes the position that it is entitled to do so as long as the appellant's auto insurer does not deduct the LTD payment from the NEB.

The application judge found that the words "any disability..benefit" were broad enough to cover the NEB, which he found was a "disability benefit payable because of the impairments which render a person completely unable to carry on a normal life." The deduction of the NEB was consistent with the LTD policy being one of indemnity.

Nor do we accept the submission that the result gives the respondent a "windfall." A deduction permitted by the plain language of the policy is not a "windfall."

Eric Schjerning is a mediator of LTD disputes and the author of 2 editions of Disability Insurance Law in Canada. To look for available mediation dates or to book a mediation with Eric, visit: https://www.blaney.com/schjerning-mediation, or simply e-mail Eric at: eschjerning@blaney.com