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A) LUMP SUM OF FUTURE BENEFITS, DISCOUNT RATE

Brito v. Canac Kitchens

As set out in chapter 12 of *Disability Insurance Law in Canada (Second Edition)* 4 cases have held that a trial judge cannot make an award for a future lump out of LTD benefits: *Cram v. Great West Life* (1995 - B.C.), *Warrington v. Great West Life* (1995 - B.C.), *Richardson v. Great West Life* (1996 - Alberta), *Anderson v. Great West Life* (1998 - Ontario). Only *Brito v. Canac Kitchens* (2011 - Ontario), which will be discussed in some detail below, supports a judicial lump out of future LTD benefits.

While there is little authority to force a judicial lump out of future LTD benefits, LTD mediations most commonly resolve on the basis of a lump sum payment for past and future benefits.

In order to achieve such a lump out, general agreement on the present value discount rate to be applied must be reached between counsel.

Some plaintiff counsel in Ontario start negotiations using the *Rules of Civil Procedure*. Under *Rule* 53.09 of the *Courts of Justice Act*, such rate is 0.1% for the first 15 years, 2.5% thereafter. For simplicity`s sake, most plaintiff counsel simply use 1% to reflect the rate set out in the *Rules*. The problem with this is that *Rule* 53.09, while used for determining the amount of an award in respect of future pecuniary damages, does not apply to LTD benefits and there is no case law supporting that section 53.09 applies to LTD cases.

Defence Counsel often seek to use a 4.0, 4.5 or even 5.0% discount rate on the basis that insurance companies can invest assets in private placements such as aircraft leasing, REITS, etc. and thus generate higher investment returns than can Joe Public. While an insurance company's ability to obtain higher investment returns than any plaintiff is without doubt, nor is there any case law agreeing with a 4 or 5% discount rate. To highlight the significance of this debate look at the difference between a 1% and a 5% present value discount rate on a $1,200 per month benefit for a 50 year old plaintiff. Using the actual rates prescribed in the *Rules*, the present value of future LTD benefits to age 65 equals $216,000. At 1%, the present value equals $200,570. At 5%, it equals $153,417.

Discount rates accordingly play a huge role in achieving an agreeable lump sum number. Starting at a 1% rate tends to inflame LTD insurers since it produces a number far above the insurer`s full claim value, (at least such full claim value as set by insurance company actuaries and which actuarial value limits the claims consultant's room for flexibility at mediation) and since it tends to put an unachievable number into the minds of the plaintiff. Using the 1% discount rate also significantly reduces the chance of a successful mediation (see Important Statistics below). Besides, argue LTD insurers, since a Court cannot order a lump sum future buyout why bother debating a 1% discount rate lump sum number at mediation? As per the case law cited above, 4 cases have specifically held that a Court cannot award a lump out of future LTD benefits.

Conversely, plaintiff counsel take issue when the insurer seeks to use a 4.5% discount rate when the plaintiff is over age 60 with limited years until 65 and thus leaving a limited number of years for the LTD insurer's investments to bear fruit. This is a legitimate issue to be debated at mediation.

Some plaintiff counsel, however, cite *Brito v. Canac Kitchens* [2011] ONSC 1011 as authority for a lump sum award of future benefits. It is true that the trial judge in *Brito* awarded a lump sum of LTD futures, and also true (apart from the punitive damage award component) that this trial decision was upheld by the *Ontario Court of Appeal* 2012 ONCA 61.

However, to say that the *Brito* case leaves many questions unanswered is a huge understatement. *Brito* concerned a wrongful dismissal and the trial judge was clearly incensed by the actions of the employer. In fact, the trial judge began his decision by stating that today's employers cannot treat employees as they did in the 19th century.

In *Brito*, after 24 years of employment, the 55 year old Plaintiff ("O") was dismissed without cause due to a restructuring and given the statutory minimum severance of 32 weeks plus a continuation of benefits for 8 weeks. The trial judge awarded a notice period of 22 months and also awarded 2 years of future LTD benefits.

It should be noted that Eric spoke with trial counsel for Canac who advised that while there was an LTD insurer for employees of Canac, such LTD insurer was not present at trial since LTD coverage ended upon O's termination and O's disability commenced roughly 1 year after his termination. Trial counsel also advised Eric that: (i) the real issue was whether there was LTD coverage for O when O became disabled and there was no real fight over disability; (ii) there was no argument at trial regarding an appropriate discount rate for future benefits and; (iii) the trial judge framed future LTD benefits as damages to be awarded against the employer and counsel stated that this was calculated on a simple straight line basis.

In 2004, one year after being terminated, O underwent surgery for laryngeal cancer, received radiation, and a tracheostomy tube was inserted in his throat until being removed in 2005. Further cancer surgeries were conducted in 2008 and 2009 with future surgeries contemplated at the time of the 2011 trial.

Dealing with the Disability Question, the trial judge wrote:

How should the law deal with the events of the period of November 6, 2004 (the disability date) to May 15, 2005 (the end of the 22 month notice period)? If it is to place O into the position he would have been in had Canac provided him with working notice, he would have received his regular cash employment compensation, plus all benefit coverages for the entirety of his 22 month notice period at law.

Canac consciously chose not to make alternative arrangements to provide its loyal, long-service employee with replacement disability coverage. Rather, it chose to go the "bare minimum" route. It provided only the statutory minimums in pay and benefits and then gambled that O would get another job and stay well. When it lost that gamble, it chose to litigate this matter for over five years. When confronted with its potential significant exposure, it raised the argument that O failed to mitigate his potential damages by purchasing a replacement disability policy.

I reject that argument.

After the 17 weeks of STD coverage expired, the question then arises: Is O entitled to receive damages as a result of his loss of LTD coverage. Again, Canac advanced a number of policy defences, none of which succeed in this instance. The plaintiff has discharged his evidentiary burden that he is "totally disabled" by both viva voce evidence and medical evidence.

Finally, Canac has urged that the "any occupation" requirement should end its liability (if any) to O for benefits from March 6, 2005 to age 65. Again, it has failed to discharge its evidentiary burden. I fix and award the sum of $146,723.00 for damages to O for loss of LTD benefits from March 6, 2005 to the outset of trial. The present value of the remainder of O's LTD entitlements to his 65th birthday is a further $47,941.00.

Having regard for Canac's cavalier, harsh, malicious, reckless, outrageous and high-handed treatment of O, I award a further $15,000.00 in damages relating to its "hardball approach".

Brito was age 63 at the time of trial and so the future lump-out was only 24 months. Also, as mentioned, there was an LTD insurer insuring employees of Canac. But because O had been terminated before his total disability, plaintiff counsel had to argue that O should not have lost LTD coverage. The LTD insurer was not named as a party, was not present at trial, and according to Canac's counsel, there was no argument at trial regarding an appropriate discount rate. Rather, the argument at trial concerned whether there was LTD coverage and the claim for LTD for the 2 years remaining until O turned 65 was framed as damages and was simply calculated on a straight line basis. Canac's counsel does not recall if O was receiving CPP and if this was offset from LTD damages. Eric's best guess is this was never raised at trial since Canac's counsel was not overly LTD conversant. O's counsel is deceased and so could not comment on the case.

There is no discussion in *Brito* of a present value discount rate for future LTD benefits or even the monthly LTD entitlement. There is also no reference to the 4 decisions holding that a judge

cannot order a lump sum award of future benefits. The *Brito* decision does not specify the quantum of the monthly LTD benefit although if calculated on a straight line basis it equaled roughly $1,997 per month.

Had an LTD insurer been involved in *Brito*, one would think there would have been a heated fight regarding (i) whether a future lump out could be awarded and (ii) if so, what the appropriate discount rate should be.

Is the *Brito* case then limited to the following fact specific situations?

- where LTD coverage was lost due to the actions of the employer;
- where the employer has treated the employee in bad faith and where future LTD entitlement is framed as damages versus the employer;
- a plaintiff aged roughly 63 with limited payments to age 65;
- a monthly benefit in the range of $2,000.00;
- a plaintiff with a serious medical condition (O had cancer) with little chance of recovery. Note the cancer diagnosis raises the issue of the insured's mortality and if there was a high prospect of increased mortality, why would an LTD insurer lump out future benefits? - Again this is not discussed in *Brito*.

IMPORTANT STATISTICS

Returning back to the issue of some Plaintiff counsel insisting on using the Courts of Justice Act discount rate, the following statistics may be of interest to counsel:

Total Number of LTD Mediations conducted by Eric in calendar year 2018	128
Total Settled	120 (94%)
Total Mediations where plaintiff's first offer was based on the rate prescribed by the *Rules* or a 1% discount rate	7
Total number of these 7 Mediations which were successful	2 (28.5%)

Of the 8 LTD Mediations that Eric failed in 2018, in 5 such cases, (62.5% of the total failed Mediations) plaintiff counsel insisted on basing their first offer on the *Rules of Civil Procedure* discount rate set out in the *Rules*.

Note also Eric's overall settlement rate of 94% compared to the 28.5% settlement rate where plaintiff's first offer used the rate set out in the *Rules.*

While this is admittedly a small sample size involving only one mediator, it does support Eric's suspicion that when a Plaintiff's first number is based on the *Rules* prescribed discount rate, it hurts the odds of a successful mediation.

B) CROSS-EXAMINATION OF MEDICAL EXPERT, APPLICABILITY OF A POLICY APPEAL PROCESS, MOTION FOR SUMMARY JUDGEMENT

Fricke v. SSQ Life Insurance Company

This case involved three procedural battles (each with a separate citation) between 2 experienced LTD counsel.

The plaintiff ("F) had been employed at a hospital for 17 years and alleged total disability.

SSQ and F agreed to resolve their dispute via the Medical Appeals Process ("MAP") prescribed by the insurance policy. Under the MAP process, both parties agreed to the appointment of an independent assessor; to be bound by the decision of the assessor and the outcome of the MAP process; and waived their right to appeal the outcome.

The independent assessor selected was one Dr. Ryan Williams. As part of the MAP process, Dr. Williams concluded that F was not totally disabled. On the basis of this conclusion, SSQ refused to pay F any LTD benefits.

F commenced an action against SSQ for payment of LTD benefits pursuant to the insurance policy. The action was premised on allegations SSQ breached its contractual obligations by declining to pay LTD benefits.

(i) Fricke v. SSQ Life (2018) ONSC 5609:

Involved F's actions in response to SSQ bringing a motion seeking summary judgment submitting that there was no genuine issue requiring a trial because by agreeing to the terms of the MAP agreement, F waived her right to initiate any proceeding in the Courts of Ontario.

In preparation of her defence of SSQ's summary judgment motion, F summoned and cross-examined Dr. Williams. SSQ sought an Order quashing the subpoena to witness and prohibiting the use of Dr. William's testimony at the summary judgment motion and any other proceeding in this action.

The motions judge noted:

SSQ submits that F's cross-examination of Dr. Williams contravenes Rule 39.03 because the cross-examination is irrelevant; was conducted without leave of the court; and is an effort to use the rule to insulate an expert from providing a report…

F argues that Dr. Williams was asked questions to clarify the process he utilized to conclude that F did not have an LTD claim and to determine what test for LTD Dr. Williams used in arriving at his conclusion.

F examined Dr. Williams for the purpose of having his testimony available for SSQ's summary judgment motion. F must demonstrate that Dr. Williams has evidence to give that is relevant to SSQ's summary judgment motion and that Dr. Williams is in a position to provide the relevant

evidence. F failed to satisfy this evidentiary threshold. Therefore, the summons and examination of Dr. Williams was a "fishing expedition" and an abuse of process.

The parties agreed to participate in the MAP process as per the insurance policy. Pursuant to the MAP process, Dr. Williams provided an expert opinion on whether F has an LTD claim as defined by the insurance policy. Dr. Williams concluded that F does not have a valid LTD claim. This forms the basis for SSQ's decision not to pay F LTD benefits.

SSQ's Statement of Defence and summary judgment motion are based on the premise that F is not entitled to sue for LTD benefits because she waived her entitlement to sue when she agreed to the MAP process. The summary judgment motion is grounded in F's entitlement to sue for LTD benefits, not F's entitlement to LTD benefits.

In addition, Dr. Williams is not qualified to give evidence relevant to the issue of whether F's agreement to participate in the MAP process constitutes a waiver which prohibits her from taking any action for LTD benefits in the Courts of Ontario.

Even if the evidence of Dr. Williams was relevant, the process by which the evidence was obtained constitutes an abuse of process. SSQ's motion is grounded on a challenge to F's ability to sue based on her agreement to participate in the MAP process. SSQ submits that this is a legal question and Dr. Williams has no relevant evidence to give. SSQ did not request an expert report from Dr. Williams.

(ii) *Fricke v. SSQ Life (2018) ONSC 5599:*

F sought leave to file a Reply and leave to set aside the decision of Dr. Williams under the MAP process. Both were dismissed.

(iii) Fricke v. SSQ (2018) ONSC 5608;

SSQ was unsuccessful on their actual motion for summary judgment to dismiss F's lawsuit.

The motions judge found:

SSQ submits that there is no genuine issue requiring a trial because the MAP agreement is enforceable; the decision of the independent physician is final and binding in accordance with the MAP agreement; and pursuant to the agreement, F is precluded from commencing any proceeding in an Ontario court or other tribunal for disability benefits.

SSQ concedes that the court has jurisdiction to review the MAP agreement, but submits that Dr. Williams' findings should not be reviewed because: (a) Dr. Williams' opinion that F did not exhibit a severe impairment that would render her Totally Disabled from performing her job duties was clear and obvious; (b) F has not pleaded or established that the findings in Dr. Williams' report were improper, inappropriate, unconscionable or unjust; and (c) F has not pleaded or established that the MAP agreement or the independent physician were in any way biased.

F submits that the term "total disability" is a legal question. F relies on Paul Revere Life Insurance v. Sucharov, [1983] 2 S.C.R. 541. She submits that SSQ failed to apply the correct test to determine F's total disability within the meaning of the insurance policy. Therefore, the MAP agreement is not valid and binding on F and there is a genuine issue requiring a trial as to the consequence and remedy resulting from the failure.

F submits that Dr. Williams' decision was ultra vires the MAP agreement because the MAP agreement explicitly provided that Dr. Williams will not comment outside his expertise. F submits that Dr. Williams provided an opinion in the area of psychiatry and not in the area of his expertise (physiatry)…

Dr. Williams testified that there may be organic and non-organic causes for the pain F said she was feeling. He testified that the non-organic causes were outside his field of expertise. Therefore, F explains, there is a genuine issue requiring a trial as to whether Dr. Williams rendered an opinion outside the MAP agreement and hence whether the MAP agreement is enforceable.

In responding to the summary judgment motion, F is not limited to her pleadings. She may rely on other evidence to "show specific facts that there is a genuine issue requiring a trial". Rule 20.02(2).

The timing of the substantive issues raised by F is not unfair to SSQ. SSQ has suffered no non-compensable prejudice.

I am satisfied that SSQ has had the full opportunity to respond to the new substantive issues raised by F and have not been prejudiced.

There is a genuine issue requiring a trial on the issue of whether SSQ applied the correct test for total disability when it instructed the independent physician under the MAP process.

Namely, the issue is whether Dr. Williams was instructed on the proper LTD test to apply under the MAP process and whether he applied the proper test.

C) LATE LAWSUIT

Wiles v. Sun Life 2018 ONSC 1090

The employer had a salary continuation program ("SCP") administered by the employer's LTD insurer. SCP was essentially the employer's substitute for short-term disability coverage. The employee ("W") claimed to have been disabled at the time she was terminated without cause and was provided with forms relating to SCP. W was denied salary continuation on the basis that she failed to provide information from her physician, and she was denied LTD benefits due to failure to apply within the required 90 day time period. W brought action against Sun Life for damages for breach of contract. Sun Life brought a motion for summary judgment dismissing the action. The sole issue before the motions judge was relief from forfeiture since W conceded that Sun Life had no liability in relation to SCP and since she had failed to apply for LTD benefits by the required time. The plaintiff sought relief from forfeiture for imperfect

compliance with the 90 day time period to submit a claim for LTD and from the one year time period to initiate legal action.

Held:

Sun Life's motion was granted.

While W's failure to give timely notice of her claim for LTD benefits could be subject of relief from forfeiture, W had failed to commence action within the one year time period provided in policy. Failure to commence legal action in time amounted to non-compliance with a term of the policy and was not subject to relief from forfeiture.

*NOTE: This decision was upheld on appeal (2018) ONCA 766.

For any questions on these, or other LTD case law, feel free to e-mail Eric at eschjerning@blaney.com

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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.