Blaney McMurtry LLP

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A) RELEASE - ENFORCEABILITY

Swampillai v. Royal & Sun Alliance and Sun Life Assurance Company (2018) ONSC 4023; 2019 ONCA 201

The decision in *Swampillai v. Royal & Sun Alliance and Sun Life Assurance Company* (2018) ONSC 4023 (motions judge decision listed in the Fall 2018 LTD update) was overturned by the Ontario Court of Appeal 2019 ONCA 201.

In *Swampillai*, the motions judge had granted the employer's summary judgment motion that a Release releasing any and all claims in exchange for 43 weeks of severance for a roughly 6 year blue collar mail room employee was binding and also released the potential LTD claim (which was in the appeal process with Sun Life). The Court of Appeal ruled that the issue of whether the Release was unconscionable and therefore unenforceable was a genuine issue requiring a trial since the record before the motion judge was insufficient to permit him to determine that the severance transaction for which the Release was signed reached the high threshold of grossly unfair and "improvident" because it included the release of the respondent's LTD claim.

The Court of Appeal wrote:

"It is not disputed that the amount of severance based on years of service was more than fair. It is also not disputed that there was no specific amount designated to compensate for the potential success of the respondent's appeal of his LTD denial (value of LTD benefits to age 65 was estimated at $300,000). The absence of any information in the record concerning the LTD appeal proceedings or the potential merit of those proceedings left a critical factual void. Without that information it is difficult to know the respondent's risk in giving up his entitlement to LTD and whether the admittedly enhanced severance adequately compensated for what may have been released.

Further, while the motion judge took into account the fact that the Release did not mention Sun Life, he did not consider whether the respondent's failure to closely read the Release impacted the analysis when applying the factors for unconscionability (set out by this Court in Titus v. William F. Cooke Enterprises Inc., [2007] O.J. No. 31008 (C.A.)).

Held: Appeal allowed and the issues of unconscionability and enforceability to be determined by a trial judge.

B) ADVERSE COST INSURANCE

Armstrong v. Lakeridge Resort (2017) ONSC 6565

In Chapter 12 of *Disability Insurance Law in Canada (Second Edition)* is reference to the case of *Markovic v. Richards*, 2015 ONSC 6983 (Ont. S.C.J.) which held that the premium for adverse cost insurance is not a compensable disbursement, in part because "it is an entirely discretionary expense and may even act as a disincentive to thoughtful, well-reasoned resolution of claims… it is not fair and reasonable that an insurer be expected to cover this disbursement".

However, in *Armstrong v. Lakeridge Resort* (2017) ONSC 6565, another Superior Court Judge explicitly rejected the reasoning in *Markovic*.

The Judge in *Armstrong* wrote:

Relying on Markovic v. Richards et al, 2015 ONSC 6983 (Can LII), defence counsel submitted that the plaintiffs' disbursement for costs insurance should not be allowed. With respect, I disagree. In this case, the costs of advancing even the claims on which the plaintiffs were successful were extremely large. Also, in general, even the strongest claim of a plaintiff may not be successful depending on how the evidence comes out and how it is perceived by a trier of fact. Without costs insurance, the fear of a very large adverse costs award would cause many plaintiffs of modest means to be afraid to pursue meritorious claims. It is in the interests of justice that plaintiffs be able to pursue meritorious claims without fear of a potentially devastating adverse costs award. Additionally, I am satisfied that it was reasonable for the plaintiffs to have advanced their claims as they did because there were genuine triable issues on all claims that were advanced. Accordingly, the claim for the costs insurance premium will be allowed.

Armstrong was not appealed and so there are competing Superior Court of Justice decisions on this issue. That being said, *Markovic* was followed in *Valentine v. Rodriguez - Elizalde* (2016) ONSC 6395 (Ont. S.C.J.); and in *Foster v. Durkin* (2016) ONSC 684 (Ont. S.C.J.).

The only case to consider both *Markovic* and *Armstrong* has been *Little v. Floyd Sinton Limited* (2018) ONSC 3165 where Justice Quinlan of the Ontario Superior Court of Justice wrote:

That brings me to the claimed disbursement for adverse costs insurance. There are conflicting rulings as to the appropriateness of this disbursement. In Markovic v. Richards, 2015 ONSC 6983, 261 A.C.W.S. (3d) 42 (Ont. S.C.J.) Milanetti J. disallowed the expense of costs insurance as a compensable disbursement. She described it as an entirely discretionary expense that does nothing to advance the litigation and may even "act as a disincentive to thoughtful, well-reasoned resolution of claims". In Armstrong v. Lakeridge Resort Ltd., 2017 ONSC 6565, Salmers J. considered Markovic but determined that the expense involved in advancing the claims was extremely large and, without costs insurance, "the fear of a very large adverse costs award would cause many plaintiffs of modest means to be afraid to pursue meritorious claims". Salmers J. allowed the disbursement.

In my view, costs insurance might comfort plaintiffs or their counsel. But I agree with Milanetti J.: costs insurance does nothing to advance litigation per se and I do not allow such claim.

In **British Columbia** one B. C. Supreme Court decision has considered this issue; *Wynia v. Soviskov*, 2017 BCSC 195, which held:

In my view, applying the reasons of the BCCA in Chandi (Guardian ad litem of) v. Atwell, the cost of insurance coverage is not a proper or necessary disbursement, incurred in the conduct of the proceeding. No doubt it provides a measure of financial comfort to the plaintiff, however, it does not arise from the exigencies of the proceeding and relate directly to the direction, management, or control of the litigation used to prove a claim against the defendants. Accordingly, the cost of the insurance coverage is disallowed.

NOTE: The *Chandi* case had set out that recoverable disbursements must be "necessarily or properly incurred in the conduct of the proceedings."

Eric Schjerning is a mediator with 7 years mediating LTD and other insurance disputes, a former litigator with 3 decades of LTD trial work, and the author of 2 editions of Disability Insurance Law in Canada.

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For any questions on these, or other LTD case law, or if you have a case you wish to share, please e-mail *eschjerning@blaney.com*.